Upper Tribunal

(Immigration and Asylum Chamber)

Weldemichael and another (St Prix [2014] EUECJ C-507/12; effect) [2015] UKUT 00540 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 February 2015	....

Before

UPPER TRIBUNAL JUDGE STOREY

UPPER TRIBUNAL JUDGE REEDS

UPPER TRIBUNAL JUDGE RINTOUL

Between

MIZAN MAHDER WELDEMICHAEL

GEORGE ODIJIE OBULOR

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

AIRE CENTRE

Intervener

Representation :

For the First Appellant: Ms O Umoh-Abudu, Solicitor

For the Second Appellant: no appearance or representation

For the Intervener: Mr A Berry, Counsel, instructed by the AIRE Centre

For the Respondent: Ms J Smyth Counsel, instructed by the Treasury Solicitor

DECISION AND REASONS

An EEA national woman will retain continuity of residence for the purposes of the Immigration (European Economic Area) Regulations 2006 (the 2006 EEA Regulations) for a period in which she was absent from working or job-seeking owing to the physical constraints of the late stages of pregnancy and the aftermath of childbirth if, in line with the decision of the CJEU in **Jessy St Prix** :

(a)

at the beginning of the relevant period she was either a worker or seeking employment;

(b)
the relevant period commenced no more than 11 weeks before the expected date of confinement (absent cogent evidence to the contrary that the woman was physically constrained from working or seeking work);

(c)
the relevant period did not extend beyond 52 weeks; and,

(d)
she returned to work.

So long as these requirements are met, there will be no breach of the continuity of residence for the purposes of regulation 15. Time spent in the United Kingdom during such periods counts for the purposes of acquiring permanent residence.

1.
These appeals have been heard together as they raise similar issues regarding the interpretation and applicability of **Jessy St Prix v DWP** [2014] CJEU C-507/12 (hereafter **St Prix**). As the parties agreed, the appeals are concerned with the continuity of residence for the purposes of acquiring permanent residence under the immigration (European Economic Area) Regulations 2006 (“the EEA Regulations”), not entitlement to benefits. In both appeals, whether or not there has been lawful residence for the required continuous five year period turns (to a greater or lesser extent) on how time spent out of employment due to the relevant EU national’s pregnancy is characterised.

2.
We are aware that the Administrative Appeals Chamber of the Upper Tribunal has also been considering the impact of **St Prix** in appeals CIS/204/2013, CIS/1288/2012, CH/1312/2013 & CH/1440/2013.

The Appellants

3.
Ms Weldemichael, the First Appellant, is a citizen of the Netherlands born on 15 December 1979 who entered the United Kingdom in February 2006. In June/July 2012 she applied to the respondent for a residence card as confirmation of her right of permanent residence. That application was refused 16 January 2013, and her appeal against that decision was dismissed by the First-tier Tribunal in a determination promulgated on 11 May 2013. Permission to appeal to the Upper Tribunal was granted on 10 July 2013.

4.
Mr Obulor, the Second Appellant, is a citizen of Nigeria. On 4 November 2006 he married Ms Jurgita Pocuite, a citizen of Lithuania who has been resident in the United Kingdom since 5 May 2004. On 30 November 2012 he applied for a residence card as confirmation of his right of permanent residence. That application was refused on 15 April 2013, and his appeal against that decision was dismissed by the First-tier Tribunal in a determination promulgated on 25 October 2013. Permission to appeal to the Upper Tribunal was granted on 17 December 2013

5.

Subsequent to the grants of permission, there have been a number of case management hearings, and directions issued. In addition, permission was granted to the AIRE centre to intervene. It was, however, only on the morning of the hearing that Mr Obulor let it be known that he would not be attending for personal reasons; he confirmed to Court staff that he was content for the matter to proceed in his absence. With our agreement, and without demur from Ms Smyth, he submitted additional material to which we refer below.

Preliminary Matter – withdrawal of the respondent's concession in Obulor

6.
As a preliminary issue, Ms Smyth sought permission to withdraw a concession made before the First-tier Tribunal in Mr Obulor's appeal that Ms Jociute had been working/exercising Treaty Rights between 2004 and 2008, it being submitted that it was open to us to do so, there being no prejudice to the appellant.

7.
In the circumstances of his non-attendance, we deferred consideration of that matter, and it is dealt with below.

Legislative framework

8.
The EEA Regulations provided, as at the date of decision in these appeals and as far as is relevant, as follows:

6.— "Qualified person" [1]

(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) Subject to regulation 7A (4) , 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.

15.— Permanent right of residence

(1) The following persons shall acquire the right to reside in the United Kingdom permanently—

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

(c) a worker or self-employed person who has ceased activity;

(d) the family member of a worker or self-employed person who has ceased activity;

(e) a person who was the family member of a worker or self-employed person where—

(i) the worker or self-employed person has died;

(ii) the family member resided with him immediately before his death; and

(iii) the worker or self-employed person had resided continuously in the United Kingdom for at least the two years immediately before his death or the death was the result of an accident at work or an occupational disease;

(f) a person who—

(i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and

(ii) was, at the end of that period, a family member who has retained the right of residence.

...

3.— Continuity of residence

(1) This regulation applies for the purpose of calculating periods of continuous residence in the United Kingdom under regulation 5(1) and regulation 15.

(2) Continuity of residence is not affected by—

(a) periods of absence from the United Kingdom which do not exceed six months in total in any year;

(b) periods of absence from the United Kingdom on military service; or

(c) any one absence from the United Kingdom not exceeding twelve months for an important reason such as pregnancy and childbirth, serious illness, study or vocational training or an overseas posting.

(3) But continuity of residence is broken if a person is removed from the United Kingdom under these Regulations

9.
Given that it is argued that the EEA Regulations do not, in these cases (and more particularly in the light of **St Prix** reflect the provisions of European Law, we consider that these too must be set out.

10.
The relevant provisions of European Union law are article 45 of the TFEU and the Directive 2004/38/EC ("the Citizenship Directive"). Article 45 enshrines the principle of freedom of movement for workers and requires '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'. Neither article 45 TFEU nor the Citizenship Directive defines 'worker'.

11.
The recitals to the Citizenship Directive provide:

(1) 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.

(2) 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

...

(9) Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice.

(17) 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.

12.
The Citizenship Directive provides at Article 1(a):

This Directive lays down:

(a) 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 7 states:

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 ...

...

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 12 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.

Articles 16(1) and (3) of the same directive provide:

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. ...

...

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.

Facts as agreed in Weldemicheal

13.
Ms Weldemichael arrived in the United Kingdom in February 2006. Between 19 October 2006 and 6 September 2007 she was in receipt of Income-based Job-seeker's Allowance ("JSA (IB)"). From 3 September 2007 until 10 April 2009 she was employed first by "Language Matters" then "S Three". She was made redundant from S Three and from 19 April 2009 until 9 August 2009 she was in receipt of JSA (IB). From that point, as she was pregnant, she claimed Maternity Allowance until 8 May 2010; her son was born on 2 November 2009. Once she was no longer in receipt of Maternity Allowance, she then claimed JSA from 5 May 2010 until 30 August 2011, the date on which she started work. Ms Weldemichael ceased employment on 9 April 2012.

14.
The parties agree that Ms Weldemichael was residing in the United Kingdom as a qualified person under the EEA Regulations:

(a)
From 19/10/06 to 6/09/07 as a job-seeker under reg. 6 (1) (a);

(b)
From 3/09/07 to 10/04/09 as a worker under reg. 6 (1)(b);

(c)
From 10/04/09 to 9/08/09 as a “retained worker” under reg. 6 (2);

(d)
From 05/05/10 to 30/08/11 as a jobseeker under regs. 6(5) and (6); and

(e)
From 30/08/11 to 09/04/12 as a worker under reg 6 (1) (b)

Discussion

15.
The parties and the intervener accept, the light of the decision of the CJEU in **St Prix,** that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of ‘worker’ within the meaning of article 45, provided she returns to work or finds another job within a reasonable period after the birth of her child. Where they differ is in the requirements that must be met at the end of the period, how long it can last; and, whether lawful residence accrued during the period of not working or seeking employment is to be taken into account in the acquisition of permanent residence.

16.
The issues can, we consider, be identified as follows:-

(a)
What status must a woman have at the beginning of a reasonable period of absence of work (or seeking work), owing to the physical constraints of the late stages of pregnancy?

(b)
When does the reasonable period begin?

(c)
When does the reasonable period end?

(d)
What conditions must the woman meet at the end of the reasonable period in order to benefit from it?

17.
To answer these questions requires consideration of how the judgment in **St Prix** is to be interpreted. Much of the argument and submissions received relates to this issue and we therefore attach a copy. We turn, therefore to that decision but not without noting that the parties appeared to proceed on the basis that the ruling requires there to be a period of fixed duration applicable in all cases, albeit that they differed on its lengths and other possible criteria for its application. The validity of that assumption is a matter on which we will expand upon below.

18.
We consider that the best starting point for our analysis of **St Prix** is the conclusion at paragraph 47:

47 In the light of all the foregoing considerations, the answer to the questions referred for a preliminary ruling by the referring court is that Article 45 TFEU must be interpreted as meaning that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of

pregnancy and the aftermath of childbirth retains the status of ‘worker’, within the meaning of that article, provided she returns to work or finds another job within a reasonable period after the birth of her child.

19.
We observe that after the CJEU handed down its decision, the appeal was settled by consent and so did not come before the Supreme Court again. The CJEU had, however, assumed that it would – see paragraph [42]:

42 In order to determine whether the period that has elapsed between childbirth and starting work again may be regarded as reasonable, the national court concerned should take account of all the specific circumstances of the case in the main proceedings and the applicable national rules on the duration of maternity leave, in accordance with Article 8 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1)

20.
It is readily apparent on the basis of this reasoning (and uncontroversial) that in order to qualify for entry into the protected period identified in **St Prix** , a woman must (a) either be a worker or seeking work; and (b) have ceased work or looking for work because of the physical constraints of the late stages of pregnancy.

21.
We do not consider that it is necessary to undertake a detailed analysis of the meaning of “worker” or “seeking work”. There is a substantial body of case law on the subject. We summarise the jurisprudence as follows:-

(i)
the term ‘worker’ within article 45 covers, to a greater or lesser extent, not only actual workers but also:

(1)
those entering a state for the first time to seek employment (‘first-time’ job seekers’) (see **Antonissen** [1997] ECR 1-441, **AG and others (EEA-jobseeker-self-sufficient person-proof) Germany** [2007] UKAIT 00075 and **Be gum (EEA – worker – jobseeker) Pakistan** [2011] UKUT 00275(IAC));

(2)
those who have had a job and are again seeking work (‘second-time job seekers’), (see 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); (**Shabani (EEA - jobseekers; nursery education)** [2013] UKUT 315 (IAC)).

(3)
vocational or occupational trainees (see **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); (see **FMB (EEA reg 6(2)(a) – ‘temporarily unable to work’) Uganda** [2010] UKUT 447 (IAC));

(4)
injured and retired workers (**FMB (Uganda)** supra); and,

(5)
women who, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth, give up work or job-seeking, provided they return to work or find another job within a reasonable period after the birth of her child (**St Prix**);

(6)
The amount of time given to jobseekers 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:-

(a) that he or she is continuing to seek employment (**Shabani** , **AG & Others** ; and,

(b) has a genuine chance of being employed (**Antonissen** ; **EC Commission v Belgium** Case C-344/95 [1997] 2 CMLR 187).

Period prior to birth

22.
It is sensible to analyse first what period of absence from employment or seeking employment prior to the expected date of confinement ("EDC") is permissible. It was not submitted that in any individual case, a woman need prove that she gave up work due to the physical constraints of the late stages of childbirth. It was common ground that from 11 weeks before "EDC a woman cannot be expected to work, that timing being fixed, in order, as a matter of policy to protect pregnant women." The period of 11 weeks is established by domestic law in order to give effect to " Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding" ("Directive 92/85/EC"). I n any event it is not clear that it was part of the remit of the CJEU in **St Prix** to give guidance as to how a pre-childbirth absence from work was to be assessed.

23.
We do not rule out that the physical constraints of pregnancy may require ceasing work or seeking employment before 11 weeks if, for example, it was a multiple pregnancy or there were particular requirements of the work in question. That would, however need to be proved by cogent evidence.

Period post childbirth

24.
We next consider how long a period after childbirth is permissible, and what other criteria must be satisfied in order for a woman to benefit from what for ease we refer to as a "St Prix Extension" or SPE.

25.
Ms Smyth for the respondent submits that the CJEU simply interpreted "worker" within article 45 TFEU so as to entail that women who give up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retain the status of 'worker', within the meaning of that article, provided they return to work or find another job within a reasonable period after the birth of their child. She submits that the Court did not seek to alter the meaning of article 7 (3) of the Citizenship Directive. We do not accept that is so; it is clear from [47] of

St Prix that the Court refers to a woman who has ceased work (or looking for work) as retaining the status of a worker following the wording of article 7 (3).

26.

This is potentially important as the transition on moving from a SPE to Job seeking is thus from one "retained" status to another "retained status", not from worker to a retained status.

27.

It follows that, in any event, **St Prix** establishes that a woman who takes time off retains her status as a worker for a period, subject to certain conditions. By definition, a period must have a beginning and an end.

28.

Ms Smyth submitted that the end point must be when the woman returns to work and that returning to work is a condition precedent to acquiring the benefit of a "St Prix Period". She accepted that it followed from that requirement, that entitlement to the period could only be determined ex post facto.

29.

Ms Smyth further submitted that the permissible period could only be 26 weeks in length; 11 weeks before the expected date of birth, and 15 weeks thereafter, the relevant period to be taken into account being thereby in line with entitlement to Maternity Allowance.

30.

Mr Berry submitted that, properly understood, the decision of the CJEU does not require a woman to return to work as a condition of entitlement to a SPE, nor can entitlement be established only post facto. He submitted that a woman who returns to job-seeking is entitled to benefit from the SPE.

31.

Mr Berry submitted that the duration of the SPE is not limited to 26 weeks as submitted by the respondent, that being the period during which Income Support may be payable, but is 52 weeks, that being the period of 26 weeks Ordinary Maternity Leave ("OML") and 26 weeks Additional Maternity Leave ("AML") permitted pursuant to sections 71 and 73 respectively of the Employment Rights Act 1996.

32.

We pause to recall that at [42] in **St Prix** the CJEU held that in assessing what is reasonable involves a consideration of other factors in addition to the relevant national maternity leave provisions. We are not assessing whether any legislative provision is compatible with EU law; the United Kingdom has not yet amended the EEA Regulations to give effect to the decision in **St Prix** .

33.

Ms Smyth submitted that in order to be entitled to an SPE, a woman must make a return to employment and it is that which retrospectively regularises her position. The corollary of that latter proposition is that viewed from a standpoint during the SPE as opposed to after it, a woman does not have the status of a worker. In **St Prix** it was not in doubt that the appellant had returned to work; so too did Ms Weldemichael, but not Ms Pociute, the wife of Mr Obulor. The argument in that case is that her status as a worker continued to a point during her SPE where she acquired the permanent right of residence.

34.

Both of Ms Smyth's propositions require careful analysis and we turn first to the issue of whether a return to work is a condition of benefiting from an SPE.

35.
We accept as we must that the CJEU does refer to the SPE ending when the woman finds a job although they expressly held a woman need only be seeking work at the beginning of the period. We recall the specific facts of **St Prix** where it was not in question that Ms St Prix had returned to work shortly after the birth of her child. The Court was considering whether her continuity of residence had been broken. The specific questions put to the CJEU were answered in the context of whether or not a woman who had ceased employment (or actively seeking employment) due to the physical problems arising from the late stages of pregnancy and the aftermath of childbirth, could be seen to have left the employment market. The Court was not asked to consider what her status had been when assessed at any particular point during her absence from work – that is a matter to which we turn later.

36.
The CJEU clearly envisaged (see paragraph [42]) that there would be an extensive, fact sensitive evaluation of whether a woman has left the employment market. Viewed in this context, a return to work within a reasonable period is a fact establishing that she has not left the employment market.

37.
The CJEU held at [41] and [42]:

41 The fact that she was not actually available on the employment market of the host Member State for a few months does not mean that she has ceased to belong to that market during that period, provided she returns to work or finds another job within a reasonable period after confinement (see, by analogy, Orfanopoulos and Oliveri , C-482/01 and C-493/01, EU:C:2004:262, paragraph 50)

42 In order to determine whether the period that has elapsed between childbirth and starting work again may be regarded as reasonable, the national court concerned should take account of all the specific circumstances of the case in the main proceedings and the applicable national rules on the duration of maternity leave, in accordance with Article 8 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1)

38.
In **Orfanopoulos & Oliveri** [2004] EUECJ C-481/01 as cited by the CJEU in **St Prix** [41], the CJEU stated at [50]:

Moreover, in respect more particularly of prisoners who were employed before their imprisonment, the fact that the person concerned was not available on the employment market during such imprisonment does not mean, as a general rule, that he did not continue to be duly registered as belonging to the labour force of the host Member State during that period, provided that he actually finds another job within a reasonable time after his release (see, to that effect, Case C-340/97 Nazli [2000] ECR I-957 , paragraph 40).

39.
This judgment predates the Citizenship Directive, but the fact that it is cited is illustrative of the CJEU's approach in **St Prix** which proceeds from the primacy of article 45 (Ex article 39). The Court

appears to take the view that the protections set out in article 7 (3) are an articulation or distillation of the jurisprudence of the court on what is required to give effect to the right of free movement of workers. It is to be noted also that recital (9) is indicative that the Directive is not a complete codification. It would thus appear, that they did not consider that the list within article 7 (3) is exhaustive. That analysis is, we consider, consistent with what the Court observed at [31]-[33]:

31 However, it does not follow from either Article 7 of Directive 2004/38, considered as a whole, or from the other provisions of that directive, that, in such circumstances, a citizen of the Union who does not fulfil the conditions laid down in that article is, therefore, systematically deprived of the status of 'worker', within the meaning of Article 45 TFEU.

32 The codification, sought by the directive, of the instruments of EU law existing prior to that directive, which expressly seeks to facilitate the exercise of the rights of Union citizens to move and reside freely within the territory of the Member States, cannot, by itself, limit the scope of the concept of worker within the meaning of the FEU Treaty.

33 In that regard, it must be noted that, according to the settled case-law of the Court, the concept of 'worker', within the meaning of Article 45 TFEU, in so far as it defines the scope of a fundamental freedom provided for by the FEU Treaty, must be interpreted broadly (see, to that effect, N. , C-46/12, EU: C:2013:97, paragraph 39 and the case-law cited).

40.
We consider that the language used by the CJEU in **St Prix** echoes the manner in which it has enunciated principles relating to jobseekers in **Antonissen** at [21]:

21. In the absence of a Community provision prescribing the periods during which Community nationals seeking employment in a Member State may stay there, a period of six months, such as that is laid down in the national legislation at issue in the main proceedings, does not appear in principle to be insufficient to enable the persons concerned to apprise themselves, in the host Member State, of offers of employment corresponding to their occupational qualifications and take, where appropriate, the necessary steps in order to be engaged and, therefore, does not jeopardise the effectiveness of the principles of free movement. However, if after the expiry of that period of the person concerned provides evidence that he is continuing to seek employment and that he has a genuine chances of being engaged, he cannot be required to leave the territory of the Member State.

41.
It is apparent from this that the underlying issue identified by the CJEU was whether a woman has left the employment market, an issue which would appear primarily to be evidential. They considered that if she has not, then her continuity of status as a worker has not been broken. The questions that the CJEU considers the national court concerned should consider [42] must be viewed in that context. The exercise to be undertaken is thus, as the court considered, an evaluative process, albeit one which is relatively closely circumscribed given the reference to "physical constraints of the late stages of pregnancy", the "aftermath of childbirth" and the proviso of a return to work. It is a narrower exercise than assessing job-seeking although there is, we consider, no reason in principle why the approach in assessing the reasonableness of an SPE should not be analogous to or analysed in the same way in which job-seeking is assessed; finding a job is indicative that prior to that point, an individual seeking work had a genuine chance of being engaged but it is not determinative.

42.

That observation is subject to this important caveat: given that the purpose of the maternity leave period is to provide protection to women, it is difficult (absent evidence of a clear intention of the part of the woman not return to work) to envisage that it would be reasonable to expect a woman to have returned to work before the end of the relevant maternity leave.

Length of SPE period

43.
We consider next the length of the SPE period. The principle difference between the parties over whether the total length should be 26 weeks, in line with social security provision, as submitted by the respondent, or 52 weeks on analogy with the length of maternity leave a worker is permitted to take by statute, as submitted by the appellants and the intervener.

44.
While we bear in mind Ms Smyth's submissions on the differences between OML and AML, we consider that as a woman is entitled (absent a few minor exceptions) to return to the same employer after either OML or AML, the difference being that she can return to the same particular job after the former, that there is no difference in substance in their provisions for the assessment of a continuity of an employment relationship, the substance of which remains unchanged although its precise terms may vary.

45.
We note from the material provided to us that maternity provision varies widely across the EU; in most cases it is substantially less than the 52 weeks allowed in the United Kingdom although the period before birth shows less variance. We are aware that it can be argued that such a wide divergence post-birth will mean that the SPE will vary substantially across the EU but that is nothing new; that variance in the protection of women who have recently given birth already exists.

46.
Ms Smyth relies in part on the opinion of Advocate-General Wahl in **St Prix** in particular from paragraph 37 onwards, in support of the view that the SPE should be limited to those periods where a woman cannot be compelled to look for work. It is, however, evident that the Court did not used the language of compulsion in formulating its test, preferring to emphasis the law on maternity leave rather than the relevant social security legislation referred to by the Advocate-General. We consider that to be a conscious preference.

47.
We would observe also, as Mr Berry submitted, that it is evident that a lone parent is not compelled to return to seeking employment in order to qualify for benefits, for a substantial period after the 26 week period in which maternity allowance is paid.

48.
It is submitted by Ms Smyth that the OML or the period of 26 weeks permitted under social security legislation is sufficient to comply with Directive 92/85/EC, and to protect women who are in the aftermath of childbirth. She did not, however, direct us to any relevant policy or statement to that effect, and if correct it would, in all the circumstances, be difficult to understand the purpose of AML. We note, however, that the phrase "aftermath of childbirth" appears to cover a wider set of circumstances than "the physical constraints of pregnancy"; the latter in the use of "physical" would, apparently, exclude psychological problems.

49.
Subject to that general observation, we consider that what is "reasonable" requires an individual consideration of a woman's circumstances, taking into account additional factors which may render a longer period between the date of birth and the commencement of work reasonable. The CJEU did not indicate that any of the factors they identified should be determinative, or of necessarily holding more weight. That said, the protection of women workers is a thread of concern running through the decision of the CJEU, and it is thus difficult to hold that any reasonable period could be less than that laid down by domestic law in conformity with Directive 92/85/EC.

50.
We do note, in reaching this conclusion, that Mr Berry submitted that there is no bright line identified by the CJEU. While we have some sympathy with that submission, we consider that the scope for variance in assessing what is reasonable is constrained significantly by the reference to Directive 92/85/EC and the consequent minimum length thereby indicated. There is also the express reference to finding work.

51.
We consider that it must not be forgotten that although pregnancy is not an illness, illness during pregnancy or afterwards which prevents a woman from working, or job-seeking, may engage regulation 6 (2) of the EEA Regulations in any event.

Status during the SPE

52.
The CJEU did not directly address the issue of a woman’s status during the SPE. As noted above, the respondent submits that a return to work is a condition necessary to establishing an SPE, the continuity of status as a worker is granted only retrospectively.

53.
That proposition does not raise significant problems when the evaluation of whether an SPE has been established is carried out retrospectively once there has been a return to work, but it does raise a significant difficulty when the evaluation has to be carried out at a date within an SPE. That is because, if status as a worker is only reinstated retrospectively at the end of the SPE when a woman restarts employment, it cannot be ascertained at any point prior to that event, that a woman is entitled to the SPE. She could not thus, during a period of several months, know whether she was here lawfully or not, thus placing her in precisely the sort of precarious circumstances the CJEU sought to prevent by their ruling - see paragraph [44]:

44. As the Commission contends, a Union citizen would be deterred from exercising her right to freedom of movement if, in the event that she was pregnant in the host State and gave up work as a result, if only for a short period, she risked losing her status as a worker in that State.

54.
If anything her situation would be even less certain as would be the position of her family. It could not be known whether any non-EEA members were here lawfully because their position may be dependent on the EEA national woman. The uncertainty that would flow from adopting the respondent’s position would, we consider, undermine significantly the effect of the decision of the CJEU and would introduce a substantial degree of legal uncertainty. Further, a woman who had arranged to take up employment again but was prevented from doing so on account of, for example, serious illness of a child or spouse, would on the respondent’s analysis be deprived of the period up to

that event, even if she (and her family) might, by then have accrued 5 years lawful residence under the EEA Regulations and thus acquired permanent residence, a status which cannot, under the EEA Regulations or the Citizenship Directive be lost except through two year’s absence or an expulsion decision.

55.
The proposition does not, we consider, derive any support from the decision of the CJEU; on the contrary. As well as what the Court noted at [44] and [45], they observed [33] that the concept of worker is to be interpreted widely and while the return to work is emphasised, it is in the context of an analogy with **Orfanopoulos & Oliveri** as discussed above. Further it would follow from Ms Smyth’s proposition that a woman would cease to have the status of a worker the minute she stopped work which is inconsistent with the approach of the court as expressed at [41].

56.
Drawing these strands together, we consider that if an evaluation of a woman’s status is to be carried out at a point during a potential SPE, so long as it is shown that she ceased work or looking for work owing to the physical constraints of the late stage of pregnancy, in effect, 11 weeks or less before the EDC, then there is a presumption that she has not left the employment market. That presumption could be rebutted by clear evidence of an intention not to return. If there is no return to work within the year starting 11 weeks before EDC, that is likely to be an indication that there had been no intention to return although account would need to be taken to evaluate attempts to find work in that period. Further, a woman may well have intended to return to work, but due to a supervening event such as serious illness or an accident, have been unable to do so. While it may well be that she has left the employment market as a result, it does not mean that she did so, and her continuity of residence ceased at the moment she ceased work or looking for work; her intentions may have changed much later, and in such circumstances, a careful fact-sensitive analysis is required.

57.
Ms Smyth submitted that only time accrued under article 7 of the Citizenship Directive could be counted when assessing whether permanent residence has been acquired and that thus time spent during an SPE could not be taken into account.

58.
We do not consider that time spent by a woman during a SPE period can be discounted in assessing continuity of residence. We note that there is no indication that other, temporary absences from work as identified in regulations 6 to 7 (and indeed by article 7) interrupt continuity of working; such a restriction could only apply to women and would thus be inherently discriminatory. Further, it presupposes that article 7 contains a closed list which at [31]-[33] of the judgment of the Court in **St Prix** indicates it is not.

59.
Drawing these conclusions together, we consider that the questions we posed at the outset can be answered as follows:-

A woman will retain continuity of residence for the purposes of the 2006 EEA Regulations for a period in which she was absent from working or job-seeking if, in line with the decision of the CJEU in **Jessy St Prix** :

(a)
at the beginning of the relevant period she was either a worker or seeking employment;

(b)
the relevant period commenced no more than 11 weeks before the expected date of confinement (absent cogent evidence to the contrary that the woman was physically constrained from working or seeking work);

(c)
the relevant period did not extend beyond 52 weeks; and,

(d)
she returned to work,

The individual appeals

60.
We now turn to applying our conclusions to the facts of the appeals

Ms Weldemichael

61.
Ms Umoh-Abudu submitted that Ms Weldemichael had demonstrated that, through a combination of periods spent as a worker, as a job-seeker, and when in receipt of maternity benefit, she had resided in the United Kingdom lawfully in accordance with the EEA Regulations for a continuous period in excess of 5 years and was thus entitled to a residence card as confirmation of this. It was submitted the maternity period did not interrupt her continuity of residence as her entitlement to draw on the benefit is based on her eligibility for that due to being a worker.

62.
It is further submitted that, despite being in receipt of benefits, Ms Weldemichael had not been an unreasonable burden on public funds, relying on **Teixeira v Lambeth** [2010] EUECJ C-480/08 as she had been legitimately entitled to the allowances, maternity allowance not falling within the definition of “public funds”.

63.
Ms Umoh-Abudu further submitted that it is inconsistent for the United Kingdom to conclude that the appellant is entitled to social assistance as a job-seeker which requires her to show that she is genuinely seeking and is available for work, yet to deny her rights under the EEA Regulations for doing so.

64.
We are not persuaded that the payment of benefits to Ms Weldemichael which, as here, are paid partly on the basis of prior contributions is of assistance in determining whether, as a matter of EU law, she was lawfully resident.

65.
On the facts of Ms Weldemichael's case, as set out above, she did not return to work until well over a year after the birth of a child. Even assuming that the relevant maternity period is 12 months (including the 11 weeks before EDC), we are not satisfied that this could be seen as a reasonable period. Assuming the start of an SPE to be 11 weeks before 20 November 2009, then the appellant would require an SPE nearly 2 years to be accepted in order to show a continuity of residence. While we note the submissions made on her behalf, we are not persuaded that there are reasons of substance sufficient to explain why such long period before returning to work should be accepted.

66.
It follows from the above that Ms Weldemichael's appeal was properly dismissed and the decision of the First-tier Tribunal did not involve the making of an error of law.

Mr Obulor

67.
Mr Obulor's case is that his wife, Ms Jociute, was, for the purposes of the Citizenship Directive [2] , lawfully resident as a worker from her arrival here on 5 May 2004 until 21 November 2008. When the appeal came before the First-tier Tribunal, Judge Broe having summarised the evidence at [9] to [13] noted the following concession by the respondent:

14. For the Respondent, Mr Pennington-Benton said that there was no dispute that the Appellant's wife had been exercising treaty rights in this country from 2004 to 2008. She had not however been doing so thereafter.

68.
Judge Broe found:

17. There is little if any dispute as to the factual background to this matter. The Appellant is… married to a Lithuanian citizen. She came to this country on 5 May 2004 and the Respondent accepts she was exercising treaty rights in this country until she left her job on 21 November 2008. She left work because she was pregnant. She had not worked since then…

69.
The respondent now submits on the basis of evidence submitted by Mr Obulor in response to directions that the concession had been made in error and seeks to withdraw it, it being noted that the material supplied to the First-tier Tribunal and subsequent evidence obtained from the Department for Work and Pensions demonstrates that:

a.
there is no documentary evidence to show that Ms Jociute earned any income in the Tax Year ending 5 April 2006;

b.
Ms Jociute received Maternity Allowance from June 2005 to December 2005 and Income Support from January 2006 until February 2007; and,

c.
Ms Jociute received Income Support from November 2007 until April 2014.

70.
As Ms Smyth accepted, whether we should permit the withdrawal of the concession is a matter for our discretion.

71.
In considering whether we should exercise our discretion, we note as a preliminary point that there has yet to be a determination of whether the decision of the First-tier Tribunal involved the making of an error of law. That is a matter which we consider must be determined first. A withdrawal of the factual concession is, in effect, a request for a reopening of the fact-finding exercise; that is generally not permissible absent a finding that the First-tier Tribunal's decision can be set aside on the basis of an error. We accept, following **E v SSHD** [2004] EWCA Civ 49, **R (Iran)** [2005] EWCA Civ 982 and

Ladd v Marshall [1954] EWCA Civ 1 that an error of fact can be an error of law, but the prerequisites for such a finding are not present here. While we do not rule out the possibility that the Upper Tribunal may permit a concession to be withdrawn at the stage of deciding whether there is a material error of law, it is difficult to see how that could be permitted, except possibly on an analogy with **Ladd v Marshall** principles.

72.
We find that whilst the First-tier Tribunal did err in law in finding that ceasing work due to pregnancy did interrupt the continuity of residence, given the decision in **St Prix** but that error made no material difference because, for the reasons we develop below, on the facts as found by Judge Broe, Mr Obulor would not have been able to show that his wife had exercised Treaty Rights for a continuous period of five years.

73.
That said, even assuming that Ms Jociute had been exercising Treaty Rights until 2008, she ceased working well before her second child was born in April 2009. While we accept that any SPE starts at 11 weeks before EDC, in this case Ms Jociute stopped work on 21 November 2008, over 20 weeks before the child was born. It is said that this was due to illness in the early to middle stages of pregnancy, and while a letter from her doctor to that effect has been produced, it was not before the First-tier Tribunal. In any event, it is lacking in any relevant detail. It does not give the dates between which she was unable to work, nor any proper indication of why that was so.

74.
In the circumstances, we are not persuaded that on the evidence before the First-tier Tribunal that there was any rational basis for concluding that the period Ms Jociute spent without employment between 21 November 2008 and the date 11 weeks before the birth of her second child was due to illness. We find that this period falls outside the scope of the ruling in **St Prix** . Further, there was insufficient evidence before the First-tier Tribunal to show that in that period she was otherwise entitled to be treated as a worker, given that the evidence indicated that she had given up work voluntarily. There was insufficient evidence before the First-tier Tribunal to show that she was not entitled to be treated as a worker by the provisions of article 7 of the Citizenship Directive or that she was seeking work. She did not therefore meet the qualifying criteria at the beginning of the period commencing 11 weeks period ending with the EDC and thus could not benefit from an SPE.

75.
As it is not in dispute that Ms Jociute had not returned to work, even on the basis of the concession made, her continuity of lawful residence ceased in November 2008, and she was not able to benefit from the decision in **St Prix** . Even if she were, there is still a substantial gap between her seeking work in November 2008 and the beginning of any applicable SPE. She ceased working almost 9 weeks before the date (11 weeks before the EDC) from which she would be entitled to maternity leave. Such a substantial extension to the period falls clearly outside what could be considered reasonable in the terms of the decision of the CJEU in **St Prix** .

76.
The appellant has, as we noted above, sought to adduce additional material which was not before the First-tier Tribunal. On that basis, it is not admissible on that ground alone. In addition to evidence of a third child born in 2014, we note also that much of it relates to Ms Jociute’s studies at Greenwich College from 2013 onwards. That could not assist in showing a continuity of residence in 2008 to

2009. Further the evidence of her studies is not, absent evidence of comprehensive sickness insurance, evidence of her being a Qualified Person; the evidence shows cover only from 2014.

77.
For these reasons, whilst we consider as explained above that Judge Broe misdirected himself in law as to whether Ms Jociute ceasing work due to pregnancy broke the continuity of lawful residence here, it was not capable of affecting the outcome of the appeal and so is not material. The decision must therefore stand.

78.
As no material error of law was found, it would not be apt to exercise our discretion to permit the respondent to withdraw the concession. As there is no further possibility of making further findings of fact it would be unfair to the appellant who would be unable to adduce further evidence.

79.
Accordingly, for these reasons, the decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it.

SUMMARY OF DECISIONS

1.
The decision of the First-tier Tribunal in dismissing Ms Weldemichael's appeal did not involve the making of an error of law and we uphold it.

2.
The decision of the First-tier Tribunal in dismissing Mr Obulor's appeal did not involve the making of an error of law and we uphold it.

Signed Date: 14 September 2015

Upper Tribunal Judge Rintoul

Appendix

JUDGMENT OF THE COURT (First Chamber)

19 June 2014 (*)

(Reference for a preliminary ruling - Article 45 TFEU - Directive 2004/38/EC - Article 7 - 'Worker' - Union citizen who gave up work because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth)

In Case C-507/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court of the United Kingdom, made by decision of 31 October 2012, received at the Court on 8 November 2012, in the proceedings

Jessy Saint Prix

v

Secretary of State for Work and Pensions,

intervening party:

AIRE Centre,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, A. Borg Barthet, E. Levits, M. Berger and S. Rodin, Judges,

Advocate General: N. Wahl,

Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 14 November 2013,

after considering the observations submitted on behalf of:

- Ms Saint Prix, by R. Drabble QC, instructed by M. Spencer, Solicitor,

- AIRE Centre, by J. Stratford QC, and M. Moriarty, Barrister, instructed by D. Das, Solicitor,

- the United Kingdom Government, by V. Kaye and A. Robinson, acting as Agents, assisted by B. Kennely and J. Coppel, Barristers,

- the Polish Government, by B. Majczyna and M. Szpunar, acting as Agents,

- the European Commission, by C. Tufvesson, and by J. Enegren and M. Wilderspin, acting as Agents,

- the EFTA Surveillance Authority, by X. Lewis, and by M. Moustakali and C. Howdle, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 December 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of ‘worker’ for the purposes of Article 45 TFEU and Article 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

2 The request has been made in the context of proceedings between Ms Saint Prix and the Secretary of State for Work and Pensions (‘the Secretary of State’) concerning the latter’s refusal to grant income support to Ms Saint Prix.

Legal context

EU law

3 Recitals 2 to 4 and 31 in the preamble to Directive 2004/38 read as follows:

‘(2) 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 [EC] Treaty.

(3) 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.

(4) With a view to remedying this sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right, there needs to be a single legislative act to amend Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [(OJ English Special Edition 1968(II), p. 475), as amended by Regulation (EEC) No 2434/92 of 27 July 1992 (OJ 1992 L 245, p. 1)], and to repeal the following acts: Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [(OJ Engish Special Edition 1968(II), p. 485)], Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [(OJ 1973 L 172, p. 14)], Council Directive 90/364/EEC of 28 June 1990 on the right of residence [(OJ 1990 L 180, p. 26)], Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [(OJ 1990 L 180, p. 28)] and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [(OJ 1993 L 317, p. 59)].

...

(31) This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation’.

4 Article 1(a) of Directive 2004/38 states:

‘This Directive lays down:

(a) 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’.

5 Article 7 of that directive, entitled ‘Right of residence for more than three months’, provides in paragraphs 1 and 3:

‘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 ...

...

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 12 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.'

6 Article 16(1) and (3) of the same directive provides:

'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. ...

...

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.'

United Kingdom law

7 The legislation which governs income support is the Social Security Contributions and Benefits Act 1992 and the Income Support (General) Regulations 1987.

8 Income support is a means-tested benefit granted to various categories of persons which include, by virtue of regulation 4ZA of those Regulations, in conjunction with paragraph 14(b) of Schedule IB thereto, women who are or have 'been pregnant but only for the period commencing 11 weeks before [their] expected week of confinement and ending 15 weeks after the date on which [their] pregnancy ends'.

9 The granting of income support requires, inter alia, according to section 124(l)(b) of the Social Security Contributions and Benefits Act 1992, that the income of the beneficiary should not exceed the prescribed 'applicable amount'. Where that amount is 'nil', no benefit is granted.

10 Under paragraph 17 of Schedule 7 to the Income Support (General) Regulations 1987, the applicable amount prescribed for a 'person from abroad' is 'nil'.

11 Regulation 21AA(1) of those regulations defines a 'person from abroad' as being 'a claimant who is not habitually resident in the United Kingdom …'.

12 According to regulation 21AA(2) of those regulations, to be considered as habitually resident in the United Kingdom, the income support claimant must have a 'right to reside' in that Member State.

13 According to regulation 21AA(4) of those regulations:

‘A claimant is not a person from abroad if he is -

(a) a worker for the purposes of [Directive 2004/38];

(b) a self-employed person for the purposes of that Directive;

(c) a person who retains a status referred to in sub-paragraph (a) or (b) pursuant to Article 7(3) of that Directive;

(d) a person who is a family member of a person referred to in sub-paragraph (a), (b) or (c) within the meaning of Article 2 of that Directive;

(e) a person who has a right to reside permanently in the United Kingdom by virtue of Article 17 of that Directive.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 Ms Saint Prix is a French national who entered the United Kingdom on 10 July 2006 where she worked, mainly as a teaching assistant, from 1 September 2006 until 1 August 2007. She then enrolled on a Post-Graduate Certificate in Education course at the University of London, the envisaged period of study being from 17 September 2007 until 27 June 2008.

15 During that period she became pregnant, with an expected date of confinement of 2 June 2008.

16 On 22 January 2008, hoping to find work in secondary schools, Ms Saint Prix registered with an employment agency and, on 1 February 2008, she withdrew from the course that she had been attending at the University of London. As no secondary school work was available, she took agency positions working in nursery schools. On 12 March 2008, when she was nearly six months pregnant, Ms Saint Prix stopped that work, however, on the grounds that the demands of caring for nursery school children had become too strenuous for her. She looked for a few days, without success, for work that was more suited to her pregnancy.

17 On 18 March 2008, that is, 11 weeks before her expected date of confinement, Ms Saint Prix made a claim for income support. As that claim was refused by the Secretary of State by decision of 4 May 2008, she brought an appeal before the First Tier Tribunal.

18 On 21 August 2008, namely three months after the premature birth of her child, Ms Saint Prix resumed work.

19 By decision of 4 September 2008, the First Tier Tribunal upheld her appeal. However, on 7 May 2010, the Upper Tribunal upheld the appeal brought by the Secretary of State against that decision. The Court of Appeal confirmed the decision of the Upper Tribunal and Ms Saint Prix then brought the matter before the referring court.

20 That court asks whether a pregnant woman who temporarily gives up work because of her pregnancy is to be considered a ‘worker’ for the purposes of the freedom of movement for workers as laid down in Article 45 TFEU and of the right of residence conferred by Article 7 of Directive 2004/38.

21 In that regard, the referring court states that neither Article 45 TFEU nor Article 7 of that directive defines ‘worker’.

22 The referring court thus considers, in essence, that whereas, when adopting that directive, the EU legislature intended to codify the existing legislation and case-law, it nevertheless did not intend to

exclude further development of the concept of ‘worker’ that takes into account situations not expressly considered when it was adopted. The Court may, therefore, taking into account special circumstances such as those characterising pregnancy and the immediate aftermath of childbirth, decide to extend this concept to pregnant women who give up work for a reasonable period.

23 In those circumstances the Supreme Court decided to stay the proceedings and to refer the following questions to the Court:

‘1. Is the right of residence conferred upon a “worker” in Article 7 of [Directive 2004/38] 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) [of that directive], or is [Article 7 of that directive] to be interpreted as not precluding the recognition of further persons who remain “workers” for this purpose?

2. (a) 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)?

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

Consideration of the questions referred

24 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether EU law, and in particular Article 45 TFEU and Article 7 of Directive 2004/38, are to be interpreted as meaning that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth, retains the status of ‘worker’ within the meaning of those articles.

25 In order to answer those questions, it should be stated at the outset that it is apparent from recitals 3 and 4 in the preamble to that directive that the aim of the directive is to remedy the sector-by-sector piecemeal approach to the primary and individual right of Union citizens to move and reside freely within the territory of the Member States, in order to facilitate the exercise of that right by providing a single legislative act codifying and revising the instruments of EU law which preceded that directive (see, to that effect, Ziolkowski and Szeja , C-424/10 and C-425/10, EU:C:2011:866 , paragraph 37).

26 In that regard, it is apparent from Article 1(a) of Directive 2004/38 that that directive is intended to set out the conditions governing the exercise of that right, which include, where residence is desired for a period of longer than three months, in particular the condition laid down in Article 7(1)(a) of that directive that Union citizens must be workers or self-employed persons in the host Member State (see, to that effect, Brey , C-140/12, EU:C:2013:565 , paragraph 53 and the case-law cited).

27 Article 7(3) of Directive 2004/38 provides that, for the purposes of paragraph 7(1)(a) of that directive, a Union citizen who is no longer a worker or self-employed person shall nevertheless retain the status of worker or self-employed person in specific cases, namely where he is temporarily unable to work as the result of an illness or accident, where, in certain situations, he is in involuntary unemployment, or where, under specified conditions, he embarks on vocational training.

28 However, Article 7(3) of Directive 2004/38 does not expressly envisage the case of a woman who is in a particular situation because of the physical constraints of the late stages of her pregnancy and the aftermath of childbirth.

29 In that regard, the Court has consistently held that pregnancy must be clearly distinguished from illness, in that pregnancy is not in any way comparable with a pathological condition (see to that effect, inter alia, Webb , C-32/93, EU:C:1994:300, paragraph 25 and the case-law cited).

30 It follows that a woman in the situation of Ms Saint Prix, who temporarily gives up work because of the late stages of her pregnancy and the aftermath of childbirth, cannot be regarded as a person temporarily unable to work as the result of an illness, in accordance with Article 7(3)(a) of Directive 2004/38.

31 However, it does not follow from either Article 7 of Directive 2004/38, considered as a whole, or from the other provisions of that directive, that, in such circumstances, a citizen of the Union who does not fulfil the conditions laid down in that article is, therefore, systematically deprived of the status of 'worker', within the meaning of Article 45 TFEU.

32 The codification, sought by the directive, of the instruments of EU law existing prior to that directive, which expressly seeks to facilitate the exercise of the rights of Union citizens to move and reside freely within the territory of the Member States, cannot, by itself, limit the scope of the concept of worker within the meaning of the FEU Treaty.

33 In that regard, it must be noted that, according to the settled case-law of the Court, the concept of 'worker', within the meaning of Article 45 TFEU, in so far as it defines the scope of a fundamental freedom provided for by the FEU Treaty, must be interpreted broadly (see, to that effect, N. , C-46/12, EU:C:2013:97 , paragraph 39 and the case-law cited).

34 Accordingly, the Court has held that any national of a Member State, irrespective of his place of residence and of his nationality, who has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of his residence falls within the scope of Article 45 TFEU (see, inter alia, Ritter-Coulais , C-152/03, EU:C:2006:123, paragraph 31, and Hartmann , C-212/05, EU:C:2007:437, paragraph 17).

35 The Court has thus also held that, in the context of Article 45 TFEU, a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration must be considered to be a worker. Once the employment relationship has ended, the person concerned, as a rule, loses the status of worker, although that status may produce certain effects after the relationship has ended, and a person who is genuinely seeking work must also be classified as a worker (Caves Krier Frères , C-379/11, EU:C:2012:798 , paragraph 26 and the case-law cited).

36 Consequently, and for the purposes of the present case, it must be pointed out 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 (see, inter alia, Antonissen , C-292/89, EU:C:1991:80, paragraph 13).

37 It follows that classification as a worker under Article 45 TFEU, and the rights deriving from such status, do not necessarily depend on the actual or continuing existence of an employment relationship (see, to that effect, Lair , 39/86, EU:C:1988:322, paragraphs 31 and 36).

38 In those circumstances, it cannot be argued, contrary to what the United Kingdom Government contends, that Article 7(3) of Directive 2004/38 lists exhaustively the circumstances in which a migrant worker who is no longer in an employment relationship may nevertheless continue to benefit from that status.

39 In the present case, it is clear from the order for reference, a finding not contested by the parties in the main proceeding, that Ms Saint Prix was employed in the territory of the United Kingdom before giving up work, less than three months before the birth of her child, because of the physical constraints of the late stages of pregnancy and the immediate aftermath of childbirth. She returned to work three months after the birth of her child, without having left the territory of that Member State during the period of interruption of her professional activity.

40 The fact that such constraints require a woman to give up work during the period needed for recovery does not, in principle, deprive her of the status of ‘worker’ within the meaning Article 45 TFEU.

41 The fact that she was not actually available on the employment market of the host Member State for a few months does not mean that she has ceased to belong to that market during that period, provided she returns to work or finds another job within a reasonable period after confinement (see, by analogy, Orfanopoulos and Oliveri , C-482/01 and C-493/01, EU:C:2004:262, paragraph 50).

42 In order to determine whether the period that has elapsed between childbirth and starting work again may be regarded as reasonable, the national court concerned should take account of all the specific circumstances of the case in the main proceedings and the applicable national rules on the duration of maternity leave, in accordance with Article 8 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1).

43 The approach adopted in paragraph 41 of the present judgment is consistent with the objective pursued by Article 45 TFEU of enabling a worker to move freely within the territory of the other Member States and to stay there for the purpose of employment (see Uecker and Jacquet , C-64/96 and C-65/96, EU:C:1997:285, paragraph 21).

44 As the Commission contends, a Union citizen would be deterred from exercising her right to freedom of movement if, in the event that she was pregnant in the host State and gave up work as a result, if only for a short period, she risked losing her status as a worker in that State.

45 Furthermore, it must be pointed out that EU law guarantees special protection for women in connection with maternity. In that regard, it should be noted that Article 16(3) of Directive 2004/38 provides, for the purpose of calculating the continuous period of five years of residence in the host Member State allowing Union citizens to acquire the right of permanent residence in that territory, that the continuity of that residence is not affected, inter alia, by an absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth.

46 If, by virtue of that protection, an absence for an important event such as pregnancy or childbirth does not affect the continuity of the five years of residence in the host Member State required for the granting of that right of residence, the physical constraints of the late stages of pregnancy and the immediate aftermath of childbirth, which require a woman to give up work temporarily, cannot, a fortiori, result in that woman losing her status as a worker.

47 In the light of all the foregoing considerations, the answer to the questions referred for a preliminary ruling by the referring court is that Article 45 TFEU must be interpreted as meaning that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of 'worker', within the meaning of that article, provided she returns to work or finds another job within a reasonable period after the birth of her child.

Costs

48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 45 TFEU must be interpreted as meaning that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of 'worker', within the meaning of that article, provided she returns to work or finds another job within a reasonable period after the birth of her child.

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[1] This version of regulation 6 was correct until 31 December 2013. It has since been amended extensively as to who qualifies as a jobseeker, and for how long. The amendments also restrict the period during which an individual, recorded as being in involuntary unemployment, is treated as a worker.

[2] Although a citizen of Lithuania which did not become a Member State of the EU until 2006, time spent here prior to accession must be taken into account for the purpose of the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38, provided those periods were completed in compliance with the conditions laid down i n Article 7(1) of the directive – see **Ziolkowski** [2011] EUECJ C-454/10.