

Paying their way? Contesting "Residence", self-sufficiency, and economic inactivity barriers to EEA nationals' social benefits: proportionality and discrimination

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At a glance

The requirement that EEA nationals¹ and their family members should be economically active or self-sufficient and not be a burden on the UK's social assistance system is a significant barrier to the acquisition and retention of residence rights. It also impacts on their ability to access a range of UK social benefits. The article considers this, and recent developments in relation to principles of proportionality and discrimination affecting decision-making processes and the scope for contesting decisions. In doing this it comments on the developing judicial discourse around 'economic integration', particularly after leading cases like *Kaczmarek*, *Lekpo-Bozua* and the Supreme Court's judgment in *Patmalniece*.

Introduction

Citizens of the European Union enjoy the Treaty-based 'right to move and reside freely within the territory of the Member States'. However, this is subject to the 'conditions and limits' defined by the Treaties and the measures adopted thereunder and which have been adopted to give them effect.² Arguably the most potent limitation affecting EEA nationals' residence in another Member State comes when they need to access support from that host State's social assistance systems. The general expectation is that claimants should either be in employment or self-employment, or else have sufficient resources to avoid becoming a burden on those systems. The requirement is integral to the scheme in Directive 2004/38 and affects many aspects of the three stages of 'residence' provided for by the Directive and the UK implementing legislation, the Immigration (European Economic Area) Regulations 2006 (the '2006 Regulations'):³ 281 residence for up to three months (the 'initial period') (art 6), residence for more than three months (the 'extended period')(art 7), and permanent residence (arts 16-18).⁴

Resources and 'becoming a burden'

The initial period is unproblematic unless the EEA national or family member becomes an unreasonable burden on the host State's social assistance system (art 14). In this event, the 2006 Regulations state more explicitly that they will *cease* to have the right to reside under the regulations.⁵ During the extended period, a right of residence is secure as long as the person is a 'worker' or a 'self-employed person' - two of the categories of 'qualified person' in the 2006 Regulations.⁶ 'Worker' status can be acquired and maintained even if the hours are limited and wages received are at or below the host State's minimum subsistence wage,⁷ or if in-work support to supplement low wages is claimed.⁸ All the other groups, ie the 'self-sufficient', enrolees at privately or publicly funded establishments accredited or financed by the State, and family members of EEA nationals, are subject to requirements requiring them to have comprehensive sickness cover and 'sufficient resources not to become a burden on the social assistance system'. The right of residence only continues while the conditions in art 7 are met (art 14). Member States may verify if the conditions are being fulfilled, but this may not be carried out 'systematically' (art 14(2)).

Permanent residence, the third key residence right in the typology, is dealt with in Chapter IV and the key provisions in arts 16-18 (implemented by reg 15 in the UK). The policy that informed

acquisition of the new right of permanent residence based on five years residence appeared to be largely directed at applicants satisfying *social* integration criteria.⁹ Nevertheless, expectations of ‘economic integration’ in cases like *McCarthy* and *Lekpo-Bozua* seem to have come to the fore.¹⁰ In the area of retention of residence rights by family members, and their acquisition of permanent residence, for example in the event of death or departure from the host State of the EEA national, or in the event of divorce, annulment of marriage or termination of registered partnerships, requirements that applicants must have sufficient resources to avoid becoming a burden on the social assistance system are more explicit.¹¹ In other contexts such as applications for housing assistance, it has been held by the Court of Appeal that EEA nationals who are not economically active or self-sufficient have not ‘resided [282](#) legally’ for the purpose of acquiring permanent residence, even after nine years residence. They cannot rely on the Treaty for a right of residence and remain ‘subject to immigration control’ unless they acquire ‘qualified person’ status under the 2006 Regulations.¹²

The UK’s system of social benefits mapped on to ‘qualified person’ status when the 2006 Regulations implemented Directive 2004/38. The Social Security (Persons from Abroad) Amendment Regulations 2006¹³ amended key benefits regulations so that a ‘person from abroad’, ie someone who is not habitually resident in the UK, Channel Islands, Isle of Man, or Republic of Ireland was ineligible for support. In order to be habitually resident a person must generally have a ‘right to reside’. By explicitly providing that a person with ‘qualified person’ status is taken *out* of the restriction, the regulations provide that an EEA national in the UK who does not have, or ceases to have, ‘worker’ status (and does not qualify for that status under any other category) is removed from eligibility for State support.¹⁴

The ‘qualified person’ gateway

An example of the ‘model’ for the way that ‘person from abroad’ status works, and has been mapping on to ‘qualified person’ status since 2006, is provided by reg 21AA of the Income Support (General) Regulations 1987.¹⁵ The regulations put ‘worker’ at the top of the list of groups taken out of ‘person from abroad’ status. This perhaps underlines successive governments’ expectations that EEA nationals should be working or otherwise reciprocating for any support they receive and thereby ‘contributing’ to the UK economy. It also reflects policies aimed at combatting the so-called ‘pull factor’, despite long-standing doubts about whether there is such a factor - or, if there is, the role it plays.¹⁶ The financial saving in restricting access to non-contributory benefits funded from taxation is also an important policy driver, and this has parallels with the Coalition government’s recent proposals to limit access to support for non-EU entrants seeking settlement as part of the non-EU family migration route.¹⁷

Claimants can, of course, look to EU sources for a right of residence, including secondary legislation like Regulation 1612/68 art 12, assisting groups like primary carers of children who have started in the UK education system after one of their parents had worker status.¹⁸ Direct reliance on the Treaty itself can also assist, as in the *Baumbast* case,¹⁹ and when it is necessary and [283](#) appropriate to fill a perceived lacuna in the residence scheme in order to assist groups like carers who have had no alternative but to resign from their employment in order to look after sick family members (an issue revisited later in this article).

In such cases proportionality and discrimination requirements have featured in the operation of the restrictions; the key legislative provisions need to be considered.

The 'residence' gateway: proportionality and discrimination

Although resort to benefits like Income Support or Pension Credit (a similar benefit, but paid to older claimants) raises the question of whether the claimant has become, or is at risk of *becoming* an unreasonable burden on the social assistance system, it is implicit that there should be an effective process evaluating this, and one that adequately addresses factors like the scale, extent, and likely duration of support.²⁰ Aspects of UK practice appear to be suspect in this respect, particularly as it is far from clear that UK agencies' decision-makers deploy, or deploy consistently, any kind of structured approach that enables all the three criteria that the directive and the guidance expect should be properly addressed. Furthermore, there are a number of scenarios in which claimants can be treated as either having had no right of residence, or as losing one as a result of seeking support.²¹ Similar eligibility issues can arise in relation to support for working claimants, for example through tax credits, when eligibility is adjudicated, checked or reviewed.²²

In the face of such approaches by adjudicating agencies, the scope for contesting them (and invoking proportionality, discrimination and Convention rights) are important, and this is now considered.

The courts and the 'right to reside'

The UK courts have generally been supportive of the right to reside scheme, including the way 'qualified person' and person from abroad' status is used. In the leading case of *Abdirahman*²³ the court made it clear that without 'qualified person' status, most claimants are effectively barred out of even the most basic support. In dismissing the appeals of two claimants who were not in employment and who did not otherwise qualify for qualified person status, the court said it was not enough for them to be lawfully present. They also had to be 'resident' on the basis expected by the right to reside scheme.²⁴ Although the court accepted that the scheme did not impact on claimants' ability to acquire a right of residence directly from the Treaty, this was held not to be an option for economically inactive residents given the limitation in Directive 90/364 (now in Directive 2004/38) that beneficiaries of free movement should not be an unreasonable burden on the public finances of the host State - a condition they considered to be [284](#) proportionate to the legitimate aim of protecting the host State's public finances, and reinforced by observations made in *Trojani*.²⁵

The Court of Appeal accepted that the discrimination provisions of the Treaty were engaged when an EU national is refused support for reasons that are not applied to host State nationals²⁶ - but said this only assisted those with a right of residence under the Treaty or national law, or where the authorities had approved the residence (as in *Trojani*). If schemes were indirectly discriminatory (as had been conceded by the Secretary of State earlier in the appeal), the court considered there was sufficient evidence to establish 'justification' on the basis of the government's response in 2004 to the Social Security Advisory Committee's report.²⁷ Lloyd LJ went further and also derived support from judicial pronouncements on 'benefit tourism' and irregular status. He quoted comments of Sedley LJ in *R (Morris) v Westminster City Council (No 3)*:²⁸ 'The problem is in all significant respects a problem of foreign nationals either coming to this country (benefit tourism) or overstaying their leave to be here (irregular status) in order to take advantage of the priority housing status accorded to homeless families. Measures directed at this, I accept, require no explicit justification, whether because they are an aspect of immigration control or because they are an obviously legitimate response to a manifest problem.'

Retention issues: *Baumbast*, lacuna-filling and proportionality

In practice, many of the contentious aspects of the subject focus on problems of *retention* of residence rights. Both the directive and 2006 Regulations enable 'worker' status to be kept after

involuntary loss of employment. Jobseekers must maintain jobseeking conditions. However, the scheme is restrictive, and makes it difficult for some groups like carers and single parents with particularly demanding childcare needs.²⁹ Judges have been reluctant to entertain arguments that the retention scheme is discriminatory and incompatible with the Sex Discrimination Act 1995, for example because of its impact on women with childcare responsibilities.³⁰ Other judgments have been more supportive when it has been possible to fill a perceived lacuna in the retention system with the help of proportionality principles. In one such 'carer' case,³¹ the claimant was a Cameroonian national who, while an asylum claimant, married a French national working in the UK. Her 'worker' status meant she had a right to reside. This, in turn, meant that he had a right of residence as her family member. However, [285](#) after he became seriously ill she gave up her employment to care for him. The level of care she provided meant she had to give up her employment, and having no other resources her husband had no choice but to look to the benefits system. Decision-makers immediately decided that both of the couple had lost their right to reside. Judge Rowland concluded that a right of residence could be asserted in these circumstances, and lack of 'self-sufficiency' should not be 'determinative in every case' (paras 36, 37).

Later cases, however, have been more circumspect in allowing appellants to take the *Baumbast* route, as seen in the Court of Appeal decision in *Kaczmarek*,³² a case in which Maurice Kay described the issues as 'labyrinthine'.

Kaczmarek: into the labyrinth...

In *Kaczmarek*, the claimant was a Polish national who started her residence in the UK as a student in April 2002. She started working in a nursing home in June 2003, but then stopped working in July 2004, and took a period of maternity leave from August 2004, intending to return to employment after that. This was put off, however, as her child was unwell and needed care from her. She was, in any case, unable to afford childcare, making it difficult for her to remain in employment - a barrier that is currently set to affect a lot more workers in the UK.³³ In the event she did not resume employment until October 2006. In the meantime she claimed Income Support. Her claim was rejected on the basis that, by the time she claimed, she no longer had a right of residence.³⁴ Although she had only intended to be out of the labour market for a short while, it was long enough for decision-makers to treat her right of residence as at an end.

On appeal, she contended that the decisions refusing her support were disproportionate, and that in any case a right of residence could be founded directly on arts 12 and 18 EC of the Treaty - particularly, as she argued, she could show 'a level of social integration and settlement' that the European Court envisaged in *Trojani*.³⁵ Her appeal failed. Although the court in *Trojani* had indicated that lawful residence 'for a certain time' could assist, Maurice Kay LJ (at para 16) took this to refer to qualifying periods giving rise to an express right of residence. By the phrase's juxtaposition with 'or possesses a residence permit', he considered that it was being advanced as 'one of two ways in which an economically inactive migrant may rely on art.12 as a result of specific and substantive entitlement'. In any case he thought it undesirable to use art 12 as a way of producing 'an open-textured temporal qualification', and considered that eligibility should be 'a matter for normative regulation rather than discretion or subjective evaluation on a case-by-case basis'. He rejected proportionality as a basis for allowing the appeal, distinguishing *Baumbast* as that case involved a working claimant who was largely self-sufficient. Approving the reasoning of Judge Rowland, he thought that to permit residence to be based on art 18 when EU legislation had excluded a particular class of persons from eligibility would be to 'attack the Directive'. Although art 18 could be relied on to *supplement* the Directive, before a national court or tribunal the limitations in a directive could not be removed (paras 20-22). In a novel approach, he also considered that if a claimant gained an [286](#) unconditional right to support by acquiring permanent residence, it was difficult to argue that it

was disproportionate to exclude someone who had become economically inactive after three years residence.

Proportionality principles also featured in the House of Lords case of *Zalewska*.³⁶ In that case, Baroness Hale and Lord Neuberger dissented from the majority's decision and considered that to deprive a worker of benefits after she had been employed in the UK for twelve months (just because four months of this period had not been in WRS-registered employment) was disproportionate - particularly as the main aim of the WRS was primarily just to monitor the numbers of A8 nationals in work, and the sectors they worked in.

Given the difficulties that claimants have experienced in this area of the social benefits system, and uncertainty about how decision-makers and courts in the UK approaches should map on to EU requirements, it was helpful when in 2009 the EU Commission provided guidance.

Economic inactivity, resources and proportionality 'tests'

In 2008 an EU Commission report³⁷ described the transposition of Directive 2004/38 as 'disappointing'. On aspects relating to social assistance, it noted that a common problem was the failure to take decisions 'on the basis of personal circumstances' (para 3.4.2). Guidance on the implementation of the legislation then followed in 2009. It included points about the way restrictions on access to social assistance should operate, including proportionality aspects.³⁸

The centrepiece of the Commission's guidance focuses on the suggestion that States should use a 'proportionality test' to assess what the Commission clearly sees as the key issue, which is whether a person whose resources are no longer 'sufficient' and who has been granted subsistence support 'is or has become an unreasonable burden...'. The *source* of the claimant's resources is generally irrelevant as long as it is available.³⁹ It then reminds Member States' authorities of what is said in Directive 2004/38, recital 16, ie that 'The host Member State should examine whether it is a case of *temporary difficulties* and take into account *the duration of residence, the personal circumstances* and *the amount of aid* granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system...'

The guidance adds a number of specific points (Section 2.3.1), as follows:

(1) Duration

- For how long is the benefit being granted?
- Outlook: is it likely that the EU citizen will get out of the safety net soon?
- How long has the residence lasted in the host Member State?

(2) Personal Situation

- What is the level of connection of the EU and his/her family members with the society of the host Member State?
- Are there any considerations pertaining to age, state of health, family and economic situation that need to be taken into account?

(3) Amount

- Total amount of aid granted?
- Does the EU citizen have a history of relying heavily on social assistance?

- Does the EU citizen have a history of contributing to the financing of social assistance in the host Member State?

Finally, the guidance makes it clear that only actual *receipt* of social assistance benefits is relevant when determining if a person is a burden on the system.

Clearly such guidance does not have legislative effect. Nevertheless, it must be regarded as a form of quasi-legislation that at one level is 'soft' law but which, in practice, has a significantly more formal status as it supplements and reinforces existing legislation.⁴⁰ It is an authoritative source, given the Commission's role in ensuring that the proper functioning and development of the Union, and shaping the way it expects Member States' obligations to be fulfilled. Commission measures against a State it considers has failed to fulfil an obligation include the use of a 'reasoned opinion' following an opportunity for the State to submit its observations (TFEU, art 226).⁴¹ A comparison between what EU law envisages and UK practice suggests that there may well be a significant deficit in terms of compliance.

In the remainder of this article consideration is given to discrimination aspects of the UK's 'residence' regime, and its impact on take-up of social benefits.

The right to reside: discriminatory?

The scope for invoking legislation and principles relating to direct or indirect discrimination has been clear for some while, and certainly since the introduction of the habitual residence test in the 1990s and cases like *Collins*.⁴² However, the precise scope of anti-discrimination measures, for example those in art 3 of Regulation 1408/71, has been less clear. A key question is whether the discrimination that obviously permeates most UK social assistance schemes should be classed as 'direct' or 'indirect'. If the latter, then it is capable of 'justification'.

288 Given the uncertainty around this, particularly in the aftermath of the European Court's controversial judgment in *Bressol*,⁴³ it was helpful when the issues came before the Supreme Court earlier this year in *Patmalniece*.⁴⁴

***Patmalniece*: economic integration and discrimination**

The appellant in *Patmalniece* was Latvian, but of Russian origin. Galina Patmalniece had been in paid employment for over forty years in Latvia before moving to the UK in 2000. Fearing persecution because of her Russian origin she sought asylum in the UK. This failed, and receiving no support from the UK welfare system she only had her Latvian pension, worth about £50 a month, to live on. Following Latvia's accession to the European Union on 1 May 2004 she claimed State Pension Credit, a means-tested source of income provided under the State Pension Credit Act 2002 and the State Pension Credit Regulations.⁴⁵ It provides eligible pensioners with support if they do not have retirement income, or need an income 'top up' to raise their income. Her claim was refused as she could not satisfy the scheme's 'presence' requirements. These impose a residence gateway that focuses on claimants' ability to demonstrate a right to reside and habitual residence. More precisely, reg 2(1) states that 'A person is to be treated as not in Great Britain if ...he is not habitually resident in the United Kingdom...'; and in regulation 2(2) 'No person shall be treated as habitually resident ... unless he has a right to reside in (as the case may be) the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland...' As with the Income Support scheme discussed, the scheme (in somewhat tortuous fashion) goes on to say in reg (4) that 'A person is not to be treated as not in Great Britain if he is - (a) a worker ... (b) a self-employed person...' and is otherwise within the scope of the directive. The problem was that the claimant had not been in paid employment, and so had

not held 'worker' status since her arrival in the UK. Nor did she come within any of the other 'qualified person' categories.

On the face of it the refusal was plainly discriminatory given that art 3 of Council Regulation (EEC) 1408/71, which like the legislation that has replaced it from 1 May 2011 as far as EEA nationals are concerned,⁴⁶ clearly accords EEA nationals the right to equal treatment with UK nationals. The President of Appeal Tribunals at the first-tier of the appeals system was very clear that this was not only discrimination, but direct discrimination given the difficulties faced by EEA claimants in comparison to UK nationals' requirements. On appeal, however, this was overturned.⁴⁷ The judge accepted that the imposition of the right to reside test, which all UK nationals, but only some EU nationals passed, was discriminatory - but it was *indirect* discrimination. He accepted that the right to reside was a necessary and proportionate means of achieving a legitimate aim (the protection of the State's public finances).

A further appeal to the Court of Appeal failed.⁴⁸ After stressing the importance of integration requirements, Moses LJ observed that 'Absent that degree of economic or social integration which both EU and domestic legislation recognise as a justifiable condition for 289 entitlement, there is no unlawful discrimination in refusing her a benefit which has the characteristics of social assistance.'

The Supreme Court's approach

In the leading judgment, Lord Hope (at para 20) identified three main issues:

1. Did the conditions of entitlement to support (as set out in reg 2 of the 2002 Regulations) give rise to direct ('overt') discrimination for the purposes of art 3 of Reg 1408/71 - or was any discrimination involved *indirect* ?
2. If any discrimination was *indirect*, could that discrimination be objectively justified on grounds independent of the appellant's nationality?
3. Assuming the indirect discrimination could be objectively justified, was that outcome undermined by the favourable treatment given by reg 2(2) to Irish nationals?

He accepted that the disadvantage that nationals of other Member States encountered when trying to meet the requirements of reg 2(2) are 'due entirely to their nationality' and had a right to reside been the sole condition of entitlement 'it would without doubt have been directly discriminatory on grounds of nationality' (para 29). However, he thought that the effect of reg 2(2) had to be looked at in the context of the scheme in s1(2)(a) of the State Pension Credit Act 2002 and reg 2 'as a whole'. He also noted that while most UK nationals were habitually resident, others were not. Furthermore, although they could all meet the right to reside requirement in reg 2(2) because of their nationality, it was not nationality *alone* that enabled them to meet the requirement in reg 2(1).⁴⁹ He went on to observe that in cases involving 'composite' tests like this, the reasoning in *Bressol*⁵⁰ assisted. In that case, changes in French education policy had meant that more students from France had started to come to Belgium. Belgium thereupon introduced a range of further conditions on access, conditions that that did not extend to Belgian nationals. The court in that case, however, took this to be indirect discrimination, rejecting Advocate General Sharpston's conclusion that it was *direct*.

Lord Hope described the Advocate General's work as a 'powerful opinion'. He noted that she had said that discrimination could be considered to be direct where the difference in treatment was based on a criterion which was either explicitly that of nationality or was necessarily linked to a characteristic 'indissociable' from nationality (para 53). She had then examined each of the

cumulative conditions separately. She considered that the first cumulative condition - that the principal place of residence was in Belgium - did not constitute direct discrimination because Belgians and non-Belgians alike could establish their principal place of residence in Belgium. As this, apparently neutral, condition was likely to operate mainly to the detriment of nationals of other Member States, it was indirectly discriminatory (paras 60-62). However, in contrast, the second cumulative condition was necessarily linked to a characteristic indissociable from nationality. Belgians automatically had the right to remain permanently in Belgium. They therefore satisfied the second cumulative condition [290](#) automatically. Non-Belgians, on the other hand, had to fulfil additional criteria to acquire a right permanently to remain in Belgium or to satisfy one of the seven other conditions. This discrimination, she concluded, was based on nationality and was therefore direct discrimination. The measures were therefore precluded by the articles of the Treaty.

The problem, though, as Lord Hope noted, was that the court had not adopted the Advocate General's approach, adding that the contrast between her 'carefully reasoned approach' and that of the court was 'so profound that it could not have been overlooked'.⁵¹ The court had examined the conditions in a way that clearly indicated the court had seen the case as one of *indirect* discrimination.

He observed the 'obvious similarity' between the issues in that case, and the case before the Supreme Court, commenting that the State Pension Credit scheme, and the residence and presence tests it included, were undoubtedly designed to make them more capable of being satisfied by a UK national than by other Member States' nationals. However, applying *Bressol*, the scheme was only *indirectly* discriminatory. Nevertheless, as the scheme put EEA nationals at a particular disadvantage it still had to be justified (para 35). In *Bidar*⁵² the ECJ had held that the criteria for granting assistance to cover the maintenance of students risked placing nationals of other Member States at a disadvantage, particularly as the condition requiring them to have residence in the United Kingdom prior to their studies was likely to be more easily satisfied by UK nationals. This could be justified only if it was based on 'objective considerations independent of the nationality of the persons concerned and was proportionate to the legitimate aim of the national provisions'. Applying this to the *Patmalniece* case, the focus was on the reasons of the Secretary of State for the difference in treatment in the Pension Credit scheme. Did they provide an objective justification for it? Even if they did, said Lord Hope, was the justification based on considerations that were 'independent of the nationality of those concerned'?

After examining this further, Lord Hope accepted that the wish of the Secretary of State to prevent exploitation of welfare benefits by those living but not working in the UK was a 'legitimate reason'. He thought this was supported by Advocate General Geelhoed's opinion in *Trojani* (at para 70) that it is a basic principle of EU law that persons who depend on social assistance 'will be taken care of in their own Member State'. After assessing the question of whether the justification offered was 'relevant' and 'sufficient' in the Pension Credit context, and whether it operated in a way that was 'independent of the nationality of those concerned', he accepted the case made by the Secretary of State.

Baroness Hale

The main issue for Baroness Hale was whether it was legitimate to limit access by an EEA claimant like the appellant to benefits, entitlement to which depended on a residence right in the host State. She pointed out (at para 103) that: 'In answering that question, it is logical to look at the European law on the right to reside. If nationals of one Member State have the right to move to reside in another Member State under European Union law, it is logical to require that they also have the right to claim special non-contributory cash benefits there - in other words that the State in which

they reside should be responsible for ensuring that they have the minimum means of subsistence to enable them to live there. But if they do not have the right 291 under European Union law to move to reside there, then it is logical that that State should not have the responsibility for ensuring their minimum level of subsistence.⁵³

She accepted, as the Grand Chamber had done in *Trojani*, that a claimant seeking a benefit because of lack of resources could not derive a right to reside from art 18 of the Treaty as that 'lack of resources' took him outside the terms of Directive 90/364. In the event, the court in *Trojani*, having held that a person such as Mr Trojani did not derive a right to reside from European Union law, went on to say that a citizen of the Union who had been lawfully resident in the host Member State for a certain time or possessed a residence permit, and satisfied the conditions required of nationals of that Member State, could not be denied benefits.⁵⁴ He was entitled, during his lawful residence to benefit from the equal treatment principle in art 12. She took that to mean that, even if a claimant does not have a right of residence under European Union law, if he had the right to reside under the *national* law of the host country, he was also entitled to claim benefits on the same terms as nationals of the host country. She did not find anything in *Trojani*, though, to suggest that 'mere presence, without any right to reside in the host country, was sufficient'. All the emphasis, she said, in the relevant paragraphs 40 to 45 was on *residence* and not presence - and moreover on what she termed 'formally approved residence'.

The only dissenting voice in the Supreme Court was Lord Walker's. Despite accepting that the case had to be seen as one of indirect discrimination, he still saw the restrictions in the scheme as based, essentially, on nationality. In this respect, and in common with the President of Appeal Tribunals when he allowed the appeal in the First-tier Tribunal, he identified the provisions in reg 2(2) of the State Pension Credit Regulations 2002 as 'probably aimed at discriminating against economically inactive foreign nationals on the grounds of nationality, noting that whether or not that was intended by those framing the legislation, 'they have that effect'. He did not think the discrimination was capable of justification because once it was examined it was 'founded on nationality' (para 79).

The EU Commission's 'notice'

In his arguments on behalf of the AIRE Centre (as interveners in the appeal) Richard Drabble QC referred the court to the 'notice' of the EU Commission to the UK in which it invited the UK to submit observations on the compatibility with EU Law of the imposition of the right to reside test for benefits within the scope of Regulation 1408/71.⁵⁵ The notice, issued last year, expressed the Commission's concerns about the way the right to reside system has been operating, and requested the UK to 'end discriminatory conditions on the right to reside as a worker which exclude from certain social benefits nationals from the A8 Accession States'. It was implicit in the notice that the requirements were seen by the Commission as 'discriminatory', a breach of transitional arrangements on free movement, and of the obligation to 'ensure equal treatment on the basis of nationality'. Although Lord Hope addressed the point 292 in his judgment, he concluded that it was still 'too early' to draw any conclusions on this aspect of the case (para 40). The Commission are right to be concerned about the operation of the right to reside, particularly given the scale of its impact on A8 nationals' trying to access social benefits.⁵⁶ Like other EEA nationals, the right to reside continues to bar A8 nationals out of social benefits if they are economically inactive. Furthermore, the Border Agency also regards them as liable to removal, an issue recently highlighted when a Czech national was reported to the agency for begging. Assisted by the AIRE Centre, she won an appeal to the First-Tier Tribunal (Immigration and Asylum Chamber) after claiming Jobseeker's Allowance. Various other grounds of appeal were relied on, including the possibility that she was 'self-employed' (as a *Big Issue* seller); and 'proportionality', as she had never actually relied on social assistance.⁵⁷

Conclusions

Clearly, the system by which EEA nationals and their family members acquire and retain residence rights is problematic in key respects. UK practice, in the way claims and awards of social assistance are currently being decided, is likely to be out of kilter with what EU law expects, particularly in the way proportionality principles should inform decisions on 'residence' and support. It is also certainly the case that some groups, including single parents, carers, and older citizens are more vulnerable to current UK approaches to determining if residence rights have been acquired and retained.

The situation of older EEA nationals like Galina Patmalniece seems to be a particular concern, especially in the context of an emerging political and judicial discourse that is starting to equate economic inactivity with a 'failure to integrate'.⁵⁸ Her exclusion from a right of residence, and therefore from State Pension Credit - the most basic support needed to secure dignity in old age which is readily available to most UK and Irish claimants, including those who may never have been in any kind of paid employment - does not say much about the value of European Union citizenship. Nor does it set much of a standard for the quality of life EU nationals can expect when they reside in other Member States after spending most of their adult life in employment in another EU State. Whilst the decision may be in accordance with the UK's legal regime, the result looks harsh. Galina Patmalniece was marginalised and made destitute by no less than two UK residence rights regimes - first, as an asylum claimant, and then as a result of the habitual residence system. It is unfortunate that this is happening against a backdrop of European initiatives aimed at combating the social exclusion of European 'elders', and 'exploring new ways to support active ageing'.⁵⁹

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1. In the UK this means EU nationals other than those of the UK, as well as citizens of Iceland, Norway, Liechtenstein, and Switzerland.
2. TFEU art 20(2)(a) (ex art 17 TEC) and art 21(1) (ex art 18 TEC).
3. SI 2006/1003. A detailed commentary on the transposition was provided by Helen Toner in 'New regulations implementing Directive 2004/38' (2006) *IANL* Vol 20 158-178. The European Casework Instructions (ECI) on the UK Border Agency's web-site provides guidance on how the agency interprets the legislation. The Directive generally refers to 'Union citizens' whereas the 2006 Regulations refer to 'EEA nationals'. This article will refer to EEA nationals.
4. Regulations 13,14, and 15 of the 2006 Regulations, respectively.
5. Regulation 13(3)(b).
6. Regulation 6(1). The others are jobseeker, self-sufficient person, or student. 'Worker' status continues in the circumstances set out in reg 6(2), for example temporary inability to work because of illness or accident; or involuntary loss of employment after a year's employment or more, registration as a jobseeker, and then unemployment for no more than six months (or proof that he/she is seeking employment and has 'a genuine chance of being engaged').
7. *Genc v Land Berlin* (Case C-14/09) [2010] 2 CMLR 44.
8. *Kempf v Staatssecretaris van Justitie* (Case 139/85) [1987] 1 CMLR 764.
9. As indicated by the recitals to Directive 2004/38. See, in particular, recital 17.
10. In *McCarthy v Secretary of State for the Home Department* (Case C-434/09), 5 May 2011, CJEU Advocate-General Kokott made it clear in her Opinion for the European Court that even if Mrs McCarthy had been a beneficiary of free movement rights she would have been ineligible for permanent residence as she was economically inactive and relied on UK State benefits (Opinion, 25 November 2010). There were no indications, she said, that 'for an uninterrupted period of five years in the past Mrs McCarthy worked in the UK or had sufficient resources for herself and her family, which would be the basic precondition for acquisition of a right of permanent residence' (para 44); and she did not consider that an applicant could enjoy advantages provided for by the directive such

as family unification in respect of her spouse without meeting the requirement of economic self-sufficiency (para 56). The self-sufficiency requirement in art 7 of the Directive also prevented the acquisition of permanent residence in *Lepko-Bozua* (note 12).

11. Articles 12, 13; and see *Amos v Secretary of State for the Home Department* [2011] EWCA Civ 552.

12. *Lepko-Bozua v Hackney LBC* [2010] HLR 46, CA. As a result of being economically inactive, accessing NHS medical care, and being what the court called 'an indirect beneficiary of social assistance', the EEA national was ineligible for a right of residence under art 7 of the Directive. This, in turn, meant she was a 'restricted person' under s 184(7) of the Housing Act 1984. The court rejected the argument that by not taking steps to remove her she had acquired a right of residence by 'waiver'.

13. SI 2006/1026.

14. This gives claimants a 'nil' applicable amount, and no support; Sch 7, para 17.

15. SI 1987/1967. Regulation 21AA lists the groups taken out of 'person from abroad' status.

16. Discussed by Catherine Phuong 'Closing Sangatte: the legal implications of the asylum dispute between France and the UK' (2003) Vol 17, No 3 *IANL* 157.

17. *Family Migration: A Consultation* (UK Border Agency, 13 July 2011). As part of the proposal to extend the probationary period before spouses and partners can apply for settlement, and 'to reduce burdens on the taxpayer', access to noncontributory benefits would be postponed for three years (Executive Summary, Section 2, para 1.11)

18. *Harrow London Borough Council v Ibrahim (Secretary of State for the Home Department Intervening)* [2010] 2 CMLR 51 (Case C-310/08), ECJ (Grand Chamber). Her derived right was reinforced by ECHR art 8, and was held not to be dependent on demonstrating self-sufficiency given that integration of the family, once installed, should be on the best possible terms. See also *Teixeira v Lambeth LBC* [2010] 2 CMLR 10 (Case C-480/08) confirming that a right of residence acquired by a parent who has been a worker at a time when the child resided with her can be obtained after she has ceased employment. Furthermore the right of residence, once acquired, can be retained without having to satisfy the self-sufficiency requirements in art 7 of Directive 2004/38.

19. *Baumbast v Secretary of State for the Home Department* (Case C-413/99) [2002] 3 CMLR 23.

20. The 'becoming' factor is underlined by the wording of art 7(1)(b) and reg 4(1)(c) of the 2006 Regulations; and see EU Commission guidance: 'Keeping the Right to Reside' in *The Right of Union Citizens & their Family Members to Move and Reside Freely within the Union: Handbook on Integration for Policy-Makers and Practitioners* (p 14) (Directorate General for Justice, Freedom & Security, May 2007, 2nd ed); and COM (2009) 313 Final.

21. 'Habitual Residence & Right to Reside' in the *Decision-Makers Guide*, Part 3, Vol 2, ch 7 (DWP, updated February 2011), para 071234/5.

22. Eligibility for in-work support through the tax credits system is dealt with by HM Revenue and Customs decision-makers. 2011 cases have highlighted how EEA claimants continue to experience discrimination, for example in the withholding of Working Tax Credit 'elements'; see *MR v HMRC* [2011] UKUT 40 (AAC) (26 January 2011): <http://www.bailii.org/uk/cases/UKUT/AAC/2011/40.html>

23. *Abdirahman v Secretary of State for Work and Pensions* [2007] 3 CMLR 37, Court of Appeal.

24. A distinction also drawn by Baroness Hale in the Supreme Court in *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11; 1 WLR 783 at 818.

25. *Trojani v Centre Public d'Aide Sociale de Bruxelles* (Case C-456/02) [2004] 3 CMLR 820. An approach approved by Baroness Hale this year in *Patmalniece* (at 818), discussed later in this article.

26. *R (Bidar) v Ealing London Borough Council* (C-209/03) [2005] QB 812; and *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies Louvain la Neuve* (C-184/99) [2002] 1 CMLR 19. In *Bidar* refusal of maintenance to students with a right to reside under art 18 of the Treaty, but who were treated as not 'settled' in the UK, was discriminatory in terms of art 12 on nationality grounds. The ECJ accepted States could expect a degree of integration into the host community, but a blanket ban breached art 12.

27. *Social Security (Habitual Residence) Amendment Regulations 2004 (SI 2004 No. 1232): Report by the Social Security Advisory Committee and Statement by the Secretary of State for Work and Pensions*, London: The Stationery Office, April 2004 (Cm 6181).
28. [2005] EWCA Civ 1184.
29. See, for example, *R (Maryam Mohamed) v Harrow LBC* [2006] HLR 18.
30. As in Commissioner's Case CIS/599/2007 (7 December 2007) when the judge dismissed an appeal against a decision that the claimant had lost her right to reside after deciding to delay her return to work to look after her child who had diabetes. He thought the decision was proportionate given that she would be unemployed for more than just a short time. On discrimination, he 'lacked jurisdiction'.
31. Case R (IS) 4-09 (31 October 2007).
32. *Kaczmarek v Secretary of State for Work and Pensions* [2009] 2 CMLR 3, CA.
33. As a result of changes in the Welfare Reform Bill 2011 support provided to low-paid workers through the childcare element of Working Tax Credit is likely to be cut.
34. Without a right of residence she was a 'person from abroad', and ineligible for support.
35. *Trojani v Centre Public d'Aide Sociale de Bruxelles (CPAS)* (C-456/02) [2004] All ER (EC) 1065.
36. [2009] 1 CMLR 24, House of Lords. More recently, in *Miskovic v Secretary of State for Work and Pensions* [2011] 2 CMLR 20, CA a decision requiring a former failed asylum seeker who had been permitted to take up employment under the WRS scheme, and who argued that this period of employment should have been aggregated with work done for WRS purposes (an argument relying on the 'regression' strand of proportionality principles) was held not to be disproportionate.
37. Report from the Commission to the European Parliament and the Council on the Application of Directive 2004/38/EC on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States', Brussels 10.12.09 COM (2008) 840 Final.
38. Section 2.3 of the Communication from the Commission to the European Parliament and the Council on Guidance for Better Transposition and Application of Directive 2004/38/EC on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States', Brussels 2.7.09 COM (2009) 313 Final.
39. *Commission v Belgium* (Case C-408/03) [2006] 2 CMLR 41 where it was held that to expect an EU citizen to hold sufficient resources personally as a condition of a right of residence and access to support would be a disproportionate interference in that person's fundamental rights under Art 18 of the Treaty. This is consistent with *Mahad (Ethiopia) v Entry Clearance Officer* [2010] 1 WLR 48, Supreme Court, when determining if family members have adequate resources for the purposes of the Immigration Rules rr 281, 297, and 317 and avoiding recourse to public funds.
40. G Ganz *Quasi Legislation* (2nd edn, London, Sweet & Maxwell, 1987).
41. A process that has been initiated against the UK with regard to aspects of the RtR scheme seen as discriminatory; see EU Commission Notice IP/10/1418 *Free Movement of Workers: Commission Requests UK to End Discrimination on other Nationals' Right to Reside as Workers* (Brussels: 28 October 2010). The appellant and intervener in *Patmalniece* cited this in the course of the appeal.
42. *Collins v Secretary of State for Work and Pensions* (Case C-138/02) [2004] 2 CMLR 8, ECJ and see *Vatsouras v Arbeitsgemeinschaft (ARGE) Nurnberg 900* (Case C-22/08) [2009] ECR I-4585, ECJ.
43. *Bressol v Gouvernement de la Communaute Francaise* (C-73/08) [2010] 3 CMLR 20.
44. *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11; [2011] 1 WLR 783.
45. SI 2002/1792.
46. Replaced from 1 May 2011, in regard to EEA nationals, by Regulation (EC) 883/04. Article 24(1) of Directive 2004/38 reinforces such 'equal treatment' requirements, but 'subject to such specific provisions as are expressly provided for in the Treaty and secondary law'.
47. Commissioner's Case CPC/1072/2006 (11 June 2008).
48. [2009] 3 CMLR 36 at 56.
49. Presumably what he had in mind here was that in some cases a UK national might be expected to acquire, or re-establish, habitual residence. Although this can be required for some groups when

coming to the UK from outside the EU, as in *Gingi v Secretary of State for Work and Pensions* [2002] 1 CMLR 587, it is *not* a requirement for UK nationals coming from another Member State, as determined by the ECJ and Lords in *Swaddling v Adjudication Officer* (Case C-90/97) 2 CMLR 679, HL. This would seem to be the group with which comparisons should be made.

50. *Bressol v Gouvernement de la Communaute Francaise* (C-73/08) [2010] 3 CMLR 20.

51. Interestingly, the court in *Bressol* did not provide any *reasons* for rejecting the Advocate General's Opinion. Lord Hope's take on this was that the court may have rejected it as being 'too analytical'!

52. *R (Bidar) v Ealing London Borough Council* (C-209/03) [2005] QB 812.

53. As Baroness Hale went on to point out (para 104), this was the reason why the Court of Appeal at the previous stage of the appeal, and in the previous cases of *Abdirahman* and *Kaczmarek*, focused on art 18(1) of the Treaty, coupled with Directive 90/364/EEC (now Directive 2004/38). These provisions restrict the right to reside to those with 'sufficient resources'.

54. The benefit in question was the Minimex, a subsistence benefit that is not unlike the UK's Pension Credit in that it provides a floor of minimum income for claimants who either have no income, or whose income falls below a minimum level; see K Puttick *Welfare Benefits & Tax Credits: Law and Practice*, 9th ed, pp215-218.

55. EU Commission Notice IP/10/1418 *Free Movement of Workers: Commission Requests UK to End Discrimination on other Nationals' Right to Reside as Workers* (Brussels: 28 October 2010).

56. In the first four years of the post-1st May 2004 restrictions on A8 nationals, 76% of claims for tax-funded, income-related benefits and tax credits were disallowed on the basis of the right to reside and habitual residence test; *Accession Monitoring Report 2004-2008* (Home Office/UKBA et al, 2008) p 23.

57. See 'Expulsion of homeless EEA national struck down on appeal' *Migrants Rights Network* 30 July 2011: <http://www.migrantsrights.org.uk/migration-pulse/2011/expulsion-homeless-eea-national-struck-down-appeal>.

58. Illustrated by the comment of Moses LJ at the end of his judgment in *Patmalniece* in the Court of Appeal that 'Absent that degree of economic or social integration which both EU and domestic legislation recognise as a justifiable condition for entitlement, there is no unlawful discrimination in refusing her a benefit which has the characteristics of social assistance...'

59. 'Active Ageing & Empowerment of Migrant Elders' and *The European Year for Active Ageing 2012*. The 2012 European Year will provide a framework to promote active ageing; see the Proposal for a Decision of the European Parliament and of the Council on the European Year for Active Ageing (2012) COM (2010) 462 Final.