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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF THE SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

AND

THE SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

AND

IN THE MATTER OF THE DECISION OF THE SOCIAL SECURITY COMMISSIONER OF 7 AUGUST 2006

BETWEEN:

EWA ZALEWSKA

Appellant;

and

DEPARTMENT FOR SOCIAL DEVELOPMENT

Respondent.

GIRVAN LJ

INTRODUCTION

[1] This is a case stated by the Social Security Commissioner in which the Commissioner has raised two questions for the opinion of the court, namely –

(1) whether she was correct in holding that the implementation of the derogation contained in Annex XII of the Treaty of Accession is compatible with European law, in particular Articles 12, 18 and 39 of the EC Treaty and Article 7(2) of EEC Regulation 1612/68; and

(2) whether she was correct in law in holding that, regardless of whether the appellant had status as a worker, the permitted derogation in Annex XII of the Treaty of Accession allows for the refusal of income support in the circumstances of her claim.

The case stated arises out of a decision given (in corrected form) on 23 August 2006 wherein the Commissioner held that the appellant Ewa Zalewska was not entitled to income support from 23 July 2005.

[2] The appellant is a Polish national who came to Northern Ireland in July 2004 after the date on which the Republic of Poland, together with a number of other states, acceded to the European Union on 1 May 2004 ("the date of accession"). From 9 July 2004 until 7 January 2005 she picked mushrooms in Northern Ireland for a firm called Monaghan Mushrooms. During this period the appellant registered her employment under the Home Office Worker Registration Scheme ("the Registration Scheme"). Following termination of that employment she immediately secured new employment through a recruitment agency working in a variety of jobs. The appellant failed to register her change of employment as required under the Registration Scheme.

[3] The appellant's daughter joined her in January 2005. Her partner and the father of the child moved to Northern Ireland in April 2005. At the end of June 2005 due to domestic violence she left her partner. She ceased work on 10 July 2005. Following her move to a Women's Aid hostel in Portadown she applied for income support. This claim was disallowed on the grounds that she did not have a right to reside in the United Kingdom and failed the habitual residence test for income support purposes.

[4] Subsequently a Social Security Appeal Tribunal allowed the appeal. The Tribunal concluded that the habitual residence test as amended to incorporate the right to reside test at the time the Accession states joined the European Union was incompatible with European Union law. It concluded that the appellant retained her status as a worker for the purposes of Article 7.2 of Council Regulation 1612/68 and that income support was a social advantage. It considered that the habitual residence tests discriminated directly against the appellant on the grounds of nationality and that Article 7 prohibited such an outcome. The Commissioner's decision reversed the conclusions of the Tribunal.

THE EUROPEAN LEGAL CONTEXT

[5] By the Treaty of Accession 2003 implemented by the Act of Accession the Accession states including the Republic of Poland were admitted to European Union. Under Article 2 of the Act of Accession from the date of

accession the provisions of the original Treaties became binding on the new Accession states. By Article 10 the application of the original Treaties and Acts adopted by the Institutions as a provisional measure were subject to derogations provided for in the Act. By Article 60 Annex 1 to XVIII form an integral part of the Act. Part 2 of Annex XII contains transitional provisions relating to the freedom of movement of Polish workers within the Union.

[6] Before considering the effect of the transitional provisions under the Act of Accession it is necessary to consider the Treaty provisions relating to the movement of workers between member states. It will then be necessary to consider the effect of the Accession transitional provisions. The Treaties establishing the European Community, now the European Union, contained provisions designed to facilitate the movement of workers between member states. That freedom is to be regarded as a fundamental right and one of the means by which the European worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement while helping to satisfy the requirements of the economies of the member states. As the recitals to Council Regulation 1612/68 make this clear. The European Court of Justice ("the ECJ") has interpreted the provisions of Articles 39 to 42 in a rather more liberal manner than a purely functional view of the Treaty might appear to dictate. Article 39 is intended to facilitate the pursuit of occupational activities of all kinds throughout the community and precludes national legislation which might place Community nationals at a disadvantage when they extend their activities beyond a single member state.

[7] Article 39 refers to the freedom of movement for workers. Article 1 of Regulation 1612/68 refers to the right to "take up an activity as an employed person". Neither "worker" nor "employed person" is defined but the concepts must be interpreted according to their ordinary meaning and in the light of the objectives of the Treaty. Workers and economically active migrants have an unconditional right of residence as well as a right of access to most welfare benefits as if they were nationals of the host state. It is, thus, in the interests of the Union citizen to be defined, whenever possible, as a "worker" or self employed person rather than just as a Union citizen. The term "worker" has to be given a Community law meaning for otherwise the term would vary from state to state. The ECJ in its case law has held that the essential characteristic of the employment relationship is that for a certain period a person performs services for and under the directions of another person in return for payment. The fact that a worker has worked for only a short period or a fixed term contract does not exclude him from the scope of Article 39. In Lair (1988) ECR 3161 the ECJ held that migrants workers who are no longer active either because of involuntary unemployment, illness or retirement "are guaranteed certain rights linked to the status of workers even when they are no longer in an employment relationship."

[8] Since Article 39 would lose much of its effect if Union citizens could not move abroad to seek work the ECJ has held that Article 39 applies to those seeking work who have a right to move to another member state to seek employment and are entitled to stay there for a reasonable time without being deported and even beyond that time if they can prove that they have genuine chances of being employed. In Antonissen (case C-292/89) the ECJ considered the question whether the right of a job seeker to stay in a member state for the purpose of seeking employment can be subjected to a temporal limitation. It held that it was not contrary to EU law governing the free movement of workers for the legislation of a member state to provide by national legislation that a national of another member state entering the first state to find employment might be required to leave the territory of that state if he has not found employment there after six months unless the person concerned provides evidence that he is continuing to seek employment and that he has a genuine chance of being engaged. The ECJ originally excluded work seekers from the right to equal treatment in relation to social assistance in the host state. This was with a view to avoiding so called "welfare tourism". However, in Collins (2004) ECR 1-2703 the ECJ reinterpreted the law. Mr Collins was an Irish national who went to the United Kingdom and whilst still looking for a job claimed unemployment benefit. He was denied the benefit on the grounds that he was not habitually resident in the United Kingdom and being merely a job seeker and not a worker was not according to previous ECJ case law entitled to equal treatment in relation to welfare benefits. The court held that Article 39 had to be interpreted in the light of the introduction of Union citizenship. Since Union citizens are entitled to equal treatment in regard to all matters falling within the material scope of the Treaty it was no longer possible to exclude job seekers from the scope of the application of Article 39(2) which provides for the general right to equal treatment benefits of a financial nature for work seekers. However, it is open to the member states to justify indirect discrimination (a residence requirement would be so considered) by claiming a necessity to ensure that a genuine link exists between the claimant and the labour market therefore limiting if not eliminating the possibility of welfare tourism. The ECJ went on to state that the United Kingdom was able to require a connection between persons claiming entitlement and the employment market. A residence requirement has to be proportionate and cannot go beyond what is necessary to achieve the objective. If a period of residence is required the period must not exceed what is necessary for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work.

[10] Paragraph 1 of Annex XII in the case of Polish workers provides that Article 39 in relation to the freedom of movement of workers between Poland and other states including the United Kingdom only fully applies subject to the transitional provisions laid down in paragraphs 2 to 14. Paragraph 2 of the Annex provides –

> "By way of derogation from Articles 1 to 6 of Regulation (EEC) No 1612/68 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.
>
> 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.
>
> 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-sub paragraphs above shall cease to enjoy the rights contained in those sub-paragraphs if they voluntarily leave the labour market of the present member states 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 or who were admitted to the labour market of that member state for a period of less than 12 months shall not enjoy those rights."

[11] Council Regulation EEC No 1612/68 contains in Articles 1 to 6 provisions ensuring the eligibility for employment of nationals of member states in other member states. Article 1.2 makes clear that a national of one state shall have a right to take up available employment in the territory of another member state with the same priority as nationals of that state the rights conferred by Article 39 and Regulations 1 to 6 of Regulation 1612/68. Article 7 of Regulation 1612/68 was not in terms modified by the transitional provisions though its effect was debated in the course of the appeal. Article 7 provides –

> "(1) A worker who is a national of a member state may not, in the territory of another member state, be

treated differently from national workers by reason of his nationality in respect of any conditions of employment in work, in particular as regards remuneration, dismissal and should he become unemployed, reinstatement or re-employment;
(2) He shall enjoy the same social and tax advantages as national workers.

THE DOMESTIC LAW PROVISIONS

[12] The principal relevant national measures which must be considered in consequence of the transitional provisions are the Immigration (European Economic Area) Regulations 2000, the Accession (Immigration and Workers Registration) Regulations 2004, the Income Support (General Regulations) as modified by the Social Security (Habitual Residence) (Amendment) Regulations (Northern Ireland) 2004.

[13] Under Regulation 14 the Immigration (EEA) Regulations 2000 "a qualified person" is entitled to reside in the United Kingdom for so long as he remains a qualified person. Such a qualified person may reside and pursue economic activity in the United Kingdom notwithstanding that his application for a residence permit has not been determined. An EEA national must be admitted to the United Kingdom if he produces on arrival a valid national identity card or passport issued by an EEA state. Under Regulation 15 the Secretary of state must issue a residence permit to a "qualified person" on application and production of a valid identity card or passport issued by an EEA state who can prove that he is a qualified person. A residence permit is valid for at least 5 years from the date of issue a person may be removed from the United Kingdom if he is not or has ceased to be a qualified person. A qualified person is defined in Regulation 5 as (inter alia) "a worker". This is defined by Regulation 2 as meaning "a worker within the meaning of Article 39 of the EEC Treaty". A worker does not cease to be a qualified person solely because he is involuntarily unemployed if that fact is duly recorded by the relevant employment office.

[14] The Accession (Immigration and Worker Registration) Regulations 2004 modified the affect of Regulation 5(1) of the 2000 Regulation by providing that the national of a relevant Accession state working in the United Kingdom during the accession period between 1 May 2004 and 30 April 2009 (such person being defined as "an Accession state worker requiring registration") will be treated as a qualified person only during a period in which he or she is working in the United Kingdom for an "authorised employer". Regulation 7 defines an "authorised employer". In effect the worker must hold a registration certificate authorising him to work for that employer (subject to a one month period of grace for the obtaining of a certificate from the date on which the work begins). A registration certificate is invalid if the worker ceases

working for that employer. Regulation 8 sets out the registration requirements which ensure the proper identification of the work. If an employer employs an Accession state worker during a period in which the employer is not an authorised employer in relation to that employer the employer is guilty of an offence under Regulation 9.

[15] Regulation 4 of the 2004 Regulation states that that regulation derogates from Article 39 and Articles 1 to 6 of Regulation EEC No 1612/68 on freedom of movement. 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."

An Accession state worker requiring registration is only entitled to reside in the United Kingdom in accordance with the 2000 Regulations as modified by Regulation 5.

[16] Consequent on the changes to the 2000 Regulations by the 2004 Regulations the Social Security (Habitual Residence) (Amendment) Regulations (Northern Ireland) 2004 made amendments to Regulation 21 of the Income Support (General) Regulations (Northern Ireland) 1987. Prior to the amendment where a person was "a person from abroad" the applicable amount for income support purposes under the Regulations was nil. A person from abroad was simply defined as a claimant not habitually resident in the UK. This did not however exclude persons with a right of residence in the United Kingdom under Community law. The Amendment Regulation of 2004 supplemented the definition of a person from abroad. A person who is an Accession state worker requiring registration who is treated as worker for the purposes of the definition of a qualified person in Regulation 5 of the Immigration (EEA) Regulations 2000 pursuant to Regulation 5 of the Accession (Immigration and Workers Registration) Regulations 2004 will qualify as habitually resident but that is only when he is working for an authorised employer. A new Regulation 21(3E) provides –

> "No person shall be treated as habitually resident in the United Kingdom if he does not have a right to reside in the United Kingdom."

Since an Accession state worker will only qualify as a qualified person with a right to reside in the United Kingdom during the period in which he is working for an authorised employer it follows that when not employed by an authorised employer he does not as such have a right to reside in the United

Kingdom while unregistered or while working for an unauthorised employer. Accordingly, he would fail to qualify for income support as a habitually resident person.

THE ARGUMENTS

[17] Mr O'Hara QC on behalf of the appellant argued that the Act of Accession permits derogation from Articles 1 to 6 of Regulation 1612/68 but not from Article 7 of that Regulation. Although Article 7.2 refers to a worker the term is not defined and has to be construed consistently with ECJ jurisprudence. Although she had ceased to be employed the appellant was nevertheless "a worker" under EU law. A worker under European Union law can include a person who is not currently employed but who is genuinely seeking work. Counsel argued that although she had lost her job she did not cease to be a worker for the purposes of Article 7(2) on unemployment she has a valid claim for income support. The appellant remained a "qualified person" for the purposes of Regulation 5(2) of the 2000 Regulations. This, accordingly, gave her a right to reside under Regulation 14 of those Regulations and she derived effective rights under Article 7 of Regulation 1612/68 from which there had been no derogation. Mr O'Hara further contended that the right to reside test introduced in the amendment of the General Regulations indirectly discriminated against Accession workers. It could only be supported if it was based on objective justification. The case of Collins made it clear that what justified a habitual residence test was the intention to avoid "benefit tourism." On the facts of the appellant's case the "benefit tourism" justification could not apply and disproportionately affected Accession workers who had completed less than 12 months continuous registered employment.

[18] Mr Maguire QC on behalf of the Department argued that under Community law there was no basis for challenging the national measures. The Treaty and Act of Accession plainly provided that transitional provisions could be made by member states at their discretion protecting their labour market from the potential effects of enlargement. Provided the national measures were properly pursuing the purpose of the transitional arrangements it was submitted that the means adopted were a matter for the member states. Consistently with the transitional provisions there would inevitably be a permitted area of discrimination. It was impossible to envisage how the permitted derogations from Regulation 1612/68 in respect of Articles 1 to 6 could be operated without restriction also being permitted in respect of the rights conferred by Article 39, and the qualified rights in Articles 12 and 18. Article 7 of Regulation 1612/68 was contained within Table 2 of the Regulations which has the purpose of dealing with persons in employment. It did not deal with the situation where the national of a member states was seeking work. Article 7(2) is contemplating rights which come into play when employment is achieved. Article 7 only applies to discrimination against those formally in the labour market. Mr Maguire relied on the judgment of Collins J

and the Court of Appeal in R v. (D) v. Secretary of state for Work and Pensions (2004) EWCA Civ 1468 which he said clearly established that the so called derogation in the Act of Accession was intended to protect the job markets of existing member states if they wished to do so and conferred a power to limit the manner in which Accession workers were entitled to enter the labour market. The right to exclude workers from the labour market included the right to take steps short of exclusion but which themselves were designed to help protect the labour market and to avoid the need to pay public money in a form of benefits when there was no work necessarily available. The national measures were necessary and proportionate and struck a fair balance.

CONCLUSIONS

[19] As Mr Maguire correctly argued Annex XII modifies the impact of the rights conferred on migrant workers under Article 39 and by Articles 1 to 6 of Regulation 16/12/68 by permitting member states during the transitional period to introduce measures to apply *national* laws regulating access to their labour markets in respect of relevant accession workers. As the decision in Re D makes clear, the conferring on member states of a power to apply different rules to accession workers as compared to the nationals of other member states enables member states to apply to Accession workers provisions which of their very nature are discriminatory.

[20] Regulation 1612/68 deals with in Title 1 with eligibility to work. Titles II and III deal with the employment and equality of treatment of workers and with workers' families. If an Accession worker is admitted to the labour market depending on what is meant by the term "worker" and "admitted to the labour market" he or she will be entitled to rely on the protections conferred in Article 7 paragraph 1 for as Collins J said in Re D –

> "Article 7.2 will come into play if employment is achieved. Then there is no discrimination because the persons become, once they are in the labour market, formally members of the labour market."

[21] The central question is whether the applicant at the time she applied for income support qualified as a worker admitted to the United Kingdom labour market. As the discussion at paragraphs [6]-[9] above indicates, had she been a citizen of a non-Accession member state she may well have qualified. It must be said, however, that on the facts as set out in the Case Stated there is insufficient evidence recorded to establish conclusively that she would have been so qualified. The Commissioner's case recites no finding of fact as to why she left her work or whether she was still genuinely seeking work at the relevant date when she was seeking income support. In her decision she records at paragraph 3 that she did not know why she ceased work. The Tribunal on the other hand in its decision on 18 November 2005 appeared to

accept that the applicant was a worker being still intent on finding work. If the argument presented by Mr Maguire is wrong in law, the matter would have to be remitted to the Commissioner to address factual issues which would still have to be determined on these questions.

[22] However, as shown above, the status of Accession workers in the national labour market is different from that of other nationals. The Community concept of worker is incapable of precise definition since, as Collins makes clear, the concept is not used in the Community law texts in a uniform way. Since the Act of Accession confers on member states in respect of Accession workers a power to make national provisions which, thus, do not have community wide effect it is necessary to ascertain the proper meaning and intent of the national law albeit that national law must be compatible with any overriding Community law requirements that limit the member state in the formulation of national law. Since the Act of Accession clearly confers a wide discretion on member states (which could include total exclusion of Accession workers) it was clearly not the intention of the Act to tie the hands of the national authorities as to how they regulated their national labour markets.

[23] Annex XII provides that Polish nationals admitted to the labour market of a member state after accession for an uninterrupted period of 12 months or longer will acquire the full rights of a Community worker within that member state. Since the member state is left to determine the conditions in which an Accession worker will be held to have been admitted to the national market the question whether such a worker has been admitted to the labour market for 12 months must be determined in accordance with national law. If, throughout the uninterrupted period of 12 months the Polish national satisfies the national conditions of admission he or she will acquire the rights of a Community worker thereafter in that national labour market.

[24] Under the national law to be found in the relevant Regulations Polish workers are admitted to the labour market conditionally. The registration requirements operate as a condition of employment breach of which results in the Polish worker failing to satisfy the national requirement for lawful admission to the member state's labour market. In Re D Kay LJ considered that the Accession worker remain *employed* for an uninterrupted period of 12 months he will receive the benefit of the time qualification. It may be that where such a worker has short breaks in continuous registered employment during which work is being sought he may still satisfy the 12 month period requirement. That is not, however, a relevant question in the present case since the applicant only worked as a registered worker for a 6 month period and thereafter took unregistered employment. She, therefore, failed to fulfil the condition to be satisfied if she was to be treated as lawfully admitted to the labour market during the relevant period.

[25] In Re D the Court of Appeal concluded that the Registration Scheme is a reasonable and proportionate concomitant of the permitted derogation. The policy behind the Registration Scheme is to enable the Secretary of State to monitor and control those falling within the derogation. It has a national legal basis which is consistent with the right conferred on member states to regulate their own labour market in the context of Accession workers. The applicant is unable to demonstrate that the Scheme lacks rationality or proportionality.

[26] In Re D the conclusion of Collins J and the Court of Appeal was that if an Accession worker ceased to qualify as a worker he falls within the permitted derogation. We conclude that the analysis set out in Re D is correct and should be followed in this jurisdiction. Accordingly, we answer each of the questions raised by the Commissioner in the case stated "Yes". The appeal is dismissed.