IN THE UPPER TRIBUNAL **Appeal No. UA-2022-000316-USTA**
ADMINISTRATIVE APPEALS CHAMBER **NCN: [2024] UKUT 186 (AAC)**

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

Secretary of State for Work and Pensions

Appellant

- v –

PC

Respondent

Before: Upper Tribunal Judge Ward

Hearing date: 4 July 2023

Representation:
Appellant: James Cornwell, instructed by Government Legal Department
Respondent: Martin Williams, Child Poverty Action Group

DECISION

The decision of the Upper Tribunal is to allow the appeal by the Secretary of State. The decision of the First-tier Tribunal made on 28 September 2021 under number SC246/21/00121 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remake it as follows:

The claimant's appeal against the decision dated 23 November 2020 that she lacked a qualifying right to reside for universal credit purposes is dismissed.

REASONS FOR DECISION

1. The Appellant (hereafter "the Secretary of State" or "SSWP") appeals with my permission against the decision of the First-tier Tribunal ("FtT") dated 28 September 2021. By that decision, the FtT had allowed the claimant's appeal against SSWP's decision dated 23 November 2020, which had resulted in the joint claim for universal

credit which she had made with her partner ("AK") on 24 October 2020[1] being paid on the basis of a single claim only, on the ground that she lacked a qualifying right to reside. At the time, the DWP classified her as a jobseeker, which is not a qualifying right to reside for this purpose. Both joint claimants are required to have such a right by reg.9 of the Universal Credit Regulations 2013/376 ("the UC Regulations"). AK's right to reside was not in dispute.

2. The claimant, a Polish national, had been granted pre-settled status under Appendix EU of the Immigration Rules on 21 February 2020. That was not a qualifying right to reside for universal credit purposes: see reg.9(3)(c), inserted by reg.8 of the Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019/872.

3. A challenge to the exclusion from means-tested benefits such as universal credit of those with pre-settled status had been heard by the Court of Appeal in *Fratila and Tanase v SSWP* [2020] EWCA Civ 1741 and was successful. That decision was appealed to the Supreme Court, whose consideration of the case was deferred to allow the Court of Justice of the European Union to give its decision in a case which had been referred to it which raised substantially similar matters. The CJEU's decision in C-709/20 *CG v Department for Communities in Northern Ireland* was such that in due course the Supreme Court reversed the decision of the Court of Appeal. However, in *CG* the CJEU also went on to indicate that States nonetheless were required to consider whether the refusal of benefit in such circumstances would result in a breach of the claimant's dignity, contrary to art.1 of the EU Charter.

4. In the present case, it is common ground that the FtT erred by applying law that was subsequently shown to have been incorrect by the Supreme Court. Nor does the claimant seek to argue that refusal of benefit to her would result in a breach of her dignity, contrary to the EU Charter. What she does seek to argue is that her previous employment conferred upon her "worker" status and that she retained such status up to the date of the joint claim for universal credit, there being no undue delay between when she finished work and the claim. As the claim was decided during the Brexit implementation period, EU law continued to apply to this case by reason of s.1A(2) of the European Union (Withdrawal) Act 2018.

5. Art.7 of Directive 2004/38 provides:

> "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:
> …
> (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;
> (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

[1] She also, on the same date, made a claim for contribution-based jobseeker's allowance, which was refused because of an insufficient contributions record.

> 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. The implementing domestic legislation was the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052), regs. 4 and 6:

By reg.4(1):

> "(1) In these Regulations—
> (a) *"worker"* means a worker within the meaning of Article 45 of the Treaty on the Functioning of the European Union."

By reg 6:

> "(1) In these Regulations—
> …
> *"qualified person"* means a person who is an EEA national and in the United Kingdom as—
> …
> (b) a worker;
>
> (2) A person who is no longer working must continue to be treated as a worker provided that the person—
> …
> (b) is in duly recorded involuntary unemployment after having been employed in the United Kingdom for at least one year, provided the person—
> (i) has registered as a jobseeker with the relevant employment office; and
> (ii) satisfies conditions A and B;
>
> (c) is in duly recorded involuntary unemployment after having been employed in the United Kingdom for less than one year, provided the person—
> (i) has registered as a jobseeker with the relevant employment office; and
> (ii) satisfies conditions A and B;
> …
> (3) A person to whom paragraph (2)(c) applies may only retain worker status for a maximum of six months.
>
> (5) Condition A is that the person—
> …
> (b) is present in the United Kingdom seeking employment, immediately after enjoying a right to reside under [sub-paragraph (b)…] of the definition of qualified person in paragraph (1) (disregarding any period during which worker status was retained pursuant to paragraph (2)(b) or (c)).
>
> (6) Condition B is that the person provides evidence of seeking employment and having a genuine chance of being engaged.
> …"

7. SSWP does not dispute that the claimant's previous employment was genuine and effective and conferred worker status. Nor is it disputed that upon the termination of her employment, her unemployment was involuntary. What are disputed however are when her employment came to an end, when should be taken to be the date of claim for present purposes, and whether there was, in the circumstances of the case, undue delay in "duly recording" her unemployment.

When the claimant's employment came to an end

8. The claimant had last worked on 21/7/20, when she and a number of other employees were released by their employer, the claimant believes as a result of the Covid-19 pandemic. Subsequently, she received a final payment of wages on 14 August 2020. Mr Williams on her behalf submits that in consequence, she was employed until the later date. Mr Cornwell, citing *Lawrie-Blum v Land Baden-Württemberg* (Case 66/85) submits that there are three requirements for a person to be found to be a worker in EU law, (1) being obliged to provide services; (2) doing so in return for remuneration; and (3) being subject to the control of another. He submits that after 21 July 2020, the claimant no longer satisfied either (1) or (3). Mr Williams had little in response on this aspect and I consider that Mr Cornwell's submission is well-founded. There are numerous reasons why a person may be entitled to receive sums after their employment has ended and the fact they do so does not of itself mean that their employment continues.

When the claimant should be taken to have claimed

9. The claimant and AK had been a couple at least since before June 2020, though this did not become known to the Secretary of State until 9 November 2020. AK, wrongly, claimed universal credit as a single person, on 24 June 2020. His claim was rejected because his income exceeded the amount to which he would have been entitled. In such circumstances, reg 32A of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance. (Claims and Payments) Regulations 2013 (SI 2013/380) ("the Claims Regulations") had the effect that he was taken as making a fresh claim on the 24th of each month for each of the next following 5 months.

10. Mr Williams originally sought to argue, based on reg 9(4) of the Claims Regulations, that the claimant should be taken as having made a joint claim with AK on any and all of the fresh claims which reg 32A deemed him to have made. Such a claim, on 24th July or even 24th August, would have the effect of significantly shortening the gap between when the claimant's work ceased and when she should be taken to have made a claim.

11. Reg 9(4) provides:

> "(4) The Secretary of State may treat a claim made by members of a couple as single persons as a claim made jointly by the couple where it is determined by the Secretary of State that they are a couple."

12. He subsequently abandoned the argument upon noting that the provision providing *vires* for the regulation, namely Welfare Reform Act 2012, schedule 1, para 3(1)(b), stipulated that:

> "(1) Regulations may provide—
> …
> (b) for claims made by members of a couple as single persons to be treated as a claim made jointly by the couple."

Reg 9(4) therefore could not be read so as to permit the claimant to attach herself to AK's claim when she had not herself made one.

13. Accordingly, the earliest date on which she can be taken as fulfilling the requirements of art.7(3) is 24 October 2020, slightly over three months after her employment had finished (21 July 2020).

Was there undue delay?

14. The issue has a number of aspects, considered in turn.

(i) The legal test

15. In *SSWP v MK* [2013] UKUT 0163 (AAC) Judge White held:

> "69. I have concluded that where there is delay of more than a very few days between the end of employment and the completion of the formalities required to take the benefit of Article 7(3)(b) of the Citizenship Directive, the proper approach is to ask whether, having regard to all the circumstances of the case, there has been undue delay in meeting the requirements of the Citizenship Directive. I believe that an approach which focuses on undue delay is likely to be more easily and more consistently applied by decision makers and tribunals than a requirement for prompt completion of the requirements.
>
> 70. What then is involved in a test of undue delay? There must be a full enquiry into the reasons for, and circumstances of, any delay in completing the requirements specified in Article 7(3)(b) of the Citizenship Directive. In practice, that will be delay in making a claim for a jobseeker's allowance, since that is the normal means by which the requirements are met.
>
> 71. Undertaking this enquiry will require decision makers and tribunals to make full and careful findings of fact about what a claimant did between the ending of employment and the completion of the requirements of Article 7(3)(b) of the Citizenship Directive. In the light of those findings, decision makers and tribunals are required to exercise a judgment as to whether there are reasonable grounds for the delay such that it is not right to regard it as an undue delay.
>
> 72. It follows that the longer the delay, the more compelling must be the reasons for it. I do not specify any outer limit beyond which a delay will necessarily be regarded as an undue delay."

16. In view of the submissions to me discussed below, it is right to note that that passage immediately follows these submissions by counsel:

> "67. Mr Watson [counsel for the claimant] did concede that a delay of three months was at the "upper end" of what might be regarded as an acceptable

> delay, but everything should turn on all the circumstances including a claimant's awareness of the provision.
>
> 68. Mr Cross [counsel for the Secretary of State], in reply, took serious issue with the relevance of a claimant's knowledge of the provision, since this would open the door to all manner of claims based on ignorance of the provision."

17. The "undue delay" test, which is equally applicable to both sub-paragraphs (b) and (c) of art.7(3), has subsequently been applied in a number of Upper Tribunal decisions, including *SSWP v MM (IS)* [2015] UKUT 0128 (AAC), *VP v SSWP* [2014] UKUT 32(AAC); [2014] AACR 25 and *FT v LB Islington and SSWP* [2015] UKUT 121 (AAC).

(ii) Publicity and knowledge

18. Article 34 of Directive 2004/38 provides that:

> **"Publicity**
>
> Member States shall disseminate information concerning the rights and obligations of Union citizens and their family members on the subjects covered by this Directive, particularly by means of awareness-raising campaigns conducted through national and local media and other means of communication."

19. Whether that provision is justiciable and if so, at the suit of whom, are matters for conjecture. In any event, this case is not examining whether art.34 has been complied with. However, while as Judge White noted at the period with which he was concerned, the "normal" route for complying with art.7(3) was a claim for jobseeker's allowance and by analogy would now often be a claim for universal credit, there will be those for whom such a claim is pointless and doomed to fail. As the majority observed in the Upper Tribunal's decision in *SSWP v FE* [2012] AACR 22 at [23] (unaffected on this point by the subsequent appeal):

> "Nor do we regard successful registration for jobseeker's allowance, of itself and in all circumstances, to be likely to be legally capable of being a valid condition of establishing a right to reside under Article 7(3)(c). There are those who, if they were to make a claim for jobseeker's allowance, would be destined to be unsuccessful yet who would appear likely to need to have an opportunity to "register as a jobseeker with the relevant employment office" in order to establish their continuing right to reside. Examples would include (a) those who are seeking work that, while effective and genuine and not on such a small scale as to be purely marginal and ancillary (*cf* Case C-53/81 *Levin* [1982] ECR 1035), is for less than the number of hours that would be necessary in order to obtain jobseeker's allowance and (b) people with inadequate contribution records who have, or whose partner has, substantial capital resources and who are concerned with preserving their continuity of rights of residence in the United Kingdom under the Directive rather than with claiming benefit."

20. Even for those who might stand to make a successful claim, as I observed in *FT* at [11]:

> "I suspect it may not be as widely understood by EU nationals as it might be that failing promptly to contact the jobcentre may not only have the expected logical consequence that one cannot claim jobseekers allowance then (a consequence which if they can manage for a while, they may be prepared to contemplate), but may also have adverse consequences at a later stage."

21. Mr Cornwell has not suggested that there is publicity given to the steps needed in order to retain worker status (irrespective of any desire to claim benefit), though the Upper Tribunal has, as seen above, taken such steps as it can in decisions where the point has arisen, which have been available on the internet.

22. There are opposing submissions as to whether in *MK* Judge White was saying that a claimant's knowledge is relevant to whether there was undue delay. The judge has not addressed the issue in terms, despite the competing submissions before him. The high point for the claimant is the argument that her state of knowledge is one of "all the circumstances of the case" and thus per Judge White's para 69 something to which regard must be had. One could however read paras 70 and 71 as identifying as relevant a narrower range of circumstances.

23. I do not consider this is a suitable case in which to resolve this issue. The question of undue delay was not canvassed at FtT level and no sufficient attempt has been made to provide evidence from the claimant about her state of knowledge or lack of it with a view to the decision being remade in her favour in the Upper Tribunal. Evidence already in the bundle concerning her state of knowledge, is very thin, primarily a sentence in her claim for contributory JSA that "I didn't know that is something like this, my friend told me just now…" . The omission arises despite the Upper Tribunal having made case management directions on 26 October 2022 requiring the claimant to file any further evidence on which she wished to rely. It is not axiomatic, even in the case of someone who had not herself claimed benefits in Great Britain previously, that there was such a lack nor is the sentence quoted above intrinsically credible, particularly (as regards the process of registering as a jobseeker) since the claimant's partner, with whom she lived, had himself made a claim for universal credit, even if on an incorrect basis.

(iii) The absence of monitoring by the State; the relevance of *Elmi*

24. It is possible to read too much into *Elmi*, which was a case about a narrow point and based on factual concessions. It was undisputed that Ms Elmi, a claimant of income support, had ticked the box on the Habitual Residence Test form, to indicate that she was looking for work. The Secretary of State accepted the genuineness of what she had thereby indicated and that the extent of the work she claimed to be looking for was sufficient. The question for the Court of Appeal was whether any legally valid provision existed so as to require that only claiming jobseeker's allowance or national insurance credits could constitute validly "registering" for this purpose, even though Ms Elmi had done what in ordinary language could be viewed as "registering" as a job-seeker[2].

25. Maurice Kay LJ (with whom Baron J agreed) held at [19] that there was no such provision within income support legislation. Nor did the terms of art.7(3)(c) avail the Secretary of State:

> "I do not consider that, having failed to do so in relation to income support, it is open to the Secretary of State to spell out of Art.7(3)(c) and its context and archaeology a provision that excludes those in the position of the respondent [Ms Elmi] from income support."

[2] It was not suggested that the term "job-seeker" was a term of art equivalent to "jobseeker" in domestic legislation.

It was open to the Secretary of State to have legislated in terms so as to limit "registering" to whose who claimed JSA or sought national insurance credits, with the consequence that such persons would be "subject to the enhanced monitoring and control mechanisms", but he or she had not done so.

26. Moses LJ (with whom Baron J also agreed) indicated that he added some words of his own "only by way of emphasis". At [26] he observed

> "The Directive imposes upon Member States an obligation to put in place a lawful system of registration whereby that Member State can undertake monitoring and control in order to assess whether a particular applicant has in truth a genuine link with economic activity in this country. But in this case nothing of the sort took place. Whilst on the one hand the Secretary of State requires registration, on the other there was a total failure to put in place a lawful system of registration." (emphasis in original)

27. I read his remarks not as directed towards a requirement to implement a system permitting monitoring and control but that any system that was imposed should be imposed lawfully. The former position would be a different position from that adopted by Maurice Kay LJ, whose position was, as we have seen, that it was open to a Member State to impose such a system but the UK had not done so. Further, one might expect that, had there been such a divergence of view, Moses LJ would have expressed it more openly, rather than indicating that his judgment was "only by way of emphasis". Such a divergence would also have made it very difficult for Baron J to express agreement with both judgments, yet she did so. Rather, as the underlining in the original emphasises, the system of registration imposed was required to be "lawful" and "in this case" (i.e. an income support claimant who had ticked the relevant box on the form) it was not.

28. In my view, *Elmi* is about legality. Ms Elmi had done something to communicate to the DWP that she was involuntarily unemployed and looking for work. The logic of *Elmi* is not dependent on whether the State does in fact exercise monitoring and control, but rather that if it wishes to be put in a position where it can, it must demonstrate a proper legal basis for that.

29. It follows that if there are cases where a claimant is in involuntary unemployment and has registered as a jobseeker, but the State chooses not to exercise monitoring, even though it could, that is a matter for it. Neither the relaxation of job seeking requirements nor the closing of Jobcentres during the Covid pandemic – their claimed effect in relation to the present claimant is in any event disputed - would make any difference. Nor does the fact that no such requirements are imposed under reg 99(6) of the Universal Credit Regulations, where a claimant's income is in excess of the Administrative Earnings Threshold. Nor, for the same reason, does it matter that when the claimant claimed contributory JSA, no questions about her job-seeking were in fact asked. I therefore reject Mr Williams' submission that the lack of utility that there would have been in the claimant's registering as a jobseeker prior to 24/10/22 in some way calls into question SSWP's ability to rely on art.7(3)(c) of the Directive.

30. I accept that, had the claimant claimed universal credit on 24/7/22, her claim would have failed. That does not put her in an analogous position to Ms Elmi. The claimant

took no steps prior to 24/10/22 to notify the DWP of her existence (indeed, that was concealed by the claim incorrectly made by her partner as a single person), much less that she was unemployed and seeking work. There might have been a closer analogy with *Elmi* if a person had made a claim for UC as a jobseeker which was unsuccessful on the grounds of (say) a partner's income or capital and the DWP had sought to argue that such an unsuccessful claim was not sufficient for the purposes of art.7(3), but that is not the present case. Mr Cornwell appears correct to submit that, irrespective of the above, had the claimant claimed on 24/8/22, her claim would have succeeded, but she did not do so.

(iv) The claimant's job search

31. Evidence of the claimant's job search is also lacking, being confined to an entry dated 24/11/20 in the couple's universal credit "journal" and another that "I cannot find job because of pregnancy. I been looking for work and I'm looking all the time. And I been calling to agencies. Asking friends."

32. In submissions it is said that:

> "[PC's search for work in the period from July was conducted via contacting friends and agencies to try to obtain work by word of mouth. [She] thought that was the best way to try to find work given she really needed work where her difficulties with English at the time would not present a problem. Unfortunately that means it is difficult for her to give written documentary evidence of her work search in this period."

While it may indeed have been difficult to adduce documentary evidence of a work search conducted on such a basis, there is no reason at all why a witness statement could not have been provided attempting to detail the friends and agencies contacted, the jobs with which it was thought they might be able to help, the outcome and so on.

33. Turning to Conditions A and B, as regards the second limb of Condition B, it had been held to be unlawful in relation to art.7(3)(b) in *KH v Bury MBC and SSWP* [2020] UKUT 50 (AAC). By paras 11 and 12 of ADM Memo 31/20, SSWP had publicly conceded that the effect of the *KH* ruling applied equally to cases (such as the present) under art.7(3)(c). However, as to the remainder of Condition B, Mr Cornwell submits that the evidence shows strikingly little about the claimant's job search activity. In particular, there was no detail as to what she had been doing in November 2020 to maintain her connection to the labour market. Merely because she had obtained work in December 2020 did not show that she had been seeking work before then; it was equally consistent with having restarted a job search shortly beforehand. The limited evidential basis was in stark contrast to the position in *MM* and in *FT*. It is not SSWP's settled position that the claimant was, indeed, a jobseeker as the decision of 23 November 2020 had found.

34. Mr Williams, while accepting that the requirements to be seeking employment and to provide evidence thereof covered substantially the same ground as the requirement of art.7(3)(c) to be in involuntary unemployment, doubted whether a person's work search was relevant to whether there had been "undue delay".

(v) Resources

35. Mr Williams further submitted by reference to the final payment of wages the claimant received that she had sufficient resources for at least one month.

(vi) Conclusions on "undue delay"

36. Contrary to the doubts expressed by Mr Williams, I consider that evidence of seeking work is relevant to undue delay. If a person is conducting an active work search and the signs are that a job is likely to be forthcoming imminently, that may justify a degree of delay in registering with the jobcentre; however, the evidence in the case is far from demonstrating an active work search between July and October or the likely imminence of a job.

37. While I accept that the availability of resources to tide a person over may have some relevance to whether there has been undue delay, the indication that limited resources were available (covering at best one-third of the period of delay) is in this case far outweighed by the very slight evidence as to seeking work.

38. As I have said, this is not the case in which to consider the relevance of claimed lack of knowledge of the system for registering as a jobseeker or of its relevance to retaining worker status and as it is inadequately evidenced, I do not take it into account as a material factor.

39. I have rejected at [29] above the submission that the failure of SSWP to carry out checks on the claimant's work search and/or that features of the DWP's operations (if established) did not permit the Secretary of State to carry out such checks during the three months in issue are relevant to whether there was undue delay.

40. I place little weight on the earlier determination that the claimant was considered a jobseeker. As a non-qualifying right for universal credit, it may be that insufficient attention was given to the evidence which, for the reasons noted, is extremely sparse. There is no reasoning detailing the evidence relied upon, save that the claimant had in November 2020 declared that she was looking for work.

41. Considering all the circumstances of the case, but in particular, the three month delay (which *MK* at [82] indicated would be "an uphill task to justify" and the minimal evidence of seeking work in that period, I conclude that there was indeed undue delay. Consequently, the claimant had not retained worker status under art.7(3)(c). For completeness, I accept Mr Cornwell's submission that the claimant had not met condition A, nor the first limb of Condition B. Consequently, the FtT's decision falls to be remade in the terms set out at the head of these Reasons.

42. I should add that at the hearing Mr Williams asked me to permit the late filing of a witness statement so that there was evidence of the points so far raised only in submissions and assuring me that, if permission were to be granted, the evidence would not include anything going beyond what was in submissions. I have not agreed to such a course. The requirement to submit evidence in connection with remaking the decision had been made plain in the October 2022 Directions and the time for doing so had long passed. Had a witness statement been submitted at the proper time, it is

possible that the Secretary of State might have required the claimant to be made available to answer questions at the hearing and to allow a late witness statement at this stage would either mean depriving the SSWP of that opportunity or the disproportionate step of reconvening the hearing. The lack of such evidence had been flagged up in submissions on behalf of SSWP who had, moreover offered to keep his position under review if "genuinely compelling evidence in this regard" was provided. The points raised in submissions are in any event of limited cogency.

43. It remains for me to apologise to the parties for any inconvenience caused by the time it has taken for this decision to be prepared.

C.G.Ward
Judge of the Upper Tribunal
Authorised for issue on 14 February 2024