

R(IS) 8/07
(Abdirahman and Ullusow v Secretary of State for Work and Pensions
[2007] EWCA Civ 657)

CA (Sir Andrew Morritt C, Lloyd and Moses LJJ)
5 July 2007

CIS/3573/2005
CH/2484/2005
CPC/2920/2005

Residence condition – habitual residence – meaning of “right to reside” – whether lawful presence in the UK sufficient

European Union law – whether right to reside requirement breaches international treaty obligations – whether discriminatory contrary to Article 12 of the EC Treaty

In each case the claimant had entered the United Kingdom (UK), being entitled to do so as an EEA national, and was living here without having to obtain permission to remain in the UK. Neither claimant was, at the relevant time, a worker or otherwise economically self-sufficient. Each claimed income-related social security benefits, but the claim was rejected on the basis that the claimant did not have the right to reside in the UK, a test introduced as from 1 May 2004. Each claimant appealed against the rejection to the appeal tribunal; Ms Abdirahman’s appeal was successful and Mr Ullusow’s failed. His further appeal to the Social Security Commissioner, and the appeal of the Secretary of State for Work and Pensions in Ms Abdirahman’s case, were heard by a Tribunal of Commissioners (DJ May QC, JM Henty and His Honour Judge Martin QC), who upheld the appeal tribunal’s decision as regards Mr Ullusow and reversed that in Ms Abdirahman’s case, after considering arguments based on UK immigration law and EC Treaty obligations, and accepting a concession from the Secretary of State that there was indirect discrimination against non-UK nationals contrary to Article 12 of the EC Treaty (discrimination on grounds of nationality), but holding that it was justified. Both claimants appealed to the Court of Appeal. Before the Court of Appeal the Secretary of State argued that the cases were outwith the scope of the EC Treaty and that therefore there could be no question of indirect discrimination contrary to Article 12.

Held, dismissing the appeal, that:

1. UK immigration law made a clear distinction between the UK’s obligation to admit an EEA national and an entitlement to reside for which it is necessary to be a “qualified person”, and the claimants, not being qualified persons, did not have a right to reside under UK law at the relevant times (paragraphs 19, 25 and 65);
2. while Article 18 of the EC Treaty imposed an obligation on the UK to confer a right to reside on nationals of Member States, that obligation is subject to the limitations imposed under Directive 90/364 to the effect that beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State, and so Article 18 did not create a right of residence in another Member State for an EEA national who was not economically active (*Trojani* [2004] ECR I-7573 and other ECJ judgments followed) (paragraphs 33, 34 and 67);
3. it was difficult to suppose that the terms of the European Convention on Social and Medical Assistance 1953 (ECSMA) or the European Social Charter could properly be read as imposing on its Contracting Parties obligations more onerous than those imposed directly on EU Member States by Article 18 as regards rights of residence and, in any event, the relevance of an international treaty to the interpretation of domestic legislation is limited, particularly where, as in this case, the legislation to be construed was not enacted in order to give effect to the treaty obligations in question (paragraphs 35 and 36);
4. while right of residence could be within the scope of application of the EC Treaty for the purposes of Article 12 (discrimination on grounds of nationality), that scope did not extend to cases where no right of residence existed under either the Treaty or the relevant domestic law and so the question of justification did not need to be considered in these cases (paragraphs 44 to 46, 69);

5. (*obiter*) if, as had been conceded before the Commissioners, there was indirect discrimination against non-UK nationals which required to be justified, the Commissioners had correctly held that the requirement was justified as a legitimate response to a manifest problem (paragraphs 48 to 50).

DECISION OF THE COURT OF APPEAL

Mr Nicholas Blake QC and Mr Stephen Knafler instructed by Leicester and Bristol and Avon Law Centres appeared for the appellants.

Mr Philip Sales QC and Mr Jason Coppel instructed by the Office of the Solicitor, Department for Work and Pensions, appeared for the respondent.

Judgment (reserved)

LORD JUSTICE LLOYD:

1. These three appeals raise the same point in relation to different social security benefits, claimed by two different persons. Ms Abdirahman is a Swedish national, born in Somalia. Mr Ullusow is a Norwegian national, also born in Somalia.

2. In each case, as regards the period relevant to this case, the claimant had entered the United Kingdom, being entitled to do so as an EEA national, and was living here without having to obtain permission to remain in the UK. Neither claimant was, at the relevant time, a worker or otherwise economically self-sufficient. Each claimed social security benefits, but the claim was rejected on the basis that the claimant did not have the right to reside in the UK, a test introduced as from 1 May 2004. Each claimant appealed against the rejection to the appeal tribunal; Ms Abdirahman's appeal was successful and Mr Ullusow's failed. His further appeal to the Social Security Commissioner, and the appeal of the Secretary of State for Work and Pensions in Ms Abdirahman's case, were heard by a special panel of three Social Security Commissioners, who upheld the appeal tribunal's decision as regards Mr Ullusow and reversed that in Ms Abdirahman's case.

3. Ms Abdirahman's claim was to income support, housing benefit and council tax benefit. Mr Ullusow's was to pension credit. The legislation relating to each benefit differs in detail, but the same point arises in relation to each, under amending regulations which came into effect on 1 May 2004. I will deal first with the position as regards income support.

Income support

4. Under the Income Support (General) Regulations 1987 (SI 1987/1967), as they stood at the relevant time (in 2004, after 1 May), entitlement to income support was subject to a special provision in the case of a "person from abroad", which had the effect that no sum was payable to such a person. How this was achieved does not matter. What matters is whether Ms Abdirahman came within the definition of "person from abroad". That definition was set out in regulation 21(3), but subject (relevantly) to regulation 21(3G). These provisions were as follows:

“(3) Subject to paragraphs (3F) and (3G), in Schedule 7 –

...

‘person from abroad’ means a claimant who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland, but for this purpose, no claimant shall be treated as not habitually resident in the United Kingdom who is –

- (a) a worker for the purposes of Council Regulation (EEC) No. 1612/68 or (EEC) No. 1251/70 or a person with a right to reside in the United Kingdom pursuant to Council Directive No. 68/360/EEC or No. 73/148/EEC; or a person who is an accession State worker requiring registration who is treated as a worker for the purpose of the definition of ‘qualified person’ in regulation 5(1) of the Immigration (European Economic Area) Regulations 2000 pursuant to regulation 5 of the Accession (Immigration and Worker Registration) Regulations 2004;
- (b) a refugee within the definition in Article 1 of the Convention relating to the Status of Refugees done at Geneva on 28th July 1951, as extended by Article 1(2) of the Protocol relating to the Status of Refugees done at New York on 31st January 1967; or
- (c) a person who has been granted exceptional leave to enter the United Kingdom by an immigration officer within the meaning of the Immigration Act 1971, or to remain in the United Kingdom by the Secretary of State; or
- (d) a person who is not a person subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act and who is in the United Kingdom as a result of his deportation, expulsion or other removal by compulsion of law from another country to the United Kingdom;

...

(3G) In paragraph (3), for the purposes of the definition of a person from abroad no person shall be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland if he does not have a right to reside in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.”

5. The requirement of habitual residence had been introduced in 1994. It precluded claims on the part of persons who came to this country on a short-term basis, and who sought benefits during their stay. It did not exclude claims by persons who came here intending to stay for a longer period or indefinitely. Such claims were the target of the amendment made in 2004 by adding paragraph 21(3G), with its requirement of a “right to reside” in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland. These appeals are about what is meant by a “right to reside” in these regulations and in the comparable regulations dealing with other benefits.

The facts

6. Ms Abdirahman is Swedish by nationality, and so a citizen of the EU. She came to England from Sweden on 1 March 2004 with her three children. She stated that her reason for coming was that she had family here, and she intended to remain here permanently. At the relevant time she did not work and was not seeking work in the UK. She claimed income support first on 13 May and then on 2 August 2004; on 1 June she claimed housing benefit and council tax benefit. The appeal tribunal held that by 1 June 2004 she had a fixed and settled intention of residing in the UK. Later she sought and eventually obtained work. At that stage, it is accepted, she was entitled to benefits, but this appeal is concerned with the earlier period, before she obtained, or sought to obtain, work.

7. Mr Ullusow is a Norwegian citizen, having been born in Somalia on 5 December 1936. He has an adult daughter of his first marriage, his first wife having died. His daughter travelled to England in 2004. Shortly afterwards he followed her, intending to find her and to persuade her to return with him to Norway. She would not return, and he decided to stay. He claimed pension credit on 14 June 2004; he was not working or seeking work at that time.

The appellants' immigration position

8. As citizens of an EEA Member State, each appellant was entitled to admission to the UK on production, on arrival, of a valid national identity card or passport issued by an EEA Member State. Each was able to remain in the UK thereafter, though the Government had the right to remove either of them. In those circumstances, Mr Blake QC, for the appellants, submitted that each of them was lawfully present in the UK, each of them was in fact residing in the UK, and accordingly each had, at least for the time being, a right to reside here. Mr Sales QC, for the Secretary of State for Work and Pensions, submitted that this is not the correct interpretation of the requirement of a right to reside in the income support Regulations. This requires consideration of the position as a matter of immigration law.

9. The starting position is in section 1(1) and (2) of the Immigration Act 1971:

“(1) All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.

(2) Those not having that right may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act; and indefinite leave to enter or remain in the United Kingdom shall, by virtue of this provision, be treated as having been given under this Act to those in the United Kingdom at its coming into force, if they are then settled there (and not exempt under this Act from the provisions relating to leave to enter or remain).”

10. The persons who have the right of abode in the UK are, under section 2 of the 1971 Act, British citizens and certain Commonwealth citizens (to whom the Act applies as if they were British citizens). By section 3 of that Act, other persons “shall

not enter the United Kingdom unless given leave to do so” under or in accordance with the Act, and may be given leave to enter the United Kingdom or, when already here, leave to remain here, either for a limited or for an indefinite period. In certain circumstances, a person who is not a British citizen may be removed from the United Kingdom in accordance with directions given by an immigration officer: section 10.

11. The position of citizens of other EU Member States is dealt with by section 7(1) of the Immigration Act 1988 (in force from 1994):

“(1) A person shall not under the principal Act require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable Community right or of any provision made under section 2(2) of the European Communities Act 1972.”

12. This was extended to citizens of all other EEA Member States by the Immigration (European Economic Area) Order 1994 (SI 1994/1895). This was replaced by the Immigration (European Economic Area) Regulations 2000 (SI 2000/2326), which in turn were replaced by the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003). Regulation 12 of the 2000 regulations covered the right of admission to the UK:

“(1) Subject to regulation 21(1), an EEA national must be admitted to the United Kingdom if he produces, on arrival, a valid national identity card or passport issued by an EEA State.”

Regulation 14 dealt with the right of residence:

“(1) A qualified person is entitled to reside in the United Kingdom, without the requirement for leave to remain under the 1971 Act, for as long as he remains a qualified person.”

13. “Qualified person” was defined by regulation 5, as a person who is an EEA national and in the United Kingdom in one of a number of capacities, including worker, self-employed person, provider of services, self-sufficient person, and student. It is not suggested that either appellant was a qualified person at the relevant time.

14. Mr Blake also relied on regulation 21(3), which was as follows:

“A person may be removed from the United Kingdom –

- (a) if he is not, or has ceased to be –
 - (i) a qualified person
- ...”

15. Thus, each appellant entered the United Kingdom lawfully, and remained here without any breach of immigration law. Each was resident in the UK by the relevant time, and no breach of the law was involved in their residing here. Each was entitled to remain here, in residence, unless and until action was taken against him or her to change that position, by way of removal. So, Mr Blake submitted, each must be regarded as having a right to do that which they were doing lawfully, namely to reside here. At least, he submitted, that is a possible interpretation of the income support regulations and the reference to “right to reside”.

16. Mr Sales submitted that this would make no sense in context. Among other things, it would render paragraphs (a) to (d) of the definition of “person from abroad” in paragraph 21(3) of the income support regulations redundant.

17. Mr Blake pointed out that paragraph 21(3G) does not define “right to reside”. He submitted that, accordingly, one must look elsewhere for the meaning of the phrase, and that it is relevant that the regulation did not merely list the circumstances in which a right to reside did exist. It seems to me that this submission loses any force that it might otherwise have had, when one takes into account the fact that the regulation deals with a right to reside not only in the UK, which the UK legislator might expect to be able to list accurately, but also with such a right as regards the Channel Islands, the Isle of Man and the Republic of Ireland. It would be presumptuous, and rash, for a UK legislative draftsman to endeavour to list exhaustively the circumstances in which a right to reside in those territories may exist, and to set out such a list would also require that, if and when there was any change in the circumstances which could give rise to such a right, the regulations would have to be changed accordingly. It seems to me that it was a much more natural drafting technique to speak of “a right to reside” in general terms, leaving it to be ascertained from the facts in any given case whether such a right did exist at the relevant time.

18. As Mr Blake submitted, there is a European law dimension to the question of rights of residence under the laws of Member States. However, it is for individual Member States to make their own provision as regards immigration, so long as they comply with the overriding requirements of EU law in cases where that applies. It is therefore necessary to start with the national law.

19. It seems to me plain that UK law makes a distinction between a right to reside, which is conferred only on British citizens, certain Commonwealth citizens, qualified persons as defined by the Immigration (European Economic Area) Regulations 2000 and the various additional categories mentioned in the definition of “persons from abroad” such as refugees, those with indefinite leave to remain and those to whom exceptional leave to remain has been granted, on the one hand, and any lesser status, in particular that of an EEA national who is in this country having entered lawfully, has committed no breach of immigration law, but is not a qualified person and therefore does not enjoy the benefit of regulation 14 which confers a “right to reside”. Logically, if an EEA national has to be a qualified person to have conferred on him a right to reside, it is not a proper reading of a reference to “right to reside” under UK law to extend it to an EEA national who is not a qualified person.

20. Mr Blake sought support for his argument in two decisions, one of this court and the other of the House of Lords. The first is *R v City of Westminster ex parte Castelli* (1996) 28 HLR 616. This arose from the provisions of what is now Part 7 of the Housing Act 1996 dealing with the obligation of local housing authorities to provide accommodation for the homeless, and with a judge-made exception under which there was no such obligation towards those who were not “lawfully here”. (This has since been replaced with a statutory requirement that the person in question must be “eligible for assistance”.) The applicants for accommodation, both EU citizens, had been qualified persons under the then relevant legislation, but had ceased to be by the relevant time. Evans LJ held at page 626 that:

“a European national who has, or may have, ceased to be a qualified person in fact, but who has not been given and overstayed a limited leave to remain and has not been informed that the Secretary of State has decided that he should be removed, does not belong to a category of persons ‘not lawfully here’ who are not to be regarded as ‘persons’ for the purposes of section 62/63 of the Housing Act [1985].”

21. Swinton Thomas LJ agreed, though he noted in terms, at page 628:

“The appellants had no right of residence in this country, and no right to remain here indefinitely. It does not follow that they were here unlawfully and that no duty was owed to them under the Act.”

22. Given that the case was concerned with the scope of a judge-made rule, I do not find it of assistance in the present case.

23. *Chief Adjudication Officer v Wolke* [1997] 1 WLR 1640 (also reported as R(IS) 13/98) was concerned with income support, and with the case of EU nationals who had been in receipt of benefits, but in relation to whom the Secretary of State later contended that they were not lawfully in the United Kingdom because they had become a burden on public funds. The issue, under the income support Regulations as they then stood, was whether the persons in question had been “required to leave” by the Secretary of State. It was held that they had not, because the letter sent to each lacked any element of compulsion. Mr Blake relies on the case not for that point, but for the discussion of the position of EU citizens generally. Lord Hoffmann’s speech is instructive as to the history and structure of the legislation. At page 1656D he said that the appellants “were lawfully present in the United Kingdom” and endorsed the decision to the same effect in *Castelli*.

24. In *Barnet London Borough Council v Abdi* [2006] EWCA Civ 383 this court had to consider whether persons in a somewhat similar position to the present appellants, as EU citizens living in this country and not economically active, but who were receiving income support, were “subject to immigration control” for the purposes of regulations under the Housing Act 1996 Part 7 as they then stood. This depended on whether each of them “required leave to enter or remain in the United Kingdom (whether or not such leave has been given)”. The court held that they did require such leave. At [18], agreeing with Buxton LJ, I said this:

“Regulation 14 of the Immigration (European Economic Area) Regulations 2000 gives an EEA national an entitlement to reside in the United Kingdom ‘without the requirement for leave to remain under the 1971 Act’ for as long as he remains a qualified person. If he ceases to be a qualified person, it follows that he no longer has an entitlement to reside in the UK, and that he does from then on require leave to remain under the 1971 Act. It seems to me that such a person is clearly ‘subject to immigration control’ for the purposes of the Homelessness (England) Regulations 2000. Mr Ismail and Ms Abdi may well never have been qualified persons. There is, however, no reason to treat their status in this respect as being different from that of an EEA national who once was, but is no longer, a qualified person.”

25. Correspondingly, it seems to me that the appellants, though lawfully present in this country, did not have a right to reside, under UK law, at the time relevant to the present appeals, because they were not qualified persons.

26. Mr Blake challenged this reading in two ways. First, he said it would result in the UK being in breach of its international treaty obligations under the European Convention on Social and Medical Assistance 1953 (ECSMA), and that as a principle of domestic law, if a statutory provision was capable of more than one meaning, a meaning which was consistent with treaty obligations should be preferred. Secondly, he said that the reading adopted by the Commissioners was discriminatory, contrary to Article 12 of the EU Treaty, and was not objectively justified.

European obligations

27. ECSMA is a Council of Europe Treaty by which the UK is bound, but which has not been incorporated into national law. The parties before us were not agreed as to whether all EEA Member States are bound by it. Mr Blake relies on Article 1:

“Each of the Contracting Parties undertakes to ensure that nationals of other Contracting Parties who are lawfully present in any part of its territory to which this Convention applies, and who are without sufficient resources, shall be entitled equally with its own nationals and on the same conditions to social and medical assistance ... provided by the legislation in force from time to time in that part of its territory.”

28. Mr Sales, on the other hand, pointed out that the Convention distinguishes between lawful presence, referred to in Article 1 (which would include short-term visitors), and residence, or lawful residence, mentioned in Articles 6, 7 and 11 among others. In particular Article 11 explains lawful residence:

“Residence by an alien in the territory of any of the Contracting Parties shall be considered lawful within the meaning of this Convention so long as there is in force in his case a permit or such other permission as is required by the laws and regulations of the country concerned to reside therein.”

29. It seems to me that the provisions of the EU Treaty are of more direct relevance to the present case. In particular, Article 18 provides as follows:

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

30. For present purposes the most important of those measures is Directive 90/364/EEC on the right of residence. This Directive was made in order to give effect to the abolition of obstacles to the free movement of persons. The preamble includes the following:

“Whereas beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State ...”

31. Article 1 is as follows:

“Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community Law and to members of their families as defined in paragraph 2, provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient

resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.”

32. We were referred to a number of decisions of the European Court of Justice concerning rights of residence.

- (1) Case C-85/96 *Martinez Sala* [1998] ECR I-2691 concerned discriminatory requirements under German law, whereby a Spanish national residing in Germany was only entitled to certain social security benefits if in possession of a particular document proving her right to reside in Germany for the relevant period. She had had residence permits for previous periods and had applied for a renewed permit, and she was in fact authorised to reside in Germany.
- (2) Case C-184/99 *Grzelczyk* [2001] ECR I-6193 related to the right of residence of students to which a different Directive applies (93/96). The court, at paragraph 41 of its judgment, noted the different nature of the relevant provisions, and the reasons for such different treatment.
- (3) In Case C-413/99 *Baumbast* [2002] ECR I-7091 the court had to consider Article 1(1) of Directive 90/364, in circumstances where the claimant (a German national) had lived and worked in the UK for a long time, and had retained his home there, with his family, after his work came to an end, even though he himself then worked abroad, so that he was not present in the UK as a worker or work-seeker. He had never had recourse to social benefits, and he and the family were covered by sickness insurance in Germany. He and the family had had residence permits but his application for a renewal of his permit was refused on the ground that his sickness insurance was not adequate because it did not cover emergency treatment in the UK. He sought to establish that he had a direct right of residence under Article 18, and that to refuse him a residence permit on the ground that the sickness insurance would not cover emergency treatment in the UK would be disproportionate and therefore unlawful under EU law. The Court upheld this argument. As regards the principles, it said, at paragraphs 84 to 86:

“84. As regards, in particular, the right to reside within the territory of the Member States under Article 18(1) EC, that right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely as a national of a Member State, and consequently a citizen of the Union, Mr Baumbast therefore has the right to rely on Article 18(1) EC.

85. Admittedly, that right for citizens of the Union to reside within the territory of another Member State is conferred subject to the limitations and conditions laid down by the EC Treaty and by the measures adopted to give it effect.

86. However, the application of the limitations and conditions acknowledged in Article 18(1) EC in respect of the exercise of that right of residence is subject to judicial review.

Consequently, any limitations and conditions imposed on that right do not prevent the provisions of Article 18(1) EC from conferring on individuals rights which are enforceable by them and which the national courts must protect (see, to that effect, Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 7).”

Applying those principles to the facts, at paragraphs 92 to 94 it concluded:

“92. In respect of the application of the principle of proportionality to the facts of the Baumbast case, it must be recalled, first, that it has not been denied that Mr Baumbast has sufficient resources within the meaning of Directive 90/364; second, that he worked and therefore lawfully resided in the host Member State for several years, initially as an employed person and subsequently as a self-employed person; third, that during that period his family also resided in the host Member State and remained there even after his activities as an employed and self-employed person in that State came to an end; fourth, that neither Mr Baumbast nor the members of his family have become burdens on the public finances of the host Member State and, fifth, that both Mr Baumbast and his family have comprehensive sickness insurance in another Member State of the Union.

93. Under those circumstances, to refuse to allow Mr Baumbast to exercise the right of residence which is conferred on him by Article 18(1) EC by virtue of the application of the provisions of Directive 90/364 on the ground that his sickness insurance does not cover the emergency treatment given in the host Member State would amount to a disproportionate interference with the exercise of that right.

94. The answer to the first part of the third question must therefore be that a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality.”

- (4) In Case C-456/02 *Trojani* [2004] ECR I-7573, the questions had been referred to the court by a Belgian court on the basis that Mr Trojani had no right derived from national law to reside in Belgium, so as to raise the issue whether he could derive such a right directly from Article 18. However, at the hearing in the European Court of Justice, it became apparent that he did have a temporary residence permit under Belgian law. Unlike Mr Baumbast, Mr Trojani was not self-

sufficient; his claim was to the minimex, a minimum subsistence allowance. Without regard to the Belgian residence permit, the court considered that he had no right of residence: see paragraphs 33 to 36:

“33. ... it follows from Article 1 of Directive 90/364 that Member States can require of the nationals of a Member State who wish to enjoy the right to reside within their territory that they themselves and the members of their families be covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of that State during their period of residence.

34. As the Court has previously held, those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality (*Baumbast and R*, paragraph 91).

35. It follows from the judgment making the reference that a lack of resources was precisely the reason why Mr Trojani sought to receive a benefit such as the minimex.

36. In those circumstances, a citizen of the Union in a situation such as that of the claimant in the main proceedings does not derive from Article 18 EC the right to reside in the territory of a Member State of which he is not a national, for want of sufficient resources within the meaning of Directive 90/364. Contrary to the circumstances of the case of *Baumbast and R* (paragraph 92), there is no indication that, in a situation such as that at issue in the main proceedings, the failure to recognise that right would go beyond what is necessary to achieve the objective pursued by that directive.”

However, Mr Trojani’s possession of the residence permit made all the difference, as is apparent from the last sentence of the answer given in paragraph 46 to the second question referred to the court:

“Consequently, the answer to the second question must be that a citizen of the Union who does not enjoy a right of residence in the host Member State under Articles 39 EC, 43 EC or 49 EC may, simply as a citizen of the Union, enjoy a right of residence there by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities must ensure that those limitations and conditions are applied in compliance with the general principles of Community law, in particular the principle of proportionality. However, once it is ascertained that a person in a situation such as that of the claimant in the main proceedings is in possession of a residence permit, he may rely on Article 12 EC in order to be granted a social assistance benefit such as the minimex.”

In respect of the position without regard to the national residence permit, the court adopted the same answer as had been suggested by Advocate General Geelhoed in an illuminating Opinion. He made the point, at paragraph 18, that the difference in treatment of economic and non-economic migrants has a mainly pragmatic basis:

“So long as social security systems have not been harmonised in terms of the level of benefits, there remains a risk of social tourism, ie moving to a Member State with a more congenial social security environment.”

At paragraph 70 he observed that “the basic principle of Community law is that persons who depend on social assistance will be taken care of in their own Member State”. That is borne out by the preamble to Directive 90/364, quoted at [30] above.

- (5) In Case C-138/02, *Collins* [2004] ECR I-2141 (also reported as R(JSA) 3/06), the claimant sought jobseeker’s allowance, which was refused on the basis that he was not habitually resident in the UK (under the Jobseeker’s Allowance Regulations 1996 (SI 1996/207). The court held that it could be legitimate for a Member State to impose a residence requirement as a condition of entitlement to such an allowance, so long as it was proportionate, not going beyond what was needed in order to establish a connection between the claimant and the employment market in the Member State in question.
- (6) In Case C-209/03, *Bidar* [2005] ECR I-2119, entitlement to student loans was at issue, so that the relevant Directive was 93/96. Moreover, it was not in dispute that the claimant had a right of residence.

33. It seems to me, on the basis of those decisions, in particular that of *Trojani*, that Article 18 does not create a right of residence for an EU citizen in another Member State, in a case in which the limitations imposed under Directive 90/364 are not satisfied, and that those limitations are proportionate to the legitimate objective in protecting the public finances of the host Member State. The same conclusion appears from a number of other decisions of the Court of Appeal, notably *R v Secretary of State for the Home Department ex parte Vitale* [1996] All ER (EC) 461, *Ali v Secretary of State for the Home Department* [2006] EWCA Civ 484 (at [21]–[22]), and *W (China) v Secretary of State for the Home Department* [2006] EWCA Civ 1494, at [4].

34. It is true that reference was made to ECSMA in the preliminary part of the court’s judgment in *Martinez Sala*, but there is no such reference in any other of these judgments. In those circumstances I find it difficult to suppose that the terms of ECSMA can properly be read as imposing on its Contracting Parties obligations more onerous than those imposed directly on EU Member States by Article 18 as regards rights of residence.

35. In any event, the relevance of an international treaty to the interpretation of domestic legislation is limited. Diplock LJ said in *Salomon v Commissioners of Customs & Excise* [1967] 2 QB 116 at 143:

“The convention is one of those public Acts of State of Her Majesty’s Government of which Her Majesty’s judges must take judicial notice if it be

relevant to the determination of a case before them, if necessary informing themselves of such acts by inquiry of the appropriate department of Her Majesty's Government. Where, by a treaty, Her Majesty's Government undertakes either to introduce domestic legislation to achieve a specified result in the United Kingdom or to secure a specified result which can only be achieved by legislation, the treaty, since in English law it is not self-operating, remains irrelevant to any issue in the English courts until Her Majesty's Government has taken steps by way of legislation to fulfil its treaty obligations. Once the Government has legislated, which it may do in anticipation of the coming into effect of the treaty as it did in this case, the court must in the first instance construe the legislation, for that is what the court has to apply. If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties (see *Ellerman Lines v Murray ...*), and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own courts. But if the terms of the legislation are not clear, but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred. Thus, in case of lack of clarity in the words used in the legislation, the terms of the treaty are relevant to enable the court to make its choice between the possible meanings of these words by applying this presumption."

36. The present case is not one (unlike *Salomon*) in which the legislation to be construed was enacted in order to give effect to the treaty obligations in question. In those circumstances a passage from the speech of Lord Neuberger in *Boake Allen Ltd v HMRC* [2007] UKHL 25 at [51] is relevant:

"Mr Aaronson also relied on what Diplock LJ said in *Salomon v Comrs of Customs and Excise* [1967] 2 QB 116, 143, to the effect that, where a statutory provision was 'not clear' and was 'reasonably capable of [bearing] more than one meaning', the court should favour 'the meaning which is consonant' with the UK's treaty obligations. This principle is of less weight in a case such as the present where there is no question, as in *Salomon*, of the legislative provision in issue, namely section 788 of the 1988 Act, having been enacted to give effect to a specific treaty obligation. In this case, section 788, while enacted to enable the UK's treaty obligations under [double taxation conventions] generally to have effect in domestic law, was plainly not designed to give effect to any specific obligation or even any specific Convention. Nonetheless, the point would have some force here on the counter-factual hypothesis that the claimants succeed on the first issue."

37. Mr Blake showed us that in *Szoma v Secretary of State for Work and Pensions* [2005] UKHL 64 (also reported as R(IS) 2/06), where other regulations about income support and other benefits were at issue, in relation to a period between 2000 and 2004, a paragraph was included in the regulation which referred specifically to ECSMA and to a person who is a national of a state which had ratified that Convention being lawfully present in the UK: see the speech of Lord Brown of

Eaton-under-Heywood at [10] and [12]. I am not aware of any basis for saying that any aspect of the regulations which we have to consider was enacted in order to give effect to the UK's obligations under ECSMA.

38. I note that, at [29] of his speech in *Szoma*, Lord Brown spoke of the distinction made in ECSMA between lawful presence and lawful residence as being a distinction "not recognised in our law". He did not have to consider the distinction between a right to reside and lawful presence without any such right, a distinction which plainly is made by the 2000 regulations.

39. I should record that Mr Blake also relied on the UK's obligations under the European Social Charter. Those do not appear to differ materially from those under ECSMA, and exactly the same points arise. Accordingly I need not consider those obligations separately.

40. Given that the domestic legislation is required to conform to the obligations of Member States under the EU Treaty, as limited by Directive 90/364, it seems to me that an argument that the same legislation was also intended to comply with the rather different provisions of ECSMA is far from compelling. In any event, I do not regard the relevant regulation as being reasonably capable of the meaning which Mr Blake urges upon us. On that basis, even if the result is that the UK is in breach of its obligations under ECSMA, that would not affect my view as to the correct interpretation of "right to reside" in regulation 21(3G).

Article 12 of the Treaty: discrimination

41. The next question is whether such a conclusion is in breach of the prohibition in Article 12 of the Treaty of discrimination on grounds of nationality:

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

42. Two questions have to be considered: is the right claimed one which is within the scope of application of the Treaty and, if so, is the discrimination objectively justified. The Commissioners held that it was within the scope of the Treaty, though without addressing the point in their reasoning, but that it was justified. The respondent contends, by a Respondent's Notice, that they were wrong on the first point.

43. The appellants complain of discrimination as regards entitlement to social security benefits. Such benefits themselves are not within the scope of application of the Treaty. However, the criterion used by the UK's legislation in this respect is whether the claimant has or does not have a right of residence. The Treaty does speak of a right of residence, in Article 18, already mentioned ([29] above), so such a right could be within the scope of application of the Treaty. However, Article 18 is qualified in its ambit, and does not give the appellants any direct European right of residence. That seems to me to be clear from a consideration of the cases already mentioned, as set out in [32] above. The only case in which a person was found to have a right of residence based on European law, rather than on an act done under national law, is *Baumbast*, where Mr Baumbast was economically self-sufficient. In particular *Trojani*, quoted and discussed at [32(4)] above, shows that an EU citizen, lawfully present in another Member State, but not economically self-sufficient, does not, merely by virtue of lawful presence in the host State, acquire a Treaty-based

right of residence. In the present case, as stated at paragraph [33] above, there is no right of residence based directly on European law.

44. I accept Mr Sales' proposition that the European cases show that, in this area, the scope of application of the Treaty, for the purposes of Article 12, includes both cases where a right of residence arises directly under the Treaty and those where it arises separately under the law of the Member State. It does not extend to cases where no right of residence exists under either the Treaty or the relevant domestic law.

45. It follows from this that the right claimed by Ms Abdirahman and Mr Ullusow is not within the scope of application of the Treaty.

46. On that basis, the need to justify the discrimination on the grounds of nationality which is involved in the use of the right to reside test does not arise.

47. Mr Blake criticised the Commissioners, who considered that the discrimination did need to be justified, for not giving adequate reasoning for the conclusion that it was justified. In an elaborate submission, he contended that the only proper way to approach this question was by way of immigration control, rather than by imposing what were necessarily arbitrary limits on entitlement to social security benefits. In his submission, it would be necessary to assess all the relevant circumstances of a claimant's position in order to decide what degree of connection the claimant had with the United Kingdom, through the claimant's own history of presence here, or other connections through family or otherwise, and as regards his or her current intentions in respect of residence, activity whether economic or social, and so on. He argued that the right approach was that anyone who was lawfully present in the UK should be entitled, if other conditions were satisfied, to all relevant social security benefits, and that this entitlement should only be brought to an end (if all other conditions continued to be satisfied) if the claimant left the country whether voluntarily or as a result of a decision to remove him or her under section 10 of the 1971 Act.

48. If the question were to arise for decision, I would reject that approach. It seems to me that it would be disproportionate to insist on individual consideration, as a matter of immigration control, of each claimant's circumstances, in order to decide whether social security benefits should be payable. The observations of the court in paragraph 36 of *Trojani*, cited above ([32(4)]) seem to me to show that the approach adopted by the 2004 Regulations is justified, even though it does involve indirect discrimination on the basis of nationality.

49. The Commissioners referred in their decision, CIS/3573/2005, to a number of passages from a statement by the Secretary of State made under section 174(2) of the Social Security Administration Act 1992. That section requires the Secretary of State, when laying regulations which had been referred in draft to the Social Security Advisory Committee (under section 172), to lay with them a copy of the Committee's report and a statement showing, insofar as effect has not been given to the Committee's recommendations, his reasons why not. In the case of the 2004 Regulations, a number of recommendations of the Committee were not given effect, and the statement explains why. In those circumstances it seems plain that this statement is admissible, as a White Paper would be in a different situation, to show the purpose of the regulations, and that it may also be looked at to see whether any discriminatory provision is justified.

50. I agree with the Commissioners that several passages from the statement are of assistance in this respect, and support the view that, if there is discrimination which requires to be justified (contrary to my view), the justification existed. They quoted many of the relevant passages, and I do not need to lengthen this judgment by quoting any myself. I also agree with them that further support for the same conclusion may be derived from a passage from [47] of the judgment of Sedley LJ in *R (Morris) v Westminster City Council* [2005] EWCA Civ 1184:

“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.”

Housing benefit and council tax benefit

51. The relevant provisions in relation to housing benefit are to be found in the Housing Benefit (General) Regulations 1987 (SI 1987/1971). Regulation 7A(1) provides:

“... A person from abroad who is liable to make payments in respect of a dwelling shall be treated as if he were not so liable ...”

52. The meaning of “person from abroad” is to be found in regulation 7A(4):

“‘person from abroad’ also means any person other than a person to whom paragraph (5) applies who –

...

- (e) is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland, but for this purpose no person shall be treated as not habitually resident in the United Kingdom who is”.

[and then four sub-paragraphs follow, which are identical to paragraphs (a) to (d) of regulation 21(3) in the income support Regulations (see paragraph [4] above).]

53. This definition is further qualified, as a result of the 2004 amendments, by paragraph 7A(4B), as follows:

“In this regulation, for the purposes of the definition of a person from abroad no person shall be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland if he does not have a right to reside in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.”

54. Thus, apart from the inclusion of the word “also” in the definition of “person from abroad” in regulation 7A(4), which is explained by the history of the text, as the Commissioners said at paragraphs 13 to 15 of their decision on the housing benefit claim, CH/2484/2005, the text of the regulations is identical to that considered in relation to income support.

55. The same is true of council tax benefit, for which reference has to be made to regulation 4A(1), 4A(4) and 4A(4B) of the Council Tax Benefit (General) Regulations 1992 (SI 1992/1814).

56. Because the text of the legislation is the same, the result is the same as in relation to income support, for the reasons given above when dealing with that benefit.

Pension credit

57. Mr Ullusow's claim was to pension credit. This arises under the State Pension Credit Act 2002. Section 1(2) of that Act provides that a claimant is entitled if he is in Great Britain, he has attained a qualifying age and he satisfies the conditions as to guarantee credit contained in section 2(1) or savings credit in section 3(1) and (2). Section 1(5) provides that regulations may be made for the circumstances in which a person is to be treated as being or not being in Great Britain. Regulation 2 of the State Pension Credit Regulations 2002 (SI 2002/1792) provides:

“(1) Subject to paragraph (2) a person is to be treated as not in Great Britain if he is not habitually resident in the United Kingdom ... but for this purpose, no person is to be treated as not habitually resident in the United Kingdom who is ...”

[The regulation continues by setting out circumstances which do not apply to the instant case.]

“(2) For the purposes of treating a person as not in Great Britain in paragraph (1), no person shall be treated as habitually resident in the United Kingdom ... if he does not have a right to reside in the United Kingdom ...”

58. Thus exactly the same point arises in relation to this benefit as does for income support and the other benefits already considered.

The EEA Agreement

59. Mr Ullusow's claim, as a Norwegian national, would not in any event arise directly under the EU Treaty, but indirectly via the Agreement on the European Economic Area 1992, known as the Oporto Agreement. Both parties accepted that, in principle, such a claim could arise in that way. The Commissioners, however, did not accept this. In their decision on this appeal, CPC/2920/2005, they said that the EEA Agreement only extends to the right of establishment, not to general provisions as regards the freedom of movement of persons.

60. It is not strictly necessary to decide this point, because Mr Ullusow's appeal fails in any event. Both parties remained in agreement before us, as they had been below, that Directive 90/364 does apply to citizens of the EFTA States, including Norway, under the EEA Agreement, and is not limited to provisions concerning freedom of establishment. That Directive forms part of Annex 8 to the EEA Agreement, and is therefore to be treated as part of the agreement itself. It follows that it is the subject of Member States' obligation to take all necessary measures to implement it, under Article 3, and that discrimination on grounds of nationality in the relevant field is prohibited by Article 4, and by Article 7 the Annexes are to have the force of law in the contracting states. I do not see any basis for distinguishing between those of its provisions which are concerned with freedom of establishment, and its other provisions, for this purpose. For those and for other reasons which it is

unnecessary to set out, for my part I agree that the fact that Mr Ullusow's entitlement has to be asserted via the EEA Agreement is not fatal to his claim.

Conclusion

61. For the reasons given above, I come to the conclusion that the Commissioners were right to hold that neither Ms Abdirahman nor Mr Ullusow had a right to reside in the UK for the purposes of the various relevant regulations at the time relevant for these appeals, and that the requirement of a right to reside is not contrary to EU law.

62. Mr Blake submitted that a decision against the appellants would give rise to a question of EU law which would have to be referred to the European Court of Justice for a preliminary ruling under Article 234 of the Treaty. It seems to me that the position is clear from the terms of the judgment in *Trojani* and in the other cases mentioned in [32] above. Accordingly I see no need to refer any question for such a preliminary ruling.

63. I would dismiss these appeals, for the reasons given above.

LORD JUSTICE MOSES:

64. I agree that the appeals should be dismissed for the reasons given by Lloyd LJ. But I add a few observations of my own.

65. The first issue is whether the appellants can equate their undoubted lawful presence within the UK with a **right to reside** within the meaning of regulation 21(3G) of the Income Support (General) Regulations 1987 or the equivalent regulation in the Housing Benefit (General) Regulations 1987, the Council Tax Benefit (General) Regulations 1992 and the State Pension Credit Regulations 2002. For the reasons given by Lloyd LJ, particularly at [19], they cannot. They were not **qualified persons** within the meaning of regulation 5 of the Immigration (European Economic Area) Regulations 2000. These regulations draw a clear distinction between the UK's obligation to admit an EEA national (regulation 12) and an entitlement to reside (regulation 14 (1)). The very fact that regulation 14(1) limits entitlement to reside to those falling within the regulation 5 category demonstrates that it is not possible to interpret regulation 21(3G) in the manner for which they contend.

66. Once it is clear that lawful presence cannot be interpreted as meaning the same as a right to reside in the relevant benefit regulations, it is not open to the appellants to invoke the UK's treaty obligations under Article 1 of the ECSMA or the European Social Charter as aids to construction. Still less, when the regulations relevant to the instant appeals were not enacted to give effect to the ECSMA (*Salomon and Boake Allen Ltd*). In that respect *Szoma* (to which Lloyd LJ refers at [37] and [38]) provides a useful contrast. In that case the regulation which was said to confer a right to certain benefits to a Polish national, whilst temporarily admitted to the UK, (paragraph 4 of the Schedule to the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 (SI 2000/636)) was enacted to give effect to the UK's obligations under those two treaties (see [12] of Lord Brown's speech). When Lord Brown suggested (in [29]) that the distinction between a right to reside and lawful presence in those treaties was not a distinction "recognised in our law", he could not have had, and had no need to consider the regulations relevant to these appeals.

67. There remains, then, only one potential source for the creation of a right to reside, namely Article 18 of the EU Treaty. This imposes, as part of our law, an obligation on the UK to confer a right to reside, subject to proportionate limitations and conditions, proportionately applied and designed to achieve the legitimate aim of protecting the fisc against unreasonable burdens imposed by those who are not economically active. This objective, expressed in plain terms in the preamble and Article 1 to Directive 90/364/EEC (cited by Lloyd LJ at paragraphs [30] and [31]) is a corollary of the important principle, expressed by Advocate General Geelhoed in *Trojani*, that:

“the basic principle of Community law is that persons who depend on social assistance will be taken care of in their own Member State” (paragraph 70).

68. The jurisprudence identified by Lloyd LJ at [32] supports that principle, even though it is not expressed by the ECJ itself. Mrs Martinez Sala had a right to reside under German law but, unlike German nationals, was required to produce a piece of paper to secure her entitlement to benefit. Mr Baumbast was economically active and, thus, secured his right to reside in the UK from Article 18(1) of the EU Treaty. Mr Trojani’s right to reside was derived from the permit he obtained, in the nick of time, from the Belgian authorities. Article 18(1) confers no such right on either of these appellants, neither of whom was economically active at the material time.

69. That conclusion establishes that the rights which these appellants assert are outwith the scope of application of the Treaty. Thus no question of discrimination, proscribed by Article 12, arises.

THE CHANCELLOR:

70. I agree that these appeals should be dismissed for the reasons given by Lloyd LJ. I also agree with the further observations of Moses LJ. I have none of my own.

Order: Appeal dismissed. Social Security Commissioners’ decisions affirmed. Appellants’ application for permission to appeal to the House of Lords refused.

(Order does not form part of the approved judgment)

