

**RIGHT TO RESIDE – INCOME SUPPORT, INCOME-BASED  
JOBSEEKER’S ALLOWANCE, INCOME-RELATED  
EMPLOYMENT AND SUPPORT ALLOWANCE & STATE  
PENSION CREDIT – EFFECT OF UPPER TRIBUNAL  
DECISION**

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**INTRODUCTION**

1. The purpose of this memo is to
  1. inform appeals officers about a recent Upper Tribunal decision<sup>1</sup> which deals with the issue of whether
    - 1.1 permanent residence under specified legislation<sup>2</sup> requires three years legal residence, or three years physical presence **and**
    - 1.2 the extension<sup>3</sup> of the A8 Worker Registration Scheme (WRS) from 1.5.09 to 30.4.11 was disproportionate and unlawful **and**
  2. provide instruction to Northern Ireland decision makers **and**

3. instruct appeals officers how a tribunal should be advised of dealing with cases involving similar circumstances where a decision maker's decision has already been made and an appeal is received.

*1 TG v SSWP (PC) [2015] UKUT 0050 (AAC) (CPC/1026/2014);*

*2 Directive 2004/38/EC Art 17(1)(a), Imm (EEA) Regs, reg 5(2)(a) & 15(1)(c);*

*3 Accession (Immigration and Worker Registration)(Amendment) Regs 2009*

## **THE UPPER TRIBUNAL DECISION**

### **Background**

2. The claimant, an A8 national from Latvia, came to the United Kingdom in 2008. The claimant was required under the Worker Registration Scheme to register her work, but only did so from 20.8.10 when a Worker Registration Scheme registration card and certificate were issued to the claimant. Her employments before that date were not covered by a Worker Registration Scheme certificate. The claimant continued to work until 25.11.12, when she retired. She applied for State Pension Credit with effect from 8.11.12, seeking to rely on a right of permanent residence as a worker who ceased activity under specified legislation<sup>1</sup>.

*1 Directive 2004/38/EC Art 17(1)(a), Imm (EEA) Regs, reg 5(2)(a) & 15(1)(c)*

3. On 18.12.12, the decision maker made a decision that the claimant was not entitled to State Pension Credit from 8.11.12 because she did not have a right to reside in the United Kingdom. The claimant appealed that decision on the basis that she had worked for the preceding 12 months and had resided in the United Kingdom for 3 years, so had a permanent right to reside as a worker who had ceased activity<sup>1</sup> (see DMG 073420). It was argued on behalf of the claimant that the extension of the Worker Registration Scheme for the period from 1.5.09 to 30.4.11 was incompatible with European Union law. On 19.11.13, the first-tier tribunal ruled that it did not have the jurisdiction to decide that ground.

*1 Imm (EEA) Regs, reg 5(2) & 15(1)(c); Directive 2004/38, Art. 17(1)(a)*

### **What the Upper Tribunal decided**

4. The Upper Tribunal decided to remake the first-tier tribunal's decision which encompassed the substantive matter of the legality of the extension to the Worker Registration Scheme, but also permitted the claimant to introduce a further point relating to the quality of residence required for the purposes of acquiring permanent residence<sup>1</sup>.

*1 Imm (EEA) Regs, reg 5(2) & 15(1)(c); Directive 2004/38, Art. 17(1)(a)*

5. The Upper Tribunal held that permanent residence under Article 17(1)(a) of the Directive only required 3 years physical presence rather than legal residence, noting that the wording of that Article refers only to 'residence'. Whereas in contrast, Article 16 refers to 'legal residence'. The Upper Tribunal's reasoning refers to the provision within the predecessor to Article 17 i.e. Regulation 1251/70, that used the same wording and was not at that time, a derogation from another right requiring legal residence.
6. The Upper Tribunal acknowledges that the Worker Registration Scheme, when introduced in 2004, was held by the majority in the House of Lords case of *Zalewska*<sup>1</sup> to be proportionate. However the Upper Tribunal found that in the present case, *Zalewska* did not provide an answer to whether it was proportionate to extend it in 2009. The Upper Tribunal Judge concluded that the extension of the Worker Registration Scheme was disproportionate and unlawful.

<sup>1</sup> *Zalewska (AP) (Appellant) v Department for Social Development (Respondents) (Northern Ireland)*

7. The Secretary of State in Great Britain has been granted permission to appeal the Upper Tribunal decision by the Court of Appeal, and a hearing is currently listed for February 2017.

### **ADVICE FOR DECISION MAKERS**

8. For Northern Ireland decision makers a decision made by the Upper Tribunal in Great Britain is persuasive only and not binding. Although persuasive, it cannot be followed whilst being appealed to a higher court. Decision Making Services will provide further guidance once the outcome is known but in the meantime decision makers should not follow this Upper Tribunal decision.

### **APPEALS**

9. Where a decision has already been made in cases involving similar circumstances (for income-based Jobseeker's Allowance, income-related Employment and Support Allowance, Income Support or State Pension Credit) and an appeal is received against that decision, the appeal should be referred to the tribunal in the normal way, but the tribunal should be advised of the *TG* Upper Tribunal case<sup>1</sup> currently being appealed to the Court of Appeal in Great Britain. Also, a tribunal should be similarly informed in potentially affected cases where appeal submissions have already been made.

<sup>1</sup> *TG v SSWP (PC) [2015] UKUT 0050 (AAC) (CPC/1026/2014)*

10. The tribunal should be informed of the following issues being considered in that case which may have an effect on the present appeal that is before it; namely;

1. the quality of residence required for acquiring permanent residence under specified legislation<sup>1</sup> **and/or**
2. whether the period used towards the acquisition of permanent residence includes the extension period of the A8 Worker Registration Scheme i.e. 1.5.09 to 30.4.11.

*1 Directive 2004/38, Art. 17(1)(a); Imm (EEA) Regs, reg 5(2)(c)*

11. In light of the potential effect of the Great Britain Court of Appeal's decision, the Department should therefore ask the tribunal to consider whether they would wish to adjourn proceedings and defer further action pending the outcome of the Court of Appeal judgment. It should be highlighted to the tribunal however, that the hearing before the Court of Appeal is scheduled for February 2017 and also that the judgment itself could be subject to further appeal, so adjournments could be lengthy.

### **DIFFICULT CASES**

12. Appeals officers may encounter cases where it is difficult to decide whether the case in front of them involves similar circumstances. Such cases can be referred to Decision Making Services for advice.

### **ANNOTATIONS**

Please annotate the number of this memo (DMG Memo Vol 2/58) against the following DMG paragraphs:

073350 (Heading); 073415; 073418 (Heading); 073500 (Main Heading).

### **CONTACTS**

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**DECISION MAKING SERVICES**

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