**Summary of cases on “genuine and effective”**

*Levin v Staatssecretaris van Justitie,* C-53/81 [1982]

*Lawrie-Blum v Land Baden-Wurttemberg* C-66/85

*Kempf v Staatssecretaris van Justitie* C-139/85

*Brown v Secretary of State for Scotland* C-197/86

*URSSAF v Hostellerie Le Manoir* C-27/91

*Raulin v Minister van Onderwijs en Wetenschappen* C-357/89 [1992] ECR 1-1027

*Megner and Scheffel*  C-444/93

R(IS) 12/98 Au pair £35 weekly

*Jany v Staatssecretaaris van Justitie,* C-268/99 [2001]

*Ninni-Orasche v Bundesminister fur Wissenschaft, Verkerhr und Kunst,*C-413/01 [2003]

*Kranemann* C-109/04

CIS/1793/2007

Vantsouras and Koupantze v Arbeitsgemeinschaft (ARGE) *Nurnberg 900* [2009] C-22/08 and C-23/08

*Barry v London Borough of Southwark* [2008]

*NE v SSWP,* [2009] UKUT 38 (AAC)

[2009] UKUT 58 (AAC)

*Genc v Land Berlin,* C-14/09 [2010]

*SSWP v JS* (IS) [2010] UIKUT 240 (AAC)

*Bristol City Council v FV* [2011] UKUT 494

JA v SSWP (ESA) [2012] UKUT 122 (AAC)

*HMRC v IT* (CTC) [2016] UKUT 0252 (AAC)

NEW SUMMARY OF CASE LAW ON “GENUINE AND EFFECTIVE”

***Levin v Staatssecretaris van Justitue* C-53/81 [1982] ECR 1035**

A worker may not be treated differently from national workers.

 “An EEC citizen is just as free as Netherlands nationals to have recourse to part-time work as long as he is actually employed.”

“it is inconceivable that each Member State should be able to modify the meaning fo that concept and to eliminate at will the protection afforded by the Treaty to certain categories of person by laying down minimum incomes”.

“Finally, the acceptance in the territory of another Member State of part-time work providing an income which is lower than the minimum wage constitutes for many persons, particularly in a difficult economic situation, an improvement in their standard of living and social advancement, considering that they would be wholly unemployed in their countries of origin.”

“A national of a Member Staet, who in the territory of another Member State

Undertakes employment to such a limited extent that in so doing he earns income which is less than that which in the last-mentioned Member State is regarded as the minimum necessary to enable him to support himself, may avail himself of the right of workers to freedom of movement provided for in Article 48 of the EEC Treaty and implemented by Regulation No 1612/68 and Directives 68/360 and 64/221. In particular, the right of residence referred to in Article 4 of Directive 68/360 may not be refused to such a national.”

Decision

Paragraph 15

“Since part-time employment, although it may provide an income lower than what is considered to be the minimum required for subsistence, constitutes for a large number of persons an effective means of improving their living conditions, the effectiveness of Community law would be impaired and the achievements of the objectives of the Treaty would be jeopardized if the enjoyment of rights conferred by the principle of freedom of movement for workers were reserved solely to persons engaged in full-time employment and earning, as a result, a wage at least equivalent to the guaranteed minimum wage in the sector under consideration.”

Paragraph 16

“It follows that the concepts of “worker” and “activity as an employed person” must be interpreted as meaning that the rules relating to freedom of movement for workers also concern persons who pursue or wish to pursue an activity as an employed person on a part-time basis only, and who, by virtue of that fact obtain or would obtain only remuneration lower than the minimum guaranteed remuneration in the sector under consideration.”

Paragraph 17

“It should however be stated that whilst part-time employment is not excluded from the field of application of the rules on freedom of movement for workers, those rules 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”

Paragraph 18

“The answer to be given to the first and second questions therefore be that the provisions of Community law relating to freedom of movement for workers also cover a national of a Member State who pursues, within the territory of another Member State, an activity as an employed person which yields an income lower than that which, in the latter State, is considered as the minimum required for subsistence, whether that person supplements the income from his activity as an employed person with other income or is satisfied with means of support lower than the said minimum, provided that he pursues an activity as an employed person which is effective and genuine.”

***Lawrie-Blum v Land Baden-Wurttemberg,* Case 66/85**

A trainee teacher was a worker.

***R H Kempf v Staatssecretaris van Justitie***

Part-time music teacher giving 12 lessons per week. Applied for supplementary benefit during that period.

Paragraphs 14 to 16

“It follows that the rules on this topic must be interpreted as meaning that a person in effective and genuine part-time employment cannot be excluded from their sphere of application merely because the remuneration he derives from it is below the level of the minimum means of subsistence and he seeks to supplement it by other lawful means of subsistence. In that regard it is irrelevant whether those supplementary means of subsistence are derived from property or from the employment of a member of his family, as was the case in *Levin* or whether, as in this instance, they are obtained from financial assistance drawn from the public funds of the Member State in which he resides, provided that the effective and genuine nature of his work is established.

That conclusion is, indeed, corroborated by the fact that, as the court held most recently in *Levin,*  the terms ‘worker’ and ‘activity as an employed person’ for the purpose of Community law may not be defined by reference to the national laws of the Member States but have a meaning specific to Community law. Their effect would be jeopardised if the enjoyment of rights conferred under the principle of freedom of movement for workers could be precluded by the fact that the person concerned has had recourse to benefits chargeable to public funds and created by the domestic legislation of the host State.

For those reasons, it must be stated in answer to the question submitted for a preliminary ruling that where a national of a Member State pursues within the territory of another Member State by way of employment activities which may in themselves be regarded as effective and genuine work, the fact that he claims financial assistance payable out of the public funds of the latter Member State in order to supplement the income he receives from those activities does not exclude him from the provisions of Community law relating to freedom of movement for workers. “

***Brown v Secretary of State for Scotland* C-197/86**

I haven’t looked at this case closely

***URSSAF v Hostellerie Le Manoir***

Low training allowance still a worker

***V J M Raulin v Minister van Onderwijs en Wetenschappen*** **C357/89 [1992] ECR I-1027**

Worker had been on call for a period of 8 months but had only worked a total of 60 hours over a three weeks period in that time.

* Zero hours workers can still be considered workers
* Duration of employment may be important
* Prior employment history can be a relevant factor

Where studies taken up following involuntary unemployment status as worker remains.

Paragraph 14

“The national court may, however, when assessing the effective and genuine nature of the activity in question, take account of the irregular nature and limited duration of the services actually performed under a contract for occasional employment. The fact that the person concerned worked only a very limited number of hours in a labour relationship may be an indication that the activities exercised are purely marginal and ancillary. The national court may also take account, if appropriate, of the fact that the person must remain available to work if called upon to do so by the employer.

***Megner and Scheffel***

Related to exemption from National Insurance contributions for those working less than 15 hours. Court found that this exemption was not discriminatory but held that the appellants were workers under European law.

Paragraphs 17 and 18

“The German Government and Firma G. F. Hehl & Co. argue that persons in

minor employment are not part of the working population within the meaning ofArticle 2 of the directive, in particular because the small earnings which they

receive from such employment are not sufficient to satisfy their needs.

“ That argument cannot be upheld. The fact that a worker's earnings do not cover all his needs cannot prevent him from being a member of the working population. It appears from the Court's case-law that the fact that his employment yields an income lower than the minimum required for subsistence (see Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035, paragraphs 15 and 16) or normally does not exceed 18 hours a week (see Case C-102/88 *Ruzius-Wilbrink* [1989] ECR 4311, paragraphs 7 and 17) or 12 hours a week (see Case 139/85 *Kempf v Staatssecretaris* *van Justitie* [1986] ECR 1741, paragraphs 2 and 16) or even 10 hours a week (see Case 171/88 *Rinner-Kühn* [1989] ECR 2743, paragraph 16) does not prevent the person in such employment from being regarded as a worker within the meaning of Article 48 (the *Levin* and *Kempf* cases) or Article 119 of the EEC Treaty (the *Rinner-Kühn* case) or for the purposes of Directive 79/7 (the *Ruzius-Wilbrink* case)”.

**R(IS) 12/98**

Au pair earning £35 per week

***Jany and Others***  ***v Staatssecdretaaris van Justitie Vefrkerher und Kunst,* C-268/99 [2001]** (At this point Poland was not an EU member, but had an Association Agreement).

Definition of “self-employment”.

Paragraph 45

“It is clear that Member States are required to grant Polish companies and nationals a freedom of establishment and a freedom to exercise their activities which are equal to those enjoyed by their own nationals”.

Paragraph 47

“In the present case, as the Court has already stated with regard to other association agreements, the rule of equal treatment lays down a precise obligation as to results and, by its nature, can be relied on by an individual before a national court as a basis for requesting it to disapply the discriminatory provisions of the legislation of a Member State under which the establishment of a Polish national is made subject to a condition which is not imposed on nationals, without any further implementing measures being required for that purpose.”

Paragraph 117

“It follow that the notion of “economic activities [performed] as self-employed persons” within the meaning of Article 44 (4) (a) (i) of the Association Agreement, must be construed as not being reserved solely to economic activities performed in a self-employed capacity, requiring a professional qualification and carried out, by a trader residing within the territory of the host Member State pursuant to certain precise detailed arrangements, such as the need to draw up a business strategy, carry out investments and assume long-term commitments, with the trader having to be involved in both management and the production of goods or services.”

***Ninni-Orasche v Bundesminister fur Wissenschaft, Verkerhr und Kunst*  C-413/01 [2003]**

* Limited duration – 2 ½ months – duration is a factor but not conclusive
* The question of abuse of the right
* Ending of a fixed term contract is involuntary unemployment

Paragraph 35

“It follows from the foregoing that an EU citizen who has undertaken actual work as an employed person for two and a half months can in principle be a worker within the meaning of Article 39 EC. “

Paragraph 40

 “The possible abuse by the person concerned of the rights conferred on a worker by Community law must not be confused with the question whether or not a national is a worker within the meaning of Article 39 EC. There can be abuse of a right only after it has been established that the person concerned is *ratione personae* a beneficiary under Community law”.

Paragraphs 44 and 45

The relevant case-law consists in particular of the judgements in *Lair, Brown, Raulin* and *Bernini,* and can be summarised as follows.

45 First a worker retains the status of a worker where there is continuity between the occupational activity previously pursued and the university course of study embarked on, in other words where there is a link between the previous occupational activity and the nature of the studies. Secondly, migrant workers do not lose certain rights stemming from the status of a worker where they have involuntarily become unemployed and are obliged by conditions on the job market to undertake occupational retraining in another field of activity. In that case continuity is not required.

Paragraph 50

“Conversely the Commission takes the view that the ‘voluntary nature’ of the unemployment does not necessarily depend on the personal volition of the worker. With reference to *Tetik* it states that that the concept of involuntary unemployment means that the inactivity cannot be attributed to the worker. In the Commisions’s view the end of a temporary contract of employment dos not give rise to ‘voluntary unemployment’ unless, upon termination of the temporary employment relationship, the worker specifically expressed a desire not to be considered for extension of the contract.”

Paragraph 54

“If, on the basis of the facts, it is established that the worker does not wish – either beforehand or subsequently – to be considered for an extension of the temporary contract of employment for a definite or indefinite term, this is an indication of voluntary unemployment. In such a case the person concerned loses his status of worker because there is no reason for it to be extended, that is to say that the conditions on the job market do not oblige him to undertake occupational retraining.

V(3)

Articles 12 and 17 EC grant to EU nationals who have resided lawfully for a considerable time as economically non-active citizens in the territory of another Member State and have commenced university studies there, a right to study finance under the same conditions as those which apply to nationals of the host Member State. Inequality of treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions.

***Kranemann* [2005] ECR I 2421**

Paragraph 17

“ According to settled case-law neither the origin of the funds from which the remuneration is paid nor the limited amount of the remuneration can have any consequence in regard to whether or not the person is a worker for the purposes of Community law (see Case 53/81 Levin [1982] ECR 1035, paragraph 16; Case 344/87 Bettray [1989] ECR 1621, paragraph 16; and Trojani, paragraph 16).”

**CIS 1793/2007**

Series of temporary jobs, none lasting more than four weeks, over a period of three years.

**Barry v London Borough of Southwark [2008] EWCA Civ 1440**

In a 6 month period, claimant had worked for two weeks. However, prior to that had worked for two years. He had an accident and subsequently was unable to work. He claimed that his status as a worker continued.

Paragraph 20

“In my judgement it follows from above that work will be subsidiary or ancillary if it is done pursuant to some other relationship between the parties which is not an employment relationship, as where a lodger performs some small task for his landlord as part of the terms of his tenancy.”

Paragraphs 21 to 23

“If a person had been employed immediately prior to the commencement of the six month period and then was not employed for more than one day of the six month period, it seems to be impossible to argue that he was not a worker on that day and within the six month period.

“Another example will demonstrate that the duration of the employment in the six month period cannot be the determining factor. A worker may in the ordinary course of his work have a number of short term employments, for example as a professional who is a locum. For this purpose it is necessary to look again at the employment history prior to the six months.

“The work which Mr Barry performed was in any case of economic value”

Paragraph 36

“I agree with Lady Arden that the period of six months must be continuous”…It is not open to a party such as the local authority to add together the latest and another previous period or periods of unemployment so as to aggregate more than six months.”

Paragraphs 40 and 41

“Applying the general criteria indicated in that passage, during the two weeks in question (“a certain period of time”) Mr Barry was a person who “performs services for and udner the direction of another person in return for which he receives remuneration.” He provided a service “of some economic value” to his employer….

I see nothing about it which could render it fairly describable as marginal. Though it did not last for long, there is nothing it 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”.

Paragraph 45

“Some reference was made to the fact that Mr Barry received Jobseeker’s Allowance both before and during, as well as after, his two weeks work at Wimbledon. It is possible that he ought not to have received it during those two weeks, but whether or not that is so, I agree with Lady Justice Arden that it can have no relevance to the question whether he was a worker for that fortnight.”

***Vatsouras and Koupantze v Arbeitsgemeinschaft (ARGE) Nurnberg 900* C-28/08 and C-23/08**

Limited earnings and short duration

Mr Vatsouras had a top-up of E169 (£150) monthly (or £34.61 weekly) July 2006 to November 2006

Mr Koupatantze - employed 1 November 2006 to 21 December 2006 Claimed unemployment benefit when work ended.

Paragraph 22

In the present case, Mr Vatsouras and Mr Koupatantze have carried out duties which fall into that legal concept of an employment relationship as developed by the case law. However, there are two complicating factors when it comes to classifying them as workers: first, the short-lived and low-paid nature of the work and, secondly, the fact that it came to an end and was followed by economic inactivity. Both factors require careful consideration in order to ascertain whether the applicants are ‘workers’.

Paragraph 23

In *Levin* it was held that the amount of remuneration is not a critical factor …. The salary received by Mrs Levin was below the amount necessary for her subsistence but that did not prevent the court from holding that, provided that the activity pursued as an employed person is genuine, the fundamental freedoms of individuals cannot be restricted; the decisive factor for the purposes of applying Article 39 EC is the nature of the work, viewed objectively, and not the amount of pay received by the worker.

Paragraph 24

Only exceptionally has an activity been held to be ‘purely marginal and ancillary’

Paragraph 28

“Remuneration which is *much lower* than a subsistence wage may mean that the work is to be considered irrelevant, but if it is *slightly lower* and in addition, it continues for a year, there can be only one possible conclusion: that Mr Vatsouris must be recognised as having the status of ‘worker’ protected by European law”.

Paragraph 29

“The case of Mr Koupatantze is similar. Here, it is not the amount of pay that is in question but the duration of the employment. As I have already mentioned, in *Ninni-Orasche*  an employment relationship lasting two and a half months was considered sufficient. As long as there is genuine employment, albeit brief or poorly paid, the Court has no difficulty in applying Article 39 EC. Mr Koupatantze worked for barely two months. He did not become unemployed voluntarily or because his contract came to an end, but because of financial problems experienced by his employer. Furthermore he never claimed subsistence benefits. As there is no indication that the employment undertaken by Mr Koupatantze was obviously marginal, he must be regarded as a worker protected under Article 39.

**[2009] UKUT 38 (AAC)**

3 weeks agency work in January 2005 and none further up to November 2006. –not genuine and effective

**[2009} UKUT 58 (AAC)**

Claimant was a self-employed interpreter – 3 to 4 hours a week – no profit. Applied for Income Support – this was allowed

Paragraph 5

“It may be true that, for tax and National Insurance purposes, a self-employed person is required to register that status with HMRC. However, it does not follow from a failure to register that a person may not be regarded as a self-employed person.

***Genc v Land Berlin*  C-14/09 [2010]**

Work of 5.5 hours is adequate work

Paragraph 9

“ Since 18 June 2004, Ms Genc has been working as a cleaner at L.Glas-und Gebaudereinigungsservice GmbH. According to the contract of employment, which was put down in writing on 9 November 2007, the working time is 5.5 hours at an hourly rate of EUR 7.87. That contract provides for entitlement to 28 days paid leave and continued payment of wages in the event of sickness. The contract is, moreover, subject to the relevant collective agreement. For this employment, Ms Genc receives monthly wages of approximately EUR 175”.

Paragraph 19

“As the Court has consistently held, the concept of ‘worker’ within the meaning of Article 39 EC has an independent meaning for the purposes of European Union law and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such small scale as to be purely marginal and ancillary, must be regarded as a ‘worker’.

Paragraph 20

Neither the origin of the funds from which the remuneration is paid nor the limited amount of the remuneration, nor indeed the fact that the person in question seeks to supplement that remuneration by other means of subsistence such as financial assistance drawn from the public funds of the State in which he resides, can have any consequence in regard to whether or not the person is a ‘worker’ for the purposes of European Union law. (see to that effect, Case 139/85 *Kempf* [1986] ECR1741, paragraph 14; Case 344/87 *Bettray* [1989] ECR 1621, paragraph 15; and Case C-10/05 *Mattern and Cikotic* [2006] ECR I-3145, paragraph 22.

Paragraphs 22 - 25

“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.

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, whetehr two European Union nationals employed in Germany as cleaners within a 10-hour working week and remuneration not exceeding, per month, one seventh of the monthly reference amount belong to the working population ……

In that judgement 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).

“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.”

Paragraph 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.”

***SSWP v JS* (IS) [2010] UKUT 240 (AAC)**

A Polish national who supported Polish and Slovak in schools, paid on an hourly basis. Unable to produce evidence of invoices between March and October 2008 when she claimed Income Support. The tribunal decided:

1. There is no concept of “retained self-employed status” whilst looking for work
2. However, claimant is still self-employed during periods of “feast and famine” - see paragraph 5.
3. Self-employment involves admin, accounts, marketing, holiday periods etc

***Bristol City Council v FV* (HB) [2011] UKUT 494 (AAC)**

The DWP had not challenged the facts, and the FTT were therefore entitled to make the findings they did.

***JA v SSWP* (ESA) [2012] UKUT 122 (AAC)**

Cash in hand work /illegal contracts of employment does not prevent claimant from being a worker in European law.

***HMRC v IT* (CTC) [2016] UKUT 0252 (AAC)**

To some extent contradicts ***Bristol City Council v FV***. However, in this case the evidence was very weak and the claimant had disappeared by the time the UT heard the case. The UT decided that there was not sufficient evidence to show that the Big Issue sales were genuine and effective.

Paragraph 25

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

Paragraph 26

“He said that he worked as a seller of the Big Issue for 16 hours over five days a week. There is, however, little to corroborate the extent of this work. The claimant in a letter of 22 July 2010 to HMRC said that he had included receipts for Big Issues purchased from him for the period from 19 November 2009. These are set out elsewhere in the appeal bundle and show between 10 and 59 magazines sold by him on various days between 19 November 2009 and 7 March 2010. He was, however, unable to provide receipts for the period from May 2009 to 18 November 2009 as he said he had had his bag stolen at the end of 2009 and he kept his records in this bag. HMRC’s appeal response sought further evidence as to this theft 9.e.g a police report) but this was not provided by the claimant “

Paragraph 27

“The basis for self-employed work as a Big Issue seller was that the claimant paid £1 for each copy of the magazine he sold at £2 a magazine. He thus made a gross profit of £1 per magazine sold. For the period for which invoices had been supplied, the gross profit was £1066. Once travel expenses had been deducted, this became a net profit of £890, which translates to £37.83 per week or £2.36 per hour. This leaves out of account the period from May 2009 to 18 November 2009. I do not consider this was “effective and genuine” self-employment given the lack of corroboration of the hours worked each week and the very low level of earnings if spread over 16 hours each week. I note that this was the sole work during this period and being done to support the claimant, his wife, and their seven children”.

Paragraph 28

“This finding is sufficient to dispose of any argument relying on the self-employed work as a Big Issue seller”.