IN THE UPPER TRIBUNAL **Case No:** CE/98/2015
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Decision: The decision of the First-tier Tribunal sitting at Margate on 28 August 2014 under reference SC1511/12/01269 having previously been set aside, I remake the decision in the following terms:

> The claimant's appeal against the decision of 16 January 2012 refusing her claim dated 29 September 2011 for employment and support allowance on the ground that she lacked the right to reside for that purpose is allowed. She had such a right to reside by virtue of Art.17 of Directive 2004/38/EC (and its implementing domestic legislation).

I direct the Secretary of State to proceed to determine any remaining aspects of the claim not previously decided upon there may be.

I further direct that sums already paid on account of employment and support allowance in respect of the period 10 October 2011 to 3 July 2013 or part thereof shall be offset against any entitlement the claimant may have in respect of that period or corresponding part thereof in consequence of this decision.

REASONS FOR DECISION

1. On 16 January 2012, the Secretary of State refused the claimant's claim for employment and support allowance ("ESA") on the ground that she lacked the right to reside for that purpose. On 28 August 2014, the First-tier Tribunal ("FtT") allowed the claimant's appeal. The Secretary of State appealed further, with permission given by a judge of the FtT.

2. A subsequent decision, dated 2 September 2014, awarded the claimant ESA with effect from 11 April 2014. The present appeal thus concerns a "closed" period.

3. The appeal has been the subject of three interim decisions in the Upper Tribunal, to which reference should be made for their detail. However, in summary:

> (a) The First Interim Decision (dated 9 June 2016) set aside the decision of the FtT for error of law and gave directions for the further conduct of the appeal.
>
> (b) The Second Interim Decision (dated 20 June 2017) held that from an unknown date no earlier than 1 April 2007 and no later than 11 November 2007 the claimant had "permanent incapacity to work" for the purposes of Article 17 of Directive 2004/38/EC ("the Directive") and

that when she stopped working she did so as the result of such permanent incapacity.

(c) The Third Interim Decision (dated 4 September 2017) ([2017] UKUT 360 (AAC)) addressed whether the present case was distinguishable from the case, then before the Court of Justice of the European Union, of C-618/16 *Prefeta*. In *Prefeta*, the CJEU subsequently held that the United Kingdom had been entitled pursuant to the accession arrangements for the so-called A8 states to derogate from Article 7(3) of the Directive. The Third Interim decision held that, unlike the derogations as to Article 7(3) which had been made by the Accession (Immigration and Worker Registration) Regulations 2004/1219 ("the 2004 Regulations"), the United Kingdom had made no such derogation in the case of Article 17 of the Directive, even if, contrary to the Upper Tribunal's view because of the legislative origins of Art.17, there was power to have done so. Thus, though the claimant's work had only belatedly been covered by a certificate under the 2004 Regulations, she nonetheless had had the status of a "worker" for the purposes of Art.17. The case was then stayed pending the decisions of the Court of Appeal and then the Supreme Court in what became *Secretary of State for Work and Pensions v Gubeladze* [2019] UKSC 31.

4. Both parties have sought to reserve their position as to some aspects of the above interim decisions pending a final decision in the appeal.

5. The claimant had moved to the United Kingdom on an unknown date in March 2005. She worked in various fish and chip shops, taking maternity leave for the birth of her first child in 2006. Her employment was registered under the 2004 Regulations only belatedly, on 21 December 2006. On 23 March 2007 she went on maternity leave for the birth of her second child. Regrettably, her mental health then took a serious turn for the worse, considered in detail in the Second Interim Decision, leading to the finding of the onset of parament incapacity above. Her employment was terminated on 1 November 2007.

6. There were two issues in *Gubeladze*. The first need not concern us: it was not the claimant's case that she was relying on any employment or period of job-seeking between 1 May 2009 and 30 April 2011, so whether or not the extension of the Worker Registration scheme to cover that period was lawful is irrelevant. The second point undoubtedly is relevant, concerning (put shortly) whether factual or lawful residence was needed for the purposes of Art.17.

7. As is well-known, Article 16 provides for what is described as a permanent right of residence after 5 years' lawful residence. Art. 17 then provides so far as material that:

"Exemptions for persons no longer working in the host Member State and their family members

1. By way of derogation from Article 16, the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by:

(a)workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years.
If the law of the host Member State does not grant the right to an old age pension to certain categories of self-employed persons, the age condition shall be deemed to have been met once the person concerned has reached the age of 60;

(b)workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work . …

(c) [not material]

Periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness or accident shall be regarded as periods of employment.

2-4 [not material]"

8. It was not in dispute that, but for the possibility of a derogation from the Directive in respect of A8 nationals, the claimant would have been a worker when she was working in the employment referred to in para 5 above. As noted, the Third Interim Decision held that there had been no such derogation in respect of rights under Art. 17. Consequently, the remaining issue was whether the requirement to have "resided continuously" required factual residence or lawful residence (in the sense of residence in accordance with the Directive). If factual residence sufficed, the claimant could demonstrate more than the two years required from her arrival in the UK in March 2005 to the unknown date in 2007 (not before 1 April 2007) when she became permanently incapable of work.

9. *Gubeladze* concerned Art.17(1)(a) rather than (b). The Upper Tribunal held that Art 17(1)(a) required factual residence, not lawful residence. On that point, its decision was reversed by the Court of Appeal. On further appeal, the decision of the Supreme Court on the lawfulness of the extension of the Worker Registration Scheme was sufficient to decide the appeal against the Secretary of State. Nonetheless, the Justices, having received detailed submissions from Leading Counsel on the point, acknowledging (para 79) that the interpretation of Article 17(1)(a) might be important in other cases and indicating their view that the Court of Appeal had erred on the point, proceeded to consider the issue at paras 80 to 92, holding that factual residence suffices.

10. Following the Supreme Court's decision in *Gubeladze*, the parties were afforded a brief opportunity to apply for permission to file a further submission if they wished. On 29 July 2019 the claimant's representatives, rather that applying for permission to file a submission, simply filed one. The email was copied to the Secretary of State's representatives who then indicated their

intention not to file one. The requirement for permission was to avoid the possible need for a further round of responses to submissions unless I concluded submissions would materially advance matters, which I considered unlikely. As it is though, the Secretary of State, having seen the claimant's submission, has neither objected nor expressed any wish to file a submission of her own, so to the extent necessary I give permission for the claimant's submission of 29 July 2019 to be made.

11. The remaining question is whether there is any reason not to apply what the Supreme Court said in relation to Art. 17(1)(a) in *Gubeladze* to Art. 17(1)(b) in the present case. In my view there is not. What has become Art.17(1)(b), like what has become Art. 17(1)(a), is derived from Regulation 1251/70. At para 80 the Supreme Court contrasted the provision made by recital (19) of the Directive (in respect of Art.17) with that made by recital (17) (in respect of Art.16). The point is relevant to both limbs of Art 17(1). The textual analysis in para 81, though in places expressed by reference to limb (a) (with which the Supreme Court was concerned), is equally applicable to both. Reliance in para 82 on recital (3) of the Directive and on Regulation 635/2006 is applicable to both. The textual points in para 83 apply to Art. 17(1) generally as do the points made in para 84 about the impossibility of reading Art 17(1) as referring to legal residence in the sense of C-424/10 and C-425/10 *Ziolkowski*. The rejection of the submission for the Secretary of State in para 86 and those in paras 87 to 91 are equally applicable to both limbs.

12. I have directed that an offset be made so as to prevent double recovery. The circumstances are addressed in paras 6 and 7 of the Second Interim Decision. Put briefly, it appears that even though the Secretary of State was at the time attempting to appeal against the FtT's decision, a payment implementing the FtT's decision was made by one part of the DWP despite attempts by another part to prevent it and a five figure sum paid out.

13. The evidence suggests that the claimant was outside Great Britain between (it appears) September 2012 and April 2013. The implications (if any) of that are not the matter before me in the present procee dings.

14. In conclusion, it remains for me to thank counsel and their instructing solicitors for their assistance in this complex, sensitive and long-running case.

CG Ward
Judge of the Upper Tribunal
13 August 2019