



Trinity Term

[2019] UKSC 31

On appeal from: [2017] EWCA Civ 1751

JUDGMENT

Secretary of State for Work and Pensions (Appellant) v Gubeladze (Respondent)

before

Lady Hale, President

Lord Kerr

Lord Carnwath

Lord Hodge

Lady Black

Lord Lloyd-Jones

Lord Sales

JUDGMENT GIVEN ON

19 June 2019

Heard on 12 and 13 March 2019

Appellant

Martin Chamberlain QC

David Blundell

Julia Smyth

(Instructed by The Government Legal Department)

Respondent

Helen Mountfield QC

Tom Royston

(Instructed by Howells LLP (Sheffield))

Interven

(The AIRE C

Thomas de la

QC

Ravi Meh

(Instructed

Herbert S

Freehills L

LORD LLOYD-JONES AND LORD SALES: (with whom Lady Hale, Lord Kerr, Lord Carnwath, Lord Hodge and Lady Black agree)

1.

The central issue in this case is whether Ms Tamara Gubeladze (“the respondent”), a Latvian national living in the United Kingdom, is entitled to receive state pension credit, a means tested benefit. She relies on [regulation 5\(2\)](#) of the [Immigration \(European Economic Area\) Regulations 2006 \(SI 2006/1003\)](#) (“the 2006 Regulations”), which implements article 17(1)(a) of Directive 2004/38/EC (“the Citizens Directive”), as a “worker or self-employed person who has ceased activity”.

2.

By a Treaty signed at Athens on 16 April 2003 (“the Athens Treaty”), ten Accession States became member states of the EU with effect from 1 May 2004. The Act of Accession, annexed to the Athens Treaty, set out the “conditions of admission and the adjustments to the [EU] Treaties on which the Union is founded, entailed by such admission” (article 1(2)). The Act of Accession 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. Annex VIII of the Act of Accession required the existing member states to apply for an initial period of two years from the date of accession national measures or those resulting from bilateral agreements, 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 (para 2). An existing member state maintaining national measures or measures resulting from bilateral agreements 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 (para 5). Other annexes contained identical provisions in respect of nationals of the other A8 States.

3.

The Act of Accession was given effect in the domestic law of the United Kingdom 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 United Kingdom. The WRS ran initially for five years, from 1 May 2004 to 30 April 2009.

4.

In *Zalewska v Department for Social Development* (Child Poverty Action Group intervening) [2008] UKHL 67; [2008] 1 WLR 2602, the House of Lords considered the legality of the WRS. The House of Lords held unanimously that any requirements of the WRS were imposed pursuant to provisions permitting derogation from EU rights and so had to be proportionate to a legitimate aim. It held further, by a majority, that the requirements of the WRS met that test and were, therefore, lawful.

5.

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 exercise the

power conferred by the Act of Accession to extend the derogations applicable to nationals of the A8 States for a further two years. Having notified the Commission, it made the [Accession \(Immigration and Worker Registration\) \(Amendment\) Regulations 2009 \(SI 2009/892\)](#) (“the Extension Regulations”) which extended the operation of the WRS for a period of two years from 1 May 2009 to 30 April 2011.

6.

The respondent is a national of Latvia who came to the United Kingdom in 2008 and worked for various employers here 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.

7.

On 24 October 2012, the respondent made a claim for state pension credit. Entitlement was conditional on her having a right to reside in the United Kingdom. The basis of her claim was that she had a right of residence in the United Kingdom under [regulation 5\(2\)](#) of [the 2006 Regulations](#) as a person who had retired, having pursued activities as a worker for at least a year in the United Kingdom, and having resided continuously in the United Kingdom 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 United Kingdom 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](#). Her claim for state pension credit was accordingly refused.

8.

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 but, with the consent of the parties, the Upper Tribunal retained the appeal and itself re-made the substantive decision. It allowed the respondent’s appeal on two 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, the decision to extend the WRS in 2009 was disproportionate and therefore unlawful. Accordingly, the respondent was not disqualified by her failure to meet the requirements of the WRS from demonstrating three years’ continuous residence with a right of residence under the Citizens Directive.

9.

The Secretary of State appealed to the Court of Appeal (Rupert Jackson, Lindblom and Peter Jackson LJ) which on 7 November 2017 dismissed the appeal [\[2017\] EWCA Civ 1751](#); [\[2018\] 1 WLR 3324](#):

(1)

The Secretary of State succeeded on the construction of the Citizens Directive. The word “reside” in article 17(1)(a) meant “legally reside” which in this context meant residence in the exercise of rights under the Citizens Directive. As a result, the Court of Appeal did not need to rule on a new argument advanced by the respondent for the first time in the Court of Appeal, namely that 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 2006 Regulation where it means actual residence, with or without any right

to remain. The Court of Appeal was, however, inclined to the view that “resided” in [regulation 5\(2\)\(c\)](#) of [the 2006 Regulations](#) has the same meaning as in the Citizens Directive.

(2)

There was no error of law in the Upper Tribunal’s conclusion that the extension of the WRS was disproportionate and therefore incompatible with EU law.

10.

On 19 June 2018 the Supreme Court granted permission to appeal on condition that the Secretary of State pay the respondent’s costs in any event. Permission to the Secretary of State to appeal included permission to argue a new ground which had not been advanced in the Court of Appeal, namely that a national measure adopted pursuant to a transitional provision in the Act of Accession is not subject to proportionality review at all. So to hold would involve departing from the reasoning of the House of Lords in *Zalewska*. Accordingly, a seven Justice panel has been convened for this appeal.

11.

The following issues therefore arise for decision on this appeal:

(1)

Is the decision to extend the WRS open to challenge on grounds of proportionality?

(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?

(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 the Citizens Directive?

(4)

If article 17 of the Citizens Directive requires lawful residence, is actual residence sufficient for the purposes of [the 2006 Regulations](#)?

Relevant EU instruments

Treaty establishing the European Community

12.

At the material time, the Treaty establishing the European Community (“TEC”) provided in relevant part:

“Article 12

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. ...

Article 17

1. Citizenship of the Union is hereby established. Every person holding the nationality of a member state shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

Article 18

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the member states, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

...

Article 39

1. Freedom of movement for workers shall be secured within the Community.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the member states as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of member states for this purpose;

(c) to stay in a member state for the purpose of employment in accordance with the provisions governing the employment of nationals of that state laid down by law, regulation or administrative action;

(d) to remain in the territory of a member state after having been employed in that state, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

...

Article 49

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of member states who are established in a state of the Community other than that of the person for whom the services are intended. ...”

Regulation (EEC) No 1612/68

13.

Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (“Regulation 1612/68”) sets out in articles 1 to 6 within Title I EU rules on eligibility for employment. Within Title II (Employment and Equality of Treatment) article 7 provides in relevant part:

“Article 7

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 and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment; ...”

The Accession Treaty

14.

The Athens Treaty states in the sixth recital that the Contracting States:

“HAVE DECIDED to establish by common agreement the conditions of admission and the adjustments to be made to the Treaties on which the European Union is founded, ...”

Article 1(1) provides that the Accession States:

“hereby become members of the European Union and Parties to the Treaties on which the Union is founded as amended or supplemented.”

Article 1 continues:

“2. The conditions of admission and the adjustments to the Treaties on which the Union is founded, entailed by such admission, are set out in the Act annexed to this Treaty. The provisions of that Act shall form an integral part of this Treaty.

3. The provisions concerning the rights and obligations of the member states and the powers and jurisdiction of the institutions of the Union as set out in the Treaties referred to in paragraph 1 shall apply in respect of this Treaty.”

Article 2(2) provides that the Treaty shall enter into force on 1 May 2004.

15.

The Act of Accession annexed to the Athens Treaty provides in relevant part:

“Article 2

From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new member states and shall apply in those states under the conditions laid down in those Treaties and in this Act.

...

Article 10

The application of the original Treaties and acts adopted by the institutions shall, as a transitional measure, be subject to the derogations provided for in this Act.

...

Article 24

The measures listed in Annexes V, VI, VII, VIII, IX, X, XI, XII, XIII and XIV to this Act shall apply in respect of the new member states under the conditions laid down in those Annexes.”

16.

Annex VIII to the Act of Accession sets out the transitional measures in respect of Latvia. [Section 1](#) of Annex VIII, which deals with free movement of persons, provides in relevant part:

"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 [the existing member states] 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 the accession.

Latvian 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.

Latvian 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 Latvian nationals mentioned in the second and third subparagraphs above shall cease to enjoy the rights contained in those subparagraphs if they voluntarily leave the labour market of the present member state in question.

Latvian nationals legally working in a present member state at the date of accession, or during a period when national measures are applied, and who were admitted to the labour market of that member state for a period of less than 12 months shall not enjoy these rights.

3. Before the end of the two year period following the date of accession the Council shall review the functioning of the transitional provisions laid down in paragraph 2, on the basis of a report from the Commission.

On completion of this review, and no later than at the end of the two year period following the date of accession, the present member states shall notify the Commission whether they will continue applying national measures or measures resulting from bilateral agreements, or whether they will apply articles 1 to 6 of Regulation (EEC) No 1612/68 henceforth. In the absence of such notification, articles 1 to 6 of Regulation (EEC) No 1612/68 shall apply.

4. Upon Latvia's request one further review may be held. The procedure referred to in paragraph 3 shall apply and shall be completed within six months of receipt of Latvia's request.

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."

The Citizens Directive

17.

The preamble to the Citizens Directive provides in material part:

“Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the member states, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.” (recital (1))

“The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.” (recital (2))

“Union citizenship should be the fundamental status of nationals of the member states when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.” (recital (3))

“Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host member state would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host member state in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure.” (recital (17))

“In order to be a genuine vehicle for integration into the society of the host member state in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions.” (recital (18))

“Certain advantages specific to Union citizens who are workers or self-employed persons and to their family members, which may allow these persons to acquire a right of permanent residence before they have resided five years in the host member state, should be maintained, as these constitute acquired rights, conferred by Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a member state after having been employed in that state and Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a member state to remain in the territory of another member state after having pursued therein an activity in a self-employed capacity.” (recital (19))

18.

The Directive lays down the conditions governing the exercise of the right of free movement and residence within the territory of the member states by Union citizens and their family members, their right of permanent residence in the territory of the member states and the limits placed on these rights on grounds of public policy, public security or public health (article 1). Within Chapter III, article 6 confers a right of residence on the territory of another member state for up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport. Article 7 confers on all Union citizens the right of residence on the territory of another member state for a period of longer than three months if, inter alia, they are workers or self-employed persons in the host member state. Article 14 provides that Union citizens and their family members shall have the right of residence provided for in article 6, as long as they do not become an unreasonable burden on the social assistance system of the host member state (article 14(1)), and the right of residence provided for in article 7 as long as they meet the conditions set out therein (article 14(2)).

19.

Article 16 provides:

“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 12 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.”

20.

Article 17 provides in material part:

“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 that member state for at least the preceding 12 months and have resided there continuously for more than three years....

21.

Article 18 provides:

“Article 18

Acquisition of the right of permanent residence by certain family members who are not nationals of a member state

Without prejudice to article 17, the family members of a Union citizen to whom articles 12(2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host member state.”

22.

In order to understand the Citizens Directive it is also relevant to set out certain parts of Commission Regulation (EEC) No 1251/70 on the right of workers to remain in the territory of a member state after having been employed in that state (“Regulation 1251/70”), which is one of the instruments referred to in recital (19) to the Citizens Directive. Regulation 1251/70 provides as follows:

“Whereas it is important, in the first place, to guarantee to the worker residing in the territory of a member state the right to remain in that territory when he ceases to be employed in that state because he has reached retirement age or by reason of permanent incapacity to work; whereas, however, it is equally important to ensure that right for the worker who, after a period of employment and residence in the territory of a member state, works as an employed person in the territory of another member state, while still retaining his residence in the territory of the first state” (recital (4))

“Article 1

The provisions of this Regulation shall apply to nationals of a member state who have worked as employed persons in the territory of another member state and to members of their families, as defined in article 10 of Council Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community.

Article 2

1. The following shall have the right to remain permanently in the territory of a member state:

(a) a worker who, at the time of termination of his activity, has reached the age laid down by the law of that member state for entitlement to an old-age pension and who has been employed in that state for at least the last 12 months and has resided there continuously for more than three years;

...

Article 4

1. Continuity of residence as provided for in article ... 2(1) ... may be attested by any means of proof in use in the country of residence. It shall not be affected by temporary absences not exceeding a total of three months per year, nor by longer absences due to compliance with the obligations of military service.

...”

Regulation 1251/70 was repealed by Commission Regulation (EC) No 635/2006 of 25 April 2006 (“Regulation 635/2006”) with effect from 30 April 2006, in anticipation of the implementation of the Citizens Directive into national laws with effect from the following day. We set out recital (1) to Regulation 635/2006 in our discussion of Issue (3) below.

Relevant domestic legislation

The [Accession \(Immigration and Worker Registration\) Regulations 2004](#)

23.

[The 2004 Regulations](#), as in force on 30 April 2007, provided in relevant part:

“2. ‘Accession state worker requiring registration’

(1) Subject to the following paragraphs of this regulation, ‘accession state worker requiring registration’ means a national of a relevant accession state working in the United Kingdom during the accession period.

(2) A national of a relevant accession state is not an accession state worker requiring registration if on 30 April 2004 he had leave to enter or remain in the United Kingdom under the 1971 Act and that leave was not subject to any condition restricting his employment. ...

4. Right of residence of work seekers and workers from relevant acceding states during the accession period

(1) This regulation derogates during the accession period from article 39 of the Treaty establishing the European Community, articles 1 to 6 of Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community and Council Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states, insofar as it takes over provisions of Council Directive (EEC) No 68/360 on the abolition of restrictions on movement and residence within the Community for workers of member states and their families.

(2) 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.

(3) Paragraph (2) is without prejudice to the right of a national of a relevant accession state to reside in the United Kingdom under [the 2006 Regulations](#) as a self-sufficient person whilst seeking work in the United Kingdom.

(4) 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](#).

5. Application of 2006 Regulations in relation to accession state worker requiring registration

(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. ...

...

7. Requirement for an accession state worker requiring registration to be authorised to work

(1) By way of derogation from article 39 of the Treaty establishing the European Community and articles 1 to 6 of 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 -

...

(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); ..."

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

The Immigration (European Economic Area) Regulations 2006

24.

The 2006 Regulations transposed some of the provisions of the Citizens Directive into domestic law. At the relevant time they provided in material part:

“5. ‘Worker or self-employed person who has ceased activity’

(1) In these Regulations, ‘worker or 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 in 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 12 months prior to the termination; and

(c) resided in the United Kingdom continuously for more than three years prior to the termination. ...”

...

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; ...”

25.

The State Pension Credit Act 2002 provides for conditions of entitlement to state pension credit, including a condition that the claimant is in Great Britain (section 1(2)(a)). The State Pension Credit Regulations 2002 (SI 2002/1792) made under that Act set out detailed provisions regarding who qualifies as a person in Great Britain for these purposes. According to those Regulations, so far as relevant, a person so qualifies if she is habitually resident in the United Kingdom pursuant to a right to reside which is not expressly excluded as a relevant right (regulation 2). A right of residence arising pursuant to article 17 of the Citizens Directive is not excluded. Accordingly it is common ground that if the respondent enjoyed a right of permanent residence pursuant to article 17 she would be entitled to claim state pension credit.

Issue (1): Is the decision to extend the WRS open to challenge on grounds of proportionality?

26.

It is common ground between the parties that decisions to apply transitional measures under the Act of Accession, such as the decision to extend the WRS, cannot be challenged by A8 nationals as a disproportionate restriction on their free movement rights under the EU Treaties or legislation made under them. That is not the basis of the respondent’s case. On the contrary, she seeks to challenge the proportionality of the measures adopted by the United Kingdom within the context of the transitional provisions established in EU law. In particular, she challenges as disproportionate the decision of the

United Kingdom in April 2009 to make the residence rights of A8 nationals contingent on compliance with the WRS beyond the expiry of the initial five year accession period.

27.

Before the Court of Appeal, it was accepted on behalf of the Secretary of State in the light of *Zalewska* that the decision to extend the requirement of compliance with the WRS was subject to proportionality review. However, before the Supreme Court and with its permission Mr Martin Chamberlain QC, who has argued the case for the Secretary of State with great skill and determination, now maintains that the decision cannot be challenged on grounds of proportionality and identifies this as “the central question in this appeal”. He accepts that the transitional provisions in Annex VIII were designed to protect the labour markets in the existing member states from the impact of large numbers of nationals arriving from the eight most populous new member states and that this was to be achieved by a “derogation” from the ordinary application of the relevant Treaty provisions on free movement of workers (*Vicoplus SC PUH v Minister van Sociale Zaken en Werkgelegenheid* (Joined Cases C-307/09 to C-309/09) [2011] ECR I-453 at para 34; *Prefeta v Secretary of State for Work and Pensions* (Case C-618/16) [2019] 1 WLR 2040 at para 41). As a result, the Accession Treaty established a carefully calibrated and comprehensive suite of “derogations” from the ordinary operation of the provisions in the EU Treaties governing free movement of workers. However, he submits, nationals of the A8 States had never enjoyed rights under the Treaties or under EU legislation and the effect of the “derogations” was to place substantive limits, which in some cases depended on decisions by member states, on the rights they would acquire by virtue of accession. In circumstances where the primary provisions of EU law did not apply to nationals of the new member states, they had, for the purposes of EU law, no protected interest in that respect during the transitional period. Accordingly, he submits, the extension of the WRS did not interfere with or derogate from any pre-existing protected interest and it was, therefore, not subject to any requirement of proportionality. It was sufficient that it fell within the scope of the permitted derogation in paragraph 5 of Annex VIII to the Act of Accession and was notified to the Commission.

28.

The respondent submits that the Secretary of State’s submission is wrong as a matter of EU law and of national law. The decision to extend the WRS is a national decision to limit fundamental EU law rights of free movement pursuant to a transitional provision in the Act of Accession and is, therefore, subject to proportionality review as a matter of EU law. In addition, the decision to limit enjoyment of state pension credit for those who would otherwise enjoy it, by reason of extension of the WRS, is a discriminatory infringement of the rights to property of an A8 national, and falls to be justified under article 14 of the European Convention of Human Rights (“ECHR”) read with article 1 Protocol 1 to that Convention (“A1P1”) by virtue of [section 6 of the Human Rights Act 1998](#).

29.

The Secretary of State’s submission is in direct conflict with the decision of the House of Lords in *Zalewska v Department for Social Development* which upheld the legality of the WRS in the initial phase of its operation from 2004. That appeal related to the provisions in Annex XII to the Act of Accession concerning national measures regulating access to labour markets within existing member states by Polish nationals. The House of Lords approached the matter on the basis that derogation by the United Kingdom from article 39 pursuant to paragraph 2 of Part II of Annex XII to the Act of Accession precluded direct reliance on article 39 by nationals of Poland and instead required compliance during the transitional period with the national measures governing such access. However, the House unanimously concluded that the powers in the United Kingdom to impose

conditions on Polish nationals were required to be exercised in accordance with the Community principle of proportionality. It proceeded on the basis that the UK measures were a derogation from the rights which would otherwise be enjoyed. Lord Hope of Craighead stated the matter in the following terms (at para 30):

“The proposition that I cannot accept however is that the national measures that the United Kingdom selects have nothing to do with Community law, so the issue as to whether they are proportionate is irrelevant. The only authority that the United Kingdom has to introduce national measures to give access to nationals of an A8 state to its labour market in place of article 39 EC and Title I of Council Regulation (EEC) No 1612/68 is that which is given to it by paragraph 2 of Part 2 of Annex XII. As article 10 of the Act of Accession makes clear, this derogation from the application of the original Treaties and Acts adopted by the institutions of the Community was agreed to by the member states under the umbrella of Community law. Furthermore, the fact that the derogation does not extend to article 7 of the Regulation shows that where the national measures of an existing member state give the status of ‘worker’ to an A8 state national he is entitled to all the rights in that state that Community law gives to workers. It is not possible to detach the opportunity that is given to the member states to apply national measures from its Community law background. The conclusion that any national measures that the member states introduce under the authority of paragraph 2 must be compatible with the authority given to them by the Treaty of Accession and with the Community law principle of proportionality seems to me to be inescapable.”

Similarly, Baroness Hale of Richmond explained (at para 46) that the appeal was concerned with the restrictive effect of national measures implementing EU law on the fundamental right of free movement of workers. The national implementing regulations had been made under [section 2\(2\) of the European Communities Act 1972](#) for the purpose of implementing Community law and in the exercise of powers conferred by [section 2 of the European Union \(Accessions\) Act 2003](#), which is headed “Freedom of movement for workers”. As a result, any national measures had to be compatible with the principle of proportionality in EU law. The House held by a bare majority that the national measures there under consideration (namely, requirements under the WRS that nationals of A8 accession states apply for a registration certificate for their first employment in the United Kingdom and re-register if they changed employment within a stipulated period) were not disproportionate.

30.

Mr Chamberlain does not shrink from submitting that Zalewska was wrongly decided. He does not suggest, as was submitted in Zalewska, that the national measures have nothing to do with EU law. He accepts that the national measures fall within the scope of EU law and that they are required to comply with the terms of the derogations permitted by EU law. He suggests, rather, that Lord Hope’s underlying premise in para 30 of his speech, set out above, is flawed in that the EU principle of proportionality can have no application where there is no antecedent interest requiring protection. On his case, nationals of the A8 States enjoyed no rights at all under the EU Treaties at the point of accession and the only rights they enjoyed in this regard during the transitional period were those permitted by the UK measures. On this basis he submits that it is circular to argue that the national measures affect the interests of Latvian nationals in free movement and entitlement to social security payments as workers because these are not conferred until the requirements of the national measures have been met.

31.

Mr Chamberlain is correct in his submission that the principle of proportionality necessarily involves, as an essential component, an assessment of the degree to which the impugned measure interferes

with a protected interest. Thus, in *R (British Sugar plc) v Intervention Board for Agricultural Produce* (Case C-329/01) [2004] ECR I-01899 the Court of Justice of the European Union observed (at para 59):

“It cannot be maintained that rules which do not themselves interfere with protected interests are capable of infringing the principle of proportionality.”

As a result, a measure the sole purpose of which was to allow the correction of errors did not give rise to any interference with the manufacturers’ interests in issue in that case and could not, therefore, constitute a breach of the principle of proportionality. The *British Sugar* case was referred to by Lord Reed and Lord Toulson in *R (Lumsdon) v Legal Services Board* [2015] UKSC 41; [2016] AC 697 (at para 25) where they reiterated that the principle of proportionality only applies to measures interfering with protected interests. The point is also well made by Professor Tridimas in *The General Principles of EU Law* (2nd ed, OUP: 2006) where he states (at p 139):

“The court assesses the adverse consequences that the measure has on an interest worthy of legal protection and determines whether those consequences are justified in view of the importance of the objective pursued.”

Similarly, Professors Craig and De Búrca in *EU Law: Text, Cases, and Materials* (6th ed, OUP: 2015) state (at p 551):

“In any proportionality inquiry the relevant interests must be identified, and there will be some ascription of weight or value to those interests, since this is a necessary condition precedent to any balancing operation.”

32.

The question arises 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. This question lies at the heart of Issue (1). The House of Lords in *Zalewska* took the former view.

33.

This reading is supported by the scheme of the relevant instruments. The Treaty of Accession provides (article 1(1)) that the Accession States “hereby become members of the European Union and Parties to the Treaties on which the Union is founded as amended or supplemented”. The Act of Accession provides (article 2) that “[f]rom the date of accession, the provisions of the original Treaties ... shall be binding on the new member states and shall apply in those states under the conditions laid down in those Treaties and in this Act”. Article 10 of the Act of Accession then provides that “[t]he application of the original Treaties and acts adopted by the institutions shall, as a transitional measure, be subject to the derogations provided for in this Act”. Article 24 provides that the measures listed in Annex VIII shall apply in respect of Latvia under the conditions there laid down. Paragraph 1 of Annex VIII provides that articles 39 and 49(1) TEC “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 and the existing member states, “subject to the transitional provisions laid down in paragraphs 2 to 14”. Paragraph 2 then provides that, during the initial two year period, the existing member states will apply national measures, or those resulting from bilateral agreements regulating access to their labour markets by Latvian nationals “[b]y way of derogation from articles 1 to 6 of Regulation (EEC) No 1612/68”. The use of the word “derogation” in this context is itself an indication that A8 nationals are regarded as having significant relevant

interests under EU law from the moment of accession, subject to limitation only by action taken by member states which will be subject to the general principle of proportionality in the usual way. The transitional provisions are a derogation from the principle that the provisions of EU law apply immediately and fully to new member states and their nationals (see *Vicoplus* per Advocate General Bot at para 46).

34.

The provisions of the Citizens Directive are also relevant in this regard. The preamble emphasises in recitals (1) to (3) that citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the member states, subject to the limitations and conditions laid down in or pursuant to the Treaty; that such a right of free movement is one of the fundamental freedoms of the internal market; and that Union citizenship should be the fundamental status of nationals of the member states as regards the exercise of their right of free movement and residence. Every A8 national became a citizen of the EU on 1 May 2004 and these recitals indicate that it is by virtue of their status as such that EU law contemplates that they have a protectable interest which came into existence on that date so far as concerns rights of free movement. The Directive lays down the conditions governing the exercise of the right of free movement and residence within the territory of the member states by Union citizens and their family members (article 1). It seems clear, therefore, that the effect of Annex VIII to the Act of Accession is, during the transitional period, to derogate from the rights which Latvian nationals would otherwise enjoy in their newly established status as EU citizens. The application of these derogating provisions is clearly subject to the principle of proportionality in EU law.

35.

The same conclusion is arrived at when one has regard to the substance of the matter. Nationals of the A8 States were to enjoy rights as EU citizens from accession, subject to the derogating transitional provisions. The purpose of the transitional provisions was to protect labour markets in existing member states from the impact of large numbers of workers arriving from the eight most populous new member states. This aim was to be achieved by requiring or permitting existing member states to derogate temporarily from the normal application of EU rules on free movement of workers. There was no intention to confer an unfettered right to derogate from general principles of freedom of movement. On the contrary, derogation must be subject to the principle of proportionality in EU law.

36.

In the course of his submissions, Mr Chamberlain placed considerable reliance on the decision of the CJEU in *Vicoplus*, which post-dated the decision of the House of Lords in *Zalewska* and which, he maintained, demonstrated that the EU principle of proportionality had no application in circumstances such as the present. That case concerned Annex XII to the Act of Accession, relating to Poland, which was materially identical to Annex VIII. The appellants had been fined for posting Polish workers to the Netherlands without having first obtained work permits. On a reference for a preliminary ruling the Raad van State (Netherlands) asked whether, with a view to protecting the domestic labour market, the requirement of a work permit under national law for the provision of a service consisting in making workers available was a proportionate measure in the light of articles 56 and 57 TFEU, in view also of the reservation in Chapter 2, paragraph 2 of Annex XII to the Act of Accession with regard to the free movement of workers. At paras 21-25 of its judgment the Second Chamber of the CJEU reformulated the question. It explained (at para 24) that if national legislation is “justified” pursuant to that transitional measure in Annex XII, the question of compatibility with articles 56 and

57 TFEU can no longer arise. It observed (at para 25) that it was “therefore necessary to examine whether legislation such as that at issue in the main proceedings is covered by that transitional measure.” The Chamber considered that an undertaking which was engaged in making labour available, although a supplier of services, carried on activities which were specifically intended to enable workers to gain access to the labour market of the host member state. In its view, it followed that the national legislation in issue must be considered to be a measure regulating access of Polish nationals to the labour market of the Netherlands within the meaning of Chapter 2, paragraph 2 of Annex XII. Moreover, a purposive interpretation of that provision led to the same conclusion.

37.

Mr Chamberlain submits that notwithstanding a reference clearly framed in terms of proportionality, the CJEU reformulated the question and failed entirely to address the issue of proportionality. This, he submits, demonstrates that proportionality has no part to play when deciding whether the subject matter was “covered by that transitional measure”. In his submission it is simply necessary to determine that the measure falls within the scope of the derogating provision.

38.

The difficulty with this submission is that, although the question referred to proportionality, the case seems to have had nothing to do with proportionality. The essential question was whether the express exception in Chapter 2, paragraph 2 of Annex XII to the Act of Accession permitted an existing member state to make the hiring out of manpower on its territory conditional on having a licence during the transitional period. The CJEU focused on this issue and concluded that the derogation extended so as to permit both measures with regard to employment and measures with regard to the provision of services which made labour available. It was assumed in the circumstances of that case that if the Dutch measure fell within the scope of the derogation, as properly interpreted, then it was of a character which would satisfy the principle of proportionality. This explains the shift in the language used in the judgment from explaining that the referring court was unsure whether the permit regime for Polish workers “can be justified in the light of [the derogation in Chapter 2, paragraph 2 of Annex XII]” (para 23) and the statement (in para 24) that if national legislation “is justified pursuant to” that transitional derogation then the question of the compatibility of that legislation with articles 56 and 57 TFEU can no longer arise, to asking (in para 25) whether the legislation in question “is covered by” that transitional derogation. The word “justified” indicates that the Chamber in fact considered that a usual process of justification according to the principle of proportionality is applicable, whereas the language used in para 25 indicates that it assumed that in the circumstances of the particular case the justification issue would be resolved if the Dutch regime fell within the scope of the transitional derogation, as properly interpreted.

39.

In this respect the judgment follows the approach of Advocate General Bot in his opinion. The case was concerned with the compatibility of a work permit regime with the transitional provision in Chapter 2, paragraph 2 of Annex XII. A work permit regime is inherently capable of having a major effect as a national measure restricting or preventing access to the labour market of the host member state which adopts it, by contrast with the monitoring regime adopted by the UK. The Advocate General treated the case as concerned simply with the interpretation of Chapter 2, paragraph 2 of Annex XII (see points 3-5, 25 and 57 of his opinion) and in addressing that question emphasised that both in the case of direct access to the employment market of member states of A8 nationals as workers and in the case of the access of such nationals to that market through their employment by an undertaking which hires out manpower “there are potentially large movements of workers which,

following new accessions, risk disturbing the employment market of the member states” and that the transitional provision should be interpreted as covering both kinds of access in order to preserve its effectiveness (points 51-52).

40.

The judgment and the Advocate General’s opinion give no support to the submission that there is no scope for the application of the principle of proportionality in the context of adoption of national measures by a member state in reliance on the transitional derogating provisions in the Annexes to the Act of Accession. In particular, neither the judgment nor the opinion refers to the absence of any relevant protectable interest. If it had been the intention of the CJEU or the Advocate General to rule that the principle of proportionality had no part to play in the context of derogation under the transitional provisions in the Annexes to the Act of Accession, they would surely have said so in terms and would have explained that that was why the question referred proceeded on a false basis.

41.

The Secretary of State also relies on a passage in the judgment of the Second Chamber of the CJEU in *Valeško v Klagenfurt* (Case C-140/05) [2006] ECR I-10025. That case concerned another provision in the Act of Accession which provided a transitional derogation from EU Treaty provisions and legislation governing excise duties. Austrian legislation purportedly made under that derogation limited the exemption for the import of cigarettes in personal luggage to 25 cigarettes. On a preliminary reference, the Independent Finance Tribunal, Klagenfurt Division, asked whether the Austrian legislation was compatible with Treaty provisions governing the free movement of goods and customs duties (now contained in articles 28, 30 and 31 TFEU). Mr Chamberlain places particular reliance on the following passage in the judgment of the court (at para 74):

“Since that national legislation is justified in the light of one of the measures referred to in article 24 of the Act of Accession, in this case the transitional measure provided for in [section 6\(2\)](#) of Annex XIII to that Act, the question of the compatibility of that legislation with other provisions of primary law, such as articles 23 EC, 25 EC and 26 EC, can no longer arise.”

Here, the court was saying no more than that once national legislation is justified for the purposes of the derogating transitional measures, it is not necessary to justify it in addition in the wider context of the principles governing free movement of goods. Again, we consider that the court’s use of the word “justified” is significant. It indicates that the court contemplated that a usual process of justification under EU law, including by reference to the principle of proportionality, would be required in relation to reliance on the transitional provision referred to.

42.

We were also referred by Mr Chamberlain to the decision of the Supreme Court in *Mirga v Secretary of State for Work and Pensions* [\[2016\] UKSC 1](#); [\[2016\] 1 WLR 481](#). There the claimants failed to establish that domestic regulations violated their rights under article 18 and article 21(1) TFEU, respectively. Lord Neuberger of Abbotsbury, with whom the other members of the Supreme Court agreed, held that those rights were qualified and, in particular, that those of Ms Mirga under article 21(1) were subject to the limitations and conditions laid down in the Treaties and the measures adopted to give them effect. Those measures included the 2003 Accession Treaty and the Citizens Directive. Clearly, the more general Treaty provisions must be read subject to those qualifications or derogations arising under transitional provisions such as those in the Act of Accession. Lord Neuberger then rejected a further submission founded on a lack of proportionality. Mr Chamberlain drew our attention in particular to the following passage (at para 69):

“Where a national of another member state is not a worker, self-employed or a student, and has no, or very limited, means of support and no medical insurance ..., it would severely undermine the whole thrust and purpose of the [Citizens] Directive if proportionality could be invoked to entitle that person to have the right of residence and social assistance in another member state, save perhaps in extreme circumstances. It would also place a substantial burden on a host member state if it had to carry out a proportionality exercise in every case where the right of residence (or indeed the right against discrimination) was invoked.”

As appears from its final words, however, this passage appears in the context of a submission by the claimants that the determination of the authorities, courts and tribunals below had failed to give consideration to the proportionality of refusing each of them social assistance on a case by case basis, taking into account all the particular circumstances of their respective cases. It has no bearing on the issue of whether national legislation derogating from rights or prospective rights under EU law is required to be proportionate and it provides no support for the Secretary of State’s case on this issue.

43.

Mr Chamberlain is correct in his submission that, if a national measure is adopted pursuant to a transitional provision in the Act of Accession, no question of its compatibility with any provision of EU “primary law” can arise. In the present case, the compatibility of national measures with EU law will have to be assessed, not in the wider context of the principles of free movement of workers, but in the particular context of the transitional provisions. However, it does not follow that the national measure does not have to satisfy the EU principle of proportionality. On the contrary, measures adopted pursuant to a temporary derogation from the law and the rights of EU citizens which would otherwise apply do require to be justified in accordance with the principle of proportionality. Furthermore, there is no basis for the submission on behalf of the Secretary of State that this would confer in substance the same rights of free movement which the Act of Accession provides do not apply during the transitional period; rather, it will simply require that the measure is suitable and necessary to achieve the particular objective identified by the provision authorising the transitional derogation and that the burden imposed is, having regard to that specific objective, not excessive.

44.

We consider, therefore, that there is no good reason to depart from the decision of the House of Lords in *Zalewska* as regards the applicability of the principle of proportionality in the present context. As Lord Reed and Lord Toulson pointed out in their judgment in the *Lumsdon* case, at para 24, proportionality is a general principle of EU law. There is no basis for saying that it has no application in the context of reliance by a member state on a derogating provision such as that in paragraph 5 of Annex VIII. We consider that it is clear to the acte clair standard that the measures taken by the United Kingdom in issue in this case are required to satisfy the EU principle of proportionality.

45.

In these circumstances there is no need to address the respondent’s alternative submission based on article 14 of the ECHR, A1P1 and the [Human Rights Act 1998](#).

Issue (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?

46.

In April 2009 the Secretary of State had a limited, binary choice to make pursuant to paragraph 5 of Annex VIII. The UK had instituted the WRS at the time the Accession Agreements came into effect as its sole relevant national measure regulating access to its labour market under paragraph 2 of Annex

VIII, by way of derogation from articles 1 to 6 of Regulation 1612/68. The UK had exercised its discretion under paragraph 2 of Annex VIII to continue to apply that measure until the end of the five year period following the date of the accession and had notified the EU Commission of this under paragraph 3 of that Annex. It is common ground that in 2009 there were serious disturbances of the UK's labour market or threat thereof, owing to the financial crisis. Accordingly, pursuant to paragraph 5 of Annex VIII the Secretary of State had to consider whether to continue to apply the WRS for an additional two years, as the sole relevant national measure in place at the time, or not. The question of the proportionality of the WRS as extended in 2009 has to be assessed in this context, as Judge Ward in the Upper Tribunal and the Court of Appeal correctly understood.

47.

The WRS had originally been introduced in 2004 as a measure to allow the monitoring of the impact of migration into the UK of workers who were A8 nationals and to safeguard the UK's social security system from exploitation by people who wished to come to the UK not to work but to live off benefits: see *Zalewska* at paras 34-35 per Lord Hope. It was as a measure having those objectives that it was held to be proportionate and lawful by a bare majority in the House of Lords in the *Zalewska* case. However, in 2009 the Secretary of State had to consider under paragraph 5 of Annex VIII whether the WRS could properly be maintained in place for an additional two years as a measure to address and ameliorate serious disturbances of the UK's labour market or the threat thereof. Put shortly, in 2009 did the WRS have a deterrent effect to moderate the in-flow of A8 nationals as workers which might exacerbate the serious disturbance of the labour market then being experienced and, if so, would it be proportionate to continue to maintain it in place for that purpose?

48.

In the context of the decision to be made pursuant to paragraph 5 of Annex VIII, Mr Chamberlain accepts that the protection of the benefits system was not itself any longer a valid objective. Although the MAC in its report stated that it thought there might be a small impact of savings in spending on benefits if the WRS was retained, it also made it clear that its recommendation that the WRS be retained was not based on this.

49.

It is significant that for her case on proportionality of the extension of the WRS in 2009 for two years, the Secretary of State has simply relied upon what is said in the MAC report of April 2009. In effect she has adopted the MAC's reasoning. She has not filed evidence to explain any distinct reasoning of her own 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.

50.

This poses problems for the Secretary of State. 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.

51.

Instead, the MAC was asked to consider, first, whether there was at the time a serious disturbance to the UK labour market. It concluded that there was a serious disturbance, as the UK economy was in recession and there had been a rise in unemployment and redundancies. That conclusion is not put in issue in these proceedings.

52.

The MAC was also asked to “consider what the likely labour market impact of relaxing transitional measures [for A8 nationals] would be and whether it would be sensible to do so”. In addressing these questions the MAC summarised its views at the start of its report as follows (pp 6-7):

“Would retaining the WRS help to address the disturbance?”

A8 immigration has increased rapidly since the date of accession and studies show that its impact on UK employment and unemployment rates to date has been negligible. These studies relate to a period of sustained economic growth prior to the current recession.

Examination of the potential labour market impacts and review of the evidence available suggests that removing the WRS would not result in substantial increases in flows of A8 immigrants. It is, however, plausible to argue that it would probably result in a small positive impact on immigration flows relative to what would happen otherwise. In the current economic climate, we are concerned that these additional flows would have a small negative impact on the labour market, thus exacerbating the serious labour market disturbance already occurring.

We emphasise that any effects of ending the WRS would be small in relation 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.”

53.

In the body of the report the MAC emphasised problems with the available evidence base and the difficulties this posed for analysis of what was likely to happen if the WRS was not extended (para 5.3). However, it considered that there was sufficient information available for it to draw broad conclusions regarding the advisability, or otherwise, of retaining the WRS (para 5.4). At para 5.16 the MAC said this:

“In conclusion, it is very unlikely that removing the WRS would result in any substantial change in A8 immigrant 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.”

54.

It is right to observe that the conclusion of the MAC regarding the impact of removal of the WRS on the flow of workers into the UK from the A8 States was tentative and hedged about with qualifications. But on a fair reading of the report the MAC was clear that such removal would have a small effect in increasing the likely flow of such workers into the UK and that this would exacerbate the prevailing serious disturbance of the labour market. The MAC was a body with the relevant experience and expertise to make an assessment of this kind. This was a legitimate conclusion for it to reach. Although the WRS had originally been introduced for the purpose of monitoring rather than deterring the flow of workers from the A8 States, that does not mean that in the circumstances

obtaining in 2009 the scheme was incapable of having the small deterrent effect which the MAC found that it did.

55.

In Chapter 6 of the report, entitled “Conclusions”, the MAC stated that it recognised that the Government would want to weigh the slight reduction in the inward flow to the UK of A8 nationals as workers if the WRS were retained “against the longer-term aim of free movement of labour within the EU and the spirit of the Treaty of Accession” (para 6.7). It also said (para 6.8):

“... it is clear that the WRS creates burdens for employers and immigrants. While we do not wish to trivialise these, they need to be assessed against the benefits of the scheme.”

This was not an exercise the MAC attempted to undertake itself.

56.

The Secretary of State has not adduced any evidence as to how she sought to balance the small impact on the labour market in the UK from retention of the WRS against the significant detriments resulting from the continued implementation of the WRS for employers and A8 nationals in the UK as workers. Whilst we do not consider that this disables the Secretary of State from contending that the retention of the WRS is to be regarded as a proportionate measure, it does mean that it is difficult to say that any significant weight or respect should be given to the Secretary of State’s (unexplained) assessment that it was right to extend the WRS when conducting a proportionality review.

57.

The leading decision of this court on the principle of proportionality in EU law is now *Lumsdon*. The judgment of Lord Reed and Lord Toulson, with which the other members of the court agreed, authoritatively sets out the approach to be adopted.

58.

At para 33 Lord Reed and Lord Toulson summarised the test of proportionality in EU law as follows:

“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.”

59.

For reasons which appear below, it should be emphasised that Lord Reed and Lord Toulson in this passage have made it clear that the third question, regarding proportionality *stricto sensu*, does indeed constitute an aspect of the EU law principle of proportionality. It is identified as such by the Court of Justice whenever it is necessary for it to do so.

60.

Lord Reed and Lord Toulson then went on at paras 34 and following to give guidance regarding the appropriate intensity of review in applying the proportionality standard. This depends on context. It ranges from intervening on the basis that a measure is “manifestly inappropriate” (the usual standard

applied in proportionality review of measures taken by EU institutions or of national measures implementing EU measures, at least where these reflect political, economic or social choices and a complex assessment of such factors: paras 40 and 73 respectively) to more demanding standards of review which may be relevant in relation to national measures falling within the scope of EU law which derogate from fundamental freedoms, including free movement of workers (paras 50-72). Also, as Lord Reed and Lord Toulson point out at para 74, where a 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.” As a result of this analysis, at paras 75-82 Lord Reed and Lord Toulson were critical of the reasoning of the English Court of Appeal in *R (Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437; [2012] QB 394, in which the less intrusive “manifestly inappropriate” standard of review was applied in relation to a national measure restricting the free movement of goods.

61.

As we have held above, Judge Ward correctly concluded that it was necessary to conduct a proportionality review of [the 2004 Regulations](#) at the time when they were given extended effect in 2009 for a further two years. His judgment was delivered before the decision in the Lumsdon case was handed down. In the section of his judgment in which he carried out this review, Judge Ward first considered at paras 82 to 103 the appropriate intensity of review to be applied, particularly in the light of the decision of the Court of Appeal in the Sinclair Collis case. Following the guidance given by Lord Neuberger MR in that case regarding factors which affect the intensity of proportionality review, Judge Ward characterised the decision as one involving economic or social choice, as a factor tending to expand the area of discretion available to the Secretary of State under the proportionality test, albeit the choice was limited in its range by the binary nature of the decision to be made and was not one involving a political dimension to any significant degree (since the Secretary of State had in effect sub-contracted consideration of the issue of extension of the WRS to a technical body, the MAC, and there was only limited Parliamentary scrutiny of the extension decision under the negative resolution procedure) (para 98); and the judge had regard to the difficulties of assessment of the evidence regarding the effects of maintaining the WRS in place, as a factor again tending to expand the area of discretion for the Secretary of State (para 99). But Judge Ward also took into account a series of factors which in his view tended to reduce that area of discretion: that the measure was adopted by delegated legislation and subject only to the negative resolution procedure, and in reliance on a report which the MAC itself considered to be rushed (para 100); that the Secretary of State adduced no evidence of having conducted his own proportionality analysis, despite the limitations in the question put to the MAC and the need, identified by the MAC, for its answer to the Secretary of State to be weighed against other factors (para 101); and the fact that the measure in question was a national measure in derogation from the principle of the free movement of workers, in relation to which a court should be astute to ensure that the national government has not unduly sought to favour its national interest at the expense of EU principles (para 102). His conclusion was that the relevant degree of intensity of review was not confined to the “manifestly appropriate” test which appears in some cases, but was significantly more intrusive than that, albeit with allowance for some margin of appreciation for the Secretary of State (para 103).

62.

In the next section of his judgment, at paras 104 to 121, Judge Ward considered whether the Extension Regulations promulgated in 2009 in relation to the WRS passed the proportionality test. He

came to the conclusion that the fee and registration requirements in those Regulations were disproportionate and contrary to EU law. He reached this conclusion on two distinct grounds:

i)

the fee was set to defray the costs of an administrative scheme aimed at monitoring migrant inflows “which does not itself materially help to address the disturbance [of the labour market]”, so the WRS could not be regarded as an “appropriate” tool for proportionality purposes for addressing the serious disturbance to 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” (para 112). Therefore, the Secretary of State’s case on proportionality failed to satisfy the first stage of the proportionality test; and in any event, even if that was wrong,

ii)

the WRS failed to comply with proportionality *stricto sensu*, at the third stage of the test. [Regulation 9 of the 2004 Regulations](#) created a criminal offence if an employer employed an A8 national who was not registered as required under the WRS, subject to certain defences. Accordingly, the judge found that the WRS created a burden on employers, even if little research had been done to examine its scale (para 114). In addition, the judge referred at para 115 to the impact of the WRS in relation to A8 nationals who came to work in the UK, paid taxes here and participated actively in UK society. He noted that the MAC report indicated that for language and other reasons there was a significant rate of non-registration by A8 nationals working in the UK which could be up to 33%, and further noted that failure by an A8 national to register under the WRS had significant adverse consequences for such a person in terms of exclusion from welfare benefits, “no matter how unforeseeable the circumstances which have caused them to be in need of them”, and it prevented them from relying on time spent working in the UK whilst unregistered as a contribution to the five years needed to establish a right of permanent residence here under article 16 of the Citizens Directive. The judge found that these detriments constituted “a very real downside” for A8 nationals who did not register, noting that this had been characterised as “severe” by Baroness Hale at para 57 of her speech in *Zalewska*. Moreover, for those A8 nationals who did comply with the registration requirement under the WRS, the fee they had to pay was a sum equivalent to around 1% of annual gross pay for someone working at the national minimum wage for a 35 hour week for 48 weeks (as noted in para 5.9 of the MAC report). The judge found that the small and speculative advantage in respect of reducing the inward flow of A8 nationals as workers from extending the WRS was “wholly outweighed” by the disadvantage to A8 nationals and employers in the UK and the limitation on Treaty principles of free movement (para 117). That was the judge’s view in light of the conclusion he had reached at para 103 regarding the appropriate intensity of review, as referred to above. But he went on to hold that even if the appropriate standard of review was the “manifestly inappropriate” test, which allows a wider margin of discretion to the relevant decision-maker, he would have come to the same conclusion (para 118).

63.

The Secretary of State challenged this assessment in the Court of Appeal. The Lumsdon judgment had now been handed down and the Court of Appeal analysed the position with reference to the guidance it contains.

64.

Rupert Jackson LJ gave the leading judgment, with which the other members of the court agreed. At paras 57 to 63 he accepted a submission for the Secretary of State that Judge Ward at para 98 of his judgment had gone too far in discounting the political aspect of the decision to promulgate the

Extension Regulations when he assessed the intensity of review to be applied; but Rupert Jackson LJ still held that whilst the degree of scrutiny “should not be intense”, it was not a case in which the more generous “manifestly disproportionate” test applied (para 63). In the event, the modest difference between Rupert Jackson LJ and Judge Ward regarding the precise intensity of review to be applied was immaterial, because Judge Ward had come to the view that the Extension Regulations were disproportionate even if the “manifestly disproportionate” test was applied. Rupert Jackson LJ pointed out that the Upper Tribunal is a specialist tribunal whose decision deserves respect, and that it can only be interfered with if the tribunal has erred in law: see [section 13 of the Tribunals, Courts and Enforcement Act 2007](#). He set out paras 111 to 115 in the judgment of Judge Ward and said that he could find no fault with his reasoning in those paragraphs. Therefore, Rupert Jackson LJ dismissed the Secretary of State’s challenge to the Upper Tribunal’s assessment that the Extension Regulations were disproportionate.

65.

The Secretary of State appeals to this court on this issue. Mr Chamberlain submits that Judge Ward erred in relation to both the grounds on which he found that the Extension Regulations were disproportionate and that the Court of Appeal erred in endorsing his assessment.

66.

We consider that there is force in Mr Chamberlain’s criticism of the first ground relied on by Judge Ward at paras 112 and 113 of his judgment, in relation to the first question that arises on a proportionality review (whether the measure is suitable or appropriate to achieve the objective pursued). Mr Chamberlain submits that, as found by the MAC in its report, extending the WRS in 2009 would have a small effect in reducing the inward flow of workers as compared to what would happen if it were not extended, and to that (admittedly small) extent it would prevent the then existing serious disturbance of the labour market from getting worse. Therefore, the extension of the WRS pursuant to paragraph 5 of Annex VIII was a measure appropriate to achieve the relevant objective, namely alleviation of the disturbance in the labour market as compared with the position which would obtain if the WRS were not extended, even if only to a small degree. Moreover, under paragraph 5 of Annex VIII, by virtue of the binary choice that it imposed on the UK in 2009, that was the only measure available to the Secretary of State to take at that time to alleviate the general disturbance in the national labour market. It could not be said that there was any less onerous method of achieving that objective.

67.

Mr Thomas de la Mare QC for the Interveners submitted that in order for the Secretary of State to satisfy the first stage of the proportionality test he had to be able to show that the extension of the WRS was materially capable of tackling or mitigating the serious disturbances to the labour market referred to in paragraph 5 of Annex VIII. He further submitted that the Secretary of State could not show that this was the case.

68.

We did not understand Mr Chamberlain to dispute the first of these submissions, save that he emphasised that the idea of materiality in this context is not a demanding one, and would only exclude measures which were immaterial or wholly de minimis in relation to their effect in tackling or mitigating the serious disturbances to the labour market in question. We agree.

69.

Mr Chamberlain took issue with the second submission. He was right to do so. 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, which would have the effect of exacerbating those disturbances.

70.

However, we cannot accept Mr Chamberlain's wider submission that Judge Ward and the Court of Appeal erred in their assessment regarding the third stage of the proportionality analysis (proportionality *stricto sensu*). The position was stark. 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.

71.

We should say that we have some reservations about whether Rupert Jackson LJ was right to criticise the level at which Judge Ward pitched the intensity of review which he considered to be appropriate in this case. Although, obviously, Judge Ward did not have the benefit of the analysis by this court in *Lumsdon* when he made his assessment, we think that in broad terms the level of intensity he judged to be appropriate in this case is compatible with the guidance given in *Lumsdon*. In particular, the extension of the WRS was rightly regarded by Judge Ward as a national measure which was restrictive of the fundamental freedom of movement for A8 nationals as protected by the Treaties, taken in reliance on a reservation or derogation in an EU instrument, in relation to which a relatively demanding intensity of review is appropriate: see *Lumsdon* at para 74.

72.

However, this is not a case which turns on the precise calibration of the intensity of review to be applied in relation to the decision to extend the WRS in 2009. Both Judge Ward and the Court of Appeal considered that this measure failed to pass muster even if the markedly more generous "manifestly inappropriate" test was applied. In our view, they were plainly entitled to come to that conclusion in the circumstances of this case, particularly in the absence of any attempt by the Secretary of State to explain why the very limited and rather speculative benefits associated with the extension of the WRS in addressing labour market disturbances outweighed the considerable detriments for employers and workers from A8 States associated with the scheme. We agree with their conclusion.

73.

In arriving at this view, we have noted that in the *Zalewska* case in the House of Lords it was held, by a majority, that it was not disproportionate for the WRS to be introduced and implemented from 2004 as a monitoring measure in the initial phase of the expansion of the European Union by the accession of the A8 States. That conclusion does not provide a relevant guide for the outcome of the proportionality analysis in the present case. By contrast with the proportionality review in *Zalewska*, the analysis in this case has to be undertaken in the very different legal context set out in paragraph 5 of Annex VIII. In order to justify the extension of the WRS in 2009, the Secretary of State has to be able to say that this is a measure which is proportionate having regard to the objective of mitigating serious disturbances in the labour market. Factors which were relevant to the assessment in the *Zalewska* case, including a desire to protect against additional and inappropriate demands on the UK's social security system (see paras 35-36 per Lord Hope), are no longer relevant in the present context. In *Zalewska*, the Government's position was that the WRS was intended to be a monitoring measure and was not expected to be a barrier to those who wanted to work (see para 34 per Lord

Hope), whereas in the present context this position is reversed: the justification of the extension of the WRS is said to be that it does provide, to a degree, a barrier to A8 nationals who might otherwise come to work in the UK and the justification does not rely upon the effect of the WRS as a monitoring measure.

74.

The result of the analysis relevant in the present case is that the extension of the WRS in 2009 was a disproportionate measure which was unlawful under EU law.

75.

As we have come to the clear conclusion that the decision to extend the WRS in 2009 was required to conform with the principle of proportionality in EU law and as the CJEU would take the view that the application of that principle to the facts is a matter for the national court, these matters are *acte clair* and this court is not required to make a preliminary reference to the CJEU.

Issue (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?

76.

The conclusion on the proportionality issue above means that the Secretary of State's appeal falls to be dismissed, as happened in the Court of Appeal. However, Ms Helen Mountfield QC on behalf of the respondent contends that there is another, alternative reason why the Secretary of State's appeal should be dismissed, even if the extension of the WRS in 2009 was proportionate and lawful.

77.

On her alternative case the respondent submits that as a result of her residence in the UK from 2008 and working here from 14 September 2009 she had acquired the right of permanent residence by virtue of article 17(1)(a) of the Citizens Directive and [regulation 5\(2\)\(c\) of the 2006 Regulations](#) by the time she made her claim for state pension credit on 24 October 2012 and was for that reason entitled to claim that benefit. Although, on the hypothesis that the extension of the WRS was lawful, she did not qualify as a worker with a right of residence under article 7 of the Citizens Directive in the period before she registered for a certificate to work on 20 August 2010, that does not matter. Article 17(1)(a) confers the right of permanent residence on workers or self-employed persons who reach the age of retirement "provided that they have been working in that member state for at least the preceding 12 months and have resided there continuously for more than three years"; the relevant requirement of residence in this provision is residence in fact, rather than residence pursuant to the provisions set out in the Citizens Directive; and the respondent can show that by the time of her claim for state pension credit she had resided in the UK for more than three years.

78.

The Secretary of State disputes this alternative argument of the respondent. She submits that the concept of residence in article 17(1)(a) is to be read in the light of article 16(1) of the Citizens Directive, from which it is said to derogate. Article 16(1) provides that Union citizens "who have resided legally" in a host member state for a stipulated continuous period will acquire a right of permanent residence there. Similarly, although article 17(1)(a) uses the term "resided" without the adverb "legally", it should be taken to be referring to the same concept of legal residence. The case law of the CJEU has established that "legal residence" in the context of article 16(1) means residence in accordance with article 7 of the Citizens Directive: see, in particular, the judgment in *Ziolkowski v Land Berlin* (Joined Cases C-424/10 and C-425/10) EU:C:2011:866; [2014] All ER (EC) 314, paras

31-51. The respondent cannot show that her period of residence in the UK was “legal” in this sense; in particular, since she did not comply with the requirement of registration under the WRS until 20 August 2010, she cannot show that before that date she was resident here as a worker or self-employed person within the scope of article 7(1)(a) of the Citizens Directive.

79.

On this issue, Judge Ward accepted the submission of the respondent, whereas the Court of Appeal accepted the submission of the Secretary of State. Resolution of the dispute on this issue is not necessary for the determination of the present appeal, because the Secretary of State has lost on the proportionality issue in relation to the extension of the WRS. However, since the issue regarding the interpretation of article 17(1)(a) may be important in other cases and we are of the view the Court of Appeal has erred on this point, we consider that we should deal with it. It is unnecessary to decide whether the position is *acte clair*, because by reason of our conclusion on the proportionality issue there is no need for a reference to the CJEU.

80.

Recital (17) to the Citizens Directive explains the purpose of article 16. Recital (19) explains the purpose of article 17. Recital (17) is explicit in stating that the right of permanent residence which article 16 provides for “should ... be laid down for all Union citizens and their family members who have resided in the host member state in compliance with the conditions laid down in this Directive during a continuous period of five years ...”. Recital (19) is in different terms. It does not refer to residence in compliance with the conditions laid down in the Citizens Directive. It refers to, among others, workers who “have resided” in the host member state who have acquired rights under Regulation 1251/70.

81.

Article 1 of Regulation 1251/70 stipulates that the Regulation shall apply to nationals of a member state who have worked as employed persons in the territory of another member state, and it uses the term “worker” in this sense. Article 2(1)(a) of Regulation 1251/70 provides for a right to remain permanently in the territory of a host member state for a worker who satisfies certain conditions, including where she has been employed in that state for at least the last 12 months “and has resided there continuously for more than three years”. Article 4 provides that continuity of residence “may be attested by any means of proof in use in the country of residence”. Accordingly, Regulation 1251/70 uses the term “worker” in a simple factual sense and similarly refers to continuous residence in a simple factual sense. By contrast with the Citizens Directive, the Regulation contains no reference to “lawful residence” which could be taken to inform the meaning of “continuous residence”. The reference in Recital (19) to the Citizens Directive to rights of permanent residence acquired under Regulation 1251/70 is a strong indication that the EU legislature intended the concept of continuous residence as used in article 17(1)(a) of the Directive to reflect the concept of continuous residence as used in article 2(1)(a) of the Regulation. Accordingly, both in its text, which contrasts with the text of recital (17), and by reason of its reference back to rights acquired under Regulation 1251/70, Recital (19) indicates that the concept of residence as referred to in article 17(1)(a) is factual residence, as the respondent contends.

82.

We consider that recital (3) to the Citizens Directive reinforces this interpretation of article 17(1)(a). It explains that the EU legislature intended to codify and review the existing EU instruments dealing with workers and others “in order to simplify and strengthen the right of free movement and residence of all Union citizens”. Thus, it was part of the purpose of the Directive to enhance existing

rights of free movement and residence, such as those which had arisen under Regulation 1251/70, and not to subject them to new restrictive conditions. The same point emerges from recital (1) to Regulation 635/2006, which repealed Regulation 1251/70, as follows:

“[The Citizens Directive] consolidated in a single text the legislation on the free movement of citizens of the Union. Article 17 thereof includes the main elements of [Regulation 1251/70] and amends them by granting beneficiaries of the right to remain a more privileged status, namely that of the right of permanent residence.”

83.

There are in addition two textual features of article 17(1)(a) which in our view point strongly in favour of the interpretation arrived at by Judge Ward. First, the text in article 17(1) essentially tracks that in article 2 of Regulation 1251/70, with appropriate minor modifications. Secondly, the language used in article 17 (“residence”; “have resided ... continuously”) is in marked contrast to that used in article 16 and again in article 18 (“have resided legally” and “after residing legally”). This has every appearance of being deliberate, and the underlying purpose of article 17 as set out in recital (19) and the correspondence of its text with article 2 of Regulation 1251/70 confirms that impression. It is also noteworthy that in the CJEU’s analysis in the Ziolkowski judgment of the meaning of “legal residence” in article 16 and article 18, which itself turns on a close textual analysis of the Directive, the court did not suggest that the term “residence” in article 17 had to be interpreted as having the same meaning.

84.

Furthermore, since article 17(1) is concerned with preserving and protecting rights already acquired under Regulation 1251/70, it seems impossible to read it as referring to “legal residence” in the sense given by the Ziolkowski judgment. When the Citizens Directive first came into force in 2004 and when it was first implemented at national level throughout the EU within two years after that as required by article 40, no one could have built up any period of continuous residence pursuant to their rights under article 7 of the Directive, let alone the three years of continuous residence referred to in article 17(1)(a). Yet individuals could in principle have rights under article 17(1) as soon as implementation of the Directive took effect. Accordingly, it seems necessary to interpret the concept of continuous residence in article 17(1)(a) as referring to factual residence rather than “legal residence” as that term is used in article 16. The meaning of continuous residence in article 17 cannot change over time, so it is no answer to the respondent’s claim to be entitled to a right of permanent residence in the UK under article 17(1)(a) that she had not herself acquired rights under Regulation 1251/70 in the UK prior to the coming into force of the Citizens Directive and the domestic regulations which implemented it in domestic law.

85.

Mr Chamberlain emphasised the introductory sentence in article 17(1), which states that the provision applies “By way of derogation from article 16” and refers to acquisition of a right of permanent residence “before completion of a continuous period of five years of residence” by the persons then specified in the sub-paragraphs. He submitted that the reference back to article 16 meant that “residence” in article 17(1) was being used in the same sense as “residence” in article 16, that is to say “legal residence”.

86.

However, we do not consider that the opening words of article 17(1) can bear the weight which Mr Chamberlain sought to place on them. In itself the use of the word “residence” in the opening part of article 17(1) is neutral on the question of what form of residence is referred to in the sub-paragraphs

which follow. It is those sub-paragraphs which set out positively the conditions which have to be satisfied for an individual to acquire the right of permanent residence under that provision. For a right of permanent residence to arise under article 16(1) a five year period of residence which has the quality of being “legal” in the requisite sense is required. In order to indicate that article 17(1) sets out a right of permanent residence which departs from, and is more generous than, the right conferred under article 16(1), it was sufficient for the drafter to state that the right under article 17(1) arises where there is a period of residence of less than five years, without needing to refer also to whether the residence in question had to be “legal” or not. Further, it is natural for the drafter simply to speak of “residence” in the opening words of article 17(1) if it is the concept of factual “residence” rather than “legal residence” which is employed in the following sub-paragraphs in that provision. In any event, the indications from the text of article 17(1) and its purpose as set out in recital (19), as discussed above, appear to us to have far greater weight than any indication to be derived from the opening words of the provision.

87.

Mr Chamberlain also relied on other judgments of the CJEU, but they were not concerned with the interpretation of article 17(1), nor did they involve any attempt to examine the purpose of that provision. In particular, Mr Chamberlain referred to the judgments in *Alarape v Secretary of State for the Home Department* (Case C-529/11) [2013] 1 WLR 2883 and in *FV (Italy) v Secretary of State for the Home Department* and *B v Land Baden-Württemberg* (Joined Cases C-424/16 and C-316/16) [2019] QB 126. However, these judgments do not support his interpretation of article 17(1).

88.

In the *Alarape* case the CJEU addressed the question whether periods of residence completed pursuant to article 12 of Regulation 1612/68, which provides a right for the child of a worker to be admitted to educational courses in the host member state, could count towards the five years of “legal residence” required for acquisition of a right of permanent residence under article 16(1) of the Citizens Directive. The CJEU applied its ruling in the *Ziolkowski* judgment regarding the meaning of “legal residence” in article 16(1) and held that residence pursuant to article 12 of Regulation 1612/68, but which did not comply with article 7 of the Citizens Directive, did not count for the purposes of article 16(1). In our view, this does not support Mr Chamberlain’s interpretation of article 17(1) of the Citizens Directive. If anything, it tends to support Judge Ward’s interpretation of that provision. That is because, following the guidance in the judgments in *Ziolkowski* and *Alarape*, residence in a host member state pursuant to rights under Regulation 1251/70 and Directive 75/34/EEC likewise would not count as “legal residence” for the purpose of article 16(1) of the Citizens Directive; but it is rights acquired by residence pursuant to Regulation 1251/70 and Directive 75/34/EEC which are intended to be respected and protected by article 17 of the Citizens Directive: see recital (19) to that Directive.

89.

FV (Italy) concerned the interpretation of article 28(3)(a) of the Citizens Directive, which provides for enhanced protection against expulsion of EU citizens if they “have resided in the host member state for the previous ten years”: in such a case the host member state may only decide to expel them “on imperative grounds of public security”. The CJEU held that article 28 had to be read as a whole, as creating steadily increasing protection for EU citizens according to their integration in the society of the host member state. Therefore, the protection in article 28(3) was to be taken to be conditional on the EU citizen having a right of permanent residence in the host member state, as referred to in article 28(2): see paras 40-61 in the judgment. In answer to the first question referred by this court, the CJEU held at para 61 that article 28(3)(a) “must be interpreted as meaning that it is a prerequisite

of eligibility for the protection against expulsion provided for in that provision that the person concerned must have a right of permanent residence within the meaning of article 16 and article 28(2) of [the Citizens] Directive.” Again, the ruling in Ziolkowski regarding the interpretation of article 16(1) was applied: see para 59. In FV (Italy) there was no question of acquisition of a right of permanent residence pursuant to article 17 of the Citizens Directive, so the question referred did not mention that provision: see para 39. The CJEU made no reference to it in its judgment. Since article 28(2) refers in general terms to “Union citizens or their family members ... who have the right of permanent residence”, if an individual had acquired such a right by virtue of article 17 rather than by virtue of article 16 of the Citizens Directive it seems entirely possible that by extension of its reasoning in FV (Italy) the CJEU would hold that such an individual likewise enjoys enhanced protection under article 28(3)(a). The important point, however, is that the judgment in FV (Italy) does not support Mr Chamberlain’s submission regarding the proper interpretation of article 17(1).

90.

Mr Chamberlain also relied on observations by Advocate General Trstenjak in her opinion in Secretary of State for Work and Pensions v Lassal (Case C-162/09) [2011] 1 CMLR 31, at points 68-69, to the effect that article 16(1) and article 17(1) of the Citizens Directive are closely connected and that therefore

“it must in principle be assumed that the two factual elements whose wording is almost identical - ‘a continuous period of five years of residence in the host member state’ in article 16(1) of the Directive and ‘resided continuously in the host member state for more than two years’ in article 17(1)(b) of the Directive - are to be interpreted in the same way.”

91.

However, this part of the Advocate General’s reasoning was not endorsed by the CJEU in its judgment. Moreover, as Judge Ward pointed out in his judgment at para 58, the Advocate General’s recitation of the text in the two provisions contains an unfortunate and highly significant misquotation, in that she omits the critical phrase, “have resided legally”, in article 16(1). Also, the Advocate General’s view is not supported by any positive reasoning, other than to point out the linkage between article 16 and article 17(1) which appears from the opening sentence of article 17(1) - as to which, see above. Accordingly, we do not consider, with respect, that Advocate General Trstenjak’s opinion on this point represents a sound guide to the interpretation of article 17(1).

92.

For the reasons set out above, in our judgment the Court of Appeal erred in its interpretation of article 17(1). Judge Ward arrived at a correct interpretation of that provision, in holding that residence in article 17(1) refers to factual residence rather than “legal residence” as required under article 16(1), as interpreted by the CJEU in the Ziolkowski judgment.

Issue (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](#)?

93.

As we would hold that the term “residence” in article 17(1)(a) has the meaning set out above, no question arises regarding a possible difference of meaning between [article 17\(1\)\(a\)](#) and [regulation 5\(2\)\(c\) of the 2006 Regulations](#) which implements that article in domestic law by using the phrase “resided in the United Kingdom continuously for more than three years prior to the termination [of employment or self-employment]”. Therefore the fourth issue on the appeal does not arise.

Conclusion

94.

For the reasons we have set out, we would dismiss the Secretary of State's appeal.