

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No: **CUC/2714/2018**

Before UPPER TRIBUNAL JUDGE WARD

Decision:

With some hesitation, I extend time so as to admit the late notice of appeal.

The appeal is allowed. The decision of the First-tier Tribunal sitting at East London on 11 January 2018 under reference SC124/17/03016 involved the making of an error of law and is set aside.

Acting under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 I remake the decision as follows:

The claimant's appeal against the decision of 7 July 2017 is allowed. He did have a right to reside for the purposes of his claim for universal credit made on 5 June 2017. The Secretary of State must now examine the remaining aspects of the claim.

REASONS FOR DECISION

1. The claimant is a Dutch national. His claim for universal credit ("UC") was refused on 7 July 2017 on the ground that he lacked the necessary right to reside. His appeal to the First-tier Tribunal ("FtT") was heard on 11 January 2018 and dismissed and he appeals to the Upper Tribunal with permission of a District Tribunal Judge.

2. Unbeknown to the FtT judge, the Court of Justice of the European Union had shortly before the FtT hearing given judgment in C-442/16 *Florea Gusa*. Since the hearing, the CJEU has given a further relevant decision, in the case of C-483/17 *Tarola*. I have to apply the law as it has now been declared to have been and have the advantage of these two decisions.

3. The claimant had been a self-employed driver from 20 June 2016 to 29 May 2017. While the Secretary of State's representative did not dispute that after 29 May the claimant was involuntarily unemployed, the judge was very doubtful as to this for reasons which he gave, before commenting that

"However, I accept that it is at the least arguable that the cessation of self-employment was involuntary and I accept that there is a reasonable possibility that he might be found to be involuntarily unemployed."

4. In the event, the judge's statement did not rule on the point, one way or the other. In his statement of reasons he indicated his view of the decision in *Gusa*, which had meanwhile come to his attention, which he considered required there to have been self-employment for at least one year before self-employed status could be retained.

5. Art 7 of Directive 2004/38 provides, so far as relevant, that:

“1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State;

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

...

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

...”

6. In *Tarola*, the CJEU had to interpret art 7(3)(c) in the context of a person who had worked for a period of two weeks before becoming involuntarily unemployed. The Court ruled that the relevant legislative provisions

“must be interpreted as meaning that a national of a Member State who, having exercised his right to free movement, acquired, in another Member State, the status of worker within the meaning of Article 7(1)(a) of that directive, on account of the activity he pursued there for a period of two weeks, otherwise than under a fixed-term employment contract, before becoming involuntarily unemployed, retains the status of worker for a further period of no less than six months under those provisions, provided that he has registered as a jobseeker with the relevant employment office.”

7. *Gusa* had already established that the ability to retain status acquired under art 7(1)(a) via **art 7(3)(b)** applied both to the formerly employed and the formerly self-employed. The FtT judge took the view that while a worker who had been employed for less than a year could retain “worker” status for up to 6 months relying on **art 7(3)(c)**, there was no equivalent provision for the previously self-employed, though he acknowledged the situation was unclear. However, the judgment in *Tarola*, though it concerned a person who had previously been briefly employed, was expressed in terms which repeatedly made clear that the protection of art 7(3)(c) was equally available to those who had previously been self-employed: see paras 30, 39-40 and 44-46 of the judgment. Accordingly, if involuntarily unemployed following his self-employment, the present claimant could retain his self-employed status, even though that had lasted for less than one year.

8. In not making the necessary finding on whether the claimant's unemployment was voluntary or involuntary, the FtT erred in law and its decision is set aside.

9. Ms Massie for the Secretary of State invites me to remake the decision to find that the claimant was involuntarily unemployed.

10. She referred to Upper Tribunal Judge White's observation in *SSWP v MK* [2013] UKUT 163 (AAC) that

“in determining whether persons are in involuntary unemployment for the purposes of Article 7 of the Citizenship Directive, the proper question is whether they remain engaged in the labour market. In determining the answer to that question, the reasons why the previous employment ended, the intentions of the person concerned, and their actions and the circumstances obtaining after they have left employment are all relevant matters.”

11. She submitted that as a self-employed driver, the appellant needed a reliable and working vehicle. As his vehicle was not, the options open to him were to repair the vehicle, rent a vehicle or purchase a new one. His evidence to the FtT was that he did not have the means to do any of those things at the time; his income from self-employment was limited. He could not continue his self-employment and so he registered as looking for work with the Jobcentre. The evidence was such that it was a matter of circumstance not choice that his work had ended. He had registered with his local Jobcentre and was looking for work.

12. I am content to accept this concession, made with knowledge of the doubts which the FtT had on the point, a concession which I consider to be correct.

13. Accordingly, the claimant was able to retain his self-employed status and so had a sufficient right to reside for UC purposes.

14. In conclusion, I note that the District Tribunal Judge's grant of permission to appeal was sent to the appellant on 10 August 2018. His notice of appeal was received on 12 November. Such a notice has to be submitted so that it is received within 1 month after the date that the tribunal which gave permission to appeal sent notice of such permission to the appellant: UT rule 23(2). I required him to give details of why it had taken so long. He cited difficulties in contacting Citizens Advice, which led him to conduct “further research about the failings of the Universal Credit benefit system and [his] right to working tax credit which as a consequence had been denied.” The deadline for submitting the notice of appeal form is clearly stated on it. I appreciate that advice services are under pressure, but that did not require the claimant then to go off and conduct the research described above. What he needed to do was to get the form in, as instructed. After all, the merits of his case had already

been identified by the District Tribunal Judge as being sufficient to merit granting permission to appeal. Whether to extend time in this case was in real doubt, so the Secretary of State was given the opportunity to express a view. In essence Ms Massie submitted that the stated reasons did not justify the delay, but there was no prejudice to the respondent and the strong merits of the appeal meant that it was in the interests of dealing with the case fairly and justly to extend time. There may be cases where even with the support of the Secretary of State an application for extension of time is refused. In this case however, I accept that the balancing exercise narrowly falls on the side of extending time, for the reasons given by the Secretary of State's representative.

CG Ward
Judge of the Upper Tribunal
11 July 2019