Neutral Citation Number: [2017] EWCA Civ 1751

Case No: C3/2015/1796

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Upper Tribunal (Administrative Appeals Chamber)
CPC10262014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2017

Before :

LORD JUSTICE RUPERT JACKSON
LORD JUSTICE LINDBLOM
and
LORD JUSTICE PETER JACKSON

- -

Between :

The Secretary of State for Work and Pensions	**Appellant**
- and -	
Tamara Gubeladze	**Respondent**

- -
- -

David Blundell & Julia Smyth (instructed by **Government Legal Department**) for the **Appellant**
Helen Mountfield QC & Tom Royston (instructed by **Howells Solicitors**) for the **Respondent**

Hearing dates: Wednesday 18th & Thursday 19th October 2017

- -

Approved Judgment

Lord Justice Rupert Jackson :

1. This judgment is in seven parts, namely:

Part 1 – Introduction

2. This is an appeal by the Secretary of State for Work and Pensions ("the Secretary of State") against a decision that the respondent is entitled to state pension credit. The issues in this appeal concern the construction of the Directive governing the rights of Union citizens and the validity of certain domestic regulations applying to Latvian nationals working in the UK.

3. The respondent in this court was appellant before the First-Tier Tribunal and the Upper Tribunal. For consistency, I shall refer to her as "the respondent" throughout this judgment.

4. Before I venture into the facts of this case, I must first outline the relevant legislation.

Part 2 – The relevant legislation

5. Section 1(2) of the State Pension Credit Act 2002 ("the 2002 Act") provides that a claimant is entitled to state pension credit if he is in Great Britain, has attained the qualifying age and satisfies certain conditions. At the material time regulation 2(4)(e) of the State Pension Credit Regulations 2002 (as amended) ("the 2002 Regulations") provided, in effect, that a person is to be treated as "in Great Britain" for the purposes

of the 2002 Act, if he is "a person who has a right to reside permanently in the United Kingdom by virtue of Article 17 of that Directive".

6. The Directive referred to in regulation 2(4)(e) of the 2002 Regulations is Directive 2004/38/EC of the European Parliament and of the Council ("the Citizens Directive"). Articles 16 and 17 of the Citizens Directive provide:

> "Article 16
>
> General Rule for Union citizens and their family members
>
> 1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.
>
> 2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.
>
> 3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.
>
> 4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.
>
> Article 17
>
> Exemptions for persons no longer working in the host Member State and their family members
>
> 1. By way of derogation from Article 16, the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by:
>
> (a) workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement,

> provided that they have been working in the Member State for at least the preceding twelve months have resided there continuously for more than three years."

7. The Immigration (European Economic Area) Regulations 2006 ("the IEEA Regulations") transposed some of the provisions of the Citizens Directive into our domestic law. Regulation 5 of the IEEA Regulations provides:

> "**5 "Worker or self-employed person who has ceased activity**"
>
> (1) In these Regulations, "worker of self-employed person who has ceased activity" means an EEA national who satisfies the conditions in paragraph (2), (3), (4) or (5).
>
> (2) A person satisfies the conditions of this paragraph if he –
>
> (a) terminates his activity as a worker or self-employed person and –
>
> (i) has reached the age at which he is entitled to a state pension on the date on which he terminates his activity; or
>
> (ii) in the case of a worker, ceases working to take early retirement;
>
> (b) pursued his activity as a worker or self-employed person in the United Kingdom for at least twelve months prior to the termination; or
>
> (c) resided in the United Kingdom continuously for more than three years prior to the termination."

8. Regulation 15 of the IEEA Regulations provides:

> "**15 Permanent right of residence**
>
> (1) The following persons shall acquire the right to reside in the United Kingdom permanently –
>
> …
>
> (c) a worker or self-employed person who has ceased activity."

9. By a treaty signed on 16th April 2003 ten new states became Member States of the European Union with effect from 1st May 2004. Eight of those states are of significant size and they are referred to as "the A8 states". Latvia is one of the A8 states.

10. The conditions of admission for new Member States are set out in the Act of Accession annexed to the treaty. In the case of the A8 states, the Act made provision to limit, during the transitional period, the freedom of movement of workers which was at the material time guaranteed by Article 39 of the Treaty establishing the European Community.

11. Annex VIII of the Act annexed to the Treaty provided:

> "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 between Latvia on the one hand, and Belgium, the Czech Republic, Denmark, Germany, Estonia, Greece, Spain, France, Ireland, Italy, Lithuania, Luxembourg, Hungary, the Netherlands, Austria, Poland, Portugal, Slovenia, Slovakia, Finland, Sweden and the United Kingdom on the other hand, subject to the transitional provisions laid down in paragraphs 2 to 14.
>
> 2. By way of derogation from Articles 1 to 6 of Regulation (EEC) No 1612/68 and until the end of the two year period following the date of accession, the present Member States will apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Latvian nationals. The present Member States may continue to apply such measures until the end of the five year period following the date of accession.
>
> …
>
> 5. A Member State maintaining national measures or measures resulting from bilateral agreements at the end of the five year period indicated in paragraph 2 may, in case of serious disturbances of its labour market or threat thereof and after notifying the Commission, continue to apply these measures until the end of the seven year period following the date of accession. In the absence of such notification, Articles 1 to 6, of Regulation (EEC) No 1612/68 shall apply."

12. The European Union (Accessions) Act 2003 ("the 2003 Act") made provision for the Accession Treaty to be implemented into domestic law. Pursuant to section 2(3) of the 2003 Act, the Secretary of State made the Accession (Immigration and Worker Registration) Regulations 2004 ("the 2004 Regulations").

13. The Upper Tribunal provided an excellent summary of the 2004 Regulations (as amended in 2006) at Appendix A to the decision which is under appeal. I gratefully adopt that summary and attach it as Appendix A of this judgment. In summary, the 2004 Regulations set up the Worker Registration Scheme ("WRS"). This required any national of an A8 state coming to this country in the first five years after accession to register under the Scheme before starting work. If he changed jobs, he had to register

again. This obligation to register continued until he had done twelve months work. A fee of £90 was payable on first registration. He would only be treated as legally working and entitled to reside in the UK, if he was registered under the WRS. Failure to register in accordance with the WRS may disentitle the individual to welfare benefits.

14. The Accession (Immigration and Worker Registration) (Amendment) Regulations 2009 provided that the 2004 Regulations should remain in force for an additional two years, namely from 1st May 2009 to 30th April 2011. I shall refer to these regulations made in 2009 as "the Extension Regulations".

15. Having outlined the relevant legislation, I must now turn to the facts.

Part 3 – The facts

16. The respondent is a Latvian national, who came to the UK in 2008 at the age of 57. Between 14th September 2009 and 25th November 2012 she worked for various employers. In the periods when the respondent was not working, she was a jobseeker. The respondent obtained a certificate under the WRS on 20th August 2010. Her employment before that date was not covered by such a certificate.

17. In November 2012 the respondent made a claim for state pension credit. The basis of her claim was that she had reached the qualifying age, she had worked for at least a year and she had a right of permanent residence in the UK. She therefore satisfied the requirements of section 1 of the 2002 Act and Regulation 2 of the 2002 Regulations.

18. The respondent contended that she had acquired a right of permanent residence under Article 17 of the Citizens Directive and regulation 15 of the IEEA Regulations. This was because she had lived in the UK for more than three years and she had been working for at least the preceeding twelve months.

19. On 18th December 2012 the Secretary of State rejected the respondent's claim, essentially because she had not been registered under the WRS during the first part of her employment. The respondent appealed to the First-Tier Tribunal. The First-Tier Tribunal erroneously held that it did not have jurisdiction. The respondent then appealed to the Upper Tribunal. The Upper Tribunal held that the First-Tier Tribunal did have jurisdiction. Instead of remitting the case to the First-Tier Tribunal, the Upper Tribunal itself dealt with the respondent's appeal against the Secretary of State's decision.

20. On 30th January 2015 Upper Tribunal Judge Ward allowed the respondent's appeal against the Secretary of State's decision, for reasons which I would summarise as follows:

    i) The phrase "resided there continuously for more than three years" in Article 17(1)(a) of the Citizens Directive and the corresponding phrase in regulation 5(2)(c) of the IEEA Regulations referred to actual residence. It did not mean residing legally. Therefore the fact that the respondent was not registered under the WRS before 20th August 2010 did not prevent the respondent from being treated as someone who had resided in the UK for the three year period December 2009 - December 2012.

ii) Alternatively, the Extension Regulations were unlawful because they were disproportionate and incompatible with EU law. Therefore the respondent was not under any obligation to register under the WRS during the three year period December 2009 - December 2012.

21. It should be noted that in reaching his decision, the Upper Tribunal judge proceeded on the basis that "residence" should be interpreted in the same way in both Article 17(1)(a) of the Citizens Directive and regulation 5(2)(c) of the IEEA Regulations. Having analysed the construction of Article 17(1)(a) of the Citizens Directive, he did not embark upon any similar analysis of the domestic regulations.

22. The Secretary of State was aggrieved by the Upper Tribunal's decision. Accordingly he appealed to the Court of Appeal.

Part 4 – The appeal to the Court of Appeal

23. By an appellant's notice filed on 5th June 2015, the Secretary of State appealed against the Upper Tribunal's decision on two grounds, which I would summarise as follows:

i) The Upper Tribunal erred in its construction of "resided" in Article 17(1)(a) of the Citizens Directive.

ii) The Upper Tribunal erred in holding that the extension of the WRS was unlawful.

24. The appeal was heard on 18th and 19th October 2017. Mr David Blundell, leading Ms Julia Smyth, appeared for the Secretary of State. Ms Helen Mountfield QC, leading Mr Tom Royston, appeared for the respondent. I am grateful to all counsel for their excellent skeleton arguments and oral submissions.

25. In relation to the first ground of appeal Ms Mountfield put forward a new argument to support the Upper Tribunal's decision which had not been foreshadowed either by a respondent's notice or by her skeleton argument. This new contention, which emerged on the afternoon of day one of the appeal, runs as follows. Even if "resided" in Article 17(1)(a) of the Citizens Directive means "legally resided", that word has a wider meaning in regulation 5(2)(c) of the IEEA Regulations. In the latter context it means actual residence, with or without any right to remain.

26. In his reply Mr Blundell strongly objected to this point being raised at such a late stage. He said that he would need departmental instructions and also research into the legislative history, in order to deal with the point properly. In case we were against him, however, Mr Blundell made brief submissions to the effect that the domestic regulations were no wider than the Citizens Directive.

27. Having listened to counsel's submissions, I incline to the view that the relevant provisions of the IEEA Regulations do no more than implement Article 17(1)(a) of the Citizens Directive. But I am not prepared to decide this point finally, because we have not heard full argument upon it. Any decision on the interrelationship between the IEEA Regulations and the Citizens Directive will be of wider significance, going beyond the issues in this appeal.

28. In the circumstances, I shall assume without deciding that the relevant provisions of the IEEA Regulations do no more than transpose Article 17(1)(a) of the Citizens Directive into domestic law. For reasons set out later in this judgment, it will make no difference to the outcome of this appeal whether that assumption is right or wrong.

29. There are, therefore, two issues for this court to address. The first issues concerns the meaning of "resided" in Article 17(1)(a) of the Citizens Directive. The second issue concerns the proportionality of the Extension Regulations.

30. Let me now turn to the first issue.

Part 5 – The meaning of "resided" in Article 17(1)(a) of the Citizens Directive

31. Article 16(1) of the Citizens Directive uses the phrase "resided legally". Article 16(2) uses the phrase "legally resided". Article 17(1)(a), by contrast, uses the word "resided" without any qualifying adverb. At first sight, therefore, one would expect Article 17(1)(a) to be referring to something wider than legal residence.

32. That expectation is not, however, a powerful one. In interpreting provisions of EU law, it is necessary to look not only at the wording, but also at the context in which it occurs and the objective being pursued by the rules: see *Secretary of State for Work and Pensions v Lassal (Child Poverty Action Group, intervening)* [2011] All ER (EC) 1169 at [49].

33. What then is the context in which Article 17(1) sits? It is a derogation from Article 16. Article 16 sets out the conditions which Union citizens must fulfil in order to acquire the right of permanent residence in a Member State. Mr Blundell submits that, when read in context, Article 17 is a derogation from the duration of residence required by Article 16, not a derogation from the quality of residence required.

34. I am bound to say, before plunging into the case law, I see force in that submission. A derogation from the length of residence required does seem to be the objective pursued by Article 17(1). Furthermore, in so far as semantic arguments are acceptable, the word "residence" in line 2 of Article 17(1) must mean "legal residence", because it is referring back to what Article 16(1) requires. Therefore it is highly likely that "resided" in Article 17(1)(a) connotes the same sort of residence as the word "residence" in line 2 of Article 17(1).

35. Let me now turn from the simple words of Article 16 and 17 to the authorities upon which counsel rely. I shall take the authorities broadly chronologically and disregard those which are principally relevant to the IEEA Regulations.

36. In *Givane v Secretary of State for the Home Department* [2003] 1 CMLR 17, a Portuguese national worked and resided in the UK for three years. He then went to India for ten months before returning to the UK with his wife and three children. He died shortly afterwards. The widow and children claimed a right of permanent residence here pursuant to Article 3(2) of Regulation 1251/70 (a provision which the Citizens Directive replaced). The Court of Justice rejected the claim. At [46] the court observed:

> "… In relation to continuation of the right of residence of the family members of a worker who has died during his working life, the first indent at Art.3(2) of Regulation 1251/70 envisages that the worker must, on the date of his decease, have resided continuously in the territory of the host Member State for at least two years. That condition is intended to establish a significant connection between, on the one hand, that Member State, and on the other hand, that worker and his family, and to ensure a certain level of their integration in the society of that State."

37. Ms Mountfield submits that actual residence achieves integration, regardless of the legal formalities. So the fact an individual is not properly registered during part of their three year period of residence does not affect the degree of integration. This is an issue to which I shall return.

38. The next case cited was *R (Bidar) v Ealing London Borough Council and Another* [2005] QB 812. That concerns the position of students. It does not assist the resolution of the present problem.

39. *Metock and Others v Ministry of Justice, Equality and Law Reform* [2009] QB 318 establishes an important principle. The Citizens Directive should not be construed as cutting down rights of free movement or residence previously given. Counsel on both sides say that *Metock* supports their case.

40. That issue depends, in turn, upon the correct interpretation of Regulation (EEC) 1251/70. The relevant provision of that Regulation is Article 2(1)(a), which is broadly similar to the present Article 17(1)(a). There is no EU authority which provides useful guidance on the meaning of "residence" in Article 2(1)(a) of the 1970 Regulation.

41. The arguments which may be advanced about the interpretation of the old Article 2(1)(a) are broadly similar to the arguments which are advanced concerning the current Article 17(1)(a). In the end, I conclude that the *Metock* principle is neutral in this case. It provides no particular assistance to either party.

42. The next relevant authority is *Secretary of State for Work and Pensions v Lassal (Child Poverty Action Group, intervening)* [2011] All ER (EC) 1169. A French national claimed a right of permanent residence in the UK under Article 16 of the Citizens Directive. The Court of Justice, on a reference from this court, held that (i) the claimant was entitled to rely upon periods of continuous residence before 30th April 2006; (ii) absences from the UK of less than two consecutive years following a continuous period of five years legal residence completed before that date did not affect the acquisition of a permanent right of residence.

43. Advocate General Trstenjak delivered an opinion to the court which included the following passage:

> "68. In the scheme of the Directive 2004/38, arts 16(1) and 17(1)(a) are closely connected. They are both in the chapter which provides for a right of permanent residence, in the section in which the substantive conditions for the acquisition

> of that right are set out. Furthermore, the introductory wording of art 17 of the directive – 'By way of derogation from art 16, the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by' – makes clear that there is also a close substantive connection between arts 16 and 17 of the directive.
>
> 69. Against the background of a close connection between those two provisions it must in principle be assumed that the two factual elements whose working is almost identical – 'a continuous period of five years of residence in the host Member State' in art 16(1) of the directive and 'resided continuously in the host Member State for more than two years' in art 17(1)(b) of the directive – are to be interpreted in the same way. Therefore, a period of residence which ended before 30 April 2006 would also have to be taken into account in the context of art 16(1) of the directive."

44. The court did not expressly address those two paragraphs in its judgment. Nevertheless, the court's decision is consistent with those two paragraphs and there is no suggestion that the court disagreed with them.

45. *Secretary of State for Work and Pensions v Dias* [2012] All ER (EC) 199 is another decision which highlights the objective of Articles 16 and 17. That objective is to ensure that Union citizens who acquire a right of permanent residence in another Member State are integrated into the host state. Mr Blundell submits that residence coupled with a legal right to remain promotes integration. Ms Mountfield submits that actual residence achieves integration, regardless of legal status.

46. The Court of Justice's decision in *Ziolkowski v Land Berlin* [2014] All ER (EC) 314 tends to support Mr Blundell's submission. At [41] the court stated that residing legally for the specified period was the genuine vehicle for integration.

47. In *RM (Zimbabwe) v Secretary of State for the Home Department* [2013] EWCA Civ 775; [2014] 1 WLR 2259 the widow of a Spanish national who had lived in the UK for many years claimed to have acquired the right of permanent residence in the UK pursuant to Article 17(3) of the Citizens Directive. The Court of Appeal, reversing the Upper Tribunal decision, upheld that claim. Gloster LJ gave the principal judgment, with which Sir Robin Jacob and Longmore LJ agreed. At [43] she said:

> "The fact that the rights conferred by article 17 are in derogation of the social integration objective of the Directive (because they allow the conferring of permanent rights of residence without the necessary period for social integration to take place), and that, accordingly, article 17 is required to be strictly interpreted (see para 23 of the judgment in *Commission of the European Communities v Italian Republic* (Case C-40/93) [1995] ECR 1-1319), does not lead to any different conclusion."

48. Mr Blundell submits that the strict interpretation of Article 17 referred to in that paragraph supports his construction of Article 17(1)(a). Ms Mountfield submits that her interpretation of Article 17(1)(a) is perfectly compatible with the dictum of Gloster LJ.

49. Let me now stand back from the scene of battle and look at the position overall. The opinion of the Advocate General in *Lassal* is pertinent. It supports the Secretary of State's case. The judgment of the Court of Justice in *Lassal* does not take issue with paragraphs 68 to 69 of the Advocate General's opinion. Indeed the other judgments of the Court of Justice which have been cited also seem to me to be consistent with those two paragraphs. Furthermore, those paragraphs accord with what seems to me to be the natural meaning of Article 17(1)(a), when read in context.

50. In the result, I accept the submissions of Mr Blundell on this issue and uphold the first ground of appeal. The word "reside" in Article 17(1)(a) of the Citizens Directive means "legally reside".

51. The Secretary of State's success on ground one is not the end of this appeal. He cannot defeat the respondent's claim to state pension credit unless he can also show that the extension of the WRS was lawful. Therefore I must now turn to that issue.

Part 6 – Was the extension of the Workers Registration Scheme lawful?

52. Under Annex VIII of the Accession Treaty, Member States were entitled to apply national measures regulating access to their labour markets by Latvian nationals up to 30th April 2009 (which was five years after the accession date). The national measures which the UK adopted were the 2004 Regulations. These introduced the WRS.

53. In *Zalewska v Department for Social Development (Child Poverty Action Group and another intervening)* [2008] UKHL 67; [2008] 1 WLR 2602 the House of Lords held, by a bare majority, that the WRS was a proportionate measure for the UK to adopt to regulate access to its labour market. It therefore complied with EU law. *Zalewska* involved a challenge by a Polish national to the validity of the WRS. Annex XII to the Accession Treaty contains provisions relating to Poland which are substantially the same as Annex VIII relating to Latvia. I shall have to return to *Zalewska* later in this judgment.

54. In April 2009 (five months after the *Zalewska* decision) the UK Government purportedly extended the WRS for a period of two years pursuant to paragraph 5 of Annex VIII to the Accession Treaty. The Upper Tribunal has held that the extension was disproportionate and therefore unlawful.

55. In relation to this matter there are two separate issues to consider: first, the intensity of scrutiny which is appropriate; secondly, whether the Upper Tribunal's decision was open to it on the evidence.

56. On the first issue, the leading authority is now *R (Lumsdon and others) v Legal Services Board* [2015] UKSC 41; [2016] AC 697. The issue in that case concerned the legality of a quality assurance scheme for advocates. The Divisional Court, the Court of Appeal and the Supreme Court all held that the scheme was proportionate and therefore lawful. Lord Reed and Lord Toulson gave the principal judgment, with

which the other members of the court agreed. In their lengthy discussion of proportionality, they said this:

> "33. Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method. There is some debate as to whether there is a third question, sometimes referred to as proportionality stricto sensu: namely, whether the burden imposed by the measure is disproportionate to the benefits secured. In practice, the court usually omits this question from its formulation of the proportionality principle. Where the question has been argued, however, the court has often included it in its formulation and addressed it separately, as in *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa* (Case C-331/88) [1990] ECR I-4023.
>
> 34. Apart from the questions which need to be addressed, the other critical aspect of the principle of proportionality is the intensity with which it is applied. In that regard, the court has been influenced by a wide range of factors, and the intensity with which the principle has been applied has varied accordingly. It is possible to distinguish certain broad categories of case. It is however important to avoid an excessively schematic approach, since the jurisprudence indicates that the principle of proportionality is flexible in its application. The court's case law applying the principle in one context cannot necessarily be treated as a reliable guide to how the principle will be applied in another context: it is necessary to examine how in practice the court has applied the principle in the particular context in question.
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> 35. Subject to that caveat, however, it may be helpful to describe the court's general approach in relation to three types of case: the review of EU measures, the review of national measures relying on derogations from general EU rights, and the review of national measures implementing EU law.
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> …
>
> 50. It is necessary to turn next to measures adopted by the member states within the sphere of application of EU law. In that context, issues of proportionality have arisen most often in relation to national measures taken in reliance on provisions in the Treaties or other EU legislation recognising permissible limitations to the "fundamental freedoms": the free movement of goods, the free movement of workers, freedom of establishment, freedom to provide services, and the free movement of capital. Compliance with the principle of

proportionality is also a requirement of the justification of other national measures falling within the scope of EU law, including those which derogate from other rights protected by the Treaties, such as the right to equal treatment or non-discrimination, or fundamental rights such as the right to family life.

…

52. The court's general approach in this context was explained in the *Gebhard* case, concerned with the provision of legal services:

"national measures liable to hinder of make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it." (para 37)

53. The last two of these requirements correspond to the two limbs of the proportionality principle. In some more recent cases, the court has also emphasised other general principles of EU law, by requiring that procedures under the national measure should be compatible with principles of sound administration, such as being completed within a reasonable time and without undue cost, and also compatible with legal certainty, including the right to judicial protection.

…

56. The justification for the restriction tends to be examined in detail, although much may depend on the nature of the justification, and the extent to which it requires evidence to support it. For example, justifications based on moral or political considerations may not be capable of being established by evidence. The same may be true of justifications based on intuitive common sense. An economic or social justification, on the other hand, may well be expected to be supported by evidence. The point is illustrated by *Commission of the European Communities v Grand Duchy of Luxembourg* (Case C-319/06) [2009] All ER (EC) 1049, concerned with legislation which imposed on providers of services in Luxembourg, who were based in other member states, the mandatory requirements of Luxembourg's employment law. In addressing an argument that the measure ensured good labour relations in Luxembourg, the court stated:

> "51. It has to be remembered that the reasons which may be invoked by a member state in order to justify a derogation from the principle of freedom to provide services must be accompanied by appropriate evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted by that state, and precise evidence enabling its arguments to be substantiated …
>
> "52. Therefore, in order to enable the court to determine whether the measures at issue are necessary and proportionate to the objective of safeguarding public policy, the Grand Duchy of Luxembourg should have submitted evidence to establish whether and to what extent the [contested measure] is capable of contributing to the achievement of that objective."
>
> …
>
> 73. Member states must also comply with the requirement of proportionality, and with other aspects of EU law, when applying EU measures such as Directives. As when assessing the proportionality of EU measures, to the extent that the Directive requires the national authority to exercise a discretion involving political, economic or social choices, especially where a complex assessment is required, the court will in general be slow to interfere with that evaluation. In applying the proportionality test in circumstances of that nature, the court has applied a "manifestly disproportionate" test: see, for example, *R v Minister of Agriculture, 731Fisheries and Food, Ex p National Federation of Fishermen's Organisations* (Case C-44/94) [1995] ECR I-3115, para 58. The court may nevertheless examine the underlying facts and reasoning: see, for example, *Upjohn Ltd v Licensing Authority Established under Medicines Act 1968* (Case C-120/97) [1999] 1 WLR 927, paras 34–35.
>
> 74. Where, on the other hand, the member state relies on a reservation or derogation in a Directive in order to introduce a measure which is restrictive of one of the fundamental freedoms guaranteed by the Treaties, the measure is likely to be scrutinised in the same way as other national measures which are restrictive of those freedoms. *Commission of the European Communities v Grand Duchy of Luxembourg,* cited earlier, concerned a national measure of that kind."

57. As can be seen from [35], there are broadly three categories of case:

(1) Review of EU measures.

(2) Review of national measures relying on derogations from general EU rights.

(3) Review of national measures implementing EU law.

The principal judgment in *Lumsdon* gives guidance as to the intensity of review appropriate to each of those three categories. For cases in the third category, the court will normally apply the "manifestly disproportionate" test: see [73]. For cases in the second category the normal proportionality test will apply: see [74].

58. The Upper Tribunal appears to have put this case into category 2. At paragraph 98 the Upper Tribunal Judge said:

> "…I do not view the present matter as one involving political choice to a significant degree (this is reflected in the Secretary of State's reliance on technical advice from an outside body and also in the lack of Parliamentary scrutiny) but it does involve "economic or social choices", albeit, those choices are, as shown above, limited in range."

59. Mr Blundell submits that in fact this case falls between categories 2 and 3, but is closer to category 3. Paragraph 53 of the Secretary of State's skeleton argument states:

> "The basis upon which the Member States agreed to Latvia (and other Accession States) joining the European Union was a matter of political choice of the highest order, the precise terms of which involved a considerable amount of economic, social and political judgment."

60. That paragraph is a perfectly valid comment about Annex VIII of the Accession Treaty. But this court is not reviewing the proportionality of that Annex. We are looking at measures taken by the UK Government pursuant to paragraph 5 of that Annex.

61. Mr Blundell submits that the decision to extend the WRS was a highly political decision. It involved the interpretation of an international treaty. It may affect the reciprocal rights of any UK citizens working in Latvia. The extension of the WRS was a high level political compromise on a very sensitive issue.

62. In my view, Mr Blundell puts his submissions rather too high. The decision to extend the WRS involved consideration of economic, social and political factors. But it is an overstatement to say that this was a high level political decision. I accept that by reference to *Lumsdon* at [35], the decision falls between categories 2 and 3, but I do not accept that it is closer to category 3.

63. It is not a consequence of *Lumsdon* that every case must be put into one of three boxes, each with its own label affixed. Decisions which the court may be called upon to review are infinitely varied. The intensity of review depends upon the nature of the decision. *Lumsdon* provides helpful guidance in determining the extent of that scrutiny. In the present case the degree of scrutiny should not be intense, but I would not go so far as to say that the "manifestly disproportionate" test applies.

64. Let me now turn to the second issue. It is common ground that in 2009 the UK was experiencing "serious disturbances of its labour market". This is conceded in paragraph 42 of the respondent's skeleton argument. So the precondition for extending the national measures by two years (as set out in paragraph 5 of Annex VIII of the Accession Treaty) was satisfied. That, however, was not the end of the matter. The UK Government could only extend the WRS for two years if such a step was proportionate and compatible with EU law.

65. The Upper Tribunal held that regardless of whether one applies the normal proportionality test or the "manifestly disproportionate" test, the result is the same. The extension of the WRS could not be justified: see paragraphs 104 – 118 of the Upper Tribunal Judge's decision.

66. The Upper Tribunal is a specialist tribunal and its decision deserves respect: see *Obrey v Secretary of State for Work and Pensions* [2013] EWCA Civ 1584; [2014] HLR 12 at [14] to [18]. It is our function to review the Upper Tribunal's decisions, not to remake them unless the tribunal has erred in law. Section 13 of the Tribunals, Courts and Enforcement Act 2007 only permits appeals from the Upper Tribunal to the Court of Appeal on points of law.

67. Let me turn then to the impugned decision of the Upper Tribunal. The tribunal began by examining the material which formed the basis of the Secretary of State's decision. The principal material was a report by the Migration Advisory Committee ("MAC") dated April 2009.

68. The MAC report stated that the UK labour market was seriously disturbed. Turning to the WRS, the Committee concluded:

> "5.16 In conclusion, it is very unlikely that removing the WRS would result in any substantial change in A8 immigration inflows. However, it is possible that some factors, including the £90 registration fee, could have a small effect at the margin. The effect of maintaining the WRS will be to slightly reduce flows relative to what would otherwise be observed. We argue in this report that this slight dampening effect on flows is a positive phenomenon in the current economic circumstances, which is why we have not given detailed consideration to the option of relaxing the WRS by keeping the scheme but abolishing the £90 fee."

69. The Committee noted that the information yielded by the WRS was now of little value. This was because "if WRS data collection was discontinued, data on registrations could be substituted with data covering new National Insurance number registrations" (report paragraph 5.29).

70. At paragraph 5.35 the Committee stated:

> "5.35 The evidence reviewed indicates that the abolition of the WRS would not result in substantial labour market impacts. This is because the absence of the £90 fee would probably have only a marginal effect on immigration decisions and behaviour

> changes resulting from abolition of the scheme would be small. Nevertheless, it is plausible to argue that abolition of the WRS could potentially result in a small positive impact on immigration inflows."

71. The Committee's final conclusion in paragraph 6.6 was:

> "6.6 We emphasise that any impacts resulting from removal of the WRS would be small in comparison to the overall negative labour market consequences of the economic downturn. Nonetheless, we believe that it would be sensible to retain the WRS for two more years due to the possibility of small but adverse labour market impacts from abolishing it."

72. The Upper Tribunal noted at paragraph 105 that the MAC had been asked (and therefore had answered) the wrong question, namely whether it was "sensible" to retain the WRS for two more years.

73. I agree with that paragraph. The real question which the Secretary of State for the Home Department was obliged to answer (notwithstanding that the MAC had been asked a different question) was whether it was proportionate to extend the WRS having regard to (a) the objective being pursued and (b) the adverse effects on individuals who failed to register in time. As the Upper Tribunal observed, there was no evidence from the Secretary of State of any weighing up of those conflicting considerations.

74. The core of the Upper Tribunal's reasoning is at paragraphs 111 to 115 of the tribunal's decision. Since the Secretary of State advances, in effect, a perversity challenge to the Upper Tribunal's decision, I should in fairness to the tribunal set out those paragraphs in full:

> "111. It is difficult to imagine a report favouring retention of the WRS couched in weaker or more heavily qualified terms. Evidence of the "small" behaviour changes resulting from abolition was not such as to establish them "to any significant degree". The abolition of the £90 fee would have an effect that was "probably…only…marginal". Any positive (i.e. increased) impact on inflows from abolition was (a) "small"; (b) only a "potential[..] result" and (c) only something that could be "plausibl[y] argued".
>
> 112. "Sensible" it may have been, even if the effects were a matter of conjecture and small or marginal, on the basis that if they did come to pass, when seen from the perspective of the government it could only help. But was it proportionate? The MAC's conclusion depends in very large measure on the deterrent effect of the £90 fee, but is maintaining that fee a measure that is "appropriate and necessary"? This was a scheme which if complied with did not otherwise restrict the access of A8 nationals to the labour market: see MAC report, para 2.36; also the evidence cited by Baroness Hale in

Zalewska at para 53. The United Kingdom originally had a wider power to put national measures in place and, albeit by a bare majority, the House of Lords held that *Zalewska* that the action then was proportionate. But by 2009 it was a question of whether it was a proportionate step to take in the context of there being a serious disturbance to the UK labour market (or threat thereof) and whether maintaining the scheme would help address that disturbance. Because of the passage of time, the appellant's argument cannot in my view properly be characterised, as does Ms Smyth, as a "challenge to *Zalewska* itself". Data collection was more relevant in 2005 than it had come in 2009, because the provisions of Annex VIII and similar annexes for reviews and extensions of the national measures which required data to be gathered as evidence had, with time, fallen away. Any residual value in data derived from the WRS was limited in that it was largely replaceable from elsewhere and was otherwise speculative ("could possibly prove to be…"). Other than that, the WRS had no demonstrable material impact on inflows or behaviour, and so on the labour market, at all. What we are left with as impacting on the labour market is the fee, set to defray the costs of an administrative scheme which does not itself materially help to address the disturbance. I do not regard it as an "appropriate" tool for proportionality purposes for addressing the serious disturbance of the UK labour market in that it relies effectively on payment of a sum of money by A8 nationals, while not otherwise affecting their access to it.

113. Given the prominence given in the MAC's reasoning to the fee, this conclusion would itself be enough to invalidate the proportionality of a decision taken relying upon that reasoning. However, if I am wrong in that conclusion, I would in any event consider that the disadvantages caused are disproportionate to the aims pursued.

114. There is a burden on employers, even if little research had been done to examine its scale. Regulation 9 of the Registration Regulations created a criminal offence if an employer employed A8 nationals who were required to be registered under the WRS but were not, subject to various defences of due diligence. Even if there is no known instance of anyone ever having been prosecuted, the procedures must have created additional burdens for any conscientious employer: certainly that (or something akin to it) seems to have been the view of the Confederation of British Industry, British Chambers of Commerce, Association of Labour Providers, the Scottish Executive, the Recruitment and Employment Confederation, the Gangmasters Licensing Authority and the National Farmers' Union (MAC report, para 5.31).

> 115. The precise effect of the Registration Regulations has been and remains to this day (though they have been repealed) the subject of legal uncertainty and so difficulties for those affected by it. In addition to *Zalewska*, reference should made to *SSWP v ZA* [2009] UKUT 294 AAC and *Szpak v SSWP* [2013] EWCA Civ 46 which illustrate the inadequacies of the drafting in relation to whether a WRS certificate was when issued retrospective to the start of the employment. Cases on other aspects continue to go through the legal system. On an orthodox view, the effect on the Registration Regulations is that a person who ought to comply with them but does not is excluded from benefits no matter how unforeseeable the circumstances which have caused them to be in need of them. Such a person is also prevented from relying on that time for the purposes of the 5 years required to establish permanent residence in the UK under Article 16 of the Directive, notwithstanding that he or she may have been working, paying taxes and generally participating actively in UK society. There is, in short, a very real downside for those who do not comply for whatever reason, once regarded by Baroness Hale at para 57 of *Zalewska* as "severe". Factors such as language difficulties and the frequent participation of A8 nationals in short-term work obtained through agencies may make it more likely that there is non-registration. The MAC was uncertain (para 5.21) whether such confusion as there may have been on the part of A8 immigrants was as to the WRS or as to employment rights more generally; but even if it was the latter, the WRS can only have served to make an already difficult situation worse. The MAC report cites at para 57, albeit not in wholly unambiguous terms, a study in which (at very least) some 33% of A8 nationals failed to register when they needed to potentially needed to do so. For those who did comply, there was the need to pay a sum equivalent to around 1 per cent of annual gross pay for someone making at the national minimum wage for a 35 hour week for 48 weeks (MAC report, para 5.9)."

75. I can find no fault with the Upper Tribunal's reasoning in that critical passage. The WRS only survived the challenge which Ms Zalewska brought by a margin of 3:2. The reasoning of the two dissenting judgments by Lord Neuberger and Baroness Hale was powerful to say the least. Lord Neuberger observed at [68]:

> "…the outright denial of future benefits to a person who has worked here for 12 months is simply not a suitable means of achieving the primary aim of the scheme."

76. The primary aim of the scheme, upon which the Secretary of State relied in *Zalewska*, was to monitor the impact of A8 state nationals on the UK's labour market. The WRS was, in the opinion of the majority, a proportionate means of obtaining the necessary information.

77. Although that was the position in 2004, the world had changed by 2009. The Secretary of State had had the benefit of five years monitoring through the WRS. As the MAC report observed, an extension of two years would yield little additional information of value.

78. The MAC report noted that there was a serious disturbance of the UK labour market. But an extension of the WRS would not make any substantial contribution to alleviating the problem. According to paragraph 5.16 of the MAC report, it was "possible" that extending the WRS "could have a small effect at the margin".

79. When that small benefit is weighed against the profound consequences for individuals such as the respondent in this case, it is hardly surprising that the Upper Tribunal found the extension to be disproportionate, whether applying a moderate degree of scrutiny or the "manifestly disproportionate" test most favourable to the Secretary of State.

80. Mr Blundell points out that the European Commission did not bring infraction proceedings against the UK in respect of the Extension Regulations. That is true, but the Commission does not, indeed cannot, bring infraction proceedings against Member States for every breach of EU law. This can only be a factor of modest weight: see *Gibraltar Betting & Gaming Association Ltd v Secretary of State for Culture, Media and Sport* [2014] EWHC 3236 (Admin); [2015] 1 CMLR 28 at [123].

81. Let me now draw the threads together. For the reasons set out above, I reject the second ground of appeal. There was no error of law in the Upper Tribunal's conclusion that the Extension Regulations were disproportionate and therefore incompatible with EU law.

Part 7 – Conclusion

82. For the reasons set out in Part 5 above, in my view the Secretary of State succeeds on his first ground of appeal. For the reasons set out in Part 6 above, the Secretary of State fails on his second ground of appeal.

83. In order to overturn the Upper Tribunal's decision the Secretary of State needs to succeed on both grounds of appeal. Since he fails on the second ground, this appeal must be dismissed.

Lord Justice Lindblom :

84. I agree.

Lord Justice Peter Jackson :

85. I also agree.

APPENDIX A:

Summary of the WRS and of relevant parts of the Registration Regulations (as amended)

1. The basic rule of the scheme that it set out is that a national of an A8 state working in the United Kingdom during the accession period was an accession state worker requiring registration: 2004 Regulations, reg 2(1). He ceased to be an accession state worker requiring registration if he legally worked in the United Kingdom without interruption for a period of 12 months falling wholly or partly after 30 April 2004: reg 2(4). But he would only be treated as legally working in the United Kingdom on or after 1 May 2004 if he was working for an authorised employer: reg 2(7)(b). Regulation 4 dealt with the right of residence of workers and work seekers from the A8 states during the accession period. Reg 4(1) derogated from the relevant Community provisions on the abolition of restrictions on movement and residence within the Community for workers of member states. Reg 4(2) provided that a national of a relevant accession State was not entitled to reside in the United Kingdom as a work seeker if he would be subject to the scheme if he began working. Reg 4(4) provided:

> "A national of a relevant accession State who is seeking employment and an accession state worker requiring registration shall only be entitled to reside in the United Kingdom in accordance with the 2006 Regulations as modified by regulation 5."

2. Regs 5(1) and 5(4) of the 2004 Regulations provided:

> "(1) the 2006 Regulations shall apply in relation to a national of a relevant accession State subject to the modifications set out in this regulation.
>
> (2) A national of a relevant accession State who is seeking employment in the United Kingdom shall not be treated as a jobseeker for the purpose of the definition of "qualified person" in regulation 6(1) of the 2006 Regulations and an accession State worker requiring registration shall be treated as a worker for the purpose of that definition only during a period in which he is working in the United Kingdom for an authorised employer.
>
> (3) Subject to paragraph (4), regulation 6(2) of the 2006 Regulations shall not apply to an accession State worker requiring registration who ceases to work.
>
> (4) Where an accession State worker requiring registration ceases working for an authorised employer in the circumstances mentioned in regulation 6(2) of the 2006 Regulations during the one month period beginning on the date on which the work begins, that regulation shall apply to that worker during the remainder of that one month period."

3. Regs 7(1), 7(2) and 7(3) of the 2004 Regulations provided:

> "(1) By way of derogation from article 39 of the Treaty establishing the European Community and articles 1 to 6 of the Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community, an accession state worker requiring registration shall only be authorised to work in the United Kingdom for an authorised employer.
>
> (2) An employer is an authorised employer in relation to a worker if –
>
> (a) the worker was legally working for that employer on 30 April 2004 and has not ceased working for that employer after that date;
>
> (b) the worker -
>
> (i) during the one month period beginning on the date on which he begins working for the employer, applies for a registration certificate authorising him to work for that employer in accordance with regulation 8; and
>
> (ii) has not received a valid registration certificate or notice of refusal under regulation 8 in relation to that application or ceased working for that employer since the application was made;
>
> (c) the worker has received a valid registration certificate authorising him to work for that employer and that certificate has not expired under paragraph (5); or
>
> (d) the employer is an authorised employer in relation to that worker under paragraph (3) or (4).
>
> (3) Where a worker begins working for an employer on or after 1 May 2004 that employer is an authorised employer in relation to that worker during the one month period beginning on which the work begins."

Reg 7(5)(b) provided that a registration certificate expired on the date on which the worker ceased working for that employer.

4. Reg 8 of the 2004 Regulations set out the system that was to be followed for obtaining a registration certificate. The application could only be made by an applicant requiring registration to work for an employer who was working for that employer at the date of the application. It has to be made in writing to the Secretary of State. Except in the case of a first registration, the application had to be accompanied by, among other things, a letter from the employer confirming that the applicant began working for the employer on the date specified in the application. On a first registration a registration fee of £90 was payable. If the Secretary of State was satisfied, he sent the applicant a registration card with a reference number, for use in

subsequent applications, and a registration certificate. The registration certificate stated, among other things, that it authorised the worker to work for the employer stated in the certificate and that it would expire on the date the worker ceased working for that employer. Reg 9(1) provided that, subject to various exceptions, an employer who employed an accession state worker requiring registration during a period in which the employer was not an authorised employer in relation to that worker was guilty of an offence.