

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No CJSA/1868/2016

Before UPPER TRIBUNAL JUDGE WARD

Decision: I consent to the application by the Secretary of State to withdraw this appeal. A copy of this decision is to be placed on the Chamber's website.

REASONS FOR DECISION

1. This appeal has raised matters concerning the (now modified) policy and practice of the Secretary of State in relation to one aspect of the so-called Genuine Prospects of Work ("GPOW") test. It is possible that the issue may have arisen, or may yet arise, in other cases and for that reason this decision, although on a withdrawal is, with the agreement of the parties, being placed on the Chamber's website.

2. The claimant is a German national. On 20 December 2014 a decision was taken awarding him income-based jobseeker's allowance ("IBJSA"). On 24 March 2015 a decision was taken on supersession ending the award, following a GPOW assessment. On 6 August 2015 a tribunal ("FtT1") allowed his appeal. The decision of 24 March 2015 was set aside and that of 20 December 2014 remained operative.

3. On 22 October 2015 a DWP official based at the specialist unit in Scotland dealing with the right to reside wrote informing the claimant that the Secretary of State had decided not to appeal against the decision of FtT1 and continued:

"Your JSA(IB) Habitual Residence test is now satisfied for an extended period of three months from when it closed – 21/03/15 to 20/06/15. I have sent notification to your Benefit Centre to determine your claim for JSA(IB) for this period.

They will be in touch to let you know what is happening with your claim and if any award of benefit is due."

There was no suggestion in the letter that the decision could be appealed against to the FtT.

4. On 25 October 2015 the claimant made a fresh claim for IBJSA. On 4 November 2015 the Secretary of State decided that he lacked a qualifying right to reside – and in particular did not fall to be treated as a jobseeker because of regulation 6(9) of the Immigration (EEA) Regulations 2006, which provides that a person in the claimant's situation could not have a fresh right to reside as a jobseeker until after a period of absence. Thus his claim failed.

The claimant appealed again to the FtT, which on 4 April 2016 allowed his appeal (“FtT 2”).

5. The Secretary of State obtained from a District Tribunal Judge permission to appeal against the decision of FtT2 on grounds relating to FtT2’s interpretation and application of the legislation implementing the GPOW test. The appeal was then stayed pending the Upper Tribunal’s decision in *SSWP v MB* [2016] UKUT 372(AAC).

6. Following the decision in *MB*, I observed when giving directions that:

“this case (in addition to more general issues regarding the GPOW test) raises the approach by the Secretary of State to the GPOW test when a previous tribunal decision has gone in the claimant’s favour. It appears that on 22 October 2015 the DWP notified [the claimant] that he had been given a 3 month extension of JSA consequent upon the earlier tribunal’s decision, which had expired on 20 June 2015 (i.e. some 4 months before). The latter gave no indication of itself that it was an appealable decision, and indicated that the local Benefit Centre would be in touch. In those circumstances, ought not the First-tier Tribunal have treated [the claimant’s] appeal as being not only against the decision of 4 November 2015 on his re-claim, but also against the decision contained in the letter of 22 October?”

7. The Secretary of State, having earlier in these proceedings adopted the contrary position, does now accept that the letter of 22 October 2015 was a decision carrying a right of appeal, via ss10 and 12 of the Social Security Act 1998. He further accepts that if the claimant had been properly notified of it, the claimant would have been likely to have appealed against it, rather than to have made a fresh claim, and in those circumstances the decision of 4 November 2015, the subject of the appeal to FtT2 and thence to the Upper Tribunal, would never have come to be made.

8. At the time of FtT1’s decision, the relevant guidance was contained in Decision Makers’ Guide *Volume 2, Part 3 -Habitual residence & right to reside -IS/JSA/SPC/ESA* (at [073099] – [073100]) and provided for a fixed three month extension, reflected in the extension granted by the letter of 22 October 2015 to 20 June 2015. Following *MB*, an amendment to those paragraphs was published on 27 October 2016¹ which provides for matters to be looked at on a case by case basis. I am not required to rule on the validity of the approach of these items of guidance in the present case and do not do so.

9. Nor is it necessary for me to rule on the legality, even if a time limited extension be an appropriate response to a decision in the claimant’s favour by a First-tier Tribunal, of the manner in which, or the time at which, such a decision was communicated to the present claimant.

¹ The amendments are listed in <https://www.gov.uk/government/publications/decision-makers-guide-vol-2-international-subjects-staff-guide#history>

10. The matters in [8] and [9] will have to await consideration in a case which requires them to be addressed.

11. The difficulties affecting the DWP's decision-taking in this case, coupled with the Secretary of State's failure to appeal against the decision of FtT1 and the fact that the claimant has succeeded in obtaining employment from January 2016 have, however, led the Secretary of State to seek to withdraw the present appeal. Arrangements are being put in place for the claimant to be paid arrears of benefit due to him. Insofar as there are lessons to be learnt for other cases, this decision seeks to facilitate that. I am, accordingly, satisfied that it is appropriate to grant the Secretary of State's application for permission to withdraw his appeal against the decision of FtT2.

CG Ward
Judge of the Upper Tribunal
4 April 2017