# [2017] AACR 11

## (The Commissioners for Her Majesty's Revenue and Customs v Spiridonova [2014] NICA 63)

**CANI (Morgan LCJ, Coghlin LJ and Weir J** **C1/10-11(CB)**
**9 September 2014**

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## Right to reside – whether conditions of entitlement to child benefit in regulation 27 of the Child Benefit (General) Regulations 2006 discriminatory on the grounds of nationality

The respondent is a citizen of Latvia who, together with her husband, began working for a mushroom firm in Northern Ireland on 30 January 2004. Both she and her husband had been issued with 12-month work permits in December 2003 giving leave to enter the UK and work for the company for 12 months. In May 2004 Latvia became a member of the European Union and the Accession (Immigration and Worker Registration) Regulations 2004 ("The A8 regulations") came into force. These regulations established a Workers Registration Scheme (WRS) by means of which a national from the Accession States (which included Latvia) could register for employment in the UK. On 31 July 2004 the respondent and her husband ceased working and returned to Latvia on 1 August 2004. They returned to the UK on 28 January 2005 and on 24 February the respondent began work with a different firm. In April 2006 the respondent made a claim for child benefit for her two children who had remained in Latvia. Regulation 27 of the Child Benefit (General) Regulation 2006 ("the 2006 Regulations") provides that a claimant had to be "ordinarily resident" in the UK (27(1)) and had to have a parallel "right to reside" (27(3)). On 8 May 2006 the claim was disallowed on the basis that she did not have a right to reside in the UK. On 2 August 2006 she reapplied and that claim was again refused on the same ground. In the meantime the respondent's husband commenced employment in the Republic of Ireland and made a successful claim for child benefit there which was backdated to 1 February 2007. A tribunal on 16 October 2009 disallowed her appeal and on 25 March 2013 the Chief Social Security Commissioner set aside that decision and held that she was entitled to child benefit for the period 2 May 2006 to 31 January 2007, provided that she satisfied the other general conditions of entitlement to that benefit in respect of that period. HMRC appealed by way of a Case Stated and the Court of Appeal was asked three questions. Was the Chief Social Security Commissioner of Northern Ireland correct when he decided that: (1) the conditions of entitlement to child benefit in regulation 27 of the Child Benefit (General) Regulations 2006 are directly discriminatory on the grounds of nationality and (2). those same conditions of entitlement, if indirectly discriminatory, are not objectively justified. Thirdly, was there any other basis on which the respondent could satisfy the conditions of entitlement to child benefit in regulation 27 of the Child Benefit (General) Regulations 2006?

*Held*, allowing the appeal by way of a Case Stated in accordance with section 22 of the Social Security Administration (Northern Ireland) Act 1992, that:

1. the answers to questions 1 and 2 were both in the negative. The third question did not fall to be answered;

2. it had not been established that the provisions in question constituted direct discrimination on the basis of nationality nor did they constitute indirect discrimination;

3. in respect of the question of direct discrimination, the Court was bound to follow the clear decisions of both the CJEU in *Bressol* [2010] 3 CMLR 559 and the House of Lords in *Patmalneice* [2011] 1 WLR 783 and it held that the conditions contained in regulation 27 of the 2006 Regulations should be viewed cumulatively. There must therefore be compliance with both paragraphs (1) and (3) of regulation 27 of the 2006 Regulations and as such the regulations do not constitute direct discrimination on the grounds of nationality (paragraphs 26 to 27);

4. with regard to the question of indirect discrimination, the Court again followed *Patmalneice* saying that that decision had confirmed that the State Pension Credit Regulations 2002 containing a similar right to reside requirement, were objectively justifiable and a legitimate means of confirming the necessary standard of integration (paragraph 30);

5. the case of *Zalewska* R 1/09 (IS) confirmed that the UK was entitled to insist that A8 nationals should satisfy the WRS, which underlay the entitlement to child benefit (paragraph 33);

6. it is for a national court to determine whether legislation satisfies the attainment of the legitimate objective concerned and whether it is a proportionate means of so doing. This is not inconsistent with the ECJ case of *Brey* [2014] 1 WLR 1080 (paragraph 36].

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## DECISION OF THE COURT OF APPEAL IN NORTHERN IRELAND

1. This is an appeal by way of a Case Stated by the Chief Social Security Commissioner ("the Chief Commissioner") dated 18 October 2013 from a decision issued by the Chief Commissioner on 25 March 2013. On 25 March 2013 the Commissioner decided to set aside a decision of the Appeal Tribunal dated 16 October 2009 and hold that Aiga Spiridonova ("the respondent") was entitled to child benefit during the period from 2 May 2006 to 31 January 2007, provided that she satisfied the other general conditions of entitlement to that benefit in respect of that period. Being dissatisfied with that decision Her Majesty's Commissioners for Revenue and Customs ("the appellants") applied to the Commissioner to state a case for the opinion of this court. In response to that application the Commissioner has stated the following three questions:

> "(1) Was I correct to consider that the conditions of entitlement to Child Benefit in Regulation 27 of the 2006 Regulations are directly discriminatory on the grounds of nationality?
>
> (2) Was I correct to consider that the conditions of entitlement to Child Benefit in Regulation 27 of the 2006 Regulations, if indirectly discriminatory, are not objectively justified?
>
> (3) Is there any other basis on which the respondent can satisfy the conditions of entitlement to Child Benefit in Regulation 27 of the 2006 Regulations?"

2. For the purposes of conducting this appeal before this court the appellants were represented by Mr Jason Coppel QC and Mr David Sharpe while Mr Richard Drabble QC and Mr Eamon Foster appeared on behalf of the respondent. The court wishes to acknowledge the assistance that it derived from the carefully prepared and well-focused written and oral submissions presented by both sets of counsel. In opening the appeal on behalf of the respondent Mr Coppel helpfully indicated that the intention was to focus solely on whether the respondent had established that the provisions in question constituted direct discrimination on the basis of her nationality or, if not, whether they constituted indirect discrimination and, if the latter, whether the same could be lawfully justified.

### Background facts

3. The respondent is a citizen of Latvia who, together with her husband, commenced employment for a mushroom producing company in Northern Ireland on 30 January 2004. In December 2003 both the respondent and her husband had been issued with work permits giving them leave to enter the United Kingdom to work for the mushroom company for a period of 12 months.

4. In May 2004 Latvia became a member of the European Union and on 1 May 2004 the Accession (Immigration and Worker Registration) Regulations 2004 (SI 2004/1219) ("the A8 Regulations") came into force. "A8" referred to eight of the ten states then being granted entry into the EU and the Regulations established a Workers' Registration Scheme ("WRS") by means

of which nationals of a relevant accession State could register for employment in the United Kingdom. Latvia was a relevant accession State for the purpose of the Regulations. The two accession States that were not made subject to the A8 Regulations because of their relatively small size were Cyprus and Malta.

5. On 31 July 2004 the respondent and her husband ceased working for the mushroom company and they returned to Latvia on 1 August 2004. The respondent and her husband came back to the UK on 28 January 2005 and, on 24 February 2005, the respondent commenced employment with B & G Murchan. In April 2006 the respondent made an initial claim for child benefit ("CB") for her two children, both of whom had remained in Latvia and in respect of whom she was receiving benefit in that country in accordance with the Latvian Social Security system. On 8 May 2006 the appellants disallowed the respondent's claim for CB on the ground that she did not have a right to reside in the UK. On 2 August 2006 the respondent made a fresh claim for CB and that claim was again refused by the appellants on 12 December 2006 upon the same ground. In the meantime, the respondent's husband had commenced employment in the Republic of Ireland and on 16 January 2007 a claim for CB was made in that jurisdiction. That claim was successful and the benefit awarded back-dated to 1 February 2007.

**The relevant legislative framework**

6. Section 142(2) of the Social Security Contributions and Benefits (NI) Act 1992 ("the 1992 Act"), as amended, provides that:

> "(2) No person shall be entitled to Child Benefit for a week unless he is in Northern Ireland in that week."

7. Regulation 27 of the Child Benefit (General) Regulations 2006 (SI 2006/223) ("the 2006 Regulations") provides:

> "(1) A person shall not be treated as being in Northern Ireland for the purposes of Section 142(2) of the Social Security Contributions and Benefits (NI) Act 1992 if he is not ordinarily resident in the United Kingdom.
>
> (2) A person who is in Northern Ireland as a result of his deportation, expulsion or other removal by compulsion of law from another country to Northern Ireland shall be treated as being ordinarily resident in the United Kingdom.
>
> (3) A person shall be treated as not being in Northern Ireland for the purposes of Section 142(2) of Social Security Contributions and Benefits (NI) Act 1992 where he does not have a right to reside in the United Kingdom."

8. Regulation 13 of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) (the "Immigration Regulations") provides that an EEA national is entitled to reside in the United Kingdom for a period not exceeding three months beginning on the day on which he is admitted to the United Kingdom provided that he holds a valid national identity card or passport issued by an EEA State. Regulation 14(1) provides that a "qualified person" is entitled to reside in the United Kingdom for so long as he remains a qualified person. The definition of "qualified person" appears in Regulation 6(1) as follows:

> "6-(1) In these Regulations, 'qualified person' means a person who is an EEA national and in the United Kingdom as –
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> (*a*) a jobseeker;
>
> (*b*) a worker;
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> (*c*) a self-employed person;
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> (*d*) a self-sufficient person; or
>
> (*e*) a student."

9. The A8 Regulations provided for a system of registering accession State workers during the accession period. Regulation 7 provided that the requirement for an accession State worker to be authorised to work, the Workers Registration Scheme ("WRS"), took effect by way of derogation from Article 39 (subsequently Article 45 TFEU) of the European Community Treaty on freedom of movement for workers within the Community. Regulation 5(1) provided that the Immigration Regulations 2000 (later the 2006 Immigration Regulations) should apply to a national of a relevant Accession State subject to the modifications set out in the A8 Regulations and regulation 5(2) provided that for an accession State worker to be treated as a "worker" and, hence, a "qualified person" with a right of residence the employment would have to be registered in accordance with the WRS. The accession State worker requiring registration could only be authorised to work in the UK for an authorised employer. Regulation 5(2) stated that:

> "(2) … an accession State worker requiring registration shall be treated as a worker for the purposes of the definition of 'qualified person' in Regulation 5(1) of the 2000 Regulations only during a period in which he is working in the United Kingdom for an authorised employer."

10 Regulation 7 of the A8 Regulations provided that an employer was an "authorised employer" if the worker had received a valid registration certificate authorising him to work for that employer and the certificate had not expired. After the completion of 12 months of such employment the worker would become entitled to full Article 45 rights and to be treated in the same way as any other EU national worker. However, if the accession State worker was not in registered employment or ceased to work without having completed the 12 months of registered employment he would not become a 'qualified person' who acquired a right to reside in the UK as a worker. Regulation 9 provided that an employer would be guilty of an offence if he employed an accession State worker requiring registration during a period in which the employer was not an authorised employer in relation to that worker.

11. The respondent did not register either her work with the mushroom company in 2004 or, from February 2005, her employment with B & G Murchan in accordance with the WRS. When she made her claim for CB she was not working for an authorised employer within regulation 5 of the A8 Regulations and, therefore, was not a "qualified person" with a right of residence within regulation 6 of the EEA Regulations.

12. Regulation 1408/71 EC contained a system for the coordination of the different Social Security Schemes of the Member States, while respecting the different characteristics of the

national legislation. Article 3 dealt with "equality of treatment" and paragraph 1 provided as follows:

> "1. Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of the State."

13. Article 4 detailed the branches of social security to which the Regulation applies and includes at (*h*) "family benefits". "Family benefits" was defined in Article 1(*u*) as meaning "all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4(1)(*h*), excluding the special child-birth or adoption allowances referred to in Annex A11".

14. Article 73 provided that:

> "An employed or self-employed person subject to the legislation of a Member State shall be entitled in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State as if they were residing in that State …"

Article 73 thus disapplied the requirement in section 142(1) of the Social Security Contributions and Benefits (NI) Act 1992 that the respondent's children should be in NI but she herself remained subject to Article 27 of the 2006 Regulations.

**The Chief Commissioner's decision**

15. The Chief Commissioner decided that regulation 27(3) of the 2006 Regulations constituted direct discrimination against the respondent upon the grounds of her nationality. He gave careful consideration to the judgment of the Supreme Court in *Patmalniece v The Secretary of State for Work and Pensions* [2011] UKSC 11; [2011] 1 WLR 783; [2011] AACR 34 but distinguished it from the present case on the basis that the test for state pension credit in that case was held to be "cumulative". By contrast, the Chief Commissioner considered that the test of ordinary residence in regulation 27(1) of the 2006 Regulations was neutral in its effect with the result that the right to reside condition in regulation 27(3) was the "effective and sole residence test for entitlement to the benefit". On that basis the Chief Commissioner considered that the right to reside test in regulation 27(3) was directly discriminatory because it was automatically satisfied by UK nationals but could only be satisfied by some non-UK nationals.

16. In the event that his finding of direct discrimination was not correct the Chief Commissioner proceeded to consider whether regulation 27(3) constituted indirect discrimination. At paragraph 68 of his decision the Chief Commissioner made the following observations:

> "68. It seems to me that it is arguable that the tenor of the case-law is that an exception must exist to the blanket application of the principles underlying the submitted justification for the indirect discrimination which the standard 'right to reside' test permits. The exception is for those who have achieved a sufficient degree of economic and social integration within the host-State from which the relevant social security benefit is claimed. In the context of the United Kingdom, the concession made on behalf of the

> Secretary of State and outlined by Lord Hope in paragraph [42] of his judgment in *Patmalniece* is, in many ways, remarkable – 'a person would be eligible to receive State pension credit if he could show economic integration in the United Kingdom or a sufficient degree of social integration here'."

17. The Chief Commissioner then proceeded to give consideration to the degree of economic or social integration that would be sufficient to constitute such an exception and, at paragraph 21 of his decision, he confirmed that, apart from a brief 17-day period in February 2005 the respondent and her husband had been in continuous employment in Northern Ireland during their period of residence. Consequently the respondent and her husband had contributed to public funds through taxes and national insurance contributions. In such circumstances the Chief Commissioner expressed himself to be satisfied that both the respondent and her husband had achieved economic integration by the time the Department had disallowed the respondent's claim to CB in December 2006. In addition, with continuous residence in Northern Ireland for 23 months immediately before the disallowed claim to CB; a prior period of residence for seven months; and continuous employment for all but three weeks of that period the Chief Commissioner formed the view that the respondent must also have established concomitant social integration in Northern Ireland. Having concluded that the respondent came within the perceived exception to the "blanket application of the principles underlying the submitted justification for the indirect discrimination" it seems that the Chief Commissioner gave no further consideration to the questions as to whether regulation 27(3) was objectively justified and proportionate to the legitimate aim pursued.

**The parties' submissions**

18. On behalf of the appellant Mr Coppel submitted that the Chief Commissioner had been in error in concluding that, in the context of the neutrality of the "ordinary residence" provision the "right to reside" test took on a specially significant emphasis and was, in practice, the effective and sole residence test for entitlement to CB. In such circumstances the Chief Commissioner purported to adopt the observations of Lord Hope in *Patmalniece* who expressed the view that, if it was taken to be the sole condition of entitlement to state pension credit ("SPC"), the "right to reside" test was directly discriminatory on the grounds of nationality. Mr Coppel argued that the reasoning in *Patmalniece*, which was consistent with that adopted by the Court of Justice in *Bressol v Gouvernement de la Communauté Française* [2010] 3 CMLR 559, demonstrated that the focus of the court must be on the structure of the legislation *as a whole*, rather than on particular conditions in isolation. The requirements of ordinary residence might or might not be satisfied by a UK citizen; therefore the child benefit legislation was not directly discriminatory for exactly the same reasons as the legislation in *Patmalniece* was not directly discriminatory. It was equally the case in *Patmalniece* that the claimant satisfied the factual test of habitual residence and was refused benefit only because she lacked a right to reside. Insofar as the Chief Commissioner's reasoning may have drawn support from paragraph 65 of the judgment of Lord Walker in *Patmalniece*, Mr Coppel pointed out that, ultimately, Lord Walker had agreed with Lord Hope that it was necessary to assume that in the *Bressol* case the Grand Chamber of the Court of Justice must be taken to have rejected the approach suggested by the Advocate General in that case.

19. In his submissions relating to indirect discrimination Mr Coppel noted that in the course of his judgment the Chief Commissioner had moved from expressing the view that it was "arguable" that the degree of economic/social integration achieved by an individual in a Member State could constitute an exception to the justification required for indirect discrimination to

reaching the conclusion that the respondent in these proceedings had established such an exception. The Chief Commissioner appeared to base this conclusion upon what he regarded as a "remarkable" concession on behalf of the Secretary of State in *Patmalniece* which he thought had been outlined by Lord Hope in paragraph 44 of his judgment as follows:

> "A person would be eligible to receive State pension credit if he could show economic integration in the United Kingdom or a sufficient degree of social integration here."

Mr Coppel contended that no such "concession" had been made by the Secretary of State in *Patmalniece* and submitted that the Chief Commissioner's reasoning was also inconsistent with the outcome of *Zalewska v Department for Social Development* [2008] UKHL; [2008] 1 WLR 2602 also reported as R 1/09 (IS).

20. On behalf of the respondent Mr Drabble sought to support the decisions of the Chief Commissioner with regard to both direct and indirect discrimination. He submitted that it was important to appreciate the distinction between means-tested social assistance benefits and CB which was not social assistance but constituted a universal benefit payable to all without a means-test. He noted that, historically, CB was the result of a fusion of family allowance and tax allowances payable to those in work in addition to the wages that they receive as a result of their employment. In such circumstances, decisions that were concerned with the prevention of "benefit tourism" such as *Zalewska* and *Patmalniece* were not relevant in the context of a claim for CB by a worker. Mr Drabble argued that this appeal could be further distinguished from the decisions in *Zalewska* and *Patmalniece* on the basis that the benefits considered in those decisions were "special non-contributory benefits" and that both claimants were not working at the time of the claim – they were economically inactive whereas, at all material times, the respondent and her husband in this case had been gainfully employed.

21. With regard to direct discrimination Mr Drabble argued that the Commissioner had been right to focus upon the "right to reside" test in the context of the "neutrality" of the "ordinary residence" test. He submitted that "ordinary residence2 was to be distinguished from "habitual residence" which was the concern of the Supreme Court in *Patmalniece*. He noted the reference in paragraph 27 of Lord Hope's judgment to the evidence of Catherine Fleay to the effect that some UK nationals returning to the United Kingdom after a long period abroad may be held not to be habitually resident in the UK and contrasted that with "ordinary residence" which he argued could be complied with by simply being present in Northern Ireland.

22. With regard to indirect discrimination, Mr Drabble submitted that the proportionality of the "right to reside" test must be judged on the facts of the individual case and that, in any event, the Commissioner had been right to hold that there was a "sufficient degree of social and economic integration" on the facts of this case to make it disproportionate to disqualify from benefit.

## Discussion

*Direct discrimination*

23. In *Bressol*, in order to obtain access to free education, a student had to prove that his principal place of residence was Belgium and that, in addition, he fulfilled one of eight other conditions, one of which was that he had the right to remain permanently in Belgium. As Lord Hope recorded at paragraph 32 of his judgment in *Patmalniece*, Advocate General Sharpston

expressed the opinion that the condition that the principal place of residence should be in Belgium did not constitute direct discrimination on the ground of nationality since it was a condition with which both Belgians and non-Belgians alike could comply. By contrast Advocate General Sharpston considered that since all Belgians automatically enjoyed the right to remain permanently in Belgium and that the second condition was necessarily linked to a characteristic indissociable from nationality. Consequently, it was her view that such a condition constituted direct discrimination. However, notwithstanding the advices of the Advocate General, the Court of Justice looked at the conditions as a whole requiring qualifying students to have both a principal place of residence in Belgium and to comply with one of the alternative conditions – see paragraph 42 of the court's judgment. As Lord Hope noted the court then proceeded to consider the case as being one of indirect rather than direct discrimination. Such a view was shared by the other members of the House of Lords in *Patmalniece*, including Lord Walker, who delivered a dissenting judgment, but who, on this point, said at paragraph 73 of the judgment:

> "73. Having said all that, I recognise that this court must follow the judgment of the Court of Justice in the *Bressol* case [2010] 3 CMLR 559, even if some of us do not fully understand its reasoning. This case must be treated as one of indirect discrimination. But the correlation between British nationality and the right to reside in Great Britain is so strong that the issue of justification must in my view be scrutinised with some rigor."

24. As noted above the Chief Commissioner gave careful consideration to the judgments of the Supreme Court in *Patmalniece* and, in the course of doing so, he expressed the view, at paragraph 41 of his judgment, that the proper approach to composite tests was to be found in the *Bressol* decision. However, having so concluded, he appears to have found that there was a significant distinction between the concept of "habitual residence" considered by the House of Lords in *Patmalniece* and the concept of "ordinary residence" in regulation 27(1) of the 2006 Regulations. At paragraph 54 of his judgment he said:

> "54. What is important here is that –
>
> (*i*) The test of 'ordinary residence' is one of fact and degree rather than law.
>
> (*ii*) The test may be satisfied immediately on arrival in the United Kingdom.
>
> (*iii*) It is one and the same for both nationals of the United Kingdom and nationals of the European Union and does not discriminate between those two groups."

At paragraph 56 of his judgment the Chief Commissioner expressed the view that:

> "It seems to me that in the case of CB, given the neutrality of the 'ordinary residence' provision, the 'right to reside' test takes on a significant emphasis and is, in effect, the effective and sole residence test for entitlement to the benefit. Consideration, therefore, has to be given to any discriminatory effect which the 'right to reside' test might have and the nature of any such discrimination. It seems to me that as all nationals of the United Kingdom automatically satisfy the 'right to reside' test, then it is discriminatory and directly discriminatory to non-UK nationals, such as the appellant in the instant case."

25. In the Case Stated the Chief Commissioner summarised his approach in the following terms at paragraph 9:

> "In considering the submission that the right to reside requirement in Regulation 27(3) is directly discriminatory, I considered the judgment of the Supreme Court in *Patmalniece v Secretary of State for Work and Pensions* [2011] 1 WLR 783. I distinguished the test for residence for Child Benefit from the cumulative residence test for State Pension Credit which was considered in *Patmalniece* and held that the right to reside requirement in Regulation 27(3) of the 2006 Regulations is directly discriminatory on grounds of nationality. I found that the test for State Pension Credit is a cumulative one whereas in the case of Child Benefit the test of ordinary residence in Regulation 27(1) is neutral in its effect, so the right to reside condition for entitlement in Regulation 27(3) of the Child Benefit General Regulations is the 'effective and sole residence test for entitlement to the benefit' (paragraph 56 of my decision). On that basis, the right to reside test in Regulation 27(3) is directly discriminatory because it is automatically satisfied by UK nationals, but will be satisfied only by some non-UK nationals."

26. For the purpose of these proceedings the Chief Commissioner appears to have rejected the cumulative approach adopted in *Bressol* and *Patmalniece* on the basis of the "neutrality" of the concept of "ordinary residence". While there might be some difference in the evidence of permanence required, ultimately, both "habitual residence" and "ordinary residence" are fact specific concepts depending upon the circumstances of the individual case. In his definitive judgment in *R v Barnet LBC ex parte Shah* [1983] AC 309, referred to by the Chief Commissioner at paragraph 53 of his decision, Lord Scarman held that the meaning to be attributed to enacted words was a question of law, being a matter of statutory interpretation. He analysed the concept of "ordinary residence" as requiring evidence of "…a regular mode of life adopted voluntarily and for a *settled* purpose, whatever it be, whether study business work or pleasure" and he emphasised that the ultimate decision in each case depended upon its own particular facts. Both conditions may be complied with by nationals and non-nationals alike and it is not easy to see why the "neutrality" of "ordinary residence" should render inappropriate the cumulative approach adopted in *Bressol* and endorsed by the House of Lords in *Patmalniece*. In *Bressol* the condition requiring a student to have his/her "principal residence in Belgium" could be satisfied by both nationals and non-nationals It is difficult to discern a difference of principle between such a condition and that of "ordinary residence" which would be such as to result in the inclusion of the latter being of so little significance as to render a right to reside requirement the sole effective condition. In order to be treated as 'being in Northern Ireland' there must be compliance both with paragraph (1) and paragraph (3) of regulation 27 of the 2006 Regulations.

27. We respectfully share the concerns expressed by Lord Hope, Lord Walker and Baroness Hale in *Patmalniece* about the total absence from the judgment of the Court of Justice in *Bressol* of any reference to the carefully analysed and clearly articulated opinion of Advocate General Sharpston or any reasoning as to why that opinion should be rejected. While the only realistic inference must be that the Court rejected the opinion, such an approach would be very hard to reconcile with the common law requirement for judgments to analyse the relevant arguments and provide a reasoned and transparent conclusion. This is seen to be particularly significant when the difference in approaches is assessed as "profound." However, we consider that we must follow the clear decisions of both courts and hold that the conditions contained in regulation 27 of the 2006 Regulations should be viewed cumulatively and, as such, do not constitute direct discrimination on the ground of nationality.

*Indirect discrimination*

28. In the event that he was not correct in holding that regulation 27(3) of the 2006 Regulations was directly discriminatory the Chief Commissioner went on to consider whether the provision constituted indirect discrimination between paragraphs 61 and 72 of his judgment. He gave careful consideration to the "Justification" section of Lord Hope's judgment in *Patmalniece* and, having done so, observed at paragraph 66:

> "66. In *Patmalniece* and in each other case in which it has been decided that the policy underlying the imposition of a 'right to reside' test as part of the conditions of entitlement to social security benefits, is justified the basis of the justification is primarily to prevent benefit tourism and access to the resources of a State through entitlement to social security benefits."

29. However, the Chief Commissioner appears to have extracted from these remarks by Lord Hope and what seemed to the Chief Commissioner to be a "concession" made on behalf of the Secretary of State in *Patmalniece*, together with some observations by Mr Commissioner Rowland at first instance, the proposition "… that an exception must exist to the blanket application of the principles underlying the submitted justification for the indirect discrimination which the standard 'right to reside' test permits provided that the individual concerned is able to show a sufficient degree of economic and/or social integration into the United Kingdom".

30. We consider that the "exception" identified by the Commissioner in the relevant section of Lord Hope's judgment was based, unfortunately, upon a misunderstanding of that passage. In *Patmalniece* the parties were agreed that, with regard to the question of indirect discrimination, the only issue was whether the Secretary of State was able to show that the difference in treatment of nationals of other Member States was based on objective considerations independent of nationality. If he could do so, the parties were agreed that there was no need to examine the question of proportionality. In that case the underlying purpose of the relevant regulations was said to be to safeguard the United Kingdom social security system from exploitation by people who wished to come to the UK not to work but to live on income-related benefits, in other words to prevent "benefit tourism". In that case the Secretary of State argued that the purpose of regulation 2 of the 2002 Regulations, the provision that no person was to be treated as "habitually resident" in the UK if he does not also have a "right to reside" in the UK, was to ensure that the individual had "achieved economic integration or a sufficient degree of social integration in the United Kingdom". In other words, it was the "right to reside" which was to determine that a sufficient degree of integration had been achieved. Read in its proper context the submission made by the Secretary of State in *Patmalniece* and referred to by Lord Hope at paragraph 42 of the judgment was to the effect that the requirements of regulation 2 of .the 2002 Regulations were objectively justifiable on the basis that compliance with such requirements would be indicative of a sufficient degree of economic and/or social integration in the UK to effectively prevent the development of "benefit tourism". It is to be noted that paragraph 42 commences with a reference to the submission by the Secretary of State that the "requirements of regulation 2 of the 2002 Regulations were objectively justifiable". The question was not whether an individual should be able to establish some undefined degree of economic and/or social integration as an exception to having to comply with the "right to reside" requirement, a criterion which could clearly give rise to a multiplicity of expensive and time consuming litigation, but whether compliance with the "right to reside" requirement was a legitimate means of confirming the necessary standard of integration. As Lord Hope himself pointed out at paragraph 52 of his judgment with regard to the wording of the regulation and its effect:

> "... they showed that the Secretary of State's purpose was to protect the resources of the United Kingdom against resort to benefit or social tourism by persons who are not economically or socially integrated with this country. That is not because of their nationality or because of where have come from. It is because of the principle that only those who are economically or socially integrated with the host Member State should have access to its social assistance system. The principle, which I take from the decision in *Trojani* case, is that it is open to Member States to say that economical or social integration is required. A person's nationality does, of course, have a bearing on whether that test can be satisfied. But the justification itself is blind to the person's nationality. The requirement that there must be a right to reside here applies to everyone, irrespective of their nationality."

31. A further complication exists since, as noted above, the relevant requirement in these proceedings was for the respondent to register her employment with an authorised employer in accordance with the WRS which was established by the A8 Regulations. The primary purpose of the A8 Regulations appears to have been to institute a registration scheme in order to effectively monitor the impact of accession State workers upon the UK labour market although any impact upon benefits provision is also likely to have been of interest. Since the Regulations were devised to apply to accession State workers the fact that an individual had worked more or less continually for a period in NI cannot have constituted an exception. In *R (D) v Secretary of State for Work and Pensions* [2004] EWCA Civ 1468 the Court of Appeal in England and Wales refused leave for a judicial review challenge to the WRS argued on the basis that the A8 Regulations were indirectly discriminatory and disproportionate. At paragraph 17 of the judgment Maurice Kay LJ held:

> "The purpose of the registration scheme is to enable the Secretary of State to monitor and control those falling within the derogation. Until he has worked for an uninterrupted period of 12 months, the Secretary of State has a continuing interest in the circumstances of the applicant. At the end of such a 12-month period the registration requirement will cease to apply; (see Regulation 2.4 of the Accession (Immigration Worker Registration) Regulations 2004). The registration scheme is a reasonable and proportionate concomitant of the permitted derogation. The contrary is not arguable."

32. In *Zalewska* the House of Lords gave consideration to the objectives of the WRS and the "right to reside" test for entitlement to income support. Unlike the respondent, who has never registered her employment in compliance with the WRS, Ms Zalewska did register her original employment but omitted to re-register subsequent employments. At paragraph 34 of the judgment Lord Hope said:

> "34. Materials which were shown to your Lordships provide some support for Mr Lewis's description of the aim of the 2004 Regulations. When the Worker Registration Scheme was first introduced its purpose was said to be to allow A8 State nationals access to the United Kingdom labour market in a way that would enable the Government to monitor the numbers working and the sectors where they were employed. It was not expected to be a barrier to those who wanted to work. On the contrary it was thought that it would encourage those A8 State nationals who were working here illegally to regularise their status and begin contributing to the formal economy. Three strands of thought can be seen to be at work here. There was a concern about numbers, which was of course the reason why Member States had sought derogation from the direct

> application of Article 39 EC and Articles 1-6 of Council Regulations (EEC) No. 1612/68 for a period of years following the date of accession. There was a concern to identify which sectors of the labour market were being affected by the influx, in case remedial measures might have to be taken to control it. And there was a concern about the number of A8 State nationals who were already working here illegally, at risk to their own health and safety, and might continue to do so. A registration system was an obvious way of combatting this abuse."

33. At paragraph 36 of the judgment Lord Hope noted that Ms Zalewska did not suggest that these aims were not legitimate and he expressed the view that it could not reasonably be suggested that it was disproportionate for A8 State nationals to be required to apply for a registration certificate for the first employment they obtained in the United Kingdom unless they were exempt from the Regulations since information about the numbers coming to the UK from the A8 States was a necessary requirement if the extent of the influx was to be monitored effectively. He held that the UK was entitled to insist that an A8 State national should satisfy the requirement of registration in accordance with the WRS in order to become a worker and that the mere fact that a person was working in the United Kingdom was not enough.

34. In effect, as an A8 national worker who had omitted to register in accordance with the WRS, "merely working" was precisely what the respondent had been doing prior to her application for CB. The holding by the Chief Commissioner that a degree of economic and/or social integration, which he considered to have been established by the respondent, could operate as an exception to the "right of residence" requirement inhibited him from any consideration of the specific statutory requirement that to establish a right of residence in the UK as a worker an A8 national had to be in continuous registered employment with an authorised employer in accordance with the WRS. As he recorded at paragraph 11 of the Case Stated the "exception" to the need to establish a "right of residence" identified by the Chief Commissioner enabled him to find in favour of the respondent "… notwithstanding that her employment was not registered pursuant to the Worker Registration Scheme ('WRS') and therefore did not give rise to a right of residence in the UK as a 'worker'". It follows that he did not feel that it was necessary to reach any finding as to whether the Regulations constituted a lawful means of attaining a legitimate objective and, if they did so, whether the means adopted were proportionate. It is not altogether easy to reconcile such an approach with the wording of the second question in the Case Stated. It is perhaps not without significance that there is no mention of the decision in *Zalewska* in his judgment, a case in which no suggestion of an "exception" was contained in the arguments but one which also concerned an individual who had held a number of employments in NI.

35. We also note that the decision of the Court of Appeal of England and Wales in *Mirga v Secretary of State for Work and Pensions* [2012] EWCA Civ 1952 does not seem to have been drawn to the attention of the Chief Commissioner prior to publication of his judgment on 25 March 2013. Both senior counsel engaged in this appeal were also involved in that litigation, although not instructed for the purpose of the hearing before the Chief Commissioner. We were informed during the hearing that the decision has been appealed[1] and it may be that was a factor taken into consideration. *Mirga* involved a claim for income support by an accession State worker who had been in registered employment for some eight months before engaging in further periods of unregistered employment. In giving the judgment of the court Laws LJ emphatically rejected any suggestion that *Zalewska* had been a decision dependent upon the

[1] Decided by the Supreme Court 27 Janauary 2016 [2016] UKSC 1; [2016] AACR 26.

particular facts adding at paragraph 17: "The argument, as it was originally advanced, would surely mean that any refusal of Income Support for a failure of full compliance by an A8 national with the terms of the WRS would potentially be subject to challenge on proportionality grounds by reference to the individual facts. That would, to say the least gravely undermine the scheme and plainly cannot stand with the *Zalewska* decision." Laws LJ noted that, in *Zaleweska*, the House of Lords had held that overall the WRS regime was proportionate to the aim in view despite the adverse consequences for the particular claimant. He also rejected the submission that the justification of indirect discrimination in *Patmalneice* was limited to the prevention of benefit tourism stating, at paragraph 30:

> "But the legislation concerning right to residence was generally justified in *Patmalneice,* certainly by reference to the benefit tourism issue; however it remained so justified whether the individual could or should be regarded as a benefit tourist."

36. Mr Drabble sought to rely upon paragraph 77 of the decision of the ECJ in *Pensionsversicherungsanstalt v Brey* [2014] 1 WLR 1080 in support of his submission that it was disproportionate to fail to take into account the personal circumstances of the individual concerned. However it seems clear that the CJEU was there referring to the "Catch 22" situation created by the requirement of the Austrian legislation for an applicant for the relevant compensatory supplement to have to establish a right of residence while at the same time providing that, despite being the holder of a registration certificate, a right of residence could not be granted because the applicant's means were so limited as to compel him to apply for the supplement thereby automatically constituting him an unreasonable burden upon the state. Earlier in its judgment the CJEU had confirmed that there was nothing to prevent, in principle, the granting of social security benefits to Union citizens who were not economically active being made conditional upon those citizens meeting the necessary requirements for obtaining a legal right of residence in the host member state citing, *inter alia*, the decision in *Trojani.* We bear in mind the jurisprudence of the Court of Justice which has consistently held that it is for the national court to assess the facts and interpret the national legislation in order to determine whether it satisfies the attainment of the legitimate objective concerned and whether it is a proportionate means of doing so – see paragraph 64 of the judgment in *Bressol*. A similar "margin of appreciation" has long been recognised by the Strasbourg Court in relation to alleged discrimination in respect of economic/social measures (*Stec v UK* [2006] 43 EHHR 47 at paragraphs 51–52). In the context of discrimination relating to state benefits the *Stec* test has been approved by Baroness Hale in *Humphreys v HMRC* [2012] UKSC 18; [2012] 1 WLR 1545; [2012] AACR 46 and there is well recognised domestic jurisprudence supporting the use of "bright line" definitions in social security legislation – see, for example, *RJM v Secretary of State for Work and Pensions* [2009] 1 AC 311 *per* Lord Neuberger at paragraph [34]; *Swift v Secretary of State for Justice* [2013] EWCA Civ 193 per Lord Dyson at paragraph [39].

37. In the circumstances we propose to answer the questions in the case stated as follows:

(1) No.
(2) No.

With the agreement of the parties we do not propose to further consider question (3).