THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

Hearing: **24 October 2019, George House, George Street, Edinburgh**
Representation: **For the Appellant: Ms Severine-Mia Davison, Citizens Advice and Rights Fife**
For the Secretary of State for Work and Pensions: McIver, Advocate

DECISION OF THE JUDGE OF THE UPPER TRIBUNAL

The appeal against the decision of the First-tier Tribunal given at Edinburgh on 20 August 2018 is refused.

REASONS FOR DECISION

Background

1. This is a case about a claim for employment and support allowance ("**ESA**"). It is an appeal from a decision of the First-tier Tribunal (the "**tribunal**") finding that the appellant (the "**claimant**") was not permanently incapacitated. It followed that the claimant did not have a right to reside in the UK and, being a person from abroad, was entitled to a nil amount of ESA.

2. The claimant is of Polish nationality and came to the UK on 29 August 2008. Since then, he has amassed numerous convictions in the UK (bundle, page 78), and has been charged with multiple assaults (bundle, pages 76-78). He has a diagnosis of schizophrenia exacerbated by multi drug abuse. He has been subject to orders under the Mental Health (Care and Treatment) (Scotland) Act 2003, orders under the mental health provisions of the Criminal Procedure (Scotland) Act 1995 (including assessment orders under Section 52D), as well as spending time in prison. The claimant worked for periods in farm jobs between 2008 and 2012; there were two periods during that time when he claimed Jobseekers' Allowance (income related); and there are periods during that time when there is no evidence of the claimant being in work or being in receipt of jobseeker's allowance. He does not appear to have worked since a short period in the summer of 2012. From August 2012 to February 2013 he was in in-patient care, and thereafter was in the community until 2016. The claimant was previously in receipt of ESA from 9 April 2014 until 18 July 2016, when he was detained on remand at HMP Perth.

3. When the claimant was transferred from prison to hospital on 1 August 2016, he claimed ESA again. On 19 June 2017 the Secretary of State for Work and Pensions ("**SSWP**") decided that, because the claimant did not have a right to reside, he was a person from abroad with a nil applicable amount for ESA.

4. The claimant appealed to the First-tier Tribunal (the "**tribunal**"). The tribunal adjourned the case when it first sat to hear it on 19 January 2018. This gave the claimant's representative more time to prepare. The next hearing on 15 June 2018 was again adjourned, after 66 pages of additional evidence obtained during that time had been lodged on behalf of the claimant. On 20 August 2018, the tribunal heard the appeal. It was noted in the record of proceedings that the claimant was in hospital and wanted the appeal to proceed in his absence (bundle, page 124), and this is also recorded in a note of a telephone call from the claimant's doctor to the tribunal on 17 August 2018 (bundle, page 118). It appears from paragraph 8 of the tribunal's statement of reasons that, at the hearing of 20 August 2018, the representative in any event asked for a further adjournment. The tribunal refused the adjournment on the basis that the issues in dispute were legal (having at paragraphs 11 and 13 of the statement of reasons accepted facts set out by the parties), and it was in the best interests of the appellant for the case to be dealt with outwith his presence. The tribunal upheld the decision of the SSWP, because the claimant had failed to establish permanent incapacity for work, the only ground put before the tribunal on the basis of which the claimant had a right to reside. In a statement of reasons dated 31 October 2018, the tribunal set out the reasons for its decision.

5. The claimant appealed to the Upper Tribunal. Parties lodged submissions and an oral hearing was allowed. The claimant attended the morning session of the oral hearing on 24 October 2019, accompanied by a friend. His representative spoke on his behalf. A Polish interpreter simultaneously translated the proceedings for the claimant, and there was a morning break. The claimant did not attend the short afternoon session after the lunch break, but his representative indicated there was no difficulty proceeding in his absence. Because the SSWP had introduced new authorities the day before, and again on the day of the hearing, that the claimant's representative was not in a position to deal with at such short notice, I allowed a further period for a written submission on behalf of the claimant in response to the SSWP's oral arguments. I have taken into account this submission, prepared with the help of CPAG's Upper Tribunal project, together with all of the other material before me.

Governing Law

6. Section 4(3) of the Welfare Reform Act 2007 provides that regulations may provide that, in prescribed cases, the applicable amount for the purposes of section 4(1) (which sets out amounts of ESA payable) shall be nil.

7. The regulations containing the provisions referred to in Section 4(3) of the Welfare Reform Act 2007 are the Employment and Support Allowance Regulations 2008 (the "**ESA Regulations**"). Regulation 69 of the ESA Regulations is entitled "special cases", and enables Schedule 5. Schedule 5 is headed up "Special Cases", and category 11 in that Schedule is "Person from abroad". The applicable amount specified for a person from abroad is nil.

8. Regulation 70 of the ESA Regulations defines "persons from abroad". There are a number of elements to the definition of persons from abroad. Persons who are not habitually resident in the United Kingdom are persons from abroad. People are not to be treated as habitually resident in the UK unless they have a right to reside (and one which does not fall within Regulation 70(3), which includes jobseekers) (Regulation 70(2)). A claimant is not a person from abroad if they fall within the categories in Regulation 70(4).

9. One of the categories within Regulation 70(4) of the ESA Regulations is a person who has a right to reside permanently in the UK by virtue of Regulation 15(1)(c), (d) or (e) of the Immigration (European Economic Area) ("**IEEA**") Regulations 2006 as a worker or a self-employed person (Regulation 70(4)(zc) of the ESA Regulations). The IEEA Regulations 2006 (the "**2006 Regulations**") were replaced by the IEEA Regulations 2016 (the "**2016 Regulations**"), which came into force on 1 February 2017. Both the 2006 and 2016 Regulations implement Directive 2004/38/E (the "**Citizenship Directive**"). Regulation 1(1) of Schedule 7 of the 2016 Regulations provides that unless the context otherwise requires, any reference in any enactment to the 2006 Regulations, or a provision of the 2006 Regulations, has effect as though it were a reference to the 2016 Regulations, or the corresponding provision of 2016 Regulations, as the case may be. Accordingly, from 1 February 2017, Regulation 70(4)(za) of the ESA Regulations should be read as referring to the 2016 Regulations. Since the date of claim in this case predated 1 February 2017, but the date of the SSWP's decision under appeal postdated 1 February 2017, there was some discussion at the hearing before me as to whether I should apply Regulation 5(3) of the 2006 Regulations or of the 2016 Regulations. The SSWP submitted the 2006 Regulations applied because they were in force at the date of claim, without citing authority for this proposition. The claimant submitted that entitlement should be calculated on each day from the date of the claim down to the decision, so that up to 31 January 2017 (the period before the 2016 Regulations were in force) entitlement should be ascertained under the 2006 Regulations, and thereafter the 2016 Regulations. It seems to me that the claimant's submissions more accurately reflect the intention of the consequential modification provisions in Regulation 1(1) of Schedule 7 of the 2016 Regulations. However, in the event, I find that nothing turns on this matter. The wording of the provisions relevant to this case in both the 2006 and 2016 versions of the IEEA regulations, although not always identical, is substantially similar. The applicable provisions in both the 2006 and 2016 Regulations are subject to the same interpretative obligation, to be interpreted purposively in accordance with the Citizenship Directive. The relevant provisions of the Citizenship Directive have remained in the same terms throughout. On the facts of this case it is not necessary for me to distinguish between the periods during which different IEEA Regulations applied, as the outcome is the same whichever apply. In these circumstances, I have used the generic term of the "**IEEA Regulations**" below, unless the context makes it necessary to distinguish between the 2006 and 2016 Regulations.

10. Regulation 15 of the IEEA Regulations provides that "the following persons acquire the right to reside in the UK permanently". Regulation 15(1)(c) lists as one of those "persons":

> "a worker or self-employed person who has ceased activity".

11. "Worker or self-employed person who has ceased activity" is the subject of additional provision in Regulation 5 of the IEEA Regulations. It means an EEA national who satisfies a condition in paragraph (2), (3), (4) or (5). Regulation 5(3) of the 2016 Regulations provides:

> "The condition in this paragraph is that the person terminates activity in the UK as a worker or self-employed person as a result of permanent incapacity to work; and-
> (a) had resided in the UK continuously for more than two years prior to the termination; or
> (b) the incapacity is the result of an accident at work or an occupational disease that entitles the person to a pension payable in full or in part by an institution in the UK".

Regulation 5(3) of the 2006 Regulations provides:

> "A person satisfies the conditions in this paragraph if –
> (a) he terminates his activity in the UK as a worker or self-employed person as a result of a permanent incapacity to work, and:
> (b) either –
> (i) he resided in the UK continuously for more than two years prior to the termination; or
> (ii) the incapacity is the result of an accident at work or an occupational disease that entitles him to a pension payable in full or in part by an institution in the UK".

The relevant provision of the Citizenship Directive which these provisions implement is Article 17(1)(b). Article 17(1)(b) provides:

> "by way of derogation from Article 16, the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by:
> ….(b) workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work. If such incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by an institution in the host Member State, no conditions shall be imposed as to length of residence".

Wording at the end of Article 17(1)(c) provides:

> "For the purposes of entitlement to the rights referred to in … (b), periods of employment spent in the Member State in which the person concerned is working shall be regarded as having been spent in the

> host Member State. Periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness or accident shall be regarded as periods of employment".

Regulation 5(3) of the IEEA was the only ground relied upon before the tribunal to establish a right to reside, so that the claimant was not a person from abroad, invoking Regulation 70(4)(zc) of the ESA Regulations.

12. If incapacity is established, but it is temporary rather than permanent, then there may be an alternative route to Regulation 5(3) to establishing a right to reside. Regulation 70(4)(za) of the ESA Regulations has the effect that a person is not a person from abroad if they are a qualified person for the purposes of Regulation 6 of the IEEA Regulations as a worker or a self-employed person. Regulation 6 of the IEEA Regulations defines "qualified persons" as persons who are EEA nationals and in the UK in various capacities. "Worker" is one of those capacities (Regulation 6(1)(b)), and under Regulation 6(2)(a) a person

> "who is no longer working"

shall not cease to be treated as a worker if the person is

> "temporarily unable to work as the result of an illness or accident".

(There is no difference between this wording in the 2006 and 2016 Regulations). These provisions implement Article 7 of the Citizenship Directive, which provides for a right to reside for a period of longer than 3 months for persons who are workers or self-employed persons in the host Member State, and extends the status of worker or self-employed person if they are

> "temporarily unable to work as the result of an illness or accident" (Regulation 7(3)(a)).

13. Dicta in *Samin v City of Westminster* [2013] 2 CMLR 6 ("***Samin***") at paragraphs 11 and 12 give helpful general background to the application of the right to reside provisions. The Citizenship Directive (on which the provisions in issue in this appeal are based) seeks to reconcile two objectives which are potentially in tension with one another, namely (i) to promote the free movement of labour within the EU; and (ii) to preserve the principle that migration should not unreasonably burden the social security and benefits system of the destination country. As was said in *Samin* at paragraph 21:

> "For many years EU law has thus given freedom of movement to those who are pursuing their occupations but has permitted restrictions on the payment of benefits to those who migrate but who are not, in broad terms, either economically active or otherwise self-supporting".

There is therefore a sliding scale of rights for migrant workers according to their circumstances and the amount of time they have been in the destination country.

> "States are not obliged to make their separate and disparate social benefits schemes available to those who have come from other States unless it is incidental to their right to free movement for the purpose of

supporting themselves and their families by work or otherwise" (paragraph 21).

Continuity of residence, for the purpose of determining the acquisition of a permanent right to reside based on a period of five years of legal residence under Article 16 of the Citizenship Directive (and Regulation 15 of the IEEA Regulations), is interrupted by periods of imprisonment and other forms of criminal detention (Case C-378/12 *Onuekwere v Secretary of State for the Home Department* [2014] 1 WLR 2420, *Vomero v Secretary of State for the Home Department* [2019] 1 WLR 4729 at paragraph 45, *Viscu v Secretary of State for the Home Department* [2019] 1 WLR 5376); but possibly not mental health disposals in criminal cases (*JO v Slovakia* [2012] UKUT 237 at paragraph 28). One reason periods of imprisonment are discounted is that they do not evidence the degree of integration with the economy of the host state which the free movement provisions are intended to promote. Periods of residence being considered under Article 17 may be subject to different rules from those applicable to Article 16; *SSWP v Gubeladze* [2019] UKSC 31 ("**Gubeladze**") and *SSWP v NZ* [2019] UKUT 250.

14. Finally, the jurisdiction of the Upper Tribunal is confined to errors on points of law by Section 11 of the Tribunals, Courts and Enforcement Act 2007. An appeal to the Upper Tribunal is not an opportunity to reargue the facts, which are primarily matters for the First-tier Tribunal. The Upper Tribunal, generally speaking, will only set decisions of tribunals aside if errors in law are material. Errors of law of which it can be said that they would have made no difference to the outcome do not matter (*R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982).

The tribunal's findings and the grounds of appeal

15. The relevant parts of the tribunal's findings which the claimant challenges are as follows:

> "20. Between April 2014 and July 2016, the appellant was in receipt of ESA (IR). The tribunal accepted the submission of the presenting officer that there was no indication that he was a "qualified person" during this time. This was not in issue….
>
> 33. …the tribunal determined that permanent meant exactly that. Something which is permanent is something which will be unchanging. By way of example a permanent right to reside means exactly that. To suggest that permanent could mean something less than unchanging seemed incongruous.
>
> 34. Whilst the tribunal accepted that the appellant has a long lasting psychiatric illness he is only aged 29. He is in and has been in treatment both as an outpatient and as an inpatient with psychiatric services. At page 73 of the papers it is confirmed that treatment is available which would be likely to prevent the mental disorder worsening and alleviate the symptoms.
>
> 35. He has been able to maintain tenancies and has had limited employment since arriving in the UK. I did not consider that it would be appropriate to indicate that he was permanently incapable of work.

> 36. In addition, in terms of Regulation 5 I noted that such permanent incapacity had to be due to an accident at work or an occupational disease. Neither of course apply to this appellant".

16. The grounds of appeal are:
    16.1 Ground 1. The claimant argues that the tribunal erred in paragraph 36 by failing to apply the word "or" which appears in between paragraphs (a) and (b) of Regulation 5(3) of the 2016 Regulations and between paragraphs (b)(i) and (b)(ii) of the 2006 Regulations. The tribunal should not only have considered whether the incapacity was due to an accident at work or occupational disease, but in the alternative whether there was a two year continuous period of residence in the UK prior to the incapacity. The SSWP accepts it was not necessary that the claimant's incapacity had to be due to an accident at work or occupational disease, provided the rest of paragraph 5(3) was satisfied; but submits that the error was not material.
    16.2 Ground 2. The claimant argues the tribunal erred in paragraph 33, by interpreting permanent as "unchanging", when it could also encompass "lasting for a long time" (this being one of the meanings set out in the Cambridge Dictionary). The SSWP accepts that the judge did not apply the correct test, but again submits the error was not material because, on the facts found by the tribunal, the same outcome would have been reached on application of the correct test.
    16.3 Ground 3. Finally, the claimant argues that the tribunal erred at paragraph 20 of its statement of reasons where it accepted the submission that there was no indication the claimant had been a qualified person during the time he was in receipt of ESA, because the SSWP could produce no evidence of a habitual residence test being applied to the claimant. The claimant argues that there should have been further enquiry. The SSWP does not accept that the claimant has a right to reside just because he previously was in receipt of benefit.

    Below, I deal with these grounds of appeal in turn. Then I consider the issue of temporary incapacity, other matters raised, and the appropriate disposal in this appeal.

Ground of appeal 1 – the word "or"

17. Regulation 5(3) of the IEEA Regulations (and Article 17(1)(b) of the Citizenship Directive which it implements) are set out in the governing law section above. For a right to reside to be acquired under them, the conditions a claimant must satisfy may be paraphrased as:
    17.1 first, worker or self-employed status in the host country in the past;
    17.2 second, that the work stopped as a result of permanent incapacity to work;
    17.3 third, that one or other of two further conditions is also satisfied. These conditions are either that the claimant had resided in the UK continuously for more than two years prior to the termination; or that the incapacity is the result of an accident at work or an occupational disease that entitles the person to a pension payable in full or in part by an institution in the UK.

18. The claimant's first ground of appeal concerns the third of these matters. In paragraph 36 of its statement of reasons, the tribunal appears to suggest that the right to reside can only be established if permanent incapacity is due to an accident at work or occupational disease. As conceded by the SSWP, this was not a correct interpretation of Regulation 5(3). It does not give effect to the word "or" at the end of Regulation 5(3)(a) in the 2016 Regulations; and the words "either" in Regulation 5(3)(b) and "or" at the end of 5(3)(b)(i) of the 2006 Regulations; or the wording of Article 17(1)(b) of the Citizenship Directive. Provided the first and second conditions set out in 17.1 and 17.2 in the previous paragraph are satisfied by a claimant, it is sufficient if the claimant establishes either that the permanent incapacity is due to an accident at work or occupational disease OR there has been a two year period of continuous residence prior to the termination of activity as a worker or self-employed person.
19. I therefore find the tribunal erred in law in its approach to Regulation 5(3) of the IEEA Regulations. However, this error is immaterial to the outcome unless the tribunal also erred in failing to find the conditions in paragraphs 17.1 and 17.2 above were satisfied. Unless they were, no right to reside would have been acquired under the relevant statutory provisions, and the outcome would have been the same. It is therefore necessary to go on to consider the second ground, which concerns the second condition set out in paragraph 17.2 above.

Ground of appeal 2 – permanent incapacity

20. Parties were in agreement that the tribunal judge applied the wrong test in equating permanent with "unchanging" when considering permanent incapacity. However, the parties differed as to what the correct test was, and what the consequences of the error should be. The claimant submitted that "permanent" should also encompass "lasting for a long time"; although the test should not be whether there is "any chance" of not returning. The SSWP submitted that the test was whether there was a realistic prospect of the claimant's return to work.
21. In *Samin* at paragraph 32, in the course of considering the issue of incapacity, the court stated:

> "There is considerable danger in substituting a different expression for the words which have been, deliberately, used in the [Citizenship] Directive and the [IEEA] regulations."

The suggested definitions put forward by the judge of "unchanging", and the claimant of "lasting for a long time", are glosses on the actual wording of the statutory provisions. I agree with the warning in *Samin,* and decline to accept either of them. Instead, in my opinion tribunals should apply the tests set out in existing caselaw in this area, in cases such as *Samin*, *De Brito v SSHD* [2012] EWCA Civ 709 ("***De Brito***"), *Konodyba v Royal Borough of Kensington and Chelsea* [2012] EWCA Civ 982, *SSWP v LM* [2017] UKUT 485 ("***LM***"), *SSWP v NZ* CE/98/2015 (Second interim decision and final decision) ("***NZ***"), and *Prefeta v Work and Pensions Secretary* [2019] 1 WLR 2040 ("***Prefeta***").

In my opinion, the following principles are established by this caselaw and the terms of Regulations 5(3) and 6(2) of the IEEA Regulations:

21.1 A claimant may be capable of work or incapable of work. If the claimant is incapable of work, then the issue of whether the incapacity is temporary or permanent may arise in the context of the right to reside (Regulation 70(4)(za) and 70(4)(zc) of the ESA Regulations, and Regulations 5(3) and 6(2) of the IEEA Regulations).

21.2 These are questions of fact, which must be judged objectively (*De Brito* paras 33-35, *Samin* para 31). Section 12(8)(b) of the Social Security Act 1998 applies, so tribunals must decide these questions without taking into account any circumstances not obtaining at the time when the decision appealed against was made (in this case 19 June 2017).

21.3 The burden is on the claimant to establish they were working, and stopped due to temporary or permanent incapacity (*De Brito*, paragraph 29, *LM* paragraph 34).

21.4 In deciding whether incapacity is permanent or temporary, according to the domestic cases, it is generally helpful to ask whether or not there is a realistic prospect of a return to work, looking at the foreseeable future (*Samin* paragraph 31, *NZ* (Second interim decision) paragraph 79). If there is no such realistic prospect, incapacity will be permanent. If there is a realistic prospect, incapacity will be temporary. Or put another way by the Court of Justice of the European Union, temporary incapacity covers situations in which a Union citizen's re-entry on the labour market is foreseeable within a reasonable period (*Prefeta* at paragraph 39).

21.5 Incapacity may be temporary on the evidence at one point in time, and become permanent later (*LM* para 54*)*.

21.6 Incapacity is only one part of the relevant statutory tests. Even if there is incapacity, it will not give rise to a right to reside unless work was terminated as a result of incapacity and other statutory conditions are satisfied (paragraphs 12, 17 and 29 of this decision).

22. In the present case, when considering permanent incapacity, the judge found that permanent meant unchanging and it would be incongruous to find that it meant anything less than unchanging. Given the dicta in *Samin* above and the principles set out in paragraph 21, this disclosed a technical error of law; "Unchanging" is not the approach in the authorities set out above, which focus on a realistic prospect of a return to work looking at the foreseeable future.

23. However, the decision will only fall to be set aside if the tribunal's error in law was material. In that regard, I note that the statutory test in Regulation 5(3) of the IEEA Regulations required the judge, as part of its application, to consider whether there was permanent incapacity to work. The claimant had been given extensive opportunities to provide evidence to the tribunal on this matter, given the time lapse between the appeal being brought in 2017 and the eventual decision in August 2018, and the adjourned hearings in between. The judge directly addressed permanent incapacity to work, on the basis of the facts found by the tribunal. Paragraphs 34 to 36 of the statement of reasons set out the considerations taken into account by the judge when concluding there was no permanent incapacity. Broken down, they were:

The claimant was young, only 29.

While he had long lasting psychiatric illness, he had been in treatment, and the papers made it clear that treatment was available that would

be likely to prevent the mental disorder worsening and alleviate the symptoms.

He had been able to maintain tenancies and carry out some employment since arriving in the UK.

Overall, the judge asked himself the correct statutory question in relation to the relevant part of Regulation 5(3) of the IEEA Regulations, of whether incapacity was permanent. In the light of the clear findings made set out above, in my opinion the outcome would have been the same if the judge, in considering permanent incapacity, had asked himself whether there was a realistic prospect of returning to work within the foreseeable future. On the findings made by the tribunal judge, the error of law made no material difference to the outcome. I have been assisted in reaching this conclusion by dicta in *Samin* at paragraphs 33-34; in that case despite the judge not having explicitly asked herself whether there was a realistic prospect of returning to work, the court was not satisfied there was an error of law. Applying a similar approach, I find the tribunal did not materially err in law by failing to ask explicitly whether there was a realistic prospect of a return to work.

Ground of appeal 3 – previous receipt of benefit

24. At paragraph 20 of its statement of reasons, the tribunal made a finding in fact that between April 2014 and July 2016 the claimant was in receipt of ESA (income related). The third ground of appeal is that the tribunal erred by accepting the SSWP's submission that no inference could be drawn from previous receipt of benefit that the right to reside test had been met, rather than the tribunal making further enquiry.
25. In *LM*, a similar argument was advanced. The Upper Tribunal was invited to draw an inference from previous receipt of a benefit that the right to reside test had been met. At paragraph 36, the judge said "Experience in other cases suggests that it is by no means axiomatic that the Secretary of State would have taken a right to reside decision in favour of the claimant before paying benefit. The Upper Tribunal did not draw any inference about right to reside from previous payment of the benefit".
26. I agree with the approach taken in *LM*. I do not consider that it can be inferred from previous receipt of benefit that the claimant met the right to reside test at that point or, more relevantly to this case, at the times covered by the claim under consideration. This was a fresh claim for ESA. It was for the claimant to show that he had a right to reside at the relevant times. The claimant was represented at the tribunal. The representative had an opportunity to make submissions about why the claimant met the relevant statutory tests. I accept that sometimes it may not have been easy to obtain instructions from the claimant. But that was counterbalanced by the tribunal having afforded the claimant's representative a much longer time to prepare for the case than usually happens, including two adjournments. As set out in paragraph 21.3 above, the claimant bore an evidential burden of adducing evidence to support the basis on which he argued there was a right to reside. If the claimant considered it relevant to his appeal that he had a right to reside when paid ESA between April 2014 and July 2016, he had the opportunity before the tribunal to produce evidence to show the statutory basis on which it had been acquired. I do not consider that the tribunal erred in law in its finding

given the evidence actually led before it, or that there was any obligation on it to make any further inquiry. I therefore reject this ground of appeal.

Temporary incapacity

27. Paragraph 12 above sets out an alternative legal basis on which a right to reside might be established, in situations of temporary incapacity. The caselaw demonstrates a close relationship between decisions about permanent incapacity and temporary incapacity. The question therefore arises whether the tribunal materially erred in law by failing to address expressly whether the claimant had a right to reside by virtue of being a qualified person under Regulation 70(4)(za) of the ESA Regulations, as a worker no longer working due to temporary incapacity as the result of an illness or accident. At the oral hearing of this case, I invited submissions from parties on the applicability of Regulation 70(4)(za) of the EA Regulations and Regulation 6 of the IEEA Regulations.
28. Having considered the case further, I have come to the conclusion that there was no material error in law in the tribunal having failed expressly to address whether the claimant was not a person from abroad due to the application of Regulation 70(4)(za) of the ESA Regulations. First, Section 12(8)(a) of the Social Security Act 1998 provides that in deciding the appeal, the tribunal "need not consider any issue that is not raised by the appeal". The claimant was represented. The representative had been provided with an appeal bundle. This contained the SSWP's position that the claimant had not obtained worker status, or retained it, from his last employment in the UK (page 4). It also set out the relevant legislative provisions, including at pages 5 and 8-11. Despite this material, the claimant's representative elected to focus the issues in both written and oral submissions, so that only the right of residence based on permanent incapacity was put in issue before the tribunal. Having regard to the terms of Section 12(8)(a), in my opinion the tribunal did not err in law by making only general findings that other grounds were not open to the claimant (paragraph 37) without dealing explicitly with Regulation 70(4)(za) of the ESA Regulations and Regulation 6 of the IEEA Regulations.
29. Second, even if I was wrong about that, and the tribunal's inquisitorial function meant it should have gone on to consider whether there was a right to reside based on Regulation 70(4)(za) (*AS v SSWP* [2018] UKUT 260), in my opinion on the facts found by the tribunal it would have been bound to find there was no such right to reside. Accordingly, any failure to address this matter expressly was not material to the outcome. It is important to notice that temporary incapacity does not of itself give rise to a right to reside. On the wording of the relevant provisions set out in paragraph 12 above, the person must be "no longer working", having become temporarily incapable of working as the result of an illness or accident. It is implicit in these provisions that the claimant should have had worker status, and become temporarily incapable while working, to be a qualified person with a right to reside (C-171/91 *Dimitrios Tsiotras v Landeshauptstadt Stuttgart* paragraph 11). It is not the purpose of the provisions to confer a right to reside on somebody who has recovered, but chooses not to work. The focus is therefore on whether the temporary incapacity continued throughout the period from being in work until

the claim (or possibly whether some other relevant status within Article 17(1)(c) of the Citizenship Directive intervened). The tribunal found extensive facts about the claimant's history, by incorporating chronologies in the papers (paragraphs 11 and 13), and I have considered those facts. I take the claimant's case at its highest; I assume (without deciding, as this matter is disputed) that the claimant acquired worker status when he last worked for a short period in August 2012 (cp *NZ* (Second interim decision) at paragraph 64). I also assume (again without deciding) that the claimant became temporarily incapacitated while working, given his admission to hospital with mental health problems in August 2012. However, these matters would still be an inadequate basis for a right to reside to have been acquired for the purposes of the claim under appeal. The claim was made on 1 August 2016. The facts found do not establish that the claimant had remained temporarily incapable for work as a result of illness or accident between August 2012 and the time of the claim. It is evident from the papers that the claimant had suffered from mental health problems for a considerable time, having been admitted for treatment in Poland in 2006 (bundle, page 101). Despite his problems, he had been able to work on various occasions since then. He had carried out a number of jobs on farms and did so from time to time. He was discharged from inpatient care in 2013 and was thereafter in the community until recalled in February 2016. I assume in the claimant's favour, again without deciding the matter, that the claimant was temporarily incapacitated from work when in receipt of ESA (although the tests are not the same: *NZ* (Second interim decision) at paragraph 60 and *HK v SSWP* [2017] UKUT 421 at paragraph 4). But ESA did not commence until 9 April 2014. It has not been shown the claimant remained temporarily incapacitated for all work between discharge in 2013 and 9 April 2014. Rather, the facts found, including the history of illness and working, suggest that a job was not found within a reasonable time of discharge (cp *Samin* at paragraphs 25-27). On the facts found by the tribunal, the claimant was not a qualified person and did not acquire a right to reside under Regulation 70(4)(za) of the ESA Regulations. I reach this conclusion even leaving aside the fact that immediately before the claim was made, the claimant's inability to work was due to him being in prison on remand at HMP Perth between 13 July 2016 and 1 August 2016. It seemed to me that the claimant's request for the case to return to the tribunal for further consideration of the facts failed to appreciate the limitations on the jurisdiction of the Upper Tribunal under Section 11 of the Tribunals, Courts and Enforcement Act 2007. This provision does not allow claimants a second opportunity to argue their case on the facts, without there being a material error of law in the tribunal's approach. I have found no such error. In all the circumstances, I find that it was not material to the outcome that the tribunal did not explain why it did not consider that temporary incapacity was a ground for a right to reside.

Other matters

30. There were a number of other matters argued before me. The SSWP made submissions about the claimant lacking worker status after, at the latest, 15 June 2010, because no work carried out after that time was genuine and effective. This was said to have two consequences: the cessation of work by

the claimant could not be said to result from any incapacity, meaning the first part of Regulation 5(3) was not satisfied; and the condition of two years of residence prior to cessation of work due to permanent incapacity in Regulation 5(3) could not be met. The SSWP did not in any event accept as good law the finding in *NZ* (final decision paragraph 11) that residence under Regulation 5(3)(a) of the 2016 Regulations or Article 17(1)(b) was residence in fact rather than legal residence. This was not because of any challenge to the Upper Tribunal's reasons in *NZ* on this particular aspect of the case. Rather, it was because *Prefeta* showed that unregistered work could not count, but on the facts the judge in *NZ* had not taken this approach. It was submitted *NZ* was still within the appeal period and should not be followed. The claimant on the other hand did not accept that worker status had stopped in 2010; the tribunal had accepted that the claimant may well have had a job fruit picking in the Blairgowrie area around the period of June 2012 at paragraphs 15 and 18 of its statement of reasons. This claimant submitted this should count as genuine and effective work. Before this work, the claimant appeared to have been in receipt of jobseekers' allowance between the end of November 2011 to May 2012. The claimant also argued that the condition of two years' residence in Regulation 5(3) of the IEEA could be met by two years of factual (not legal) residence prior to the cessation of work, relying on *Gubeladze* and *NZ* (final decision at paragraph 11); he had two years of factual residence prior to 2012.

31. In the event, it is not necessary for me to decide between the parties on these interesting arguments. This is because I have found that the tribunal did not materially err in law in its approach to permanent incapacity, for reasons set out above. There is no finding that the claimant is permanently incapacitated. Given what I have said in paragraph 17 above, the claimant cannot satisfy all of the conditions to establish a right to reside under Regulation 5(3) of the IEEA Regulations (in the context of Regulation 70(4)(zc) of the ESA Regulations). He cannot succeed in this appeal, whatever the outcome on these other arguments.

Disposal

32. I therefore find that, although the tribunal erred in law in its approach to the statutory test in Regulation 5(3) of the IEEA Regulations in two ways, neither error was material to the outcome. I decline to set aside the tribunal's decision under the provisions of Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, and refuse the appeal.

A I Poole QC
Judge of the Upper Tribunal
Date: 14 November 2019