IN THE UPPER TRIBUNAL **Appeal No.** CE/855/2014
ADMINISTRATIVE APPEALS CHAMBER

Appellant:	Mr Rafal Prefeta
Respondent:	Secretary of State for Work and Pensions
Heard at:	Manchester Crown Court (Crown Square), Tribunals Wing
Date of hearing:	19 February 2016 (with post-hearing submissions)
Date of decision:	6 September 2016

INTERIM
DECISION OF THE UPPER TRIBUNAL

Upper Tribunal Judge Ward

ON APPEAL FROM:

Tribunal:	The First-Tier Tribunal (Social Entitlement Chamber)
Tribunal Case No:	SC003/13/02595
Tribunal Venue:	Doncaster
Hearing Date:	13 September 2013

CE/855/2014

IN THE UPPER TRIBUNAL **Case No** CE/855/2014
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant: Mr Tom Royston (acting pro bono), instructed by Kirklees Law Centre

For the Respondent Ms Katharine Apps, instructed by Government Legal Service

Interim Decision:

(a) The appeal is allowed to the extent that the decision of the First-tier Tribunal sitting at Doncaster on 13 September 2013 under reference SC003/13/02595 involved the making of an error of law and is set aside.

(b) Further consideration of whether the extension of the Worker Registration Scheme between 1 May 2009 and 30 April 2011 was compatible with EU law remains stayed until after the Court of Appeal shall have given its decision in *SSWP v Gubeladze*, or further order.

(c) The claimant was not engaged in any work that was genuine and effective between the termination of his employment with S Ltd on 11 March 2011 and the date of his claim for Employment and Support Allowance (20 October 2011).

(d) A reference is to be made to the Court of Justice of the European Union under Article 267 TFEU as to whether the derogation from Article 7(3)(a) and (b) of Directive 2004/38/EC ("the Directive") made by regulation 5(3) of the now repealed Accession (Immigration and Worker Registration) Regulations 2004 is inconsistent with Article 7 of Regulation 1612/68 and the terms of Part 2 of Annex XII of the Treaty of Accession of the so-called A8 States.

(e) Within 28 days of the date of the letter issuing this Interim Decision, the parties shall lodge with the Upper Tribunal a draft or drafts of the reference to the Court of Justice prepared by Counsel in the case, which shall, so far as possible, be agreed between them.

REASONS FOR DECISION

1. The two principal areas of interest of the case to a wider readership beyond the parties are:

(a) its consideration of the question of whether the United Kingdom's derogation from Article 7(3) of Directive 2004/38 by regulation 5(3) of the

Accession (Immigration and Worker Registration) Regulations 2004 ("the 2004 Regulations") was lawful (see [28] to [76]); and

(b) its consideration of what role, if any, is played by the United Nations Convention on the Rights of Persons with Disabilities in assessing whether work is "genuine and effective" for the purposes of Article 45 of the Treaty on the Functioning of the European Union ("TFEU") (see, in particular, [13] to [17]).

However, these are by no means the only points in the case. It is convenient to start by setting out a summary of the facts.

2. The claimant is a national of Poland, who first came to the United Kingdom in 2008. On 7 July 2009 he started working for S Ltd. In October 2010 he sustained (not at work) a shoulder injury and was advised by his doctor to stop physical work. On 5 January 2011 he obtained a worker registration certificate in respect of that employment. On 11 March 2011 his employment with S Ltd was terminated because of his shoulder injury. On 20 May 2011 2011 he was awarded contribution-based jobseeker's allowance backdated to 20 March 2011 (Ms Apps does not suggest there was any untoward delay between termination of the claimant's employment and the commencement of jobseeker's allowance). The only subsequent employment he had between then and the date of the claim which is the subject of the present proceedings was in July 2011 for D Ltd as a crane operative and in August 2011 for M Ltd as a packer. I say more about those two jobs below. His contribution-based JSA ran out on 22 September 2011 and he was then awarded income based JSA ("IBJSA") to 19 October 2011. On 20 October 2011 he claimed employment and support allowance ("ESA"): it is that claim which is the subject of the present proceedings. He underwent surgery on his shoulder in the Autumn of 2011, then recuperated, but was involved in a car accident on New Year's Eve 2011, resulting in a need for physiotherapy. By a decision dated 16 November 2012 his claim to ESA was refused, on the ground that he lacked the right to reside.

3. On 6 November 2013 the First-tier Tribunal dismissed the claimant's appeal. On 21 May 2014 I gave permission to appeal. There was a variety of ways in which the tribunal's findings of fact and expression of its reasons were insufficient and it is not disputed by the parties that there was an error of law so that the Upper Tribunal is entitled to remake the decision. Attempts to secure appropriately specialist representation for the claimant failed initially to produce a durable solution. More recently the case has been taken over by the claimant's present advisers acting pro bono, and I am grateful to them, as I am also to Ms Apps for the Secretary of State, for their submissions in these proceedings.

4. The issues in this case resolved into the following:

Issue 1: was the extension of the Worker Registration Scheme from 1 May 2009 to 30 April 2011 lawful (as the First-tier Tribunal assumed)? In *TG v SSWP (PC)* [2015] UKUT 50 I ruled that it was not. If my view there proves to be correct, then the claimant had worker status throughout his time at S Ltd – notwithstanding his delayed application for a worker registration certificate. Thereafter (as Ms Apps accepts) he would retain that status under Article 7(3)(b) of the Directive while claiming JSA and thus have a right to reside for the purposes of his claim to ESA: see regulation 70(4)(c) of the Employment and Support Allowance Regulations 2008/794. However, *TG* is on appeal to the Court of Appeal as *SSWP v Gubeladze*, with a hearing date in February 2017. Further consideration of this issue was, and remains, stayed pending the Court of Appeal's decision.

Issue 2A: The worker registration scheme had – even on the Secretary of State's view in *TG* – terminated on 30 April 2011. An alternative route for the claimant to succeed would be if his work in Summer 2011 for D Ltd and/or M Ltd had been "genuine and effective". If that were so, then there would be no bar to the claimant obtaining "worker" status in consequence and, once again, retaining it down to the date of his claim for ESA and it would not be necessary to consider issue 2B. My findings of fact appear at [10] and, for the reasons at [26]-[27] I conclude that such work was not "genuine and effective".

Issue 2B: was the United Kingdom's derogation from Article 7(3) of Directive 2004/38 by regulation 5(3) of the 2004 Regulations lawful? If it was not, then, it was submitted, a person who by the time he needed to rely on Article 7(3) had received a worker registration certificate, even though he had not completed 12 months of certificated work under it, could rely on that Article. That would, once again, open the door to having "worker" status down to the end of employment with S Ltd and retaining it thereafter (as under Issue 1).

Issue 3: had originally been whether a proportionate assessment of the claimant's individual circumstances was necessary. It was then accepted in the light of the decision of the CJEU in C-67/14 *Alimanovic* that if income-related ESA constitutes "social assistance", there was no need for such an assessment. Accordingly, this issue became whether income-related ESA is a benefit intended to facilitate access to the labour market (cf. C-22/08 and 23/08 *Vatsouras and Koupatantze*. JSA is such a benefit and could be claimed at the material time by a jobseeker, such as the claimant was, and he had duly claimed it. The necessary right to reside for ESA purposes, however, excludes jobseekers. While the present case has been in the Upper Tribunal, the Court of Appeal in *Alhashem v SSWP* [2016] EWCA Civ 395 ruled that ESA is not a benefit intended to facilitate access to the labour market. The Upper Tribunal is bound by that decision and unless it comes to be appealed further I shall have to dismiss the appeal insofar as it is based on Issue 3.

There had originally also been challenges under the heading of Issue 4 to various matters of rationality and fairness. Mr Royston confirmed that he was not seeking to argue them as errors of law before me. He did however dispute some of the tribunal's findings of fact and invited me to make further findings in the event that I were to find other errors of law in the tribunal's decision. As it is common ground that there are such errors and I have proceeded to make such findings, I say no more concerning this aspect.

Issue 2A

5. The clamant says he worked at D Ltd for one day for 8 hours. As he put it (spellings corrected):

> "My work role was crane operative, where I had no licence or experience on that and was not explained about the job role before I started. I was unable to hold the job because of non experience and when I asked for different job there was no[t] any other position."

6. No payslip from that job is in evidence but his P45 is, showing pay of £32.95 (with no tax deducted). At the national minimum wage for adults, which between 1 October 2010 and 30 September 2011 was £5.93 per hour, this would equate to just over 5 ½ hours, not 8. The figures do not produce an arithmetically satisfactory result on the claimant's version either, in that £32.95 divided by 8 produces an hourly rate running into 5 decimal places, which seems unlikely.

7. The claimant says he worked for M Ltd between 8 and 15 August 2011 but cannot say exactly which dates. He says he worked approximately 16 hours per week and was there for two weeks, so 32 hours altogether. His job role was to "repack". He was unable to hold the job "due to my health[ ] condition and agency mistakes".

8. Once again, no payslip from that job is in evidence but his P45 is. It shows a leaving date of 16 August 2011 and total pay of £133.43 with no tax deducted. That sum at the national minimum wage would equate to just over 22 ½ hours. The claimant's own evidence appears unreliable, because his suggestion that he worked for a period of two weeks appears inconsistent with the dates for which he claimed to have worked.

9. Further, in the case of both companies, the claimant's version would mean they were in breach of national minimum wage legislation, for which I would require more compelling evidence than the claimant's understandably vague recollection of how many hours he worked.

10. I find as fact that the claimant worked for D Ltd for a little over 5 ½ hours and for M Ltd for a little over 22 ½ hours, earning the sums shown on the respective P45s.

11. I therefore have to consider whether the work was “genuine and effective”. The legal approach mandated by the Court of Justice can be found in C-413/01 *Ninni-Orasche* [2004] 1 CMLR 19:

> “23. First of all, it is settled case-law that the concept of ‘worker’, within the meaning of Article 48 of the Treaty, has a specific Community meaning and must not be interpreted narrowly (see, to that effect, inter alia, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 16, Case 197/86 *Brown* [1988] ECR 3205, paragraph 21, Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 14, and Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 13).
>
> 24. Moreover, that concept must be defined in accordance with objective criteria characterising the employment relationship in view of the rights and duties of the persons concerned. The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person in return for which he receives remuneration (see *Lawrie-Blum*, cited above, paragraph 17, Case 344/87 *Bettray* [1989] ECR 1621, paragraph 12, and *Meeusen*, cited above, paragraph 13).
>
> 25. In the light of that case-law, it must be held that the fact that employment is of short duration cannot, in itself, exclude that employment from the scope of Article 48 of the Treaty.
>
> 26. In order to be treated as a worker, a person must nevertheless pursue an activity which is effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and accessory (see, in particular, *Levin*, cited above, paragraph 17, and *Meeusen*, paragraph 13).
>
> 27. When establishing whether that condition is satisfied, the national court must base its examination on objective criteria and assess as a whole all the circumstances of the case relating to the nature of both the activities concerned and the employment relationship at issue.”

12. Mr Royston, in a resourceful argument inviting me to conclude that this work was “genuine and effective”, prays in aid the provisions of the United Nations Convention on the Rights of Persons with Disabilities (“the Convention”). The point was not anticipated in his skeleton argument and accordingly I allowed Ms Apps the opportunity to respond to the point by written submissions.

13. The Convention, to which the European Union itself is a party, "is to be regarded as one of the Community Treaties as defined in section 1(2) of the European Communities Act 1972”: see The European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons

with Disabilities) Order 2009 No 1181. Mr Royston relies on Articles 5, 18 and 27 which so far as material are as follows:

> **"Article 5**
> **Equality and non-discrimination**
> 1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
> 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
> 3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
> 4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.
>
> **Article 18**
> **Liberty of movement and nationality**
> 1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:
>
> (*a*) …;
>
> (*b*) Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;
>
> (*c*) …;
>
> (*d*) … .
>
> 2. … .
>
> **Article 27**
> **Work and employment**
> 1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:
>
> (*a*) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance

> of employment, career advancement and safe and healthy working conditions;
> (*b*) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;
> (*c*) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;
> (*d*) …;
> (*e*) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;
> (*f*) …;
> (*g*) …;
> (*h*) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;
> (*i*)(j)(k) … .
> 2. … ."

14. Whether a person is a "worker" for present purposes is clearly within the scope of EU law. The status of the Convention, at least up to a point, was considered in C-335/11 *HK Danmark*:

> "28. It should be noted, as a preliminary point, that, by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding on its institutions, and consequently they prevail over acts of the European Union (Case C-366/10 *Air Transport Association of America and Others* [2011] ECR I-13755, paragraph 50 and the case-law cited).
>
> 29. It should also be recalled that the primacy of international agreements concluded by the European Union over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements (Joined Cases C-320/11, C-330/11, C-382/11 and C-383/11 *Digitalnet and Others* [2012] ECR, paragraph 39 and the case-law cited).
>
> 30. It follows from Decision 2010/48 that the European Union has approved the UN Convention. The provisions of that convention are thus, from the time of its entry into force, an integral part of the European Union legal order (see, to that effect, Case 181/73 *Haegeman* [1974] ECR 449, paragraph 5)."

15. It seems to me though, that I am being asked to apply the Convention when interpreting not an instrument of secondary law (cf. *HK Danmark* at

[29]), but in effect, the TFEU itself, as the issue is whether work is sufficient to make the claimant a worker for the purposes of Article 45 TFEU. I have not been offered submissions as to whether the interpretative obligation which exists in relation to secondary legislation would equally apply to interpreting the TFEU. I proceed on the basis of assuming, without deciding, that there is an interpretative obligation of the type described.

16. Before doing so, I note that C-363/12 *Z v A Government Department* [2014] CMLR 20 at [90] holds that the provisions of the Convention lack the quality of being unconditional and of being sufficiently precise for it to have direct effect. However, I am being invited not to give direct effect to its provisions, but to interpret the law so far as possible in the light of them.

17. Article 4 of the Convention creates a principle of progressive realisation where economic and social rights are concerned. I agree with Ms Apps that Articles 5, 18 and 27 are, at most, aspirational. I do not regard them as well suited to modifying the meaning of a concept which has been clearly articulated by the Court of Justice. Even if, for instance, Member States are to recognise the rights of persons with disabilities to liberty of movement as contemplated by Article 18, it does not follow from that that the way to achieve it is by relaxing the concept of what constitutes "genuine and effective work". Given that people with disabilities may have particular needs for additional public or other resources, the way in which the recognition which Article 18 envisages should be given is clearly a matter for careful consideration and debate. I respectfully agree with the observations of Laws LJ in *Hainsworth v Ministry of Defence* [2014] EWCA Civ 763. In that case the Court of Appeal was invited to interpret Article 5 of Directive 2000/78/EC in the light of the Convention. Laws LJ, giving the judgment of the Court, made

> "The more general point … that great care needs to be taken in deploying provisions which set out broad and basic principles as determinative tools for the interpretation of a concrete measure such as Article 5 of the Directive."

The interpretative obligation which I am assuming should be applied is a qualified one ("so far as possible") and in the present case, for the reasons in this paragraph, I do not regard such interpretation as possible.

18. Under *Ninni-Orasche*, it is "objective criteria characterising the employment relationship in view of the rights and duties of the persons concerned" which have to be considered. That is not directed to the circumstances of the individual. While I accept that it is possible that a "genuine and effective" test may be harder for people with disabilities to comply with than for others, the present case is not a discrimination action, nor is there evidence to that effect. As Ms Apps points out, work is as a matter of EU law already not precluded from being "genuine and effective" on the basis that a person is working part-time, or for low remuneration, two of

the possible ways in which disadvantage experienced by people with a disability might arise.

19. I am, with respect, doubtful whether the attempted distinction of *Ninni-Orasche* in CSIS/467/2007 should succeed, in taking into account a subjective factor –a person's health condition - as going to whether an employment is "genuine and effective" or not. I therefore do not place reliance on the claimant's stated inability to continue working with M Ltd due to his "health[ ] condition" in reaching the conclusions below.

20. Nonetheless, I consider that the work with D Ltd and that with M Ltd, whether singly or taken together, was not "genuine and effective". The former was an engagement for, as I have found, less than a full working day. The latter proved to be a very short term arrangement, under which the hours worked were on any view less than full time. From both, the pay earned was very low. In *NE v SSWP* [2009] UKUT 38 it was held that the very short periods of work do not suffice to make a person a worker rather than a work seeker and the present approach is consistent with that. While in *Barry v LB Southwark* [2008] EWCA Civ 1440 the court held that a period of two weeks work (at the Wimbledon tennis championships) was genuine and effective, *Barry* is distinguishable on the basis that the period of work was longer, the hours greater and the wages significantly higher than those at issue in the present case. C-14/09 *Genc*, relied upon by Mr Royston as demonstrating that a small number of hours weekly may suffice, is distinguishable, as Ms Genc performed her duties, limited as they were, for some three years rather than a day or a week or two.

21. There may be some room for debate what the ratio of *Barry* is. The Court of Appeal cited cases such as Case 53/81 *Levin* [1982] ECR and the latter's subsequent citation in C-357/89 *Raulin*, to the effect that:

> "the rules on freedom of movement for workers….cover only the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary".

22. Arden LJ at [20] examined the circumstances in which work would be "subsidiary or ancillary". At [23] she concluded that Mr Barry's work

> "…was not ancillary to any other relationship between Mr Barry and the Wimbledon Championships. It was not marginal because it was a role for which the Wimbledon Championships was prepared to pay a not insignificant sum as remuneration."

23. At [41] Lloyd LJ said:

> "It is true that this period of work was short, though I dare say that Mr Barry may have worked long hours during the fortnight in question. I see no reason why, if the question arises, a short period of

> employment should not count for these purposes. It was real work, and genuine employment. I see nothing about it which could render it fairly describable as marginal. Though it did not last for long, there is nothing in the facts which suggests that it could fairly be regarded as an activity "on such a small scale as to be regarded as purely marginal and ancillary". Lady Justice Arden gives an example at paragraph 20 of why work might be properly regarded as ancillary, for this purpose. There could be other examples, but I agree with her that there was no other status or activity on the part of Mr Barry to which the work could be regarded as ancillary."

24. Thomas LJ (as he then was) agreed with both judgments.

25. It might, therefore, be concluded that the case is authority either for viewing "marginal and ancillary" as a composite phrase and as the antithesis, when judged by scale, of work that is "genuine and effective" or as a phrase containing two separate tests, one examining what is "marginal" and one what is "ancillary" (to which Arden LJ's judgment provided, per Lloyd LJ, a non-exhaustive guide). In that case, it did not matter, as Mr Barry's work was unanimously considered neither to be "ancillary" to any other status or activity, nor to be "marginal" and, if the test was the composite one, based on scale, it was not to be considered "marginal and ancillary".

26. In the present case the claimant's work was not ancillary to any other status or relationship. It was however marginal. It was also on such a small scale as to be "marginal and ancillary" rather than "genuine and effective". I do not read *Barry* as saying that work had to be, separately, both "marginal" and "ancillary". The point did not arise, as Mr Barry's work was neither. The Court of Appeal was obliged to apply cases such as *Levin* and *Raulin* and I read its observations in that light. While the present claimant's work with D Ltd and M Ltd was not "ancillary" to anything else, that in my view is immaterial. I agree with Ms Apps that there was nothing to which the contract in *Raulin* was ancillary, but that lack did not cause the Court of Justice to indicate that it was not open to the national court to conclude that the contract was "marginal and ancillary". In my view nothing in the Court of Appeal's judgment precludes the test from being "marginal and ancillary" in antithesis to "genuine and effective" in the sense of *Levin* and *Raulin*, and that is what I regard as the test. However, if, contrary to my view, "marginal" be a stand-alone factor, the claimant's work was marginal. In either case the consequence is that he was not, as a result of that work, a "worker". I would add that I do not read *Genc* (e.g. at [19]) as in any way inconsistent with *Levin* and *Raulin*. Nor is it the case that it is only situations that concern rehabilitation (such as that in 344/87 *Bettray*) that are excluded by the "marginal and ancillary" rule.

27. Finally on this aspect, even if work history be relevant for the reasons given by Arden LJ in *Barry* (and there was some debate before me as to whether there might be an unintended surplus "not" in para 21) there is

nothing in the present claimant's work history which would cause me to modify the conclusion reached above.

Issue 2B.

28. Article 7 of the Directive, so far as material, provides:

> "1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
>
> (a) are workers or self-employed persons in the host Member State; …
>
> 3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:
> (a) he/she is temporarily unable to work as the result of an illness or accident;
> (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;
> (c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;
> (d) …"

29. The claimant had worked from 7 July 2009 to 11 March 2011. In the version in force down to 30 April 2011, reg 6 of the Immigration (European Economic Area) Regulations 2006/1003 ("the IEEA Regulations") provided:

> "(2) A person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if—
> (a) he is temporarily unable to work as the result of an illness or accident;
> (b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom, provided that he has registered as a jobseeker with the relevant employment office and—
> (i) he was employed for one year or more before becoming unemployed;
> (ii) he has been unemployed for no more than six months; or
> (iii) he can provide evidence that he is seeking employment in the United Kingdom and has a genuine chance of being engaged;
> (c) and (d) [not material]."

30. These provisions reflect Article 7(3) of the Directive and apply by analogy the test articulated in C-292/89 *Antonissen*. Limbs (i) to (iii) of sub—para (b)

are disjunctive. If a claimant qualified for the protection of the regulation in the first place, as long as he met the conditions of (i) or (iii), there was no time limit on his ability to retain "worker" status on the grounds of involuntary unemployment. That would see the present claimant through to 20 October 2011, the date of his claim for ESA. There is no objection to a claimant relying on more than one of the sub-paragraphs of reg 6(2) in sequence, where they apply.

31. However, at that time, regulation 5 of the 2004 Regulations provided:

> "(1) The 2006 Regulations shall apply in relation to a national of a relevant accession State subject to the modifications set out in this regulation.
>
> (2) A national of a relevant accession State 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 an accession State worker requiring registration shall be treated as a worker for the purpose of that definition only during a period in which he is working in the United Kingdom for an authorised employer.
>
> (3) Subject to paragraph (4), regulation 6(2) of the 2006 Regulations shall not apply to an accession State worker requiring registration who ceases to work.
>
> (4) and (5) [not material]"

Thus, if he had become a worker in the first place, regulation 5(2) and, in particular, (3) purported to take away from the right to retain worker status in certain circumstances which he would otherwise have had.

32. The Accession (Immigration and Worker Registration) (Revocation, Savings and Consequential Provisions) Regulations 2011/544 amended the above to make the application of reg 6(2) subject to regulation 7A(4) from 1 May 2011. This provided that:

> "(4) Regulation 6(2) applies to an accession worker where he—
> (a) was a person to whom regulation 5(4) of the Accession Regulations applied on 30th April 2011; or
> (b) became unable to work, became unemployed or ceased to work, as the case may be, on or after 1st May 2011."

Regulation 5(4) need not concern us. The remainder of reg 7A(4)(a) presupposes the lawfulness of the extension of the WRS from 2009 to 2011 (i.e. the *Gubeladze* issue) and (b) presupposes an outcome in favour of the SSWP of the issue I am now called upon to decide.

33. It was at one point submitted that if regulation 5(3) has the effect the Secretary of State now asserts, then the claimant should not have been paid JSA with effect from March 2011, but he was. Even if that were so, it would not assist the claimant because of the terms of section 17 of Social Security Act 1998. But in any case, the JSA paid at that point was contribution based JSA – which is not subject to a "right to reside" test - so the point falls away.

34. Did then, the claimant qualify for the protection of regulation 6(2) in the first place? The question has two components: (a) was Article 7 of Regulation 1612/68 ("the Regulation") validly derogated from by the operation of, in particular, regulation 5(3) of the 2004 Regulations? (b) If it was not, was the claimant in any event in a position, following the termination of his employment, to access the protection of Article 7 of the Regulation i.e. to the extent that his claim would otherwise be defeated on the basis that he had, by virtue of regulation 5(3), lost the ability to retain the "worker" status he (ex hypothesi) would have had, at any rate for limited purposes, was that derogation from Article 7(3) of the Directive lawful?

35. Article 7(1) and (2) of the Regulation provide:

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

36. Part 2 of Annex XII of the Treaty of Accession provides, so far as material:

> "1. Article 39…of the EC Treaty shall fully apply only, in relation to the freedom of movement of workers…, subject to the transitional provisions laid down in paragraphs 2 to 14.
>
> 2. By way of derogation from Articles 1 to 6 of 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 Polish 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.
>
> Polish 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.
>
> 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.
>
> The Polish 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.
>
> 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.
> …
> 9. Insofar as certain provisions of Directive 68/360/EEC may not be dissociated from those of Regulation (EEC) No 1612/68 whose application is deferred pursuant to paragraphs 2 to 5 and 7 and 8, Poland and the present Member States may derogate from those provisions to the extent necessary for the application of paragraphs 2 to 5 and 7 and 8."

37. Essentially the same point arose in *VP v SSWP (JSA)* [2014] UKUT 0032(AAC); [2014] AACR 25. The relevant legislative background is set out at [16] – [29] of that case. At [30] I record the view of Jackie Morin of the European Commission that the scope of the derogation (and in particular paragraph 9) was insufficiently wide to allow the UK to adopt in all respects the approach that it had done. At [31]-[43] I analysed in some detail why I thought neither the decision of the House of Lords in *Zalewska v Department for Social Development* [2008] UKHL 67; [2008] 1 WLR 2602 nor any of the other decisions of the higher courts then available provided binding authority on the point. At [44] – [47] I examined in brief the substantive arguments, but ultimately did not need to decide the point as the claimant in *VP* failed on another ground.

38. As regards (a), Mr Royston essentially invites me to adopt my reasoning from *VP* and responds to Ms Apps' criticisms of it. It is to those criticisms, accordingly, that I turn.

39. Ms Apps invites me not to follow *VP* for four reasons, considered below, but which, put shortly, are:

> (a) In the subsequent case of *Mirga v SSWP* [2016] UKSC1 both the Court of Appeal and Supreme Court have confirmed that the 2004 Regulations and WRS reflected the Accession Treaty and were consistent with EU law;

> (b) My reasons for concluding in *VP* that *Zalewska* was not binding were incorrect;
>
> (c) *Mirga* provides no support for the distinction made in *VP* between "admission to" and "access to" the labour market. Had the reasoning in *VP* been correct, Ms Mirga could have succeed; and
>
> (d) My reasons for distinguishing *Szpak* and *Miskovic* in *VP* did not provide a valid rationale for doing so.

40. I consider first (a) and (c) – the two points dependent on *Mirga* – together.

41. Ms Mirga worked, registered, from 18 April 2005 until 11 November 2005 (i.e. for less than 12 months). According to the Upper Tribunal's decision in the same case (*RM v SSWP (IS)* [2010] UKUT 238 (AAC)), subsequently appealed but without successful challenge to the findings of fact, she had a further (unregistered) job for about two months from February 2006. She then worked again, from 20 June 2006 to 21 July 2006, once again unregistered. At all those times, she was an "Accession State Worker requiring registration". There was only a material exemption from the requirement to hold a registration certificate under reg 7(3) of the 2004 Regulations, which provided:

> "Where a worker begins working for an employer on or after 1 May 2004 that employer is an authorised employer in relation to that worker during the one month period beginning on the date on which the work begins."

42. That provision could avail Ms Mirga neither in relation to her employment for "about two months" in February 2006 nor indeed in relation to her employment for fractionally over one month in June to July 2006. Both employments should have been registered but were not. As noted by Laws LJ in the Court of Appeal at [7]:

> "The appellant was not working for an authorised employer at the time when she applied for Income Support, nor…had she by then completed 12 months' registered employment so as to take her outside the requirements of the Workers Registration Scheme…"

Ms Mirga was, accordingly, in the same position as Ms Zalewska of not having re-registered following changes of employment, as to which the decision of the House of Lords does provide binding authority. My analysis in *VP* does not suggest otherwise. Limb (c) of Ms Apps' submission is, accordingly, not well founded. The issue of "access" versus "admission" to the labour market simply did not arise.

43. Rather, the first issue in *Mirga* was that her asserted rights under Article 21 TFEU would be impermissibly interfered with by the denial of income

support which would, in practice, force her to return to Poland. It sufficed to note at [45] that Ms Mirga had not done 12 months' [sc. registered] work in the UK and so could not claim to be a "worker" and to note that making income support subject to a right of residence was consistent with recent decisions of the CJEU, such as C-140/12 *Brey*, C-333/13 *Dano* and C-67/14 *Alimanovic.*

44. In so doing, Lord Neuberger observed at [55]

> "55. *Dano* and *Alimanovic* clearly demonstrate that the jurisprudence of the Grand Chamber of the Court of Justice is inconsistent with Mr Drabble's first argument on behalf of Ms Mirga and Mr Samin, at least in so far as his argument is focussed on the 2004 Directive. It is fair to say that those cases were not concerned with the 2003 Accession Treaty. However, the House of Lords concluded in *Zalewska v Department for Social Development* [2008] 1 WLR 2602 that the A8 Regulations, which reflect the provisions of the 2003 Accession Treaty, were consistent with EU law, and nothing I have heard or read in connection with this appeal casts doubt on that conclusion. In particular, it appears to be consistent with the reasoning in *Brey*, *Dano* and *Alimanovic*.

45. If Ms Mirga was in a situation akin to that of Ms Zalewska and the "access v admission" point, not being material, was not raised, it is unsurprising that Lord Neuberger found nothing to cast doubt on the decision in *Zalewska.*

46. The second point in *Mirga* was an argument based on lack of proportionality. The appeal before me does not involve such an argument and nothing the Supreme Court said in dealing with that point in *Mirga* is relied upon by Ms Apps.

47. I therefore conclude that, contrary to Ms Apps' limb (a), the decision in *Mirga* does not provide any reason why I should not follow my reasoning in *VP*.

48. I turn to examining Ms Apps' submissions under limb (b) above.

49. She suggests that at [25] Lord Hope suggested that the question to be decided was

> "whether the appellant can rely directly on article 39 EC 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"

and that I was wrong to conclude (in VP at [36]) that the question was limited to that described at [22] of *Zalewska*:

> "The central issue is whether the registration requirements in reg 7 of the 2004 Regulations on which the appellant's right to reside in the United Kingdom under the worker registration scheme depends are compatible with Community law."

50. Ms Apps' submission in my view pays insufficient heed to the structure of Lord Hope's remarks. It is in the section headed "the issues", of which para 22 forms part, that the "central issue" is defined. Lord Hope goes on to explain that counsel for Ms Zalewska had two arguments in support. It is in the "Discussion" relating to the first of those arguments that the passage from [25] appears. As Ms Zalewska was not in registered employment immediately before her claim, her only route to success would have been if he had worked in registered employment for the whole of a 12 month period – but she had not.

51. In any event, as I made clear at [36] of *VP*, I did not regard Lord Hope's summary at [22] as determinative of the issue before me then, so even if, contrary to my view, there is any merit in Ms Apps' submission on the point, it would not invalidate the analysis in *VP.*

52. Ms Apps then refers to [29] of *Zalewska* where Lord Hope "expressly accepted that an A8 national is only admitted to the labour market while they comply with national measures (i.e. the requirement to register) but not otherwise." So he does, but I do not see that it helps Ms Apps. I stand by what I said in *VP* at [39]-[42]:

> "39. By contrast at [29], he refers to the test for the applicability of Article 7 being that of admission to the labour market. Further, the implication of his remarks at [36] is that it is registration (triggering "admission", though not yet "access") that holds the key:
>
> > "Registration brings with it the package of benefits that a worker is entitled to because article 7 of Regulation 1612/68 requires that he must not be treated differently. Failure to register does not."
>
> 40. At [43] he makes clear his view that it is incorrect to suggest that a person is admitted to the UK labour market only once 12 months had elapsed. Rather, "Admission to the United Kingdom labour market is obtained as soon as the A8 state national begins work for an authorised employer."
>
> 41. So the question is: once admitted in accordance with national measures (as Ms Zalewska, having failed to register her third job was not, but the present claimant was in relation to work for M & B), what is it that a person can rely upon? It is sustainable in the light of *Zalewska* that while employed he can rely on e.g. Article 7 of Regulation 1612/68. And, if that is correct, questions arise such as whether the package of

> rights attaching to him as a "worker" under national law includes the protection against his worker status coming to an end; whether an A8 national can rely on that part of Art 7 which deals with "should he become unemployed, reinstatement or re-employment" and whether the UK, in respect of a person who has (albeit belatedly) complied with its rules to obtain admission to the labour market, can rely on the self-limiting status of worker under national law (in that, having been acquired, it is defeated by the fulfilment, outside the person's control, of a condition to which national law made the status subject) to take away rights under EU law which would meanwhile have accrued.
>
> 42. It seems to me that *Zalewska* provides useful guidance on many aspects of the accession of the A8 states and the 2004 Regulations but is not determinative of the present question. While there may be an argument that the distinction between "admission" and "access" to the labour market means that it is only those who have the latter who have the full panoply of rights of a worker under EU law, it is not unequivocally and consistently stated in *Zalewska* that such is the case and indeed, as has been noted, in a number of places there are suggestions that the rights attach to those who have been admitted to the labour market. That there should be a degree of ambiguity in this regard in my view testifies to the fact that the position of someone who was "admitted" (having obtained a worker registration certificate) was not what was in issue in that case. It was not necessary for the case to deal with such points and it did not in the event do so. In my view *Zalewska* does not provide binding authority against Mr Weiss's submission."

53. While Ms Apps submits that my distinction of *Szpak* and *Miskovic* at [43] of *VP* was unjustified, she has provided only brief argument why this should be so. She suggests that in these two cases the Court of Appeal accepted that the ambit of *Zalewska* was broad rather than narrow. She relies on [86] of *Miskovic*, but there the Court was merely expressing the view that the ability of Member States to set down the rules for access to its labour market under "national measures" was wide enough to entitle them to exclude those who had been unlawfully present in the United Kingdom. By contrast, at [39] the Court was at pains to make clear that in *Zalewska* their Lordships were focussing on one aspect of the Worker Registration Scheme only and that their conclusions were not determinative of the issue before the Court of Appeal. As to *Szpak*, Ms Apps relies on the discussion in that case at [41], applying Lord Hope's remarks at paras 39-44 of *Zalewska* to Mr Szpak's case. However, that was in the context of a discussion of proportionality. The present case is not a proportionality challenge, but one based on the scope of the permitted derogation. Ms Apps' submission on these two cases is in my view too generalised, seeking to make good a broader point than the discussion in the cases merits. I stand by what I said in *VP* in relation to these two cases.

54. Accordingly, it is necessary to turn to examining the scope of derogation argument. I was initially not offered in the skeleton arguments any submissions on this point and so, following the oral hearing, directed submissions expressly by reference to C-305/87 *Commission v Greece* and C-9/88 *Lopes da Veiga*.

55. Ms Apps submits that the provisions respectively concerned in those cases, under the Greek Accession Act and the Accession Treaty for (Spain and) Portugal were importantly different from those in the A8 Accession Treaty.

56. The structure of those provisions was as follows:

> (a) a declaration that the Treaty Article on freedom of movement shall "only" apply subject to transitional provisions;
>
> (b) a statement that certain specified articles of Regulation (EEC) no 1612/68 ("the Regulation") shall only apply (in the acceding state) to nationals of other Member States (and vice versa) from a date some years subsequent to the date of accession; and
>
> (c) a provision allowing the present member states and the acceding state to maintain national provisions making prior authorisation a requirement for immigration with a view to employment.

57. In the case of the A8 Accession Treaty, the structure was:

> (a) a declaration that the Treaty Article on freedom of movement shall "fully" apply "only" subject to transitional provisions;
>
> (b) a statement, expressed to be "by way of derogation" from specified articles of the Regulation, that existing Member States will apply national measures regulating access to their labour markets by A8 nationals; and
>
> (c) provision is then made (as a series of further sub-paragraphs following the sub-paragraph summarised as (b) above) in relation to the right of "access" to the labour market of the host Member State for various categories of worker, including that those "admitted" to the labour market for a period of less than 12 months "shall not enjoy those rights" (sc. of "access").

58. While it is true that there are differences, they are much less significant than the similarities when the case law is considered. I do not consider the matters relied upon by Ms Apps – notably the contrast between prior immigration authorisation in the former category and the ability to introduce "national measures" in the latter – constitute a relevant distinction.

59. In *Commission v Greece*, a long-standing Presidential Decree had imposed draconian restrictions on the ownership by, or letting to, foreign nationals of certain categories of immovable property. Article 9(1) of Regulation 1612/68 provided for equality of treatment between national workers and workers from other Member States in matters of housing. The Commission asked the Court to declare the Greek legislation contrary to the Treaty. The relevant Treaty articles had not been suspended and, while certain Articles of Regulation 1612/68 had been suspended for a while, Article 9 was (as noted by the Advocate General at [10] and [11]) not among them.

60. Ms Apps submits that the Court "held that the Greek Accession Treaty did not suspend the application of the Free Movement of Workers...to Member State nationals who were already working in Greece at the date of accession." In my view, that is to misread the effect of the case. It was not a case about the effect on those working in Greece at the date of accession: as the Advocate General noted at [11], the issue was equally applicable to those who were employed in Greece between the date of accession and the date the Court was considering the matter.

61. In *Lopes da Veiga,* the appellant, a Portuguese national, had been working on Netherlands–flagged ships since 1974. Portugal acceded to the EU on 1 January 1986. He sought to rely on Article 7 et seq. of Regulation 1612/68 in order to obtain a residence permit. The Court held that it followed from the fact that Articles 1 to 6 had been expressly excluded from applying by the Treaty of Accession, that Article 7 had not been. In paras 9 to 11 it observed:

> "9. Article 216(1) of the Act of Accession provides that Articles 1 to 6 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition1968 (II), p. 475) is to apply in Portugal with regard to nationals of the other Member States and in the other Member States with regard to Portuguese nationals only as from 1 January 1993. It follows from an *a contrario* interpretation of that provision that Article 7 *et seq.* of the regulation, which are not covered by that derogating provision, apply as from 1 January 1986, the date on which the Act of Accession came into force.
>
> 10. That interpretation is consistent with the ratio of the transitional arrangements, which suspend, until 1 January 1993, the application of the provisions of Title I of Regulation No 1612/68 dealing with eligibility for employment, in order to prevent disruption of the labour markets of the old Member States through a massive influx of Portuguese nationals seeking employment. There is no reason, however, to refuse to allow the provisions of Title II of Regulation No 1612/68 dealing with employment and equality of treatment to be applied to Portuguese workers who were already employed in the territory of one of the old Member States.

> 11. With regard to the similar provisions of the Act concerning the Conditions of Accession of the Hellenic Republic to the European Communities, the Court has in fact ruled, in its judgment of 30 May 1989 in Case 305/87 *Commission* v *Hellenic Republic* [1989] ECR 1461, that, although the transitional arrangements suspended the application of a number of provisions of Regulation No 1612/68 defining the rights guaranteed under Articles 48 and 49 of the Treaty, they did not suspend the application of those articles, in particular in regard to workers from other Member States who were lawfully employed in the Hellenic Republic before 1 January 1981 and continued to be employed there after that date or those who were lawfully employed there for the first time after that date.

62. Ms Apps submits that the case held that the Portuguese nationals did not require additional "prior authorisation" for immigration purposes to access free movement rights after Accession, if they were already present for relevant purposes within the relevant Member State. However, while the Court did hold that it was not fatal to Mr Lopes da Veiga's case that he had not obtained a residence permit enabling him to carry on activities as an employed person (see [18]), that was not all it decided. As the passage quoted above makes clear, it also decided that the derogation from Regulation 1612/68 was limited to those Articles which it had been expressly stated were not to apply.

63. In *Zalewska,* Lord Hope considered *Lopes da Veiga* at [28] in response to a submission from Counsel. After summarising the facts, he observed:

> "In para 10 of his opinion Advocate General Darmon said that as soon as the Act of Accession came into force workers who were nationals of the new member state and who were already employed in the territory of one of the member states of the Community must be able to enjoy the freedoms which the Treaty guarantees. In para 10 of its judgment the court said that the fact that the provisions of Title I of Regulation 1612/68 had been suspended by the transitional arrangements did not provide a reason for refusing to allow the provisions of Title II dealing with employment and equality of treatment to be applied to a person already employed in the territory of one of the old member states. The second subparagraph of paragraph 2 of part 2 of Annex XII gives effect to that decision in the case of Polish nationals who were legally working in an existing member state at the date of accession. The 2004 Regulations too were careful to provide that an A8 state national was not an accession state worker requiring registration if he was legally working in the United Kingdom on 30 April 2004 and had been legally working in the United Kingdom without interruption for a period of 12 months ending on that date: reg 2(3). But these provisions which apply to the decision in *Lopes da Veiga* are of no assistance to the appellant, as she did not arrive in Northern Ireland until after the accession date."

64. As we have seen, the ECJ based its decision on the point both (in [9]) on a process of interpretation of the language of the legislation and (in [10]) on the reason behind the transitional arrangements. Although Lord Hope's remarks might be seen as focussing exclusively on the latter in suggesting that because Ms Zalewska had arrived in Northern Ireland after the Accession Date, *Lopes da Veiga* did not help her, he had already addressed in the previous paragraph the need to "have been admitted to the [labour market] under the national measures regulating access" (as it was not in dispute that Ms Zalewska had not been). In that context, the remarks on *Lopes da Veiga* were made for completeness in order to respond to a submission from Counsel. The matters examined in [9] of *Lopes da Veiga* did not arise in *Zalewska*, because she did not have the registration certificate that she required. If he had been intending to address them, in my view it is likely that Lord Hope would have felt the need to address, additionally, *Commission v Greece*, which, as we have seen, expressly did not turn on the question of status at the Accession Date and of whose existence he would – from its citation in *Lopes da Veiga* – necessarily have been aware.

65. Mr Royston:

> (a) refers me to 77/82 *Peskeloglou,* as authority for the proposition that a derogation from the principle of freedom of movement must be interpreted restrictively; and
>
> (b) refers to Commission Decision of 20 December 2012 authorising Spain to extend the temporary suspension of the application of Articles 1 to 6 of Regulation (EU) No 492/2011 (Official Journal L356, 22/12/2012 p0090-0092) to substantially the same effect (although as a Commission decision it seems to me that it can be no more than an illustration in a relevant context of the principle under (a) being applied).

His submission is that derogations from Treaty rights must be interpreted restrictively and that a court should not imply into the Accession Treaties derogations which are not expressly there. Both of these I accept. He invites me to follow my reasoning in *VP*.

66. Ms Apps relies then on the wording of the derogation in the A8 Accession Treaty as a distinguishing feature. However, as I noted in *VP* at [26], the wording appears to draw a distinction between admission to the labour market of a Member State and access to the labour market. Where Ms Apps seeks to rely on the fifth sub-paragraph, which states that "Polish nationals legally working…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 those rights", the question is what are "those rights" that are being referred to. The answer, if one works back up through the sub-paragraphs set out in [36] is "access to the labour market of that member State but not to the labour market of other member States applying national

measures." That takes us back to whether there is a distinction between "access" and "admission" and if so, its effect on Article 7 rights. As I said at [47] of VP:

> "47. It does seem to me that as each of the accession treaties has broadly similarly structured provisions with specific differences, one may take the view that Article 7 of Regulation 1612/68 – the normal concomitant of "worker" status - was advisedly not included in the A8 accession derogations. The derogations in paragraphs 2 and 9 of the relevant schedule for Lithuania [as it was in *VP,* but it is the same for Poland] fall to be interpreted narrowly. This is not a question of construing a UK statute but an EU instrument. The distinction between "access" and "admission" does not lead inexorably to the conclusion that rights under Article 7 of Regulation 1612/68 only extend to those who enjoy access to the labour market: those who have been admitted could still enjoy Article 7 rights, without depriving the concept of "access" of effect, which could carry a right to be exempted from quotas or similar mechanisms a Member State may adopt to limit access to its labour market. While I do not need to decide the point at this stage and do not do so, it seems to me to be arguable that the intention expressed in the derogation provisions may have been that once a person is admitted to the labour market at all, they should be protected against discriminatory adverse treatment in the event of subsequent supervening involuntary unemployment, rather than that they could be admitted on essentially any terms because they could have been excluded altogether. The contention that the UK did not "de facto restrict access to its labour market" (which must I think be interpreted in its context as referring to stopping people from joining it in the first place) is a sustainable one – rather, the UK imposed the worker registration scheme, described by Baroness Hale in *Zalewska* at [52] as a "purely administrative act". **If** de facto control of access to the labour market is what is relevant (as opposed to shrouding it in legal conditions through national measures to control the rights that person has once "admission" has been obtained) the argument that paragraph 9 of the derogation schedule does not extend far enough does not appear manifestly doomed to fail. The position adopted by Jackie Morin and set out at [30] does appear realistically arguable. If I thought it might make a difference to the outcome in this case, I would have to give consideration to making a reference to the CJEU under Article 267 TFEU."

67. When the present decision was at final draft stage, I was referred to *SSWP v JS (IS)* [2010] UKUT 347(AAC). I have not received argument on it and, while it is consistent with the content of this interim decision, has not materially influenced it, and I merely note it for completeness. Upper Tribunal Judge Jacobs concluded, following an oral hearing, that a woman who was in certificated employment, but had not been for 12 months, was sufficiently a "worker" for the purposes of her child's rights under Article 12 of the

Regulation. I also note in passing that the decision provides no indication that the Secretary of State argued that *Zalewska* provided binding authority against the claimant.

68. Turning to issue (b) discussed at [34], if the present claimant was a "worker" whilst working then, as Mr Royston submits, he could not have been treated differently from a UK national in relation to in-work "social and tax advantages", such as tax credits.

69. It is less immediately clear how Article 7 of the Regulation was intended to operate in relation to out of work benefits (even absent the complications caused by the Worker Registration Scheme).

70. In R(IS)12/98, the claimant, a French national, claimed benefit when her employment had ended but in circumstances when she fulfilled the requirement to retain "worker" status. That was therefore straightforward.

71. In *Zalewska* however, it appears to have been assumed that, had she not fallen foul of the Worker Registration Scheme, Ms Zalewska, having left all her employments, registered or not, would have been entitled to rely on Article 7 to establish her claim for a benefit (income support) that, at least generally, is not an in-work benefit. How this would occur did not need to be – and was not – discussed. It may be that Ms Zalewska was doing enough to retain "worker" status (if she had had it in the first place) and, though claiming income support rather than jobseeker's allowance, was in a similar position to that of the claimant in *SSWP v Elmi* [2011] EWCA Civ 1403 - see the observations of Baroness Hale at [51] about Ms Zalewska's efforts to seek work around the time of the First-tier Tribunal hearing – but this is nowhere made clear.

72. In R(IS) 4/98, a case which was the subject of a reference to the European Court of Justice, though not on this point, the claimant had taken early retirement some six years before the events giving rise to his claim for benefit and was held able to rely on Article 7(2). It is not immediately obvious to me how he retained "worker" status and I have not heard argument on it.

73. It might be thought a surprising result if an EU national could rely on Article 7 of the Regulation to be able to access out of work benefits in circumstances where he does not have the corresponding right of residence, the importance of which to protecting the finances of a Member State has been repeatedly affirmed by the CJEU in recent caselaw such as *Brey*, *Dano* and *Alimanovic*. One would, therefore, expect the requirement which exists, before the Regulation can apply, for a person to be a "worker" or to retain worker status to be significant.

74. If one looks at the potential to retain worker status after employment has ended, with the accompanying rights, as something which is accruing during employment, I am struggling to see how that of itself that could fall within

Article 7(1). It appears neither to be the type of matter with which Article 7(1) is concerned, nor is accruing the potential to retain worker status something with which national workers, at least normally, will be concerned.

75. More likely is it that in order to give effect to Article 7(2) a court might need to ensure that the ability to retain worker status is preserved. A UK national whose employment had been terminated on the grounds of injury but who was nonetheless able to look for work would, other things being equal, be entitled to sign on (and, if eligible, claim JSA) and, when he then on disability or health grounds developed "limited capability for work" (or was treated as so doing), to claim ESA. If rights under Article 7(2) are to mean anything (assuming they arise in a case such as this at all) the disapplying by UK legislation of the European and domestic legal framework normally permitting worker status to be maintained where the conditions are met would have to be reversed.

76. If Article 7 of the Regulation has not been derogated from, it would appear that the matter comes down to whether there is indeed a distinction between admission and access to the labour market, and whether it is the former that suffices for the ability to rely on Article 7. If it is, then it is hard to see that para 9 of Annex XII can provide authority for withholding the retention of worker status which would otherwise accrue. If it is the latter, then no relevant worker status arises and recourse to para 9 is not needed.

77. In my view the matter is certainly not acte clair in favour of the Secretary of State's interpretation. On the other hand, it is difficult to say that there is no scope for any reasonable doubt that the claimant's construction is correct. It is in my view a question of EU law of considerable difficulty. The power to make a reference under Article 267 arises "if [a court or tribunal] considers that a decision on the question is necessary to enable it to give judgment." The only reason why it might be said not be necessary in the present case is that if the Secretary of State loses his appeal in *Gubeladze* in relation to the lawfulness of the extension of the Worker Registration Scheme in 2009, the present claimant will succeed in any event. However the hearing in *Gubeladze* is not until February 2017 and judgment is likely to be reserved. Given the importance of the case in indirectly addressing the lawfulness of the residence of certain categories of A8 nationals in the UK in the 2009-11 period, it is impossible to exclude the possibility that *Gubeladz*e may subsequently be further appealed to the Supreme Court, where a decision would be unlikely before 2018. It is regrettable that decisions in social security cases of this complexity are necessarily far removed in time already from the circumstances giving rise to the original need, but that does not provide a reason to acquiesce in relation to further delay ensuing, as it would if I failed to make a reference in circumstances where the Court of Appeal on an appeal to it in the present case might then, some considerable time later, feel it had to do so. If that would be, as Ms Apps suggests, to pre-empt the Court of Appeal, then I do so respectfully and for good reason.

78. If the relevant part of *Gubeladze* does go (definitively) in favour of the claimant, then consideration can be given at that point to what should become of the reference effected pursuant to the present decision. It is worth noting in that regard that there is one other case before the Upper Tribunal (CE/98/2015 *SSWP v NZ*) in which the same points as are the subject of the reference may arise. Submissions will in due course be invited from the parties in that case (in which Ms Apps also appears) in the light of the present decision.

C.G.Ward
Judge of the Upper Tribunal
6 September 2016