IN THE UPPER TRIBUNAL **Case No.** CTC/1180/2009
ADMINISTRATIVE APPEALS CHAMBER

1. This is an appeal by the Claimant, brought with my permission, against a decision of a First-tier Tribunal sitting at Southampton on 12 January 2009. For the reasons set out below that decision was in my judgment wrong in law and I set it aside. In exercise of the power in s.12 of the Tribunals, Courts and Enforcement Act, 2007, I re-make the First-tier Tribunal's decision, as follows:

> **The Claimant's appeal against the decision of HMRC made on 15 November 2007 is allowed. The Claimant was entitled, in respect of his claim made on 31 October 2007, to have the 50 Plus element included in calculating the maximum rate of working tax credit.**

Introduction

2. One step in calculating the amount of a claimant's entitlement to working tax credit (WTC) is to work out the amount of the claimant's "maximum rate of working tax credit". The maximum rate consists of a basic element and such additional elements as are applicable in the claimant's case. One of the additional elements is the "50 Plus element", which is provided for in reg. 18 of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 ("the 2002 Regulations"). Entitlement to the 50 Plus element arises where the claimant is aged at least 50 and immediately before starting work had been in receipt of a qualifying benefit (such as jobseeker's allowance (JSA) or income support) for at least 6 months. (At current rates the 50 Plus element adds £1390 per annum to the maximum rate in the case of a person working 16-29 hours per week, and £1965 per annum in the case of a person working 30 or more hours per week). The 50 Plus element is payable only for 12 months. The Government has announced the intention to abolish the 50 Plus element from April 2012, the projected saving being about £40 million per annum.

3. The Claimant is aged more than 50 and came here from Poland, having obtained work, and having been in receipt of unemployment benefit in Poland for more than 6 months. He was awarded working tax credit, but without the 50 Plus element. The main issues which I have to decide are whether the fact that it is a condition of entitlement to the 50 Plus element that the claimant must have been in receipt of a qualifying UK benefit constitutes unjustified discrimination against migrant workers, contrary to Article 7 of Regulation 1612/68 (EEC), and if so what remedy the Upper Tribunal can give.

The facts

4. The facts, as found by the First-tier Tribunal, supplemented with information provided in this appeal, are as follows.

5. The Claimant was born in Poland on 9 December 1948, and is therefore now aged 62. He worked in Poland for 35 to 37 years and before 2007 had not worked outside that country except for 2 years in the USA. He registered as unemployed in Poland on 30 June 2006, and received benefit there at a rate of 120% of basic benefit from 8 July 2006 to 25 February 2007, a period in excess of 7 months.

6. He felt that there was little prospect of work in Poland and was sending his CV to other countries, including Holland and England. He found work at English Provender Co Ltd with ADS Recruitment Agency, came to the UK and started working there for the agency on 26 February 2007. From 2 April 2007 he was employed directly by English Provender Ltd.

7. He was issued with a certificate under the Accession State Worker Registration Scheme on 20 March 2007.

8. He made a claim for WTC on 30 May 2007.

9. On 11 June 2007 an initial award of WTC was made under s.14 of the 2002 Act in the sum of £2077.92 for the period 30 May 2007 to 5 April 2008. That award did not include the 50 Plus element. He did not appeal the decision on that claim.

10. The Claimant ceased his employment in early July 2007, but recommenced on 25 July 2007, and made a fresh claim for WTC on 31 October 2007. On 15 November 2007 a fresh decision was made awarding WTC in the sum of £1766.66 in respect of the period 30 July 2007 to 5 April 2008. That also did not include the 50 Plus element.

The appeal to the First-tier Tribunal

11. On 15 December 2007 the Claimant appealed against the decision of 28 November 2007.

12. The basis of the Claimant's appeal was that, as he had been in receipt of the Polish equivalent of JSA for more than six months immediately before first starting work in the UK, he should have been awarded the 50 Plus element of WTC.

13. The First-Tier Tribunal did not accept that contention, and so dismissed the appeal. It did so on two main grounds. First, it held that, because there had been a gap (between early July 2007 and 25 July 2007) in the Claimant's employment in the UK, the date down to which he was required to have been in receipt of a qualifying benefit was the date when he recommenced employment, and not when he first started it. Even if the Polish benefit had counted as a qualifying benefit, he would not have been entitled to the 50 Plus element.

14. Secondly, the Tribunal held that the natural meaning of "jobseeker's allowance", in the list of benefits which count as qualifying benefits, was jobseeker's allowance awarded in accordance with UK law, and did not include equivalent benefits awarded abroad. The Tribunal rejected the Claimant's contention that Regulation 1408/71 (EEC) required "jobseeker's allowance" to be given a different meaning, holding that WTC did not fall within the ambit of Regulation 1408/71.

The appeal to the Upper Tribunal

15. HMRC's first submission in this appeal by the Claimant to the Upper Tribunal, written by Mr Best of HMRC, extended to 144 paragraphs. I wish to express my gratitude to Mr Best for the great care and attention to detail which his submissions display.

16. As to the First-tier Tribunal's first ground, HMRC accepted, in my judgment rightly, that the Tribunal should have held that, because the gap in the Claimant's employment was of not more than 4 weeks, the effect of reg. 7D of the 2002 Regulations was that the date down to which he was required to have been in receipt of a qualifying benefit was the date when he first commenced employment in the UK. I agree with the reasoning set out in paragraphs 66 to 98 of Mr Best's first submission (dated 15 October 2009).

17. As to the Tribunal's second ground, the Tribunal was in my judgment clearly right to hold that WTC does not fall within the matters covered by Article 4(1) of Regulation 1408/71 (replaced as from 1 May 2010 by Regulation 883/2004). Nor is it a "special non-contributory cash benefit" listed in Annex IIa. Nor did any of the other provisions of Regulation 1408/71 assist the Claimant.

18. However, having considered HMRC's first written submission, and a short supplemental one dated 29 October 2009, and the Claimant's submission in reply, I issued a Direction on 25 January 2010, paras. 3 to 6 of which were as follows:

> "3. However, my provisional view is that the requirement in reg 18(4) of the 2002 Regulations that a claimant must have been in receipt of one of the benefits specified in reg. 18(5) for at least 6 months may well be indirectly discriminatory against foreign nationals, and so contrary to Art. 7 of Reg. 1612/68 EEC, relating to equal treatment of workers. Working tax credit would appear to be a "social advantage" within Art 7.2 of that Regulation.
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> 4. If HMRC accepts that, does it wish to contend that the discrimination is proportionate and justified, and if so on what basis?
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> 5. If the discrimination cannot be justified, is the effect that (i) reg. 18(5) must be interpreted as including similar benefits payable under foreign legislation or (ii) the requirement in reg. 18(4) is simply struck out? If the latter, presumably the striking out must have effect in relation to all workers, and not merely foreign nationals.
>
> 6. Does it make any difference that the Claimant is from one of the A8 countries? (HMRC appears to accept that it does not)."

19. I directed that HMRC should make a further written submission on those matters. A further written submission from Mr Best, extending to 81 paragraphs, duly followed, for which I am again grateful. It was confirmed in that submission that in HMRC's view the fact that the Claimant had come here from one of the A8 countries had no bearing on the issues relating to Article 7 of Reg. 1612/68. I agree with that also. The submission accepted that working tax credit is a "social advantage" within Article 7.2 of Regulation 1612/68, but contended that regulation 18 of the 2002 Regulations was not indirectly discriminatory, and in the alternative that any discrimination was justified.

20. I then directed an oral hearing of the appeal, and indicated that, subject to any further Direction which I might be asked to make, the hearing should be limited to the issues outlined in paras. 3 to 5 of my Direction of 25 January 2010.

21. At the hearing Mr Christopher Brown of counsel, via the Free Representation Unit, appeared on behalf of the Claimant, and Mr Clive Sheldon, of counsel,

appeared on behalf of HMRC. I am likewise grateful to counsel for their assistance. Neither party sought to argue any additional issues at the hearing.

The 50 Plus element

22. Regulation 18 of the 2002 Regulations is as follows:

"50 Plus element

18.- (1) The determination of the maximum rate must include the 50 plus element if -

(a) in the case of a single claim, the claimant satisfies paragraph (3); or

(b) in the case of a joint claim, at least one of the claimants satisfies that paragraph.

This is subject to the qualification in paragraph (2).

(2) The 50 plus element shall not be payable in respect of a claimant –

(a) for a continuous period of longer than 12 months; or

(b) for periods amounting in aggregate to more than 12 months if the gap between any consecutive pair of those periods is not more than 26 weeks.

(3) A claimant satisfies this paragraph if –

(a) he is aged at least 50; and

(b) he starts qualifying remunerative work; and

(c) he undertakes qualifying remunerative work for at least 16 hours per week; and

(d) he satisfies the condition in paragraphs (4), (6), (7), (8) or (9)

(4) The condition is that –

(a) for a period of at least six months immediately before his starting qualifying remunerative work as mentioned in paragraph (3)(b); or

(b) for consecutive periods, amounting in the aggregate to at least six months, the last of which ends immediately before his starting qualifying remunerative work as mentioned in paragraph (3)(b), paragraph (5) is satisfied.

(4A) For the purposes of paragraph (4)(b) "consecutive periods" are periods, any pair of which is separated by a gap of not more than 12 weeks.

(5) This paragraph is satisfied while the claimant is receiving –

(a) income support;

(b) a jobseeker's allowance;

(c) incapacity benefit;

(d) severe disablement allowance;

(e) both a state retirement pension and state pension credit within the meaning of the State Pension Credit Act 2002;

(f) a training allowance paid by the Secretary of State under section 2(1) of the Employment and Training Act 1973 to a person in his capacity as a participant in either of the schemes provided by, or under arrangements made with, the Secretary of State and known as "Work-Based Learning for Adults£ and "Training for Work"; or

(g) an employment and support allowance.

(6) The condition is that for at least six months immediately prior to his starting qualifying remunerative work –

(a) another person was receiving –

(i) the payment mentioned in sub-paragraphs (a) to (d) of paragraph (5); or

(ii) both the payments mentioned in paragraph (5)(e); and

(b) an increase in respect of the claimant, as a dependant of the other person –

(i) in a case falling within sub-paragraph (a)(i) was payable with that payment; or

(ii) in a case falling within sub-paragraph (a)(ii) was payable with that pension

(7) The condition is that for at least six months immediately prior to his starting qualifying remunerative work as mentioned in paragraph (3)(b) he satisfied the conditions entitling him to be credited with contributions or earnings in accordance with the Social Security (Credits) Regulations 1975.

(8) The condition is that –

(a) the condition in paragraph (4)(a), (6) or (7) would have been satisfied if the reference to six months were omitted;

(b) immediately prior to the period during which that condition, as modified by sub-paragraph (a), is satisfied there is a period during which the condition in paragraph (9) is satisfied; and

(c) the total of the periods during which –

(i) the condition in paragraph (4)(a), (6) or (7), as modified by sub-paragraph (a), is satisfied; and

(ii) the condition in paragraph (9) is satisfied, equals or exceeds six months

(9) The condition is that the claimant, or in the case of a joint claim, one of the claimants, is receiving –

(a) carer's allowance;

(b) bereavement allowance; or

(c) widowed parent's allowance."

23. By way of explanation of the purpose of and background to the 50 Plus element, I would refer to the following passages from the Report (HC 1026 Session 2003-4) by the National Audit Office: "Welfare to Work: Tackling the Barriers to the Employment of Older People".

<u>From the Executive Summary:</u>

"7. It is estimated that the relatively lower level of employment among older workers costs the economy £19-31 billion a year in lost output, taxes and increased welfare payments.

<u>From Part 2:</u>

"2.14. The New Deal 50 Plus was launched in April 2000 as the main initiative to help to return to work those aged over 50 receiving a qualifying benefit for six months. It is a voluntary programme of advice and guidance. Until 2003, there was also an Employment Credit of £60 a week for those working full-time which went to the individual. Since 2003, the Working Tax Credit includes a return-to-work element for those on benefits for at least 6 months. There is also a training grant

element to the scheme. The United Kingdom is one of the few counties with an employment programme specifically targeted at older people. The cost of the programme up to the end of December 2003 was £270 million.

2.16 By March 2003, more than 98,000 people had begun claiming the Employment Credit. The Department estimates that, by then, the programme could have achieved as many as 120,000 job starts, as not all those who started work claimed Employment Credit. 71 percent who took up the Employment Credit had been claiming Jobseeker's Allowance."

Is Polish unemployment benefit "a jobseeker's allowance" within regulation 18(5)(b)?

24. By section 1(1) of the Jobseekers Act 1995 "an allowance, to be known as a jobseeker's allowance, shall be payable in accordance with the provisions of this Act." Although the expression "jobseeker's allowance" is not defined in either the Tax Credits Act 2002 or the 2002 Regulations, in my judgment it clearly refers, and refers only to, a jobseeker's allowance granted under the Jobseekers Act 1995. The same must apply to the other social security benefits specified in reg.18(5) and (9). For example, how can "an employment and support allowance" properly refer to anything other than an award of employment and support allowance under the Welfare Reform Act 2007 and the Employment and Support Allowance Regulations 2008? I do not think that the fact that, in reg. 18(5)(e), the reference to "state pension credit" is followed by the words "under the State Pension Credit Act 2002", detracts from that conclusion.

25. Mr Best helpfully points out that the term "jobseeker's allowance" *is* defined in relation to its use in some other parts of the tax credits statutory scheme. For example, section 7(1) of the 2002 Act imposes the income test which makes tax credits a means tested provision. Section 7(2) then disapplies that income test in cases of persons entitled to such social security benefits as may be prescribed. Those benefits are prescribed by reg. 4 of the Tax Credits (Income Thresholds and Determination of Rates) Regulations 2002, and include "(c) an income-based jobseeker's allowance within the meaning of the Jobseekers Act 1995 or the Jobseekers (Northern Ireland) Order 1995."

26. Mr Best submits that where a term such as "jobseeker's allowance" is defined in one part of the statutory scheme, it is to be inferred that it has the same meaning in another part of the statutory scheme, albeit that it may not again be defined at that point. That may in some cases be a correct inference – all depends on the structure of the legislation, and where in the scheme the definition appears. In this case I do not derive any assistance from the fact the fact that in the particular provision which I referred to in the previous paragraph the meaning of "an income-based jobseeker's allowance" is spelt out by reference to the legislation providing for that benefit. If anything, the fact that that is spelt out there, but not in reg. 18(5)(b), might lead to an argument that in reg. 18(5)(b) the term is not intended to be limited to a jobseeker's allowance awarded under the 1995 Act. However, such an argument would in my judgment clearly be ill-founded.

27. Leaving aside for the moment any interpretative duty which may arise under EU law, therefore, "a jobseeker's allowance" in reg. 18(5)(b) in my judgment means JSA awarded under the 1995 Act.

The impact of EU law
The EU legislation

28. By Article 18 of the Treaty on the Functioning of the European Union:

> "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

29. By Article 45:

> "1. Free movement for workers shall be secured within the Union.
>
> 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
>
> 3. It shall also entail the right, subject to limitations justified on grounds of public policy, public security or public health:
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> (a) to accept offers of employment actually made;
> (b) to move freely within the territory of Member States for this purpose;
> (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
> (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
>
> 4. The provisions of this Article shall not apply to employment in the public service."

30. One of the key pieces of legislation securing the Treaty provision in respect of free movement of workers is Regulation no. 1612/68 (EEC). Article 7 provides as follows:

> "1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or reemployment.
>
> 2. He shall enjoy the same social and tax advantages as national workers.
>
> 3. ……."

The significance of Article 7.2 of Regulation 1612/68

31. HMRC accept that WTC is a "social advantage" within Art. 7.2 of Reg. 1612/68. In the formula which has been adopted by the ECJ in many cases (for example, Case 207/78 *Even* [1979] ECR 2019 at para. 22):

> "It follows from all its provisions and from the objective pursued that the advantages which [Regulation 1612/68] extends to workers which are nationals of other member States are all those which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community."

32. It is not contended on behalf of the Claimant that the condition of entitlement to WTC 50 Plus in reg.18(4) of the 2002 Regulations discriminates directly against foreign nationals. The requirement that the claimant must have been in receipt of one of the specified benefits applies to UK nationals and foreign nationals alike. It is contended, however, that it constitutes indirect discrimination. That is not accepted by HMRC.

Indirect discrimination

33. In Case C-237/94 *O'Flynn v. Adjudication Officer* [1996] ECR I-2617 the ECJ was asked whether it was compatible with the principle of non-discrimination on nationality grounds in Art 7 of Reg. 1612/68 for domestic law to make entitlement to a funeral payment, a means-tested social security benefit, conditional on the burial or cremation taking place in the UK. The claimant in that case was an Irish national resident in the UK as a former migrant worker whose son had died in the UK but had been buried in Ireland. He was refused the funeral payment on the ground that the burial had not taken place in the UK.

34. The claimant submitted that the condition at issue was by its very nature discriminatory, alternatively that discrimination should be taken to be established if it was shown that migrant workers were normally less likely to fulfil the condition (see para. 9 of the ECJ's judgment). The UK Government, on the other hand, argued that the condition would only be discriminatory if it were shown that it was substantially more difficult for migrant workers than for national workers to fulfil it and that it was necessary for the claimant to show that the condition was satisfied only by a substantially lower proportion of workers from all the other Member States than of national workers (para. 10).

35. The Court rejected the UK Government's arguments, stating as follows (I omit the Court's copious references to the case-law supporting its propositions):

> "17. The Court has consistently held that the equal treatment rule laid down in [Article 45] of the Treaty and in Article 7 of the Regulation No 1612/68 prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result …….

> 18. Accordingly, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers …… or the great majority of those affected are migrant workers ……, where they are indistinctly applicable but can be more easily satisfied by national workers than by migrant workers or where there is a risk that they may operate to the particular detriment of migrant workers ….
>
> 19. It is otherwise only if those provisions are justified by objective considerations independent of the nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by national law …..
>
> 20. It follows from all the foregoing case-law that, unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage
>
> 21. It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect. Further, the reasons why a migrant worker chooses to make use of his freedom of movement within the Community are not to be taken into account in assessing whether a national provision is discriminatory. The possibility of exercising so fundamental freedom as the freedom of movement of persons cannot be limited by such considerations, which are purely subjective.
>
> 22. A migrant worker will, in his capacity as a responsible member, incur costs of the same type as, and of comparable amount to, those incurred by a national worker. On the other hand, it is above all the migrant worker who may, on the death of a member of the family, have to arrange for burial in another Member State, in view of the links which the members of such a family generally maintain with their State of origin."

36. Of the circumstances, referred to in para. 18 of *O'Flynn,* in which conditions imposed by national law may be indirectly discriminatory, the most relevant to the present case is "where they are indistinctly applicable but can be more easily satisfied by national workers than by migrant workers".

37. It is clear from ECJ case law that it will not be necessary to adduce statistical evidence to show that that is the case, if as a matter of common sense that is obviously likely to be so. That emerges clearly from the decision of the Court of Appeal in *SSWP v. Bobezes* [2005] EWCA Civ 111; [2005] 3 All ER 497. At para. 24 Lord Slynn of Hadley (who had of course formerly been an Advocate General to the ECJ) said:

> "In these cases [including *O'Flynn*] neither the Advocate General nor the Court has insisted on statistical evidence. It was enough in cases of discrimination based on nationality that the effect of the provision is "essentially" "intrinsically"

> "susceptible by its very nature" "by its own nature" liable to be discriminatory. These cases are dealing with different statutory provisions and I do not suggest that any of them applies directly to the provisions in this legislation. *O'Flynn* is a more obvious example of indirect discrimination than eg. *Biehl's* case or *Collins's* case but the drift is the same, and it seems to me that the commissioners and the court are entitled to take a broad approach and to find that indirect discrimination is liable to affect a significant number of migrant workers on the ground of nationality without statistical proof being available. This is of course quite different from the position where discrimination on the ground of sex is alleged and where the discrimination in many cases will not be obvious and so that it is necessary to establish than more women and men are liable to be affected."

38. Buxton LJ's judgment, at para. 41, was to the same effect.

39. On the face of it, it seems clear that the condition in reg. 18(4) is intrinsically much less likely to be satisfied by migrant workers than by workers who are UK nationals. As regards JSA, a "migrant worker", or foreign national, is much less likely to have been in receipt of JSA for the six months immediately before starting employment.

40. In his second written submission on behalf of HMRC Mr Best sought to argue, as did Mr Sheldon at the hearing, that reg. 18(4) is not intrinsically liable to operate in a discriminatory manner. I agree both with Mr Brown's summary of Mr Best's very detailed contentions, and his rebuttal of them, which I gratefully adopt from his skeleton argument:

> "At paras. 46-50 of its submission HMRC attempts to argue that reg. 18(4) is not indirectly discriminatory, on the grounds that there are circumstances in which (a) UK nationals would not be entitled to the 50 Plus element of WTC and (b) migrant workers from other EU member States would be entitled to that element. That is undoubtedly true, but it misses the point: the question is whether the condition for eligibility is <u>more easily satisfied</u> by UK nationals. The answer to that question, applying the commonsense approach set out by Buxton LJ in *Bobezes*, is undoubtedly "yes".
>
> At paras. 52-58 of its submission HMRC argues that relatively few UK nationals can benefit from the 50 Plus element of WTC and that the majority of migrant workers will be unaffected, given that (according to HMRC) the vast majority of migrant workers are under the age of 50. Once again, this is irrelevant. The focus must be on the provision at issue, the question being whether it can more easily be satisfied by UK nationals than by UK workers. The *O'Flynn* case is instructive as an illustration in this regard: plainly the great majority of migrant workers would not have been affected by the discriminatory rules on eligibility for the funeral payment – most migrant workers will either not suffer a bereavement during their time in the UK or will not satisfy the means-tested element of eligibility – but that did not stop the rules being contrary to Article 7(2) of Regulation 1612/68.

> At para. 61 of its submission HMRC contends that reg. 18(4) "poses no risk of a particular detriment to migrant workers". It submits that the fact that a migrant worker is in the UK working and claiming entitlement to WTC 50 Plus "must show that regulation 18 has erected no practical or insurmountable barrier to his exercise of his free movement rights." This argument, for which no authority is cited, is likewise misconceived. It need not be shown that the provision in question has erected a practical or insurmountable barrier to the exercise of free movement rights: it must simply be shown that the rule is discriminatory."

41. Mr Sheldon argued that it is not obvious that there are (or would but for the allegedly discriminatory condition) be more foreign nationals over 50 looking for work in the UK than UK nationals over 50 doing so. I should have thought it was obvious that that there would be more UK nationals over 50 doing so. But that is not the point. The question is whether the UK nationals are more likely to be able to satisfy the condition of having been in receipt of JSA for 6 months immediately prior to starting work than the UK nationals. The answer is plainly "yes", because a foreign national is much less likely to have been resident here and in a position to claim JSA.

Justification

42. In para. 19 of *O'Flynn* the ECJ repeated the almost formulaic statement of the principle that discrimination can be justified:

> "It is otherwise only if those provisions are justified by objective considerations independent of the nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by national law …..

43. Further:

> "a measure is proportionate when, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary to attain it." (*De Cuyper* Case C-406/04 [2006] ECR I-6947).

44. It is submitted on behalf of HMRC that the aim of WTC 50 Plus is to encourage people over 50 to take up employment, and thereby (among other things) (i) increase the output of the UK economy (ii) increase the revenue from taxes and (iii) reduce the UK's social security bill. It is submitted (a) that that constitutes a legitimate aim and (b) that because people over 50 who are unemployed and in receipt of benefit abroad are no part of the problem which the Government was trying to solve by providing for the 50 Plus element, it is necessarily proportionate to limit the 50 Plus element to people who have been in receipt of one of the specified benefits for at least 6 months. Extending the 50 Plus element to persons in receipt of equivalent benefits abroad would in no way further the Government's legitimate aim.

45. As Mr Best put it in his second submission:

> "77. The appellant here was unemployed in Poland. Whatever the then situation in Poland, he was not part of the UK problem of low employment in the over 50 age cohort; was not part of the resultant cost to the UK economy

(indeed his unemployment in Poland was of no cost to the UK economy); and was not unemployed in Poland due to any age discrimination in the UK employment market.

78. Thus the appellant was not part of the UK problem being addressed by the scheme. HMRC submit that, in those circumstances, it would be surprising were he to benefit from the scheme. That he does not, and that the reason he does not is because he has not received for the requisite period a UK out of work benefit, in HMRC's submission simply reflects the fact that the scheme legitimately and proportionately addresses a particular UK issue. The UK benefit requirement at regulations 18(4) and (5) of the [2002] Regulations operates not to discriminate against foreign nationals but to target assistance on those persons, regardless of their nationality, who are aged over 50 and have been unemployed in the UK and so part of the UK socio-economic problem."

46. Mr Brown accepts that the aims of encouraging the economically inactive over 50s back to work and thereby (among other things) reducing expenditure on benefits is, in principle, a legitimate aim pursued by the UK government. I proceed on that footing. It seems to me that that aim falls within the description "objective considerations independent of the nationality of the workers concerned", even though the aim is concerned primarily with benefiting the *UK* economy.

47. However, Mr Brown submits that imposition of the requirement that the claimant must have been in receipt of one of the specified UK benefits for at least 6 months is not proportionate to that aim, essentially because it would in no way jeopardise or undermine that aim if WTC 50 Plus were extended to, for example, people such as the Claimant who have been in receipt of, for example, unemployment benefit in a Member State. The aim of encouraging the economically active over 50s back into employment, and thereby (inter alia) reducing the burden on the UK economy of benefit payments, would still be achieved just as effectively. He points out that HMRC has not attempted to explain why WTC 50+ could not reasonably have been extended to persons in receipt of equivalent benefits in other Member States.

48. Mr Sheldon's response to that, however, is that it is not necessary for HMRC to show that extending the 50 Plus element to persons who were in receipt of equivalent benefit abroad would jeopardise or undermine the legitimate aim. The restriction to people who have been in receipt of UK benefits is necessarily proportionate because it achieves the purpose of targeting the 50 Plus element only at those persons who are within the aim of getting people who are over 50 and in receipt of UK benefits, and thus a burden on the UK economy. It would not further that aim at all to extend the 50 Plus element to people who have been unemployed and in receipt of benefit abroad. Mr Sheldon submits that it is not necessary to get involved in questions such as how much it would cost if WTC 50 Plus were extended to persons in receipt of equivalent foreign benefits, or what the impact on employment in the UK would be if it were.

49. In my judgment Mr Sheldon's submissions overlook that what has to be justified is the discriminatory effect of the condition. The discriminatory effect of a

condition will not be proportionate unless the condition was not only appropriate but also necessary. If the legitimate aim can be achieved by some other means, or by modifying the condition, so that the discriminatory effect can be removed or reduced without undermining the legitimate aim, that must be taken into account in determining the question of proportionality. In my judgment, therefore, Mr Brown is right in submitting that it was for HMRC to show some good reason why WTC 50 Plus could not have been extended so that it applied to a person, such as the Claimant, who had been in receipt of an equivalent qualifying benefit in another Member State for the necessary period. I think that these principles emerge from the ECJ case law to which Mr Brown referred me.

50. In *Collins* (Case C-138/02; [2004] 3 WLR 1236), the question was whether it was permissible to impose, as a condition of entitlement to JSA, the requirement that the claimant be "habitually resident" in the UK, notwithstanding that, since it was capable of being met more easily by UK nationals, it "place[d] at a disadvantage Member State nationals who have exercised their right of movement in order to seek employment in the territory of another Member State" (para. 65). The justification put forward was that the habitual residence requirement served to establish that there was a genuine link between the claimant and the UK employment market. The ECJ ruled as follows:

> "69. It may be regarded as legitimate for a Member State to grant such an allowance only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that State.
>
> ……
>
> 71. The United Kingdom is thus able to require a connection between persons who claim entitlement to such an allowance and its employment market.
>
> 72. However, while a residence requirement is, in principle, appropriate for the purpose of ensuring such a connection, if it is to be proportionate it cannot go beyond what is necessary to achieve that objective. ..... if compliance with the requirement demands a period of residence, the period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State."

51. In *De Cuyper* (Case C0406/04 [2006] ECR I-6947) the benefit at issue was a Belgian unemployment allowance. The claimant had obtained exemption from the need to sign on, look for work etc. It was a condition of entitlement to the allowance that the claimant should have his habitual residence in Belgium and be actually resident in Belgium. The claimant was awarded the allowance in 1997, while resident in Belgium, where he had been employed, but had moved to France in 1999. His award of benefit was terminated.

52. The ECJ ruled as follows:

> "39. It is established that national legislation such as that in this case which places at a disadvantage certain of its nationals simply because they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred by Article 18 EC on every Citizen of the Union.
>
> 40. Such a restriction can be justified, with regard to Community law, only if it is based on objective considerations of public interest independent of the nationality of the persons concerned and proportionate to the legitimate objective of the national provisions.
>
> 43. The justification given by the Belgian authorities for the existence, in the present case, of a residence clause is the need for ONEM inspectors to monitor compliance with the legal requirements laid down for retention of entitlement to the unemployment allowance. Thus it must *inter alia* allow those inspectors to check when the situation of a person who has declared that he is living alone and unemployed has undergone changes which may have an effect on the benefit granted.
>
> 44. So far as concerns, in the main proceedings, the possibility of less restrictive monitoring measures, such as those mentioned by Mr Cuyper, it has not been established that they would have been capable of ensuring the attainment of the objective pursued.
>
> 46. It follows that less restrictive measures, such as the production of documents and certificates, would mean that the monitoring would no longer be unexpected and would consequently be less effective."

53. In *Meints* (Case C-57/96 [1997] ECR I-6689) a Dutch Compensation Fund provided for the grant of a benefit, consisting of a single payment, to agricultural workers whose contract of employment had been terminated as a result of the setting aside of land belonging to their former employer. It was a condition of entitlement that the worker was entitled to benefit under the Dutch unemployment law, which in turn required the claimant to be resident in Holland.

54. The claimant was a German national who worked on a farm in Holland while continuing to reside in Germany. Following set-aside measures taken by his former employer, he lost his job and subsequently received unemployment benefit in Germany. He was refused a grant under the Dutch Compensation Fund.

55. The ECJ held that a grant under the Compensation Fund was a "social advantage" within Article 7(2) of Regulations 1612/68, and that the residence condition was indirectly discriminatory. As regards the issue whether that discrimination was justified, the Court said:

> "47. The Netherlands Government stresses that the Compensation Rules do not explicitly lay down the residence condition but refer to the [unemployment benefit provisions], which contains that condition. The purpose of the condition that the recipient be entitled to unemployment benefit under that Law is not to limit entitlement to the benefit in issue only to those resident in the

> Netherlands but to incorporate into the Compensation Rules another condition, contained in the [unemployment benefit provisions], to the effect that no applicant laid off as a result of his own action may receive the benefit concerned.
>
> 48. That justification cannot be accepted. It is neither necessary nor proportionate, in order to achieve the aim of excluding persons laid off as a result of their own action from entitlement to benefit, to include a residence condition in the Compensation Rules. The applicant's place of residence is irrelevant to determining whether he was laid off as a result of his own action."

56. In other words, it was held that there was a method of achieving what was said to be the legitimate aim which would not have involved discriminating against nationals of other Member States, and therefore that the method actually chosen was not proportionate.

57. Although it did not concern discrimination in relation to the free movement of workers, I think that the case of *Bickel and Franz* (Case C-274/96 [198] ECR I-2617) is also instructive in relation to the Court's attitude to proportionality.

58. Under Italian law German-speaking citizens resident in the province of Bolzano (the area where most of the German-speaking minority live), but not other German-speaking persons, whether Italian or otherwise, were entitled to have criminal proceedings conducted in German. The complainants in the domestic proceedings were an Austrian national and a German national, each resident in their own country, and were denied that right, having been accused of offences said to have been committed in the province of Bolzano.

59. The ECJ held, first, that under the general non-discrimination on grounds of nationality provision in what is now Article 18 of the TFEU the accused were in principle entitled, in exercise of the right to move and reside freely in another Member State, to treatment no less favourable than that accorded to nationals of the host state so far as concerned the use of languages which are spoken there (paras. 17 to 19).

60. As regards justification, the Court ruled as follows:

> "26. ….rules such as those in issue in the main proceedings, which make the right, in a defined area, to have criminal proceedings conducted in the language of the person concerned conditional on that person being resident in that area, favour nationals of the host State by comparison with nationals of other Member States exercising their right to freedom of movement and therefore run counter to the principle of non-discrimination laid down in Article 6 of the Treaty.
>
> 27. A residence requirement of that kind can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions (see …..).

> 28. However, it is clear from the order for reference that this is not the position in the case of the rules in issue.
>
> 29. The Italian Government's contention that the aim of those rules is to protect the ethno-cultural minority residing in the province in question does not constitute a valid justification in this context. Of course, the protection of such a minority may constitute a legitimate aim. *It does not appear, however, from the documents before the Court that that aim would be undermined if the rules in issue were extended to cover German-speaking nationals of other Member States exercising their right to freedom of movement.* (My emphasis)
>
> 30. Furthermore, it should be recalled that Mr Bickel and Mr Franz pointed out at the hearing, without being contradicted, that the courts concerned are in a position to conduct proceedings in German without additional complications or costs."

61. In my judgment that case is instructive in that it is a clear example where the Court refused to accept that the mere fact that the infringing provision was tailored to remedy a particular local problem meant that the discrimination was proportionate to that aim. It was necessary to go further and to consider whether extending the same benefit to foreign nationals would undermine the aim. (Although this case was not referred to in argument, I have not thought it necessary to invite further submissions on it, as it seems to me merely to provide some additional support for the conclusion which I would have reached without its aid).

62. HMRC has not attempted to explain why the 50 Plus element could not reasonably have been extended to persons in receipt of equivalent benefits in other Member States. As I have said, it has sought to justify the condition in reg. 18(4) simply on the basis that it is precisely tailored to the legitimate aim. It is therefore not really appropriate for me to speculate whether there might be good reasons for not extending the entitlement conditions. I have, however, found it impossible to resist the temptation.

63. Plainly, on the footing that at least some additional migrant workers would then be entitled to be awarded the 50 Plus element, there would be an additional cost in doing so. But I doubt whether it would be permissible for HMRC to rely on that on the question of proportionality, given that extending the same social and tax advantages to migrant workers, as Article 7.2 requires, will necessarily cost money. Mr Brown drew my attention to the ECJ's case law to the effect that it is only where there is a risk of seriously undermining the financial balance of a social security system that a Member State may be able to justify, by reference to "aims of a purely economic nature", a barrier to the principle of free movement of goods: see e.g. Case C-120/95 *Decker* [1998] ECR I 1831 at para. 39. I am unclear whether the same applies in relation to the free movement of workers.

64. In any event, HMRC has not sought to estimate what the cost of extending the ambit of WTC 50 Plus in this way might be. Attached to Mr Best's second submission (paras. 54 and 55) was some evidence indicating that the vast majority of migrant workers are under 50. For example, of the A8 migrants registered for UK employment under the Worker Registration Scheme between May 2004 and

December 2007, 82% were in the age range 18-34. 80% of the migrant workers arriving in the UK between 1997 and 2007 were aged between 18 and 40. If the cost would be relatively small, that would arguably have weakened any detailed submission on proportionality which HMRC might have sought to put forward along these lines.

65. It is of course possible that extending the conditions of entitlement to migrant workers who were in receipt of equivalent benefits abroad might to an extent undermine one of the stated aims of WTC 50 Plus, in that it might cause people aged over 50 to come here to work who would not otherwise have done so, with the result that social security expenditure would not be reduced by as much as it would otherwise have been. However, I am doubtful whether it would have been permissible to rely on that by way of justification, as it would run directly contrary to the principle of free movement of workers.

66. Nor has HMRC sought to argue that it would be impractical to extend the 50 Plus element to persons in receipt of equivalent benefits abroad. It may well be that in the case of at least some of the benefits which can qualify a claimant for the 50 Plus element it would be impossible to define what the equivalent qualifying condition for a migrant worker should be. That would seem likely to be less of a problem in the case of JSA than in the case of some of the other benefits, and HMRC has not disputed that the Claimant has been in receipt of the Polish equivalent of JSA. It might well be necessary to draft the extended condition by referring to some or all of the primary conditions of entitlement to the UK benefit, rather than to actual entitlement to an equivalent benefit abroad. There would no doubt be significantly greater difficulty in determining whether those conditions were satisfied, than is the case under reg. 18 as currently framed, where HMRC merely needs to check whether the Claimant was in receipt of one of the qualifying benefits. As I have said, however, HMRC has not sought to rely on any of these difficulties.

67. If the conditions were extended, the practical effect might be to create a different set of qualifying condition applicable to migrant workers. Clearly, only migrant workers would in practice be able to satisfy a condition which depended on having been in receipt of an equivalent benefit abroad, and the conditions of entitlement to the foreign benefit would never be identical to those applicable to the relevant UK benefit. I am not sure that that would of itself constitute a justification for not seeking to remove the discrimination. In any event, HMRC has not relied on it. One answer might be to modify the conditions introduced by reg. 18(3)(d) so that the primary conditions of entitlement (or some of them) to the UK benefit, as opposed to receipt of the benefit, are referred to (e.g., in the case of JSA, being unemployed and available for work).

68. Mr Best relied in his second submission on the principle stated by the ECJ in *Nolte v Landesversicherungsanstalt Hannover* Case C317/93 [1995] ECR I-4625. In that case the complaint was about the fact that under the German social insurance scheme national insurance contributions were not payable in respect of certain part-time work, thereby excluding many more women than men from benefit under the scheme. The reasons for the exclusion of part-time work were explained in detail by the German Government, by reference to the need to foster the existence and supply of part-time employmen: “the only means of doing this within the structural framework

of the German social security scheme is to exclude minor employment from compulsory insurance" (para. 31). The Court held:

> "33. The Court observes that, in the current state of Community law, social policy is a matter for the Member States (see …..). Consequently, it is for the Member States to choose the measures capable of achieving the aim of their social and employment policy. In exercising that competence, the Member States have a broad margin of discretion.
>
> 34. It should be noted that the social and employment policy aim relied on by the German Government is objectively unrelated to any discrimination on grounds of sex and that, in exercising its competence, the national legislature was reasonably entitled to consider that the legislation in question was necessary in order to achieve that aim.
>
> 35. In those circumstances, the legislation in question cannot be described as indirect discrimination within the meaning of Article 4(1) of the Directive."

69. Mr Best also placed reliance on the similar case law of the European Court of Human Rights in relation to Article 14 of the Convention, and in particular the principles affirmed by the Grand Chamber in *Stec v United Kingdom* [2006] EHRR 47:

> "51. ……. A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment ……
>
> 52. The scope of this margin will vary according to the circumstances, the subject-matter and the background (see ….). As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. …. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. ……. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation".
>
> 53. Finally, since the applicants complain about the inequalities in a welfare state system, the Court underlines that Article 1 of Protocol 1 does not include a right to acquire property. It places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security system, or to choose the type or amount of benefits to provide under any such scheme. If, however, a State does decide to create a benefits or pension

> scheme, it must do so in a manner which is compatible with Article 14 of the Convention (see …….)."

70. Mr Best contended that the UK Government's policy decision to restrict the 50 Plus element to persons in receipt of qualifying benefits could not be said to be "manifestly without reasonable foundation".

71. It does not seem to me that the principles enunciated by the ECJ in *Nolte* and the ECHR in *Stec* can assist HMRC in the present case, where (i) what is in issue is discrimination on the grounds of nationality, contrary to the specific provision in Article 7(2) of Regulation 1612/68 that migrant workers shall receive the same social advantages as national workers, and (ii) HMRC has put forward no reasons why the 50 Plus element could not have been extended to persons who had been in receipt of equivalent qualifying benefits abroad.

72. I therefore conclude that HMRC has not established that the indirect discrimination on grounds of nationality, inherent in reg. 18(3)(d) of the 2002 Regulations, is justified. In so concluding I do not overlook that the 50 Plus element is in effect merely a supplement to the basic element of WTC, and that it lasts only for 12 months.

73. The one point which has caused me considerable hesitation, in arriving at that conclusion, is that it would on the face of it be odd to have, as an alternative condition of entitlement, receipt of a foreign benefit (or satisfaction of certain other conditions while abroad). However, it seems to me that this is in effect a justification argument, and one which, as I have said, HMRC has not sought to put forward. If it considers that there is a justification along those lines, it would presumably be open to HMRC to take that view when adjudicating on future claims. I do not think that decision of the Claimant's case should be delayed any further.

Remedy

74. The Claimant's right to equal treatment under Article 7(2) is directly enforceable against HMRC. Mr Brown contends that, against the background of Article 7(2), I can and should construe the words "a jobseeker's allowance" in reg. 18(5)(b) as including an equivalent benefit awarded in another Member State. However, I accept Mr Sheldon's submission that it is not possible to do so. Nor do I accept Mr Brown's submission that it is permissible for me to add words such as "or any equivalent benefit payable under the legislation of another Member State". In my judgment, for the reasons set out in paras. 24 to 27 above, it is perfectly clear that the words "a jobseeker's allowance" were not intended to encompass anything other than a jobseeker's allowance awarded under the Jobseeker's Act 1995.

75. However, "under the terms of [the European Communities Act 1972] it has always been clear that it was the duty of a United Kingdom Court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law." Lord Bridge of Harwich in *R v Secretary of State for Transport, ex parte Factortame* [1991] 1 AC 603, at p.659.

76. Both Mr Brown and Mr Sheldon point out that disapplying reg. 18(5)(b) would not assist the Claimant: he would still not have been in receipt of a qualifying benefit.

77. Mr Brown submits that the concrete outcome of his substantive contentions succeeding must be that the Claimant is awarded the 50 Plus element, because otherwise he would be left without a remedy, which would itself be contrary to the principle of effective protection of EU law.

78. In *Francis v Secretary of State for Work and Pensions* [2006] 1 All ER 748 the claimant obtained a residence order under the Children Act 1989 in respect of the baby son of her elder sister, which gave her parental responsibility for the baby while the order remained in force. Her application for a Sure Start Maternity Grant was refused because, although she fulfilled the other conditions of entitlement, the child was not either her natural child or an adopted child. The Court of Appeal held that the failure of the legislation to include claimants with residence orders was discriminatory on the grounds of status, contrary to article 14 of the Human Rights Convention in conjunction with article 8, because there was no rational justification for distinguishing between the position of a person with an adoption order and a residence order.

79. On the question of the appropriate remedy, Peter Gibson LJ, who gave the leading judgment, concluded as follows (at para. 31):

> "[Counsel for the claimant] submitted that this court should perform its interpretive duty under s.3(1) of the Human Rights Act 1998 to read and give effect to the 1987 regulations in a way which is compatible with the convention rights so far as possible, and she reminded us of the remarks of Lord Steyn in *R v A* [2001] 3 All ER 1 at [44], [45], which make clear how strong is that duty. However, I do not think that it is possible to construe reg. 5(1)(b) in a way which includes a person given parental responsibility by a residence order for a child not exceeding the age of 12 months at the date of claim. That would not be the interpretation but the rewriting of reg 5(1)(b) to include a new category. [Counsel for the claimant] submitted in the alternative that the court should grant a declaration that Ms Francis was entitled to maternity grant. [Counsel for the Secretary of State] accepted that that was the appropriate remedy. I agree. That would allow the Secretary of State to decide how best to reformulate the 1987 regulations so as to exclude the discrimination identified in the present case. ……"

80. In *Francis* it was impossible to achieve the desired result by simply disapplying an offending condition of entitlement. The problem was that a person with the benefit of a residence order was not one of the categories of person who could qualify. The position is somewhat similar here. It seems to me that I can (and indeed should) do something similar in the present case, and that I should therefore simply decide that the Claimant was entitled to the 50 Plus element in respect of his claim made on 31 October 2007. If necessary that could be done by disapplying reg. 18(3)(d) (i.e. the requirement that the claimant was in receipt of a qualifying benefit) in relation to the Claimant, whom HMRC accepts to have been in receipt in Poland of a benefit equivalent to JSA. That would not, it seems to me, enable persons who have not been entitled either to one of the specified UK benefits, or an equivalent benefit abroad, to claim the 50 Plus element, because it is only persons who have been prejudiced by the indirect discrimination inherent in reg. 18(3)(d) who are entitled to have reg. 18(3)(d) disapplied in relation to them.

Disposal

81. I therefore allow this appeal, in the terms set out in paragraph 1 above.

Charles Turnbull
Judge of the Upper Tribunal
26 January 2011