IN THE UPPER TRIBUNAL **Appeal No: CTC/899/2013**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of Her Majesty's Revenue and Customs.

The decision of the First-tier Tribunal sitting at Manchester on 1 November 2012 under reference SC946/12/01073 involved an error on a material point of law and is set aside.

The Upper Tribunal gives the decision the First-tier Tribunal ought to have given. The decision is to uphold the decisions made by HMRC on 30 November 2010.

This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

Representation: Mr Tim Buley of counsel represented Her Majesty's Revenue and Customs (the appellant).

The claimant (the respondent) neither appeared nor was represented at the Upper Tribunal hearing.

REASONS FOR DECISION

Introduction

1. This appeal concerns the right to reside test for what is sometimes termed 'A2 nationals'; that is, nationals of Bulgaria and Romania. The claimant (the respondent to this appeal, but the appellant before the First-tier Tribunal) and his wife are both Romanian nationals. I will refer to him from now on as 'the claimant', and the appellant before the Upper Tribunal as 'HMRC'.
2. More particularly, the appeal concerns whether, and if so the extent to which, the derogations made by the UK Government for Romanian

(and Bulgarian) nationals between 1 January 2007 and 1 January 2011 in respect of their EU law rights as employed 'workers' in the UK extended to what was article 12 of EC Regulation 1612/68.

Factual background

3. The claimant made a claim to HMRC for working and child tax credit in May 2009. In so far as is relevant to this appeal, awards were then made to him of child and working tax credit for the periods 10 May 2009 to 5 April 2010 and then from 6 April 2010 to 5 April 2011. The claim and awards were based on the claimant being self-employed. Awards of child benefit were also made. Whether the child benefit awards were made to the claimant or his wife is now immaterial.

4. The tax credit awards were selected for what was a called 'a check' by HMRC in July 2010. It is perhaps important to note that the legislative basis for this selection differed between the 2009/2010 award and the 2010/2011 award. As this was not in any sense fully and properly set out in HMRC's appeal response to the First-tier Tribunal, I devote some attention this issue here. It is not, however, germane to the main issue on which this appeal turns. Some of the facts set out below have come from a submission made by HMRC after the hearing before me.

5. The claim for tax credits made in May 2009 had led to a decision on 25 September 2009 to make an award of both tax credits under section 14 of the Tax Credits Act 2002 (TCA). As is the case with the structure of the tax credits scheme, that was an award ending at the end of the tax credits year on 5 April 2010. A final notice was issued under section 17 of the TCA in respect of this award on 28 April 2010 and a response made to that notice by the claimant and his wife on 25 June 2010. An entitlement "decision after final notice" was than made by HMRC on 8 July 2010, and notified on 12 July 2010, under section 18 of the TCA. This decided that the claimant and his wife were entitled to both tax credits for the period 10 May 2009 to 5 April

2010. For reasons which are unclear, the very next day however HMRC issued a letter to the claimant and his under section 19 of the TCA of its intention to enquire into the entitlement decision for 2009/2010. This section 19 enquiry was made in time, falling as it did within one year of the section 17 notice of 28 April 2010: see section 19(4)(b) of the TCA. It was HMRC's decision on this enquiry, made pursuant to section 19(3) of the TCA, which led to the decision under appeal to the First-tier Tribunal that the claimant and his wife were not entitled to either working or child tax credit for the period 10 May 2009 to 5 April 2010.

6. In the meantime, however, a decision had been made for the following tax credits year. This again, as understand it, was a section 14 decision. The claimant and his wife were awarded child and working tax credits from 6 April 2010 to 5 April 2011. Quite when that awarding decision was made is not clear from the appeal papers. No explanation for this award or the legislative basis for its removal was provided by HMRC in its appeal response to the First-tier Tribunal. It is reasonably apparent from the appeal response, however, that the appeal was taken as being against both the section 19(3) TCA decision removing entitlement for the 2009/2010 year and the decision removing the award for the tax credit year 2010/2011. Moreover, HMRC's decision letter of 30 November 2010 did, if the reader ignores its misleading subject heading in bold on the first page and hunts through it to the very end, include a decision that for the tax credits award for the year 2010/2011 was being "terminated". Allied to this, HMRC had in fact issued a separate 'enquiry' letter, also dated 13 July 2010, to the claimant and his wife about the tax credits year 2010/2011. This said "Your claim has been selected for review".

7. Piecing all of this together, and in the absence of any explanation from HMRC, it seems that this 'review' into the 2010/2011 award and the 'termination' decision which followed it must have been a revision

decision under section 16 of the TCA on the basis that HMRC had "reasonable grounds for believing" that the claimant and his wife ought never to have been awarded tax credits for that tax credits year (on right to reside grounds), and deciding to "terminate the award" under section 16(1) of the TCA[1].

8. What is (at least tolerably) clear is that what was under appeal to the First-tier Tribunal was both the section 19(3) non-entitlement decision for May 2009 to April 201o and the section 14(1) decision terminating the award for 2010/2011.

9. The initial basis for the enquiry and review seemed to focus on the claimant's self-employed work as a 'Big Issue' seller and any other work he did. The same sorts of questions were asked of his wife. This then led to HMRC's decisions of 30 November 2010. The decisions were to the effect that the claimant did not have a right to reside in the UK because his self-employed work as a "Big Issue" seller was not "genuine and effective" and therefore did not give him 'worker' status under EU law. Further, the claimant's work as a cleaner for Paragon Limited was as an employee and as that work had not been authorised under the "Worker Authorisation Scheme" for Romanian (and Bulgarian) nationals employed in Great Britain, this work did not confer on him 'worker' status either. A virtually identical decision letter was issued to the claimant's wife. She too had relied on working as a self-employed cleaner through Paragon Ltd, but she had not worked as a Big Issue seller.

10. HMRC's decision letters of 30 November 2010 also covered child benefit. The letters said that child benefit also had the 'right to reside' test as a condition of entitlement and as neither the claimant nor his wife had a right to reside, there could be no entitlement to child

[1] Quite what this may mean about any subsequent section 18 TCA decision required to be made for the tax credits year 2010/2011 (e.g. whether any such decision was made or is still to be made, and whether it was or may still be open to appeal), may need to be worked out but does not need to be addressed on this appeal.

benefit. The letter continued "I will be asking my colleagues in the Child Benefit Office to amend your Child benefit awards to zero from the date the award began". That, however, was the sum total of the information before the First-tier Tribunal on child benefit. As is set out below the child benefit decision was *also* appealed but despite this HMRC's appeal response to the First-tier Tribunal said nothing whatsoever about child benefit and proceeded as if the only matters in issue were child tax credit and working tax credit.

11. The decisions (including the decision on child benefit) were appealed by the claimant. It is not clear if his wife made any separate appeal. His grounds of appeal were: (i) that his work as a "Big Issue" seller was genuine and effective; (ii) that he was not an employee of Paragon Limited; and (iii) therefore he was lawfully working in Great Britain (as a self-employed person) and so had a right to reside. The appeal letter refers to the decision letters raising overpayments in respect of both of the tax credits awards and the child benefit award, however no separate overpayment decision in respect of child benefit under section 71 of the Social Security Administration Act 1992 is in the appeal bundle or was before the First-tier Tribunal. (Overpayments of working and child tax credits are automatically recoverable and not subject to any section 71 'defence' for claimants.)

12. The appeal came before the First-tier Tribunal in Manchester. The first hearing was adjourned as the First-tier Tribunal wanted written argument from the parties (the claimant now being represented) on whether the claimant at the material times had "a right to reside as the primary carer (or spouse of the primary carer) of a child who entered into full-time education during a period when the [claimant] was in self-employment" based on article 12 of EC Regulation 1612/68. Arguments were submitted on both sides. HMRC agued that regulation 12 of EC Regulation 1612/68 could not assist the claimant as it only covered the employed and did not cover the self-employed. The claimant's representative 'parked' his submissions on this issue

on the basis that whether regulation 12 of EC Regulation 1612/68 covered the self-employed was to be decided by the Court of Justice of the European Union (CJEU) in a case called *Czop* (Case C-147/11). He argued in any event that the self-employed work which the claimant had carried out as a Big Issue seller was 'genuine and effective'.

13. The First-tier Tribunal then decided the appeal after another hearing. It "allowed the appeal in part" and set aside HMRC's decision of 30 November 2010. It found in its *Decision Notice* that for the period prior to 24 March 2010 the claimant's work was self-employed work but there was insufficient evidence upon which this could be treated as qualifying remunerative work. From 24 March 2010 it found that the claimant was an employee of a cleaning company (as was his wife) and his normal working hours were 16 hours a week. The First-tier Tribunal then said:

> "HMRC must make a new decision on the basis of the findings of fact [about the self-employment before 24 March 2010 and employment after that date]. That decision will carry a new right of appeal."

14. A statement of reasons for the decision was sought, perhaps surprisingly by the claimant's representative rather than by HMRC notwithstanding the odd form of the decision the First-tier Tribunal had made. The statement of reason provided did not add materially to the *Decision Notice*. HMRC then sought permission to appeal, It did so on the basis that it was unclear:

(i) which part of the appeal had been upheld –and what part(s) of the decision under appeal had been left undisturbed?;
(ii) what had actually been decided?;
(iii) why no reference was made at all to EU law on rights of residence or to the employment restrictions on Romanian nationals?;
(iv) why the decision was silent on entitlement to child tax credit and child benefit?; and

(v) how HRMC was to implement the directions given to it?

The First-tier Tribunal gave permission to appeal without giving any reasons for why it had given permission to appeal.

15. In the initial directions on the appeal I said:

> "On a preliminary view, it seems to me strongly arguable that the First-tier Tribunal erred in law in the ways contended for by HMRC. In particular it is very arguable that the tribunal failed to marry up its findings on self-employment (as a Big Issue seller) and employment (with Paragon) to the critical issue of whether [the claimant], as what is termed an "A2" national, had a "right to reside" in....Great Britain for tax credit purposes. In failing to decide that issue it is very arguable that the tribunal erred in law."

16. Matters were then somewhat held up as the Upper Tribunal (AAC) Office sought to obtain a response to HMRC's appeal from the claimant. None was forthcoming and he had ceased to have a representative. That led me to further consider the appeal and issue further directions on it. Those directions cover what this appeal is now about and therefore repay setting out in full.

> "In [my earlier] directions I sought the views of the parties as to my setting aside the First-tier Tribunal's decision for error of law and remitting the appeal to another First-tier Tribunal to be re-decided. HMRC provided a late consent to this course of action. Nothing, however, has been heard from [the claimant]. Mr Best from HMRC had helpfully provided details of a new address for [the claimant] in Manchester, to which a fresh appeal bundle together with the directions of 7 May 2013 were issued on 9 January 2014, but that has not elicited a reply from [the claimant] either. I have noted however that it would seem that at no stage has [the claimant's] representative.....been notified of the appeal to the Upper Tribunal, and I return to this further below.
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> In the light of the lack of any input from [the claimant] and therefore the likelihood of his not attending any hearing of his appeal were it to be remitted for rehearing before a freshly constituted First-tier Tribunal, in coming to write up my decision on this appeal I have had to consider the utility of remitting the appeal to another First-tier Tribunal, that has led me to focus more on closely than I otherwise might have done on the issues that need to be determined on the substantive appeals below, and that in turn has brought the following new issues into focus. The purpose of these directions is therefore to

seek the views of parties (including hopefully the [representative]if it is still acting for [the claimant]), on these issues and how generally this appeal ought to be disposed of.

The first new issue arises in the context of the tribunal's findings of fact in relation to [the claimant's] self-employment as a Big Issue seller and then employment as an employed earner with Paragon Limited as a cleaner. Subject to argument not so far made to me, it seems to me well arguable that the First-tier Tribunal's findings and conclusions on these two periods of economic activity were properly based on the evidence before the tribunal: the fault lay in the tribunal failing to fully work those findings through in terms of the "right to reside" test and entitlement to tax credits and child benefit. In other words, it seems to me very arguable that the tribunal was entitled to find (i) that [the claimant] was self-employed as a Big Issue seller but that even if they were genuine and effective earnings no *Baumbast* type right to reside could arise from such work (following *Czop* and *Punakova*); and (ii) that he was employed as an employed earner by Paragon and that work was 'genuine and effective'.

Based on those findings it seems to me, at least at present, that the self-employed work could give rise to no right to reside sufficient to invalidate the decisions of HMRC under appeal. Likewise, the finding of the work for Paragon being employed earner's employment as it was not "authorised" pursuant to the Accession (Immigration and Worker Authorisation) Regulations 2006 could not give rise to any right to reside in terms of [the claimant] being a "worker" under Article 7 of Directive 2004/38/EC or the Immigration (EEA) Regs 2006.

Pausing at this point, *if* the above is correct (and no other issues arise), then it may be that the appropriate course of action would be for the Upper Tribunal to set aside the First-tier Tribunal's decision but dismiss [the claimant's] appeals from HMRC's decisions concerning tax credits and child benefit.

However, two issues arise which may benefit [the claimant]. The first may be stated as follows. The findings of the tribunal provide that [the claimant] was engaging in genuine and effective work as an employed earner (i.e. as an employee) from 24 March 2010. Absent the worker's authorisation scheme that employed work on its face would have made him a person who at the relevant time was "**employed in the territory of the [UK]**" under article 12 of Regulation (EEC) 1612/68. However, do the terms of the agreement between Romania and the European Union for the former's accession to the EU allow for the UK to derogate from article 12 of Regulation (EEC) 1612/68?

Put another way, does any derogation in respect of articles 1-6 of Regulation (EEC) 1612/68 and a "worker" thereunder (assuming that the Treaty of Accession between Romania and the EU followed the same drafting course as Treaty between what is termed the "A8 countries" and the EU did earlier) affect a person who is or has been "employed" under article 12 of 1612/68?

In *Collins –v- SSWP* (C-138/02) (*RJSA)3/06*) the ECJ stated at paragraph [32] that:

> "[t]he concept of "worker" is thus not used in Regulation No 1612/68 in a uniform manner. While in Title II of Part I of the Regulation this term covers only persons who have already entered the employment market, in other parts of the same Regulation the concept of "worker" must be understood in a broader sense".

Article 12 of 1612/68 appeared in *Title III Workers' families* whereas Article 7 appeared in *Title II Employment and Equality of Treatment* and Articles 1-6 appeared in *Title I Eligibility for Employment*.

Moreover in *SSWP –v- JS* [2010] (IS) UKUT 347 (AAC) Upper Tribunal Jacobs said (at paragraphs 15-18):

> "Ms Rhee's case was set out in paragraph 6.2 of her skeleton argument. In essence, she argued that the child's right under Article 12 only arises when the parent has completed 12 months' work. Until then, the parent's rights are qualified. The key passage reads: 'the fact alone that the dependent child may have availed himself of his right to access education under Article 12 cannot serve to transform what may have been only a qualified right on the part of his parent to rely on Article 12 ... into a qualified right to rely on Article 12.' That passage shows the flaws in the argument. The Article 12 right is conferred on the child, not on the parent. The parent's status as a worker serves only to trigger the child's right. The parent does not take advantage of the right as worker but only at most as primary carer. And the Baumbast right does not depend on the parent having any continuing status as worker.
> If I understood Ms Rhee's oral presentation correctly, she argued that Article 12 was covered by the derogation in Poland's Treaty of Accession. I reject that argument. It is a right for the child, not the worker. It is not linked to any of the provisions in Articles 1 to 6, either on their wording or on their substance. It is a right with continuing effect independent of the future status of the person whose work gave rise to the child's right.
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> Even if there were an argument that Articles 1 to 6 formed (as Ms Rhee put it) a gateway to Article 12, I would still reject her argument. The derogation must be interpreted narrowly and the omission of any reference to Article 12 in the Annex is sufficient to prevent it being covered.
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> The simple answer to the Secretary of State's case is this. The Treaty of Accession allowed member States to derogate from a person's rights as a worker. The United Kingdom has implemented that derogation partially. It could have deprived persons from the A8 countries of any rights until they had completed 12 months' work. It did not do so and the claimant is entitled to the benefit of the limited rights that it conferred on her."

Taken together these two authorities may provide the basis for an argument that the child's educational right conferred under article 12 of 1612/68 (and the contingent right of his or her primary carer) is not dependent – in the case of A2 nationals – on his or her parent having been employed in authorised employment. It may be noteworthy that *JS* was decided after the House of Lord's decision in *Zalewska* [2008] UKHL 67 (*R 1/09 (IS)*).

> On the other hand, *Collins* was not concerned with what I will term Accession State nationals and in *JS* the claimant had been in registered employment when her child entered education.
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> These issues are of sufficient importance, and potential relevance to [the claimant's] case, to merit seeking submissions on them.
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> The second issue concerns child benefit. HMRC has criticised the First-tier Tribunal for not making any decision on the appeal against the child benefit decision. I think that aspect of its criticism of tribunal may be a little unfair. HMRC's appeal response to the First-tier Tribunal makes no mention of any child benefit decision and the decision itself only appears on pages 140-143.
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> Of more importance, however, is the effect of the decision of Chief Commissioner Mullen in Northern Ireland in *AS –v- HMRC* (CB) [2013] NICom 15. In *AS* the Chief Commissioner has held, distinguishing *Patmalniece* [2011] UKSC 11; [2011] AACR 34, that the right to reside test in Northern Ireland child benefit regulations is directly discriminatory contrary to article 3 of Regulation (EC) 1408/71 and therefore unlawful. The decision in *AS* may be under appeal to the Court of Appeal in Northern Ireland.
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> Ought I to follow *AS*; if not, why not; and does its reasoning not extend to child tax credit?
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> These issues, too, merit further submissions."

17. These directions led to a reply from the claimant's representative but only to the extent of it saying it no longer acted for the claimant. The claimant has continued to take no part in these proceedings.

18. For reasons which are no longer relevant, unfortunately it then took HMRC a considerable period of time to file its response to the issues raised in the directions set out in paragraph 15 above. On the two issues raised it argued as follows.

    (i) Romania had joined the EU on 1 January 2007 under the Treaty of Accession of Bulgaria and Romania of 24 April 2005. Article 1.2 of Annex VII to the Protocol to the Treaty provided for derogations from articles 1 to 6 of Regulation (EEC) 1612/68 to be adopted in, inter alia, the UK for a transitional period of two years from the date of accession extendable to five years. Articles 1 to 6 of Regulation 1612/68 appeared under Title I *Eligibility for Employment*, whereas article 12 appeared under Title III *Workers' Families*. Articles 1 to 6 of Regulation 1612/68 were concerned with matters such as

access to, here, the UK's labour market and availability in finding employment, and did not deal with the rights of a person who is or has been employed. Article 12 of the same Regulation also did not deal with the rights of persons who are or have been employed in the UK but rather with the educational rights of a child of such a person, and that educational right was not found in articles 1-6. The distinction between article 12 rights of a child in education and those of those seeking work under articles 1-6 of Regulation 1612/68 was central to the Upper Tribunal's reasoning *SSWP –v- JS* [2010] (IS) UKUT 347 (AAC). The terms of Romania's accession to the EU did not enable the UK to derogate from article 12 of Regulation 1612/68 nor did the derogations from articles 1-6 of the same Regulation affect a person "who is or had been employed" within the meaning of article 12. However the claimant had at all times described himself as "self-employed" and as such he could not benefit from article 12 of Regulation 1612/68: per the decisions of the Court of Justice of the European Union in *Czop and Punakova –v- SSWP* (Cases C-147/11 and C-148/11). As for any work the claimant had done as an employee, this work had to be covered by authorisation under the "Worker Authorisation Scheme", which the claimant did not have, and this meant that he at no stage had acquired the status of "worker" under EU law. In order for him to have acquired such status he had to secure employment. This, however, took the enquiry back to articles 1-6 of Regulation 1612/68 and the claimant had not secured access to the UK's employment market in the manner dictated by the permitted derogations from those articles agreed in the Protocol to the Treaty of Accession. As such he was not a "worker" and so had to be seen for the purposes of article 12 of Regulation 1612/68 as not having been employed in the UK.

(ii) As for child benefit and the decision in *AS –v- HMRC* (CB) [2013] NICom 15, this had been overturned by the Northern Ireland Court of Appeal in *HMRC –v- Aiga Spiridonova* [2014] NICA 63; [2015] 1 CMLR 26. The court there held that any discrimination in the right to reside test in child benefit was indirect but was objectively justified, and the Upper Tribunal should follow or be persuaded by that decision.

19. As I was not entirely clear as to the correctness of HMRC's argument as summarised in paragraph 18(i) above, I directed an oral hearing of the appeal. The focus of that hearing was on whether the claimant had a right to reside under article 12 of Regulation 1612/68 at the date of the decision under appeal based on the First-tier Tribunal's finding that he was an employee of Paragon Advanced Cleaning

("Paragon") from 24 March 2010 working 16 hours per week. I asked why the claimant was not "**employed in the [UK]**" under article 12 of 1612/68 based on this employment[2]. If he had such a right to reside then on the face of it that would have meant that he and his wife were entitled to child tax credit (and child benefit) from 6 April 2010 at least, and perhaps working tax credit as well; or at least they would not be 'disentitled'' on the basis of not having a right to reside. The hearing was focused in this way because I was satisfied on the basis of the evidence before the First-tier Tribunal and the lack of any argument from the claimant thereafter that the self-employed work as a Big Issue seller was not 'effective and genuine" and so was satisfied that that work could not lead to the claimant having a right to reside.

Discussion and conclusion

20. Having heard from Mr Buley on behalf of HMRC at the hearing before me and reflected further on the arguments, I am now satisfied that HMRC's arguments are correct and that the claimant did not have a right to reside in the UK at any time relevant to the decisions under appeal.

21. Before explaining why the claimant did not have a right to reside based on his employment with Paragon I need, however, to deal with the First-tier Tribunal's decision and whether it can stand as a legally correct decision. The answer to that has to be "No". Even putting to one side the issue of the child benefit decision, which for the reasons given above the First-tier Tribunal cannot rationally be criticised for missing, the First-tier Tribunal's decision was fundamentally in legal error for not giving an outcome decision in respect of the decisions on tax credits which it did understand were under appeal to it.

22. I accept that HMRC's appeal response to the First-tier Tribunal was not a model of clarity. The **decision**, however, given in Section 3 of

[2] It is not, nor has it ever been, disputed that at least one of the claimant's children was in school education at the relevant time and would otherwise have come within article 12 of Regulation 1612/68.

the HMRC's appeal response to the First-tier Tribunal was that the award of tax credits had been disallowed and the First-tier Tribunal was therefore required to decide on the appeal against that decision, having set aside HMRC's decision of 30 November 2010, whether the claimants' awards of tax credit should be allowed or disallowed; and that if failed to do. Its decision must therefore be set aside.

23. Having set aside the First-tier Tribunal's decision I have two options open to me as provided for under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007. I can either remit the appeal to be re-decided afresh by another First-tier Tribunal or I can remake the decision myself. There is in my judgment no sensible purpose in my taking the first option. The decision under appeal is now very old and the appeal against it ought to be decided as soon as is practicable; remitting the appeal to be re-decided by the First-tier Tribunal would simply add to the time it takes for the appeal to be decided. Moreover, remission as far as I can see would serve no useful purpose as the claimant's lack of any engagement with the Upper Tribunal on this appeal does not suggest he would involve himself, and attend before, the First-tier Tribunal on any new hearing of the appeal. I therefore consider I am in as good a position as the First-tier Tribunal would likely to find itself in in terms of deciding the appeal.

Spiridononva

24. I deal firstly with the separate argument for child benefit (and, on HMRC's concession, child tax credit) based on *Spiridonova*. I can deal with this very briefly as I accept that I ought to follow the decision of the Northern Ireland Court of Appeal in *Spiridonova*, even though strictly speaking it is not binding on me: see *R(SB) 1/90*, paragraphs 26-27 of *SSWP –v- Deane* [2010] EWCA Civ 699; [2011] 1 WLR 743; [2010] AACR 42, and paragraph 29 of *EC-v-SSWP* (ESA) [2015] UKUT 618 (AAC). No argument has been made to me providing any basis for me not to follow *Spiridonova* nor can I

identify any strong argument to enable me conscientiously not to follow it.

Big Issue

25. Turning then to the self-employed work as a Big Issue seller, even though I have set aside the First-tier Tribunal's decision, I accept and adopt its finding that there was insufficient evidence showing the remuneration received by the claimant for this work and, based on this, I conclude that the claimant's self-employment as a Big Issue seller was not "effective and genuine" and was on such a small scale as to be regarded as purely marginal and ancillary: per *Levin* [1982] ECR 1035.

26. The Big Issue work took place in the tax credits year 2009/2010 and was said by the claimant to have occurred between May 2009 and the middle of March 2010. He said that he worked as a seller of the Big Issue for 16 hours over five days a week. There is, however, little to corroborate the extent of this work. The claimant in a letter of 22 July 2010 to HMRC said that he had included receipts for Big Issues purchased from him for the period from 19 November 2009. These are set out elsewhere in the appeal bundle and show between 10 and 59 magazines sold by him on various days between 19 November 2009 and 7 March 2010. He was, however, unable to provide receipts for the period from May 2009 to 18 November 2009 as he said he had had his bag stolen at the end of 2009 and he had kept his records in this bag. HMRC's appeal response sought further evidence as to this theft (e.g. a police report) but this was not provided by the claimant.

27. The basis for self-employed work as a Big Issue seller was that the claimant paid £1 for each copy of the magazine he sold at £2 a magazine. He thus made a gross profit of £1 per magazine sold. For the period for which invoices had been supplied, the gross profit was £1066. Once travel expenses are deducted this become a net profit of

£890, which translates to £37.83 per week or £2.36 per hour. This leaves out of account the period from May 2009 to 18 November 2009. I do not consider this was "effective and genuine" self-employment given the lack of corroboration of the hours worked each week and the very low level of earnings if spread over 16 hours each week. I note that this was the sole work during this period and was being done to support the claimant, his wife and their seven children.

28. This finding is sufficient to dispose of any argument relying on the self-employed work as a Big Issue seller. I therefore decline to further delay deciding this appeal on the basis of any challenge in the Court of Appeal in the case of *Hrabkova –v- SSWP* to the decision of the Upper Tribunal in *RM –v- SSWP* (IS) [2014] UKUT 0401 (AAC); [2015] AACR 11. The decision in *RM* holds, in effect, that being "employed" for the purposes of article 12 of EC Regulation 1612/68 or article 10 of Regulation (EU) 492/2011 does not extend to the self-employed. Here, however, on the above finding the claimant's work does not get him past first base of showing him as having been engaged in effective and genuine self-employment, so even if the view in *RM* was to be overruled by the Court of Appeal in *Hrabkova* (which in my judgment is unlikely in the light of how the CJEU decided *Czop and Punakova*) this would not benefit the claimant as he still would not be able to satisfy article 12 of Regulation 1612/68 based on his time selling the Big Issue.

Article 12 of 1612/68

29. The basis of the argument here is foreshadowed in the directions set out in paragraph 16 above. In short the argument is that article 12 of Regulation 1612/68 sits outside and is not affected by the derogations made by the Treaty of Accession to articles 1-6 of Regulation 1612/68 and so the claimant's employed work for Paragon, which it is accepted was "effective and genuine", was sufficient to bring him within article 12 and the word "employed" used within that article even though that

employment was not authorised under the Worker Authorisation scheme.

30. The argument does not succeed in my view because in order to be "employed" for the purposes of article 12 of Regulation 1612/68 a person has to have been admitted to the UK employment market in the first place under article 1.1 of Regulation 1612/68 and in order to do that the claimant had to meet the conditions of the UK's derogations from articles 1-6 of Regulation 1612/68 as set out in the Worker Authorisation scheme. As it is accepted that the claimant did not meet those conditions, the legal effect was that he had not been admitted to employment in the UK and so had not been "employed" in the UK under article 12 of Regulation 1612/68. Furthermore, properly understood this result is not inconsistent with *SSWP –v- JS* [2010] (IS) UKUT 347.

31. The legislative starting point is section 3(3) of the TCA. This is in Part 1 of the TCA and provides that claims for tax credits may only be made by persons who are over the age 16 and are "in the United Kingdom". Section 3(7) of the TCA then provides that "[c]ircumstances may be prescribed in which a person is to be treated…. as being, or as not being, in the United Kingdom". Those circumstances are prescribed in regulation 3 of the Tax Credits (Residence) Regulations 2003, which provided so far as is material at the relevant time as follows:

> "**Circumstances in which a person is treated as not being in the United Kingdom**
>
> 3.—(1) A person shall be treated as not being in the United Kingdom for the purposes of Part 1 of the Act if he is not ordinarily resident in the United Kingdom.
>
> (4) For the purposes of working tax credit, a person shall be treated as being ordinarily resident if he is exercising in the United Kingdom his rights as a worker pursuant to Council Regulation (EEC) No.1612/68…… or he is a person with a right to reside in the United Kingdom pursuant to Council Directive No. 2004/38/EC.

> (5) A person shall be treated as not being in the United Kingdom for the purposes of Part 1 of the [TCA] where he
> (a) makes a claim for child tax credit……on or after 1st May 2004; and
> (b) does not have a right to reside in the United Kingdom."

The effect of these provisions is that the claimant had to be exercising his rights as a 'worker' under Regulation EC 1612/68 or otherwise exercising a right of residence in the UK. For the purposes of this appeal it is only necessary to address the first of these criteria as there is no suggestion that at the material time he had a right to reside arising outside of Regulation 1612/68.

32. Part I of Regulation 1612/68 is titled *Employment and Workers' Families*. Articles 1-6 and article 12 fall under Part I. Articles 1-6 fall under a sub-heading Title I *Eligibility for employment*. Article 1 provides that:

> "1.1 Any national of a Member State shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.
>
> 1.2 He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State."

Article 3(1) then provided, inter alia, that:

> "3.1 Under this Regulation, provisions laid down by law, regulations or administrative action or administrative practices of a Member State shall not apply:- where they limit application for and offers of employment, or the right of foreign nationals to take up and pursues employment or subject these to conditions not applicable in respect of their own nationals."

And Article 5 provided:

> "5. A national of a Member State who seeks employment in the territory of another Member State shall receive the same assistance

> there as that afforded by the employment offices in that State to their own nationals seeking employment."

33. Article 12 in Regulation 1612/68 appeared under the sub-heading Title III *Workers' Families* and provided:

> "The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory."

34. The next piece of the legislative jigsaw is paragraphs one and two of Annex VII to the Treaty of Accession of Bulgaria and Romania of 24 April 2005. Paragraph one sets the starting point. It is:

> "Article 39 and the first paragraph of Article 49 of the EC Treaty shall fully apply only, in relation to the freedom of movement of workers and the freedom to provide services involving the temporary movement of workers as defined in Article 1 of Directive 96/71/EC between Romania on the one hand, and each of the present Member States on the other hand, subject to the transitional provisions laid down in paragraphs 2 to 14."

Paragraph two in Annex VII then sets out:

> "By way of derogation from Articles 1 to 6 of the Regulation (EEC) No 1612/68 and until the end of the two year period following the date of accession, the present Member States will apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Romanian nationals. The present Member States may continue to apply such measures until the end of the five year period following the date of the accession.
>
> Romanian nationals legally working in a present Member State at the date of accession and admitted to the labour market of that member state for an uninterrupted period of 12 months or longer will enjoy access to the labour market of that Member State but not to the labour market of other Member States applying national measures.
>
> Romanian nationals admitted to the labour market of a present Member State following accession for an uninterrupted period of 12 months or longer shall also enjoy the same rights.

> The Romanian nationals mentioned in the second and third subparagraphs above shall cease to enjoy the rights contained in those subparagraphs if they voluntarily leave the labour market of the present Member State in question
>
> Romanian nationals legally working in a present Member State at the date of accession, or during a period when national measures are applied, and who were admitted to the labour market of that Member State for a period of less than 12 months shall not enjoy these rights"

And Paragraph 12 in the same Annex VII goes on to provide:

> "Any present Member State applying national measures in accordance with paragraphs 2 to 5 and 7 to 9, may introduce, under national law, greater freedom of movement than that existing at the date of accession, including full labour market access. From the third year following the date of accession, any present member State applying national measures may at any time decide to apply articles 1 to 6 of Regulation (EEC) No 1612/68 instead. The Commission shall be informed of any such decision."

35. The "national measures" adopted by the UK in respect of Great Britain are set out in the Accession (Immigration and Worker Authorisation) Regulations 2006 (the "Worker Authorisation Regs"). These provide, so far as is material, as follows.

36. First, subject to exceptions that do not apply to the claimant in this appeal, an "accession State national subject to worker authorisation" means a national of Bulgaria or Romania: per regulation 2(1) of the Worker Authorisation Regs.

37. Second, regulation 5 of the Worker Authorisation Regs provided at the material time that :

> "**Derogation from provisions of Community law relating to workers**
> **5.** Regulations 6, 7 and 9 derogate during the accession period from Article 39 of the Treaty establishing the European Communities, Articles 1 to 6 of Regulation (EEC) No. 1612/68 on freedom of movement for workers within the Community and Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States."

38. Regulation 6 of the Worker Authorisation Regs provided at the material time as follows:-

> "**Right of residence of an accession State national subject to worker authorisation**
> **6.**—(1) An accession State national subject to worker authorisation shall, during the accession period, only be entitled to reside in the United Kingdom in accordance with the 2006 Regulations, as modified by this regulation.
> (2) An accession State national subject to worker authorisation who is seeking employment in the United Kingdom shall not be treated as a jobseeker for the purpose of the definition of "qualified person" in regulation 6(1) of the 2006 Regulations and such a person shall be treated as a worker for the purpose of that definition only during a period in which he holds an accession worker authorisation document and is working in accordance with the conditions set out in that document.
> (3) Regulation 6(2) of the 2006 Regulations shall not apply to an accession State national subject to worker authorisation who ceases to work."

39. The last piece in the statutory jigsaw is regulation 6(1) of the Immigration (European Economic Area) Regulations 2006 (the "EEA Regs"), which provides as follows:

> "**"Qualified person"**
>
> 6.—(1) In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as—
> (a)a jobseeker;
> (b)a worker;
> (c)a self-employed person;
> (d)a self-sufficient person; or
> (e)a student.".

40. The basis on which these provisions fit together was explained by Lord Hope in *Zalewska –v- Department for Social Development* [2008] UKHL 67; [2008] 1 WLR 2602; *R 1/09(IS)*. In my judgment Lord Hope's speech in *Zalewska* gives a clear and complete answer to the argument raised earlier and it is therefore worth repeating parts of that speech here. The appellant in *Zalewska* was a Polish national but as the material legal provisions are identical in their wording I have replaced (in [square brackets]) for ease of understanding the

references to 'Poland' and 'Polish' with references to 'Romania' and 'Romanian'.

41. Ms Zalewska's facts were different from the claimant's in this case because she **had** 'registered' her first employment under the UK Worker Registration scheme but when she moved to a different job after less than a year she did not register the new employment, with the result that although she had been employed in the UK for more than 12 months only part of that period had been in registered employment as required under UK law.

42. The important parts of Lord Hope's speech are in paragraphs 25-27, 29 and 40, where he said:

> "25. The first question is whether the appellant can rely directly on article 39EC and article 7(2) of Regulation 1612/68 to qualify for income support, despite the fact that she was not authorised to work for an authorised employer under reg 7 of the 2004 Regulations for the whole of the 12 month period. In my opinion the answer to it is to be found in paragraph 2 of Part 2 of Annex XII to the Act of Accession.
>
> 26. Absent the derogation provisions in that paragraph, a worker who is a national of any member state has the same rights of access to the labour market and to the social advantages that go with it as those of any other member state. That is the effect of article 39EC read together with article 7 of the Regulation. It is not open to the United Kingdom to impose restrictions on workers who are nationals of other member states that are incompatible with the fundamental rules of Community law. But, as paragraph 1 of ..... Annex XII makes clear in the case of [Romania], article 39EC is subject to derogation in the case of the freedom of movement of workers from nationals of [Romania]. Paragraph 2 of Part 2 states, by way of derogation, that for the two year period from the date of accession the member states will apply national measures.....The effect of that paragraph was to enable the United Kingdom, notwithstanding the fundamental rules of Community law as to freedom of movement of persons, to lay down its own rules for access to its labour market by [Romanian] state nationals.
>
> 27. It is true that paragraph 2 does not mention article 7 of Regulation 1612/68. It states that the liberty that is given to the member states to apply national measures is by way of derogation from articles 1 to 6 of the Regulation. But I think that there are two reasons for the fact that article 7 is not mentioned in this paragraph. The first is that mention of it was unnecessary. Access to labour markets is treated in Title I of the Regulation as a question of eligibility. The fundamental rules about the eligibility for employment of any national of a member state

are set out in articles 1 to 6. A national of a member state who takes up employment in another member state under those rules is a worker for the purposes of article 7, but not otherwise. Taking [Romania] as the example, displacement of articles 1 to 6 by national measures was all that the derogation provision in paragraph 2 of part 2 of Annex XII needed to do to ensure that access to employment in the 15 existing member states by workers from [Romania] was controlled by national measures during the five year period. The second is that its exclusion from derogation ensured that any workers from [Romania] who did obtain access to the labour market in an existing member state under its national measures enjoyed the same guarantees against discrimination as regards conditions of employment and social and tax advantages as national workers. But the rights conferred on [Romanian] workers by article 7 were to depend on their compliance with the national measures. It is those measures that determine their eligibility to obtain access to the national labour market on which the rights given by article 7 in their turn depend. The reference to [Romanian] nationals "admitted to the labour market of a present member state" in the third subparagraph of paragraph 2 of Part 2 of Annex XII is a reference to [Romanian] nationals who have been admitted to it under the national measures regulating access.

29. The next question is whether, as [counsel for the Secretary of State] submitted, the United Kingdom has a complete discretion to determine the conditions on which nationals from the A8 states may obtain access to its labour market, or whether Community law requires that the measures that it selects must have a legitimate aim and be proportionate. He took as his starting point a series of propositions which I would regard as impeccable. The word "worker" in article 7 of Regulation 1612/68 refers to a national of one member state who is admitted to the labour market in another member state. A national of an A8 state is a "worker" in the United Kingdom for the purposes of article 7 only if he complies with the national measures that regulate access to the labour market in this country. This is because articles 1 to 6 of the Regulation have been suspended during the accession period and the national measures as to eligibility have taken their place.....So long as the requirements of the national rules are satisfied an A8 state national is entitled to the benefit of article 7(2) of the Regulation because he is a person who is admitted to the labour market, but not otherwise. Conversely an A8 state national is not admitted to the labour market if he does not comply with the national measures. So he is not in a position to acquire the rights that Community law gives to workers. In other words, access by an A8 state national to the Community rights in an existing Member state that the EC Treaty gives to workers there depends on his satisfying the national measures that give access to its labour market. So long as those measures are satisfied the United Kingdom is under a Community law obligation to give him the benefit of article 7(2), but not otherwise.

40. Then there is the important question of access to social security benefits. The Secretary of State for Work and Pensions said in paragraph 4 of his introduction to the Report on the 2004 Social Security Regulations that their underlying purpose was to safeguard the United Kingdom's social security system from exploitation by

> people who wished to come to the UK not to work but to live off benefits. The terms on which A8 state nationals are to have access to the labour market are critical to achieving that purpose. Access to that market confers on them the status of workers. So they become entitled immediately, under article 7 of Regulation 1612/68, to the same social advantages as nationals. And the third subparagraph of paragraph 2 of Part 2 of Annex XII provides that A8 state nationals admitted to the labour market of an existing member state following accession for an uninterrupted period of 12 months or longer are to enjoy access to the labour market of that state. This is a right that is given to them by Community law, with all the other rights that go with it, at the end of that period. But it is given only to those who are, as the subparagraph puts it, "admitted" to that labour market during that period. The proportionality of the formalities of registration and re-registration and of the consequences of a failure to comply with these requirements must be judged in that context." (my underlining added for emphasis).

43. Given the facts on this appeal, I need not concern myself with the difficult and potentially elusive distinction (if it is such) between being "admitted" to the UK employment or labour market and having "access" to that market, and whether rights under EU law may apply during the period where an A8 (e.g. Polish) national or A2 (e.g. Romanian) national has been admitted to the UK employment market (by meeting the registration or authorisation conditions for that employment) but before that national has completed 12 months in such employment: see *obiter* discussion in *VP –v- SSWP* (JSA) [2014] UKUT 32 (AAC); [2014] AACR 25.

44. I do not need to traverse this area because the undisputed fact in this case is that the claimant's employment with Paragon (and the First-tier Tribunal in my judgment was plainly right in its view that this was employed work rather than self-employed work) was **never** authorised under the Worker Authorisation Regs. The consequence of this failure in my judgment, following the above cited passages from *Zalewska*, is that the claimant was never admitted to the UK employment market because he failed to meet the "national measures" set out in the Worker Authorisations Regs; he therefore failed to meet, per Lord Hope, the "fundamental rules about eligibility for employment" in articles 1-6 of Regulation 1612/68; and as a result

he was and had not been "employed" in the UK for the purposes of article 12 of Regulation 1612/68.

45. I appreciate that *Zalewska* was not concerned with article 12 of Regulation 1612/68. In my judgment however the force of Lord Hope's reference to articles 1-6 containing the "fundamental rules about eligibility for employment" carry forward as much to article 12 as they do to article 7(2). Indeed they must do so because if the eligibility criteria for employment were not met, as is the case here, I cannot see the basis on which it can be said that the claimant nevertheless had been "employed" in the UK for the purposes of article 12 of Regulation 1612/68.

46. Put another way, and using the language of article 1.1 in Regulation 1612/68, the failure of the claimant to meet the UK's "national measures" in respect of his employment with Paragon meant that he had no "right [under Regulation 1612/68] to take up an activity as an employed person, and to pursue such an activity, within the [UK]"; and if he had no such right then he cannot in my judgment be said to be, or be treated as having been, "employed" in the UK under article 12 of the same Regulation. To hold otherwise would be to reduce the fundamental rules of eligibility for the very thing article 12 speaks of ("employment") to mere bystanders.

47. Further, I do not consider that anything said by the Court of Justice in *Collins –v- SSWP* (Case C-138/02) [2005] QB 145; *R(JSA)3/06*, and paragraph 32 in particular, materially affects this conclusion. Putting matters very briefly, the facts were that Mr Collins had previously worked in the UK for 10 months in 1981. In 1998 he returned to the UK to look for work. It is in that context that the Court of Justice said, in paragraphs 29-33:

> "29. In the absence of a sufficiently close connection with the United Kingdom employment market, Mr Collins' position in 1998

> must therefore be compared with that of any national of a Member State looking for his first job in another Member State.
>
> 30. In this connection, it is to be remembered that the Court's case-law draws a distinction between Member State nationals who have not yet entered into an employment relationship in the host Member State where they are looking for work and those who are already working in that State or who, having worked there but no longer being in an employment relationship, are nevertheless considered to be workers (see Case 39/86 *Lair* [1988] ECR 3161, paragraphs 32 and 33).
>
> 31. While Member State nationals who move in search for work benefit from the principle of equal treatment only as regards access to employment, those who have already entered the employment market may, on the basis of Article 7(2) of Regulation No 1612/68, claim the same social and tax advantages as national workers (see in particular, *Lebon*, cited above, paragraph 26, and Case C-278/94 *Commission v Belgium* [1996] ECR I-4307, paragraphs 39 and 40).
>
> 32. The concept of "worker" is thus not used in Regulation No 1612/68 in a uniform manner. While in Title II of Part I of the Regulation this term covers only persons who have already entered the employment market, in other parts of the same Regulation the concept of "worker" must be understood in a broader sense.
>
> 33. Accordingly, the answer to the first question must be that a person in the circumstances of the appellant in the main proceedings is not a worker for the purposes of Title II of Part I of Regulation No 1612/68. It is, however, for the national court or tribunal to establish whether the term "worker" as referred to by the national legislation at issue is to be understood in that sense."

48. It is important to note, however, that the decision in *Collins* was not concerned with a situation, as here, where the person had not (even) entered or been admitted to the UK's employment market under articles 1-6 of Regulation 1612/68 as modified by the relevant of the Treaty of Accession concerning Romanian and Bulgarian nationals. The distinction the Court of Justice was drawing in *Collins* was between the rights of a person who had worked or was in work under article 7(2) of Regulation 1612/68 and the person who in effect had never worked in, here, the UK before but was eligible to look for work in the UK under article 1-6 of Regulation 1612/68. Both according to *Collins* could be said to be "workers" under Regulation 1612/68, but in the latter category the term "worker" was being used in a broader sense.

49. In the case of the claimant in this appeal, however, to use the language of *Collins* he did not even meet that broader meaning of "worker" under Regulation 1612/68 as the employment with Paragon was not employment he had a right to pursue under article 1.1 of Regulation 1612/68 as it was not authorised.

50. I need, lastly, to address the decision in *SSWP –v- JS* [2010] (IS) UKUT 347 and why it is not inconsistent with the decision I have arrived at on this appeal. The key reason why it is not inconsistent is because the claimant in *JS* had been in employment in the UK in accordance with UK national measures derogating from and modifying articles 1-6 of Regulation 1612/68 and therefore she had been "employed" in the UK for the purposes of article 12 of Regulation 1612/68. The decision in *JS*, however, does not mandate that any and all employment in the UK will count for the purposes of article 12 of regulation 1612/68, nor did it need to do so. It is consistent with the view set out above, following *Zalewska*, that the employment must be employment which it is eligible for a claimant to take up and pursue. That was the case in *JS* (at least for part of the period); it is not the case here.

51. I was troubled at one stage with how the decision in *JS* may be reconciled with the third and fifth sub-paragraphs in paragraph 2 of Annex VII to the relevant Treaty of Accession, given that on the facts *JS*, who was Polish, had not completed 12 months or registered work in the UK. Those sub-paragraphs in her case read:

> "Polish nationals admitted to the labour market of a present Member State following accession for an uninterrupted period of 12 months or longer shall also enjoy the same rights [access to the UK labour markets].
>
> Polish nationals legally working in a present Member State at the date of accession, or during a period when national measures are applied, and who were admitted to the labour market of that Member State for a period of less than 12 months shall not enjoy these rights [access to the UK labour market".

Combined with this, as I have already set out, in *Zalewska* Lord Hope said at paragraph 40:

> And the third subparagraph of paragraph 2 of Part 2 of Annex XII provides that A8 state nationals admitted to the labour market of an existing member state following accession for an uninterrupted period of 12 months or longer are to enjoy access to the labour market of that state. This is a right that is given to them by Community law, with all the other rights that go with it, at the end of that period. But it is given only to those who are, as the subparagraph puts it, "admitted" to that labour market during that period" (my underlining added for emphasis).

It may be open to argument therefore that it is only at the end of 12 months of registered or authorised employment that the relevant EU national may be said to be "employed" in the UK for the purposes of article 12 of Regulation 1612/68: see paragraph 42 of *VP*.

52. This is an issue that does not arise for determination on this appeal and so does not call for any decision from me. However it seems to me that there may be two potential answers to the argument.

53. First, on the terms of the relevant sub paragraphs in Annexe VII to Treaties it may be said that the 12 months of registered or authorised work was only needed to give the EU national legally unfettered access to the UK's employment market and say nothing, and do nothing to limit, the rights flowing from properly registered or authorised employment during the 12 months. This answer may, however, sit uneasily with the view of Lord Hope in paragraph 40 of *Zalewska*, though I note the argument against this suggested in paragraph 47 of *VP*.

54. Second, and the better potential answer, is to consider the provisions of UK domestic law. This it seems to me was the basis for the decision in *JS*. The crucial domestic law provision is regulation 6(2) of the Worker Authorisations Regs, and its provision that:

> "An accession State national subject to worker authorisation..... shall be treated as a worker for the purpose of the definition of "qualified person" in regulation 6(1) of the [EEA Regs] only during a period in which he holds an accession worker authorisation document and is working in accordance with the conditions set out in that document."

Thus even within the 12 month period a Romania national would have been a "worker" at the time(s) when he or she was in authorised employment. Regulation 6(1)(b) of the EEA Regs provides that a qualified person is a person in the UK as a 'worker' and, as *JS* points out, regulation 4(1)(a) of the EEA Regs as it stood at the time relevant to this appeal defined "worker" as meaning "a worker within the meaning of Article 39 of the Treaty...".

55. An EU national who was working in employment which was authorised under the Worker Authorisation Regs was therefore treated under UK domestic law as a 'worker' for the purposes of Article 39 of the Treaty of the European Union (now Article 45 of the Treaty on the Functioning of the European Union), whatever the position may be in terms of his or her "worker" status under Annex VII to the Treaty of Accession. Such more favourable treatment in domestic law is empowered, in my view, by paragraph 12 in Annex VII to the Treaty of Accession (see paragraph 34 above). In the result, a Romanian or Bulgarian national working in authorised employment under the Worker Authorisation Regs is a "worker", and if that is so that employment very arguably must amount to being "employed" for the purposes of what was article 12 of EC Regulation article 1612/68, given that regulation was concerned with *freedom of movement for workers within the Community*.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 24th May 2016