1. It is common ground that Miss X was employed at the relevant times. The Tribunal has however raised the question as to whether or not Miss X’s employment was marginal and ancillary following her enrolment on a nursing course. If Miss X’s employment had become marginal and ancillary, her own on-going right to reside could possibly be on the sole basis of being a student and Mrs X could not rely on that status to establish her own right to reside in the UK. If on the other hand Miss X’s employment was held to be genuine and effective (*or alternatively she had retained worker status*), Mrs X could rely on that status to be the basis for her own right to reside.
2. Mr Commissioner (now Judge) Jacobs held at paragraph 24 of **CIS/4144/2007: (***the emphasis is mine)*

In *CH/3314/2005* and *CH/3315/2005*, Mr Commissioner Rowland analysed the decisions of the European Court of Justice and decided that effective employment was to be judged by reference to the level of income necessary to avoid resort to a claim for a social assistance benefit. I am not persuaded by his analysis, which does not seem to me to accord with the actual decisions of the European Court of Justice. Mr Rowland made a number of points about the consistent interpretation and application of the EC provisions to the different categories of persons who may have a right to reside**. He has, with respect, not given sufficient significance to the fact that the freedom of movement of workers is a fundamental feature of the EC and is, accordingly, to be interpreted broadly**. That seems to me to explain the differences that he was concerned to avoid. I direct the tribunal to apply the language of the decisions of the European Court of Justice and to decide as a matter of fact whether the claimant’s work was genuine and effective or marginal and ancillary.

* 1. I concede that Miss X had been working for agencies prior to enrolling on her nursing course, but it is arguable that the mere fact of doing agency work may not detract from that work being genuine and effective, given the observations of Judge Jacobs cited above. Indeed, in **CIS/1502/2007** Judge Rowland held at paragraph 9:

9. The issue in a case like the present may be said to be whether the claimant has genuinely and effectively (to borrow that phrase from its usual context) become a worker rather than a workseeker. I do not accept Mr Edwards’ submission that agency work is by its nature ancillary and insufficient to confer on a claimant the status of worker. Although agency work is often temporary and for short periods, it is not necessarily so. However, I do accept that a distinction is to be drawn between temporary employment for a short period and indefinite employment that has been curtailed prematurely. Where work is undertaken for what is expected from the outset to be for a very short period and is known to be temporary, the person concerned is obliged to keep looking for work and often he or she cannot realistically be said to have become established in work and to have ceased to be a workseeker. It does not follow that all agency workers always remain workseekers. Where short periods of temporary work are not separated by longer periods of no work, it will often be appropriate to regard the person concerned as having become a worker rather than a workseeker. There will be cases where work that is temporarily is nonetheless for a prolonged period or where there is a high likelihood of further work being obtained and, in particular, many agency workers will be able to show that the agency has regularly found them work albeit for short periods and they have, for practical purposes, become established members of the national workforce. On the other hand, where a person has worked only intermittently for very short periods, as in CIS/1793/2007, the claimant is more likely to have remained a workseeker because the work performed has been marginal. The case-law shows that whether work is marginal is a matter of judgement on the facts of each case. In *Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* (Case C-413/01) [2003] E.C.R. I-13187, the Court did not rule out the possibility that work under a fixed-term contract for two and a half months might be marginal and ancillary

* 1. Miss X has regularly found agency work, apart from periods when she has been unable to work (and had claimed incapacity benefit). This suggests that she had ( *like the example cited by Judge Rowland above)* established herself as a member of the national workforce. I would also add that it would not have been possible for Miss Tuary to have claimed incapacity benefit if she has not so established herself as a worker.
  2. In **SS v Slough Borough Council [2011] UKUT 128 (AAC) (CH/3733/2007),** Judge Rowland again considered the question of whether or not work was genuine and effective. Judge Rowland held at paragraph 19:

19. However, what is absolutely clear from the decisions of the European Court of Justice is that the question whether employment is genuine and effective, rather than marginal or ancillary, is a question for the national court. This has been emphasised recently in *Genc v Land Berlin* (Case 14/09), in which the Verwaltungsgericht Berlin referred to the Court the question whether a person working only 5.5 hours a week (by comparison with a normal working week of 39 hours) and earning only EUR 7.87 per hour could be a worker. The Court, having decided that it was not necessary to obtain an opinion from the Advocate General, said –

“21 Having established that Ms Genc performs services for and under the direction of an employer in return for remuneration, the national court has *ipso facto* established the existence of the constituent elements of any employment relationship, namely subordination and the payment of remuneration in return for services rendered (see, to that effect, Case C‑456/02 *Trojani* [2004] ECR I‑7573, paragraph 22).

22       The national court is, however, uncertain whether, in view of the particularly low number of hours of work performed by the person concerned and of her remuneration, which covers only partially the minimum necessary for subsistence, a minor activity such as that performed by Ms Genc is capable of entitling her to the status of worker within the meaning of the Court’s case-law.

23       In that regard, it should be borne in mind that, in Case C-444/93 *Megner and Scheffel* [1995] ECR I-4741, the Court was called on to decide, inter alia, whether two European Union nationals employed in Germany as cleaners with a 10‑hour working week and remuneration not exceeding, per month, one seventh of the monthly reference amount belonged to the working population within the meaning of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).

24       In that judgment, the Court rejected the argument of the German Government that persons in minor employment are not part of the working population because the small earnings which they receive from such employment are not sufficient to satisfy their needs (*Megner and Scheffel*, paragraphs 17 and 18)

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25       The Court held that the fact that a worker’s earnings do not cover all his needs cannot preclude him from being a member of the working population and that employment which yields an income lower than the minimum required for subsistence or normally does not exceed even 10 hours a week does not prevent the person in such employment from being regarded as a worker within the meaning of Article 39 EC (see, to that effect, Case C‑213/05 *Geven* [2007] ECR I‑6347, paragraph 27, and *Megner and Scheffel*, paragraph 18).

26       Although the fact that a person works for only a very limited number of hours in the context of an employment relationship may be an indication that the activities performed are marginal and ancillary (Case C‑357/89 *Raulin* [1992] ECR I-1027, paragraph 14), the fact remains that, independently of the limited amount of the remuneration for and the number of hours of the activity in question, the possibility cannot be ruled out that, following an overall assessment of the employment relationship in question, that activity may be considered by the national authorities to be real and genuine, thereby allowing its holder to be granted the status of ‘worker’ within the meaning of Article 39 EC.

27       The overall assessment of Ms Genc’s employment relationship makes it necessary to take into account factors relating not only to the number of working hours and the level of remuneration but also to the right to 28 days of paid leave, to the continued payment of wages in the event of sickness, and to a contract of employment which is subject to the relevant collective agreement, in conjunction with the fact that her contractual relationship with the same undertaking has lasted for almost four years.

28       Those factors are capable of constituting an indication that the professional activity in question is real and genuine.

29       The national court states, however, that, in the field of the interpretation of the concept of ‘worker’, the Court’s case‑law does not contain a threshold, determined on the basis of working time and level of remuneration, below which an activity would have to be regarded as being marginal and ancillary, and that this contributes to a lack of precision in the concept of marginal and ancillary activity.

30       In that regard, it should be borne in mind that the procedure for referring questions for a preliminary ruling under Article 234 EC establishes a relationship of close cooperation between the national courts and the Court of Justice, based on the assignment to each of different functions, and constitutes an instrument by means of which the Court provides the national courts with the criteria for the interpretation of European Union law which they require in order to dispose of disputes which they are called upon to resolve (Joined Cases C‑260/00 to C-263/00 *Lohmann and Medi Bayreuth* [2002] ECR I‑10045, paragraph 27, and Case C‑259/05 *Omni Metal Service* [2007] ECR I‑4945, paragraph 16)

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31       It is one of the essential characteristics of the system of judicial cooperation established under Article 234 EC that the Court replies in rather abstract and general terms to a question on the interpretation of European Union law referred to it, while it is for the referring court to give a ruling in the dispute before it, taking into account the Court’s reply (Case C‑162/06 *International Mail Spain* [2007] ECR I‑9911, paragraph 24).

32       The analysis of the consequences which all those factors which characterise an employment relationship, in particular those set out in paragraph 27 above, may have for the finding as to whether Ms Genc’s employment is real and genuine and, therefore, for her status as a worker is a matter coming within the jurisdiction of the national court. The national court alone has direct knowledge of the facts giving rise to the dispute and is, consequently, best placed to make the necessary determinations.

33       Having regard to the foregoing considerations, the answer to the first question is that a person in a situation such as that of the applicant in the main proceedings is a worker within the meaning of Article 6(1) of Decision No 1/80, provided that the employment in question is real and genuine. It is for the national court to carry out the examinations of fact necessary to determine whether that is so in the case pending before it.”

Judge Rowland allowed the claimant’s appeal on the facts. The Judge suggested (at paragraph 26) that the issue of whether or not work is genuine and effective involves simply considering what is proportionate, taking all possibly relevant matters into consideration. I suggest that if Judge Rowland’s approach as outlined in [2011] UKUT128 is followed, it would be entirely appropriate for the Tribunal in the present case to determine that Miss X remained in fact a worker at the time of the decision under appeal.