[2017] AACR 12

**(Alhashem v Secretary of State for Work and Pensions
[2016] EWCA Civ 395)**

CA (Arden, Richards LJJ and Mitting J) CE/4153/2012
21 April 2016

European Union law – free movement – test for distinguishing social assistance and labour-market related benefits – predominant purpose of ESA not to facilitate access to labour market

The claimant, a Dutch national, arrived in the UK in 2010 and was awarded jobseeker's allowance which stopped after she was unable to sign on for work due to ill health. The Secretary of State refused her claim for employment and support allowance (ESA) on the basis that she had no right to reside in the UK. The claimant appealed against that decision, arguing, amongst other things, that it was not permissible under European Union (EU) case law to deny access to benefits intended to facilitate access to the labour market to someone who had the right to reside as a jobseeker. The First-tier Tribunal rejected her appeal as did the Upper Tribunal, holding that ESA was for claimants unable to access the labour market and was not intended to facilitate access to the labour market within the meaning of EU case law. The claimant renewed her appeal to the Court of Appeal and the issues before the court were the test for distinguishing between social assistance and labour-market related benefits, the application of that test to the facts, and whether it was possible to divide ESA into social assistance and labour-market related components and apply the test to the latter.

Held, dismissing the appeal, that:

1. the test for distinguishing whether a benefit was for social assistance or labour market-related purposes was to determine its predominant function; the payments of social assistance benefits were predominantly to cover a claimant's minimum subsistence costs, while labour market-related benefits were predominantly paid for the purpose of facilitating a claimant's access to the labour market: *Jobcenter Berlin Neukölln v Alimanovic*, C-67/14, EU:C:2015:597 followed. The Court of Justice of the European Union took a narrow approach to defining labour-market related benefits, and subsistence benefits were excluded from that definition (paragraphs 5 and 22 to 24);

2. ESA properly described was primarily provided for those who could not work or who were on the borderline due to some disability or past episode in their lives, and was not intended to facilitate access to the labour market for the purposes of EU law and therefore a jobseeker from another Member State could not apply for it (paragraphs 42 and 49);

3. it was not possible to divide ESA into social assistance and labour-market related components and apply the test to the latter. That approach was inconsistent with ESA's aim of making the various groups "porous" so that claimants could move from the Support Group to the Work-Related Activity Group and *vice versa* depending on their capability over time (paragraphs 49 and 52 to 53).

DECISION OF THE COURT OF APPEAL

Helen Mountfield QC and Tom Royston, instructed by Howells Solicitors, appeared for the appellant.

Julia Smyth, instructed by Government Legal Department, appeared for the respondent.

Judgment

LADY JUSTICE ARDEN:

Issue for decision and summary of conclusion

1. This appeal is about social security and raises questions of law to which EU law applies.

2. Mrs Alhashem, a Dutch citizen, has been living in the UK since 2010. She was at first awarded jobseeker's allowance ("JSA"), but this ended because she was unable to sign on for work because of ill health. She then applied for employment and support allowance ("ESA"). On 12 November 2011, the Secretary of State refused her claim on the basis that she did not have the right to reside in this country. She appealed to the First–tier Tribunal ("the F-tT") on two grounds. Only the second ground is relevant. She claimed that it was not permissible under EU law to deny access to benefits intended to facilitate access to the labour market to someone who had the right to reside as a jobseeker, so that ESA had to be made available to jobseekers in the UK who met the financial conditions for eligibility. The F-tT rejected this ground, as subsequently did the Upper Tribunal ("the UT") (Upper Tribunal Judge Edward Jacobs) on appeal to it. Judge Jacobs concluded that:

> "[ESA] is for claimants who are unable to access the labour market. As a condition of receiving the benefit, claimants may have to undertake work-related activity in order to help them get fit for work. But that does not make [ESA] a benefit that is intended to *facilitate* access to the labour market in the sense of EU case law."(emphasis in the original)

3. Judge Jacobs amplified his conclusion when refusing permission to appeal to this Court:

> "The purpose of work-related activity is to assist a claimant to recover sufficiently to be able to work. In other words, it operates at a stage that is preliminary to the point at which a claimant could access the labour market within the meaning of EU case law."

4. Mrs Alhashem, for whom Ms Helen Mountfield QC together with Mr Tom Royston appears, contends this reasoning is erroneous in law. The Secretary of State, for whom Ms Julia Smyth appears, contends that the decision of the UT was right essentially for the reason that the UT gave.

5. In my judgment, the contention of the Secretary of State is correct for the detailed reasons given below. EU law makes a distinction between "social assistance" and benefits paid to enable a jobseeker's integration into the labour market ("labour market-related benefits"). EU law requires the latter only to be made available to jobseekers who are EU citizens coming from other Member States and meet the financial conditions for eligibility. In *Jobcenter Berlin Neukölln v Alimanovic*, C-67/14, EU:C:2015:597, the CJEU stated the test for identifying the category into which a benefit falls: the test is whether the function of the benefit is "predominantly" for facilitating access to the job market. If this is met, the benefit is a labour market-related benefit. This category does not include benefits paid to provide welfare for persons with a disability who cannot, or cannot yet, work to enable them to subsist. EU law thus recognises that, unless the liability of a State paying non-contributory benefits is restricted by an appropriate test, a State which pays generous benefits may be the subject of "benefits tourism", where persons move to that State to take advantage of non-contributory benefits. Applying that test to the facts, ESA is social assistance and not a labour market-related benefit.

More about ESA

6. ESA was introduced by the Welfare Reform Act 2007 to replace incapacity benefit. It is aimed at promoting a change in attitudes to people with disabilities with regard to work. The impact assessment stated that the starting point for the assessment would be that the overwhelming majority of customers were capable of some work, given the right support. That would lead to better employment outcomes for people with disabilities. Treating people in line

with their capabilities, instead of making assumptions based on their condition, would have a positive impact on the attitude of others to people with disabilities.

7. When claimants apply for ESA, they undergo a work capability assessment to see whether they have a limited capability for work and, if so, whether they also have a limited capability for work-related activity. Work-related activity depends on what it is reasonable for a claimant to do. Examples include attending workshops to learn how to write a CV, or basic skills training (it is said that this facility may make this benefit more attractive to some jobseekers than JSA). I will call individuals who have made valid claims whose claims are being assessed "the WCA group". If Mrs Alhashem's claim was accepted as valid she would start in this group.

8. If the individual has limited capability for work and also limited capability to undertake work-related activity, he or she is placed in a support group ("the Support Group"). If an individual has a limited capability for work but does not have limited capability to do work-related activity, he or she is placed in a separate group ("the Work-Related Activity Group"). The individual is expected to engage in that activity as a condition of receiving benefits. This requirement is known as "work-related conditionality". I will call this group of claimants "the third group." Rules enable a person receiving ESA to do some specified types of work while receiving the benefit. Of those applying for ESA for the period January to March 2015, some 74 per cent were found to be entitled to ESA. Of those, 64 per cent were placed in the Support Group and 11 per cent were placed in the Work-Related Activity Group (these percentages are approximate but are adjusted for the outcome of appeals): see *Employment and Support Allowance: outcomes of Work Capability Assessments, Great Britain, Quarterly official statistics bulletin 10 December 2015.*

9. We are concerned here with only one type of ESA, namely ESA as a non-contributory benefit. It is paid to a person because of his inability to support himself by work due to disability. It is paid irrespective of his contributions paid by deductions from wages. A jobseeker who comes to the UK from another Member State and has never previously been a worker in the UK will not therefore have made any contributions to public funds to support the payment of this benefit.

10. Since the decision of the Upper Tribunal, both parties filed witness statements – by Mr Michael Spencer, a Solicitor employed by the Child Poverty Action Group in the case of the appellant and by Mr Iain Walsh, Head of the ESA and Work Capability Assessment Policy Division at the Department for Work and Pensions respectively. By filing this evidence, the parties intended to assist this Court, which does not have the specialist knowledge of the F-tT or UT in this case, better to understand the nature of the benefit: it was succinct and informative. I would admit that evidence. We cannot of course resolve an issue of fact on which the deponents disagree.

Relevant EU case law

11. EU law allows a Member State to confine "social assistance" to those who lawfully reside in that State: see, in relation to workers from other Member States, *Trojani v Centre Public d'aide sociale de Bruxelles*, C-456/02, EU:C:2004:488. This right is preserved by Article 24(2) of the Citizenship Directive (Directive 2004/38). This however also gives Member States the option to withhold types of "social assistance" from certain types of citizens of other Member States. The concept of "social assistance" is very broad: it covers "all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an

individual who does not have resources sufficient to meet his own basic needs and the needs of his family" (*Pensionsversicherungsanstalt v Brey*, C-140/12, EU:C:2013:565 at [61]).

12. But there are special rules for jobseekers and workers. A Member State must in general make benefits which are paid to these groups available also to EU citizens who are not resident in that State but are exercising their freedom of movement rights as jobseekers or workers.

13. The scope of the special rule for jobseekers has been considered by the CJEU. The function of the CJEU is to provide the national court with the elements for the interpretation of EU law which may be of assistance to it in deciding the case pending before it. It is for the national court to carry out the determination of fact necessary to enable it to determine the application of EU law in the case before it. I shall set out a summary of the elements of interpretation provided by three decisions of the CJEU about the entitlement of jobseekers to social security benefits in another Member State. I examine these in chronological order. The third is the most important on this appeal, but it needs to be read together with the other two to deduce the current state of EU law.

14. *Collins v Secretary of State for Work and Pensions*, C-138/02, EU:C:2004:172, [2005] QB 145, also reported as R(JSA) 3/06 decides that the principle of non-discrimination applied to a decision by a Member State to discriminate against workers and jobseekers from other Member States in paying financial benefits, and the UK had to pay relevant benefits to workers and jobseekers from another Member State on the same basis as residents, subject to proportionate restrictions to enable it to establish whether there was a "genuine link between [the claimant] … and the … employment market" of that Member State (a "genuine link") (judgment, [67]). This could be established where a person had, for a reasonable period, genuinely sought work in the Member State in question (judgment, [70]). *Collins* concerned JSA, which is paid to help jobseekers with very limited income while they look for employment. The UK required applicants to be habitually resident in the UK. The CJEU held that such a test could be imposed only for the period necessary to verify that the claimant was genuinely seeking work in the UK.

15. The relevant benefits ("labour-market related benefits") were those "intended to facilitate access to employment in the labour market of a Member State" (Judgment, [63]). *Vatsouras v ARGE Nürnberg* 900, C-22/08 and C-23/08, EU:C:2009:344, [2009] All ER (EC) 747 recognised that there was a narrow dividing line between some social assistance and labour market–related benefits and explained the task for national courts in distinguishing between the two. Not surprisingly, the CJEU held that the benefit had to be analysed according to its results and not its formal structure. The national court had to consider the constituent elements of the benefit. Specifically, a condition that a person had to be capable of earning a living could constitute an indication that a benefit was labour market-related.

16. In *Alimanovic*, which was decided in September 2015 after Beatson LJ gave permission to appeal to this Court, the Grand Chamber of the CJEU addressed the categorisation of a German means-tested benefit ("SGB II") for which jobseekers who were fit to work in the foreseeable future were eligible. SGB II was expressed to consist of two parts: (1) to meet their basic subsistence costs to enable them to live in keeping with human dignity, and (2) to facilitate their integration into the labour market. A claimant had to have a right to reside in Germany other than because he was a jobseeker. The CJEU held that "social assistance" included benefits paid to enable an individual who does not have sufficient resources of his own to meet his basic needs (judgment, [44]). The further issue was whether, where a benefit was in part social assistance and in part labour market–related, the benefit was to be categorised according to its predominant function. I discuss the CJEU's reasoning on this point in the next section of this judgment.

Submissions and discussion

17. I now consider the parties' submissions and set out my reasons for accepting or rejecting them. The issues may be divided into four broad areas: (1) the relevant test for distinguishing social assistance from labour market-related benefits, (2) the application of that test to the facts, (3) the possibility of applying the test to the labour market-related element of ESA as a stand-alone benefit and (4) some final points about points we are not deciding.

(1) The relevant test for distinguishing social assistance from labour market-related benefits: emergence of "predominant function"

18. The ultimate issue here is whether the test for distinguishing social assistance from labour market-related benefits is that in *Vatsouras* or that in *Alimanovic*. In their submissions, the parties also addressed the differences between the two tests.

19. Ms Mountfield submits that the test laid down in *Vatsouras* was one of intention: thus the CJEU held that "benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting social assistance within the meaning of Article 24(2) of Directive 2004/38" (judgment, [45]). The benefit must therefore be intended to facilitate access to the market. It is a question of looking at what was intended and (as counsel put it) whether that was the function of the benefit in question, and not solely of assessing the predominant means by which the benefit performed that function.

20. She submits that the test of intention remains good law. In *Alimanovic* at [46], the CJEU used this test without criticism or qualification.

21. Ms Smyth submits that what happened is that some Member States thought that the adoption of Article 24(2) of Directive 2000/38 had affected the decision in *Collins*. The CJEU confirmed in *Alimanovic* that this had not happened and that a benefit was not within Article 24(2) if it was a labour market-related benefit. On Ms Smyth's submission, *Alimanovic* does two things: it clarifies *Vatsouras* and it makes it clear that a benefit will only be a labour market-related benefit if its predominant purpose is to facilitate access to the labour market. That means that, where the benefit paid to a jobseeker provides the jobseeker with subsistence, which is "social assistance" for EU law purposes, predominant function is now the test.

Conclusion on Issue (1)

22. There is an important difference between intention and function. The latter enables the court to take into account the social context and outcomes of the benefit, and not just the intentions of those who promote it and the terms and conditions of the benefit. If, for example, in this case the relevant factor is the predominant function of the benefit, it is possible to take into account that numerically the largest group of those entitled to it have such reduced capability for work that they are in general unable to access the labour market. That would not be so if the test were merely one of intention.

23. The critical passage of the judgment of the CJEU in *Alimanovic* dealing with the distinction between social assistance and labour market-related benefit is as follows:

> "42. Since the issue of whether the benefits at issue constitute 'social assistance' or measures intended to facilitate access to the labour market is determinative for the

purposes of identifying the EU rule under which that compatibility falls to be assessed, it is necessary to classify them.

43. In this connection, it is sufficient to note that the referring court has itself characterised the benefits at issue as 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004. It states in that regard that those benefits are intended to cover subsistence costs for persons who cannot cover those costs themselves and that they are not financed through contributions, but through tax revenue. Since those benefits are moreover mentioned in Annex X to Regulation No 883/2004, they meet the conditions in Article 70(2) thereof, even if they form part of a scheme which also provides for benefits to facilitate the search for employment.

44. That said, it should be added that, as is apparent from the Court's case-law, such benefits are also covered by the concept of 'social assistance' within the meaning of Article 24(2) of Directive 2004/38. That concept refers to all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that fact may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State (judgment in *Dano*, C-333/13, EU:C:2014:2358, paragraph 63).

45. However, in the present case it must be found that, as the Advocate General observed in point 72 of his Opinion, the predominant function of the benefits at issue in the main proceedings is in fact to cover the minimum subsistence costs necessary to lead a life in keeping with human dignity.

46. It follows from those considerations that those benefits cannot be characterised as benefits of a financial nature which are intended to facilitate access to the labour market of a Member State (see, to that effect, judgment in *Vatsouras and Koupatantze*, C-22/08 and C-23/08, EU:C:2009:344, paragraph 45) but, as the Advocate General observed in points 66 to 71 of his Opinion, must be regarded as 'social assistance' within the meaning of Article 24(2) of Directive 2004/38."

24. In my judgment, the test for distinguishing social assistance from labour market-related benefits is now plain from this passage. The CJEU has restricted the labour market-related benefits which an EU citizen from another Member State can claim by virtue of EU citizenship to those whose sole or predominant function is to facilitate access to the labour market, and left it to the Member State to decide what, if any, other benefits he should have. In other words, it has taken a narrow approach to what is a labour market-related benefit. Specifically it does not include a mere subsistence benefit. Moreover, the CJEU expressly confirmed that result in the later case of *Vestische Arbeit Jobcenter Kreis Recklinghausen v Garcia-Nieto,* C-299/14, EU:C:2016:114, but I need not go to that case as well.

25. The fact that in *Alimanovic* the CJEU continues to refer to *Vatsouras* is not conclusive. It does not mean that the CJEU did not expand its case law in *Alimanovic*. The position is that it was not necessary for the CJEU to state that it had qualified *Vatsouras* because in *Alimanovic* it was dealing with a new argument. The referring court had not asked for a ruling on the interpretation of EU law where a single benefit had both types of benefit within it.

26. The CJEU's test looks for a close relationship with the labour market. The CJEU has taken the terminology of intention to facilitate access to the labour market as set out in *Vatsouras* but explained that test by stating that a subsistence benefit is not enough and by holding that if there is some element of facilitation of access to the market, the test is whether that it is the predominant function of the benefit. It does not further define what a labour market-related benefit is because that explanation was enough to decide the case before it.

27. I appreciate that *Alimanovic* thus read leads to the conclusion that the decision reduces the amount of benefits which an EU citizen can claim in every Member State and potentially creates two tiers of EU citizens in a single Member State (those entitled to social assistance and those not so entitled). They are not treated equally in the circumstances in issue in *Alimanovic*. However that result is a logical consequence of the fact that social benefits are only available by virtue of EU citizenship in another Member State where a claimant is a worker or jobseeker exercising his right to freedom of movement (see *Collins*). Because of that, there are inherent limitations in any event on EU citizenship as a passport to EU-wide social benefits.

28. An analogy can be drawn with economically inactive claimants. In *Sanneh v Secretary of State for Work and Pensions* [2015] EWCA Civ 49; [2015] 2 CMLR 27; [2015] AACR 18 (Arden, Elias and Burnett LJJ) the claimant was a third country national who was a *Zambrano* carer, that is, an individual who was neither an EU citizen and nor a worker or jobseeker, and who claimed benefits as the carer of a child who was an EU citizen in right of the EU Charter of Fundamental Rights. This Court held that EU law had no competence in the level of social security benefits which should be paid to a *Zambrano* carer. The principle of non-discrimination did not apply as the individual was not an EU citizen. I refer to this case to show that EU law is not a passport to the same social benefits in every Member State in every situation. There is a place for separate national benefit systems in which claimants from another Member State cannot always participate.

29. Ms Mountfield in her submissions addressed the question of the protection of the public finances of a State against abuse from "benefits tourism". She submits that the protection against any Member State receiving too many so-called jobseekers is that the jobseekers have to show some capacity to work and that they are genuinely seeking work and have a link to this country: see generally *Collins* at [58]. This point is not determinative because the question for this court is the effect of the CJEU case law and in my judgment that is clear. It is correct, however, to say that the CJEU has expressed concern about protection of a Member State's finances and the need to ensure that a Member State's social security schemes are financially viable: see, for example, the statement by Advocate General Wathelet in *Dano v Jobcebter Leipzig*, Case C-333/13, EU:C:2014:341 at [132] that: "It has also accepted that the risk of seriously undermining the financial balance of a social security system may constitute an overriding reason in the public interest capable of justifying barriers to the fundamental freedoms."

30. In [43] of its judgment in *Alimanovic*, the CJEU explained that the referring court had treated the benefit in that case as social assistance because it was a special non-contributory cash benefit for the purposes of Annex X of Regulation 883/2004 (see [43] in paragraph 23 above). Non-contributory ESA and also JSA are listed in that Annex. It is, however, common ground that that factor does not determine whether a benefit is a labour market-related benefit, as is also clear from *Alimanovic*. I do not therefore need to go further into the effect of ESA being included in Annex X of that Regulation.

(2) Application of the predominant function test to ESA: ESA does not satisfy the test as its primary function is the welfare of eligible claimants

31. As Ms Smyth submits, the crucial question for the Secretary of State is the proper classification of ESA: is it a labour market-related benefit or is it social assistance? If it is simply an unemployment benefit focussed on a small group of claimants, it would be the former. And if ESA is to be analysed as the former, any jobseeker, such as Mrs Alhashem may be, may claim it. If it is the latter, it may be restricted to those in the UK.

32. I approach this question on the basis that the predominant function test applies as I have reached the conclusion that that is the applicable test (see Issue (1) above).

33. Ms Mountfield submits that the predominant function of the ESA is to provide a benefit which is intended to facilitate access to the labour market.

34. The first stage of Ms Mountfield's argument is to rely on descriptions of ESA in various documents, particularly those issued by the Secretary of State. For example, the Department for Work and Pensions' published description of ESA reads:

> "Employment and Support Allowance helps people with an illness or disability to move into work. …"

Therefore ESA is not simply about subsistence. Ms Mountfield adopts the following passage from the report of the Select Committee on *Merits of Statutory Instruments*, 18th Report, which states:

> "10. The ESA will focus on how people can be helped into work and will not automatically assume that because a person has a significant health condition or disability they are incapable of any work … "

35. The next stage in Ms Mountfield's argument highlights the work-related conditionality of ESA for the third group. The Work-Related Activity Group can be required to do work-related activity and there could be no purpose in this other than to facilitate access to the labour market. This significance of work-related conditionality is increased by the fact that, to be required to do work-related activity, a claimant's work capability does not have to be severely limited. One specified task which a person must complete in the course of assessment to show inability to undertake work-related activity is to complete a simple task, such as setting an alarm clock, which suggests that the Work-Related Activity Group is intended to be the largest possible group.

36. The third stage in Ms Mountfield's argument is that ESA claimants are permitted to work to some extent. So ESA claimants may be working as well as claiming benefit and so the benefit is in those cases clearly intended to facilitate access to the labour market.

37. Ms Smyth submits that ESA does not facilitate access to the labour market as this must mean immediate access. Moreover ESA does not have a predominant function of doing so. ESA is a safety net: it is to help those who cannot help themselves. It is unreal to suggest that ESA facilitates access to the labour market or that that is its purpose or function. For claimants in the third group (only), it is about the possibility of work in the future. It is a key feature of ESA that it is payable only to those with limited capability for work: see section 1 of the 2007 Act, which makes that a condition of the benefit. Some will be offered work-related activity but that is related to work in the future.

38. Furthermore, on Ms Smyth's submission, ESA is not designed like a benefit to be paid to jobseekers. It is clear from *R (o/a Antonissen) v Immigration Appeal Tribunal* C-292/89,

EU:C:1991:80, [1991] ECR I-745, and *Secretary of State for Work and Pensions v Elmi* [2012] EWCA Civ 1402; [2012] PTSR 780; [2012] AACR 22 that the State can check whether a person is entitled to a benefit. But, with ESA, the Secretary of State has no right to check if a person could look for a job. ESA is therefore unsuitable for a State to provide for jobseekers because the Secretary of State cannot check that a person is searching for work and the person cannot be required to take work.

39. Moreover in *Alimanovic* the CJEU took the unusual step of holding that the benefit in question in that case, SGB II, was not a labour market-related benefit. It did not take the usual step of stating the interpretation of applicable EU law and leaving the national court to apply that interpretation to the facts. How then, asks Ms Smyth, can ESA be such? SGB II conferred a broader benefit beyond that available to jobseekers. It was a merger of two previous systems. It covered those who did not have sufficient means (eg asylum seekers). It was all means-tested.

40. Both counsel refer to *D'Hoop v Office National d'Emploi*, C-224/98, EU:C:2002:432, [2002] 3 CMLR 12. This was about a Belgian benefit called a tideover allowance which enabled new entrants to the employment market who had completed secondary education in Belgium to be treated as unemployed and on benefit so that the State was responsible for their remuneration and social security contributions. The terms of this benefit were held to breach EU law on freedom of movement. In *Alimanovic* this tideover allowance was specifically described as a labour market-related benefit. Ms Mountfield stresses that this was so even though there was no conditionality. ESA therefore must be a labour market-related benefit *a fortiori*.

41. Ms Smyth submits that neither Advocate General Wathelet nor the CJEU in *Alimanovic* placed any reliance on conditionality. The CJEU in particular looked at the predominant function of the benefit and not its detailed terms.

Conclusion on Issue (2)

42. It is clear from the history of ESA that it is primarily provided for those who cannot work or who are on the borderlines due to some disability or past episode in their lives. Some of these claimants will in future be able to work, and a further aim of the benefit is to provide facilities which will enable them to do so. That is at least partly a question of social policy inspired by an aim of treating individuals affected by disability with dignity and helping them to realise their maximum potential. But facilitating an entry into work is not the predominant function of the benefit.

43. The statistics as to the percentage of claimants in the Support Group receiving ESA (64 per cent of the 74 per cent of claimants found to have valid claims) makes it impossible to conclude that the predominant function of ESA is to facilitate access to the labour market. That means that roughly 87 per cent of those eligible for ESA are put into the Support Group: they are treated as having limited capability to do both work and work-related activity. Neither claimants in the WCA group nor those in the Support Group are required to do any work-related activity for the reason that their assessed or potential capability for work-related activity is recognised to be limited. It makes no sense to treat the benefit paid to them as intended to facilitate access into the labour market.

44. I reject Ms Mountfield's submission that these numbers must be disregarded because the benefit is still (to some degree) intended to facilitate access to labour market. That submission fails to take account of the fact that the CJEU has decided that the character of a benefit must be

determined by its predominant function and thus the terms of the benefit received by the majority of claimants and the abilities of those claimants are undoubtedly relevant.

45. The rationale of the EU law requirement that nationals of other Member States participate equally in benefits paid to facilitate access to the labour market is to support the internal market by putting jobseekers from other Member States on an equal footing with those resident within the Member State where they seek to work. It is not to put those with limited capability to work into the same position as regards training and preparation for work as those in different Member States. The fact that an aim of ESA is to help some people back into work where possible at some future point in time cannot therefore convert ESA into a labour market-related benefit any more than the element of benefit in *Alimanovic* which was labour market-related could do so.

46. In all the circumstances I need not decide whether ESA paid to the Work-Related Activity Group viewed on its own is a labour market-related benefit for the purposes of EU law. I would not wish to do so because that matter has not been fully investigated. We are not, for instance, told how many members of the Work-Related Activity Group actually find jobs, which means they no longer require ESA. It may be that the link with the payment of the benefit and access to the labour market is simply too remote.

47. Ms Mountfield relies on the conditionality of ESA (meaning work-related activity may be required), and also on the fact that work is permitted. However, on the latter point, claimants are only permitted to take certain limited types of work or work up to a particular (low) financial limit. In my judgment, neither conditionality nor the element of permitted work affects the true character and effect of ESA as identified in paragraph 42 above.

48. The fact that the Secretary of State has not attached conditions which would enable him to investigate whether a claimant is entitled to benefit is consistent with this assessment, though the terms of the benefit are within the Secretary of State's control and could be changed if necessary. It follows that this point is not conclusive.

49. In conclusion, ESA is not in my judgment properly described as intended to facilitate access to the labour market for the purposes of EU law with the result that a jobseeker from another Member State cannot apply for it. That conclusion could only be displaced if any part of ESA which is properly described as labour market-related and can be treated as a separate stand-alone benefit, and that is the question to which I now turn.

(3) The predominant function test is not to be applied on the basis that ESA is divided into separate components

50. It is common ground that in appropriate circumstances a benefit could be separated into component parts. Ms Mountfield cites Article 1 of Regulation 1408/71 and *Commission of the European Communities v European Parliament* C-299/05, EU:C:2007:608, [2007] ECR I-8695 at [69] (where the CJEU held that the mobility element of the UK's disability living allowance could be severed).

51. Ms Mountfield submits on this appeal that the benefits paid to the Work-Related Activity Group can be separated out.

52. Ms Smyth submits that ESA is not the sort of benefit that can be separated into component elements because it is part of the function of the benefit that claimants should be able to move from one group to another. She contrasts disability living allowance, where the benefit has

distinct components, ie mobility and care. They might be separable but the present benefit would not be so.

Conclusion on Issue (3)

53. I agree with Ms Smyth's submission. If the two-part benefit in *Alimanovic* was treated as a single benefit, it is difficult to see how EU law could have the result of severing ESA into an ESA Mark 1 for the WCA group and the Support group and an ESA Mark 2 for the Work-Related Activity Group. That would be inconsistent with the aim of the benefit which is in part to make the various groups "porous" (my word) so that over time individuals in the Support Group can move to the Work-Related Activity Group and *vice versa* dependent on their capability at different points in time.

54. Again, I need not decide whether, if the benefit paid to the Work-Related Activity Group were a separate benefit, it would be a labour market-related benefit.

(4) Some final points: matters we do not need to decide

55. First, Ms Mountfield took us to further authorities on the question of the relevant "link" (see above, paragraph 14). I have not gone into those authorities as, in my judgment, we are not concerned with that point.

56. Second, this judgment is concerned with benefits for EU citizens of other Member States who are jobseekers for EU law purposes. The Tribunals determined that Mrs Alhashem is not a worker for EU law purposes and we are proceeding for the purposes of this appeal on the assumption only that she is a jobseeker as the Secretary of State does not accept that she was a jobseeker at the relevant time and that matter has not been decided.

Overall conclusion

57. Ms Smyth submits that, although *Alimanovic* had not been decided at the time, the decisions of both Tribunals were correct and are consistent with it. For the reasons given above, I accept that submission.

58. For the reasons set out above, I would admit the witness statement of Mr Walsh and Mr Spencer and dismiss this appeal.

LORD JUSTICE DAVID RICHARDS:

59. I agree.

MR JUSTICE MITTING:

60. I also agree.