Upper Tribunal
(Immigration and Asylum Chamber)

Shabani (EEA - jobseekers; nursery education) [2013] UKUT 00315 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21 December 2012	.....

Before

UPPER TRIBUNAL JUDGE STOREY

UPPER TRIBUNAL JUDGE PETER LANE

UPPER TRIBUNAL JUDGE WARD

Between

JOHN MUNDU SHABANI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr L Jegede, Solicitor, OJN Solicitors

For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

1. Although the question whether Article 7(3) of Directive 2004/38/EC deals exhaustively with the circumstances in which a jobseeker can retain the status of a worker in EU law has been held by the Supreme Court in Saint Prix v Secretary of State for Work and Pensions [2012] UKSC 49 to require a reference to the Court of Justice, a woman who has left the labour market in order to look after children does not retain her status as a worker in EU law: Secretary of State for Work and Pensions v Dias [2009] EWCA Civ 807 applied.

2. The effect of the concession made by the Secretary of State in the course of the present case (after consultation with the Department for Work and Pensions and HM Revenue and Customs) is that a person who has been employed but after falling unemployed seeks employment again (i.e. a “second-time” jobseeker) can potentially fall within regulation 6(4) of the Immigration (European Economic Area) Regulations 2006 applying the twofold test set out in Antonissen C-393/96 P(R) [1997] ECR 1-441.

3. A further concession made by the Secretary of State in the course of the present case is that for the purposes of new regulation 15A of the same Regulations (if not also as a matter of Court of Justice jurisprudence) the primary carer of the child of an EEA national/Union citizen who has been employed in the host Member State is entitled to a derivative right of residence once that child has entered into reception class education. The Secretary of State has indicated that the definition of "education" is to be reviewed.

DETERMINATION AND REASONS

1. We apologise for the time it has taken to promulgate this decision; as will become clear there were two matters of law on which we sought clarification from the Secretary of State as to her position and which required her to undertake interdepartmental consultation. That does not account for all of the delay but does for much of it.

2. The appellant is a citizen of the Democratic Republic of Congo (DRC). On 23 December 2010, whilst in the UK on a visit visa due to expire in February 2011, he applied for a residence card as the spouse of a French national exercising EEA national Treaty rights. He submitted, inter alia, a certificate of marriage with Jolie Mantezolo dated 19 November 2010. (He had divorced his previous wife in April 2010). Ms Mantezolo had arrived in the UK in 2004 to seek work. She had worked for a period of two years commencing on 23 October 2006 as a shop assistant with a company called Peacocks. She had taken maternity leave in May 2008; it ended on 1 June 2009. She did not return to work after the birth of her first child, K, on 30 July 2008 and, after the birth of her second child, G, on 7 December 2010, she decided to look after her two children rather than work in paid employment. She and her children being French nationals they are also, of course Union citizens/EEA nationals.

3. On 1 April 2011 the respondent made a decision refusing his application. The refusal letter noted that the appellant had submitted evidence to show that his EEA sponsor wife was in receipt of income support and child tax credits, which are public funds. He had therefore failed to demonstrate that his EEA sponsor, a qualified person, was working or able to support herself and the appellant without becoming a burden on public funds. The respondent was also satisfied the decision did not violate the appellant's Article 8 rights.

4. The appellant's appeal was heard by First-tier Tribunal (FtT) Judge Black. In a determination sent on 4 June 2011 Judge Black dismissed his appeal. The judge's principal findings included that the appellant had not shown his wife was a qualified person either by virtue of being a worker under regulation 6(1)(b) of the Immigration (European Economic Area) Regulations 2006 No.1003 (as amended) ("the 2006 EEA Regulations") or under regulation 6(1)(a) as a jobseeker. The judge accepted that the sponsor had made an application for jobseeker's allowance ("JSA") and had been in receipt of this benefit from 15 April 2011, but considered this was immaterial because she had made this application "merely going through the motions in order to bolster the appellant's prospects of success". The judge also decided to dismiss the appellant's Article 8 ground of appeal. At [24] she found that the appellant could move back to France or to Belgium where he had worked previously and that it would not be unreasonable for his wife and children to go with him.

5. The legal provisions relevant to this case are to be found in Directive 2004/38/EC (the Citizenship Directive), the 2006 EEA Regulations and Article 12 of Regulation 1612/68 (now Regulation 492/2011). We set these out in Appendix A but would flag in advance, as regards the 2006 EEA Regulations, that these were amended with effect from 16 July 2012 by the Immigration (European Economic Area) Amendment Regulations 2012 SI No. 1547. The amending regulations add a new regulation 15A, part of whose purpose was to give effect to the recognition by the Court of Justice of a

derived right of residence for primary carers of children in education by virtue of Article 12, Regulation 1612/68.

6. On 2 April 2012 Upper Tribunal Judge (UTJ) Storey found that the FtT judge had erred in law in her approach to the issue of whether the appellant was a qualified person by virtue of his wife's recent application for and receipt of JSA. The judge had discounted this application because she considered his wife had made it solely in order to assist the appellant's appeal. It was observed that the fact that this was her motive did not necessarily mean she did not intend to work. It was equally consistent with her resolving that she had to work in order to help her husband's efforts to stay in the UK. In EU law the focus has to be not on a person's reasons for seeking work but whether they genuinely intend to work (and have a genuine chance of working): see C-53/81 Levin [1982] ECR 1035. Furthermore, it did not appear that the FtT judge, in assessing whether the appellant's wife was genuinely intending to work, treated as a relevant consideration the fact that she had previously been engaged with the labour market, having worked for two years and had then not gone back so that she could look after her children who were very young. UTJ Storey also found that the judge's credibility findings were flawed by inconsistent findings on the status of the appellant's relationship. Despite appearing to accept that the appellant and his wife were in a genuine marriage (i.e. not a marriage of convenience) and had two children together, the judge appeared to discount the family relationship for the purposes of establishing that she was the spouse of an EEA national by reference to her view that "the marriage may be for the purpose of enabling the appellant to acquire the right to reside in the UK". In EU free movement law, once it is accepted a marriage is not one of convenience, the fact that one of its purposes may have been to assist one of the parties to acquire EU rights of residence is not relevant. All that matters is that the relationship is a genuine one and that the marriage has not been terminated: see Diatta v Land Berlin [1985] ECR 567.

7. Having set aside the judge's determination, UTJ Storey gave directions to the effect that the parties address their minds to the question of whether the appellant qualified as the family member of an EEA national exercising Treaty rights by virtue of his wife's current situation. Submissions were directed on whether she qualified either as a jobseeker under regulation 6(1)(a) or a worker under regulation 6(1)(b). In relation to regulation 6(1)(b) it was observed that jurisprudence of the Court of Justice had made clear that in certain circumstances a jobseeker could qualify as a worker: see Antonissen C-393/96 P(R) [1997] ECR 1-441. It was noted that the re-making hearing would be before a senior panel including an Upper Tribunal Judge of the Administrative Appeals Chamber (AAC).

8. A hearing fixed for 19 June 2012 was adjourned because contrary to directions no skeleton arguments had been produced by either side, and because the appellant's solicitor, Mr Obi Nwokeji, had been taken ill at short notice and was unable to attend and the Tribunal considered the appellant would benefit from legal representation. On the same date directions were sent relating to skeleton arguments, relevant case law (including previous decisions of the AAC) and a witness statement from the appellant's wife.

9. A hearing fixed for 12 July 2012 was also adjourned in light of the information that due to an intervening holiday period UKBA had not been able to complete consultations on the policy issues raised by the case with HM Revenue and Customs and the Department for Work and Pensions. As the skeleton argument produced by the appellant's representatives did not properly address the legal issues identified in previous directions, fresh directions were made requiring, inter alia , both parties to submit skeleton arguments specifically addressing the issues identified in the error of law decision of 2 April 2012. In order to ensure that the respondent was making the promised progress in preparation of submissions, it was directed that there would be a further Case Management Review

("CMR") which both parties were expected to attend. This took place on 24 October 2012. Despite notice being sent to both parties, no one appeared for the appellant.

10. At this CMR hearing Mr Deller produced a skeleton argument which he confirmed reflected the Secretary of State's position after interdepartmental consultation. At [7]-[8] this stated:

"7. Having reconsidered the position in light of the issues raised in this case, the respondent can confirm that she agrees that…it is accepted that someone who has come to the UK as a jobseeker, has obtained work, becomes unemployed, and then sought work again is a jobseeker within the meaning of the Directive and Article [sic] 6(1)(a) of the EEA Regulations.

8. On this interpretation Ms Mantezolo is potentially someone who is capable of being regarded as a jobseeker and the appellant as her family member".

11. The skeleton argument went on to state that the respondent did not accept, however, that the appellant's wife should have been regarded as a worker under regulation 6(1)(b), although adding that this submission "may be somewhat academic in this particular case given that the respondent accepts the possibility that Ms Mantezolo is a jobseeker".

12. Several days prior to the hearing the appellant's representatives requested an adjournment as Counsel who had had prior conduct of the case and was doing it on a pro bono basis (Ms Nmani) was unable to attend due to holiday commitments. That application was refused by UTJ Gill on 19 December 2012. At the hearing Mr Jegede renewed the application for an adjournment on the basis that it had not proved possible to find alternative Counsel willing to do the case on the same pro bono basis and the solicitor who had conduct of the appellant's case (Mr Nwokeji) had injured his ankle two days ago. Mr Jegede said he was not in a position to deal with the legal issues identified by the Tribunal in previous directions. Discussion then took place with the parties designed to clarify to what extent the appellant's representatives had previously complied with directions. Several documents were produced by Mr Jegede including a "second witness statement" from Ms Mantezolo dated 5 July 2012 exhibiting copies of her JSA records detailing her attempts to find work between 17 May 2012 and 4 July 2012; a "third witness statement" from her dated 20 December 2012 exhibiting further JSA records covering the period 2 July to 23 November 2012; and an e-mail from a restaurant inviting her for an interview on 20 December 2012.

13. Despite notice of the hearing being sent on 30 November 2012, no request for an adjournment was made until 18 December 2012. Having considered the matter we decided to refuse the renewed request for an adjournment. This is a case which had already been adjourned twice. Whilst on the second occasion the reason was in order to give the respondent more time to complete interdepartmental policy consultations, on the first occasion the appellant's representatives (like the respondent) had failed to submit a skeleton argument as directed and it was only learnt that the appellant's solicitor would not be attending (because of sudden illness) as a result of an inquiry from Tribunal Administration. Although the appellant's representatives had complied with an initial Tribunal direction to furnish a skeleton argument, they had not complied with a further direction for a more specific skeleton.

14. When the case had been set down for a hearing on 19 June 2012 the appellant attended and was ready to proceed. Even giving the appellant's representatives the benefit of the doubt in relation to their claims to have sent certain documents to the Tribunal in compliance with directions, it was clear that there had not been full compliance with directions and that two previous applications for an adjournment had been made very late in the day.

15. We also considered it necessary to take stock of the fact that, at all events, we did now have two skeleton arguments from the appellant's representatives and that in addition, a central legal issue on which we sought submissions, concerning the meaning of regulation 6 of the 2006 EEA Regulations, has been the subject of a specific concession by the respondent.

16. A further factor of relevance was that although submitted very late in the day we now had very full documentary evidence from the appellant and his wife relating to her work, maternity and jobseeking history. Although insistent that he could not assist with any legal submissions, Mr Jegede confirmed he was able and ready to assist with examination-in-chief and any necessary re-examination of the only witness it was proposed to call, namely Ms Mantezolo.

17. We then heard from Ms Mantezolo who confirmed the accuracy of her witness statements of 5 July and 20 December 2012. She confirmed she was looking for full-time work. She confirmed she was still receiving JSA and that it had been paid to her continuously since April 2012. She confirmed that her JSA records logging her efforts to find work were genuine. She had taken the advice of her Job Centre and applied for a wide range of jobs not just in retail; she was willing to work in a warehouse. She said that she had had her interview for a job at a restaurant the day before the hearing and had been told she would hear whether she had got the job in several days. (Subsequently we received confirmation that she had not been contacted within that time and emails she had sent to HR and the recruitment consultant who had arranged the interview had not been responded to). Prior to that she had only been asked to go for one other job interview, in September 2012. That was for a job at Tesco. She could not say what view her interviewers on either occasion had of her written application. At her previous employers (Peacocks) she had worked both in the stockroom and in the shop. She had never asked Peacocks for a reference. In order to increase her suitability to employers she had started an ESOL Entry 2 course at Trinity College in September 2011, but she did not complete this as she had to stop when she had her second child. She had applied to resume it in September 2012 but they never got back to her. She did not follow the matter up because she did not think that would help. She believed she had sufficient command of English to communicate well enough to do the jobs she had applied for.

18. We then heard submissions. As forewarned, Mr Jegede confined himself to the state of the evidence. He asked the Tribunal to accept that the appellant's wife had demonstrated that she had been genuinely looking for work since April 2012. As regards whether she had a genuine chance of finding work, he asked us to consider that a combination of her time away from the labour market (four years) and the difficult economic conditions had hampered efforts to find work. The fact that she had been invited for two interviews in the past three months showed that she continued to have realistic prospects. Although she had not completed the ESOL course, she had obtained one level of it and in any event it was not her fault the organisers had not got back to her. As regards the legal issues, he referred us to the two skeleton arguments previously submitted.

19. In those skeleton arguments, dated 27 and 28 June respectively, counsel for the appellant submitted that his appeal stood to be allowed because his wife qualified both as a jobseeker under regulation 6(1)(a) of the 2006 EEA Regulations and also as a worker under regulation 6(1)(b) on the authority of Antonissen and also of AG & Others (EEA – jobseeker self-sufficient person proof) Germany [2007] UKAIT 00075. It was also submitted in the second skeleton that the appellant's wife should be regarded as someone who had acquired the status of worker in 2008 and had not lost it because she had decided to look after her new-born children. A woman on maternity leave is still an employee and retains that status as long as she is temporarily involuntarily unable to work. To decide otherwise, it was submitted, would be to discriminate against female workers. The decision of the

Social Security Commissioner in CIS/519/2007 was cited in support as was the Court of Justice case of Hoekstra (nee Unger) Case 76/63 [1964] ECR 177, which held that EU law protected not only the "present worker" but also "one who having left his job, is capable of taking another". It was submitted that the appellant's case was distinguishable from JS v Secretary of State for Work and Pensions [2012] EWCA Civ 806, as the claimant in that case was an agency worker who did not have a specific employer-employee relationship and had not been looking for work from the date of her last agency assignment until the claim for income support was made. It was also submitted that notwithstanding the decision of the Upper Tribunal in the error of law decision (that the FtT judge had not erred in law in her assessment that the appellant could not succeed on Article 8 grounds), the appellant stood to succeed on Article 8 ECHR grounds, particularly in light of the UK's obligations under s.55 of the UK Borders, Citizenship and Nationality Act 2009 as interpreted by the Supreme Court in ZH (Tanzania) [2011] UKSC 4.

20. In submissions on behalf of the respondent Mr Deller said that the respondent accepted that the FtT had materially erred in law in its approach to the motives of the appellant in marrying and pursuing his EEA application. The respondent now accepted that the appellant and his wife were in a subsisting relationship and had two children.

21. Mr Deller also pointed to the terms of the concession as set out in the respondent's skeleton argument prepared for the 24 October CMR (see above [10]). This, he said, had narrowed the legal issues originally identified as being raised by the appellant's case. The respondent maintained her position that the appellant's wife could not be considered to have continued to be a "worker", notwithstanding that her purpose in stopping work was to look after children. As regards whether she was a "jobseeker", however, it was now accepted that she was not precluded as such from qualifying under regulation 6(1)(a) by virtue of being a "second-time" jobseeker. The only issue, so far as the respondent was concerned, therefore, was whether the appellant's wife actually (rather than just potentially) met the requirements set out in the jurisprudence of the Court of Justice relating to jobseekers. By virtue of s.85(4) of the Nationality, Immigration and Asylum Act 2002, the Upper Tribunal had to decide the appellant's wife's position at the date of hearing. In essence, the case of Antonissen had established a two-fold test which had been incorporated into regulation 6(1)(a). A person had to show (1) that they were genuinely seeking work; and (2) that they had (or continued to have) a genuine chance of obtaining employment. Antonissen also made clear that application of this test had to take account of all the circumstances. Even though six months was a rough indicator of the period during which work should have been found, there was no hard and fast rule. On the basis of the evidence now to hand, the respondent was prepared to accept that the appellant had shown she met (1) – because since April 2012 she had been and continued to be genuinely seeking work. However, the respondent did not consider she continued to meet (2), given that after a lengthy period out of the labour market she had now been looking for work for nearly nine months, she had never requested her former employer to furnish her with a reference and she accepted that she had made only limited efforts to improve her English language skills so as to make her more employable.

22. As regards the potential application of Article 12 of Regulation 1612/68, the respondent accepted that the appellant's wife had been employed in the UK (between 2006 and 2008/9, completing maternity leave in June 2009), that he was a joint primary carer of their children and that it did not matter that her eldest child had begun the education on which it was sought to rely at a time when she was no longer in employment. However, she considered that the matter of whether the eldest child, by virtue of (as had become apparent in evidence) now being enrolled in a reception class at a maintained primary school in a London Borough, met the requirements of either the revised 2006 EEA

Regulation (at regulation 15A) or the jurisprudence of the Court of Justice dealing with Article 12 was for the Tribunal to decide.

23. At the end of the hearing we gave directions permitting the appellant's representatives further time in which to inform us of the outcome of the appellant's wife's job interview (see [17]).

24. Subsequent to the hearing we decided it was necessary to give further directions which we did on 8 February 2013. In these we expressed our provisional view that the appellant's wife could not show she has a genuine chance of being employed and so his appeal would fail unless we were satisfied that she – and the appellant through her - had a derived right resulting from the enrolment of their eldest son in the reception class. We informed the parties that in seeking to address the latter issue, we had undertaken some research and it was thus necessary to apprise the parties of that; to convey the views we presently held on this issue in the light of that research; and to afford the parties an opportunity to respond to this research and our provisional views. In summary we set out that in our view the appellant could not bring himself within regulation 15A because his eldest son's reception class enrolment was "nursery education" within the meaning of regulation 15A(6)(a), which was a specified exclusion. We asked the parties whether they agreed or disagreed with that view. We also stated that, assuming we remained unpersuaded that the appellant could succeed under regulation 15A, we wished to know the view of the parties on whether we should consider making an order for reference to the Court of Justice of the European Union on the basis that regulation 15A may not be consistent with what Article 12 of Regulation 1612/68 requires.

25. The appellant's response stated that the circumstances of a child in a reception class of a primary school receiving structured education is obviously different from a child who is not receiving a structured education and is not being taught in line with the Early Years Foundation Stage. As regards the jurisprudence of the Court of Justice, the appellant's representatives considered (like the Upper Tribunal in its stated provisional view) that the Court, having already rejected an upper age limit in Gaal Case C-7/94 [1996] ECR, was unlikely to impose a lower age limit. It was also considered that, in light of the Court's observations in Echternach and Moritz Cases 389 & 390/87 [1989] ECR 723 [1990] 2 CMLR 305, the Court would conclude that all forms of education with no lower age limit, particularly in the case of a child in a reception class receiving structured education, would be within the purview of Article 12. At [10] it was stated:

"10. It is submitted that the restrictions imposed by Regulation 15A are inconsistent with and at odds with the purpose, context and broad approach of Article 12 and therefore the Appellant should have a derivative right to reside".

26. It was added that if the Upper Tribunal was unpersuaded by the approach of the Court of Justice in previous cases on broadly the same issue, then it may be appropriate for it to refer the questions posed to the Luxembourg Court.

27. In her further response, the respondent stated that Article 12 of Regulation 1612/68 exists to ensure that a child of a worker has the possibility of going to school but it was consistent with the jurisprudence on this provision to include reception class education as schooling. It was stated that:

"In this case the Secretary of State accepts that the appellant's child has been admitted to one of the state's general educational courses within the meaning of Article 12 of Regulation 1612/68."

28. As to the implications of this reading of Article 12 for interpretation of regulation 15A, the respondent's response stated that the obligation to interpret the Regulations in accordance with EU

law and the operation of direct effect meant that “nursery education” should not be read as including reception class enrolment. At [11] it was stated that:

“…it was never the intention of the Secretary of State that the definition of education at regulation 15A …should exclude children attending the reception class of a primary school prior to compulsory school age who will be following an identical curriculum to their classmates who have already attained school age. “

29. And at [17]:

“…

The definition of education in the regulations can and should be interpreted in accordance with EU law to include attendance in a reception class prior to compulsory school age as a matter of fact and that, even if that is not accepted, given that the rights in question are directly effective as a matter of EU law they [can] be relied on whether or not the regulations technically make adequate provision in that regard.”

30. Accordingly:

“The Respondent considers that a reference is not necessary, as there is no dispute that the reference to education in the regulations dos not and should not exclude the appellant’s son based on the correct application of Article 12…”

Our Assessment

The issue of whether the appellant’s wife continued to be a worker after ceasing work in order to look after children

31. In consequence of the error of law decision one of the issues on which submissions were invited was whether the appellant’s wife could be considered to have continued to hold the status of worker in EU law notwithstanding that she had given up work in order to care for her children. Having reviewed the respective arguments, we consider we are bound by higher court authority to find that the appellant’s wife lost the status of worker she had acquired in 2006 around the time when her maternity leave ended on 1 June 2009. It was around that date that she and her husband decided she would not return to work because she wanted to look after her children. That caring for her children was the reason for not returning to work in 2010 was expressly confirmed by the appellant’s wife in her witness statement dated 17 June 2011.

32. The question of whether a woman who leaves the labour market to look after children remains a worker was addressed by the Court of Appeal in Secretary of State for Work and Pensions v Dias [2009] EWCA Civ 807. If any doubt as to the binding effect of the Court’s judgment on this issue was thought to have been created by the fact that the Court of Appeal made an order for reference (albeit on a different matter), this was comprehensively dispelled by its subsequent decision in JS v Secretary of State for Work and Pensions [2011] EWCA Civ 806. At [13]-[14] Stanley Burnton LJ said this:-

“13. In my judgment, the propositions set out in paragraph 21 of the judgment in Dias are the ratio of the decision, and are binding on us. In any event, I agree with them. It is implicit in Article 7.3 that a person who ceases to work for reasons other than those set out in its sub-paragraphs ceases to be a worker. It would be inconsistent with the provisions of the Directive to hold that a woman who ceases work because she is pregnant retains the status of a worker, since pregnancy is not an illness, and it is common ground that the disability that results from pregnancy does not result from an accident

within the meaning of Article 7.3. Illness during pregnancy is of course different. To hold that the status of worker is retained during pregnancy would be illegitimate judicial legislation, amending Article 7.3(a) by inserting "or pregnancy". Moreover, the effect of the insertion would be uncertain: for how long before and after the expected date of delivery would the status of worker be retained?

14. My view of the correctness of the judgment of this Court in Dias on the interpretation of the Citizenship Directive is supported by the comment of Advocate General Trstenjak in her opinion on the reference made by this Court on other issues in that case. She said:

‘68. Ms Dias' period of residence in period 3 would be legal residence within the meaning of Article 16(1) of Directive 2004/38 if she had also been a worker in that period. The referring court held that not to be the case and in that regard did not refer a question for a preliminary ruling.

69. The referring court's conclusion that Ms Dias was not a worker in period 3 appears to be in conformity with the case-law of the Court. According to that case-law, once the employment relationship has ended, the status of worker is as a rule lost. (Case C-43/99 Leclere [2001] ECR I-4265 , paragraph 55.) It is apparent from the order for reference that Ms Dias' employment relationship ended when period 3 began, that is when she decided following the end of her maternity leave to continue to care for her son and not to go back to her job. Ms Dias thereby voluntarily lost her status of worker as such.

70. …

71. Ms Dias can also not base her status of worker on provisions of secondary law. Admittedly, Article 7(1) of Directive 68/360 (See now Article 7(3)(b) of Directive 2004/38/EC) provides that persons who are not workers within the meaning of that term are in certain circumstances to be assimilated to them. It makes such provision however only for persons who became unemployed involuntarily and not, on the other hand, for those in voluntary unemployment.’”

33. We are aware that when JS went on further appeal as Saint Prix v Secretary of State for Work and Pensions , [2012] UKSC 49, the Supreme Court made an order for reference, stating at [21] that:

“21. The Supreme Court is not persuaded that the case of either side is acte clair . We believe it likely that the Council and Parliament did think, when enacting the Citizenship Directive, that the Directive was codifying the law as it then stood. But we are not persuaded that in doing so it was precluding further elaboration of the concept of ‘worker’ to fit situations as yet not envisaged. The Court has developed the concept of EU citizenship in a number of ways: see, for example, Collins v Secretary of State for Work and Pensions [2004] ECR 1-2703. We are further conscious that pregnancy and the immediate aftermath of childbirth are a special case. Equal treatment of men and women is one of the foundational principles of EU law. Only women can become pregnant and bear children. Thus in this respect they cannot be compared to men. Pregnancy is not to be equated with illness or disability. But unless special account is taken of pregnancy and childbirth, women will suffer comparative disadvantage in the workplace. There are also good reasons in health and social policy for allowing women to take a reasonable period of maternity leave without losing the advantages attached to their status as workers. This is different from leaving the workforce in order to look after children. Both men and women may do this and there is no sex discrimination involved in denying them both the status of worker for the time being. We do not see the sex discrimination argument as invalidating Article 7, but as indicating that it would be consistent with the fundamental general principles of EU law for the Court to develop the concept of ‘worker’ to meet this particular situation.

22. Hence we refer the following questions to the CJEU:

1. Is the right of residence conferred upon a ‘worker’ in Article 7 of the Citizenship Directive to be interpreted as applying only to those (i) in an existing employment relationship, (ii) (at least in some circumstances) seeking work, or (iii) covered by the extensions in article 7(3), or is the Article to be interpreted as not precluding the recognition of further persons who remain ‘workers’ for this purpose?

2. (i) If the latter, does it extend to a woman who reasonably gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy (and the aftermath of childbirth)?

(ii) If so, is she entitled to the benefit of the national law’s definition of when it is reasonable for her to do so?”

34. We do not consider that the terms of this reference afford any basis for doubting the authority of the Court of Appeal decision in Dias in regard to the issue of whether giving up work to look after children brings the status of worker in EU law to an end. In [22] the Supreme Court makes very clear that its questions about retention of worker status do not extend to the “different” issue of “leaving the workforce in order to look after children”. The only maternity-related question it poses (question 2(i)) is confined to the situation of a woman who reasonably gives up work, or seeking work, “because of the physical constraints of the late stages of pregnancy (and the aftermath of childbirth)”.

The issue of the meaning of “jobseeker” within regulation 6 of the 2006 EEA Regulations.

35. The issue identified as being central to the Tribunal’s continuation hearing concerned whether the appellant’s wife was precluded from qualifying as a jobseeker by the terms of regulation 6(4) which state that:

“ (4) For the purpose of paragraph (1)(a), “jobseeker” means a person who enters the United Kingdom in order to seek employment and can provide evidence that he is seeking employment and has a genuine chance of being engaged.”

36. The question the Tribunal posed in directions was whether this definition precluded a person who was a “second-time” jobseeker such as the appellant’s wife.

37. That question was posed against the backdrop of somewhat inconclusive case law dealing with this issue. It may assist to differentiate between three different dimensions to the case law: A. The jurisprudence of the Court of Justice prior to enactment of the “Citizenship Directive; B. Relevant provisions of this Directive; and C. subsequent Court of Justice and related case law. (Where relevant we shall include domestic case law seeking to apply the relevant principles set out in Court of Justice cases.)

A. Prior Court of Justice case law

38. Confining ourselves to Court of Justice jurisprudence dealing with workers and job seekers, it is clear that:

(i)
Under Article 45 (ex Article 39) the term ‘worker’ covers, to a greater or lesser extent, not only actual workers but (those whom we shall refer to as) “first-time” job seekers (Antonissen) as well as those who have had a job and are again seeking work, i.e. (those whom we shall refer to as) “second-time job seekers (Case 75/63 Hoekstra (nee Unger) [1964] ECR 177, Case 66/85 Lawrie-Blum [1986] ECR

2121 , Bernini v Minister van Onderwijs en Wetenschappen [1992] ECR I-1071, Case C-85/96 Martinez Sala v Freistaat Bayern [1998] ECR I-2691); vocational or occupational trainees (Lair v Hanover University [1988] ECR 3161, [1989] 3 CMLR 545, Brown v Secretary of State for Scotland [1988] ECR 3205 [1988] 3 CMLR 403); the involuntarily unemployed and sick (Lair , Case C-302/90 Caisse Auxiliare d'Assurance Maladie-Invalidite v Faux [1991] ECR I-4875); as well as injured and retired workers.

(ii)
As regards jobseekers, the amount of time given to them to find work is not fixed although Member States may require them to leave their territory after a reasonable period unless the person concerned produces evidence (1) that he or she is continuing to seek employment; and (2) has genuine chances of being employed (Antonissen ; EC Commission v Belgium Case C-344/95 [1997] 2 CMLR 187).

39. So far as jobseekers are concerned, it would also seem at least arguable that the Antonissen principles cover any kind of jobseeker, including (i) the "first-time jobseeker" as just described; (ii) the "second-time jobseeker" as identified in Hoekstra and other cases; and (iii) a person who did not enter the host Member State in order to seek employment but who after having been admitted seeks employment. We base this view on [13] and [16] of the Court of Justice judgment in Antonissen , where the Court stated that freedom of movement for workers entails the right for nationals of Member States to move freely within the territory of other Member States and to stay there for the purposes of seeking employment. At [16] the Court added that "[t]he effectiveness of Article 48 is secured in so far as Community legislation or, in its absence, the legislation of a Member State gives persons concerned a reasonable time in which to apprise themselves, in the territory of the Member State concerned, of offers of employment corresponding to their occupational qualifications and to take, where appropriate, the necessary steps in order to be engaged." Although Antonissen himself was a "first-time" jobseeker, in neither of these paragraphs did the Court restrict its enunciation of principles to first-time jobseekers.

40. The view we express here is consistent with that expressed by Upper Tribunal Judge Jacobs in the Administrative Appeals Chamber in [2009] UKUT 35 (AAC) [21] and by the Upper Tribunal Immigration and Asylum Chamber in RP (EEA Regs – worker – cessation) Italy [2006] UKAIT 00025 and AG and others (EEA-jobseeker-self-sufficient person-proof) Germany [2007] UKAIT 00075.

B. Directive.

41. The next dimension concerns the scope of the Citizenship Directive's codification of measures recognising the situation of workers who are not in work.

42. Article 7(3) identifies four sets of circumstances in which a person who has been a worker (or self-employed person) retains that status:

"For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment."

Article 7(3)(a)

43.As regards the meaning of Article 7(3)(a) and the corresponding domestic provision, regulation 6(2)(a), the Court of Appeal in Samin v City of Westminster [2012] EWCA Civ 1468 (per Hughes LJ) reviewed both Court of Justice case law (the case of C-482/01 Orfanopolous v Land Baden-Wurttemberg [2005] 1 CMLR 18 in particular) and domestic case law (SSHD v FMB [2010] UKUT 447, De Brito v SSHD [2012] EWCA Civ 709 and Konodyba v Royal Borough of Kensington and Chelsea [2012] EWCA Civ 982) and concluded, inter alia, at [30] that the Luxembourg jurisprudence was:

"entirely consistent with the approach [in the English cases], which is that it is normally sensible to ask whether there is a realistic prospect of the individual returning to work. Although Mr Carter would have us substitute the question whether there is "any chance" of his doing so, he did not contend that any chance, however remote or improbable, would suffice, nor that a worker remains temporarily unable to work until all possibility of a return to work has been eliminated".

Article 7(3)(b) and (c)

44. We are not aware of any higher court authority on the meaning of Article 7(3)(b) and (c) in particular (save for Secretary of State for Work and Pensions v Elmi [2011] EWCA Civ 1403, which deals with the meaning of "…registered with the relevant employment office" within the meaning of Article 7(3)(c)), but in our view they seek to identify when worker status can be retained in the circumstances of involuntary unemployment on the part of someone who is a "jobseeker". To fall within Article 7(3)(b) one must be someone who is unemployed having previously been employed and it is necessary also to have been employed for more than one year. This reflects the approach of the Court of Justice that prior connection with the labour market should make it more difficult to lose the status of worker upon unemployment. Article 7(3) (c) is restricted to "second-time" jobseekers with less than 12 months. It guarantees retention for "no less than six months".

45. It would appear from the above that Article 7(3)(b) and (c) of the Directive do not fully incorporate the principles laid down in Antonissen . They do not deal with the situation of the "first-time" jobseeker despite Antonissen's case clearly falling within that category. The approach to time limits is also different. Whereas the Court in Antonissen left open the possibility of retention of worker status beyond six months and refused to fix a time limit, Article 7(3)(b) and (c) both fix time limits. As noted by the Upper Tribunal AAC in IA v SSWP [2009] UKUT 35(AAC) at [23]:

"The six months' limit in Article 7(3)(c) and the prohibition on expulsion in Article 14(4)(b) reflect the [Luxembourg] Court's answer in Antonissen , but the Directive does not translate the Court's reasoning in that case into a right to reside for those [who] are not in the labour market ".

46. Further, although the scope of Article 7(3)(b) and (c) is confined to subcategories of "second-time" jobseekers, elsewhere in the Directive itself, at Article 14(4) second indent, albeit only in the context of protection against expulsion, the wording clearly has in mind "first-time" jobseekers (at least in the

historic sense): “[those who have] entered the territory of the host Member State in order to seek employment”. We have already noted the seeming intent in recital (9) to preserve the more favourable treatment applicable to jobseekers as recognised by the case law of the Court of Justice”.

47. Turning to the wording of regulation 6(1)(a), with reference to regulation 6(4) in particular, one finds a contrasting state of affairs. Whereas Article 7(3)(b) and (c) are confined to subcategories of “second-time” jobseekers, regulation 6(1)(a) read together with regulation 6(4) is confined to “first-time” jobseekers. Just as it is exceedingly difficult to construe Article 7(3)(b) and (c) to encompass “first-time” jobseekers, so it is just as difficult to construe regulation 6(1)(a)/6(4) as encompassing “second-time” jobseekers. Both sets of provisions appear not to reflect the Antonissen line of jurisprudence which encompasses both “first-time” and “second-time” jobseekers without specifying fixed time restrictions on either.

48. Further, Article 7(3)(b) does not appear on its face to contain an Antonissen test. It simply requires that, for a person to retain the status of worker that: “he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a jobseeker with the relevant employment office”.

C. Subsequent case law

49. As noted earlier, in JS v Secretary of State for Work and Pensions [2011] EWCA Civ 806 Stanley Burnton LJ was emphatic that Article 7(3) was to be read as an exhaustive codification of the jurisprudence of the Court of Justice dealing with those who can retain the status of worker even when not working: see [13]-[16]. Subsequently, however, on appeal in Saint Prix v Secretary of State for Work and Pensions [2012] UKSC 49, the Supreme Court was faced with a submission by the Secretary of State - that 'worker' in Article 7(1) should be taken to have the meaning that it had acquired in 2004 and that Article 7(3) is an exhaustive list of the people who then fell outside that meaning but were nevertheless to be treated as if they were workers ([15]) - and a submission from the claimant with the support of the AIRE Centre to the contrary. In face of these competing submissions, the Supreme Court decided at [21] that the matter was not acte clair and its first question in its order for reference to the Court of Justice at [22] directly poses this question: :

“1. Is the right of residence conferred upon a 'worker' in Article 7 of the Citizenship Directive to be interpreted as applying only to those (i) in an existing employment relationship, (ii) (at least in some circumstances) seeking work, or (iii) covered by the extensions in article 7(3), or is the Article to be interpreted as not precluding the recognition of further persons who remain 'workers' for this purpose?”

50. We consider ourselves bound by the decision of the Supreme Court to regard the issue as not, at least in some respects, acte clair and, were it not for two matters to which we shall turn next which render it academic, we might have adjourned our case to await the outcome of the Court of Justice deliberations.

The concession regarding regulation 6(1)(a)/6(4) of the 2006 EEA Regulations

51. The first matter in point is this. In the course of this case the respondent had made a concession in very clear terms: see above [10]. It is stated with reference to regulation 6(1)(a) of the 2006 EEA Regulations that the fact that a person has previously been a jobseeker and then got employment will not disqualify him or her from being a “jobseeker” if he or she ceases their employment and becomes a jobseeker again. It is also stated that the respondent accepts that it follows that the appellant’s wife

can potentially meet the requirements of regulation 6(4) and all that is in issue is whether the facts of his case enable her actually to meet them. The respondent has not set out her reasons for arriving at these conclusions although Mr Deller has confirmed it was the result of interdepartmental agreement. Article 37 of the Directive permits Member States to make more generous provisions in their relevant national law whether in the form of "laws, regulations or administrative provisions". So, even if the respondent's interpretation were considered to be more generous than that correctly to be given as a matter of law to regulation 6 or Article 7(3), we are entitled to treat this concession as acceptance by the respondent of her policy to regard regulation 6(1)(a) as capable of being satisfied by persons who are second-time jobseekers without regard to any specific time limit.

52. Accordingly, we must approach this case on the basis that the appellant's wife's previous experience as a jobseeker being brought to an end when she became employed does not preclude her from being accepted by the Secretary of State as potentially qualifying under regulation 6(1)(a) of the 2006 EEA Regulations.

53. This brings us to the second matter. Even though the appellant's wife being a "second-time" jobseeker does not preclude her in this way from being accepted by the respondent as coming within the personal scope of regulation 6(1)(a), it remains to consider whether she met the material criteria as set out in regulation 6(4). It is common ground that regulation 6(4) essentially reflects the two-pronged Antonissen criteria outlined earlier.

54. In submissions Mr Deller has accepted that since April 2012, when the appellant's wife applied for and was granted JSA, she has been and continues to be genuinely seeking work and so meets the first limb of the regulation 6(4)/ Antonissen test. In our view that was a sensible response to the detailed evidence of the JSA record of the appellant's wife's searches for employment which showed her making regular and frequent attempts to find a job.

55. We are not persuaded, however, that the appellant's wife can be said to meet the second limb of regulation 6(4)/the Antonissen test, which requires an applicant to still have a genuine chance of finding employment. Whilst we recognise that prior to giving birth to her first and second child the appellant's wife had been employed for over two years continuously and so had established a connection with the labour market, the fact remains that she has stayed out of the labour market for nearly four years (between June 2009 and the present), that she has never sought to approach her previous employers for a job reference (even though saying she had no reason to think they would not give her a good reference) and that, despite recognising that completing and obtaining an ESOL qualification would increase her suitability for employment, she had not taken any steps to follow up the ESOL course organisers' lack of response. The appellant's wife has not suggested there have been or are any health-related difficulties impeding her search for work. Whilst we recognise the difficult economic climate, we are not aware that over the past nine months employers in Greater London, where the appellant and his wife live, have not been recruiting for the sorts of jobs for which she would be employable. Yet she has only been asked to attend a job interview on two occasions, neither of which proved successful. We take no pleasure in pointing out the appellant's wife's lack of success but we have to evaluate it as part of the factual inquiry we are obliged to make. In our view the evidence in the round does not show that as at the date of hearing there was any longer a genuine chance of her being employed.

56. The conclusion we draw is that the appellant's wife does not meet an essential requirements of regulation 6(1)(a) and 6(4). Nor, on the basis of our finding that as at the date of hearing she no

longer had a genuine chance of being employed, does she meet the requirements of either Article 7(3))(b) or the jurisprudence of the Court of Justice in Antonissen and related cases.

Zambrano

57. In submissions made at the error of law hearing the appellant's representatives sought to rely on Case C-34/09 Zambrano [2011] All ER (EC) 491. In his decision of April 2012 UTJ Storey held that no basis had been shown for considering that the decision to refuse the appellant a residence permit in the UK would prevent his children exercising their rights as Union citizens in France, the country of which they and their mothers are nationals. In the light of Court of Justice case law subsequent to Zambrano - Dereci [2011] All ER (EC) 373, McCarthy v Secretary of State for the Home Department [2011] All ER (EC) 729, Case C-40/11 Lida v Stadt Ulm [2012] ECR 1-0000 and Cases C-356/11 and C-357/11 O, S and L , 6 December 2012 - we consider that it is now even clearer that Zambrano principles only assist in exceptional circumstances and require it to be shown that the refusal decision would effectively cause the third country national carer of Union citizen children to leave not just the host Member State but the territory of the Union and thereby deny the Union citizen child the effective enjoyment of their substantive rights as Union citizens. The evidence in this case falls well short of demonstrating any such thing.

Regulation 15A and Article 12, Regulation 1612/68 (now Article 10, Regulation 492/2011)

58. We deal first with the question of whether this new domestic regulation, regulation 15A of the 2006 EEA Regulations, can assist the appellant.

Regulation 15A of the 2006 EEA Regulations

59. As already noted, in further directions we asked the parties two questions: (a) whether the expression "nursery education" in regulation 15A of the 2006 EEA Regulations applies to a child in the reception class of a state primary school; and (b) whether or not it would be appropriate for the Upper Tribunal to make a reference to the Court of Justice of the European Union in order to resolve the point identified at [24] above.

60. The thrust of the appellant's further submissions (see [25]-[26] above) is that we should find that the wording of regulation 15A is too restrictive and fails to reflect Court of Justice jurisprudence on Article 12.

61. In his most recent submissions, Mr Deller sets out that the position of the Secretary of State is that (we paraphrase), applying a purposive approach, regulation 15A(6) is to be construed so that the exclusion for those in "nursery education" does not apply to those in reception class education within a primary school setting. The Secretary of State considers that this approach amounts to a proper reflection of Court of Justice case law on Article 12 which in the respondent's view broadly confined its scope to those in full-time compulsory education from 5 upwards but would extend to cover those in reception class education within a primary school.

62. However, a concession as to the law cannot bind the Tribunal. Notwithstanding the respondent's concession, our duty is to interpret regulation 15A(6)(a) for ourselves and in that context that concession is at best a submission that we have to take into account.

63. We are not persuaded the appellant's wife can bring herself within these Regulations. Regulation 15A(6)(a) stipulates that ""education" excludes nursery education". Notwithstanding that the respondent (and to an extent the appellant) seeks to argue that "nursery education" should be taken

as including reception class education, we do not consider that is a correct interpretation even applying a teleological approach.

64. Education is a devolved matter in the United Kingdom and, as will be seen, the statutory basis for it differs as between England, Scotland, Wales and Northern Ireland. However, the 2006 EEA Regulations, as a measure concerned with implementing European free movement law which is equally applicable to all parts of the United Kingdom, should be construed uniformly if it is possible to do so. For that reason, we need to have regard to the position in Wales and in Scotland and Northern Ireland, as well as in England.

65. In England, the expression "nursery education" is not in general use since the implementation of the Childcare Act 2006 ("the 2006 Act"), having been generally replaced

by "early years provision". It appears that what has become “early years provision” in England remains nursery education in Wales, see for instance section 123(4) of the School Standards and Framework Act (“the 1998 Act”) which has the two provisions in parallel and the current form of section 509A of the Education Act 1996 ("the 1996 Act", and further the raft of consequential amendments in Sch 2 of the 2006 Act. However, whether one starts from surviving references to “nursery education” in England or from the substituted concept of “early years provision”, the outcome is the same.

66. There is still a definition of “nursery education” in the 1998 Act, section 117, but that is expressed to be for the part of that Act in which all operative provisions in which the term is used now apply solely in Wales. Likewise, although there is a definition in the Nursery Education and Early Years Development (England) Regulations 1999 SI No.1329 (“the 1999 Regulations”) which appears to survive in England, it is purely for the purpose of a duty under section 117 of the 1998 Act, a section which now applies only in Wales, so this appears to be a historical anomaly. The section 117 definition is:

"In this Part "nursery education" means full-time or part-time education suitable for

children who have not attained compulsory school age (whether provided at schools

or elsewhere)."

67. The definition in the 1999 Regulations is in like form, subject to the omission of the words in parentheses.

68. We were told at the hearing in December 2012 that the appellant’s oldest child was aged 4 years 6 months and will thus become 5 during this academic year. This means he will not be of compulsory school age until 31 August 2013: see the 1996 Act, section 8(3) and SI No. 1998/1607. On that basis, and disregarding as remote the possibility of successfully arguing that what is provided in the reception class is not "suitable" for children of that age, then if those definitions are relevant, what the child is receiving is indeed, ” nursery education".

69. Such a definition is, moreover consistent with the definition of "nursery school" in section 6(1) of the 1996 Act.

70. Starting from the substituted concepts of “early years provision”, it is relevant to note certain features of provision as it presently exists in England. Section 20 of the 2006 Act provides that “[i]n this Part ”early years provision” means the provision of childcare for a young child”. It is also relevant

to note certain features of early years provision as it presently exists in England. Section 19 provides that:

"For the purposes of this Part and Part 3, a child is a "young child" during the period-

(a) beginning with his birth, and

(b) ending immediately before the 1st September next following the date on which he

attains the age of five."

71. By section 18(2) and (3) of the 2006 Act:

“(2) “Childcare” means any form of care for a child and, subject to subsection (3), care includes:

(a)
Education for a child, and

(b)
any other supervised activity for a child.

(3) “Childcare” does not include-

(a) education (or any other supervised activity) provided by a school during school hours for a registered pupil who is not a young child, or

(b) any form of health care for a child”.

72. Section 7 of the 2006 Act and regulation 4 of The Local Authorities (Duty to Secure Early Years Provision Free of Charge) Regulations 2008 SI No.1724 contain a duty to secure such provision for each young child who is over a prescribed age (as the child in the present case is) but under compulsory school age. Such provision is regulated, inter alia, through the statutory Early Years Foundation Stage, under a different regime from that which applies to children above compulsory school age.

73. Applying these provisions to the older son of the appellant and Ms Mantezolo, he is a "young child" and what he receives in the reception class is “ early years provision". The emergence of “early years provision” as the statutory successor, in England, to the concept of nursery education is a further route leading to the conclusion that the expression "nursery education" in regulation 15A includes what is received by a child under compulsory school age in the reception class of a maintained school. We consider that bearing in mind our analysis of the relevant education provisions applied in England and Wales (and even applying a teleological approach based on Court of Justice jurisprudence), it would be a step too far to seek to read “nursery education” as not including reception class education.

74. We add that this also appears consistent with our initial researches into the position in Scotland, where there does not appear to be a definition of “nursery education", but the definition in section 1(5)(a) of the Education (Scotland) Act 1980 ("the 1980 Act") of cognate terms makes reference to "activities in schools and classes (such schools and classes being in this Act called "nursery schools" and "nursery classes"), being activities of a kind suitable in the ordinary case for pupils who are under school age". Broadly, to be of "school age" requires a child to have attained the age of five: 1980 Act, section 31.

75. As regards the situation in Northern Ireland, our limited researches suggest that there does not appear to be a definition of nursery education but the Education and Libraries (Northern Ireland) Order 1986 SI No. 594 NI 3), as amended in particular by the Education (Northern Ireland) Order 1998 SI No. 1759 (N.I.13) defines a nursery school as "…a primary school which is used mainly for the purpose of providing full-time or part-time education for children who have attained the age of 2 years but are under compulsory school age". Many primary schools have opened special nursery units to provide such education.

76. We conclude this part of our decision by noting some of the regulatory features which now characterise "early years provision". Those who provide early years provision are under a statutory duty (2006 Act, section 40) to secure that the provision meets, inter alia, the "learning and development requirements". These are to be found, via the Early Years Foundation Stage (Learning and Development Requirements) Order 2007/1772 in the Statutory Framework for the Early Years Foundation stage, published by the Secretary of State in March 2012: see http:// www.education.gov.uk/schools/teachingand learning curriculum/a0068102/early-years-foundation-stage-eyfs.

77. The requirements cover three "prime" areas (communication and language, physical development and personal, social and emotional development) and impose a requirement to "support children in four specific areas, through which the primary areas are strengthened and applied", namely literacy, mathematics, understanding the world and expressive arts and design.

78. We note that in her latest submissions the respondent made reference to the AAC case of CIS/ 3960/2007 and SSWP v IM (IS) [2011] UKUT 231 (AAC) (also known as CIS/0097/2008) which expressed the view that in the context of England and Wales Article 12 should be understood as applying only to children who had begun primary school. However, we would observe that the judge in these cases was concerned with the legislative position then prevailing. In both cases he was concerned with the circumstances obtaining at the time of decisions refusing benefit which had been taken in January 2007. Both thus concerned (as in the second case was expressly acknowledged) the situation prior to changes to the law brought into effect in 2008 (namely the introduction with effect from 1 April 2008 of the duty on local authorities in respect of early years provision under section 7 of the 2006 Act; and the duty on early years providers to comply with the Early Years Foundation Stage under section 40 of the same Act, with effect from 1 September 2008). For that reason we derive little assistance from them.

Article 12, Regulation 1612/68

79. We have already intimated that we do not think that the jurisprudence of the Court of Justice pertaining to Article 12, Regulation 1612/68 provides clear guidance on the question of whether education undertaken by a child of a former or current migrant worker in a reception class can give rise to a derivative right of residence for the primary carer of such a child. The Court of Justice's jurisprudence on Article 12, Regulation 1612/68 has been developed through cases such as Case C-7/94 Gaal [1995] ECR I-1031 , Case C-413/99 Baumbast and R v Secretary of State for the Home Department [2002] ECR I-7091 , Case C-310/08 Ibrahim and Secretary of State for the Home Department [[2010] ECR I-1065, Case C-480/08 Teixeira [2010] ECR I-1107 and Joined Cases C-147/11 and C-148/11 Czop and Punakova [2012] ECR I-0000. (See now also C-529/11 Alarape & Anor v Secretary of State for the Home Department [2013] EUECJ (08 May 2013)) [23]-[31].)

80. It is certainly clear that the Court of Justice considers that Article 12 of Regulation 1612/68 should be interpreted consistently with the European Convention of Human Rights: see Case C-389, 390/87

Echternach and Moritz v Minister van Onderwijs [1990] 2 CMLR 305. But that does not necessarily point in favour of one view or the other on the question of whether Article 12 applies only to school education after the age at which it has become compulsory.

81. There is a clear tension between two opposing views. On the one hand it would appear that in all the cases dealing with children the assumption of the Court has been that education begins when the child commences school: see e.g. Baumbas t [53]. In addition, it is only at the stage of primary education that Member States are obliged to ensure universal education in the general interest of the community. In the context of wider international human rights obligations, the UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 13 the right to education' has endorsed the position taken by UNICEF, namely that "primary education is the most important component of basic education". On the other hand, the jurisprudence on Article 12 does not specify any age limit and has said that there is no upper age limit: see e.g. the Advocate General's opinion in Teixeira , [40]. For the most part the Court contents itself with reference to the point at which a child is "in education" or "first enters education". In regard to context and purpose, it might be said that if the aim behind the right is to ensure migrant workers will feel free to move to another Member State in order to take employment there, then what is essential is that there should be the best possible conditions for the integration of the family (as to which the importance attributed to early years provision by the provisions cited at [65]-[73] above cited may be material) and that there should be equality of treatment between a Member State's own nationals and children of nationals of another Member State (see Case C-308/89 Di Leo , [13] and [15], cited with approval in Baumbast at [50] and [53]). Further, the right to education guaranteed by the First Protocol of the ECHR is a right of access to all levels of education, including entry to nursery, primary, secondary and higher education: see Belgian Linguistics Case (1968) 1 EHRR 252 [1].

82. The issue, therefore, is subject to a degree of uncertainty. Our inclination is towards the view that having rejected an upper age limit the Court would also reject a lower limit and thus would see the question as to be one of fact for each Member State to decide. But in view of the uncertainty, if this were a material matter in this case we would have given further thought to whether to make an order for reference addressing it.

83. We have however decided that a reference is unnecessary as the issue is not material to the outcome of the appeal. It is not material because in our judgment the appellant is entitled to succeed in her appeal by virtue of the Secretary of State's concession that she will treat the primary carer parent of a child of a former worker as falling within the scope of (the new) regulation 15A of the 2006 EEA Regulations. We have already had cause to note that Article 37 of the Directive permits Member States to make more generous provisions in relevant law if they choose and that the Directive itself does not provide for a derived right of residence for primary carers of children in education.

84. Accordingly whilst we regard the answer to the question of whether the primary carer of a child of a former migrant worker who has still not commenced primary education can benefit from Article 12, Regulation 1612/68 directly as uncertain, we do not consider that matters on the particular facts of this case. The appellant is entitled to succeed in his appeal on the basis that he comes within the terms of the Secretary of State's concession summarised at [62] above. There being nothing discretionary about the terms of this concession we are in a position to conclude not only that the decision of the respondent is not in accordance with the law but also that the appellant's appeal should be allowed outright. Under the Secretary of State's concession the appellant has a derived right of residence. Although such a right does not qualify him under the current state of the law for

the purposes of accruing permanent residence (see regulation 15(1A): “Residence in the United Kingdom as a result of a derivative right of residence does not constitute residence for the purpose of this regulation”), it does entitle him to be granted a “derivative residence card”: see regulations 2 and 18A (the latter states that such a card will be valid for five years or any other date specified by the Secretary of State when issuing it).

Article 8

85. The appellant submitted in his skeleton argument that the Upper Tribunal should revisit its earlier decision that the FtT judge did not err in law in rejecting the appellant’s Article 8 grounds of appeal. However, given that (1) the respondent now accepts that the appellant has a derivative right of residence under regulation 15A of the 2006 EEA Regulations; and (2) that the EEA decision cannot in the light of our findings be one which even hypothetically might lead to the appellant’s removal, we consider that the Article 8 grounds fall away.

Disposal

86. For the above reasons:

The FtT judge materially erred in law. The decision we re-make is to dismiss the appeal under regulation 6 of the 2006 EEA Regulations but to allow it on the basis that the decision of the respondent is not in accordance with the law. Given that the respondent now accepts that the appellant has a derivative right of residence, we allow the appeal outright.

Signed Date

Upper Tribunal Judge Storey

APPENDIX A: RELEVANT LEGAL PROVISIONS

A. Citizens Directive

Article 7 Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

…

Article 14 Retention of the right of residence

1. 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.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or

(b) the Union citizens entered the territory of the host Member State in order to seek employment.

In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.”

Recital 16

As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance

system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security."

Recital 21

However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons."

" **B. 2006 EEA Regulations (as amended)**

Worker", "self-employed person", "self-sufficient person" and "student"

4. (1) In these Regulations —

(a) "worker" means a worker within the meaning of Article 39 of the Treaty establishing the European Community;

(b) "self-employed person" means a person who establishes himself in order to pursue activity as a self-employed person in accordance with Article 43 of the Treaty establishing the European Community;

(c) "self-sufficient person" means a person who has—

(i) sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence; and

(ii) comprehensive sickness insurance cover in the United Kingdom;

(d) "student" means a person who—

(i) is enrolled at a private or public establishment, included on the Department for Education and Skills' Register of Education and Training Providers(**6**) or financed from public funds, for the principal purpose of following a course of study, including vocational training;

(ii) has comprehensive sickness insurance cover in the United Kingdom; and

(iii) assures the Secretary of State, by means of a declaration, or by such equivalent means as the person may choose, that he has sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence.

(2) For the purposes of paragraph (1)(c), where family members of the person concerned reside in the United Kingdom and their right to reside is dependent upon their being family members of that person—

(a) the requirement for that person to have sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence shall only be satisfied if his

resources and those of the family members are sufficient to avoid him and the family members becoming such a burden;

(b) the requirement for that person to have comprehensive sickness insurance cover in the United Kingdom shall only be satisfied if he and his family members have such cover.

(3) For the purposes of paragraph (1)(d), where family members of the person concerned reside in the United Kingdom and their right to reside is dependent upon their being family members of that person, the requirement for that person to assure the Secretary of State that he has sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence shall only be satisfied if he assures the Secretary of State that his resources and those of the family members are sufficient to avoid him and the family members becoming such a burden.

(4) For the purposes of paragraphs (1)(c) and (d) and paragraphs (2) and (3), the resources of the person concerned and, where applicable, any family members, are to be regarded as sufficient if they exceed the maximum level of resources which a United Kingdom national and his family members may possess if he is to become eligible for social assistance under the United Kingdom benefit system.

“Worker or self-employed person who has ceased activity”

5. (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 twelve months prior to the termination; and

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

(3) A person satisfies the conditions in this paragraph if—

(a) he terminates his activity in the United Kingdom as a worker or self-employed person as a result of a permanent incapacity to work; and

(b) either—

(i) he resided in the United Kingdom continuously for more than two years prior to the termination; or

(ii) the incapacity is the result of an accident at work or an occupational disease that entitles him to a pension payable in full or in part by an institution in the United Kingdom.

(4) A person satisfies the conditions in this paragraph if—

(a) he is active as a worker or self-employed person in an EEA State but retains his place of residence in the United Kingdom, to which he returns as a rule at least once a week; and

(b) prior to becoming so active in that EEA State, he had been continuously resident and continuously active as a worker or self-employed person in the United Kingdom for at least three years.

(5) A person who satisfies the condition in paragraph (4)(a) but not the condition in paragraph (4)(b) shall, for the purposes of paragraphs (2) and (3), be treated as being active and resident in the United Kingdom during any period in which he is working or self-employed in the EEA State.

(6) The conditions in paragraphs (2) and (3) as to length of residence and activity as a worker or self-employed person shall not apply in relation to a person whose spouse or civil partner is a United Kingdom national.

(7) For the purposes of this regulation—

(a) periods of inactivity for reasons not of the person's own making;

(b) periods of inactivity due to illness or accident; and

(c) in the case of a worker, periods of involuntary unemployment duly recorded by the relevant employment office,

shall be treated as periods of activity as a worker or self-employed person, as the case may be.

"Qualified person"

6. (1) In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as—

(a) a jobseeker;

(b) a worker;

(c) a self-employed person;

(d) a self-sufficient person; or

(e) a student.

(2) A person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if—

(a) he is temporarily unable to work as the result of an illness or accident;

(b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom, provided that he has registered as a jobseeker with the relevant employment office and—

(i) he was employed for one year or more before becoming unemployed;

(ii) he has been unemployed for no more than six months; or

(iii) he can provide evidence that he is seeking employment in the United Kingdom and has a genuine chance of being engaged;

(c) he is involuntarily unemployed and has embarked on vocational training; or

(d) he has voluntarily ceased working and embarked on vocational training that is related to his previous employment.

(3) A person who is no longer in self-employment shall not cease to be treated as a self-employed person for the purpose of paragraph (1)(c) if he is temporarily unable to pursue his activity as a self-employed person as the result of an illness or accident.

(4) For the purpose of paragraph (1)(a), "jobseeker" means a person who enters the United Kingdom in order to seek employment and can provide evidence that he is seeking employment and has a genuine chance of being engaged.

…"

One of the entirely new provisions inserted by the 2012 Amendment Regulations is regulation 15A:

"15A. Derivative right of residence

(1) A person ("P") who is not entitled to reside in the United Kingdom as a result of any other provision of these Regulations and who satisfies the criteria in paragraph (2), (3), (4) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.

(2) P satisfies the criteria in this paragraph if—

(a) P is the primary carer of an EEA national ("the relevant EEA national"); and

(b) the relevant EEA national—

(i) is under the age of 18;

(ii) is residing in the United Kingdom as a self-sufficient person; and

(iii) would be unable to remain in the United Kingdom if P were required to leave.

(3) P satisfies the criteria in this paragraph if—

(a) P is the child of an EEA national ("the EEA national parent");

(b) P resided in the United Kingdom at a time when the EEA national parent was residing in the United Kingdom as a worker; and

(c) P is in education in the United Kingdom and was in education there at a time when the EEA national parent was in the United Kingdom.

(4) P satisfies the criteria in this paragraph if—

(a) P is the primary carer of a person meeting the criteria in paragraph (3) ("the relevant person"); and

(b) the relevant person would be unable to continue to be educated in the United Kingdom if P were required to leave.

(5) P satisfies the criteria in this paragraph if—

(a) P is under the age of 18;

(b) P's primary carer is entitled to a derivative right to reside in the United Kingdom by virtue of paragraph (2) or (4);

(c) P does not have leave to enter, or remain in, the United Kingdom; and

(d) requiring P to leave the United Kingdom would prevent P's primary carer from residing in the United Kingdom.

(6) For the purpose of this regulation—

(a) "education" excludes nursery education; and

(b) "worker" does not include a jobseeker or a person who falls to be regarded as a worker by virtue of regulation 6(2).

(7) P is to be regarded as a "primary carer" of another person if

(a) P is a direct relative or a legal guardian of that person; and

(b) P—

(i) is the person who has primary responsibility for that person's care; or

(ii) shares equally the responsibility for that person's care with one other person who is not entitled to reside in the United Kingdom as a result of any other provision of these Regulations and who does not have leave to enter or remain.

(8) P will not be regarded as having responsibility for a person's care for the purpose of paragraph (7) on the sole basis of a financial contribution towards that person's care.

(9) A person who otherwise satisfies the criteria in paragraph (2), (3), (4) or (5) will not be entitled to a derivative right to reside in the United Kingdom where the Secretary of State has made a decision under regulation 19(3)(b), 20(1) or 20A(1).".

C. Article 12, Regulation 1612/68 (now Article 10 of Regulation 492/2011)

This Article provides:

"The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that state's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that state, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions".