Bulletin 195

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Decision No: C6/05-06(IS)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

INCOME SUPPORT

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 18 November 2005

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal (leave having been granted by the legally qualified panel member) by the Department against a tribunal decision dated 18 November 2005. By that decision the tribunal upheld the claimant's appeal against a Departmental decision refusing her income support (IS). The Tribunal awarded IS from 23 July 2005.

2. In the appeal to me the Department has been represented by Mr Millar of its Decisions Making Services Branch and the claimant by Mr Allamby of the Law Centre (NI). I am grateful to both gentlemen for their considerable assistance in this matter. My decision is given in the final paragraph.

3. The background facts to the case are that the claimant, a Polish national with one daughter, who was aged approximately three at the relevant time, came to Northern Ireland on 1 July 2004 on her own. She worked in Northern Ireland, initially picking mushrooms for Monaghan Mushrooms, from 9 July 2004 until 7 January 2005. During this period she was registered with the Home Office Worker Registration Scheme and received a registration certificate on 5 November 2004 acknowledging her job start date as 9 July 2004. She changed employment, it appears because of a scarcity of work, to Oaks Recruitment Services in Newry, an employment agency. She did not notify the Home Office Worker Registration Scheme to amend her certificate. Through Oaks Recruitment Services she obtained work for Smirnoff Vodka packing cases in Belfast from 8 January 2005 for approximately three weeks with varying weekly hours. She then obtained work, again through Oaks, for Linwoods of Armagh making and packing bread from the end of January until 10 July 2005, again with varying hours. Her daughter joined her in Northern Ireland in January 2005. In April 2005 her partner and the father of the child came to Northern Ireland and initially lived in Newry, the claimant and her daughter joining him in May. However, following violence to the claimant, she left the relationship home at the end of June and moved in with a friend for three weeks. She last worked on 10 July 2005. I do not know why she ceased work. On 21 July 2005 she moved to the Women's Aid Hostel in Portadown. She made application for IS on 22 July

2005. She claimed on behalf of herself and her daughter and stated that she had no savings or income and had claimed child benefit.

4. The decision under appeal to the tribunal was dated 29 July 2005 and was that the claimant was not covered under the Worker Registration Scheme for a whole year, that no registration had been provided for her last employer, that she had no right to reside, and was not habitually resident in Northern Ireland and could not be treated as habitually resident. A subsequent letter informed the claimant that:

> "It was decided that you did not have a right to reside and were therefore not habitually resident with no access to Income Support."

The claimant appealed to the tribunal.

The Accession States legislation

5. As a national of the Republic of Poland the claimant was a national of one of the A8 Accession States which were admitted to the European Union through the Treaty of Accession 2003 implemented by the Act of Accession which is annexed thereto. Annexes to the Act include certain transitional provisions which allow Member States to derogate from specific aspects of European community law in relation to A8 nationals during the transition period. That transition period covers all relevant events in this case. In particular Annex XII deals with Poland and provides as follows in so far as relevant:

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

The scope of the derogation is further extended by paragraph 9 of Article X11 which provides:

"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."

Directive 68/360 relates to abolition of restrictions on movement and residence within the Community of workers of Member States and their families.

6. Articles 1 to 6 of Regulation (EEC) 1612/68 relate to eligibility for employment. It was common case in the appeal to me that there was no derogation permitted from Article 7 of the said Directive which relates to employment and equality of treatment. Following the accession of the A8 States to the European Union many of the Member States refused to allow their labour markets to be opened at all. The United Kingdom, (amongst several other States) did so but subject to certain conditions.

The domestic legislation

7. The Income Support (General) Regulations (Northern Ireland) 1987 are applicable in this case. In particular regulation 21(3) defines a person from abroad as follows:

"Subject to paragraphs (3D) and (3E) in Schedule 7 - "person from abroad" means a claimant who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland, but for this purpose, no claimant shall be treated as not habitually resident in the United Kingdom who is -

(a) a worker for the purposes of Council Regulation (EEC) No. 1612/68 ... or a person with the right to reside in the United Kingdom pursuant to Council Directive No. 68/360/EEC ... or a person who is an accession State worker acquiring registration who is treated as a worker for the purpose of the definition of "qualified person" in regulation 5(1) of the Immigration (European Economic Area) Regulations 2000 pursuant to regulation 5 of the Accession (Immigration and Worker Registration) Regulations 2004."

Schedule 7 provides that a "person from abroad" has an applicable amount of nil for IS purposes.

8. Regulation 21(3E) provides as follows:

> "In paragraph (3), for the purposes of the definition of a person from abroad no person shall be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland if he does not have a right to reside in the United Kingdom, the Channel Islands, or the Isle of Man or the Republic of Ireland."

In this case there was no question of there being any right of residence in the Channel Islands, the Isle of Man or the Republic of Ireland. It was whether there was a right to reside in the United Kingdom which was the relevant question.

9. I shall refer to the Immigration Regulations mentioned at regulation 21(3)(a) above as the 2000 and the 2004 Regulations respectively. Regulation 14(1) of the 2000 Regulations provides that a qualified person is entitled to reside in the United Kingdom without the requirement for leave to remain under the 1971 Act for as long as he remains a qualified person. Regulation 5 thereof in so far as relevant to this case specifies a qualified person who has a right to reside under regulation 14(1) as being an EEA national in the United Kingdom as a "worker" but states (regulation 5(2)) that a worker does not cease to be a qualified person solely because he becomes temporarily incapable of work as a result of illness or accident or he is involuntarily unemployed "if that fact is duly recorded by the relevant employment office." Mr Allamby conceded that the claimant was not a qualified person within regulation 5.

10. The 2004 Regulations are made under section 2(2) of the European Communities Act 1972 and section 2 of the European Union (Accessions) Act 2003. Section 1 of that Act refers to the Accession Treaty. Section 2(2) of the Act enables the Secretary of State to apply specified enactments (relating to the entitlement of nationals of EU Member States to enter or reside in the United Kingdom as workers) to nationals of the Accession States subject to specified exceptions or modifications. The modifications made by the 2004 Regulations include regulations 4 and 5. These apply the 2000 Regulations to Accession State workers requiring registration with certain modifications. Regulations 4 and 5 thereof are particularly relevant. Regulation 4(2) states that a national of a relevant Accession State shall not be entitled to reside in the United Kingdom for the purpose of seeking work by virtue of his status as a work seeker if he would be an Accession State worker requiring registration if he began working in the United Kingdom. Regulation 4(3) makes an exception to this for nationals of Accession States who are seeking work in the United Kingdom and who are self-sufficient. Regulation 4(4) provides that an Accession State worker requiring registration shall only be entitled to reside in the United Kingdom in accordance with the 2000 Regulations as modified by regulation 5. Regulation 5(2) provides that an Accession State worker requiring registration shall be treated as a worker for the purpose of the definition of "qualified person" in regulation 5(1) of the 2000 Regulations only (my emphasis) during a period in which he is working for an authorised employer. Once an Accession State worker has worked for a registered employer for 12 months without interruption for a period falling partly or wholly after 30 April 2004, he or she is permitted to work without registering and enjoys the full rights enjoyed by other EEA nationals. There are certain other exceptions to the need to register but they are not relevant to this case.

11. By contrast regulation 5 of the 2000 Regulations refers to EEA nationals who are in the United Kingdom as "workers" and it provides at regulation 5(2):

> "A worker does not cease to be a qualified person solely because –
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> (a) he is temporarily incapable of work as a result of illness or accident; or
> (b) he is involuntarily unemployed, if that fact is duly recorded by the relevant employment office."

By reason of the 2004 Regulations this does not apply to an Accession State national who therefore, under domestic legislation can only be treated as a qualified person during a period of working for an authorised employer. Such an unqualified person under the domestic legislation only has a right to reside in the United Kingdom if he has leave to reside under the 1971 Immigration Act. I proceed on the basis that the claimant had no such leave to reside. No one has indicated that the claimant had any such leave.

The tribunal's decision

12. The tribunal concluded that the amended habitual residence test incorporating the said right to reside requirement contained in the definition of a person from abroad in regulation 21(3) of the Income Support (General) Regulations was incompatible with EC law. Specifically the tribunal concluded that it was contrary to Article 39 of the Treaty of Rome and Article 7(2) of regulation 1612/68 and was outside the scope of the derogation permitted by the Accession Treaty. It concluded that there was no derogation permitted from the said Article 7. It concluded further that the claimant remained a worker for the purposes of Article 7(2) of 1612/68. She had continued to work, though not registering, and even when she ceased to be employed she continued to make applications for employment albeit unsuccessfully. Under the case law of the European Court a broad approach to the definition of "worker" had to be taken. It concluded further (relying on decision R(IS)12/98) that the claimant having continued to seek work after her registered (and unregistered) employment ended, was still in the labour market. She therefore remained a worker for purposes of Article 7(2) of Reg. 1612/68. Additionally, on the basis of the domestic legislation, the tribunal concluded that the claimant, being a worker for purposes of Regulation 1612/68, was exempt from the requirement to be habitually resident in regulation 21. She consequently had a right to reside and was habitually resident in the United Kingdom.

13. The tribunal concluded that the claimant's circumstances were covered by Article 39 of the Treaty and Article 7 of Regulation 1612/68. It concluded that IS was a social advantage and covered by Regulation 1408/71. It concluded that the effect of the 2004 Regulations was to discriminate directly against Accession State nationals on grounds of nationality and it found that Article 7 prohibited such an outcome. The Treaty did not permit derogation from Article 7. The tribunal found that the claimant remained a worker both factually and for the purposes of Article 7(2) after her employment ceased and was therefore able to enjoy the same social and tax advantages as national workers. It found the claimant to be habitually resident in the United Kingdom, having a right to reside there.

14. In this case, as mentioned above, all parties are agreed that the claimant ceased to be a qualified person under the 2000 Regulations, as modified by the 2004 Regulations, once she ceased working for an authorised employer. As she had no leave to remain under the 1971 Act she therefore under the domestic legislation ceased to have a right to reside and could not be considered habitually resident. Under the 2004 Regulations she could not be treated as a worker for the purposes of regulation 5 of the 2000 Regulations. There is no doubt that under domestic legislation Accession State nationals are treated differently from other European Union nationals who could be treated as workers and therefore qualified persons with the right to reside by having the benefit of regulation 5(2) of the 2000 Regulations. At issue in this case is whether the provisions of regulation 5(2) of the 2004 Regulations are within the permitted derogation from Article 39 of the Treaty and if not whether Article 7 of the Regulation EEC 1612/68 (which implements Article 39) can assist the claimant.

15. Before me it was accepted by both parties that the Treaty of Accession permitted the complete closure of the labour markets of those countries which choose so to do to Accession State nationals during the transition period. The United Kingdom had chosen to admit Accession State nationals under the Scheme of the 2000 Regulation as modified by the 2004 Regulations. The Department submitted that the definition of "worker" in the 2004 Regulations was a narrower definition than that in EC Regulation 1612/68. The effect of the 2004 Regulations, it submitted, was to create a different species of worker. The Department submitted that this was permissible under the Treaty of Accession and it had the effect of excluding A8 nationals from being workers under Regulation 1612/68.

16. The Department submitted that to be a worker for the purpose of Regulation 1612/68, the relevant person must have exercised his right to freedom of movement under that Regulation. It submitted that the claimant had not. She gained access to the United Kingdom labour market under the 2004 domestic Regulations not under EEC Regulation 1612/68.

17. The Department submitted that the case of *The Queen on the application of "D" v The Secretary of State for Work and Pensions* (C4/2004/1117) essentially dealt with the same argument as had been placed before the tribunal. Lord Justice Maurice Kay, giving the judgment of the Court of Appeal in England and Wales, recited the submissions made to Mr Justice Collins in the High Court as follows:

> "11. Mr Justice Collins refused permission to apply for judicial review in the circumstances that were before him. He described the submission made to him and his response to it in these terms:
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> > "27 So, Mr Gill submits, ... that once it is accepted that members of the eight states are entitled to access the labour market they cannot be discriminated against in connection with benefits of a financial nature which are intended to facilitate access to employment. Those, it is said, must include support which enables them to remain in this country in order to seek that employment, because if they do not have that support they will not be able to exercise their right, so it is said, to seek employment.

28 With individuals who are not able to be discriminated against in their access to the labour market, that is undoubtedly correct. It is far from clear to me that the meaning of the word 'worker', particularly when one looks at 1612/68, has a meaning that necessarily extends in all circumstances to cover a person who is seeking work. Assuming that it does and assuming that Collins [*Case – 138/02*] extends it that far still, as it seems to me, the fundamental principle is that the annex permits discrimination against access to the labour market of this country and that must include discrimination which relates to the provision of benefits in order to entitle that access to be carried out. It is, quite apart from anything else, a perfectly permissible means of avoiding benefit tourism. Thus, it is clearly proportionate.

29 Accordingly, the permission for discrimination must extend, in my view, to that discrimination. Article 7.2 will come into play if employment is achieved. Then there must be no discrimination because the persons become, once they are in the labour market, formally members of that labour market.

30 Once one accepts that there is discrimination that can be put in place in relation to access, then it seems to me the argument raised by Mr Gill, important though it no doubt is, really falls away."

12. The second complaint sought to be advanced on behalf of the applicant in this court, which was not considered by Mr Justice Collins, is that now that the applicant has employment the Regulations still discriminate against him unlawfully. The present application to this court is put in a number of ways but they all raise the central question of whether the domestic legislation, that is to say the 2004 Regulations, is more discriminatory than is permissible under the EC Treaty (Regulation 1612/68) and the Treaty of Accession. Mr de Mello made a number of submissions to this court dealing with the factual position as it existed before Mr Justice Collins and with the present factual position where the applicant is now employed.

13. In my judgment, those submissions do not raise any point with a real prospect of success for the following reasons. First, as regards the period 1 May to 1 July when the applicant was seeking work, it is abundantly clear, as Mr Justice Collins held, that the position fell four-square within the permitted derogation. At that stage the applicant could not bring himself within Article 7.2 of Regulation 1612/68 because he was not "a worker". The European Court of Justice decided as much in Collins. When the present case was before Mr Justice Collins Article 12 of the EC Treaty did not feature in the oral submissions although it had been foreshadowed in the pleadings. I do not consider that it avails the applicant in relation to the period 1 May to 1 July. Article 12 is stated to be "without prejudice to any special provisions contained in" the Treaty. Article 39 is one such special provision. It, in turn, has given birth to Regulation 1612/68. The Treaty of Accession permits derogation from Articles 1 to 6 of that

Regulation. The domestic Regulations of 2004 are a permissible derogation. The contrary is simply not arguable. I entirely agree with the passage from the judgment of Mr Justice Collins which I have set out earlier.

14. Secondly, the position which arises now that the applicant has employment is equally clear. So long as he retains that employment he is not the subject of any discrimination. He has the same employment rights and rights to benefits – for example income support as appropriate – as others. I shall return to the point about registration later. If he remains employed for an uninterrupted period of 12 months he will receive the benefit of that time qualification. Mr de Mello's complaint is that if he ceased to be employed before the expiration of the 12 months he will be discriminated against on the grounds of his nationality. Mr de Mello again seeks to rely on Article 7.2 of Regulation 1612/68 and Article 12 of the EC Treaty.

15. As to Article 7.2, there is an obvious fallacy in Mr de Mello's submission. If the applicant ceases to be employed he will no longer be "a worker" within the meaning of Article 7.2; if it is within the 12-month period he will revert to the position which applied in May and June. In other words, he will fall expressly within the permitted derogation. So far as Article 12 of the EC Treaty is concerned, it is powerless to protect him for the same reasons to which I have already referred."

18. The Department submitted that Article 7(2) could not be relied on by the claimant even though the permitted derogations went no further than Articles 1 to 6. The Department submitted that Article 7(2) extended to a worker who commenced lawful employment after the date of accession. Lawful employment referred to the worker's immigration status and by implication those who breached their immigration status were not entitled to the protection of Article 7(2). To decide to the contrary would mean that workers who had obtained employment in one of the existing Member States e.g. France which had not opened its borders to A8 workers and was therefore working unlawfully could obtain the protection of Article 7. This would render Article 24 of the Treaty and the relevant Annexes otiose. Work outside the Registration Scheme was unlawful and persons engaging in this work were not part of the labour market.

19. As an alternative the Department argued that even if I accepted that the claimant was a work seeker she would still fall within the permitted derogation. The tribunal had stated that the following cases may not have been cited before the Court of Appeal in *"D"* – case C/184/99 *Grzelczyk*, case 314/99 *Baumbast*, case 456/02 *Trojani*. The Department submitted that each of those cases indicated that any European Union law right to reside was subject to limitation and conditions laid down in the Treaty and measures adopted to give it effect. Those limitations and conditions included that economically inactive persons, such as the claimant, could not claim EU rights unless they were self-sufficient. The Department submitted that the tribunal had erred in not following the *"D"* case. It submitted that it was incumbent on the tribunal to follow the decision in *"D"* as a decision of a superior court even though the case was heard in Great Britain. It referred to decision R(SB)1/90 wherein a Northern Ireland Tribunal of Commissioners held that identically worded provisions operating in both Northern Ireland

and Great Britain should be interpreted uniformly. It submitted that the *per incuriam rule* was not available to a tribunal in relation to a decision of a court superior in the hierarchy and in any event there was considerable doubt as to whether the *"D"* case was decided *per incuriam*. The cases that the tribunal relied on in distinguishing the *"D"* case may or may not have been cited before the court and in any event it was not certain that the court would have arrived at a different conclusion in reliance on those cases.

20. In reply Mr Allamby submitted that the Accession Treaty allowed derogation from Articles 1 to 6 of EC Regulation 1612 by means of national measures. By that derogation those national measures were permitted to override Treaty rights. Those States which decided not to open their job markets were not obliged to do so. Articles 1 to 6 included the right to take up employment. Member States were given the choice as to whether or not to open up their labour markets. The United Kingdom chose to open its market and at a late stage decided to implement the 2004 Regulations. Those were intended to say that an employed person had a right to reside and could claim in work benefits. Provided the person worked for an interrupted period of 12 months in registered employment, after that period he would have access to out of work benefits and would have a right to reside. The claimant did not register her change of employment and did not fulfil this 12 month condition. She did not know she had to register her subsequent work.

21. Mr Allamby conceded that Member States which opened their markets had a right to take national measures. For those who arrived in the United Kingdom and were not workers the national measures were perfectly appropriate.

22. Mr Allamby submitted that the claimant was not in breach of immigration rules. She was lawfully present in the United Kingdom but there was a question as to whether she was lawfully resident there which was a different question. She could not be excluded from the United Kingdom as being in breach of the immigration rules.

23. In relation to Article 7(2) Mr Allamby submitted that the case of *Lopes da Veiga v Staatsecretaris van Justitie* (Case C-9/88) was authority for the proposition that Article 7(2) applied to those who had once been admitted to the employment market. A derogation was permitted by the Act of Accession from Articles 1 to 6 of Regulation 1612/68 and this indicated that the other Articles of that Regulation did apply. Mr Allamby submitted that the same point was made in the *Helenic Republic* case (Case C-305/87).

24. He submitted that the claimant was clearly within Article 7. This was so even when she was outside the Worker Registration Scheme. Mr Allamby submitted that failure to register did not turn someone from being lawfully employed to not lawfully employed. It simply turned her from someone who was within the confines of the Regulations to someone who had no longer a right to reside as a qualified person. It did not sweep away her rights under the Treaty. The Department's argument was trying to move away from the Treaty. Article 39 said that there should be freedom of movement of workers and established a right not to be discriminated against on the grounds of nationality. The Accession Treaty did permit derogation from Article 39 in relation to Articles 1 to 6 of Regulation 1612 but the permitted derogation did not go beyond those Articles.

25. Mr Allamby also submitted that the Department was wrong because the loss of the right to reside under the 2004 Regulations could not produce a loss in terms of Treaty rights. In this connection he referred to Directive 68/360 and the opening preamble thereof relating to the right to reside. Workers in European terms had an automatic right to reside. The claimant's rights to reside in terms of European law had not been affected. If she was a worker she had a right to reside and automatically satisfied the test. In this connection Mr Allamby referred to decision CIS/3573/2005 – the lead case of a recent Tribunal of Commissioners and in particular to paragraph 17 thereof.

26. Mr Allamby submitted that, for an A8 worker as for a non-A8 worker, once the person arrived and took up employment, in European terms, that person had a right to reside. The 2004 Regulations gave the same right to reside but were to the effect that once the person ceased to be a registered worker that right to reside was lost. Mr Allamby submitted that the right was not lost in European law terms. The test of a right to reside was a European law test not a 2004 Regulations test otherwise the qualified person test would not be needed. If the claimant retained her rights as a worker after finishing employment she retained her right to reside and therefore satisfied the habitual residence test. Had the claimant just arrived and claimed benefit she would not have been a worker and would not have had a general right to reside and would not have been able to access benefit under EC law.

27. As regards whether or not the claimant was a worker Mr Allamby referred to decision R(IS)12/98 as being the primary decision. He referred in particular to paragraphs 19 to 22 thereof. Mr Allamby stated that the recent Tribunal of Commissioners decisions in Great Britain (C15/3573/2005 and 4 others) and the facts were all eminently distinguishable from this case. Three of them dealt with cases of persons who had arrived, in two cases from Sweden and the other not having worked before claiming benefit in the United Kingdom. One case concerned a person from Norway who had never worked. In the final case, that of a Polish national the person had worked for a period. The parties agreed that the person was not a worker for purposes of European law.

28. Decision R1/05(IB) related to the applicability of the decisions of Superior Courts in England and Wales in Northern Ireland. That case was authority for the proposition that decisions of such Courts did not bind Courts and tribunals in Northern Ireland. The tribunal in this instant case was entitled to decide it was not bound by the *"D"* case and it had explained why it so considered. The remarks in the *"D"* case were obiter and it was a fair deduction that the issue of whether or not the claimant was a worker was not opened substantively in the *"D"* case. The tribunal was not bound and by extension the Commissioner was not bound by that decision. In any event it was distinguishable on the facts.

29. In summary Mr Allamby contended that the tribunal had not erred in law in deciding that the claimant retained rights – she was still looking for work and had made arrangements to have her child looked after to allow her into the tax credit system. The tribunal was entitled to find that she retained her status as a worker and could avail of Article 7(2). It was clear that A8 nationals were being treated differently to non-A8 nationals and such discrimination had to be objectively justified. The case of *Collins* was authority for the proposition that the habitual residence test was of itself legitimate but in

so far as it discriminated it had to be proportionate. The question here was whether the entitlement to out of work benefits being tied to both registration and uninterrupted employment for 12 months was proportionate. In his submission they were disproportionate. The primary purpose of the legislation was to stop benefit tourism and here the claimant had clearly established her rights as a worker.

30. Mr Allamby submitted that he had no problem with the requirement for registration per se and indeed there was an argument for tying in work benefits to registration – people must have an incentive to register. It did not seem to him that it was proportionate to deny benefit to those who might be exploited by unscrupulous employers. He also did not consider that the 12 months period of uninterrupted employment was proportionate. He would have found 3 months much harder to argue against but this was someone who had worked for 12 months.

31. Mr Allamby submitted that the claimant was habitually resident in terms of how long she had been in the United Kingdom. In addition if she was a worker she satisfied the right to reside test and was therefore exempt from the habitual residence test. Even if the right to reside test was separate from rights given by virtue of her being a worker she had, he submitted, a right to reside under Directive 68/360 which (relying on the case of *Royer*) established that the right to reside came from the Treaty. Mr Allamby submitted that whether or not a person was a worker could not be determined by whether or not that person claimed IS. He conceded that the tests regulation 21(3E) of the Income Support (General) Regulations was a free standing test which had to be satisfied alongside the habitual residence test contained in regulation 21(3). This was in line with the decision of the Tribunal of Commissioners in Great Britain in decision CIS/3573/2005.

32. In rejoinder Mr Millar submitted that there was a link between EC Directive 68/360 and Regulation 1612/68. The 2004 Regulations reflected that. The right of residence could be linked to the period of work. He submitted that the 12 month period came directly from the derogation permitted and reflected it. He submitted that the 12 month qualifying period mentioned in the Regulations and access to the labour market covered full EEA rights. Without access to the labour market a person could not be a worker for purposes of Regulation 1612/68. The derogation permitted by the Treaty was for 2 years and the UK provisions gave additional and full benefits to those who had been working in accordance with the UK registration scheme for 12 months.

33. Mr Millar did not in any event accept that the claimant was a worker, she may have applied for jobs but by claiming IS she had taken herself out of the market. Two cases were pending in Great Britain as to whether a person could remain a worker for purposes of Regulation 1612/68 whilst claiming IS.

REASONS

34. The modification in the 2004 Immigration Regulations to the effect that Accession State nationals are to be treated as workers only when actually working for a registered employer, is for purposes of the right to reside. That right is given to citizens of the Union by virtue of their status as citizens. It derives from Article 18 of the Treaty. It is not, however, unconditional. Article 18(1) of the Treaty expressly provides that it is "Subject to the limitations and conditions laid down in this Treaty and by the measures

adopted to give it effect". Article 39 of the Treaty and Directive 68/360/EEC and Directive 90/365/EEC are some of the measures indicating the limitations and conditions. Article 39 secures freedom of movement for workers within the community. Article 39(3) sets out the rights which flow from that freedom but which are "subject to limitations justified on grounds of public policy, public security or public health". The rights include rights to stay in a Member State for the purpose of employment and to remain after employment subject to conditions to be embodied in implementing regulations.

35. Article 1 of Directive 68/360/EEC provides that Member States shall "as provided in this Directive, abolish restrictions on the movement and residence of nationals of the [Member States] ... to whom Regulation (EEC) No. 1612/68 applies." Article 7 makes provision for circumstances when a residence permit may be retained even though a worker is no longer in employment. Amongst those circumstances are that incapacity for work or involuntary unemployment are "duly confirmed by the competent employment office."

36. Directive 90/365/EEC relates to circumstances where employees and self-employed persons who have ceased their occupational activity are to be granted and retain rights of residence. Of particular note are Articles 1 and 3. Article 1 provides (inter alia):

> "Member States shall grant the right of residence to nationals of Member States who have pursued an activity as an employee or self-employed person ... provided that they are recipients of an invalidity or early retirement pension, or old age benefits, or of a pension in respect of an industrial accident or disease of an amount sufficient to avoid becoming a burden on the social security system of the host Member State during their period of residence and provided they are covered by sickness insurance in respect of all risks in the host Member State.
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> The resources of the applicant shall be deemed sufficient where they are higher than the level of resources below which the host Member State may grant social assistance to its nationals taking into account the personal circumstances of persons admitted pursuant to paragraph 2."

Article 3 provides:

> "The right of residence shall remain for so long as beneficiaries of that right fulfil the conditions laid down in Article 1."

It is therefore apparent that under general Community law the Member States may restrict rights of residence to workers within Regulation EEC/1612/68 and to those otherwise self-sufficient and may remove those rights where the conditions upon which they are granted are no longer fulfilled. It appears that Member States are entitled to take measures to prevent a person exercising a right of residence from becoming an unreasonable burden on the host Member State during an initial period of residence at least.

In addition, as regards Accession State national, the Treaty of Accession permits certain derogations during the transitional period. The events relevant to this case took place

during that period. The permitted derogations are indicated above. It is apparent from the permitted derogations that the right of access to a labour market of a Member State and the right to reside in that State are considered as linked. It is also apparent that both may be limited during the transition period. It was common case that a complete closure of the labour market and thus of any right to reside was a permitted derogation. Most of the existing Member States took this route. A few opened their markets completely. The United Kingdom took an intermediate stance, opening its market only to those who registered their employment and giving only those persons rights of residence only for so long as they worked in compliance with the Registration Scheme until they had completed 12 months on that Scheme when permanent right of residence and full EEA rights came into play.

37. I do not consider the United Kingdom's Scheme for the admission of A8 workers to be incompatible with EC law. As regards the right to reside it is clearly within the permitted derogation from what is, in any event, a conditional right to reside. It is correct that the fundamental status of Union citizenship is strengthened by enjoyment of permanent residence and the United Kingdom legislation gives that after 12 months continuous registered employment. The 12 month period does not appear to me in any way excessive or disproportionate to prevent undue burden on the resources of the State and to enable the State to monitor employment patterns.

38. The necessity to register employment is also in my view within the permitted derogation and proportionate. It is in no one's interest to have A8 nationals working for employers who are not known to comply with national employee protection legislation. The Registered Employer Scheme endeavours to ensure this does not happen and it also enables the State to monitor employment patterns. It is unfortunate that the claimant did not comply with the requirements of the Scheme as a result of which she has ended up in a very disadvantageous position compared to what her situation would have been had she complied with the Scheme's requirements. That does not, however, affect the legality of the Scheme.

39. The claimant did not, at the relevant date, have a right to reside under the domestic immigration legislation. It does not appear to me that she has a right to reside under Directive EEC No. 68/360. This Directive does have within its scope those who move in order to pursue activities as employed persons. The Act of Accession provided that there could be derogation from the provisions of Directive EEC No.68/360 in so far as this was necessary to give effect to the application of paragraphs 2 to 5 and 7 and 8 of Annex XII thereof. Those were the paragraphs permitting derogations from access to the labour market by way of national measures. It appears to me that the restrictions on the right to reside to periods when the claimant was actually working for a registered employer were within the permitted restrictions on access to the labour market in paragraph 2 of Annex XII. I conclude that the limitations on the right to reside are within the permitted derogations and are proportionate to attain the legitimate aim of regulating access to the labour market by Accession State nationals. The derogation by its very nature permits discrimination between Accession State nationals and other EC nationals in relation to access to labour markets and the right to reside as linked thereto. The United Kingdom legislation is within that permitted derogation.

40. What is the effect on entitlement to IS? Regulation 21(3E) of the Income Support (General) Regulations provides that "for the purposes of the definition of a person from abroad no person shall be treated as habitually resident in the United Kingdom ... if he does not have a right to reside there." The claimant did not have such right to reside. Regulation 21(3) is made subject to regulation 21. This means that whether or not the claimant could otherwise be treated as habitually resident because she falls within sub-paragraphs 21(3)(a) to (d) she cannot be so treated if she does not have a right to reside in the United Kingdom. She therefore cannot satisfy the habitual residence test and must therefore be treated as a person from abroad with an applicable amount of nil for IS purposes.

41. The tribunal found that the amendment to Income Support regulation 21 whereby the right to reside test was incorporated was contrary to Articles 12 and 39 of the Treaty of Rome and Article 7(2) of Regulation 1612/68. It considered that the appellant's circumstances were covered by Article 39 of the Treaty and Article 7 of Regulation EEC/1408/71. It concluded that Article 7 of Regulation EEC/1612/68 was unaffected by the derogation and continued to apply (relying on the *Lopes de Veiga* and *Hellenic Republic* cases). However in neither case was there any ruling on the effect of non-compliance with a national measure (adopted in compliance with a permitted derogation) whereby residence in and access to the labour market of the host Member State was permitted. I have therefore found the cases of limited assistance.

42. I am in agreement with the tribunal (following *Lopes de Veiga*) that no derogation from Article 7 was permitted by the Act of Accession. I am much less convinced that the claimant was covered by Article 7(2) once she ceased her registered employment. The claimant came to the United Kingdom and was permitted access to the labour market here under the terms of a particular scheme rather than in exercise of any Article 39 right. She failed to comply with the Scheme and I am dubious in those circumstances that the claimant can be said to be a worker for purposes of Article 7(2) of Regulation 1612/68. I do not consider that the facts of this case are at all on a par with the *Collins* case. Mr Collins was an Irish citizen and there was no derogation permitted from his rights of access to the labour market. The effects of the permitted derogation are, in my view, crucial in this case in relation to whether a person outside the Scheme can be classed as a worker and they are not considered in that case.

43. Mr Allamby referred to decision R(IS)12/98. That decision while authority for the proposition that a person who has acquired the status of worker for purposes of Regulation 1612/68 can retain that status while unemployed and seeking work does not have relevance to the scope and implications of the permitted derogations and the situation when access to a labour market is permitted under specific national measures. A similar factual situation was dealt with in the case of "*D*" *v Secretary of State for Work and Pensions* C4/2004/1117. In that case Lord Justice Maurice Kay, delivering the judgment of the Court of Appeal in England and Wales, approved a passage from the judgment of Mr Justice Collins in the inferior court where he stated at paragraph 28:

> "It is far from clear to me that the meaning of the word "worker" particularly when one looks at 1612/68, has a meaning that necessarily extends in all circumstances to cover a person who is seeking work. Assuming that it does and assuming that Collins (Case C-138/02) extends it that far still, as it seems to me,

fundamental principle is that the annex permits discrimination against access to the labour market of this country and that must include discrimination which relates to the provision of benefits in order to entitle that access to be carried out. It is quite apart from anything else, a perfectly permissible means of avoiding benefit tourism. Thus, it is clearly proportionate."

44. The Court of Appeal went further, see paragraphs 12-15 of its judgment quoted above. I am in agreement with its reasoning and do not consider (contrary to the argument advanced by the Law Centre) that its remarks on the situation of those who had worked and subsequently became unemployed and sought out of work benefits were obiter. It is clear from paragraph 12 that the Court was dealing with submissions put to it on a specific issue which had been raised by the applicant. That being so, while I do not consider (contrary to the Department's submission) that the Court's decision is directly binding on inferior courts in Northern Ireland, it is of persuasive authority and entitled to considerable respect (R(SB)1/90 and R1/05(IB)). In any event I agree with it.

45. The tribunal sought to distinguish *"D"* on the basis that the decisions of the ECJ in *Grzelczyk* (Case C-184/99), *Baumbast and R* (Case C-413/99) and *Trojani* (Case C-456/02) did not appear to have been cited to the Court of Appeal in *"D"* and that the type of argument accepted by the ECJ in those decisions was capable of application to the right to reside test in the circumstances of this case. The Department argues that in the circumstances of this case the arguments accepted by the ECJ in those cases are not appropriate to the circumstances of this case. The arguments in *Grzelczyk* were based upon the applicant being legally resident in the host Member State – he had been granted a residence permit. At paragraphs 42-48 thereof the ECJ referred to the limitations on the right to reside. The circumstances here, where the claimant did not comply with the domestic conditions for a right to reside are quite different and the arguments in *Grzelczyk* do not appear appropriate.

46. In *Baumbast* the ECJ again referred to the conditional nature of the right to reside (para 87-91) and to the necessity to apply the limitations and conditions on that right in compliance with general principles of Community law and in particular the principle of proportionality. Again Mr Baumbast and his family were legally resident and satisfied the self-sufficiency requirements.

47. In *Trojani* the ECJ again referred to the conditional nature of the right to reside to the limitations and conditions thereon and to the need to ensure that those limitations and conditions are applied in compliance with the general principles of Community law, in particular those of proportionality. Again Mr Trojani was legally resident in the host Member State being in receipt of a residence permit.

48. I am in agreement with the Department. I consider that these cases are not grounds for distinguishing the "*D*" case and that the arguments accepted there, while having some relevance to the present case do allude to the limited and conditional nature of the right to reside. I find the tribunal's reasoning a little difficult to follow here but do not consider that any of the cases mentioned are grounds for distinguishing the "*D*" case.

49. In general terms what the United Kingdom authorities have done is to permit A8 nationals to have access to the United Kingdom labour market and a concomitant right to reside subject to the Registration Scheme but to provide that once registered employment ceases the concomitant right to reside also ceases unless there has been 12 months continuous working under the Scheme. Without a right to reside there cannot under United Kingdom legislation be entitlement to benefit. Given the derogation permitted by the Annex to the Act of Accession from the provisions on freedom of movement of workers and from the linked right to reside given the conditional nature of the right to reside even apart from those derogation and the acknowledgement in the Annex of a link between access to the labour market and the right to reside, the measures adopted by the United Kingdom appear to me to be compatible with EC law. That being so the question of proportionality may not be relevant but in any event I consider the domestic legislation to be proportionate to the legitimate aims of avoiding benefit tourism, preventing undue burden on the resources of the host Member State and monitoring the employment patterns of A8 nationals during the initial 2 year transition period.

50. As mentioned above and like the Court in the *"D"* case I am far from convinced that the word "worker" in EEC Regulation 1612/38 has a meaning that necessarily extends in all circumstances to cover a person who is seeking work. However, even if the claimant could be considered a worker, like the Court in *"D"* I consider that in any event the Annex to the Act of Accession Treaty permits discrimination in access to the labour market of the United Kingdom and "that must include discrimination which relates to the provision of benefits in order to entitle that access to be carried out."

51. In light of my decision above I have not found it necessary to deal with whether or not IS is a "social advantage" within EC Regulation 1408/71. Nor have I found it necessary to deal with the question of whether an IS claimant can be considered a worker. My initial reaction is that in the latter case much may depend on the surrounding circumstances but I express no concluded view.

52. There is also merit in the Department's argument that to give those who breached their immigration status and worked unlawfully the protection of Article 7(2) would render the EC legislation permitting derogations otiose.

53. The tribunal erred in its distinguishing of the *"D"* case, in failing to consider ful the conditional nature of the right to reside, in failing to consider fully the permitted derogations in particular that for the right to reside and in concluding that the right to reside test in the domestic legislation was incompatible with EEC law. I set its decision aside for those reasons. The Department wins its appeal. It is expedient that I give the decision which the tribunal should have given. This is that the claimant is not entitled to IS from and including 23 July 2005.

(signed): Moya F Brown

Moya F Brown
Commissioner

23 August 2006

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