II Cases

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DIGEST

■ *Analysis of recent cases*

Acquiring and retaining the status of a worker and the habitual residence test

LT Benefits; Community nationals; Habitual residence; Rights of entry and residence; Worker Registration Scheme; Workers

Discerning whether an EEA citizen has the status of a worker for the purposes of social security law requires a careful consideration of the structure of the habitual residence test (the Social Security (Persons from Abroad) Amendment Regulations 2006 (SI 2006/1026)). The test refers to both the Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 (the Directive) and the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) (the EEA Regulations) and is subject to case law of the European Court of Justice (ECJ); special rules apply to accession state nationals. *CIS/4304/2007* suggests that the habitual residence test (here, within the IS Regulations (SI 1987/1967)) has the following underlying structure:

- Claimants who come within reg.21AA(4) are not persons from abroad. They have the right to reside and do not have to be habitually resident.
- In order to be entitled to IS, anyone else must be habitually resident (reg.21AA(1)). If they are not, they are persons from abroad, whose applicable amount is nil.
- In order to be habitually resident, they must have a right to reside (reg.21AA(2)). If they do not, they are persons from abroad, whose applicable amount is nil.
- But persons who come within reg.21AA(3) cannot have a right to reside and cannot, therefore, be habitually resident.

Acquiring the status of a worker

An EEA citizen may have a right of residence as a work seeker even if he or she has never been a worker in the host state (*R. v Immigration*

Appeal Tribunal Ex p. Antonissen (C-292/89) [1991] E.C.R. I-745; [1991] 2 C.M.L.R. 373). Since April 2006 this has been enshrined in reg.6(a) of the EEA Regulations. But EEA citizens who are mere work seekers will not retain the status of a worker if they become ill before they find work (*CIS/4304/2007* at [30]). Accordingly, if an EEA citizen has worked in the United Kingdom and claims benefit relying on the provisions for retaining worker status, the first question that needs to be considered is whether the claimant acquired worker status at all.

In *CIS/467/2007* the claimant had started work in a call centre in March 2006 but after working for about a month she had to take time off work, for about a week, due to a back condition. The claimant returned to work for several days but was unable to continue due to her incapacity. Her employment was terminated in May 2006 and she did not work again until September 2006. After setting out the ECJ's approach to the concept of a "worker" in *Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* (C-413/01) [2004] All E.R. (EC) 765; [2004] 1 C.M.L.R. 19 at [22]–[33], the Commissioner held that the physical capacity to perform the work was a material and objective feature of the employment relationship and the tribunal was entitled to treat this as critical to its conclusion that the claimant had not acquired the status of a worker. In *CIS/1837/2006* the claimant provided assistance with teaching within a Somali community-based organisation on a voluntary basis. The deputy Commissioner held that this could not count as "work" as the ECJ has defined it as an activity for which payment is made (*Raulin v Minister Van Onderwijs en Wetenschappen* (C-357/89) [1992] 1 E.C.R. 1027; [1994] 1 C.M.L.R. 227).

In *CIS/1502/2007* [2009] UKUT 38 (AAC) the Secretary of State argued that agency work was, by its very nature, ancillary and therefore insufficient to confer on a claimant the status of worker. The judge held that agency work may be enough to make someone a worker, for example, where the agency regularly found work for the individual, albeit for short periods, and this was not separated by long periods without work. In those circumstances it would be appropriate to regard the claimant as a worker rather than a work seeker as they had, for practical purposes, become established members of the national workforce. On the other hand, where a person obtained work from an agency only intermittently, and for very short periods, they would remain work seekers. The question whether work was marginal was a matter of judgement, having regard to the facts of each case (*Ninni-Orasche*). The judge referred to *CIS/1793/2007* as an example where the claimant remained a work seeker because the work performed was marginal. In that case the claimant had been registered

with a temporary work agency but had only been able to find work in the United Kingdom for a total of 10 weeks in a period of three to four years.

In *Barry v Southwark LBC* [2008] EWCA Civ 1440; [2009] I.C.R. 437, a case concerning eligibility to housing assistance, the appellant had previously been an agency worker but needed to show that his employment for a period of two weeks as a steward at the Wimbledon tennis championships was sufficient to acquire the status of a worker under the six month provision for retaining that status in reg.6(2)(a) of the EEA Regulations. The local authority had decided that Mr Barry did not have a right to reside as a worker because his work at Wimbledon did not make him a worker for Community law purposes, due to its limited duration and its seasonal and casual nature and it should therefore be discounted. The Court of Appeal held that it was necessary to look at Mr Barry's employment history prior to the six-month period because the fact that he had been employed by a temporary agency and had a number of employments of short duration supported his claim that he was still a worker during his fortnight at Wimbledon. The Court also held that the work Mr Barry performed met the ECJ criteria as it was clearly of economic value since, if he had not performed that service, the Wimbledon championships would have had to employ someone else to fulfil his duties.

Effective work

In *CH/3314/2005* and *CIS/3315/2005* Commissioner Rowland produced an analysis of "work" which held that if the claimant was seeking part-time work it could not be regarded as "effective" if the claimant had to rely on a social security benefit for 'additional' support, i.e. it would be insufficient to remove entitlement to IS or JSA. The Commissioner opined that someone would need to be seeking work of at least 16 hours per week for it to be effective as they would then be eligible to claim Tax Credits. The Commissioner stressed that his comments on the effectiveness of part-time work did not apply to someone who was actually in work (*CJSA/1475/2006*). Be that as it may, it is difficult to square the analysis in *CH/3314/2005* and *CIS/3315/2005* with ECJ case law to the effect that if someone relied on social assistance because their employment income was lower than the minimum required for subsistence, they could still be regarded as a worker under the Treaty (*Kempf v Staatssecretaris van Justitie* (139/85) [1986] E.C.R. 1741; [1987] 1 C.M.L.R. 764). The Commissioner's restrictive interpretation also appears to run contrary to the prohibition against Member States unilaterally imposing additional conditions on whether a person can be classified as a worker (*Brown v Secretary of State for Scotland* (C-197/86) [1988] E.C.R. 3205; [1988] 3 C.M.L.R. 403 at

[21]–[22]). In any event, the need for a work seeker to show that they are seeking employment of at least 16 hours a week is no longer a live issue in social security because, as *R(IS) 8/08* points out, since April 2006 it is no longer possible to claim IS as a jobseeker and the JSA rules required that the claimant be available for at least 16 hours in order to qualify for the allowance.

Retaining worker status

Once it has been established that the claimant has acquired the status of a worker, the next question is whether they retained that status such that they meet the right to reside requirement. Under the habitual residence test, a person can be treated as habitually resident if they are a worker or self-employed person under Directive 2004/38 or retain that status under art.7(3). Former workers who have actually worked in the United Kingdom for at least a year (art.7(3)(i)) retain the status of worker as a work seeker indefinitely subject to being registered as a jobseeker (*CIS/0601/2008* [2009] UKUT 35(AAC) at [22]). For most people, an entitlement to JSA is sufficient evidence that they have a genuine chance of being engaged (*CIS/1951/2008* [2009] UKUT 11 (AAC) at [21]).

The position is more complex where the EEA citizen has worked in the United Kingdom for less than a year. According to Judge Jacobs, the effect of art.7(3)(ii) is to extend the default position in *Antonissen* to those who have been in employment and leaves Member States free to allow a longer period in domestic law (*CIS/1951/2008* at [22]). Accordingly, such EEA citizens may continue to retain the status of a worker under the more generous provisions in the EEA Regulations which provide that a work seeker (regs 6(1)(a), (4) and 14) can continue to retain the status of a worker for more than six months as long as they had a genuine chance of being engaged (reg.6(2)(b)(iii)).

As mentioned above, art.7(3) of the Directive makes no provision for the status of a work seeker to survive ill health (*CIS/4304/2007* at [30]). An attempt to argue that it would be disproportionate to refuse IS to someone who was detained under the Mental Health Act 1983 before they found any work was rejected in *CIS/3891/2007* [2009] UKUT 17 (AAC). Once an EEA citizen has acquired a right to reside as a worker in the United Kingdom they can retain the status of a worker if they become temporarily unable to work as a result of an illness or accident (the Directive, art.7(3)(a), the EEA Regulations, reg.6(2)(a)) and will therefore be eligible to claim IS based on their temporary incapacity. In *CIS/3890/2005*, the Commissioner said the tribunal had been wrong to hold that because the claimant's

back condition was permanent her incapacity could not be temporary. The Commissioner in *CIS/4304/2007* opined that the standard by which a claimant's ability to work would not depend upon domestic legislation and should be judged by reference to the claimant's ability to do the work they were doing when they became unwell (at [7]). This leaves open the possibility that an EEA national could continue to qualify for IS even if they failed the domestic law test for incapacity.

The case law therefore establishes that worker status can survive where someone who was seeking work becomes unwell and claims IS in place of JSA: see *CIS/1951/2008* [2009] UKUT 11 (AAC) at [23]. Moreover, EEA citizens who are either unable to work or to find work or are training to improve their job prospects can move from JSA to IS or vice versa, as the sequence in which any of the events in reg.6(2) of the EEA Regulations occur is purely arbitrary (*CIS/4304/2007* at [34]).

EEA citizens and claims for Income Support

EEA citizens who have worked in the United Kingdom are not entitled to receive IS as a lone parent, as the provisions for retaining worker status do not extend rights to those who temporarily cease to be economically active because they need to look after children (*CIS/3182/2005* and *CIS/4010/2006*). Attempts to argue that this approach is contrary to EC law have so far failed: see *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657; [2008] 1 W.L.R. 254 (*R(IS) 8/07*), and *Kaczmarek v Secretary of State for Work and Pensions* [2008] EWCA Civ 1310; [2009] 2 C.M.L.R. 3; a further challenge based on art.3 of Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community [1983] OJ L230/8 is pending before the Court of Appeal under the name *Patmalniece v Secretary of State for Work and Pensions*.

Prior to the amendment to the habitual residence test in April 2006, EEA citizens could claim IS as a jobseeker so long as there was evidence that indicated that the claimant still intended to remain in the labour market (*R(SB) 12/98*), as no system for determining whether a claimant is a work seeker had been set up for IS claimants (*CIS/3315/2005*). Since April 2006 a jobseeker cannot qualify for IS, as it is an excluded category under reg.21AA(3)(b)(i) and (d) (see *CIS/686/2008*). As there is no equivalent to these exclusions in the JSA legislation, the proper course was to claim JSA and not IS (*CIS/3779/2007*).

The condition that a jobseeker is registered with the relevant employment office under art.7(3) of the Directive was considered in

CIS/3505/2007 [2009] UKUT 25 (AAC), where the claimant, who was a lone parent, sought to argue that attending a work-focused interview was sufficient to meet the registration requirement, bearing in mind that the Community concept of work includes short-term, part-time work which was less than the hours needed to qualify for JSA and more likely to be obtained by informal means. The judge said that while "work" has been defined in terms that are independent of a particular state, it was not possible to retain contact with a labour market in such a broad and abstract sense. An EEA citizen must maintain contact with a particular market and the Directive therefore requires that the EEA citizen registers in accordance with the particular arrangements in the host state.

CIS/4144/2007 considered the position of EEA citizens who were misadvised by Jobcentre staff to apply for IS rather than JSA because they were single parents or pregnant. The Commissioner held that if the EEA citizen had been in receipt of JSA at the time they were advised to claim IS instead, then the claimant had the right to appeal against both the decision terminating JSA and the decision refusing IS based on the analysis in *R(JSA) 2/04*. If, on the other hand, the EEA citizen was not in receipt of JSA when they were advised to claim IS, then a tribunal has no power to treat the claim for IS as a claim for JSA. Such claimants would need to claim any lost benefit as an ex-gratia payment under the DWP's compensation scheme.

Under EC case law a claimant who is a separated spouse of an EEA national will remain a spouse until divorce (*Diatta v Land Berlin* (C-267/83) [1985] E.C.R. 567; [1986] 2 C.M.L.R. 164). In this type of case, it is the spouse's status that needs to be established: see *CIS/2431/2006* and *CIS/366/2007*. As long as the claimant's spouse is an EEA national exercising a Treaty right, the claimant will remain a family member with a derived right to reside. From April 30, 2006 the spouse of a work seeker is ineligible for IS (reg.21AA(3)(b)(ii)). However, the exclusion in reg.21AA(3) does not apply if the claimant comes within reg.21AA(4). An estranged spouse should qualify under reg.21AA(4)(d) as a family member of a person who retains the status of a worker under art.7(3) of the Directive.

Accession workers

Since May 2004, workers from the eight accession states (A8 nationals) have been required to register their employment in the United Kingdom with the Workers Registration Scheme (WRS). The status of A8 nationals as employed workers is governed by the Accession (Immigration and

Worker Registration) Regulations 2004 (SI 2004/1219) (as amended) and they do not gain the full rights of an EEA citizen until they have completed 12 months continuous registered employment. In *Zalewska v Department for Social Development (Northern Ireland)* [2008] UKHL 67; [2008] 1 W.L.R. 2602 the House of Lords rejected a legal challenge to the WRS in a case where the claimant had completed 12 months employment, but where she failed to register the second job. The House held that the adverse consequences of non-registration of the second job were not so disproportionate as to render the WRS invalid. In *CIS/3213/2007* [2009] UKUT 58 (AAC) a citizen of the Czech Republic claimed IS on the basis that he was self-employed. The claim was refused and the appeal dismissed on the ground that self-employment be registered with HM Revenue and Customs (HMRC) in order to get worker status. The judge said the Accession (Immigration and Worker Registration) Regulations 2004 (SI 2004/1219) were concerned with employed workers within the scope of art.39 of the EC Treaty and did not apply to self-employed persons within the scope of art.43. Nor do the EEA Regulations make any reference to registration with HMRC. Accordingly, the claimant's failure to register with HMRC did not mean that he could not be regarded as a self-employed person, particularly as the time for registering had not expired at the date the claim for IS was made.

Gaps

ECJ case law confirms that a person may remain a worker even when out of work: see *Unger v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* (75/63) [1964] E.C.R. 177; [1964] C.M.L.R. 319 [1964]. A number of decisions have considered whether a period of not working can result in the loss of worker status. In *CIS/185/2008* the Secretary of State conceded that a maternity period did not interrupt self-employment and that the claimant remained a worker for as long as she was on maternity leave and her contract of employment subsisted (at [8]). Accordingly, an EEA citizen who is a single parent on maternity leave is potentially entitled to IS as a worker with a right of residence (*CIS/4237/2007*). The question whether worker status can continue during sick leave was considered in *CJSA/1439/2008* [2009] UKUT 16 (AAC). The claimant had been working in the United Kingdom when she returned to Bulgaria for a holiday in July 2006 but became ill and required hospital treatment for depression and did not return to the United Kingdom until January 2007. Her employer (a care home) was informed regularly of her progress and kept her employment open for her. In January 2007, on medical advice, the claimant informed her employer that she would not be returning to work in a care home because

she was medically unable to perform the duties of that employment and she claimed JSA. Judge Jacobs held that in the circumstances, the claimant remained a worker while she was ill in Bulgaria, bearing in mind that she was in regular contact with her employer, who was prepared to keep her position pending her recovery and return.

CIS/1951/2008 [2009] UKUT 11 (AAC) considers the issue whether a delay in claiming JSA could prevent someone who has become involuntarily unemployed from retaining worker status. Judge Jacobs said that a gap between becoming involuntarily unemployed and claiming JSA was not necessarily fatal to retaining the status of a worker under the Directive or the EEA Regulations. It was a question of fact and degree whether the gap showed that the claimant had withdrawn from the labour market: a delay of two months, for example, between the ending of employment and claiming benefit might not prevent the claimant from retaining the status of a worker (*CIS/0519/2007*) but a gap of two years was too long (*CIS/1934/2006*). In another case the claimant had left her employment voluntarily and went back to Germany for a visit to her father which lasted some four and a half months. Upon returning to the United Kingdom, she immediately claimed IS as a single parent. The Commissioner held that she had lost the status of a worker as the provisions for retaining worker status were "not apt" to include a person who had withdrawn from employment voluntarily and was neither in work nor seeking it (*CIS/3789/2006*).

■ *Court decisions*

Court of Appeal

Child support—Variation—Effect of dividend income

(LT) Child support; Dividends; Non-resident parents

Secretary of State for Work and Pensions v Ross Wincott [2009] EWCA Civ 113, February 23, 2009: Sedley, Arden, Longmore L.JJ.

The appeal concerned the period in respect of which the conditions in reg.19(1A) of the Variations Regulations 2000 (SI 2001/156) must be satisfied. The appellant, Mr Wincott, was a non-resident parent of two qualifying children for the purposes of the CSA 1991. The parent with care applied for maintenance and the Secretary of State determined that Mr Wincott's income was £104.20 per week. In March 2005, Mr Wincott received a distribution (less tax) of £27,400 from his company.