19 June 2019

PRESS SUMMARY

Secretary of State for Work and Pensions (Appellant) v Gubeladze (Respondent)
[2019] UKSC 31
On appeal from [2017] EWCA Civ 1751

JUSTICES: Lady Hale (President), Lord Kerr, Lord Carnwath, Lord Hodge, Lady Black, Lord Lloyd-Jones, Lord Sales

BACKGROUND TO THE APPEAL

By a Treaty signed at Athens on 16 April 2003 ("the Athens Treaty"), ten Accession States became member states of the EU. The Act of Accession, annexed to the Athens Treaty, permitted the existing member states to apply national measures regulating access to their labour markets by nationals of the eight most populous Accession States ("the A8 States") which included Latvia. It required the existing member states to apply measures, for an initial period of two years from the date of accession, regulating access to their labour markets by Latvian nationals. The existing member states were permitted to continue to apply such measures until the end of the five year period following the date of the accession. An existing member state maintaining such measures at the end of the five year period was permitted, "in case of serious disturbances of its labour market or threat thereof and after notifying the Commission" to continue to apply these measures until the end of the seven year period following the date of accession.

The Act of Accession was given effect in the domestic law of the UK by the European Union (Accessions) Act 2003 and the Accession (Immigration and Worker Registration) Regulations 2004 (SI 2004/1219) ("the 2004 Regulations"). The 2004 Regulations established the Worker Registration Scheme ("WRS") which obliged any national of an A8 State to register before starting employment and before taking up any new employment. Each registration incurred a fee of £90 and the obligation to register continued until the worker had worked for 12 months. Failure to register work in accordance with the WRS would mean that the individual would not derive from that work a right to reside in the UK. In 2009 HM Government asked the Migration Advisory Committee ("MAC") to advise it in relation to the continuation of the WRS. In the light of the MAC's advice, the Government decided to extend the measures applicable to nationals of the A8 States for a further two years.

The central issue in this case is whether Ms Tamara Gubeladze ("the respondent"), a Latvian national living in the UK, is entitled to receive state pension credit. The respondent came to the UK in 2008 and worked for various employers between September 2009 and November 2012. In the periods when she was not working she was a jobseeker. She was issued with a registration certificate under the WRS on 20 August 2010. Her employment before that date was not covered by the certificate.

On 24 October 2012, the respondent made a claim for state pension credit. The basis of her claim was that she had a right of residence in the UK under regulation 5(2) of Immigration (European Economic Area) Regulations 2006 (SI 2006/1003), ("the 2006 Regulations"), which implement article 17(1)(a) of Directive 2004/38/EC ("the Citizens Directive"), as a person who had retired, having pursued activities as a worker for at least a year in the UK, and having resided continuously in the UK for three years. The Secretary of State for Work and Pensions ("the Secretary of State") rejected her claim on the ground that the requirement of three years' continuous residence required three years' continuous "legal"

residence which meant a right of residence under the Citizens Directive. Since the respondent's asserted right of residence during that time was as a worker, but she had not been registered under the WRS for part of that period, the Secretary of State considered that she had not resided in the UK pursuant to a right of residence conferred by the Citizens' Directive and therefore did not meet the three year residence requirement in regulation 5(2) of the 2006 Regulations.

The respondent's appeal to the First-tier Tribunal was dismissed on jurisdictional grounds. On appeal to the Upper Tribunal, it held that the First-tier Tribunal had had jurisdiction to hear the appeal and it re-made the substantive decision. It allowed the respondent's appeal on two distinct grounds. First, it held that article 17 of the Citizens Directive, and therefore regulation 5(2)(c) of the 2006 Regulations, did not require that the three years' continuous residence be in exercise of rights under the Citizens Directive. Actual residence was sufficient. Secondly, it held that the decision to extend the WRS in 2009 was disproportionate and therefore unlawful. On that footing, the respondent's residence in the UK at the relevant time had not involved any breach of any applicable valid domestic law and so was to be regarded as legal residence for the purposes of the 2006 Regulations. The Secretary of State appealed to the Court of Appeal which dismissed the appeal. In the Court of Appeal, the Secretary of State succeeded in her appeal in relation to the first point, with the Court holding that the word "reside" in article 17(1)(a) of the Citizens Directive meant "legally reside" in the requisite sense; but the Court held that the extension of the WRS was disproportionate and therefore incompatible with EU law. The Secretary of State appealed to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Lloyd-Jones and Lord Sales give the sole judgment with which the other Justices agree.

REASONS FOR THE JUDGMENT

(1) Is the decision to extend the WRS open to challenge on grounds of proportionality? The Secretary of State submits that the extension of the WRS did not interfere with or derogate from any pre-existing protected interest, so it was not subject to any requirement of proportionality under EU law **[27]**. The Court considers that the question at the heart of this issue is whether the Act of Accession created relevant protectable interests by conferring rights of EU citizenship on the new EU citizens from the A8 States subject to initial, tapering exceptions imposed by the existing member states, or whether it should be regarded as providing for only such rights as may be conferred by the existing member states during the transitional period. The House of Lords in *Zalewska v Department for Social Development* [2008] UKHL 67 took the former view **[32]**. The Court agrees. It considers that there was no intention under the Act of Accession to confer an unfettered right to derogate from general principles of freedom of movement. On the contrary, derogation from those principles must be subject to the principle of proportionality in EU law **[35]**. This conclusion is supported by the scheme of the relevant instruments **[33]** and the purpose of the measures **[35]**.

(2) If the decision to extend the WRS is open to challenge on grounds of proportionality, did the Upper Tribunal and the Court of Appeal err in their approach and conclusion on this issue? It is significant that the Secretary of State has simply relied upon what is said in the MAC report of April 2009. She has not filed evidence to explain any distinct reasoning as to why the extension of the WRS was justified, nor to point to any additional relevant factors other than those taken into account by the MAC in its report **[49]**. This poses problems for the Secretary of State because the MAC was not asked to consider whether an extension of the WRS would be proportionate in terms of EU law and it expressed no view about that **[50]**.

The leading decision of this Court on the principle of proportionality in EU law is now *R (Lumsdon) v Legal Services Board* [2015] UKSC 41 **[57]**. This explains that the principle applies according to a three stage test. As regards the first stage of this test, the Court considers that the continuation of the WRS is suitable or appropriate to achieve the objective pursued **[66]**. The MAC report showed that extending the WRS would have a material, though small, effect in mitigating the serious disturbances to the UK labour market by reducing the flow of workers from A8 States which would otherwise occur **[68]**. No issue arises in relation to the second stage. However, the Court finds that the third stage of the

proportionality analysis (sometimes called "proportionality stricto sensu") is not satisfied. According to the assessment in 2009 the extension of the WRS would have only a small and rather speculative mitigating effect in relation to the serious disturbances in the UK's labour market, as found by the MAC, whereas the burdens and detriments it would impose on employers and A8 nationals working in the UK were substantial and serious **[70]**. The result is that the extension of the WRS in 2009 was a disproportionate measure which was unlawful under EU law **[74]**.

On the basis of the Court's rulings on Issues 1 and 2, the appeal falls to be dismissed.

(3) If the Secretary of State succeeds on Issue 1 or Issue 2, does article 17(1)(a) of the Citizens Directive require a person to show that, throughout the period of continuous residence, she enjoyed a right of residence under that Directive? Although resolution of this issue is not necessary for the determination of the present appeal, the Court considers that it should deal with it since the interpretation of article 17(1)(a) may be important in other cases **[79]**. The Court concludes that, on a textual interpretation of the relevant provisions, the concept of residence as referred to in article 17(1)(a) is factual residence **[81]**. This interpretation is reinforced by the purpose of the Citizens Directive, which is to enhance existing rights of free movement and residence and not to subject them to new restrictive conditions **[82]**. For these reasons, the Upper Tribunal arrived at a correct interpretation of article 17(1) in holding that residence in article 17(1) refers to factual residence rather than "legal residence" in the specific sense which that term bears in the context of the Citizens Directive **[92]**.

(4) If article 17 of the Citizens Directive requires "legal residence" in the relevant sense, is actual residence sufficient for the purposes of the 2006 Regulations? As the Court holds that the term "residence" in article 17(1)(a) has the meaning set out above, this issue does not arise **[93]**.

For the reasons set out in the judgment, the Court would dismiss the Secretary of State's appeal **[94]**.

References in square brackets are to paragraphs in the judgment.

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
https://supremecourt.uk/decided-cases/index.html