

R(IS) 5/09
(Kaczmarek v Secretary of State for Work and Pensions
[2008] EWCA Civ 1310)

CA (Sir Anthony Clarke MR
Maurice Kay and Stanley Burnton LJJ)
13 October 2008

CIS/2358/2006

European Union law - free movement - whether a former worker has a right of residence under Article 18(1) of the EC Treaty

Residence and presence conditions - right to reside - scope of Article 18(1) of the EC Treaty

The claimant was a Polish national, who came to the United Kingdom in April 2002. She was initially a student and then in employment, but became economically inactive after the birth of her child and claimed income support in October 2005. Her application was rejected but she appealed successfully to an appeal tribunal. The Secretary of State appealed to the Commissioner, who allowed the appeal. The claimant appealed to the Court. It was common ground that under domestic legislation she was not entitled as she did not enjoy the right to reside in the UK at the material time because she was not a “qualified person” as defined by regulation 5 of the Immigration (European Economic Area) Regulations 2000. The argument for the claimant was that entitlement arose under the EU Treaty: either Article 12 on the authority of *Trojani v Centre public d’aide sociale de Bruxelles* (Case C-456/02) [2004] ECR I-7573, where it was held that a citizen of the Union who is not economically active may rely on Article 12 EC where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit, or Article 18 on the authority of *Baumbast v Secretary of State for the Home Department* (Case C-413/99) [2002] ECR I-7091 on the basis that it was disproportionate to deny a right of residence, and thereby entitlement to income support, to a person who was lawfully resident and as substantially settled as the claimant.

Held, dismissing the appeal, that:

1. the reference to lawful residence “for a certain time” in *Trojani* is a reference to specific qualifying periods which give rise to an express right of residence and does not open the door to eligibility based on residence of unspecified but significant duration and of a type which evidences a degree of social integration in the host Member State (paragraph 16);
2. Article 18(1) may be relied upon to fill a lacuna in a Directive where it would be disproportionate for the limitations and conditions contained in the Directive and the domestic Regulations to undermine the direct application of Article 18, but the facts of *Baumbast* were more susceptible to such lacuna-filling than the facts of the present case where, at the material time, the appellant was no longer a worker and nor was she self-sufficient (paragraphs 17 to 22);
3. an authoritative insight into the parameters of proportionality is given by Council Directive 2004/38/EC, in force from 30 April 2006, which provides for a right of permanent residence after five years’ lawful presence that is not conditional on the claimant being economically active or self-sufficient, and, if a five year qualification is proportionate in that context, it is all the more difficult to argue that it would be disproportionate to exclude this appellant from income support when, at the time of her claim, she had been in this country for three years and had become economically inactive (paragraph 23).

DECISION OF THE COURT OF APPEAL

Miss Nathalie Lieven QC and Mr Ranjiv Khubber (instructed by Fisher Meredith LLP) appeared for the appellant.

Mr Jason Coppel and Ms Deok-Joo Rhee (instructed by Office of the Solicitor, Department for Work and Pensions) appeared for the respondent.

Judgment (reserved)

LORD JUSTICE MAURICE KAY:

1. Since the inception of the European Economic Community, one of its cornerstones has been the facilitation of free movement so as to enable a citizen of one Member State to seek and obtain employment in another. This case is concerned with a woman from Poland (at the material time an EEA country) who entered and remains in this country lawfully. However, after a period of time as a student and in employment, she became economically inactive and incapable of supporting herself. She claimed income support. By a decision of a Social Security Commissioner (Mr Mark Rowland) she was held to be ineligible. However, he granted her permission to appeal to this Court. It is common ground that she has no entitlement under the domestic legislation. Her case is that entitlement arises under Article 12 and/or 18 of the EU Treaty. A similar contention was advanced but without success in *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657, [2008] 1 WLR 254 [also reported as R(IS) 8/07]. Initially, it was to be submitted on behalf of the appellant that *Abdirahman* was decided *per incuriam* but that approach has been wisely abandoned by Miss Lieven QC. Instead, she seeks to distinguish it.

2. The issues raised are important because, if a citizen of one Member State who is lawfully present in another Member State can, without difficulty and whilst economically inactive, access the social security benefits of the host State, the implications for the more prosperous Member States with more generous social security provision are obvious. In *Trojani v Centre public d'aide sociale de Bruxelles* (Case C-456/02) [2004] ECR I-7573, Advocate General Geelhoed said (at paragraph 18):

“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.”

And (at paragraph 70):

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

3. The present appeal is concerned with the extent to which Articles 12 and 18, as interpreted by the Court of Justice, may depart from that principle. Indeed, *Trojani* itself lies at the heart of Miss Lieven's submissions.

The facts

4. The appellant came to this country as a student in April 2002. She later worked as a kitchen assistant in a nursing home on a part-time basis from 17 June 2003 until 30 April 2004 and on a full-time basis from 1 May 2004 until 31 July 2004. She was on maternity leave from 1 August 2004 until 26 February 2005. She gave birth to a daughter on 5 October 2004. Although it had been her intention to return to work, the child's health was not good and the appellant could not afford a childminder. On 26 May 2005 she applied for income support. Her application was rejected but she appealed successfully to the independent appeal tribunal. This prompted the Secretary of State to appeal to the Social Security Commissioner who allowed the appeal, paving the way for the present appeal to this Court. To complete the factual background: the appellant began to seek employment again in September 2006 and she has been in employment

since October 2006. Accordingly, the claim for income support relates to the period from May 2005 until October 2006.

The domestic legislation

5. I do not propose to dwell on this in view of the common ground that, under it, the appellant was not entitled to income support at the material time. The provisions are labyrinthine but, to cut a convoluted story short, she was a “person from abroad” pursuant to paragraph 17 of Schedule 7 to the Income Support (General) Regulations 1987 (SI 1987/1967) and, although her presence in this country was lawful – unless and until removal pursuant to regulation 21(3) of the Immigration (European Economic Area) Regulations 2000 (SI 2000/2326) – she did not enjoy the right to reside here at the material time because she was not a “qualified person” as defined by regulation 5 of the 2000 Regulations. To be qualified, she would have had to be, for example, a worker, a self-employed person, a self-sufficient person or a student at the material time and she was not. In short, her lack of a right to reside (which is not the same as lawful presence) disqualified her from access to income support. Essentially, domestic legislation confined qualification to EEA nationals who are economically or educationally active or otherwise self-sufficient. Those who do not qualify are able to remain here lawfully but subject to removal. A more comprehensive tour of the labyrinth can be found in *Abdirahman*.

Articles 12 and 18

6. The relevant provisions of the Treaty are in the following terms:

“Article 12

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

Article 18

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.”

The appellant’s case in a nutshell

7. Miss Lieven emphasises Article 12. Her submission is that a person with the employment record of the appellant, whilst economically inactive at the time of her claim for income support, is nevertheless eligible. She relies on a passage in the judgment of the Court of Justice in *Trojani* (at paragraph 43):

“... with regard to [certain social security benefits], a citizen of the Union who is not economically active may rely on Article 12 EC where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit.”

The contention is that the appellant had been lawfully resident in this country for three years at the time of her claim; that for the majority of that time she had been active as a student or an employee; and that she had demonstrated the sort of social integration that the Court of Justice had in mind when propounding a test of lawful residence “for a certain time”.

8. As regards Article 18, Miss Lieven seeks to invoke the approach adopted by the Court of Justice in *Baumbast v Secretary of State for the Home Department* (Case C-413/99) [2002] ECR I-7091 where it said (at paragraph 94):

“... 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.”

9. In essence, the case for the appellant is that it is disproportionate to deny a right of residence, and thereby entitlement to income support, to a person who is lawfully resident and as substantially settled as the appellant.

Abdirahman v Secretary of State for Work and Pensions

10. The appellants in *Abdirahman* were economically inactive EEA nationals who were lawfully present in the United Kingdom and who sought to access various social security benefits by reference to Article 12 and Article 18. Unlike the appellant in the present case, they could not point to a background of study and work in this country.

11. The lead judgment was given by Lloyd LJ. Moses LJ gave a concurring judgment and the Chancellor agreed with both judgments. As regards Article 12, Lloyd LJ is reported as saying that the benefits in question, which included income support in one case, “are not within the scope of application of the Treaty” ([43]). However, it seems to me that, given the context and the ensuing passages, that is probably a misreport. Social security benefits can be within the scope of the application of the Treaty: see, for example, *Martinez Sala v Freistaat Bayern* (Case C-85/96) [1998] ECR I-2691 and *Grzelczyk v Centre public d’aide sociale* (Case C-184/99) [2001] ECR I-6193. It is also implicit in the reasoning by which Lloyd LJ rejected the Article 12 submission (at [44]):

“... the scope of the 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.”

12. Although we were referred to oblique references in the skeleton argument on behalf of the appellants in *Abdirahman*, it does not seem that Miss Lieven’s submission based on paragraph 43 of *Trojani* figured prominently and it is not dealt with in the judgments. Indeed, it seems that the emphasis was on Article 18.

13. When considering Article 18, Lloyd LJ analysed the jurisprudence of the Court of Justice before concluding (at [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 Council 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 Directive referred to was one of the sources of the 2000 Regulations.

14. The jurisprudence of the Court of Justice included *Martinez Sala v Freistaat Bayern* (above, [11]) and *Baumbast* (above, [8]). In *Sala* the claimant was a Spanish national who had had a series of residence permits allowing her to reside in Germany and had applied for a renewal. Effectively, she had a right of residence. In *Baumbast*, the facts were particularly strong. It is authority for the principle which I set out in [8], above. In relation to outcome, it stands as the high watermark of resort to proportionality under Article 18.

Discussion

15. Having recognized the insurmountable difficulty of overcoming *Abdirahman* on the original pleading of *per incuriam*, Miss Lieven (who was not party to that pleading) has sought to distinguish it.

(1) Article 12

16. The question in relation to Article 12 is a narrow one. It is: Does the reference to lawful residence “for a certain time” in paragraph 43 of *Trojani* open the door to eligibility based on residence of unspecified but significant duration and of a type which evidences a degree of social integration in the host Member State? In my judgment, it does not. I respectfully agree with the Commissioner who considered (at paragraph 10) that the reference to “a certain time” is a reference to specific qualifying periods which give rise to an express right of residence. By its juxtaposition with “or possesses a residence permit”, it is being advanced as one of two ways in which an economically inactive migrant may rely on Article 12 as a result of specific and substantive entitlement. Moreover, it would be wholly undesirable if Article 12 were to give rise to an open-textured temporal qualification of the kind suggested on behalf of the appellant. Eligibility is primarily and more appropriately a matter for normative regulation rather than discretion or subjective evaluation on a case by case basis. Article 12 should be approached with that in mind. Accordingly, I reject this ground of appeal.

(2) Article 18

17. As I have indicated, the dispute by reference to Article 18 turns on proportionality because it is common ground that a right can emerge from between the interstices of Article 18, as it did in *Baumbast*. The question becomes: Is it disproportionate to deny a right of residence to a person in the position of the appellant?

18. The scope of Article 18 in this context was explained by Advocate General Geelhoed in *Baumbast*. There the claimant was a German national who came to the United Kingdom to work first as an employee and later on a self-employed basis. His wife and children settled here. He later worked outside the EU, albeit for a German company. He had German medical insurance but his domestic base remained in the United Kingdom. His position vis-à-vis a Community law based right to reside was jeopardised by the facts that he was no longer a worker here and nor was he self-sufficient here (because his medical insurance only provided cover in Germany). The Advocate General observed (at paragraph 120) that the rules on freedom of movement “have not kept up with the pace of developments”. He added:

“On adoption of the Regulation [in 1968] manifestly no account was taken of a case in which a person is ordinarily resident in one Member State whilst working for short periods and in different places for an undertaking which is established in another Member State.

121. This is a case which was not provided for by the Community legislature. There is no regulatory framework within which the right to remain may be exercised. On those grounds I apply by analogy the regulatory framework applicable to economically active persons. Save for the circumstance not provided for by the Community legislature that Mr Baumbast is not employed in the host country, he satisfies all the other requirements for residence in the United Kingdom; he is the national of a Member State of the European Union, he is a worker, he is resident in another Member State of the European Union (United Kingdom) and his family has a right to remain under Regulation No.1612/68.

122. I therefore also conclude that Mr Baumbast has a right to remain in the United Kingdom based on Article 18 EC in conjunction with Article 39 EC.”

19. This reasoning plainly informed the judgment of the Court of Justice: see paragraphs 84–86 and 92–94. Its concern is to fill what would otherwise be a lacuna exposed by the passage of time. The lacuna is filled because it would be disproportionate for the “limitations and conditions” contained in the Directive and the domestic regulations to undermine the direct application of Article 18.

20. It is abundantly clear that the facts of *Baumbast* were more susceptible to “lacuna-filling” than the facts of the present case where, at the material time, the appellant was no longer a worker and nor was she at all self-sufficient. In *Abdirahman*, Lloyd LJ considered that there was no lacuna in that case because Council Directive 90/364/EC on the right of residence expressly confines the right of residence to cases where nationals of other Member States and their families:

“are covered by sickness insurance in respect of all the 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 the period of their residence.”

21. Whereas there was scope for the lacuna approach in *Baumbast*, where the claimant was working (albeit outside the EU) and self-sufficient (save that his medical insurance was German), the same could not be said in *Abdirahman* where the appellants were neither working nor self-sufficient.

22. It seems that this is what the Commissioner had in mind in the present case when he said (at paragraph 15):

“However, it seems to me that to rely on Article 18(1) where the Council of the European Communities has apparently deliberately excluded a class of persons from the scope of a Directive would be to attack the Directive ... Article 18(1) may be relied upon to supplement a Directive but, in proceedings before a national court or tribunal, it cannot be relied upon to remove limitations necessarily implicit in a Directive.”

In my view, this analysis is correct. It is properly founded on *Abdirahman*, by which we too are bound and with which I agree in any event.

23. There is a further consideration which was referred to by the Commissioner. The Directives in issue in *Baumbast*, *Abdirahman* and the present case have now been replaced by Council Directive 2004/38/EC, which was adopted on 29 April 2004, before the claim for income support was made in this case, although it did not come into force until 30 April 2006. Therefore it does not strictly apply to this case. Its point of interest for present purposes, however, is that it provides for a right of permanent residence after five years' lawful presence which is not conditional on the claimant being economically active or self-sufficient. To that extent it represents a further liberalisation of the European perspective on entitlement to social security benefits. On the other hand, it provides an authoritative insight into the parameters of proportionality when applied to the economically inactive migrant. If, as we must assume, a five year qualification is proportionate in that context, it is all the more difficult to argue that it is disproportionate to exclude this appellant from income support when, at the time of her claim, she had been in this country for three years and had become economically inactive. Rights conferred by the Directive upon those whose lawful presence is less than five years are conditional upon, amongst other things, self-sufficiency. Although the Directive cannot impact directly on this appeal, I agree with the Commissioner that it is a useful benchmark and provides a steer as to the ambit of proportionality. To put it another way: it would be inappropriate and presumptuous for us to characterise something as a lacuna when it was not identified as such by the Council when it most recently moved to enlarge eligibility.

24. For all these reasons I am satisfied that the Commissioner was correct to hold that Article 18 does not avail the appellant in this case.

Conclusion

25. It follows from what I have said that I would dismiss this appeal.

LORD JUSTICE STANLEY BURNTON:

26. I agree.

THE MASTER OF THE ROLLS:

27. I also agree.

