IN THE UPPER TRIBUNAL **Case No** CE/98/2015
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant: Ms K Apps, instructed by the Government Legal Department

For the Respondent: Mr R Mehta, instructed by the AIRE Centre

Third Interim Decision:

The United Kingdom has not derogated from Article 17 of Directive 2004/38 by the Accession (Immigration and Worker Registration) Regulations 2004 or otherwise and so the claimant is not precluded from relying on Article 17 in accordance with its terms by having been working in registered employment in accordance with those Regulations only for a period of less than 12 months at the time she seeks to rely upon the Article.

If this interim decision were to be considered appealable in its own right (as to which I make no ruling), the time within which any application for permission to appeal against it to the Court of Appeal must be made is extended until the time provided for by rule 44(3) in relation to the final decision, yet to be given by the Upper Tribunal, as varied, if applicable, by that final decision.

Further action in this appeal is stayed until the Court of Appeal shall have issued its decision in *SSWP v Gubeladze* or further order.

REASONS FOR DECISION

Introduction

1. I begin by recalling that the claimant, a Polish national, had been working in a chip shop. That employment had been registered belatedly under the Worker Registration Scheme, with effect from 21 December 2006. She continued actively working until 23 March 2007, when she went on maternity leave. After she had been unwell for a while and made unsuccessful attempts to return to work, her employment was terminated on 1 November 2007. On 11 November 2007. On 11 November 2007 she experienced acute psychosis and was sectioned under the Mental Health Act 1983.

2. By a first interim decision, dated 9 June 2016, the decision of the First-tier Tribunal ("FtT") sitting at Margate on 28 August 2014 under reference SC151/12/01269 was set aside. By a second interim decision, dated 20 June 2017, on the way to remaking the decision under s.12(2)(b) of the Tribunals Courts and Enforcement Act 2007, I held that the claimant was unable to show on the balance of probabilities that her illness with effect from an

unknown date, no earlier than 1 April 2007 and no later than 11 November 2007, was such that she was "temporarily unable to work as the result of an illness" for the purposes of Article 7(3)(a) of Directive 2004/38/EC ("the Directive"). Rather, with effect from that unknown date she had "permanent incapacity to work" for the purposes of Article 17 of the Directive. When the claimant stopped working, she did so as a result of such permanent incapacity.

3. Thereafter directions were issued requiring the Secretary of State to clarify his position as to which issues still required to be determined in order for the Upper Tribunal to reach a decision on whether the claimant succeeded under Article 17. I was not entirely satisfied with the response and directed a further oral hearing, which was held, at short notice so as to be fitted in before the vacation. I am grateful to all who facilitated that hearing.

4. Article 17(1)(b) of the Directive confers a right of permanent residence on "workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work." The Secretary of State's position can be summarised as follows:

Issue A: because of the impact of the Worker Registration Scheme created by the Accession (Immigration and Worker Registration) Regulations 2004 No.1219 ("the WR Regulations") upon her, the claimant, as she had been working, but only latterly with a certificate, was not a "worker" for the purposes of Article 17; and further

Issue B: on its true construction Article 17 requires a person to be able to show two years' legal residence (rather than actual residence) at the material time.

5. Issue B is one of the two issues under appeal to the Court of Appeal (as *SSWP v Gubeladze*) from the Upper Tribunal's decision in *TG v SSWP* [2015] UKUT 50. Two earlier hearings of that case have been postponed; it is now listed for hearing on 18 October 2017.

6. Issue A at first sight bears some similarities with the issue referred to the Court of Justice of the European Union in *RP v SSWP* [2016] UKUT 422 as C-618/16 *Prefeta*. However, Mr Mehta, for the claimant, suggests that the issue is materially different: put shortly, his position is that whether or not the UK could have derogated from Article 17, it did not actually do so.

7. I had previously received submissions as to the substance of issue A and it was further addressed at a hearing on 25 July 2017. That hearing was primarily to determine in what order and how the remaining issues should be resolved. For reasons set out in Directions of 31 July 2017, I rejected the application of the Secretary of State for further progress on the present case to be stayed pending *Gubeladze* and decided to tackle issue A at this point.

EU law: freedom of movement – generally applicable provisions

8. By Article 21 of the Treaty on the Functioning of the European Union:

> " 1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

9. The Directive provides in the following terms.

10. Recital 19 reads:

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

11. Article 6 confers on Union citizens a right of residence for a period of up to three months. Article 7 confers a right of residence for more than three months on certain categories of people – workers and self-employed persons (including those who are to be treated as retaining such status where particular conditions are met), those who are self-sufficient or students, and their family members. Article 16 provides for Union citizens who have resided legally for a continuous period of five years in the host Member State to have a right of permanent residence there.

12. Article 17 provides:

> **"Exemptions for persons no longer working in the host Member State and their family members**
>
> 1. By way of derogation from Article 16, the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by:
>
> (a)…;
>
> (b) workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work.

> If such incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by an institution in the host Member State, no condition shall be imposed as to length of residence;
>
> (c) ....
>
> Periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness or accident shall be regarded as periods of employment.
>
> 2-4. …

13. The terms of recital (19) and also the principle in C-127/08 *Metock* (at para 59) that "Union citizens cannot derive less rights from [the Directive] than from the instruments of secondary legislation which it amends or repeals" necessitate looking at the previous law also. Under Article 48 of the (then) EEC Treaty:

> "1. Freedom of movement shall be secured within the Union.
> …
> 3. It shall entail the right …
>
> > (d) to remain in the territory of a Member State after having been employed in that State subject to conditions which shall be embodied in regulations to be drawn up by the Commission."

14. Thus it came about that Regulation (EEC) No. 1251/70 of the Commission of 29 June 1970 came to be made, which it is necessary to quote at some length.

> "The Commission of the European Communities,
>
> Having regard to the Treaty establishing the European Economic Community, and in particular Article 48(3)(d) thereof …
>
> Having regard to the Opinion of the European Parliament
>
> Whereas Council Regulation (EEC) No 1612/68 of 15 October 1968 and Council Directive No 68/360/EEC of 15 October 1968 enabled freedom of movement for workers to be secured at the end of a series of measures to be achieved progressively; whereas the right of residence acquired by workers in active employment has as a corollary the right, granted by the Treaty to such workers, to remain in the territory of a Member State after having been employed in that State; whereas it is important to lay down the conditions for the exercise of such right;

> Whereas the said Council Regulation and Council Directive contained the appropriate provisions concerning the right of workers to reside in the territory of a Member State for the purposes of employment; whereas the right to remain, referred to in Article 48(3)(d) of the Treaty, is interpreted therefore as the right of the worker to maintain his residence in the territory of a Member State when he ceases to be employed there;
>
> …
>
> Whereas it is important, in the first place, to guarantee to the worker residing in the territory of a Member State the right to remain in that territory when he ceases to be employed in that State because he has reached retirement age or by reason of permanent incapacity to work …
>
> …
>
> Has adopted this Regulation:
>
> Article 1
> The provisions of this Regulation shall apply to nationals of a Member State who have worked as employed persons in the territory of another Member State and to members of their families, as defined in Article 10 of Council Regulation (EEC) No 1612/68 on Freedom of Movement for Workers within the Community.
>
> Article 2
> 1. The following shall have the right to remain permanently in the territory of a Member State:
>
> > (a) …
> > (b) a worker who, having resided continuously in the territory of that State for more than two years, ceases to work there as an employed person as a result of permanent incapacity to work …;
> >
> > (c) …

15. The wording of Article 2 of Directive 75/34/EEC (the equivalent provision relating to the self-employed) is identical to that of Regulation 1251/70.

16. Regulation 1251/70 was repealed not by the Directive but, as it was a Commission Regulation, by Commission Regulation (EEC No. 635/2006). The recital to that Regulation, having recorded the consolidation effected by the Directive, states:

> "Article 17 thereof includes the main elements of Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been

> employed in that State and amends them by granting beneficiaries of the right to remain a more privileged status, namely that of the right of permanent residence."

UK law – implementation of the above EU provisions

17. The provisions of the Directive were at the material time implemented in the UK through the Immigration (European Economic Area) Regulations SI 2006/1003 ("the 2006 Regulations"). By reg 4(1)(a), "worker" meant a worker within the meaning of Article 45 TFEU. Reg 6 introduced the concept of a "qualified person". Leaving aside for a moment the particular position of nationals of Poland and other A8 States, the expression "qualified person" included, amongst others, a worker and those who retain worker status under Article 7 of the Directive. The status of "qualified person" under the 2006 Regulations was relevant for specific purposes: the ability of a family member to retain a right of residence (reg 10); the extended right of residence beyond an initial three month period (reg 14); and eligibility to receive a registration certificate (reg 16) or for their non-EEA national family members to receive a residence card (reg 18).

18. In relation to Articles 16 and 17 of the Directive, regulation 15 provided as set out below.

> "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…"

Thus sub-paragraphs (1)(a) and (b) dealt with Article 16 rights, (c) and (d) with those under Article 17.

19. The expression "worker or self-employed person who has ceased activity" was defined by regulation 5(1) by reference to fulfilment of one of a number of conditions. That in paragraph (3) provided:

> "(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."

20. Regulation 5 (7) makes equivalent provision to that made by Article 17 in relation to various circumstances of involuntary inactivity:

> "(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."

The above text is how it stood until 30 April 2011. Between 1 May 2011 and 31 December 2013 it was amended by SI 2011/544 so that it was expressed to be "subject to regulation 7A(3)". From 1 January 2014 it was further amended (by SI 2013/3032) so that it was "subject to regulations 6(2), 7A(3) or 7B(3)".

21. It will be observed that neither reg 5 nor reg 15 makes any use of the concept of "qualified person".

EU law - the permitted derogation

22. Part 2 of Annex XII of the Treaty of Accession provides, so far as material:

> "1. Article 39…of the EC Treaty shall fully apply only, in relation to the freedom of movement of workers…, subject to the transitional provisions laid down in paragraphs 2 to 14.
>
> 2. By way of derogation from Articles 1 to 6 of Regulation (EEC) No 1612/68 and until the end of the two year period following the date of accession, the present Member States will apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Polish nationals. The present Member States may continue to apply such measures until the end of the five year period following the date of the accession.
>
> Polish nationals legally working in a present Member State at the date of accession and admitted to the labour market of that Member State

> for an uninterrupted period of 12 months or longer will enjoy access to the labour market of that Member State but not to the labour market of other Member States applying national measures.
>
> Polish nationals admitted to the labour market of a present Member State following accession for an uninterrupted period of 12 months or longer shall also enjoy the same rights.
>
> The Polish nationals mentioned in the second and third subparagraphs above shall cease to enjoy the rights contained in those subparagraphs if they voluntarily leave the labour market of the present member state in question.
>
> Polish nationals legally working in a present Member State at the date of accession, or during a period when national measures are applied, and who were admitted to the labour market of that Member State for a period of less than 12 months shall not enjoy these rights.
> …
> 9. Insofar as certain provisions of Directive 68/360/EEC may not be dissociated from those of Regulation (EEC) No 1612/68 whose application is deferred pursuant to paragraphs 2 to 5 and 7 and 8, Poland and the present Member States may derogate from those provisions to the extent necessary for the application of paragraphs 2 to 5 and 7 and 8."

23. Ms Apps has sought to rely on para.9. I do not consider that that avails her. Para 9 authorises derogation from certain provisions of Council Directive 68/360/EEC. The provisions being considered in the present case are not from that Directive but from Commission Regulation 1251/70. Further, while I acknowledge that Directive 68/360 is recited in the Regulation, the enabling provision for the Regulation is not that Directive but, as set out in [13] above, Article 48 of the then EEC Treaty.

24. Even were I to be wrong in the view in the preceding paragraph, there would still be Mr Mehta's primary submission on this aspect, that even if the UK could have derogated, it has not done so.

UK law - the derogation effected

25. The WR Regulations came into force on 1 May 2004 when (a) immigration from EEA Member States was subject to the Immigration (EEA) Regulations SI 2000/2326 ("the 2000 Regulations") and (b) the implementation date for the Directive (30 April 2006) had not yet been reached.

26. The 2000 Regulations had a broadly similar structure to that subsequently adopted by the 2006 Regulations, including making similar use of the concept of a "qualified person".

27. The 2000 Regulations do not operate so as to confer substantive rights on those who benefit from Regulation 1251/70 (though they do so for the equivalent EU legislation for the self-employed which, being a Directive, would have required the UK to take measures to implement it). The only relevance of the 2000 Regulations to those with rights under Regulation 1251/70 is provided by the appeal rights conferred by Part VII: see the definition of "EEA decision" in reg 27(2) and reg 28. Reg 1251/70 clearly was considered to confer substantive rights independently of the 2000 Regulations.

28. The WR Regulations did not purport to address all the rights, of whatever nature, nationals of accession States might enjoy. The self-employed, students and the self-sufficient were unaffected by them and could rely on the rights conferred by EU law. The WR Regulations did not in terms address Regulation 1251/70 at all.

29. By reg 2 of the WR Regulations "accession State worker requiring registration" ("ASWRR") meant (subject to immaterial provisos) "a national of a relevant accession State working in the United Kingdom during the accession period".

30. Regulation 4(1) of the WR Regulations provided that

> **"**4**.**—(1) This regulation derogates during the accession period from Article 39 of the Treaty establishing the European Community, Articles 1 to 6 of Regulation (EEC) No. 1612/68 on freedom of movement for workers within the Community and Council Directive (EEC) No.68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families.
>
> (2) A national of a relevant accession State shall not be entitled to reside in the United Kingdom for the purpose of seeking work by virtue of his status as a work seeker if he would be an accession State worker requiring registration if he began working in the United Kingdom.
>
> (3) Paragraph (2) is without prejudice to the right of a national of a relevant accession State to reside in the United Kingdom under the 2000 Regulations as a self-sufficient person whilst seeking work in the United Kingdom.
>
> (4) An accession State worker requiring registration shall only be entitled to reside in the United Kingdom in accordance with the 2000 Regulations as modified by regulation 5."

31. Reg 5 of the WR Regulations provided:

"Application of 2000 Regulations in relation to an accession State worker requiring registration

> **5.**—(1) The 2000 Regulations shall apply in relation to an accession State worker requiring registration subject to the modifications set out in this regulation.
>
> (2) An accession State worker requiring registration shall be treated as a worker for the purpose of the definition of "qualified person" in regulation 5(1) of the 2000 Regulations only during a period in which he is working in the United Kingdom for an authorised employer.
>
> (3) Subject to paragraph (4), regulation 5(2) of the 2000 Regulations shall not apply to an accession State worker requiring registration who ceases to work.
>
> (4) Where an accession State worker requiring registration —
> (a) begins working for an authorised employer on or after 1st May 2004; and
> (b) ceases working for that employer in the circumstances mentioned in regulation 5(2) of the 2000 Regulations during the one month period beginning on the date on which the work begins,
> that regulation shall apply to that worker during the remainder of that one month period.
>
> (5) and (6) [not material]"

32. At this point, the mentioned parts of reg 5 of the 2000 Regulations provided:

> **"5.— "Qualified person"**
>
> (1) In these Regulations, *"qualified person"* means a person who is an EEA national and in the United Kingdom as—
> (a) a worker;
> (b) a self-employed person;
> (c) a provider of services;
> (d) a recipient of services;
> (e) a self-sufficient person;
> (f) a retired person;
> (g) a student; or
> (h) a self-employed person who has ceased activity;
> or who is a person to whom paragraph (4) *[not material to the present case]* applies.
>
> (2) A worker does not cease to be a qualified person solely because—
> (a) he is temporarily incapable of work as a result of illness or accident; or
> (b) he is involuntarily unemployed, if that fact is duly recorded by the relevant employment office.
> ..."

33. The Directive was given effect to at its implementation date by the coming into force of the 2006 Regulations, which in turn necessitated amendment to the WR Regulations. Their structure remained the same. As at the dates with which this case is concerned (1 April to 11 November 2007) the WR Regulations kept so far as material the definition of "accession State worker requiring registration". Reg 4 of the WR Regulations was modified so that it now read (emphasis added):

> "(1) This regulation derogates during the accession period from Article 39 of the Treaty establishing the European Community, Articles 1 to 6 of Regulation (EEC) No. 1612/68 on freedom of movement for workers within the Community *and Council Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, insofar as it takes over provisions of Council Directive (EEC) No. 68/360* on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families.
>
> (2) A national of a relevant accession State shall not be entitled to reside in the United Kingdom for the purpose of seeking work by virtue of his status as a work seeker if he would be an accession State worker requiring registration if he began working in the United Kingdom.
>
> (3) Paragraph (2) is without prejudice to the right of a national of a relevant accession State to reside in the United Kingdom under the 2006 Regulations as a self-sufficient person whilst seeking work in the United Kingdom.
>
> (4) *A national of a relevant accession State who is seeking employment and an* accession State worker requiring registration shall only be entitled to reside in the United Kingdom in accordance with the 2006 Regulations as modified by regulation 5.

34. The 2006 Regulations also modified reg 5 of the WR Regulations so that it read:

> **"5.— Application of 2006 Regulations in relation to accession State worker requiring registration**
>
> (1) The 2006 Regulations shall apply in relation to a national of a relevant accession State subject to the modifications set out in this regulation.
>
> (2) A national of a relevant accession State who is seeking employment in the United Kingdom shall not be treated as a jobseeker for the purpose of the definition of "qualified person" in regulation 6(1) of the 2006 Regulations and an accession State worker requiring

registration shall be treated as a worker for the purpose of that definition only during a period in which he is working in the United Kingdom for an authorised employer.

(3) Subject to paragraph (4), regulation 6(2) of the 2006 Regulations shall not apply to an accession State worker requiring registration who ceases to work.

(4) Where an accession State worker requiring registration ceases working for an authorised employer in the circumstances mentioned in regulation 6(2) of the 2006 Regulations during the one month period beginning on the date on which the work begins, that regulation shall apply to that worker during the remainder of that one month period.

(5) An accession State worker requiring registration shall not be treated as a qualified person for the purpose of regulations 16 and 17 of the 2006 Regulations (issue of registration certificates and residence cards)."

35. Regulation 6(1) and(2) of the 2006 Regulations performed a similar function to reg 5(2) of the 2000 Regulations:

"(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.
…"

36. Although Article 17 had been introduced by the Directive and the 2006 Regulations sought to implement the Directive, the WR Regulations (as amended) contained no provision expressly directed to Article 17.

37. A jobseeker, even though for some purposes (see C-282/89 *Antonissen*) he is a "worker" within (now) Art 45 and that, by reg 1(2)(k) of the WR Regulations is the test by which "worker" "work" and "working" are to be construed, is by reg 5(2) not intended to be an ASWRR until such time as he or she has actually commenced work. The express carve-out and the definition in reg 1(2)(k) suggest that the interpretation of who is a worker is – subject to the terms of any applicable carve-out - a broad one. Reg 5(3) operates in the same way: a worker reliant on his right under Article 7 (implemented by reg 6) would still be a worker even though not actually working, were it not for reg 5(3).

38. Regs 4(4) and 5(1), as well as bringing into play limitations (which will be shown to be irrelevant for our purposes), also contain a positive statement that save to that extent reliance may be placed on the 2006 Regulations. If the claimant was to be viewed as an ASWRR at the point of becoming permanently incapable of work, then reg 4(4) and, to the extent that it can be relied upon, the title of reg 5 would mean that she was entitled to rely on the 2006 Regulations, subject only to the modifications effected by reg 5 of the WR Regulations. If she was not at that point to be viewed as an ASWRR but faced the argument that reg 5, as amended to reflect the 2006 Regulations, in fact now addressed the wider category of "a national of a relevant accession State", she would still be entitled to rely on the 2006 Regulations, subject only to the modifications effected by reg 5 of the WR Regulations, none of which is in point. If regs 4 and 5 of the WR Regulations did not apply to her on either basis, she would simply be able to rely on her rights under EU law and the 2006 Regulations, without them being qualified by the WR Regulations: she would be in the same position as the student, self-sufficient person or others discussed at [11].

39. The reasons why the limitations of reg 5, if indeed that regulation is potentially applicable, do not apply to the claimant are as follows. The claimant was not a jobseeker so the first part of reg 5(2) has no application. The second part of reg 5(2) does not bite for two reasons: first, rights under Article 17 as implemented by regs 5 and 15 do not require a person to be a "qualified person" (as defined) and so that derogation has no purchase; and at that point, having obtained a worker registration certificate and remained in employment, first actively performing her duties and subsequently on maternity leave, she would have been admitted to the labour market: see Lord Hope in *Zalewska v Department for Social Development* [2008] UKHL 67 at [43]. Reg 5(3) has no purchase because the claimant has no need to rely on reg 6(2) of the 2006 Regulations. If her incapacity for work had become permanent any time before she was dismissed on 1 November 2007, there is no gap to be bridged. In the scenario that the onset of permanent incapacity was between 1 and 11 November 2007, she would rely not on reg 6(2) but on reg 5(7). At the time of the DWP's decision under appeal (16 January 2012)

reg 5(7) was not expressed to be subject to any other provision at all. In my view that is the point at which the text of reg 5(7) falls to be considered and subsequent amendments to it are immaterial.

40. If there be an argument that the ability to rely on Article 17 is effectively dependent on having previously been a "worker" and thus if the ability to be a "worker" is excluded until the provisions of the WR Regulations requiring 12 months of registered work have been complied with, there is no need separately to preclude reliance on Article 17 by an express derogation, the argument in my view fails. While a somewhat similar argument commended itself to Lord Hope in *Zalewska* at [27] in the context of interpreting the EU provisions permitting derogation, the context here is a different one, turning on the drafting of a particular domestic regulation. The same argument would exclude (without more) the ability of an ASWRR to rely on Art 7(3) of the Directive/reg 6(2) of the 2006 Regulations, yet reg 5(3) of the WR Regulations makes express provision to exclude such an ability. Whilst I accept that sometimes the legislator may include provisions in order to put a matter beyond doubt, to uphold the argument in this context would be to accept that the draftsman had intended an approach which, within the one regulation (reg 5 of the WR Regulations) was internally inconsistent, an approach I am not prepared to attribute to him or her.

41. It will be observed that even though the Directive was creating new rights (Article 16) or bringing within its fold the substance of rights from elsewhere (Article 17), the derogation effected from the Directive by reg 4(1) of the WR Regulations (as amended) was limited to that part of the Directive which took over provisions of Directive 68/360.

42. The conclusion I have reached that the UK legislation does not derogate from Article 17 is far from surprising. It is consistent with the apparent scope of the permitted derogation. It is consistent with Article 17's genesis in the preservation of earlier rights, favourable to certain categories of individual. As can be seen from the discussion of the 2000 Regulations at [27] above, the predecessor rights to Article 17 were always treated as a special case.

43. In my view, there is no ambiguity within the WR Regulations which bears on the point I have to decide. If, however, I were to be wrong in that regard, then the claimant could rely on what is said in *Miskovic v SSWP* [2011] EWCA Civ 16 at [41], following submissions from Counsel in that case that the terms of any derogation from the right of free movement must be interpreted strictly (see 77/82 *Peskeloglou*):

> "The starting point under the Accession Treaty is that A8 nationals have the full rights of free movement conferred unless a State chooses to limit them. To the extent that there may be ambiguity in the language then, in my judgment, it should be interpreted in favour of the worker. But that principle would not justify an artificial or distorted construction of the domestic statute."

Conclusion

44. In conclusion, the UK has not effected a valid derogation from Article 17. As a person who would – but for the impact of the worker registration scheme – otherwise on any view have been a worker, the claimant's inability to point to 12 months of registered work does not preclude her from relying on Article 17 if she can satisfy its remaining conditions. The only issue outstanding therefore is the one which I have termed issue B, to be addressed by the Court of Appeal in *Gubeladze.* It is therefore appropriate to stay the present case pending the Court of Appeal's decision or further order.

Appeal

45. Both parties, relying on *VOM (error of law when appealable) Nigeria* [2016] UKUT 410(IAC), have taken the view in relation to earlier aspects of this case that an appeal to the Court of Appeal does not lie from an interim decision of the Upper Tribunal and have sought to reserve their position concerning such an appeal for once the Upper Tribunal's final decision in the present case has been promulgated. I am not intending to express a view about the scope of application of *VOM (Nigeria)*, as to which I have heard no argument, but have considered it appropriate in this interim decision expressly to provide for the position. I do so because, unlike the two previous interim decisions in this case, which contained a lot of detail specific to it and of limited wider interest, I consider it appropriate that this third interim decision be placed on the Chamber's website, where it will be appropriate that the reader is aware of the parameters within which an attempt may be made to take the point higher, if thought fit.

CG Ward
Judge of the Upper Tribunal
4 September 2017