JS-v-Department for Communities (JSA) [2019] NICom 18

Decision No: C6/18-19(JSA)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

JOBSEEKERS ALLOWANCE

Application by the claimant for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 11 February 2010

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I grant leave to appeal and proceed to determine all questions arising thereon as though they arose on appeal.

2. The decision of the appeal tribunal dated 11 February 2010 is not in error of law. Accordingly, the appeal to the Social Security Commissioner does not succeed.

Representation

3. In these somewhat lengthy proceedings the appellant has been represented by Mr Black of the Law Centre (Northern Ireland) and the Department by Mr Gorman of the Decision Making Services unit. Gratitude is extended to both representatives for their detailed and constructive observations and comments, both oral and written. This application was heard together with a second appeal in which the issues arising were related.

Background

4. In the Case Summary prepared for the oral hearing of the appeal, Mr Black set out the following factual background:

> '(The appellant) is a Czech national. On 1 May 2004, the Czech Republic joined the European Union, along with nine other States and (the appellant) became a citizen of the European Union as a result. He obtained the right to

travel freely throughout the European Union on the basis of his Union citizenship. However, the right to take up employment in other European Union states was restricted by the terms of derogations contained in the Treaty of Accession 2003. Most of the European Union Member States at the date of Accession applied derogations to exclude nationals of the so-called "A8" countries, which included the Czech Republic, from their employment markets. Only the United Kingdom, the Republic of Ireland and Sweden opened their employment markets to A8 nationals. These latter countries were further permitted by the Treaty of Accession 2003 to impose conditions on access to their employment markets.

Under the permission to impose conditions on access to their labour markets, and as a measure derogating from the Treaty of Accession, the United Kingdom implemented an "Accession State Worker Registration Scheme".

(The appellant) arrived in the UK in 2007 with the intention of working here. He obtained employment with … from 01/05/2007 and 29/06/2007 and provided an accession state Worker Registration Scheme (WRS) certificate for this employment. (The appellant) then worked for … from 14/08/2007 until 28/04/2008. This was also registered under the WRS. (The appellant's) next period of employment that was registered under the WRS was with … and lasted from 18/08/2008 until 17/10/2008. Altogether (the appellant) completed over 12 months registered employment under the WRS, however we admit that this may not necessarily have been 'continuous'. (The appellant) was also employed at other periods but advises that they were not registered under the WRS.

(The appellant) attempted to claim Jobseeker's Allowance (JSA) from 28/01/2009. On 09/02/2009 a decision maker decided that as (the appellant) was an accession state national who had not completed 12 continuous months of registered employment he did not have a right to reside in the UK. He was deemed a person from abroad and so his claim for JSA was refused. (The appellant) appealed this decision and the grounds for this appeal are now before the Social Security Commissioner. At the heart of this dispute lies the fact that (the appellant) has not completed 12 months uninterrupted employment in accordance with the Accession (Immigration and Worker Registration) Regulations 2004.'

The submissions of the parties

5. In his Case Summary, Mr Black made the following submissions:

> '**It is submitted that regulation 5(2) of the Accession (Immigration and Worker Registration) Regulations 2004 is ultra vires and that the appeal tribunal erred in its finding that (the appellant) did not retain a right of residency as a worker.**
>
> On the facts of the case (the appellant) is an EU citizen, who comes within Article 3 (Beneficiaries) of Directive 2004/38. At the time of his claim for Income based JSA he had resided in the UK for over a year without recourse to social assistance. He had worked and paid tax and national insurance during that time. However, (the appellant) has been refused access to Income based JSA due to the operation of regulation 85A and Schedule 4 para 14 of the Jobseeker's Allowance Regulations (NI) 1996, which provide that a person defined as a *Person From Abroad* will have an applicable amount of nil.
>
> Regulation 85A requires careful consideration. A person who retains worker status pursuant to Article 7(3) of the Directive will have a right to reside (85A(4)(c)). Regulation 85A(4)(f)(i) refers to regulation 5 of the Accession (Immigration and Worker Registration) Regulations 2004 and it is these provisions that purport to derogate from (the appellant's) possible right to reside as a person who retains worker status under Article 7(3) of the Directive.
>
> This raises an important issue of EU law. The right of free movement of workers is a fundamental right and as such should be given a broad interpretation and application. The UK did not choose to close its labour market to A8 nationals but rather to permit them access to the labour market under national provisions that monitored and did not restrict access of A8 nationals to the UK labour market. Reg 5(2) clearly provides that (the appellant) was treated as an EU worker during the period of his employment in registered work. At that time he was covered by the provisions of Article 7 of Directive 2004/38. The issue is whether (the appellant's) failure to complete 12 months continuous employment under the Workers Registration Scheme means that he not able to rely on the provisions of Article 7(3)(b) of Directive 2004/38 in his circumstances.

The Workers Registration Scheme (regulation 5(3) Accession (Immigration and Worker Registration) Regulations 2004 purports to derogate from Article 7(3)(b) of Directive 2004/38 and provides that even if a claimant is in the position of Article 7(3)(b), he will not retain the status of worker and the right to reside under Directive 2004/38.

It is submitted that this derogation is not covered by the transitional arrangements on free movement of workers (that allow Member States to derogate from EU law on residence "to the extent necessary" for the application of the transitional arrangements) because the UK did not restrict access to its labour market that might make such a derogation necessary.

It is a settled principle of EU case law that fundamental principles are to be interpreted broadly and that derogations are to be interpreted and applied narrowly. (see para 5 ***CIS/0647/2009***).

It is submitted that Article 24 of Directive 2004/38 is relevant to the determination of this dispute. Once (the appellant) came within the terms of Directive 2004/38, he was entitled to rely on the right to equal treatment with UK nationals which is enshrined in Article 24 of the Directive. The operation of regulations 4 and 5(2) and 5(3) is contrary to the equal treatment provisions in Article 24 of Directive 2004/38.

In the circumstances of this case it is submitted that regulation 5(2) of the Accession (Immigration and Worker Registration) Regulations 2004 is ultra vires and that the first tier appeal tribunal erred in its finding that the right to reside scheme is a valid derogation from the Treaty.

The tribunal erred in failing to make findings on whether the appellant had a right to reside at the relevant time under Articles 20 and 21 of the Treaty on the Functioning of the EU.

The Court of Justice of the EU has upheld on a number of occasions the right to reside in the territory of another Member State based upon citizenship of the Union. (See *Baumbast C-413/99* paras 84 – 91; *Zambrano* C-34/09 paras 41 and 42)

It is accepted that (the appellant) was at the relevant time an EU citizen and that he was entitled to cite a right to reside under Articles 20 and 21 of the TFEU. (The

appellant) had resided in the UK for over 2 years, during this time he had worked and paid tax and national insurance. As such he could show he had economically integrated in the UK.

It is submitted that if the Commissioner finds that the provisions of regulation 5 (2) and (3) of the Accession (Immigration and Worker Registration) Regulations 2004 are not ultra vires, that he may nonetheless go on to find that (the appellant) had a right to reside in the particular facts of this case under Article 20/21 of the TFEU.

The right to reside test in (the appellant's) case is indirectly discriminatory and on the facts of his case cannot be objectively justified.

It is common case that the right to reside test operates in an indirectly discriminatory way against EU nationals. The issue is whether that discrimination is objectively justified.

The tribunal in this case should have taken into account the material differences between cases such as Patmalniece (where the benefit that was claimed was State Pension Credit) and Income-based Jobseeker's Allowance, which was claimed in this case. Jobseeker's Allowance, in contrast to certain other benefits, is for persons active in the labour market and actively seeking work.

Indirect discrimination was objectively justified in the Patmalniece case in order to protect the UK's resources against resort to benefit by those who are not economically or social integrated. However, it is submitted that the tribunal has erred by failing to address the issue or to provide reasons for its decision as to how such indirect discrimination against a person demonstrating economic and social integration such as demonstrated by (the appellant) can be objectively justified.

Outcome sought

The commissioner is requested to find that regulations 4 and 5(2) and 5(3) of the Accession (Immigration and Worker Registration) Regulations 2006 are *ultra vires* and should not be applied in this case so as to exclude the appellant from entitlement to Income based Jobseeker's Allowance under regulation 85A of the Jobseekers Allowance Regulations (NI) 1996. The Commissioner is

asked to find that (the claimant) had a right to reside under Article 7(3)(b) of Directive 2004/38/EC.

Further, should the Commissioner find that regulations 4 and 5(2) and 5(3) of the Accession (Immigration and Worker Registration) Regulations 2006 are not ultra vires, we would ask that a decision be made that it is discriminatory based on nationality. We assert that this case is to be distinguished from other cases such as ***Patmalniece*** where it has been found that the Right to Reside test was discriminatory but that it was justified as proportionate to the aim of "protecting the public purse", as in that case the applicant was not claiming a benefit designed to facilitate access to the labour market.

Furthermore, there is case law that suggests that there has to be an exception in right to reside tests for those who have achieved the necessary degree economic and/or social integration. In ***CIS/3182/2005*** Commissioner Rowland stated the following, at paragraph 14 of his decision:

> 14. *I accept Mr Samuel's point that the justification accepted in CIS/3573/2005 may not apply in all cases. Justification of unequal treatment requires answers to two questions: whether the provision under consideration implements a legitimate social policy and whether the method of implementing the social policy is proportionate having regard to the desirability of both that policy and the avoidance of covert discrimination.* ***It is one thing to apply a "right to reside" test to put pressure on people to leave the United Kingdom when they have never been economically active here and have not been here for very long but it may be less clear that the blanket application of the test represents a proportionate response to the problem that concerns the Government if it results in pressure to leave the United Kingdom being placed on people who have been economically active in the past or have been established here for many years but for some reason or other have not acquired a permanent right of residence.*** *Indeed, this has been recognised to some extent in new legislation that has come into*

force this year, although the approach that has been taken has been to clarify, or extend, the right to reside in the United Kingdom rather than to create exceptions to the application of the test.

In ***Commission v UK EUECJ C-308/14*** it was found that right to reside test was permitted in Child Benefit and Child Tax Credit awards and was not a breach of **EC Reg 883/2004** and that even though discriminatory on nationality grounds was legitimate in pursuit of the host state protecting the public purse. Again, we seek to differentiate our case from this in that IB JSA is a benefit designed to facilitate access to the labour market, a much more fundamental principle of EU law.

The facts which I identify as differentiating this case are:

1. This appeal relates to entitlement to Income Based Jobseeker's Allowance.
2. The benefit in question was designed to facilitate access to the labour market.'

6. Mr Gorman prepared a Case Summary which addressed the common arguments raised by Mr Black in the two cases which were heard together and the arguments which were discrete to each individual case. His response to the common arguments was as follows:

'The grounds of appeal overlap on some issues however there are also grounds submitted which are individual to each Appellant. The Department will first address the common grounds of both …

1) <u>The Act of Accession 2003 and the power to derogate from Article 7(3) of Directive 2004/38 (both appeals).</u>

The Law Centre submits that the Appellants have a right to reside under Article 7(3) of Directive 2004/38 EC (2004/38) and that regulation 5(2) of the 2004 Regulations is *ultra vires* if it excludes that right.

The Treaty establishing the European Union was amended to incorporate the accession of the new Member States on 01.05.04 (see Article 24 to the Act of Accession 2003 as well as Annex V regarding the Czech Republic and Annex XII regarding Poland). This amendment allowed the existing Member States who were willing to open their labour markets to A8 nationals to derogate from certain provisions of Council Directive

68/360 (68/360) and from Articles 1-6 of Regulation EEC 1612/68 (1612/68) regarding the free movement of workers within the European community.

2004/38 was enacted with a view to remedying the piecemeal approach to the right of free movement and residence. In so doing it repealed 68/360 in its entirety (Article 38.2). However 2004/38 also provided that any reference to 68/360 is to be construed as being made to 2004/38 (see Article 38.3). It is respectively submitted therefore that any reference to 68/360 in the Act of Accession 2003 must be construed as a reference to 2004/38, which necessarily has the effect of allowing Member States to derogate from those provisions of 2004/38 which cannot be disassociated from those of 1612/68 (see paragraph 9 of both Annex V and Annex XII to the Accession Treaty).

The UK Government used its right to derogate when it introduced the 2004 Regulations. Regulation 5(2) of the 2004 Regulations provided that an A8 national shall only be treated as a 'worker' during a period in which he is working for an authorised employer. It is submitted therefore that the Appellants could only be considered to have been 'workers' while they were in registered employment in accordance with regulation 5(2) of the 2004 Regulations.

The Department further submits that as regulation 6(2) of the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations) shall not apply to an accession State worker requiring registration then neither Appellant could retain the status of a 'worker' whilst unemployed (see regulation 5(3) of the 2004 Regulations). This is because both Appellants remained A8 nationals requiring registration at the dates of their claims as neither of them had completed 12 continuous months of registered employment.

In considering the position of A8 nationals the House of Lords decided in *Zalewska* (UKHL 67, paragraphs 16 and 29) that a right to reside exists only during the period while an A8 national is working for an authorised employer, and this continued to be the case until he has worked for an authorised employer without interruption for a period of 12 months. It was further held that access to Community rights whilst resident in the UK depended on satisfying the national measures governing access to its labour market.

Since the Department's original submissions the CJEU has issued its decision in *Prefeta* C-618/16. The Department submits that the Court's conclusion in *Prefeta* supports the Department's position:

> *"Chapter 2 of Annex XII to the Act concerning the conditions of accession of the Czech Republic… the Republic of Poland …. and the adjustments to the Treaties on which the European Union is founded, must be interpreted as permitting, during the transitional period provided for by that act, the United Kingdom of Great Britain and Northern Ireland to exclude a Polish national, such as Mr Rafal Prefeta, from the benefits of Article 7(3) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, when that person has not satisfied the requirement imposed by national law of having completed an uninterrupted 12-month period of registered work in the United Kingdom."*

2) <u>The 'right to reside test' contained in regulation 85A of the Jobseeker's Allowance Regulations (Northern Ireland) 1996 (the JSA Regulations) is unlawfully discriminatory in light of the Appellants social and economic integration (both appeals).</u>

The Supreme Court considered the right to reside test in *Patmalniece* [2011] UKSC 11. The Supreme Court decided that Regulation 2 of the State Pension Credit Regulations 2002 (the 2002 Regulations), commonly referred to as the 'right to reside test', was indirectly discriminatory but that it was objectively justified as it is the means by which economic and social integration are measured and access to social security benefit allowed. Lord Hope stated:

> *"46. … The purpose of regulation 2 of the 2002 Regulations is to ensure that the claimant has achieved economic integration*

or a sufficient degree of social integration in the United Kingdom or elsewhere in the Common Travel Area as a pre-condition of entitlement to the benefit… The Secretary of State's justification lies in his wish to prevent exploitation of welfare benefits by people who come to this country simply to live off benefits without working here. That this is a legitimate reason for imposing the right of residence test finds support in Advocate General Geelhoed's opinion in Trojani v Centre Public d'Aide Sociale de Bruxelles [2004] 3 CMLR 820, para 70 that it is a basic principle of Community law that persons who depend on social assistance will be taken care of in their own Member State.

....

48. The justification is founded on the principle that those who are entitled to claim social assistance in the host Member State should have achieved a genuine economic tie with it or a sufficient degree of social integration as a pre-condition for entitlement to it. In Kaczmarek v Secretary of State for Work and Pensions [2008] EWCA Civ 1310, [2009] 2 CMLR 85, para 2, Maurice Kay LJ said that if a citizen of one Member State who is lawfully present in another Member State can, without difficulty and whilst economically inactive, access the social security benefits of the host State, the implications for the more prosperous Member States with more generous social security provisions are obvious. The rules that regulation 2 of the 2002 Regulations lays down are intended to meet this problem…"

Regulation 2 of the 2002 Regulations states:

The State Pension Credit Regulations 2002

(2) For the purposes of treating a person as not in Great Britain in paragraph (1), no person shall be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of

Ireland if he does not have a right to reside in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland."

(NOTE: The Regulation 2 quoted above is from the Great Britain 2002 Regulations as this was what was being considered by the Supreme Court. The Northern Ireland equivalent would be Regulation 2 of the State Pension Credit (Northern Ireland) Regulations 2003 which substitute the words 'Northern Ireland' for the words 'Great Britain' but are otherwise identical).

The right to reside test contained in the JSA Regulations (as at the date of claim) is almost identical in wording to that of the 2002 Regulations, as can be seen below:

The Jobseeker's Allowance Regulations (Northern Ireland) 1996

85A. —
....

(2) No claimant shall be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland unless he has a right to reside in (as the case may be) the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland other than a right to reside which falls within paragraph (3).

It would be the Department's submission that this judgment is also relevant to JSA(IB), for which the right to reside test is identical for all practical purposes.

Lord Hope considered the right to reside test in relation to indirect discrimination and justification and stated:

50. The principle on which the Secretary of State's justification relies underlies the EU rules as to whether, and if so on what terms, a right of residence in the host Member State should be granted. This is the issue to which Council Directive 90/364 EEC is directed. In that context there is no prohibition on discrimination on grounds of nationality under EU law. So there is no need to be concerned with the question whether the approach that is taken there

can be justified on grounds that are independent of nationality. Three questions then arise. The first is whether the Secretary of State's justification can be regarded as relevant in the present context. The second is whether it is a sufficient justification given the effect of the rules that regulation 2 of the 2002 Regulations lays down. The third is whether it is independent of the nationality of the person concerned.

51. The first and second questions can be taken together. The justification is relevant because the issues that arise with regard to the grant of a right of residence are so closely related to the issues that are raised by the appellant's claim to state pension credit. They are, at heart, the same because they are both concerned with a right of access to forms of social assistance in the host Member State. It is also a sufficient justification, in view of the importance that is attached to combating the risks of what the Advocate General in Trojani v Centre Public d'Aide Sociale de Bruxelles [2004] 3 CMLR 820, para 18 described as "social tourism".

52. As for the third question, the answer to it depends not just on what the Secretary of State himself said in his statement (see paras 37-38, above), but also on the wording of the regulation and its effect. They show that the Secretary of State's purpose was to protect the resources of the United Kingdom against resort to benefit, or social tourism by persons who are not economically or socially integrated with this country. This is not because of their nationality or because of where they have come from. It is because of the principle that only those who are economical or socially integrated with the host Member State should have access to its social assistance system. The principle, which I take from the decision in Trojani, is that it is open to Member States to say that economical or social integration is required. A person's nationality does, of course, have a bearing on whether that test can be

> *satisfied. But the justification itself is blind to the person's nationality. The requirement that there must be a right to reside here applies to everyone, irrespective of their nationality.*
>
> *53. For these reasons I would hold that the Secretary of State has provided a sufficient justification, and that it is independent of the nationality of the person concerned. It follows that the indirect discrimination that results from regulation 2 of the 2002 Regulations was not made unlawful by article 3(1) of Regulation 1408/71.*

Therefore it is submitted that in accordance with *Patmalniece* the right to reside test contained in the JSA Regulations is indirectly discriminatory. However, as that indirect discrimination is objectively justified on grounds that are independent of nationality the Appellants have not been unlawfully discriminated against.

In *Spiridinova* [2014] NICA 63 the Northern Ireland Court of Appeal decided that a claimant was not exempt from satisfying the right to reside test by demonstrating a sufficient degree of economic or social integration in the UK. The Court of Appeal followed the Supreme Court's decision in *Patmalniece* and stated:

> *[30] .... In that case the Secretary of State argued that the purpose of Regulation 2 of the 2002 Regulations, the provision that no person was to be treated as 'habitually resident' in the UK if he does not also have a 'right to reside' in the UK, was to ensure that the individual had 'achieved economic integration or a sufficient degree of social integration in the United Kingdom.' In other words, it was the 'right to reside' which was to determine that a sufficient degree of integration had been achieved. Read in its proper context the submission made by the Secretary of State in Patmalniece and referred to by Lord Hope at paragraph 42 of the judgment was to the effect that the requirements of Regulation 2 of the 2002 Regulations were objectively justifiable on the basis that compliance with such requirements would be indicative of a sufficient degree of economic and/or social*

integration in the UK to effectively prevent the development of 'benefit tourism'.... The question was not whether an individual should be able to establish some undefined degree of economic and/or social integration as an exception to having to comply with the 'right to reside' requirement, a criterion which could clearly give rise to a multiplicity of expensive and time consuming litigation, but whether compliance with the 'right to reside' requirement was a legitimate means of confirming the necessary standard of integration. As Lord Hope himself pointed out at paragraph 52 of his judgment with regard to the wording of the regulation and its effect:

"... they showed that the Secretary of State's purpose was to protect the resources of the United Kingdom against resort to benefit or social tourism by persons who are not economically or socially integrated with this country…"

The Department submits that the Court of Appeal's decision in *Spiridinova* supports the Department's position by following the Supreme Court's decision in *Patmalniece* and it is therefore of no assistance to the Appellants. Furthermore, the Law Centre accepted in its letter dated 03.11.14 that if the Court of Appeal decision in *Spiridinova* stood then they would no longer be able to rely on this ground of appeal. As the Court of Appeal's decision is no longer being appealed to the Supreme Court the Department agrees that this ground of appeal is no longer of use to the Law Centre.'

7. Mr Gorman made certain additional submissions which he submitted were discrete to the second appeal heard at the same time as this one. It is the case, however, that those submissions were also relevant to this appeal and are, accordingly, repeated here.

"**The Tribunal failed to address (the appellant's) grounds that he had a right to reside based on Articles 20 and 21 of the Treaty on the Functioning of the European Union (TFEU)**

The Department submits that the Tribunal did address the Appellant's argument regarding Articles 20 and 21 TFEU which relate to citizenship of the European Union,

although it did not mention them by name in its statement of reasons:

> *"Is there a right to reside based on citizenship?*
>
> *The general acceptance of the importance of citizenship, and the conclusion that there is a right of residence based on citizenship rather than the right to free movement (Zambrano v ONEM 2010) does not of itself detract from the very specific framing of rights for the purpose of claiming JSA, set out above. That scheme was drafted for a particular purpose within the scope of the derogation and is unaffected. The scheme does not prevent (the claimant) from actually residing in the UK."*

The Department submits that the Tribunal's reference to 'citizenship' is a clear reference to Article 20 (formerly Article 17) and Article 21 (formerly Article 18) of TFEU.

It is relevant to the proceedings that the CJEU considered the concept of citizenship and residence where it was held (see *Baumbast and, R* v *Secretary of State for the Home Department*, C413/99, para 85; *Kunqian Catherine Zhu and Man Lavette Chen* v *Secretary of State for the Home Department*, C200/02, paras 26 and 27) that the *" …right of citizens of the Union to reside in another Member State is recognised subject to the limitations and conditions imposed by the Treaty* ***and by measures adopted to give it effect****…"* (my emphasis).

The Court of Appeal in England and Wales also considered Article 21 TFEU in *Kaczmarek* [2008] EWCA Civ 1310 holding that it cannot by itself furnish a right to reside in contradiction of a Directive. Therefore Article 21 cannot create a right to reside where limitations set out in 2004/38 and the Accession Treaty 2003 prevents it.

The Law Centre also sought to rely on the CJEU judgment in *Zambrano* C-34/09 however it can be distinguished from the present case and is therefore of no assistance to the claimant. It is submitted that neither (the appellant) nor his children can be said to have been deprived *'of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen'.* Nor can it be argued that (the claimant) has been deprived of his *"…right to move and reside freely within*

the territory of the Member States, or any other right conferred …by virtue of [his] *status as a Union citizen* (see *McCarthy,* C-434/09).'

8. In connection with the grounds of appeal which were specific to this appellant's case, Mr Gorman made the following submissions:

> 'The tribunal erred in not giving proper consideration to an adjournment when (the appellant) was not present at the hearing
>
> The Tribunal recorded in the 'record of proceedings' that *"The Tribunal decided to proceed. The Appellant did not attend the hearing"* and in the 'reasons for decision' it is recorded that "*The Appellant did not attend the hearing at the allocated time. The Tribunal had no reason to adjourn the hearing and decided to proceed in the absence of the Appellant".*
>
> The Law Centre contends that the Tribunal should have established if confirmation that (the appellant) would be attending the hearing had been received by the Appeals Service, i.e. whether or not form AT1 had been returned, or if (the appellant) had been in contact with the Appeals Service about the hearing. Only after taking this information into account should a decision on an adjournment have been made. The Department agrees that the record of proceedings does not show that this was done and that this may constitute an error in law. However, the Department submits that this ground of appeal has no material impact as the remedy would normally be to have the case resubmitted for a new hearing by a different Tribunal. The Department feels that it would be in the best interests of natural justice in this case for the Commissioner to decide on the substantive issues of the appeal, as the facts have already been established and agreed.'

9. At the oral hearing of the appeal, Mr Black and Mr Gorman were provided with a copy of the decision of Upper Tribunal Judge Gamble in *RJ v Secretary of State for Work and Pensions* ([2012] AACR 28, [2011 UKUT 477 (AAC) ('*RJ*')). Mr Black was invited to provide a further written submission on the potential application of the principles in *RJ* to the issues arising in the appeal. Mr Black's further submission was as follows:

> 'With respect to the Upper Tribunal in RJ, we state that it was incorrectly decided, should not be followed, is not directly relevant to the circumstances of (these) cases …

and is in any case not binding on a Social Security Commissioner in Northern Ireland.

RJ concerns the application for Income Based Jobseekers Allowance by a Polish National and Citizen of the European Union.

The background facts of the case in RJ are unclear but it appears that RJ was not a worker in the UK prior to making a claim to JSA. One can only assume then that their level of social and economic integration in the UK was minimal if it existed at all.

The terms of appeal in RJ also appear to be that the appellant was seeking to claim JSA as someone seeking self-employment. The grounds of appeal are therefore of limited relevance to the circumstances of (the present cases).

The facts of RJ can be distinguished from (the present cases) as both (claimants) had lived and worked for well over a year in the UK. (The appellant's) level of integration was so great that he was actually entitled to Contributions Based Jobseekers Allowance and shortly after gained permanent residence in the UK.

This difference is important as in paragraph 12 of the Judgement in RJ the Upper Tribunal references the case of ***Patmalniece*** and goes on to state that the Right to Reside test:

> *"amounted to indirect but not direct discrimination on the ground of nationality. However the Supreme Court, by a majority of four to one, held that that discrimination was justified because the right to reside test had the legitimate purpose of ensuring that a claimant had achieved economic or social integration in the United Kingdom as a pre-condition of entitlement to benefit and that that justification was relevant, sufficient and independent of the issue of nationality."*

The Upper Tribunal judge in RJ was dealing with a case where it appears the applicant had little to no economic or social integration in the UK, in contrast to that of (these claimants) and so their legal rights to claim JSA should be considered in different contexts.

It should also be noted that there is insufficient reference in the decision of the Upper Tribunal on the main issue of distinction raised by Law Centre NI in (these cases). This distinction being between JSA as a benefit facilitating access to the labour market, and other 'social assistance' dealt with in cases such as ***Patmalniece*** (Pension Credit), ***Spiridonova*** (Child Benefit) or ***Zalewska*** (Income Support).

Once again we point out the distinction already made in EU law between benefits facilitating access to the labour market and 'social benefits' (See para 45 Case ***C-22/08 Vatsouras)***:

> *"Benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38."*

Although some limited reference is made in para 15(c) of RJ to 'benefits of a financial nature intended to facilitate access to the labour market'. It goes no further than to suggest that, following the decision in ***Collins v SSWP [2006]***, other requirements may be imposed on a jobseeker other than merely 'seeking work'. This could include an additional means of establishing a genuine link between an applicant for jobseeker's allowance and the United Kingdom employment market. In the case of RJ it is unclear whether the applicant has met such an additional criteria, however we would submit that (these claimants) certainly have.

We therefore state that the only way that decisive clarification can be made in the issues raised by (these claimants) is a reference to the Court of Justice of the European Union.

On a related point which calls the judgement in RJ into question, we would also like to point out that at least one aspect of the decision in RJ has already been shown to be incorrect and overturned by the recent decision of the ECJ in case C-442/16 ***Florea Gusa***. RJ in the summary of its judgement states that in relation to Directive No. **2004/38/EC**:

> *Article 7.3(b) and (c) applied only to "workers" and not to "self-employed*

> *persons". The claimant could therefore only succeed in his appeal by establishing that he was self-employed at the date of claim.*

However, ***Gusa*** has decided that:

> *"Article 7(3)(b) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC must be interpreted as meaning that a national of a Member State retains the status of self-employed person for the purposes of Article 7(1)(a) of that directive where, after having lawfully resided in and worked as a self-employed person in another Member State for approximately four years, that national has ceased that activity, because of a duly recorded absence of work owing to reasons beyond his control, and has registered as a jobseeker with the relevant employment office of the latter Member State."*

We therefore submit that if one particular strand of the judgement of RJ has been shown to be incorrect and over-ruled in this way by the ECJ, then it also calls into question the correctness and the validity of the judgement in its entirety. We state that, at the very least, legal surety demands a referral to the ECJ for further clarification.

Conclusion

It is submitted that the Social Security Commissioner disregard the decision of RJ v SSWP for the purposes of deciding whether a referral to the Court of Justice of the European Union in the above cases of (these claimants) is necessary for the following reasons:

> (1) The decision is that of an Upper Tribunal in Great Britain and, whilst persuasive, is not binding on a Social Security Commissioner in Northern Ireland.

(2) The decision of the Upper Tribunal in RJ is not good law. It does not provide sufficient reasoning why it applied the decision in ***Patmalniece***, which is relation to non-work related social assistance (Pension Credit), to the applicant in RJ for IB JSA which is a benefit designed to facilitate access to the labour market, one of the fundamental four freedoms of the European Union.

(3) The background facts of (these) cases and in particular their personal circumstances, work history and level of social and economic integration are sufficiently differentiated from the circumstances of the claimant in RJ in order to conclude that RJ should not be applied.

(4) One aspect of the decision in RJ has already been shown to be incorrect and has been overturned by the decision of the ECJ in ***Florea Gusa***. This calls into question the correctness and the validity of the entirety of the judgement of RJ v SSWP and at the very least demands clarity in the form of a reference to the Court of Justice of the European Union.'

10. Mr Gorman made the following submission in response:

'The Department accepts that *RJ* is not binding case law in Northern Ireland however as a reported decision of the Upper Tribunal in Great Britain it is highly persuasive. The Department submits that *RJ* has direct relevance to (these) appeals … due to the Upper Tribunal's consideration of the right to reside test, the Supreme Court's decision in *Patmalniece* [2011] UKSC 11 and the applicability of that decision to claims made to income-based Jobseeker's Allowance, as is the case here. The Department would also like to highlight that even if the self-employed aspect of *RJ* has been overtaken by subsequent case law that does not negate the entire decision and that the findings in respect of the right to reside test remain valid. On that basis the Department respectfully submits that the Commissioner follows the decision in *RJ.*'

The relevant legislative background

11. The assessment of entitlement to income-based jobseeker's allowance is by way of the calculation of a claimant's applicable amount under articles 3(4) and 5 of the Jobseekers (Northern Ireland) Order 1995 ('the 1995 Order'). The applicable amounts are set by regulations made under article 6(5) of the 1995 Order. Article 6(12) of the 1995 Order permits the fixing of an applicable amount of nil by such regulations.

12. An applicable amount of nil is fixed for 'persons from abroad' by paragraph 14 of Schedule 4 to the Jobseeker's Allowance Regulations (Northern Ireland) 1996 ('the 1996 Regulations').

13. Regulation 85(4) of the 1996 Regulations *inter alia* provides:

> 'Person from abroad has the meaning given in regulation 85A."

14. Regulation 85A provided, so far as relevant as at the date of the decision under appeal, as follows:

> '**85A.** – (1) 'Person from abroad' means, subject to the following provisions of this regulation, a claimant who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.
>
> (2) No claimant shall be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland unless he has a right to reside in (as the case may be) the United Kingdom, the Channel Irelands, the Isle of Man or the Republic of Ireland other than a right to reside which falls within paragraph (3).'

15. The appellant did not fall into any of the categories of person in paragraph (3).

16. In paragraph 4 of the decision of the Court of Appeal in *The Commissioners for Her Majesty's Revenue and Customs v Aiga Spiridonova* ([2014] NICA 63, ('*Spiridonova*'), Lord Justice Coghlin stated:

> 'In May 2004 Latvia became a member of the European Union and on 1 May 2004 the Accession (Immigration and Worker Registration) Regulations 2004 ("the A8 Regulations") came into force. "A8" referred to eight of the ten states then being granted entry into the EU and the Regulations established a Workers' Registration Scheme ("WRS") by means of which nationals of a relevant Accession State could register for employment in

the United Kingdom. Latvia was a relevant Accession State for the purpose of the Regulations. The two accession states that were not made subject to the A8 Regulations because of their relatively small size were Cyprus and Malta.'

17. Substituting 'Poland' for 'Latvia' the explanation in paragraph 4 is applicable in the instant case. In paragraphs 8 to 10, Coghlin LJ added the following:

> 'Regulation 13 of the Immigration (European Economic Area) Regulations 2006 (the "Immigration Regulations") provides that an EEA national is entitled to reside in the United Kingdom for a period not exceeding three months beginning on the day on which he is admitted to the United Kingdom provided that he holds a valid national identity card or passport issued by an EEA State. Regulation 14(1) provides that a "qualified person" is entitled to reside in the United Kingdom for so long as he remains a qualified person. The definition of "qualified person" appears in Regulation 6(1) as follows:
>
> > "6-(1) In these Regulations, 'qualified person' means a person who is an EEA national and in the United Kingdom as –
> >
> > (*a*) a jobseeker;
> >
> > (*b*) a worker;
> >
> > (*c*) a self-employed person;
> >
> > (*d*) a self-sufficient person; or
> >
> > (*e*) a student."
>
> The A8 Regulations provided for a system of registering accession State workers during the accession period. Regulation 7 provided that the requirement for an accession State worker to be authorised to work, the Workers Registration Scheme ("WRS"), took effect by way of derogation from Article 39 (subsequently Article 45 TFEU) of the European Community Treaty on freedom of movement for workers within the Community. Regulation 5 (1) provided that the Immigration Regulations 2000 (later the 2006 Immigration Regulations) should apply to a national of a relevant Accession State subject to the modifications set out in the A8 Regulations and Regulation 5 (2) provided that for an accession State worker to be treated as a 'worker' and, hence, a 'qualified

person' with a right of residence the employment would have to be registered in accordance with the WRS. The accession State worker requiring registration could only be authorised to work in the UK for an authorised employer. Regulation 5(2) stated that:

> "(2) …an accession State worker requiring registration shall be treated as a worker for the purposes of the definition of 'qualified person' in Regulation 5(1) of the 2000 Regulations only during a period in which he is working in the United Kingdom for an authorised employer."

Regulation 7 of the A8 Regulations provided that an employer was an "authorised employer" if the worker had received a valid registration certificate authorising him to work for that employer and the certificate had not expired. After the completion of 12 months of such employment the worker would become entitled to full Article 45 rights and to be treated in the same way as any other EU national worker. However, if the accession State worker was not in registered employment or ceased to work without having completed the 12 months of registered employment he would not become a 'qualified person' who acquired a right to reside in the UK as a worker. Regulation 9 provided that an employer would be guilty of an offence if he employed an accession State worker requiring registration during a period in which the employer was not an authorised employer in relation to that worker.'

18. Once again, and subject only to the first line of paragraph 9, that analysis is apposite in the present case.

Analysis

The right to reside test in regulation 85A of the 1996 Regulations is discriminatory

19. As was noted above, Mr Black has argued that the right to reside test in regulation 85A of the 1986 Regulations is discriminatory.

20. In *Patmalniece v Secretary of State for Work and Pensions* ([2011] AACR 34, '*Patmalniece*'), the claimant was a Latvian national who came to the United Kingdom in 2000. Her claim to asylum was refused in January 2004, but no steps were taken to remove her from the United Kingdom. On 1 May 2004 Latvia joined the European Union, so pursuant to derogations from Article 39(3) of the EC Treaty she became entitled to work in the United Kingdom if she complied with the Workers

Registration Scheme in the Accession (Immigration and Worker Registration) Regulations 2004. She had worked for about 40 years in Latvia and was in receipt of a retirement pension from the Latvian social security authorities, but she had not worked at any time in the United Kingdom and had no other income. In August 2005 she claimed state pension credit. Her claim was refused on the ground that she lacked a right to reside in the United Kingdom. Regulation 2 of the State Pension Credit Regulations 2002 provided that a person is to be treated as not in Great Britain if he is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland. As amended from 2004, Regulation 2 further provided that no person shall be treated as habitually resident in those territories if he/she does not have a right to reside in one of them. The claimant appealed, asserting direct discrimination on grounds of her nationality contrary to Article 3(1) of Regulation (EEC) 1408/71. Her case was that it was her Latvian nationality that precluded the entitlement to state pension credit which she would have had if she had been a United Kingdom national.

21. The case advanced as far as the Supreme Court. There the Court, by a majority, held that:

> (i) the test of presence "in Great Britain" was constructed in a way that was more likely to be satisfied by a United Kingdom national than by a national of another Member State, but the judgment of the Court of Justice of the European Union in Case C-73/08 *Bressol v Gouvernement de la Communauté Française* [2010] 3 CMLR 20 required the court to find that that was not directly discriminatory on grounds of nationality (although the Court of Justice had not explained why it did not accept the opinion of the Advocate General on that point), but that it was indirectly discriminatory as it put nationals of other Member States at a particular disadvantage. As such, to be lawful, it had to be justified on objective considerations independent of nationality (paragraphs 30 to 35, 73. 89 to 92, 109);
> (ii) the Secretary of State's purpose was to protect the resources of the United Kingdom against exploitation of welfare benefits and social tourism by persons who were not economically or socially integrated with the United Kingdom and that was a legitimate aim according to the principle laid down in Case C-456/02 *Trojani v Centre Public d'Aide Sociale de Bruxelles* [2004] ELR I-7573; [2004] 3 CMLR 38, and was independent of the nationality of the person concerned, since, while a person's nationality has a bearing on whether that test can be satisfied, the justification itself is blind to the person's nationality. The parties were agreed that the provisions were proportionate to the aim. The Secretary

of State had therefore provided a sufficient justification (paragraphs 47 to 53, 105 to 108, 109);
(iii) the provision for Irish citizens in regulation 2 did not undermine the policy justification for treating the other Member States differently as for economic, historical and social reasons Ireland is different from the other Member States. The provision was protected by Article 2 of the Protocol on the Common Travel Area as an arrangement between the two states relating to the movement of persons between their territories

22. Lord Hope made the following remarks in paragraphs 50 to 53 of his decision:

> '50. The principle on which the Secretary of State's justification relies underlies the EU rules as to whether, and if so on what terms, a right of residence in the host Member State should be granted. This is the issue to which Council Directive 90/364 EEC is directed. In that context there is no prohibition on discrimination on grounds of nationality under EU law. So there is no need to be concerned with the question whether the approach that is taken there can be justified on grounds that are independent of nationality. Three questions then arise. The first is whether the Secretary of State's justification can be regarded as relevant in the present context. The second is whether it is a sufficient justification given the effect of the rules that regulation 2 of the 2002 Regulations lays down. The third is whether it is independent of the nationality of the person concerned.
>
> 51. The first and second questions can be taken together. The justification is relevant because the issues that arise with regard to the grant of a right of residence are so closely related to the issues that are raised by the appellant's claim to state pension credit. They are, at heart, the same because they are both concerned with a right of access to forms of social assistance in the host Member State. It is also a sufficient justification, in view of the importance that is attached to combating the risks of what the Advocate General in *Trojani v Centre Public d'Aide Sociale de Bruxelles*, paragraph 18 described as "social tourism".
>
> 52. As for the third question, the answer to it depends not just on what the Secretary of State himself said in his statement (see [37]–[38], above), but also on the wording of the Regulation and its effect. They show that the Secretary of State's purpose was to protect the resources of the United Kingdom against resort to benefit, or social

> tourism by persons who are not economically or socially integrated with this country. This is not because of their nationality or because of where they have come from. It is because of the principle that only those who are economically or socially integrated with the host Member State should have access to its social assistance system. The principle, which I take from the decision in *Trojani*, is that it is open to Member States to say that economical or social integration is required. A person's nationality does, of course, have a bearing on whether that test can be satisfied. But the justification itself is blind to the person's nationality. The requirement that there must be a right to reside here applies to everyone, irrespective of their nationality.
>
> 53. For these reasons I would hold that the Secretary of State has provided a sufficient justification, and that it is independent of the nationality of the person concerned. It follows that the indirect discrimination that results from regulation 2 of the 2002 Regulations was not made unlawful by Article 3(1) of Regulation 1408/71.'

23. Mr Black seeks to distinguish the decision in *Patmalniece* on the primary basis that the benefit in issue in that case was State Pension Credit (SPC) while in the instant case it was IBJSA. As was noted above, he argues that there is a distinction between IBJSA as a benefit '… facilitating access to the labour market, and other 'social assistance' dealt with in cases such as ***Patmalniece*** (Pension Credit), ***Spiridonova*** (Child Benefit) or ***Zalewska*** (Income Support).'

24. In *RJ v Secretary of State for Work and Pensions* ([2012] AACR 28, '*RJ*'), at the time of his claim, the claimant was a Polish national and a citizen of the European Union. As in the instant case, he applied for IBJSA. A decision-maker decided that his applicable amount for the purpose of his claim was nil as he was a person from abroad because he did not have a right to reside and was therefore not habitually resident in the UK. The First-tier Tribunal refused his appeal and the claimant appealed to the Upper Tribunal.

25. One of the grounds of appeal advanced on behalf of the appellant (and set out in paragraph 10(a) of the decision) was that the right to reside test established by regulation 85A of the Jobseeker's Allowance Regulations 1996 could not lawfully be applied under European Union law. At paragraph 12 of his decision, Upper Tribunal Judge Gamble stated:

> '12. The submission narrated in [10(a)] above was correctly abandoned by the claimant's representatives in the light of the decision of the Supreme Court in *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11; [2011] 1 WLR 783; [2011] AACR 34,

documents 311–346, given on 16 March 2011. That case related to state pension credit. However, its *ratio* applies to income-based jobseeker's allowance. See [102] of the judgement *per* Baroness Hale of Richmond, document 345. *Patmalniece* establishes that the right to reside test in its application to European Union citizens (other than United Kingdom citizens) amounted to indirect but not direct discrimination on the ground of nationality. However the Supreme Court, by a majority of four to one, held that that discrimination was justified because the right to reside test had the legitimate purpose of ensuring that a claimant had achieved economic or social integration in the United Kingdom as a pre-condition of entitlement to benefit and that that justification was relevant, sufficient and independent of the issue of nationality. Mr Weiss helpfully produced a press release (documents 450–451) indicating that on 29 September 2011 the European Commission had given a reasoned opinion that despite *Patmalniece* the continued application of the right to reside test by the United Kingdom constituted a contravention of European law. The Commission has requested the United Kingdom Government to stop its continued application. No reference of the United Kingdom to the Court of Justice of the European Union on this matter has been made by the Commission. I hold that that expression of opinion by the European Commission does not affect the binding authority or the persuasiveness of *Patmalniece* so far as this tribunal is concerned. I take the same view in regard to the note from the legal service of the European Commission, documents 485–488 (lodged after the hearing of 11 November 2011).'

26. Before I analyse the Mr Black's response to the decision in *RJ*, I return to *Patmalniece* and the reference by Upper Tribunal Judge Gamble to what was said by Baroness Hale at paragraph 102. It is the case, however, that what was stated in paragraph 102 can only be understood by also citing the surrounding paragraphs:

> '99. It is necessary to look at these aims in the context of what Regulation 1408/71 is trying to achieve. As its recitals show, it is principally designed to coordinate national social security legislation in order to promote freedom of movement for employed and self-employed persons, while recognising that there are differences between the social security systems of the Member States. It caters for three different kinds of benefit in three different ways.

100. At the top are those benefits described in Article 4.1 as “branches of social security”. Many of these are based upon contributory social insurance schemes but some are not. Their main distinguishing feature is that they are paid as of right. They are not designed to top up the income of people whose individual means of support fall short of the nationally set subsistence level. Workers who move from one country to another must be allowed to participate in these social security schemes in the same way as workers in the host country. Further, if they have accrued certain benefits, including old age pensions, in one country, Article 10 requires that they cannot be denied these simply because they have moved to live in another country. Thus Ms Patmalniece is entitled to have the Latvian authorities pay her her Latvian pension here.

101. At the bottom are “social and medical assistance [and] benefit schemes for victims of war or its consequences”. Article 4.4 provides that these are excluded from the Regulation altogether. Social assistance used to encompass the kinds of income-related benefits with which we are here concerned. But now it appears to be limited to benefits in kind – social and medical services – along with discretionary cash benefits such as the grants and loans which are made by the United Kingdom’s social fund.

102. In the middle are the “special non-contributory cash benefits”, financed out of general taxation to guarantee a minimum subsistence level or to cater for disabled people, and specifically listed in Annex IIa to the Regulation. State pension credit is one of these. So too are income-based jobseekers’ allowance, income support, and disability living allowance (mobility component). Under Article 10a, these are excluded from Article 10 and are payable “exclusively in the territory of the Member State in which they reside and under the legislation of that State”.

103. The question is whether it is legitimate to limit these benefits, entitlement to which under the Regulation depends upon the Member State in which the claimant resides, to people who are entitled to reside in that Member State. In answering that question, it is logical to look at the European law on the right to reside. If nationals of one Member State have the right to move to reside in another Member State under European Union law, it is logical to require that they also have the right to claim these “special non-contributory cash benefits” there

> – in other words that the State in which they reside should be responsible for ensuring that they have the minimum means of subsistence to enable them to live there. But if they do not have the right under European Union law to move to reside there, then it is logical that that State should not have the responsibility for ensuring their minimum level of subsistence.'

27. The key here is the linking of SPC with IBJSA as a special non-contributory cash benefit described in Article 4 and listed, on that basis, in Annex IIa of Regulation 1408/71.

28. Mr Black, while respecting the decision in *RJ*, submits that it was incorrectly decided, should not be followed and was not directly relevant to the circumstances which pertain the present case. The decision in *RJ* is reported in the reported decisions of the Administrative Appeals Chamber of the Upper Tribunal. To be reported it must command the broad assent of majority of Upper Tribunal Judges of the Chamber who regularly determine appeals in the jurisdiction to which the decision relates. It is the case, of course, that the decision is not binding on me as a Northern Ireland Social Security Commissioner but is highly persuasive.

29. It is not, in my view, wrongly decided. On the fundamental issue of whether the *ratio* in *Patmalniece* applies to IBJSA, it is supported by the comments of Baroness Hale in that decision. As Mr Gorman has observed, even if one aspect of the decision has been overtaken that does not negate the decision in its entirety.

30. Mr Black asserts that the facts of *RJ* may be distinguished from those in the instant case in that the appellant in this case had acquired a greater level of economic integration than the claimant in *RJ*. The appellant, as at the date of the claim to IBJSA, and through no fault of his own, had not been economically active for some time.

31. The relevance of economic (and social) integration was addressed by the Court of Appeal in *Spiridonova*. Before considering the specific issue of integration, it is important to note that the Court addressed the question as to whether the right to reside test in regulation 27 of the Child Benefit (General) Regulations 2006 was indirectly discriminatory. The Court followed *Patmalneice* saying that that decision had confirmed that the State Pension Credit Regulations 2002 containing a similar right to reside requirement, while indirectly discriminatory were objectively justifiable and a legitimate means of confirming the necessary standard of integration. Further, Lord Justice Coghlin referred to the decision of the House of Lords in *Zalewska v Department for Social Development* ([2008] UKHL; [2008] 1 WLR 2602 also reported as *R 1/09 (IS)*), in paragraphs 32 and 33, as follows:

‘32. In *Zalewska* the House of Lords gave consideration to the objectives of the WRS and the “right to reside” test for entitlement to income support. Unlike the respondent, who has never registered her employment in compliance with the WRS, Ms Zalewska did register her original employment but omitted to re-register subsequent employments. At paragraph 34 of the judgment Lord Hope said:

> “34. Materials which were shown to your Lordships provide some support for Mr Lewis’s description of the aim of the 2004 Regulations. When the Worker Registration Scheme was first introduced its purpose was said to be to allow A8 State nationals access to the United Kingdom labour market in a way that would enable the Government to monitor the numbers working and the sectors where they were employed. It was not expected to be a barrier to those who wanted to work. On the contrary it was thought that it would encourage those A8 State nationals who were working here illegally to regularise their status and begin contributing to the formal economy. Three strands of thought can be seen to be at work here. There was a concern about numbers, which was of course the reason why Member States had sought derogation from the direct [2017] AACR 11 (HMRC v Spiridonova) 12 application of Article 39 EC and Articles 1-6 of Council Regulations (EEC) No. 1612/68 for a period of years following the date of accession. There was a concern to identify which sectors of the labour market were being affected by the influx, in case remedial measures might have to be taken to control it. And there was a concern about the number of A8 State nationals who were already working here illegally, at risk to their own health and safety, and might continue to do so. A registration system was an obvious way of combatting this abuse.”

33. At paragraph 36 of the judgment Lord Hope noted that Ms Zalewska did not suggest that these aims were not legitimate and he expressed the view that it could not reasonably be suggested that it was disproportionate for A8 State nationals to be required to apply for a

registration certificate for the first employment they obtained in the United Kingdom unless they were exempt from the Regulations since information about the numbers coming to the UK from the A8 States was a necessary requirement if the extent of the influx was to be monitored effectively. He held that the UK was entitled to insist that an A8 State national should satisfy the requirement of registration in accordance with the WRS in order to become a worker and that the mere fact that a person was working in the United Kingdom was not enough.'

32. On the question of the relevance of social and economic integration, Lord Justice Coghlin made the following remarks, at paragraphs 29 to 30 and 34:

> 29. However, the Chief Commissioner appears to have extracted from these remarks by Lord Hope and what seemed to the Chief Commissioner to be a "concession" made on behalf of the Secretary of State in *Patmalniece*, together with some observations by Mr Commissioner Rowland at first instance, the proposition "… that an exception must exist to the blanket application of the principles underlying the submitted justification for the indirect discrimination which the standard 'right to reside' test permits provided that the individual concerned is able to show a sufficient degree of economic and/or social integration into the United Kingdom".
>
> 30. We consider that the "exception" identified by the Commissioner in the relevant section of Lord Hope's judgment was based, unfortunately, upon a misunderstanding of that passage. In *Patmalniece* the parties were agreed that, with regard to the question of indirect discrimination, the only issue was whether the Secretary of State was able to show that the difference in treatment of nationals of other Member States was based on objective considerations independent of nationality. If he could do so, the parties were agreed that there was no need to examine the question of proportionality. In that case the underlying purpose of the relevant regulations was said to be to safeguard the United Kingdom social security system from exploitation by people who wished to come to the UK not to work but to live on income-related benefits, in other words to prevent "benefit tourism". In that case the Secretary of State argued that the purpose of regulation 2 of the 2002 Regulations, the provision that no person was to be treated as "habitually resident" in the UK if he does not also have a "right to reside" in the UK, was to ensure that the individual had

"achieved economic integration or a sufficient degree of social integration in the United Kingdom". In other words, it was the "right to reside" which was to determine that a sufficient degree of integration had been achieved. Read in its proper context the submission made by the Secretary of State in *Patmalniece* and referred to by Lord Hope at paragraph 42 of the judgment was to the effect that the requirements of regulation 2 of .the 2002 Regulations were objectively justifiable on the basis that compliance with such requirements would be indicative of a sufficient degree of economic and/or social integration in the UK to effectively prevent the development of "benefit tourism". It is to be noted that paragraph 42 commences with a reference to the submission by the Secretary of State that the "requirements of regulation 2 of the 2002 Regulations were objectively justifiable". The question was not whether an individual should be able to establish some undefined degree of economic and/or social integration as an exception to having to comply with the "right to reside" requirement, a criterion which could clearly give rise to a multiplicity of expensive and time consuming litigation, but whether compliance with the "right to reside" requirement was a legitimate means of confirming the necessary standard of integration.

…

34. In effect, as an A8 national worker who had omitted to register in accordance with the WRS, "merely working" was precisely what the respondent had been doing prior to her application for CB. The holding by the Chief Commissioner that a degree of economic and/or social integration, which he considered to have been established by the respondent, could operate as an exception to the "right of residence" requirement inhibited him from any consideration of the specific statutory requirement that to establish a right of residence in the UK as a worker an A8 national had to be in continuous registered employment with an authorised employer in accordance with the WRS. As he recorded at paragraph 11 of the Case Stated the "exception" to the need to establish a "right of residence" identified by the Chief Commissioner enabled him to find in favour of the respondent "… notwithstanding that her employment was not registered pursuant to the Worker Registration Scheme ('WRS') and therefore did not give rise to a right of residence in the UK as a 'worker'". It follows that he did not feel that it was necessary to reach any finding as to whether the Regulations constituted a lawful means of attaining a legitimate objective and, if they did so, whether the means adopted were proportionate. It is not

> altogether easy to reconcile such an approach with the wording of the second question in the Case Stated. It is perhaps not without significance that there is no mention of the decision in *Zalewska* in his judgment, a case in which no suggestion of an "exception" was contained in the arguments but one which also concerned an individual who had held a number of employments in NI.'

33. The decision of Mr Commissioner Rowland (as he then was) referred to by Lord Justice Coghlin referred to in paragraph 29 is *CIS/3182/2005*, mentioned by Mr Black in his Case Summary and relied on to support his argument on an exception based on economic and/or social integration.

The lawfulness of the derogation from Article 7(3) of Directive 2004/38

34. This issue was addressed by the House of Lords in *Zalewska* where it was held that:

> (i) The United Kingdom was permitted, in accordance with Article 10 of the Accession Treaty and Article 24 and Annex XII to the Act of Accession, to derogate from Community law on the freedom of movement of workers from nationals of the A8 States. This enabled the United Kingdom to lay down its own rules for access to its labour market by A8 State Nationals.
>
> (ii) The claimant could not rely directly on Article 39 of the Treaty establishing the European Community and/or Article 7 (2) of Regulation EEC/1612/68 as she was not authorised to work for an authorised employer under regulation 7 of the Accession (Immigration and Worker Registration) Regulations 2004.
>
> (iii) The 2004 Regulations were introduced under the authority of paragraph 2 of the Treaty of Accession and must therefore be compatible with the authority given to them by the Treaty of Accession and with the Community law principle of proportionality.
>
> (iv) The Registration Scheme, introduced by the 2004 Regulations pursued the legitimate aims of regulating and monitoring access to the United Kingdom's labour market by A8 nationals and safeguarding the United Kingdom's social security system from exploitation by people who wished to come to the United Kingdom not to work but to live off benefits.
>
> (v) The proportionality of the formalities registration and reregistration and of the consequences of a failure to

> comply with these requirements must be judged in the context of the legitimate aims of the Registration Scheme.

35. We now also have the decision of the Court of Justice of the European Union ('CJEU) in *Prefeta C-618/16*. This was a decision on a request for a preliminary ruling on the following question:

> 'Did Annex XII [to the 2003 Act of Accession] permit Member States to exclude Polish nationals from the benefits of Article 7(2) of Regulation [No 492/2011] and Article 7(3) of Directive [2004/38] where the worker, though he had belatedly complied with the national requirement that his employment be registered, had not yet worked for an uninterrupted registered 12-month period?

36. The response of the Court was as follows:

> 'Chapter 2 of Annex XII to the 2003 Act of Accession must be interpreted as permitting, during the transitional period provided for by that act, the United Kingdom to exclude a Polish national, such as Mr Prefeta, from the benefits of Article 7(3) of Directive 2004/38 when that person does not satisfy the requirement imposed by national law of having completed an uninterrupted 12-month period of registered work in the United Kingdom.'

37. To my mind, that ruling is definitive of the issue of the lawfulness of the derogation from Article 7(3) of Directive 2004/38 and it does not matter that the benefit at issue in *Prefeta* was different to that claimed in the instant case.

Articles 20 and 21 of the Treaty on the Functioning of the European Union ('the TFEU')

38. As was noted above, Mr Black has submitted that the appeal tribunal erred in failing to make findings on the argument raised by the appellant that he had a right to reside at the relevant time under Articles 20 and 21 of the Treaty on the Functioning of the European Union.

39. I begin by agreeing with Mr Gorman that the appeal tribunal, while not making a specific reference to Articles 20 and 21 of the TFEU, did address the question as to whether a right to reside might be acquired through the basis of citizenship.

40. In *Kaczmarek v Secretary of State for Work and Pensions* ([2008] EWCA Civ 1310, *R(IS) 5/09*, '*Kaczmarek*') the Court of Appeal in England and wales was considering, *inter alia*, the following argument:

‘As regards Article 18, Miss Lieven seeks to invoke the approach adopted by the Court of Justice in *Baumbast v Secretary of State for the Home Department* [2002] ECR 1-7091 where it said (at paragraph 94):

> “A citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community Law and, in particular, the principle of proportionality.”

In essence, the case for the appellant is that it is disproportionate to deny a right of residence, and thereby entitlement to income support, to a person who is lawfully resident and as substantially settled as the appellant.’

41. ‘Article 18’ is a reference to Article 18 EC the precursor to Article 21 TFEU. Lord Justice Maurice Kay said the following about that argument, at paragraphs 17 to 23:

> ‘As I have indicated, the dispute by reference to Article 18 turns on proportionality because it is common ground that a right can emerge from between the interstices of Article 18, as it did in *Baumbast*. The question becomes: Is it disproportionate to deny a right of residence to a person in the position of the appellant?
> The scope of Article 18 in this context was explained by Advocate General Geelhoed in *Baumbast*. There the claimant was a German national who came to the United Kingdom to work first as an employee and later on a self-employed basis. His wife and children settled here. He later worked outside the EU, albeit for a German company. He had German medical insurance but his domestic base remained in the United Kingdom. His position *vis-à-vis* a Community law based right to reside was jeopardised by the facts that he was no longer a worker here and nor was he self-sufficient here (because his medical insurance only provided cover in Germany). The Advocate General observed (at paragraph 120) that the rules on freedom of movement “have not kept up with the pace of developments”. He added:

> "On adoption of the Regulation [in 1968] manifestly no account was taken of a case in which a person is ordinarily resident in one Member State whilst working for short periods and in different places for an undertaking which is established in another Member State.
>
> 121. This is a case which was not provided for by the Community legislature. There is no regulatory framework within which the right to remain may be exercised. On those grounds I apply by analogy the regulatory framework applicable to economically active persons. Save for the circumstance not provided for by the Community legislature that Mr Baumbast is not employed in the host country, he satisfies all the other requirements for residence in the United Kingdom; he is the national of a Member State of the European Union, he is a worker, he is resident in another Member State of the European Union (United Kingdom) and his family has a right to remain under Regulation No.1612/68.
>
> 122. I therefore also conclude that Mr Baumbast has a right to remain in the United Kingdom based on Article 18 EC in conjunction with Article 39 EC."

This reasoning plainly informed the judgment of the Court of Justice: see paragraphs 84-86 and 92-94). Its concern is to fill what would otherwise be a lacuna exposed by the passage of time. The lacuna is filled because it would be disproportionate for the "limitations and conditions" contained in the Directive and the domestic Regulations to undermine the direct application of Article 18.
It is abundantly clear that the facts of *Baumbast* were more susceptible to "lacuna filling" than the facts of the present case where, at the material time, the appellant was no longer a worker and nor was she at all self-sufficient. In *Abdirahman*, Lloyd LJ considered that there was no lacuna in that case because Council Directive 90/364/EC on the right of residence expressly confines the right of residence to cases where nationals of other Member States and their families

> "are covered by sickness insurance in respect of all the risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during the period of their residence."

Whereas there was scope for the lacuna approach in *Baumbast*, where the claimant was working (albeit outside the EU) and self-sufficient (save that his medical insurance was German), the same could not be said in *Abdirahman* where the appellants were neither working nor self-sufficient.
It seems that this is what the Commissioner had in mind in the present case when he said (at paragraph 15):

> "However, it seems to me that to rely on Article 18(1) where the Council of the European Communities has apparently deliberately excluded a class of persons from the scope of a Directive would be to attack the Directive … Article 18(1) may be relied upon to supplement a Directive but, in proceedings before a national court or tribunal, it cannot be relied upon to remove limitations necessarily implicit in a Directive."

In my view, this analysis is correct. It is properly founded on *Abdirahman*, by which we too are bound and with which I agree in any event.

There is a further consideration which was referred to by the Commissioner. The Directives in issue in *Baumbast*, *Abdirahman* and the present case have now been replaced by Council Directive 2004/38/EC, which was adopted on 29 April 2004, before the claim for income support was made in this case, although it did not come into force until 30 April 2006. Therefore it does not strictly apply to this case. Its point of interest for present purposes, however, is that it provides for a right of permanent residence after five years' lawful presence which is not conditional on the claimant being economically active or self-sufficient. To that extent it represents a further liberalisation of the European perspective on entitlement to social security benefits. On the other hand, it provides an authoritative insight into the parameters of proportionality when applied to the economically inactive migrant. If, as we must assume, a five year qualification is proportionate in that context, it is

all the more difficult to argue that it is disproportionate to exclude this appellant from income support when, at the time of her claim, she had been in this country for three years and had become economically inactive. Rights conferred by the Directive upon those whose lawful presence is less than five years are conditional upon, amongst other things, self-sufficiency. Although the Directive cannot impact directly on this appeal, I agree with the Commissioner that it is a useful benchmark and provides a steer as to the ambit of proportionality. To put it another way: it would be inappropriate and presumptuous for us to characterise something as a lacuna when it was not identified as such by the Council when it most recently moved to enlarge eligibility.'

42. It seems to me that the key principle is that set out by Mr Commissioner Rowland, as he then was, in paragraph 15 of his decision which gave rise to the appeal to the Court of Appeal, and as set out by Maurice Kay LJ above. Article 21 cannot be relied upon to create a right to reside where limitations in a Directive, as in Council Directive 2004/38/EC in the instant case, do not permit a right to reside.

43. Although not explicit on the point, Mr Black seeks to distinguish *Kaczmarek* by arguing that the appellant was economically integrated in Northern Ireland. With respect to that argument, I cannot accept it. The factual background is analogous to that pertaining in *Kaczmarek*. As I observed above, the appellant, as at the date of the claim to IBJSA, and through no fault of his own, had not been economically active for some time.

The referral of questions to the CJEU

44. During the course of the proceedings Mr Black made an application for the referral of three questions to the CJEU for a preliminary ruling. His submission was as follows:

> 'This case had been stayed following the referral of a question in ***Florea Gusa v Minister for Social Protection and Others***. 3 questions were referred to the ECJ. Question 3 was "is a refusal of a jobseeker's allowance (which is a non-contributory special benefit within the meaning of Article 70 of Regulation No 883/2004) by reason of a failure to establish a right to reside in the host Member State compatible with EU law, and in particular Article 4 of Regulation No 883/2004?"
>
> A decision here could have impacted upon the appellant's case but the ECJ did not answer Question 3 because it decided the case on other grounds. Therefore, a

reference in our case along the lines of Question 3 in Gusa could still be appropriate.

However, we would note the following decision from the Florea Gusa case.

> *"a national of a Member State retains the status of self-employed person for the purposes of the directive where, after having lawfully resided in and worked as a self-employed person in another Member State for approximately four years, that national has ceased that activity because of an absence of work owing to reasons beyond his control."*

It therefore seems reasonable to argue that if a self-employed person in the appellant's circumstances has satisfied the residence test then (the claimant) should too and therefore had a right to reside at the relevant time under Articles 20 and 21 of the Treaty on the Functioning of the EU.

In a recent decision the ECJ in ***Prefeta v Secretary of State for Work and Pensions*** decided, on a referral from the Social Security Upper Tribunal in Britain, that a claimant who had not completed a period of 12 months under the Accession (Immigration and Worker Registration) Regulations 2004 did not retain worker status for purposes of an ESA claim. We respectfully submit that this case differs in that (Mr S's) claim is for IB JSA, a benefit meant to facilitate access to the labour market and so to be differentiated to a claim for ESA.

Should the Commissioner be minded to refer this issue to the ECJ we can summarise our questions as follows:

> **1.** Did Regulation 5 of the Accession (Immigration and Worker Registration) Regulations 2004 constitute a valid derogation from EU law?
>
> **2.** If the derogation was valid, are the right to reside requirements discriminatory on grounds of nationality?
>
> **3.** If the derogation is discriminatory, can such discrimination be justified as part of a legitimate aim by the host state?'

45. Mr Gorman made the following submission in response:

> 'The Department does not consider it necessary to make a referral to the CJEU in the present cases and respectfully submits that the applicable legislation and available case law are sufficient to allow the Commissioner to determine both appeals.'

46. I do not consider that it is necessary to make the reference to the CJEU which Mr Black seeks. In my view, the decision in *Prefeta* answers the first of these questions and the decision in *Patmalniece*, and subsequent decisions as analysed above, answer the second and third questions. I consider that the relevant principles are acte claire.

One further matter arising

47. At an early stage in the proceedings, a submission had been made on behalf of the appellant that the appeal tribunal should have considered an adjournment of the oral hearing of the appeal tribunal hearing as the appellant was not present. That submission was not pursued by Mr Black when he became involved in the proceedings. In the statement of reasons for the appeal tribunal's decision, the appeal tribunal has referred to the absence of the appellant and has set out that it could find no reason to adjourn the oral hearing. It proceeded, accordingly, in the absence of the appellant. I can find no fault with the manner in which the appeal tribunal addressed this issue. In any event, matters have moved on and the appellant has had the benefit of excellent representation in the proceedings before me.

(signed): K Mullan

Chief Commissioner

2 April 2019