



# to the GPOW (v3.0):

the “Genuine Prospect of Work Test” -

(1) as a cause of homelessness for EEA migrants

(2) arguments against the test



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**SECTION 1: Introduction:**

1. This paper seeks to:
  - 1.1. Explain what is here called the “genuine prospect of work test” in UK law and how it is applied (sections 1 to 5);
  - 1.2. Consider whether it is applied consistently with the UK legislation (section 3);
  - 1.3. Provide an explanation of the EU law principles of who has a right of residence as a jobseeker (section 6);
  - 1.4. Consider whether, given those EU law principles, the UK legislation is lawful based on what we know of the DWP arguments on this point (section 7);
  - 1.5. Consider whether a proper understanding of a claimants position under the domestic rules on workseeking within Jobseekers Allowance can assist a claimant to argue they meet the EU law test of being a jobseeker (section 8);
  - 1.6. Look at older UK caselaw on who has a right of residence as a jobseeker under EU law and whether that supports the DWP view that these regulations are lawful (section 9);
  - 1.7. Explain specific arguments that can be used about retaining worker status (sections 10 and 11).
  - 1.8. Explain that if the arguments contained in this paper about the UK regulations now being contrary to EU law then Tribunals are required to disapply them (section 12).
2. It is hoped that the paper will be useful for those representing claimants who are refused benefits because of the genuine prospect of work test. CPAG’s view is that the test is unlawful for the reasons set out below and we encourage representatives to challenge decisions which apply it.
3. It should be noted that in any case where the claimant has a right of residence other than that of a jobseeker or someone retaining worker status due to involuntary unemployment, which is not an excluded right of residence for the benefit claimed, then these arguments are not needed as the test should not apply in such cases.

**SECTION 2: What is the “genuine prospect of work test”? The UK law:**

4. Essentially the “genuine prospect of work test” is the requirement that applies in UK law either to an EEA national:
  - 4.1. who wishes to assert a right of residence as a jobseeker for longer than 91 days; or
  - 4.2. who wishes to assert that they retain their right of residence as a worker whilst unemployed for longer than six months having worked for more than a year.
  - 4.3. who wishes to assert that they can have a right of residence as a jobseeker following retention of the status of worker for a period of six months after having worked for less than a year.
5. The UK rules provide that a person in either of these first two situations will only have a right of residence if they can provide “compelling evidence” that they have a genuine chance of being engaged and are continuing to seek work. The rules also prevent any period of residence as a jobseeker arising in the third case unless the claimant has had a period of absence from the UK and in such cases then prescribe that “compelling evidence” needs to be provided from the first day as a jobseeker.

*The UK law on right of residence for a jobseeker*

6. Pursuant to regulation 14 of the Immigration (EEA) Regs<sup>1</sup> (as amended as at 19/08/2014) a person will have a right to reside as a “jobseeker” in domestic law if they meet the definition in regulation 6:

**“Qualified person”**

6. (1) In these Regulations, “qualified person” means a person who is an EEA national and in the United Kingdom as—

(a) a jobseeker;

[...]

(4) For the purpose of paragraph (1)(a), a “jobseeker” is a person who satisfies conditions A, B and, where relevant C.

(5) Condition A is that the person—

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<sup>1</sup> Immigration (European Economic Area) Regulations 2006 (SI 2006 No. 1003)

(a)entered the United Kingdom in order to seek employment; or

(b)is present in the United Kingdom seeking employment, immediately after enjoying a right to reside [*as a worker, self employed person, student or self-sufficient person*]

(6) Condition B is that the person can provide evidence that he is seeking employment and has a genuine chance of being engaged.

(7) A person may not retain the status of [...] jobseeker pursuant to paragraph (1)(a), for longer than the relevant period unless he can provide compelling evidence that he is continuing to seek employment and has a genuine chance of being engaged.

(8) In paragraph (7), “the relevant period” means—

(a) [...]; or

(b)in the case of a jobseeker, 91 days, minus the cumulative total of any days during which the person concerned previously enjoyed a right to reside as a jobseeker, not including any days prior to a continuous absence from the United Kingdom of at least 12 months.

(9) Condition C applies where the person concerned has, previously, enjoyed a right to reside under this regulation as a result of satisfying conditions A and B—

(a) [...]; or

(b)in the case of a jobseeker, for at least 91 days in total,

unless the person concerned has, since enjoying the above right to reside, been continuously absent from the United Kingdom for at least 12 months.

(10) Condition C is that the person has had a period of absence from the United Kingdom.

(11) Where condition C applies—

(a)paragraph (7) does not apply; and

(b)condition B has effect as if “compelling” were inserted before “evidence”

7. What this rule does in effect is state that no-one can assert a right of residence as a jobseeker for more than 91 days unless they can provide “compelling evidence” that they are continuing to seek employment and have a genuine chance of being engaged.
8. This rule has been in force in this form since 10/11/2014. The amendment history reveals the flurry of legislative activity in this area:

- 8.1. Until 01/01/2014, a person had a jobseeker right of residence under the UK Regulations provided they simply could “provide evidence that [s]he is seeking employment and has a genuine chance of being engaged”.
- 8.2. From 01/01/2014, the Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2013 (SI No. 3032) changed this so that now a person only had a right to reside as a jobseeker for a period of longer than six months if they “could provide compelling evidence that [s]he is continuing to seek employment and has a genuine chance of being engaged”.
- 8.3. From 01/07/2014, the Immigration (European Economic Area) (Amendment) Regulations 2014 (SI No. 1451) replaced the “six months” with a *cumulative* period of 182 days and introduced the exception in cases of absence from the UK - at this stage, the provision was in its current form with the exception that the period for which a jobseeker right to reside could exist without “compelling evidence” was 182 days rather than 91 days..
- 8.4. From 10/11/2014, the Immigration (European Economic Area) (Amendment) (No. 3) Regulations 2014 (SI No. 2761) reduced that 182 day period to the current 91 days.

UK Rules on retaining worker status and the GPOW- worked for less than a year

9. For those who are retaining worker status rather than those who have only ever sought work the rules are slightly different.
10. A person who has worked for less than a year can retain worker status for a maximum of six months. This works as follows:

(2) Subject to regulations 7A(4) or 7B(4), a person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if—

[...]

(ba)he is in duly recorded involuntary unemployment after having been employed in the United Kingdom for less than one year, provided that he—

(i)has registered as a jobseeker with the relevant employment office;  
and

(ii)satisfies conditions A and B;

[...]

(2A) A person to whom paragraph (2)(ba) applies may only retain worker status for a maximum of six months.

11. After the six month period, the person would then be subject to the requirement to provide compelling evidence in order to have a right of residence from day one and will only have a right of residence at all if they have a period of absence from the UK (Reg 6(9)(a) (10) and (11)).

UK rules on retaining worker status and the GPOW- worked for over a year

12. For those who have worked for more than a year then the situation is different: they will retain worker status for six months. However, at that point

(2) Subject to regulations 7A(4) or 7B(4), a person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if—

[...]

(b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom for at least one year, provided that he—

(i) has registered as a jobseeker with the relevant employment office; and

(ii) satisfies conditions A and B;

(5) Condition A is that the person—

(a) [...]; or

(b) is present in the United Kingdom seeking employment, immediately after enjoying a right to reside pursuant to paragraph (1)(b) to (e) (disregarding any period during which worker status was retained pursuant to paragraph (2)(b) or (ba)).

(6) Condition B is that the person can provide evidence that he is seeking employment and has a genuine chance of being engaged.

(7) A person may not retain the status of a worker pursuant to paragraph (2)(b), or jobseeker pursuant to paragraph (1)(a), for longer than the relevant period unless he can provide compelling evidence that he is continuing to seek employment and has a genuine chance of being engaged.

(8) In paragraph (7), “the relevant period” means—

(a) in the case of a person retaining worker status pursuant to paragraph (2)(b), a continuous period of six months;

13. So a person who has worked for more than a year will be allowed to retain worker status after six months only if they provide compelling evidence of a genuine chance of being engaged.

### SECTION 3: DWP Guidance on applying the test and its consistency with the UK Regulations

#### What the guidance says:

14. Decision Makers at the Department for Work and Pensions (“DWP”) rely on guidance issued by the Secretary of State for Work and Pensions to work out whether or not a particular claimant has provided the “compelling evidence”. This guidance is in the *Decision Maker’s Guide* at paras 073099 and onwards:

#### **Compelling Evidence**

073099 The DM can extend the claimant’s JSA entitlement where the claimant has provided compelling evidence that a change of their circumstances as set out below has now given them a genuine prospect of work -

1. where the claimant has provided reliable evidence that they have a genuine offer of a specific job which will be genuine and effective work (see DMG 073112 to 073113) provided that job is due to start within 3 months starting from the relevant period plus 1 day point. In this case the relevant period can be extended up to the day before the job actually starts or is due to start (whichever is the earlier) or

2. where the claimant can provide proof during the relevant period that a change of circumstance has given them genuine prospects of employment (which will be genuine and effective work (see DMG 073112 to 073113) and as a result they are awaiting the outcome of job interviews).

In these cases the relevant period can be extended by up to 2 months. Any extension is backdated to the date of change. However, time within the current relevant period is disregarded and as such, any change that occurs more than 2 months before the last day of the relevant period will not, in practice, result in any extension beyond the six month point.

**Note:** Examples of a change in circumstances could include evidence of recent completion of a vocational training course, or a recent change of location to improve labour market conditions, which may significantly improve the claimant’s genuine prospect of employment. Using these examples, the date of change would be the date that any qualification was awarded from, or the date that the claimant moved into a different labour market area.

073100 The DM should accept there is compelling evidence if

1. the claimant has a definite job offer of genuine and effective work or

2. the evidence presented of their change in circumstances indicates that it is likely the claimant will receive a job offer imminently. The DM should note that it is irrelevant whether the evidence is compelling if the change in circumstances does not meet the “date of change” requirement stated at DMG 073099 2. above

15. In effect this guidance means that unless a claimant has either a firm offer of a job or has had a change of circumstances such that it is likely they will receive a job offer imminently then they do not have compelling evidence of a genuine prospect of work.
16. Note: the guidance also deals with a number of other issues which are not relevant to considering the lawfulness of the test and so not dealt with here.

*Is this guidance consistent with the UK rules?*

17. It can be argued that this guidance mischaracterises the requirement in regulation 6(7) of the Immigration (EEA) Regs. That requirement is that the claimant can provide “compelling evidence” that she is continuing to seek employment and has a genuine chance of being engaged. However, the Secretary of State’s two examples are not of *the evidence* having to be compelling but rather that *the chances of employment* have to be compelling (i.e. more than realistic).
18. For example, if a rule states that a person needs to provide compelling evidence that they have ginger hair one would simply be able to provide a picture showing this to be the case (or perhaps a hair follicle with evidence it comes from that person). However, on the Secretary of State’s interpretation, the evidence will only be good enough if the person can show that not only do they have ginger hair but that it is particularly and strikingly ginger.
19. In short the DWP guidance interprets the regulations which require “compelling evidence” of a genuine prospect of employment as meaning that the evidence should be of a “compelling prospects of being engaged” rather than being “compelling evidence” of a genuine chance of engagement.
20. Even if that is not the case, arguments that the guidance (which essentially requires a job offer) actually requires more than “compelling evidence” could succeed - a person who had very good prospects of employment without it being, as the guidance seems to require, a near certainty that employment would be obtained, could still meet that threshold.

**SECTION 4: When must the evidence be provided?**

21. The DWP also argue that, if a claimant does not provide evidence *before* they make their GPOW decision, then it will not help them to later produce compelling evidence. Thus in a recent submission in a case CPAG are involved in, they have said:

“If the claimant provides evidence at a later date to show that they have improved their prospect of work or have found a job, this does not enable them to have a retrospective right of residence as right ended [...]”

22. Their argument here is that the requirement in reg 6(7) of the Immigration (EEA) Regulations (that the person “provide compelling evidence that he is continuing to look for work....”) can only be met at the time – if evidence is presented later then it is of no account.

23. What that interpretation would do in effect is to remove a right of residence from a person simply on procedural grounds, even though all concerned accept that the person met the substantive conditions (albeit that they did not demonstrate this at the time). It is therefore to elevate a procedural or administrative condition to a substantive rule. Arguably, that is not in accord with the way in which EU law rights function. That is made very clear in, for example, Article 8 of Directive 2004/38 (on the ability of Member States to require EU migrants who wish to stay for longer than three months to register) wherein it is stated that a failure to register (i.e. fulfil a procedural requirement) should only result in “proportionate and non-discriminatory sanctions”.

24. The purpose of requiring evidence of a prospect of being engaged is simply to check the person does have a right of residence as a jobseeker. By making the timely provision of the evidence so fundamental that even if it is provided at a later date then the underlying right which it shows existed all along is regarded as never having arisen is to twist this administrative measure in such a way that it destroys the effectiveness of the right itself.

25. Furthermore, the DWP position here is not supported by the decision in joined cases CH/3314/2005 and CIS/3315/2006 (both involved the same claimant). Although this case arose at a time before the then in force Immigration (EEA) Regulations 2000 contained an express statement that a jobseeker had a right of residence, and therefore the case dealt only with the EU law provisions that give jobseekers such a right, it is still arguably authority for when the evidence must be provided. The issue in that case (after a number of other arguments were rejected) boiled down to whether the claimant was a workseeker. The Commissioner was more than happy for the necessary *evidence* to be provided to the Tribunal (or even the Commissioner) even though it had not been provided previously to the decision maker. The following extract from the

case shows the Commissioner happily taking account of evidence provided after the date of decision:

14. However, the claimant's mere assertion that she was a work-seeker was not enough to guarantee her right of residence. Mr Venables accepted that she had actually to be available for employment and to be actively seeking employment with reasonable prospects of being engaged; otherwise, she could not be regarded as being genuinely in the labour market. He also accepted that the work she was seeking had to be effective and genuine and not on such a small scale as to be regarded as purely marginal and ancillary (see paragraphs 14 and 15 of R(IS) 12/98 and the cases cited therein). I agree.

15. Those are issues that were raised by the claimant's assertion that she was a work-seeker. I accept that there was insufficient evidence before the appeal tribunal for decisions to be made on those issues but that was because neither the Secretary of State nor the local authority had asked enough relevant questions. The appeal tribunal ought to have asked the questions itself. Instead, it completely failed to consider whether, as a work-seeker, the claimant was involuntarily unemployed and so a worker with a right of residence in the United Kingdom. Its decision is erroneous in point of law on that ground and must be set aside.

16. There is much more evidence before me. It is not perfect and the initial view of both Mr Venables and Mr Coppel was that I should refer this case to another appeal tribunal for determination. However, it seemed to me that it was unlikely that much better evidence would be available before the appeal tribunal. Of course, it would have been possible for the claimant to give oral evidence but I was not convinced that that would have taken matters much further, given the lapse of time there had been. I therefore heard submissions from both Mr Venables and Mr Coppel on the written evidence. [...].

**SECTION 5: Why the genuine prospect of work test causes homelessness- the DWP retesting programme and effects on Housing Benefit**

26. The application of this harsher test of who counts as a jobseeker causes homelessness for two main reasons:

26.1. For EEA jobseekers who have been receiving JSA (passing the right to reside test on the basis that they are a jobseeker) and claiming housing benefit (“HB”) since prior to 01/04/2014 then the ending of JSA ends entitlement to HB. This is because such claimants have transitional protection from amendments made to the housing benefit rules from 01/04/2014 (meaning they do not need to demonstrate a right of residence to get that benefit) that ceases as soon as their income based JSA ends.

26.2. For EEA workers who cease to retain this status and become mere jobseekers because they fail the “GPOW” test, then the effect may often be that they also do not have a right of residence for HB purposes.

27. The DWP have now started the process of checking all EEA nationals who have been receiving JSA for more than 91 days to see whether (1) they have any other right of residence than that of a jobseeker and (2) if not whether they can provide compelling evidence of a GPOW. This policy was announced in *Touchbase* (the DWP’s internal magazine).<sup>2</sup>:

From 9 February 2015 DWP will begin writing to European Economic Area (EEA) nationals whose existing claim for income-based Jobseeker’s Allowance (JSA) was made before 1 January 2014.

They will be told that their income-based JSA claim and their right to reside in the UK will be reviewed in three months’ time.

This will apply to EEA nationals who have a right to reside status as a ‘jobseeker’ or ‘retained worker’.

Since January 2014, all European Economic Area (EEA) nationals making a claim to income-based JSA have had time-limited access to the benefit.

The new measure means that all EEA nationals who get income-based JSA are treated in the same way, regardless of when they made their claim to benefit.

Starting on 9 February 2015, claimants who are subject to the new measure will get a letter explaining the change and how it will affect them. They will also be provided with information about alternative rights of residence.

Due to the numbers involved, the letters will be issued as part of a rolling programme over a number of weeks.

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<sup>2</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/405167/touchbase-feb-2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/405167/touchbase-feb-2015.pdf)

One month before their income-based JSA claim is due to stop, the claimant will receive a second letter reminding them about the change and inviting them to attend an assessment interview.

At the interview, they will be given the chance to show that they have a genuine prospect of work or, where appropriate, an alternative right to reside in the UK. Those who have an alternative qualifying right to reside will continue to receive income-based JSA.

If the claimant can provide compelling evidence that they have a genuine prospect of work, a short extension to income-based JSA might be considered. If not, their income-based JSA claim will stop.

DWP staff will seek to support any vulnerable people who might be affected by the change and will draw on specialised help where needed

28. Further information about the retesting process has been provided to Local Authorities in connection with HB. *HB Bulletin G2/2015*<sup>3</sup> This details how the DWP inform Local Authorities about cases:

### **Migrants Access to Benefits changes**

9. The Migrant Access to Benefits (MABs) Project has introduced a number of measures which restricted Jobseeker's Allowance (Income Based) (JSA(IB)) for European Economic Area (EEA) nationals.
10. To date the measures have included the following:
  - from 1 January 2014 - Restricting JSA(IB) to EEA claimants classed as Retained Worker to 6 months and EEA Jobseekers to six months and introducing a three month residency requirement before an EEA national can claim JSA
  - from 1 April 2014 - Removing access to HB to EEA JSA(IB) claimants defined as a Jobseeker
  - from 10 November 2014 - Further restricting JSA(IB) to EEA Jobseekers to three months.
11. From the 9 February 2015, any existing claim to JSA(IB) made before January 2014 from an EEA Jobseeker will be informed that they will be subject to a Genuine Prospect of Work (GPoW) assessment in three months time.
12. Implementation will take place over a four week period from the 9 February 2015. DWP will be notifying approximately 8,800 claimants that their JSA(IB) is due to cease in three months time, unless they can show a genuine prospect of work or prove an alternative right to reside.
13. A number of these EEA claimants will also have been in receipt of HB therefore LAs are likely to see the impact of this measure in early May 2015, when the JSA(IB) ceases.
14. LAs will be notified as appropriate via the existing 'Business As Usual' channels and should continue to follow current process.

<sup>3</sup> [http://www.rightsnet.org.uk/pdfs/HB\\_Bulletin-G2\\_2015\\_.doc](http://www.rightsnet.org.uk/pdfs/HB_Bulletin-G2_2015_.doc)

**SECTION 6: the EU law concept of who has a right of residence as a jobseeker**

29. It is strongly arguable that there is no EU law requirement stipulating that a person can only have a right of residence as a jobseeker for longer than 91 days (or 6 months) if they are able to provide “compelling evidence” that they are continuing to seek work and have a genuine chance of being engaged.

**Antonissen**

30. This is argued on the basis that:

30.1. The right of residence in order to look for work in a Member State other than that of which a person is a citizen derives from Article 45(3) of the Treaty on the Functioning of the European Union (“TFEU”- formally Article 39 TEC).

30.2. The question of whether a right under Article 45 (or its predecessor provisions in earlier EU treaties could be made subject to a temporal limitation was considered in Case C-292/89 *The Queen v The Immigration Appeal Tribunal (ex parte Gustaff Desiderius Antonissen)* [1991] ECR I-773.

30.3. In that case, the Home Secretary had attempted to deport Mr Antonissen under a UK rule 5 in the then paragraph 143 of the Statement of Changes in Immigration Rules (HC169), adopted pursuant to the Immigration Act 1971, under which a national of a Member State could be deported if, after six months from admission to the United Kingdom, he had not yet found employment and was not carrying on any other occupation.

30.4. Given that was the UK rule, the European Court of Justice considered that effectively the questions being asked of it boiled down to:

8 By means of the questions submitted to the Court for a preliminary ruling the national court essentially seeks to establish whether it is contrary to the provisions of Community law governing the free movement of workers for the legislation of a Member State to provide that a national of another Member State who entered the first State in order to seek employment may be required to leave the territory of that State (subject to appeal) if he has not found employment there after six months.

30.5. The Court answered as follows:

21 In the absence of a Community provision prescribing the period during which Community nationals seeking employment in a Member State may stay there, a period of six months, such as that as laid down in the national

legislation at issue in the main proceedings, does not appear in principle to be insufficient to enable the persons concerned to apprise themselves, in the host Member State, of offers of employment corresponding to their occupational qualifications and to take, where appropriate, the necessary steps in order to be engaged and, therefore, does not jeopardize the effectiveness of the principle of free movement. However, if after the expiry of that period the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host Member State.

- 30.6. So essentially, it is possible to have a basic rule in national law setting out a time period during which a person is allowed to reside as a jobseeker (such as the 6 month rule that was used in Mr Antonissen's case). However, once that period has expired, then if "*the person concerned provides evidence that he is continuing to seek employment and that he has a genuine chance of being engaged*", that is sufficient to enable the person to be allowed to remain in their capacity for a jobseeker for a longer period. Thus, only Condition B from the UK regulations is lawful.
- 30.7. There is no requirement in the EU test, as set out so clearly in *Antonissen*, for this evidence to be "compelling" (particularly no requirement for it to be as compelling as suggested in the guidance the Secretary of State has issued on this matter where effectively only an offer of a job will count as such evidence).

## SECTION 7: DWP arguments about why the UK rules are lawful and counter-arguments

31. CPAG has represented several claimants in cases in which the reasoning of the Secretary of State as to why the current UK rules properly reflect EU law appears to have emerged. The argument goes as follows:

31.1. **PROPOSITION 1** The DWP start from the proposition that *Antonissen* said that as a matter of EU law, a jobseeker did not need to show any evidence of a genuine prospect of being engaged for the first six months:

“Antonissen held that the genuine chance of being engaged criteria did not apply until the six month point” (see doc [7])

They point to paragraph 21 of the judgment (see above).

31.2. **PROPOSITION 2** DWP then proceed to Article 14(4)(b) of Directive 2004/38 which makes it clear that under the Directive, a jobseeker will need to show evidence of a genuine prospect of being engaged from day one of their time with a right of residence as a jobseeker. They say:

“The Directive subsequently provided that a jobseeker moving to the UK from another member state must be able to provide evidence from the outset that they are seeking employment and have a genuine chance of being engaged” (again at [7])

31.3. It may help to set out the text of Article 14(4)(b):

4. By way of derogation from paragraphs 1 and 2 [*which refer to the rights of residence during first 3 months provided do not become an unreasonable burden and also others with an extended right of residence*] and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) [...], or

(b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

31.4. **PROPOSITION 3** The DWP then combine the results of proposition 1 and 2 to argue from this apparent difference between what it is said *Antonissen* decided and what is in the Directive, that

“[t]he Directive, in combination with *Antonissen*, supports the view that the criteria which must be met by a “jobseeker” from the outset may be enhanced at the six month point, allowing a Member State at that point to request evidence beyond that originally provided”.

32. Taking Proposition 1, the DWP argue that: “*Antonissen* held that the genuine chance of being engaged criteria did not apply until the six month point” and refers to paragraph 21 of the judgment to back this up. As has been shown, that is not at all what the Court decided. Rather it decided that the UK national law allowing for six months residence as a jobseeker was allowed in principle, but no one could be removed if they could provide evidence that they were continuing to seek employment and had a genuine prospect of being engaged. Any particular period set out in national legislation may be found sufficient by the Court of Justice but that proviso will always apply at the end of whatever period is set.

33. It is striking that the un-amended definition of jobseeker that used to be in regulation 6(4) of the Immigration (EEA) Regulations matched the *Antonissen* wording exactly. Then the rules said that a jobseeker was:

(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.

Now the Secretary of State has made legislation which does not match the *Antonissen* test but suggests that the addition of the word “compelling evidence” is still compatible. Logically this is absurd- either the amendments made some difference to the law (which is why DWP is now retesting all EEA jobseekers) or it did not (in which case a claimant does not need to provide compelling evidence).

34. Once it is established that *Antonissen* did not find that no evidence could be sought within the first six months, the DWP attempt to derive a difference between the pre and post Directive position based on comparing this incorrect understanding of *Antonissen* with what is in Article 14(4)(b) fails (Proposition 3 cannot be correct as it relies on a difference between the EU law position before and after the Directive came into force that falls away once Proposition 1 is shown to be wrong). *Antonissen* did not find anything special as a matter of EU law about the 6

month rule the UK was applying at that time. It simply found that as a national rule, it was not in principle incompatible provided that after that time, anyone who could provide evidence they were seeking work and had a genuine chance of being engaged would continue to have a right. That is why the Directive is expressed as it is at Article 14(4)(b)- it codifies what was decided as a matter of EU law in *Antonissen* (Proposition 2 was always the EU law position). This is that jobseekers cannot be removed if they meet the requirement of evidence and genuine prospects.

35. To summarise: the comments about a six month rule in *Antonissen* was simply a comment on a more generous UK provision and therefore the EU law test has always been what it stated in Article 14(4)(b)- if the requirements of evidence of jobsearch and job prospects are met then a jobseeker right of residence exists. There is no warrant for reading into this some EU law blessing for a harsher version of Article 14(4)(b) to be applied at the six month point.

36. Furthermore, it would be surprising if the Directive had in fact imposed a harsher test of who could have a right of residence as a jobseeker. The preamble to the Directive states at recital 3:

3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify **and strengthen** the right of free movement and residence of all Union citizens.

[emphasis added]

The Court of Justice in Case C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-06241 having referred to that recital, said that [59]:

"...it aims in particular to "strengthen the right of free movement and residence of all citizens", so that Union citizens cannot derive fewer rights from that Directive than from the instruments of secondary legislation which it amends or repeals."

In fact, as regards the rights of jobseekers, it can also be said that this right comes directly from the Treaty (Article 45(3) TFEU) and therefore secondary legislation cannot cut down on the rights which the Court has held that provision provides.

37. The European Court of Justice dealt with a similar attempt to restrict the period for which an EU citizen could reside as a jobseeker in Case C-344/95 *Commission of the European Communities v Kingdom of Belgium* [1997] ECR I-1046. In that case the European Commission took infringement proceedings against Belgium as they had a law requiring jobseekers to leave the Kingdom of Belgium if they had not found a job within 3 months:

12 The Commission's first objection is that, in providing that a Community national who has not found employment at the end of a period of three months following submission of his application for establishment and who has not provided to the

district authorities a certificate proving that he is pursuing an activity as an employed person is automatically to be ordered to leave the territory, Article 45 of the Royal Decree is manifestly contrary to Article 48 of the Treaty, as interpreted by the Court of Justice in its judgment in Case C-292/89 *Antonissen* [1991] ECR I-745.

38. The Court held:

14 The Court had consistently held that the principle of freedom of movement for workers laid down in Article 48(1) to (3) of the Treaty forms one of the foundations of the Community and that, consequently, the provisions laying down that freedom must be given a broad interpretation (see, in particular, *Antonissen*, paragraph 11).

15 In paragraph 13 of its judgment in *Antonissen*, the Court stated further that freedom of movement for workers entails the right for nationals of Member States to move freely within the territory of other Member States and to stay there for the purposes of seeking employment.

16 The effectiveness of Article 48 is secured in so far as Community legislation or, in its absence, the legislation of a Member State gives persons concerned a reasonable time in which to apprise themselves, in the territory of the Member State concerned, of offers of employment corresponding to their occupational qualifications and to take, where appropriate, the necessary steps in order to be engaged (*Antonissen*, paragraph 16).

17 In the absence of Community provisions prescribing a period during which Community nationals who are seeking employment may stay in their territory, the Member States are entitled to lay down a reasonable period for this purpose. However, if after expiry of that period, the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host Member State (*Antonissen*, paragraph 21).

18 In view of the foregoing, it is sufficient to state that the Belgian legislation infringes Community law in automatically requiring nationals of other Member States who are looking for employment to leave Belgium after expiry of the period laid down.

39. Again, here we see that the principle is that whilst national rules may lay down a fixed period, European law does not do so. Any national rule laying down a fixed period must give way to the two fold test in *Antonissen* that where a person provides evidence they are seeking work and they have a genuine chance of being engaged they have a right of residence. In *Belgium* the CJEU did not require the evidence that was provided after the three month period to be “compelling”.

## **SECTION 8: Relevant provisions about JSA entitlement**

40. It is worth looking at the rules governing entitlement to Jobseeker's Allowance (JSA) to see, if a claimant has successfully been signing on and receiving JSA, the evidence that they will have had to provide and which the DWP will have had to accept as to their job search and their chances of obtaining employment.

41. In a recent case CPAG has been dealing with the DWP say:

“The fact that you were still actively seeking employment is a separate condition. It is not in dispute that you were actively seeking employment as this is a labour market condition and is assessed separately each time you sign to claim JSA (IB). As you have not been disallowed by labour market decision makers sufficient evidence must have been provided to demonstrate compliance to be actively seeking employment throughout the 6 months of your JSA (IB) claim.”

Their sticking point is that they do not accept evidence of a compelling prospect of work was accepted.

42. Turning to the relevant JSA labour market conditions:

42.1. By section 1(2)(c) of the Jobseekers Act 1995 it is a condition of entitlement that a claimant is “actively seeking work”.

42.2. That is further defined in section 7 as effectively that the person makes their best efforts to find employment:

7.—(1) For the purposes of this Act, a person is actively seeking employment in any week if he takes in that week such steps as he employment. can reasonably be expected to have to take in order to have the best prospects of securing employment.

42.3. Regulation 18 of the Jobseeker's Allowance Regulations 1996 (SI No. 207) sets out in more detail what counts as a step (paragraph (2)) and the matters to be considered by a decision maker (paragraph (3)) in determining whether the steps taken were sufficient to meet the goal set by section 7(1).

42.4. A claimant is also required (by section 1(2)(a) of the Act) to be available for employment as a condition of entitlement. By virtue of section 6:

6.—(1) For the purposes of this Act, a person is available for employment if he is willing and able to take up immediately any employment employed earner's employment.

42.5. Section 6(2) allows for the making of regulations which allow a claimant still to count as available for work even when they are not willing or able to take up some jobs (otherwise in theory a jobseeker in London with a disability would have to be prepared to go at the drop of a hat to take a job as a construction worker in Aberdeen). Sub-section (3) goes on to give examples of the ways in which these regulations might work:

(2) Subsection (1) is subject to such provisions as may be made by regulations; and those regulations may, in particular, provide that a person—

(a) may restrict his availability for employment in any week in such ways as may be prescribed; or

(b) may restrict his availability for employment in any week in such circumstances as may be prescribed (for example, on grounds of conscience, religious conviction or physical or mental condition or because he is caring for another person) and in such ways as may be prescribed.

(3) The following are examples of restrictions for which provision may be made by the regulations—

(a) restrictions on the nature of the employment for which a person is available;

(b) restrictions on the periods for which he is available;

(c) restrictions on the terms or conditions of employment for which he is available;

(d) restrictions on the locality or localities within which he is available.

42.6. Thus regulation 7 of the Jobseekers Allowance Regulations allows for a person to restrict their availability for work to 40 hours a week. Regulation 8 provides for restrictions in other ways- for example in terms of the terms or conditions of employment, the location, and the nature of employment. This is made subject to the provision that the claimant can still show that they have “reasonable prospects of securing employment”. Regulation 13(4) (very relevant in the case of a lone parent) allows a claimant with caring responsibilities to restrict their hours of employment to less than 14 provided they still have reasonable prospects of employment. Here are some of these provisions:

**Restriction of hours for which a person is available to 40 hours per week**

7.—(1) Except as provided in regulations 13, 13A and 17(2), a person may not

restrict the total number of hours for which he is available for employment to less than 40 hours in any week.

(2) A person may restrict the total number of hours for which he is available for employment in any week to 40 hours or more providing

(a) the times at which he is available to take up employment (his “pattern of availability”) are such as to afford him reasonable prospects of securing employment;

(b) his pattern of availability is recorded in his jobseeker’s agreement and any variations in that pattern are recorded in a varied agreement and

(c) his prospects of securing employment are not reduced considerably by the restriction imposed by his pattern of availability.

(3) A person who has restricted the total number of hours for which he is available in accordance with paragraph (2) and who is not available for employment, and is not to be treated as available for employment in accordance with regulation 14, for one day or more in a week in accordance with his pattern of availability shall not be regarded as available for employment even if he was available for employment for a total of 40 hours or more during that week

#### **Other restrictions on availability**

8. Subject to regulations 6, 7 and 9, any person may restrict his availability for employment by placing restrictions on the nature of the employment for which he is available, the terms or conditions of employment for which he is available, (including the rate of remuneration) and the locality or localities within which he is available, providing he can show that he has reasonable prospects of securing employment notwithstanding those restrictions and any restrictions on his availability in accordance with regulations 7(2), 13(2), (3), (3A) or (4), 13A or 17 (2).

[...]

#### **Additional restrictions on availability for certain groups**

13. [...]

(4) A person with caring responsibilities may restrict the total number of hours for which he is available for employment to less than 40 hours in any week providing

(a) in that week he is available for employment for as many hours as his caring responsibilities allow and for the specific hours that those responsibilities allow and

(b) he has reasonable prospects of securing employment notwithstanding that restriction and

(c) he is available for employment of at least 16 hours in that week.

42.7. Regulation 10 then sets out how the test of whether a person has reasonable prospects of securing employment should be conducted by the decision maker:

**Reasonable prospects of employment**

10.—(1) For the purposes of regulations 7 and 8 and paragraphs (2) and (4) of regulation 13, in deciding whether a person has reasonable prospects of securing employment, regard shall be had, in particular, to the following matters—

- (a) his skills, qualifications and experience;
- (b) the type and number of vacancies within daily travelling distance from his home;
- (c) the length of time for which he has been unemployed;
- (d) the job applications which he has made and their outcome;
- (e) if he wishes to place restrictions on the nature of the employment for which he is available, whether he is willing to move home to take up employment.

(2) It shall be for the claimant to show that he has reasonable prospects of securing employment if he wishes to restrict his availability in accordance with regulation 7 or 8 or paragraph (2) or (4) of regulation 13

43. The regulations also provide for the Secretary of State to gather evidence on a continual basis that the claimant is indeed actively seeking and available for work (including where limitations are placed upon that availability that they have reasonable prospects of securing employment). Thus regulation 23 obligates a claimant to attend the Jobcentre when called upon to do so (in most cases this is every two weeks to sign on). Regulation 24, headed “Provision of information and evidence” sets out the claimant’s duties to provide (at paragraph (1)) information about availability for work and actively seeking work, (at paragraph (4) and (5)) to furnish “such certificates, documents and other evidence” as the Secretary of State may require. Paragraph (6) provides that a claimant has to provide a signed declaration that they were actively seeking and available for work when required to do so.

44. Almost every JSA claimant will have restricted their availability for employment in some way under these rules such that they needed to show to the labour market decision maker that they had a “reasonable prospect of securing employment” under regulation 10.

45. Taking together the EU law test in *Antonissen* the requirement is for the claimant to provide evidence that (1) they are “continuing to seek employment” and (2) they have a “genuine chances of being engaged” and marrying that with the domestic requirements for JSA we can say:

45.1. As stated, the DWP accept (at least in some cases) that the claimant has provided evidence that they were “actively seeking work” under the domestic legislation and does not seem to raise any point under the EU law test about whether they are “continuing to seek employment”.

45.2. The DWP must, as stated, also have accepted that almost every claimant has “reasonable prospects of securing employment” under the domestic legislation.(because it is more likely than not a claimant will have placed some restrictions on her availability under regulations 7, 8 and/or 13(4). However, the DWP then argue that the claimant has not shown “compelling evidence” that she has a “genuine chance of being engaged”.

46. It is difficult to see that there is any difference between evidence that shows a “reasonable prospects of securing employment” and evidence showing a “genuine chance of being engaged [in employment]”. Arguably the two formulations are no different to each other. Thus it can be argued that the DWP have already accepted in these cases that claimants have provided evidence they have a genuine chance of being engaged.

## SECTION 9: Domestic authorities on who has an EU law right of residence as a jobseeker

47. In *CJSA/1475/2006* the DWP conceded that a JSA claimant who met the labour market conditions also met the *Antonissen* test. The case is significant as it related to the period before the coming into force of the Immigration (EEA) Regulations 2006 (30/04/2006). Their predecessor provisions (the Immigration (EEA) Regulations 2000) had not stated that a jobseeker had a right of residence. Therefore the Commissioner (as he then was) had to consider the matter from the point of view solely of EU law rather than looking at the domestic implementation. He accepted the concession of the Respondent as follows:

13. The Secretary of State also concedes that a claimant who satisfies the conditions of entitlement to jobseeker's allowance set out in section 1(1) of the Jobseekers Act 1995, which include being available for employment, entering into a jobseeker's agreement and actively seeking employment, will satisfy the *Antonissen* test of seeking employment and having genuine chances of being engaged in employment. Moreover, in this particular case, Mr Kolinsky conceded that the *Antonissen* test was satisfied in respect of the period from 9 September 2005 and he supported the claimant's appeal in respect of that period.

14. I accept the Secretary of State's concessions. The "right to reside" test imposed by regulation 85(4B) does not, in practice, provide an additional hurdle for citizens of the European Union claiming jobseeker's allowance, save where there is a derogation from the usual rules. The tribunal's decision was plainly erroneous in point of law. In respect of the period from 9 September 2005, I accept that the claimant had a right of residence in the United Kingdom.

48. In *R(IS)8/08*, which is a decision binding on Tribunals, the same Commissioner (whose decision was reported- i.e. supported by the majority of the then Commissioners), returned to this issue. He said that he now thought he had been wrong in *CJSA/1475/2006* to hold as he did but it is clear from what he holds that it would only be in a small minority of cases that this would make a difference and in all but these extreme cases then it was better to approach the case from the point of the domestic labour market rules:

4. The Secretary of State submits that the tribunal erred in failing to consider whether the claimant had a right of residence under Article 39 of the EC Treaty as a workseeker, in the light of *Regina v Immigration Appeal Tribunal, ex parte Antonissen* (Case C-292/89) [1991] ECR I-745. At paragraph 21, the European Court of Justice said:

"In the absence of a Community provision prescribing the period during which Community nationals seeking employment in a Member State may stay there, a period of six months, such as that as laid down in the national legislation at issue in the main proceedings, does not appear in principle to be insufficient to enable the persons concerned to apprise themselves, in the host Member State, of offers of employment corresponding to their occupational qualifications and

to take, where appropriate, the necessary steps in order to be engaged and, therefore, does not jeopardise the effectiveness of the principle of free movement. However, if after the expiry of that period the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host Member State.”

5. On that basis [i.e. paragraph 21 of *Antonissen- Martin Williams*], the Secretary of State submits, an EEA national has a right of residence as a workseeker where he or she is seeking employment and has a genuine chance of being engaged. It is pointed out that the right found to exist by the Court is now guaranteed by Article 14(4)(b) of Council Directive 2004/38/EC, which it is said has been transposed into domestic law with effect from 30 April 2006 by regulation 6(1)(a) and (4) of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003). It is also pointed out that it is not necessary to rely upon *Antonissen* where a “worker” becomes unemployed, because separate provision is, and was even before 30 April 2006, made for such cases (see Article 7(1) of Council Directive 68/360/EEC and Article 7(3) of Council Directive 2004/38/EC, transposed into domestic law by, respectively, regulation 5(2) of the 2000 Regulations and regulation 6(2) of the 2006 Regulations). *Antonissen* is relevant in the present case because the claimant had not worked in the United Kingdom and she claimed income support before 30 April 2006. I accept the Secretary of State’s submission that *Antonissen* and Article 14(4)(b) of Council Directive 2004/38/EC guarantee a right of residence for workseekers. Regulation 6 of the 2006 Regulations unambiguously confers such a right from 30 April 2006, as a matter of domestic law.

6. I think I was wrong to state in paragraph 14 of CJSA/1475/2006 that, in the light of *Antonissen*, “the ‘right to reside’ test ... does not, in practice, provide an additional hurdle for citizens of the European Union claiming jobseeker’s allowance, save where there is a derogation from the usual rules” and I may have inaccurately recorded the Secretary of State’s concession in paragraph 13. I accept that some people may be available for work and be actively seeking employment but not have a genuine chance of being engaged because, for instance, they have an insufficient command of English or Welsh for the type of job they are seeking or, perhaps, they have settled in an area where there is a particularly high level of unemployment and a dearth of jobs, so that the requirement to have a genuine chance of being engaged can be an additional hurdle. However, that additional hurdle will not often be significant and I suggest that the proportion of cases in which it will be right to reject a claim for jobseeker’s allowance on the ground that the claimant does not have a right of residence rather than on the ground that the claimant does not satisfy one or more of the conditions in section 1(2) of the Jobseekers Act 1995 – because, for instance, he or she is not genuinely available for, or is not actively seeking, employment – may be relatively small. It is true that a person who is not genuinely available for, or is not actively seeking, employment may not have a right of residence, but, in such a case, it is not helpful to reject the claim solely on the ground of the lack of a right of residence without reference to the underlying ground that would apply to British citizens as well as other EEA nationals.

49. The number of cases covered by the extreme circumstances Commissioner Rowland refers to will no doubt be small. In all cases where the facts are nowhere near the type of facts referred to by Commissioner Rowland in *R(IS)8/08* at paragraph 6 then this case is authority for saying they meet the *Antonissen* test. *R(IS)8/08* is still good law given that it interpreted the *Antonissen* test (eg the EU law position on jobseekers) before there were any UK regulations providing residence

rights for jobseekers. As the EU law position has not changed then it must still reflect what that position actually is.

50. The Immigration and Asylum Chamber of the Upper Tribunal have also considered the extent of a jobseeker right of residence- in *Shabani (EEA - jobseekers; nursery education)* [2013] UKUT 00315 (IAC) a three judge panel of that Chamber (including Judge Ward from the Administrative Appeals Chamber) considered the issue of “second time jobseekers”. The Secretary of State for the Home Department in that case submitted (correctly and uncontroversially) that:

21. [...] In essence, the case of Antonissen had established a two-fold test which had been incorporated into regulation 6(1)(a). A person had to show (1) that they were genuinely seeking work; and (2) that they had (or continued to have) a genuine chance of obtaining employment. Antonissen also made clear that application of this test had to take account of all the circumstances. Even though six months was a rough indicator of the period during which work should have been found, there was no hard and fast rule.

51. The Upper Tribunal went on to find as follows:

**The issue of the meaning of “jobseeker” within regulation 6 of the 2006 EEA Regulations.**

35. The issue identified as being central to the Tribunal’s continuation hearing concerned whether the appellant’s wife was precluded from qualifying as a jobseeker by the terms of regulation 6(4) which state that:

“(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.”

36. The question the Tribunal posed in directions was whether this definition precluded a person who was a “second-time” jobseeker such as the appellant’s wife.

37. That question was posed against the backdrop of somewhat inconclusive case law dealing with this issue. It may assist to differentiate between three different dimensions to the case law: A. The jurisprudence of the Court of

Justice prior to enactment of the “Citizenship Directive; B. Relevant provisions of this Directive; and C. subsequent Court of Justice and related case law. (Where relevant we shall include domestic case law seeking to apply the relevant principles set out in Court of Justice cases.)

A. Prior Court of Justice case law

38. Confining ourselves to Court of Justice jurisprudence dealing with workers and job seekers, it is clear that:

- (i) Under Article 45 (ex Article 39) the term ‘worker’ covers, to a greater or lesser extent, not only actual workers but (those whom we shall refer to as) “first-time” job seekers (Antonissen) as well as those who have had a job and are again seeking work, i.e. (those whom we shall refer to as) “second-time job seekers (Case 75/63 Hoekstra (nee Unger) [1964] ECR 177, Case 66/85 Lawrie-Blum [1986] ECR 2121, Bernini v Minister van Onderwijs en Wetenschappen [1992] ECR I-1071, Case C-85/96 Martinez Sala v Freistaat Bayern [1998] ECR I-2691); vocational or occupational trainees (Lair v Hanover University [1988] ECR 3161, [1989] 3 CMLR 545, Brown v Secretary of State for Scotland [1988] ECR 3205 [1988] 3 CMLR 403); the involuntarily unemployed and sick (Lair, Case C-302/90 Caisse Auxiliare d’Assurance Maladie-Invalidite v Faux [1991] ECR I-4875); as well as injured and retired workers.
- (ii) As regards jobseekers, the amount of time given to them to find work is not fixed although Member States may require them to leave their territory after a reasonable period unless the person concerned produces evidence (1) that he or she is continuing to seek employment; and (2) has genuine chances of being employed (Antonissen; EC Commission v Belgium Case C-344/95 [1997] 2 CMLR 187).

39. So far as jobseekers are concerned, it would also seem at least arguable that the Antonissen principles cover any kind of jobseeker, including (i) the “first-time jobseeker” as just described; (ii) the “second-time jobseeker” as identified in Hoekstra and other cases; and (iii) a person who did not enter the host Member State in order to seek employment but who after having

been admitted seeks employment. We base this view on [13] and [16] of the Court of Justice judgment in Antonissen, where the Court stated that freedom of movement for workers entails the right for nationals of Member States to move freely within the territory of other Member States and to stay there for the purposes of seeking employment. At [16] the Court added that “[t]he effectiveness of Article 48 is secured in so far as Community legislation or, in its absence, the legislation of a Member State gives persons concerned a reasonable time in which to apprise themselves, in the territory of the Member State concerned, of offers of employment corresponding to their occupational qualifications and to take, where appropriate, the necessary steps in order to be engaged.” Although Antonissen himself was a “first-time” jobseeker, in neither of these paragraphs did the Court restrict its enunciation of principles to first-time jobseekers.

40. The view we express here is consistent with that expressed by Upper Tribunal Judge Jacobs in the Administrative Appeals Chamber in [2009] UKUT 35 (AAC) [21] and by the Upper Tribunal Immigration and Asylum Chamber in RP (EEA Regs - worker - cessation) Italy [2006] UKAIT 00025 and AG and others (EEA-jobseeker-self-sufficient person-proof) Germany [2007] UKAIT 00075.

52. There is nothing in this careful analysis by a three-judge panel of the Upper Tribunal that supports the proposition for which the DWP argue- i.e. that after a period of 91 days then compelling evidence is necessary to go on being a jobseeker.

**SECTION 10: Lawfulness of UK rules on retaining worker status whilst unemployed having worked for more than a year**

53. In respect of those who have worked for more than a year, then the requirements of the Immigration (EEA) Regulations are set out at para 10 above.

54. To summarise this rule:

54.1. A person who has worked for more than a year will retain their right of residence when in duly recorded involuntary unemployment only if they can provide evidence they are seeking work and have a genuine chance of being engaged; or

54.2. They will only retain worker status for longer than six months where they can in addition provide the “compelling evidence”.

55. However, those who have worked in the UK for more than a year can rely on Article 7(3)(b) of Directive 2004/38 which simply does not restrict the right of residence in such cases to a period of six months after which compelling evidence is required:

**3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:**

[...]

**(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;**

56. Thus, the Directive specifies no limit on the period on which a person can retain worker status under Article 7(3)(b). Nor is there any requirement in the Directive for her to provide evidence that she is continuing to seek employment or has a genuine chance of being engaged. The period of residence is “open ended but not for ever more” and retained worker status will continue indefinitely “in the absence of some intervening event which indicates that the person has withdrawn from the labour market entirely” [*SSWP v MM (IS)* [2015] UKUT 0128 (AAC) paras 53-54].

57. Therefore it is arguable that Regulation 6(7) of the I(EEA) Regulations, to the extent that it requires a person who has retained worker status under Regulation 6(2)(b) to show “compelling evidence that he is continuing to seek employment and has a genuine chance of being engaged”, is unlawful.

58. Furthermore, it is of note that there is nothing in Article 7(3)(b) which suggests that the provision of evidence of a chance of being engaged is ever part of the EU law test of retaining status for those who have worked for in excess of a year. By contrast, a Member State is entitled as a matter of EU law to require a jobseeker to provide evidence of a genuine chance of being engaged [*Antonissen*]; Article 14(4)(b) of the Directive].
59. This fits with the objective of the Directive, which is to ensure the free movement of workers between Member States, because a person who has worked for more than a year has a stronger link with the labour market than someone who has recently entered the territory as a jobseeker. In contrast to a jobseeker they have demonstrated their employability through being employed for over a year and are not therefore required to provide evidence of a genuine chance of being engaged. Therefore it is arguable that Condition B is also unlawful for those who have worked in excess of a year. Whether this would ever need to be tested is doubtful as claimants of jobseeker's allowance are required to provide such evidence in any event as part of the domestic conditions of entitlement to that benefit.

**SECTION 11: Lawfulness of UK rules on retaining worker status whilst unemployed having worked for less than a year**

60. For those who have worked for less than a year then the relevant provisions of the Immigration (EEA) Regulations are set out at para 8 above.

61. Turning to the Directive, for those who have worked for less than a year Article 7(3)(c) provides:

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months

62. Note that this says “no less than six months” rather than “for a maximum of six months” (as the UK Regulations say). This could be argued to imply that what the Directive provides for is that after the period of six months then the *Antonissen* requirement of evidence of a genuine prospect of work (see below) applies to allow retention of worker status (and indeed that is what the UK Regulations used to provide). If that is right then the comments in Section 6 and below apply equally to those who have worked for less than a year and reached the six month point.

63. Against the above suggested argument, it is worth noting that in Case C-67/14 *Jobcentre Berlin Neukölln v Alimanovic* on the facts the benefit claimants had worked for less than a year and then been unemployed for six months. Under the German provisions transposing Directive 2004/38 then after the expiry of that time they had a right of residence as jobseekers. The Advocate General commented that:

101. Under the second sentence of Paragraph 2(3) of the FreizügG/EU, Union citizens who have worked for less than one year retain their right of residence in German territory for six months in the event of involuntary unemployment confirmed by the relevant employment office.

102. No longer having the status of ‘worker’, Ms Alimanovic and her daughter Sonita were again regarded as jobseekers. Accordingly, they automatically fell once more within the ambit of point 2 of the second sentence of Paragraph 7(1) of SGB II, which excludes the long-term unemployed from entitlement to subsistence allowances. Consequently, her two other children, Valentina and Valentino, also lost their secondary entitlement to social assistance to cover their subsistence costs under SGB II.

103. If loss of the status of worker seems to be an appropriate, albeit restrictive, transposition of Article 7(3)(c) of Directive 2004/38,

64. Thus it seems that the retention of worker status for a maximum of six months in this case was in fact accepted by the Advocate General (and not further commented on in the judgment of the Court).

65. Nonetheless, even if it is not correct to say that the Directive requires at least six months retention of worker status for this group (and therefore provides in appropriate cases for more than six months), it is worth noting that there is nothing in the way the German legislation operates to mean that someone who had retained worker status for six months would then not have a right of residence as a jobseeker. That is different to the UK position where the Immigration (EEA) Regulations go on to attempt to prevent a right of residence as a jobseeker existing after the six month period under Reg 6(2)(ba) and (2A) unless certain conditions are met. That is because “Condition C” is made to apply when that person is then attempting to rely on a jobseeker right of residence.
66. It is arguable that Condition C is unlawful- it is evidently not part of the German scheme. Furthermore, there does not seem to be any reason why if a person can reside in the UK as a jobseeker under the *Antonissen* principle (see above) for so long as they meet the conditions as to having a genuine prospect of work, they would be required to leave for a period and then to provide compelling evidence in this event- this would treat a person who had actually worked worse than a person who had only ever had a right of residence as a jobseeker.

**SECTION 12: Duty of UK Tribunals to disapply the GPOW test provided for in UK law**

67. UK Tribunals deciding JSA appeals have a legal duty to dis-apply any provision of UK law which is not consistent with EU law rights: Case 106/77 *Amministrazione delle finanze dello Stato v Simmenthal* [1978] ECR 00629 where the European Court of Justice held:

A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means.

68. Therefore, in cases where this is at issue, Tribunals should be invited to apply the EU law test of who is a jobseeker as set out in *Antonissen*. To the extent that the Immigration (EEA) Regs conflict with the *Antonissen* test (see above) they should not be applied.

