**IN THE UPPER TRIBUNAL** **Case No.** CPC/1179/2015
**ADMINISTRATIVE APPEALS CHAMBER**

**Before Upper Tribunal Judge Rowland**

**Decision:** The claimant's appeal is allowed. I set aside the decision of the First-tier Tribunal dated 16 December 2014 and substitute a decision that the claimant had a right of residence in the United Kingdom for the purposes of her claim to state pension credit made on or about 16 September 2013. Other issues arising on that claim are to be determined by the Secretary of State.

## REASONS FOR DECISION

1. This is an appeal, brought by the claimant with my permission, against a decision of the First-tier Tribunal dated 16 December 2014, whereby it dismissed the claimant's appeal against a decision of the Secretary of State dated 5 December 2013 to the effect that the claimant was not entitled to state pension credit on her claim made on or about 16 September 2013 because she did not have a relevant right of residence in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland and therefore could not be treated as habitually resident in Great Britain.

2. The original ground of appeal to the Upper Tribunal was submitted by Ms Charlotte Frost of the Citizens' Advice Bureau in Swale, who represented the claimant in the proceedings before the First-tier Tribunal by way of written submissions but not at the hearings. She then passed the case to Mr Graham Tegg, solicitor, of Kent Law Clinic, who submitted further grounds of appeal in response to a direction from me and who appeared before me at the subsequent oral hearing of the claimant's application for permission. In a helpful written submission, Mr Michael Page now concedes on behalf of the Secretary of State that the appeal should be allowed.

3. The claimant is a Polish national. She has lived in the United Kingdom with her son, who is also a Polish national, since late 2006. She was receiving disability living allowance at the material time but has otherwise been dependent on her son since her arrival. She attained pensionable age on 6 November 2010 but did not complete a claim for state pension credit until 16 September 2013, as a result of which she appears to have been treated as having claimed from 24 June 2013. She argued that she had a right of residence under European Union law (and domestic law giving effect to the relevant European Union law) as a dependent member of her son's family, but the Secretary of State and the First-tier Tribunal decided that, at the material time, he had a right of residence only as a jobseeker and, as is common ground, jobseekers and their dependants are excluded from entitlement to state pension credit by virtue of the terms of regulation 2(2) and (3) of the State Pension Credit Regulations 2002 (SI 2002/1792), as amended. The Secretary of State argued that a formerly self-employed person does not retain that status while involuntarily unemployed and that, because he had been self-employed immediately before he last became unemployed, the claimant's son had not had the status of a worker at any time between the date of the claimant's claim and the date of the

Secretary of State's decision on that claim. The claimant's contention, rejected by both the Secretary of State and the First-tier Tribunal, was that her son had acquired a permanent right of residence by virtue of his employment before he became self-employed and it was for that reason that she was entitled to a right of residence as a member of his family.

4. Article 16(1) of Council Directive 2004/38/EC provides that –

> "Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there."

To have "resided legally", the person concerned must have satisfied the other conditions of residence in the Directive, although periods before the Directive came into force may be taken into account. Article 6 provides for a citizen to have a right of residence for three months without restrictions and Article 7 provides for a worker or a self-employed person to have a right of residence and that such a person who "is in duly recorded involuntary unemployment after having been employed for more than one year" retains that status. The Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) were intended to transpose the Directive into United Kingdom law, although it is a matter of dispute whether they did so entirely satisfactorily.

5. In the light of the Directive, the claimant's case required a detailed consideration of her son's employment history. He attended the hearings before the First-tier Tribunal and gave evidence at the final hearing to the effect that he had arrived in the United Kingdom in October 2012 to learn the language but had decided to stay, being employed in various jobs from March 2003 until May 2012, interrupted by two substantial periods of unemployment. He became self-employed in August 2012 before becoming unemployed again in May 2013.

6. It was common ground that none of his employment between 1 May 2004 and 30 April 2011 had been registered under the Workers' Registration Scheme, but he claimed that that was not necessary in his case because he had the advantage of transitional protection as a result of having been lawfully in work at the time that the Scheme came into existence. Regulation 2(3) of the Accession (Immigration and Worker Registration) Regulations 2004 (SI 2004/1219) provided –

> "(3) A national of a relevant accession State is not an accession State worker requiring registration if he was legally working in the United Kingdom on 30th April 2004 and had been legally working in the United Kingdom without interruption throughout the period of 12 months ending on that date."

If he was wrong about that, he did not have a right of permanent residence because, in broad terms, the effect of the Regulations is that an "accession State worker requiring registration" who has never applied for a registration certificate is not treated as a worker (except during the first month of any employment and, of course, after the Regulations ceased to be in force) and also does not have a right of residence while a work seeker. Ordinarily, a Polish national ceased to be "an accession State worker requiring registration" only after working legally (i.e., having

applied for a certificate within the first month of any employment and not having a gap in employment exceeding 30 days) for twelve months or when the Regulations ceased to be in force.

7. The First-tier Tribunal rejected the claimant's son's evidence, saying –

> "[The claimant's son] provided information that he recalled he had been working from March 2003 to August 2004 for South Pacific Treats. [He] was not able to provide any documents of the evidence relating to working legally in the UK for a continuous period of 12 months prior to 30.04.04, or for an uninterrupted period of 12 months partly, or wholly, after 30.04.04."

As a result, it found that the claimant's son did not have transitional protection and so had not been working lawfully between 1 May 2004 and 30 April 2011 and so had not been lawfully resident for five years by 5 December 2013 so as to have acquired a right of permanent residence. Less importantly, it also recorded –

> "The Home Office had no knowledge of [his] entry in to the UK in 2002"

8. The claimant's original ground of appeal to the Upper Tribunal was essentially that the First-tier Tribunal acted unfairly because it did not ask her son for the evidence that it said he could not provide or for evidence of his entry into the United Kingdom in 2002 and, had it asked him at the hearing for the evidence, he would have provided it. In a written submission, provided to the First-tier Tribunal by Ms Frost in September 2014, it had been clearly stated that the claimant's son "will be bringing details of his employment/self employment to the hearing". There was then a hearing before the First-tier Tribunal on 1 October 2014. The hearing was not effective due to the lack of an interpreter for the claimant herself and also to the late provision of evidence when the Secretary of State was unrepresented, but it is clear that material evidence in addition to the evidence formally handed in and copied into the file was shown to the judge because he informed the Secretary of State in the notice of adjournment that the claimant's son "has invoices available for his work in 2012-13 should the Respondent wish to see them". I suspect the son had also proffered the payslips from earlier employment as well, but the judge plainly regarded the evidence of self-employment to be important. Unfortunately, despite that judge having reserved the case to himself, it was then listed for hearing before a different judge, who presumably relied on the hearing bundle without realising that there were other documents available. Had she asked for them, I have no doubt that they would have been provided. I suspect that she did not indicate at the hearing that she was not minded to accept the claimant's son's oral evidence, that he did not think it necessary to produce the documents again or refer to them or to his passport in the absence of such an indication and that it understandably therefore did not occur to her that he might have such further evidence. Indeed, it does not really matter whether he had the payslips with him or could have provided them after the hearing. In either event, I accept that there was a failure to ask for them that resulted in a potential unfairness that justifies setting aside the First-tier Tribunal's decision if the evidence clearly shows that the First-tier Tribunal proceeded on the basis of a materially erroneous understanding of the facts (see *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] QB 1044, read with

*Hussain v Secretary of State for Work and Pensions* [2016] EWCA Civ 1428 at [27].). The Secretary of State does not argue to the contrary.

9. I turn then to the question whether, in the light of the documentary evidence now before me, the claimant's son did have a right of residence. This is the issue that Mr Tegg addressed in response to the direction from me.

10. It is now clear from the documentary evidence that the claimant's son merely passed briefly through the United Kingdom in October 2002, while travelling by coach to the Republic of Ireland where he stayed until January 2003, and that it was only on 30 March 2003 that he arrived in the United Kingdom again and was given leave to enter as a student – Poland not having then joined the European Union – for one year, subject to standard conditions that he should have no recourse to public funds and that "work (and any changes) must be authorised". There was at that time no system for authorising employment for students on a job-by-job basis. Mr Tegg drew my attention to published advice (doc 140), showing that there was a limit on the number of hours for which a student could work during term time but no requirement to have each job authorised. He provided payslips showing clearly that the claimant's son worked for South Pacific Treats from the beginning of April 2003 until June 2004. Significantly, although his "salary" varied only slightly – from £351 to £391.50 per month – between April 2003 and March 2004, it was only £180 in April 2004 and then increased to £417.10 in May 2004 and £882.70 in June 2004. Mr Tegg submitted that the £180 received in April 2004 was two weeks' holiday pay – he had just completed a year's employment – and that the claimant's son did not actually work in that month. Instead, he went to Poland so as not to be an "overstayer" when his visa expired on 30 March 2004. Poland joined the European Union on 1 May 2004 and he was then entitled to return and to work full time. It is right to say that there is no stamp in his passport to show that he travelled to Eastern Europe or anywhere else outside the United Kingdom in March or April 2004. There is also no stamp showing his return to the United Kingdom, but there would not be once Poland had joined the European Union.

11. It appears from further payslips and P45s that the claimant moved straight from South Pacific Treats to another job where he worked from July 2004 until April 2005 and then straight into a third job where he worked from May 2005 until June 2006. That was followed by two years' unemployment until June 2008, during which period he was awarded and paid jobseeker's allowance, presumably on the Secretary of State's understanding that he had a right of residence. From June 2008 to May 2009, he was employed in a fourth job but then became unemployed again. This time he was refused jobseeker's allowance by the Secretary of State but he successfully appealed to the First-tier Tribunal and was paid jobseeker's allowance in the light of its decision dated 5 March 2010. It seems that neither party asked for a statement of reasons for the decision, but the evidence shows that the claimant had explained that he did not have any workers registration certificates because he had been in permanent employment for 12 months at the time the Workers' Registration Scheme was introduced (doc 300) and the decision notice (doc 74) shows that the First-tier Tribunal relied on the claimant's son's status having "previously been established and accepted by the Respondent which paid Jobseekers Allowance to him in 2007". It said –

> "To treat him now as "a person from abroad" would be to prejudice his accrued rights."

From November 2010 until April 2011, the claimant's son was employed again, in his fifth job. As the Secretary of State points out, although the claimant's son has said he was employed with that firm until April 2012, that statement appears inconsistent with the documentary evidence. (Indeed, there are other instances where the documentary evidence does not exactly tally with his evidence as regards dates, but many people are what doctors call "poor historians".) There is then an unexplained gap until August 2012, from when he worked on a self-employed basis until April or May 2013. Thereafter, he was unemployed until after the Secretary of State has made his decision on the claimant's claim for state pension credit.

12. In the light of that evidence, Mr Tegg advanced four grounds of appeal in his written submission. First, he argued that the distinction between the retained rights of former employed workers who had become involuntarily unemployed and the lack of retained rights of former self-employed people that was drawn by the Secretary of State was inconsistent with European Union law, although he accepted that it was consistent with domestic law. Secondly, he argued that the evidence showed that the claimant's son fell within the scope of regulation 2(3) of the 2004 Regulations and so had not been required to register his work under the Workers' Registration Scheme from 1 May 2004, with the result that he had completed five years of lawful residence under the Directive long before 2013. Thirdly, he argued that the Secretary of State was anyway bound by the First-tier Tribunal's decision of 5 March 2010 to accept that the claimant had not been required to register his work under the Worker's Registration Scheme. Fourthly, he argued that, in the light of *TG v Secretary of State for Work and Pensions (SPC)* [2015] UKUT 50 (AAC), the extension of the Worker's Registration scheme after 30 April 2009 was unlawful.

13. Following the oral hearing, at which Mr Tegg developed those grounds, I gave permission to appeal and made the following observations –

> "5. The first ground raises the question whether the Upper Tribunal remains bound by *R.(Tilianu) v Secretary of State for Work and Pensions* [2010] EWCA Civ 1397 in the light of *St Prix v Secretary of State for Work and Pensions* (Case C-507/12) [2014] AACR 18. I understand that this is to be the subject of a hearing on 20 October 2016 before Upper Tribunal Judge Ward in two cases in which HMRC is the appellant (on files CF/393/2016 and CF/1375/2016).
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> 6. As regards the second ground of appeal, it is arguable that the claimant's son was not in breach of United Kingdom immigration law during April 2004 (if he left the country) and that he had a subsisting valid contract of employment, but I am not currently persuaded that that necessarily means that he was "legally working in the United Kingdom on 30th April 2004" for the purposes of regulation 2(3) of the Accession (Immigration and Worker Registration) Regulations 2004 (SI 2004/1219) because his existing visa had expired and, had he actually been working, he would not have been doing so legally. However, even if the claimant was not legally working on that date, it might perhaps be arguable that this was one of the "category of exceptional cases where proportionality could come into play" that was contemplated as a possibility in *Mirga v Secretary of State for Work and Pensions*

> [2016] UKSC 1; [2016] 1 WLR 481 at [70] when considering whether the claimant had a right of residence.
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> 7. As regards the third ground of appeal, the conventional view is that *res judicata* does not generally exist in social security law because section 17 of the Social Security Act 1998 implies that findings of fact made in one decision are not binding save when there is express provision in regulations that they should be. However, in this instance, there was arguably no issue of fact between the claimant's son and the Secretary of State (see docs 271 to 303) and it is arguable that the finding by the First-tier Tribunal that the law did not require him to register under the worker registration scheme is binding on the Secretary of State for all purposes since the effect of the finding and of the Secretary of State not appealing was to cause the claimant's son to act to his detriment by not registering thereafter. The present claimant was not a party to the proceedings in 2010 but it would arguably be sufficient for her purposes that the Secretary of State was estopped from denying to her son that he had a right of residence, since her right would follow from his.
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> 8. In relation to the fourth ground, Mr Tegg conceded that there was an error in the submission because the Secretary of State's decision in the present case was made on 5 December 2013 (not 2014) and so five years from 30 April 2009 had not elapsed."

14. As regards the first ground, the case on file CF/1375/2016 has now been decided on another basis but the case on file CF/393/2016 has not been decided and consideration is currently being given to whether it should be stayed to await the decision of the Court of Justice of the European Union in C-442/16 *Florea Gusa v Minister for Social Protection, Attorney General* (see *HMRC v HD (CHB)* [2017] UKUT 11 (AAC)). As regards the third ground, the Secretary of State points out that, as with the fourth ground, fewer than five years had elapsed between 2010 and the date of the Secretary of State's decision. That might not be an insurmountable difficulty if the decision of the First-tier Tribunal of 5 March 2010 were nonetheless binding as a ruling that there was in law an estoppel arising out of the Secretary of State's award of jobseeker's allowance from June 2006, even if the decision was wrong both because, normally, estoppel has no role in social security decision-making (see *PS v Secretary of State for Work and Pensions (CSM)* [2016] UKUT 437 (AAC) at [58]) and because it is also not clear that the Secretary of State's award of jobseeker's allowance in 2006 was made on a complete understanding of the facts. The fact that a ruling is wrong does not mean that it cannot be binding as *res judicata* (see *Watt v Ahsan* [2007] UKHL 51; [2008] 1 AC 696). As regards the fourth ground, *TG v Secretary of State for Work and Pensions (PC)* [2015] UKUT 50 (AAC) is the subject of an appeal to be heard by the Court of Appeal later this year but the ground has now anyway been abandoned.

15. In any event, I need not consider any of those grounds further, because the Secretary of State concedes that the appeal can be allowed on proportionality grounds. He accepts that the facts are as the claimant submits and that not only did her son not work during April 2004 but he also left the country for that month. However, he does not concede that her son was "legally working" during that month for the purpose of regulation 2(3) of the Accession (Immigration and Worker Registration) Regulations 2004. On that basis, the claimant's son was not

technically working lawfully for more than four separate months from 1 May 2005 until 30 April 2009 (or, the Secretary of State would argue, for more than a further month until 30 April 2011) and so cannot have acquired a right of residence as a worker or jobseeker during that period and so had not technically "resided legally for a continuous period of five years" in the United Kingdom so as to have acquired a permanent right of residence under Article 16 of the Directive by the time of the Secretary of State's decision on the claimant's claim for state pension credit.

16. On the other hand, the Secretary of State accepts that the claimant's son had in fact been continuously living in the United Kingdom for ten years by the time the claimant claimed state pension credit and that the evidence shows that he was working legally (when actually working) before Poland's accession, that he intended to work legally after accession and that he strove to avoid a period of illegal work following the expiry of his visa. In the light of those matters, the Secretary of State submits that it would be disproportionate to disregard all of the claimant's son's subsequent work when it seems clear from his actions before accession that he intended to remain within the law. He therefore concedes that the claimant's son had acquired a permanent right of residence by the time his fifth job ended in April 2011.

17. In my judgment, that is a legitimate approach. Unsurprisingly in the light of my observations when giving permission to appeal, Mr Page refers to *Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1; [2016] 1 WLR 481; [2016] AACR 26 as the justification for the approach. However, upon reflection, it seems to me that the more relevant authority is *Zalewska v Department for Social Development* [2008] UKHL 67; [2008] 1 WLR 2609; R 1/09(IS).

18. In *Mirga*, the Supreme Court said –

> "69. Where a national of another Member State is not a worker, self-employed or a student, and has no, or very limited, means of support and no medical insurance (as is sadly the position of Ms Mirga and Mr Samin), it would severely undermine the whole thrust and purpose of the 2004 Directive if proportionality could be invoked to entitle that person to have the right of residence and social assistance in another Member State, save perhaps in extreme circumstances. It would also place a substantial burden on a host Member State if it had to carry out a proportionality exercise in every case where the right of residence (or indeed the right against discrimination) was invoked.
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> 70. Even if there is a category of exceptional cases where proportionality could come into play, I do not consider that either Ms Mirga or Mr Samin could possibly satisfy it. They were in a wholly different position from Mr Baumbast: he was not seeking social assistance, he fell short of the self-sufficiency criteria to a very small extent indeed, and he had worked in this country for many years. By contrast Ms Mirga and Mr Samin were seeking social assistance, neither of them had any significant means of support or any medical insurance, and neither had worked for sustained periods in this country. The whole point of their appeals was to enable them to receive social assistance, and at least the main point of the self-sufficiency test is to assist applicants who would be very unlikely to need social assistance.

> 71. Whatever sympathy one may naturally feel for Ms Mirga and Mr Samin, their respective applications for income support and housing assistance represent precisely what was said by the Grand Chamber in *Dano*, paragraph 75 (supported by its later reasoning in *Alimanovic*) to be the aim of the 2004 Directive to stop, namely 'economically inactive Union citizens using the host Member State's welfare system to fund their means of subsistence'."

19. The reference to Mr Baumbast was to the protagonist in *Baumbast v Secretary of State for the Home Department,* C-413/99, EU:C:2002:493; [2003] ICR 1347. He was a German national who was found to have a right of residence in the United Kingdom by virtue of being a citizen of the European Union even though he did not technically meet the self-sufficiency criteria in the relevant directive. He had previously worked in the United Kingdom and had maintained his family home here while working outside the European Union for a German company. His wife and elder daughter were Colombian nationals and his younger daughter had dual German and Colombian nationality. The Supreme Court in *Mirga* explained –

> "60. The effect of the decision of *Baumbast* is that the fact that an applicant may fall short of the strict requirements of having 'self-sufficiency' status under what are now the 2004 Directive and the EEA Regulations cannot always justify the host Member State automatically rejecting his or her right to reside on the ground that the requirements for that status are not wholly complied with. In *Baumbast* the court was concerned, *inter alia*, with the issue whether an applicant could exercise the right to reside in the UK in circumstances where he was resting his case on the ground that he was a 'self-sufficient person'. It is clear from paragraphs 88 and 89 of the judgment that the applicant had sufficient resources to be self-sufficient in practice, and that he had medical insurance. His only possible problem was that the insurance may have fallen short of being 'comprehensive' in one respect, namely that it was not clear whether it covered 'emergency treatment'. The court held that, on the assumption that the insurance fell short in this connection, it would nonetheless be disproportionate to deprive the applicant of his right to reside.
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> 61. In paragraph 92, the court pointed out that there were strong factors in the applicant's favour, namely that he had sufficient resources, that he had worked and resided in the UK for 'several years', that his family had also resided in the UK for several years, that he and his family had never received any social assistance, and that he and his family had comprehensive medical insurance in Germany. In those circumstances, the court said in paragraph 93 that it would be 'a disproportionate interference with the exercise' of the applicant's right of residence conferred by what is now Article 21.1 of TFEU to refuse to let him stay in the UK because of a small shortfall in the comprehensiveness of his medical insurance."

20. Clearly the purpose of the current Directive is not just to stop economically inactive Union citizens from gaining access to the host Member State's welfare system. It is also to ensure that those who are, or have been, economically active do have access to a welfare system when they require it and, more pertinently to the present case, that those who have been in the host Member State for long enough, while being either economically active or self-sufficient, acquire a right of permanent residence with the benefits that go with it, so as to give practical effect to the right conferred on Union citizens by Article 21(1) of the Treaty on the Functioning of the European Union "to move and reside freely within the territory of the Member States,

subject to the limitations and conditions laid down in the Treaties and by measures adopted to give them effect" .

21. However, it seems to me that the reason why it is only in an exceptional case that that a claimant may be able to argue that it would be disproportionate to refuse social assistance when the terms of the Directive are not satisfied is that the parameters of proportionality are to be inferred from the Directive itself (see *Kaczmarek v Secretary of State for Work and Pensions* [2008] EWCA Civ 1310; R(IS) 5/09 at [23]) with the consequence that, absent a lacuna due to an apparent oversight by the Council of Ministers, proportionality must be presumed when the Directive has been properly applied. Hence what the Supreme Court said in paragraph [69] of *Mirga*.

22. On the other hand, in the present case, the claimant's difficulty arises not from the terms of the Directive as such but from the terms of the 2004 Regulations (assuming that the Secretary of State is right in his construction of them), because it is only her son's failure to have his work registered in compliance with the Regulations that has led to his employment not being regarded as lawful and therefore to his failure to meet the terms of the Directive. The 2004 Regulations were the subject of consideration in *Zalewska*, where it was held that the Treaty of Accession under which Poland joined the European Union enabled the United Kingdom to lay down its own temporary rules for access to its labour market, notwithstanding the fundamental rules of European Union law as to freedom of movement, but that the rules had to have a legitimate aim and be proportionate. The members of the House of Lords were unanimous as to that approach but divided as to its application. Giving the leading speech for the majority, Lord Hope of Craighead said –

> "44. … The right that the Accession Treaty gives to regulate access to the labour market during the accession period carries with it the right to ensure that the terms on which access is given are adhered to. Regulation of the right of access and monitoring its exercise are appropriate and necessary consequences of making that right available. Furthermore, it does not seem to me that there is any difference in principle between the consequences of late registration, which have not been criticised as disproportionate, and those that flow from a failure to re-register. They are the result, in both cases, of the same basic failure. The terms on which access is given have not been adhered to, so the rights that flow from it are not available. This may come with a cost, depending on the person's circumstances. But, for the reasons that the Commissioner gave and the other reasons that I have mentioned in the previous paragraphs of this opinion, I do not think that the consequences in either case when examined in their whole context are unreasonable or disproportionate."

Baroness Hale of Richmond and Lord Neuberger of Abbotsbury considered that the effect of the Regulations was disproportionate.

23. The issue of proportionality was, of course, considered in the light of the facts of that case, where the claimant was held not to have a right of residence when she had worked for just over twelve months but had been in registered work only for the first six of them. Lord Hope also referred to my reasoning in a case concerning four

other claimants who had similarly been employed for between one and two years but had been in registered employment for less than a year (CIS/3232/2006 *et al*), which he endorsed. In that case, I expressly limited the scope of my reasoning, saying –

> "Because, on any view, the claimants would not have resided in the United Kingdom for long enough to have acquired a permanent right of residence even on the approach I have taken in CIS/408/2006, the right of residence in issue in these cases is a right of residence during a period of temporary incapacity or unemployment. Unlimited entitlement to benefit is therefore not in issue."

That was in paragraph [46] of my decision, immediately before a passage summarised by Lord Hope in paragraph [42] of *Zalevska*, and is important because the part of my reasoning that he did summarise might be thought to carry weight only where the total period of employment is relatively short. Thus, what was decided by the House of Lords was not that the 2004 Regulations were *intra vires* for all purposes but merely that it was not necessary for them to be disapplied for the purpose of Mrs Zalewska's case in order to give effect to the European Union principle of proportionality. Its decision is therefore no bar to an argument that the effect of the Regulations is disproportionate in the present case and, indeed, permits such an argument.

24. The issue in the present case is rather different. If the 2004 Regulations are effective, they have the effect that, even though they require work to be registered only for a year, a failure ever to register can result in several years of employment being disregarded when considering whether the person concerned has acquired a right of permanent residence. The purpose of conferring a right of permanent residence is explained in paragraphs (17) and (18) of the preamble to the Directive –

> "(17) Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure.
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> (18) In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions."

Apart from being of practical value to the citizen concerned, a right of permanent residence therefore has a wider importance.

25. Here, the claimant's son had, at the material time, lived in the United Kingdom for ten years – nine of them since Poland's accession – and there is incontrovertible evidence of his employment and jobseeking for seven years between May 2004 and April 2011. He clearly wished to settle – indeed, had settled – in the United Kingdom and he clearly believed, for a perfectly understandable reason, that he did not need to apply for a registration certificate in respect of his work and that he had a right of

residence, which belief can only have been reinforced by the Secretary of State's award of jobseeker's allowance in 2006 and the Secretary of State's failure to appeal against the First-tier Tribunal's decision in 2010.

26. In these circumstances, I accept the Secretary of State's submission that it would in 2013 have been disproportionate to hold that the claimant's son had not acquired a right of permanent residence by April 2011 solely due to mistakes he had made in 2004 in failing to register the work he was undoubtedly doing. Consequently, I accept that the claimant's son did have a right of permanent residence and I also accept the Secretary of State's concession that the claimant therefore also had a right of residence as a dependent family member. She was therefore not a person who was not in Great Britain for the purpose of her claim to state pension credit.

27. I leave other issues arising on the claim to be determined by the Secretary of State.

**Mark Rowland**
**28 April 2017**