

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No CJSA/1933/2010

Before UPPER TRIBUNAL JUDGE WARD

Decision: The Secretary of State's appeal is allowed on a technical level only. The decision of the First-tier Tribunal sitting at Leeds on 4 March 2010 under reference 013/09/03616 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 in the following terms:

In connection with his claim for jobseeker's allowance made on 9 March 2009, the claimant had a right to reside from 1 May 2009, but not before.

The Secretary of State must now decide upon the remaining aspects of the claim. Any dispute as to those would carry fresh appeal rights to the First-tier Tribunal.

REASONS FOR DECISION

1. This long-running case was stayed, previously behind the series of cases culminating in the Court of Appeal's decision in *Szpak v SSWP* [2013] EWCA Civ 46 and then pending the decision of the Supreme Court in *SSWP v Gubeladze* [2019] UKSC 31, in which judgment was given on 19 June 2019.
2. The claimant, a Polish national, had claimed jobseeker's allowance on 9 March 2009. By a decision dated 2 May 2009 his claim was rejected on the ground that he lacked the right to reside.
3. On 4 March 2010, the First-tier Tribunal allowed his appeal, concluding that he had clocked up the necessary 12 months of registered employment under the Worker Registration Scheme established pursuant to the Accession (Immigration and Worker Registration) Regulations 2004. That could only be so on the facts if certificates, when issued, were retrospective to the start of the employment. The Secretary of State challenged that conclusion, correctly as the decision in *Szpak* proved to be the case.
4. By the time Mr Szpak's representatives had abandoned their attempt to appeal to the Supreme Court, the Upper Tribunal had meanwhile held in *TG v SSWP (PC)* [2015] UKUT 50 (AAC) that the extension of the Worker Registration Scheme with effect from 1 May 2009 was disproportionate and so unlawful. That decision was appealed against by the Secretary of State, culminating in the Supreme Court's decision in *Gubeladze* which upheld the Upper Tribunal's view.

5. On the assumption (now shown to be false) that the Worker Registration Scheme was in force at the time of the date of decision on the claim (2 May 2009), the claimant would have been disqualified from claiming JSA as a jobseeker by reg.5(2) of the 2004. The effect of the decision in *Gubeladze* is that during the period 1 May 2009 to 30 April 2011 an A8 national, such as the claimant, was not after all subject to the additional hurdles created by the Worker Registration Scheme but in the same position as any other EU national.

6. At that time, the general position was that an EU national had the right to reside if they were a jobseeker as that term is understood in EU law i.e. that they were seeking employment and had a genuine chance of being engaged. Such a person had a sufficient right for the purposes of reg 85A(2) of the Jobseeker's Allowance Regulations 1996. It mattered not that they were not on the express list created by reg 85A(4). Such a right was not excluded by the operation of reg 85A(3).

7. The Secretary of State in post-*Gubeladze* submissions did initially suggest that the claimant could only benefit from *Gubeladze* if he had made a claim for JSA on or after 1 May 2009. I challenged that view for the following reasons.

8. Social Security Act 1998, s.8(2) provides that:

“Where at any time a claim for a relevant benefit is decided by the Secretary of State-

(a) the claim shall not be regarded as subsisting after that time; and

(b) accordingly, the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time.”

That implies that circumstances down to the date of that decision can be taken into account and is mirrored as regards the First-tier Tribunal in section 12(8)(b) of the 1998 Act. It was therefore incorrect to say that the claimant needed to make a fresh claim on 1 May 2009. Rather, the principle that he was entitled to have his claim determined on the circumstances obtaining down to the date of decision would enable him to succeed if by then he was in fact and law a jobseeker, even if he was not one previously.

9. Whether or not a person was a jobseeker in 2009 required them to fall within reg 6(4) of the Immigration (European Economic Area) Regulations 2006 (as they then stood):

“(4) For the purpose of paragraph (1)(a), “*jobseeker*” means a person who enters the United Kingdom in order to seek employment and can provide evidence that he is seeking employment and has a genuine chance of being engaged.”

A claim for jobseeker's allowance was therefore not an essential condition to establishing that a person was a jobseeker.

10. The circumstances at the date of decision, as is now known, included that on 1 and 2 May 2009 the Worker Registration Scheme was no longer in force and the claimant was in the same position as any other EU national claiming to be a jobseeker. Given that (1) at that time the DWP did not probe whether a person had a “genuine chance of being engaged” but (it appears) was prepared to infer it in the case of those who complied with the jobcentre’s requirements (which the claimant, by claiming in March 2009, had expressed a willingness to do) and (2) the UK state has never regarded the requirement to “have entered the UK in order to seek employment” as excluding “second-time” jobseekers, he was entitled to succeed.

11. It may appear rather fortuitous for the claimant that it took the DWP almost 8 weeks to decide his claim and that by then the Worker Registration Scheme had fallen due for (as is now definitively established, 10 years later, legally ineffective) renewal but he still has a right to have his claim determined in accordance with the law.

12. The Secretary of State has now resiled from her earlier submission and in my judgment, for the reasons above, was correct to do so.

CG Ward
Judge of the Upper Tribunal
14 October 2019