Bulletin 155

CH/3314/2005
CIS/3315/2005

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeals are unsuccessful. I set aside the decisions of the Leicester appeal tribunal dated 18 August 2005 but substitute decisions to the same effect. The claimant's award of housing benefit is superseded with effect from 22 October 2004 and she is not entitled to housing benefit from that date. The claimant is also not entitled to income support in respect of her claim made on 20 October 2004.

REASONS

2. I held an oral hearing of these appeals. The claimant was represented by Mr Keith Venables of Leicester Law Centre. Leicester City Council, the first respondent in the housing benefit appeal, was not represented at the hearing, being content to adopt the submissions made on behalf of the Secretary of State. The Secretary of State, who was joined as a party to the housing benefit appeal and was also the respondent in the income support appeal, was represented by Mr Jason Coppel of counsel, instructed by the Solicitor to the Department of Health and the Department for Work and Pensions. I heard these appeals at the same time as the appeal in CIS/3182/2005, in which I have already given my decision. These appeals raise a quite distinct issue as to the circumstances in which a national of another Member State of the European Union who is looking for part-time employment in Great Britain may be a "worker" with a right to reside in the United Kingdom.

3. The claimant is a single parent with two young children. She is a Dutch national and first came to the United Kingdom on 8 March 2004. She claimed income support, which was initially refused on the ground that she was a "person from abroad" with an applicable amount of "nil" by virtue of regulation 21 of, and Schedule 7 to, the Income Support (General) Regulations 1987 (S.I. 1987/1967 as amended). However, income support was subsequently awarded for the period from 11 May 2004 to 15 July 2004 following a decision of an appeal tribunal on 24 September 2004 who found that she was habitually resident in the United Kingdom from the earlier of those dates and therefore was not a "person from abroad" as that term is defined in regulation 21(3). The award of income support was made in respect of a period ending on 15 July 2004 because the claimant had become engaged in remunerative work from the following day.

4. However, the claimant's employment was short-lived and came to an end on 7 October 2004. She made a fresh claim for income support on 20 October 2004. The claim was rejected on 20 January 2005 on the ground that the claimant had no right to reside in the United Kingdom and therefore could not, by virtue of regulation 21(3G) of the 1987 Regulations, be treated as habitually resident in the United Kingdom for the purposes of the definition of a "person from abroad" in regulation 21(3). The claimant appealed.

5. The claimant had also claimed housing benefit, council tax benefit, child benefit, working tax credit and child tax credit. Child benefit had been awarded and interim payments of tax credits had been made but she had some difficulty in providing the local authority with the necessary evidence of her entitlement to tax credits for the purposes of her claim to housing benefit and council tax benefit because no proper notice of awards had been issued by

the Inland Revenue. Eventually, it appears, housing benefit was awarded up to 21 October 2004. However, on 2 March 2005, housing benefit was refused from 22 October 2004, which is when the claimant ceased to be treated as being in remunerative work, on the same grounds as she had been refused income support. The material legislation in respect of housing benefit (regulation 7A(4) and (4B) of the Housing Benefit (General) Regulations 1987 (S.I. 1987/1971 as amended)) was indistinguishable from the legislation in respect of income support. The claimant appealed against the refusal of housing benefit from 22 October 2004.

6. The two appeals were heard together by the appeal tribunal. Resisting the appeals, the Secretary of State and the local authority argued that the claimant had no right to reside in the United Kingdom because she was not a "qualified person" within the scope of regulation 5 of the Immigration (European Economic Area) Regulations 2000 (S.I. 2000/2326) and therefore did not have the right of residence by virtue of regulation 14. In his first written submission to the appeal tribunal, Mr Venables, for the claimant, accepted that the claimant was not a "qualified person" but argued that the phrase "right to reside" in the 1987 Regulations was not synonymous with the phrase "entitled to reside" in the 2000 Regulations and that the claimant had a right to reside if lawfully admitted to the United Kingdom unless and until a decision was made to remove her. He also argued that the "right to reside" test was incompatible with Article 12 of the European Communities Treaty and that, in any event, the failure to satisfy the test did not matter because the claimant was actually habitually resident in the United Kingdom and the test affected only those who might require to be treated as habitually resident when not actually habitually resident. At the hearing before the appeal tribunal, Mr Venables sought to rely on the decision of the appeal tribunal dated 24 September 2004 and also resiled from the first of his written arguments to the extent of arguing that the claimant remained a "worker" and therefore a "qualified person" with a right to reside under the 2000 regulations. The appeal tribunal rejected Mr Venables' submissions and accepted those of the Secretary of State and the local authority. In particular, the appeal tribunal, rightly in my view, decided that it was not bound by the decision of 24 September 2004 and pointed out that that appeal tribunal appeared to have overlooked regulation 21(3G) of the 1987 Regulations relating to income support which had come into force only on 1 May 2004. The claimant now appeals with the leave of a full-time chairman who suggested that the appeal should be heard urgently. However, the appeals were not heard as soon as submissions had been made because a Tribunal of Commissioners was considering most of Mr Venables' arguments. Unfortunately, the Tribunal of Commissioners was obliged to adjourn the hearing before it and it was not until 12 May 2006 that the decision in CIS/3573/2005 was given. On 19 May 2006, I directed an oral hearing of these appeals, which took place on 19 July 2006.

7. In the light of CIS/3573/2005, Mr Venables did not pursue before me the arguments raised in his written submission to the appeal tribunal, although I understand that an application has been made to the Court of Appeal for leave to appeal against the decision in CIS/3573/2005 and he may wish to resurrect those arguments if the present case goes further. He did adopt, without adding to, two arguments that were advanced on behalf of the claimant in CIS/3182/2002 to the effect that the application of the "right to reside test" amounted to unlawful discrimination contrary to Article 3 of Council Regulation (EEC) 1408/71 and that, in any event, the claimant had a right to reside in the United Kingdom by virtue of Article 18 of the European Communities Treaty and Article 1(1) of Directive 90/364/EEC. I reject those arguments for reasons I have given in CIS/3182/2005 and need not repeat here. Mr Venables' arguments before me focused on the narrower question whether the claimant could be a

"qualified person" within regulation 5 of the 2000 Regulations. There was a considerable amount of common ground between him and Mr Coppel.

8. The evidence before the appeal tribunal as to the circumstances in which the claimant had ceased to be employed on 7 October 2004 and as to whether she was looking for work when she claimed income support was limited to her statement in her income support claim form that she could only work "3 of [sic, presumably intended to be "or"] 2 hours day", a bare statement on a "Right to Reside Stencil" that she was a work-seeker and a statement on a habitual residence test form that she intended to support herself by working. Before me, there is a statement from the claimant to the effect that she left her employment because her childcare arrangements had broken down when her sister moved away from Leicester and that she then looked for work for 2 to 3 hours a day in the morning while her children were at school and nursery.

9. So far as is material, regulation 5 of the 2000 Regulations provides –

> "(1) In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as –
>
> (a) a worker;
>
> ...
>
> (e) a self-sufficient person;
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> ...
>
> "(2) A worker does not cease to be a qualified person solely because –
>
> (a) ...; or
>
> (b) he is involuntarily unemployed, if that fact is duly recorded by the relevant employment office."

10. It is plain from the recital to the 2000 Regulations that they were made to implement the law of the European Communities. The term "worker" must therefore be understood in the context of the law of the European Communities. So must the term "voluntarily unemployed" in regulation 5(2) of the 2000 Regulations, which is clearly derived from Article 7(1) of Council Directive 68/360/EEC, which in turn is a measure consequential upon Regulation (EEC) No. 1612/68. In R(IS) 12/98, Mr Commissioner Mesher said –

> "... a person who has left employment but remains in the labour market must retain the status of worker for the purpose of Regulation 1612/68. In that context, it does not matter in itself whether the previous employment was left voluntarily or involuntarily. The question is whether the circumstances of the leaving, and in particular the person's intentions and actions at the time, indicate that the person was still in the labour market or not."

11. Thus, it seems to me, the term "voluntarily unemployed" must be regarded as focussing on the question whether the claimant is still in the labour market rather than on the circumstances in which he or she ceased to be employed, although the latter may be material as evidence as to whether or not the claimant is genuinely still in the labour market. It was therefore unnecessary for Mr Venables to argue, as he did, that the claimant was forced by her circumstances to give up her employment and so did not give it up voluntarily. Indeed, such an argument would not avail a claimant who was forced to give up employment due to

childcare responsibilities and then remained unavailable for work due to those responsibilities. I accept the Secretary of State's submission that such a claimant would lose the status of "worker". That, though, is not the position in the present case. If the claimant's evidence is accepted, she ceased to be in the labour market for full-time employment but did remain in the labour market for part-time employment. It is common ground that being available for part-time employment can be sufficient to enable a claimant to retain the status of "worker". Whether it was sufficient in the present case is a matter to which I shall return below.

12. When refusing to revise the Secretary of State's refusal of income support after the claimant had appealed, the decision-maker said –

> "As she has claimed Income Support as a lone parent she cannot be treated as a work seeker."

Regulation 5(2)(b) of the 2000 regulations clearly envisages a person registering as a work-seeker but, as entitlement to income support does not depend upon a claimant being available for employment, claiming income support does not involve any such registration, whereas claiming jobseeker's allowance does. It is, of course, the practice of jobcentres to advise unemployed lone parents to claim income support rather than jobseeker's allowance because there is usually no difference in entitlement and a lone parent with a right to reside in the United Kingdom usually qualifies for income support if his or her income is low enough and thereby avoids the need to register as available for employment. However, being a work-seeker does not preclude a person from entitlement to income support and work-seeking by claimants of income support is now encouraged through work-focused interviews. It is true that section 124(1)(f) of the Social Security Contributions and Benefits Act 1992 makes it a condition of entitlement to income support that the claimant is not entitled to a jobseeker's allowance but, as section 1 of the Social Security Administration Act 1992 makes it a condition of entitlement to a jobseeker's allowance that a claim be made for it, section 124(1)(f) of the Contributions and Benefits Act can have effect only where a claimant claims both benefits. In the light of these considerations, Mr Venables argued and Mr Coppel conceded, that a person could be a work-seeker notwithstanding that he or she was claiming income support rather than jobseeker's allowance. Mr Coppel also conceded that the Secretary of State had had no system enabling claimants of income support to register the fact that they were work-seekers and so he submitted that the requirement for the claimant's involuntary unemployment to be "duly recorded by the relevant employment office" was met if the claimant claimed income support and declared that he or she was a work-seeker.

13. The concept of a declaration is problematic because it is difficult to see how a claimant can be expected to declare that he or she is a work-seeker until asked to do so and, at the time material to this case, no such question was asked of a person claiming income support save in the barest of forms in the "Right to Reside Stencil". It is unnecessary for me to decide whether it would be fatal to a claimant's case if the question on that form was answered "no" even though there was compelling evidence before an appeal tribunal that the claimant had in fact in been looking for work (which would require an explanation for the form having been completed as it was). In the present case, the claimant did declare that she was a work-seeker at the first opportunity given to her and that evidence was before the appeal tribunal.

14. However, the claimant's mere assertion that she was a work-seeker was not enough to guarantee her right of residence. Mr Venables accepted that she had actually to be available

for employment and to be actively seeking employment with reasonable prospects of being engaged; otherwise, she could not be regarded as being genuinely in the labour market. He also accepted that the work she was seeking had to be effective and genuine and not on such a small scale as to be regarded as purely marginal and ancillary (see paragraphs 14 and 15 of R(IS) 12/98 and the cases cited therein). I agree.

15. Those are issues that were raised by the claimant's assertion that she was a work-seeker. I accept that there was insufficient evidence before the appeal tribunal for decisions to be made on those issues but that was because neither the Secretary of State nor the local authority had asked enough relevant questions. The appeal tribunal ought to have asked the questions itself. Instead, it completely failed to consider whether, as a work-seeker, the claimant was involuntarily unemployed and so a worker with a right of residence in the United Kingdom. Its decision is erroneous in point of law on that ground and must be set aside.

16. There is much more evidence before me. It is not perfect and the initial view of both Mr Venables and Mr Coppel was that I should refer this case to another appeal tribunal for determination. However, it seemed to me that it was unlikely that much better evidence would be available before the appeal tribunal. Of course, it would have been possible for the claimant to give oral evidence but I was not convinced that that would have taken matters much further, given the lapse of time there had been. I therefore heard submissions from both Mr Venables and Mr Coppel on the written evidence. After the hearing, I sought further evidence as to the amount of the claimant's rent.

17. In the written submission made by the Secretary of State on 20 June 2006, it was argued that proof of work-seeking "should involve weekly documenting of work-seeking activities." That is all very well if, as happens when a claimant claims jobseeker's allowance and enters into a jobseeker's agreement, a claimant is apprised of the need to provide such evidence at the time a claim is made. However, if the Secretary of State fails to put in place any system for determining whether a claimant is a work-seeker or not and so fails to alert a claimant to the need to provide relevant evidence at the time, it may be unreasonable to expect the claimant to produce evidence of the same standard when the issue is eventually investigated nearly two years later.

18. Moreover, the process of negotiating a jobseeker's agreement may cause a claimant to widen his or her horizons and modify the terms upon which he or she is prepared to seek employment. So may a work-focussed interview or a refusal of benefit on the ground that the terms on which the claimant was prepared to look for employment were too narrow. It seems to me to be quite understandable that a claimant should initially seek work that involves little inconvenience but be prepared to look wider if persuaded that it is possible to do so. Also, it is obviously difficult to make childcare arrangements in the abstract because potential carers may be unwilling to make open-ended commitments but, once a job offer has actually been made and one knows that childcare is required for, say, an hour before they go to school, making arrangements becomes much easier. A work-seeker may therefore be persuaded that seeking employment where some childcare will be required may not be impractical. These consideration make me inclined to take a rather more liberal approach to work-seeking in a case where the right questions were not asked at the relevant time and are being raised nearly two years later than I would if those questions had been asked when the claimant first claimed benefit. Asking a claimant what he or she might have done if pressed at the time is likely to be a fairly artificial exercise. A person cannot modify his or her behaviour retrospectively and

it is unfair to apply the approach one would take if the claimant had had the opportunity to modify his or her behaviour in circumstances where the claimant has not had that opportunity through the fault of the Secretary of State or the local authority.

19. The claimant's evidence is that she worked full-time from July to October 2004. Her sister looked after the children while she was at work. From the beginning of September, her elder child was at primary school all day and her younger child attended a nursery in the mornings. The claimant changed her working pattern so that she collected her younger child from the nursery before going to work and leaving her child with her sister. Her sister then collected the elder child from school and she looked after both children until, I presume, after they had gone to bed in the evening. When her sister moved to Slough later in the month, the claimant asked her aunt to look after the children. However, her aunt found the children too much for her and so the claimant felt obliged to leave her employment. The claimant continues –

> "I did continue looking for work, but felt that I could only work part-time to fit in with when the children were at school and nursery. I was therefore looking for work two or three hours per day, in the morning when both children were at school or nursery. I was hoping to find a cleaning job, because I knew such jobs are usually for a very few hours per day. I approached numerous employment agencies but they were unable to provide me with work for such limited hours. They did indicate that such work was available in the late afternoon when offices were closed but generally not during the hours I was available. I also approached Somali community organisations but they were unable to assist me in finding work."

Due to lack of housing benefit, the claimant lost her home and had to move in with her aunt. However, that appears to have led to her aunt's housing benefit being reduced (presumably because a "non-dependant deduction" was made, although that does not seem entirely fair when the claimant was not in a position to contribute to the rent), and so she eventually moved to Birmingham in May 2005, where she claimed jobseeker's allowance. Jobseeker's allowance was initially refused and it is not entirely clear whether that decision was successfully challenged. In November 2005, by which time her younger child had started school full-time, the claimant obtained part-time work for about 16 hours per week. Usually the claimant could work when the children were in school but occasionally she arranged for a friend to pick them up and look after them for a short time until she got home from work. In March 2006, she obtained regular work from 8 am to 11 am five days a week, which involves taking the children to a friend before she goes to work and the friend taking the children to school. Occasionally she works at week-ends and a friend looks after the children. The claimant's statement does not say whether or not she is now seeking full-time work.

20. I see no reason not to accept the claimant's evidence. It is clear that, at the time of the decisions of the Secretary of State and the local authority, she was only looking for work that she could do while her younger child was at nursery in the mornings. She would have wished to travel to and from her work during that time as well but I find that she would have been prepared to make the sort of arrangement she did later if she had been offered work that meant that she had to ask a friend to look after her children for a short period before they started school or nursery or to pick her younger child up from the nursery. The claimant declared that she was prepared to work for up to 15 hours per week. For the reasons I have given above, I would, if it were important, be prepared to find that she would have stretched that a little but I

do not consider that I can find that she would have been prepared to work full-time, even if she had been advised as to the full extent of her possible entitlement to tax credits which might have paid for extra child care, given that she appears not to have looked for full-time work even when refused benefit. History cannot be rewritten. The evidence makes it clear that the particular hours for which she was seeking work also limited her chances of finding employment. The employment agencies said as much. However, Mr Venables made the point that cleaning work was likely to be available in the morning in restaurants and hotels and the claimant did eventually find work in the mornings. The claimant clearly did not have a high capacity to earn wages as she was looking for work only as a cleaner. She does not appear to have looked for other types of work, perhaps because she lacked confidence in the English language or socially and did not want a job that would involve working with people. She now earns £5.85 per hour but I am prepared to accept that she might have been able to earn a little more than that.

21. I have no doubt that the claimant was seeking work that was "genuine" and not marginal but I have to consider whether it would have been "effective" and whether the claimant had reasonable prospects of securing it. Mr Venables and Mr Coppel were at one in submitting that this was a borderline case but Mr Venables urged me to find that the claimant was seeking "effective" work that she had reasonable prospects of obtaining and Mr Coppel submitted that she was not.

22. Mr Venables referred me to paragraph 19 of the judgment of the European Court of Justice in *Nolte v. Landesversicherungsanstalt Hannover* (Case C-317/93) [1995] E.C.R. I-4625, where the Court said –

> "The fact that a worker's earnings do not cover all his needs cannot prevent him from being a member of the working population. It appears from the Court's case-law that the fact that his employment yields an income lower than the minimum required for subsistence (see Case 53/81 *Levin v. Staatssecretaris van Justice* [1982] E.C.R. 1035, paragraphs 15 and 16) or normally does not exceed 18 hours a week (see Case C-102/88 *Ruzius-Wilbrink* [1989] E.C.R. 4311, paragraphs 7 and 17) or 12 hours a week (see Case 139/85 *Kempf v. Staatssecretaris van Justice* [1986] E.C.R. 1741, paragraphs 2 and 16) or even 10 hours a week (see Case 171/88 *Rinner-Kühn* [1989] E.C.R. 2743, paragraph 16) does not prevent the person in such employment from being regarded as a worker within the meaning of Article 48 (the *Levin* and *Kempf* cases) or Article 119 of the EEC Treaty (the *Rinner-Kühn* case) or for the purposes of Directive 79/7 (the *Ruzius-Wilbrink* case)."

Mr Vanables pointed out that the claimant was prepared to work for longer hours than the claimants were working in two of the cases mentioned in that judgment and he also relied upon the statement that a person could be regarded as a worker even though not earning the minimum required for subsistence.

23. However, it is necessary to look carefully at the cases cited by the Court and to acknowledge that the way the Court expressed itself suggests that the term "worker" may need to be construed differently in the context of different pieces of legislation. *Rinner-Kühn*, *Ruzius-Wilbrink* and *Nolte* itself were all cases arising out of legislation outlawing discrimination and it is difficult to see why the extent to which a person works should be material when deciding whether or not he or she is a "worker" unless the work is truly

"marginal". *Levin* and *Kempf* are the more relevant cases. In both cases, the claimant applied for a residence permit and was refused on the ground that she or he was not a "favoured EEC citizen" within the meaning of Dutch legislation because the work she or he was doing or seeking was not enough to avoid reliance on social assistance.

24. In *Levin*, the Court, having regard to regulation (EEC) 1612/68 and Directive 68/360/EEC, held, at paragraph 16 –

> "It follows that the concepts of "worker" and "activity as an employed person" must be interpreted as meaning that the rules relating to freedom of movement for workers also concern persons who pursue or wish to pursue an activity as an employed person on a part-time basis only and who, by virtue of that fact obtain or would obtain only remuneration lower than the minimum guaranteed remuneration in the sector under consideration, in this regard no distinction may be made between those who wish to make do with their income from such an activity and those who supplement that income with other income, whether the latter is derived from property or from the employment of a member of their family who accompanies them."

Thus Mrs Levin's employment could be considered effective and genuine and she had a right to reside in the Netherlands and could not properly be refused a residence permit. However, it is to be noted that she did not seek social assistance and the decision was based on the supposition that she would not do so but would "make do" with her income or supplement it from other sources.

25. In *Kempf*, the claimant did receive social assistance. However, the European Court of Justice did not consider it necessary to consider whether his former part-time work could be regarded as "effective and genuine" because the national court had made a finding that it was. Once that finding had been made, it was, the European Court of Justice held, irrelevant that the claimant had had recourse to social assistance. Nevertheless, I can see nothing in the judgment to preclude a national court from considering whether work is "effective" by reference to the extent to which the claimant has recourse to social assistance. Moreover, if, as was held in *Trojani v. Centre public d'aide sociale de Bruxelles* (Case C-456/02) [2004] E.C.R. I-7573, it follows from Article 1 of Directive 90/364/EEC that Member States can require of nationals of other states who wish to reside within their territory that they have sufficient resources to avoid becoming a burden on their social assistance systems during their period of residence, it seems to me that it is perfectly proper in the present context to consider whether work is "effective" by reference to the person's need to claim social assistance.

26. In the 2000 Regulations, the language of Directive 90/364/EEC is echoed in the definition of "self-sufficient person" in regulation 3(1)(e), which requires such a person to have "sufficient resources to avoid his becoming a burden on the social assistance scheme of the United Kingdom". The effect of regulations 5 and 14 is that an EEA national who is not retired or a student must be either economically active or self-sufficient if he or she is to have a right of residence in the United Kingdom and it seems to me that work can be regarded as "effective" in that context – and in the context of Directives 68/360/EEC and 90/364/EEC – only if it makes the worker self-sufficient having regard, in the light of *Levin*, to other resources the claimant may have or to the claimant's willingness to "make do" without recourse to social assistance. To be "involuntarily unemployed" for the purposes of regulation 5(2)(b), a person must therefore be looking for work that is "effective" in that sense.

27. What does it mean to be "a burden on the social assistance scheme of the United Kingdom"? It is unnecessary for me to reach a concluded view on this question but it is necessary for me at least to reach a tentative view because I need to have some idea as to what might amount to effective employment before determining whether the claimant had reasonable prospects of obtaining such employment.

28. Regulation 3(2) of the 2000 Regulations provides that, for the purposes of regulation 3(1)(e) and (f) (the definitions of "self-sufficient person" and "retired person"), "resources and income are to be regarded as sufficient if they exceed the level in respect of which the recipient would qualify for social assistance". Income-based jobseeker's allowance, income support and housing benefit are all clearly forms of social assistance. However, I doubt that mere entitlement to housing benefit while working can amount to being a burden on the social assistance scheme for the purpose of considering whether a person is a "worker" because the benefit is structured in such a way that a person may be entitled to some benefit even though his or her income is above the minimum needed for mere subsistence including the payment of rent. It cannot be right that a person who is working full-time on a low income can be in the position of not being a "worker" and it must follow that a person who is looking for full-time work may be regarded as a "worker" even though obtaining the work might leave him or her entitled to some housing benefit. Child benefit and tax credits are not usually regarded as forms of social assistance. I incline to the view that the existence of children and benefits for them should simply be excluded from the calculation when considering whether a person is a burden on the social assistance scheme. On the other hand, I suggest that the possibility of entitlement to working tax credit should be taken into account, perhaps, in the present case, with the lone parent element because the claimant's accommodation costs must reflect the fact that she has children. Therefore, in my judgment, a person is a burden on the social assistance scheme of the United Kingdom if dependent on income-based jobseeker's allowance or income support or if his or her income or hours of work, or the income or hours of work he or she seeks, is insufficient both to remove entitlement to those benefits and also to pay those housing costs that would be covered by housing benefit. Thus, in the present case, where the claimant has no other sources of income, she could be regarded as retaining her status as a "worker" while unemployed only if she was seeking work that, with working tax credit, would produce an income equivalent to her "applicable amount" for income support purposes plus her rent.

29. The claimant's applicable amount was £55.65 and her "eligible rent" was £100 per week by virtue of a rent officer determination. (Her contractual rent was £125 per week but that seems to me to be irrelevant.) Until 31 October 2004, she had a friend living with her but there would have been no non-dependant deduction made from her eligible rent, because the friend appears to have been under 25 and in receipt of either income-based jobseeker's allowance or income support. The claimant could therefore cover her needs working 15 hours a week only if her earnings were at least £10 per hour, nearly twice what she was eventually able to earn. However, if the claimant had been prepared to work 16 hours a week so as to secure entitlement to working tax credit, she could have become self-sufficient if her earnings were at least about £6 per hour. Thus, if it were to be accepted that the claimant would have been prepared to work slightly longer hours than she said, that her earning capacity was a bit more than the £5.85 per hour she eventually earned and that my approach to being a burden on the social assistance scheme of the United Kingdom is correct, it would be just possible to regard her as looking for work that was "effective".

30. However, there is the question whether the claimant had reasonable prospects of securing "effective" employment notwithstanding the restrictions she put on the hours she was prepared to work. It seems to me that that must be the correct test if she is to be regarded as a genuine work-seeker and involuntarily unemployed. I derive the language from the test for those whose work-seeking for the purposes of jobseeker's allowance is restricted due to caring responsibilities (see regulation 13(4)(b) of the Jobseeker's Allowance Regulations 1996 (S.I. 1996/207)). Obviously, any restrictions inevitably reduce the number of jobs that is available, but, if a large enough number of jobs remains available to a person despite restrictions he or she has placed on what will be considered, the chances of employment being obtained may not be significantly affected and he or she can be said to have reasonable prospects of securing employment. On the other hand, since there was no obligation on a Member State to provide social assistance to a national of another Member State who was not economically active at all due to caring responsibilities, I take the view that prospects of securing employment in this context are not to be regarded as reasonable if restrictions imposed due to caring responsibilities very substantially reduce the chances of a claimant obtaining work quickly.

31. I am prepared to accept Mr Venables' suggestion that there would have been some cleaning work suitable for the claimant available in the mornings – it may be that employers of such cleaners do not make much use of agencies – and I also accept that the claimant did eventually find some suitable employment. However, finding employment took her the claimant year and in my judgment, the restrictions she put on her work-seeking must greatly have reduced her prospects of securing employment. The fact that such work could not be obtained through agencies was itself significant. It must also be noted that the need for the work to be "effective" placed an additional restriction on the work being sought because merely working two hours a day, as the claimant suggested she would have been prepared to do, would not have given her a sufficient income to meet her basic needs. If a claimant is not prepared to work much more than 16 hours a week and is not able to afford to work less than that and is also inflexible as to the parts of the week in which the 16 hours or so must fall and is unable or unwilling to do anything other than cleaning work or something very similar, the range of work that is being sought is really very narrow. Having regard to all the circumstances, I do not consider that the claimant had reasonable prospects of obtaining effective employment.

32. It follows that the claimant was not "involuntarily unemployed" for the purposes of regulation 5(2)(b) of the 2000 Regulations when she ceased to work in October 2004 and that she therefore ceased to be a "worker" and ceased to have a right of residence in the United Kingdom. Consequently, she cannot be treated as having been habitually resident in the United Kingdom and she was not entitled to housing benefit or income support.

(signed on the original) **MARK ROWLAND**
Commissioner
25 September 2006