HOUSE OF LORDS SESSION 2007–08
[2008] UKHL 67
on appeal from:[2007]NICA 17

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Zalewska (AP) (Appellant) *v* Department for Social Development (Respondents) (Northern Ireland)

Appellate Committee

Lord Hope of Craighead
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood
Lord Neuberger of Abbotsbury

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Hearing dates:

23 and 24 JULY 2008

ON
WEDNESDAY 12 NOVEMBER 2008

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LORD HOPE OF CRAIGHEAD

My Lords,

1. By the Treaty on Accession that was signed in Athens on 16 April 2003 an agreement was entered into for the accession on 1 May 2004 of 10 new member states to the European Union, including the Republic of Poland. The European Union (Accessions) Act 2003 made provision for the Accession Treaty to be implemented into domestic law. One of the issues that the Accession Treaty addressed in the case of the acceding member states other than Cyprus and Malta ("the A8 states") was the freedom of movement for workers which is guaranteed by article 39 of the Treaty establishing the European Community ("article 39EC"). The accession of Cyprus and Malta, on account of their small size, was not seen as being likely to overload the labour markets of the 15 existing member states. But it was decided as an integral part of the Treaty to lay down conditions as to access to their labour markets by nationals of the A8 states.

2. Part 2 of Annex XII to the Accession Treaty made provision for freedom of movement of persons in the case of Poland. Similar provision was made for the other A8 states in other Annexes. Section 2 of the 2003 Act gave power to the Secretary of State to make regulations that a specified enactment relating to the entitlement of a national of a State in the European Economic Area to enter or reside in the United Kingdom as a worker was to apply in relation to a national of an acceding state as it did to a national of an EEA state, with such exceptions and modifications that might be specified. In the exercise of that power the Secretary of State made various modifications to the Immigration Act 1971 ("the 1971 Act") by the Accession (Immigration

and Worker Registration) Regulations 2004 (SI 2004/1219) ("the 2004 Regulations").

3. The question in this case is whether the appellant, who is Polish and has worked in the United Kingdom without interruption for 12 months, qualifies for income support under the relevant social security legislation as a person who is habitually resident in this country. The answer to it depends on whether the modifications that the 2004 Regulations made to the 1971 Act about the right of access of nationals of the A8 states to the labour market of the United Kingdom, on which depends the right of residence, are compatible with Community law. The facts are relatively simple. But to set the scene I must first describe the background of Community law against which the 2004 Regulations were made. I must then set out the provisions of the 2004 Regulations with which the appellant was expected to comply under the worker registration scheme as a condition of access to the benefit and the relevant provisions of the social security legislation under which she claimed that benefit. The amount of detail that has to be included in this introduction is regrettable. But it is a necessary prelude to a discussion of the issues of law that are before your Lordships.

The Community law background

4. The starting point is to be found in the EC Treaty. Article 18EC sets out one of the rights of citizenship of the Union. It provides that every citizen shall have the right to move and reside freely within the territory of the member states. Article 39EC provides that freedom of movement for workers shall be secured within the Community, and that such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of member states as regards employment, remuneration and other conditions of work and employment.

5. On 15 October 1968 the Council adopted Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community. The preamble to the Regulation explains that this was done to enable the objective laid down in article 49 of the EEC treaty (now article 39EC) to be achieved and to perfect measures previously taken for its attainment. Part I of the Regulation makes provision for employment and workers' families. It is divided into three Titles. Title I deals with eligibility for employment. Title II deals with employment and equal treatment. Title III, which is not in issue in this case, deals with workers' families.

6. The basic rule about eligibility for employment is set out in Part I, Title I, article 1 of Regulation 1612/68. It provides that any national of a member state shall, irrespective of his place of residence, have the right to take up an activity as an employed person within the territory of another Member State. Title 1, article 2 provides that this right shall be enjoyed in accordance with any provisions laid down by law, regulation or administrative action, without any discrimination resulting there from. Title II, article 7 provides for the equal treatment of workers who are eligible for the right to take up an activity as an employed person under article 1:

> "1. A worker who is a national of a member state may not, in the territory of another member state, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal and, should he become unemployed, reinstatement or re-employment.
>
> 2. He shall enjoy the same social and tax advantages as national workers."

7. The Accession Treaty established by common agreement among the 15 member states the conditions of admission to the European Union of the 10 new members and the adjustments to be made to the Treaties on which the European Union was founded. The conditions and adjustments are set out in the Act of Accession which is annexed to the Treaty. Article 10 of the Treaty provides that the application of the original Treaties and Acts shall, as a transitional measure, be subject to the derogations provided for in the Act. Article 24 of the Accession Act incorporates Annex XII which deals with the position of the Republic of Poland. Part 1 of Annex XII contains the conditions and adjustments relating to free movement of goods. Part 2 contains the conditions and adjustments relating to freedom of movement for persons. Para 1 of Part 2 provides that article 39EC shall fully apply only, in relation to the freedom of movement of workers between Poland on the one hand and the 15 member States on the other hand, subject to the transitional provisions laid down in paragraphs 2 to 14. The word "only" indicates that, subject to the conditions that they lay down, the transitional provisions must be taken to replace the guarantee of free movement of workers in the article.

8. Paragraph 2 of Part 2 of Annex XII provides:

> "By way of derogation from Articles 1 to 6 of the Regulation (EEC) No 1612/68 and until the end of the two year period following the date of accession, the present member states will apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Polish nationals. The present member states may continue to apply such measures until the end of the five year period following the date of the accession.
>
> Polish nationals legally working in a present member state at the date of accession and admitted to the labour market of that member state for an uninterrupted period of 12 months or longer will enjoy access to the labour market of that member state but not to the labour market of other member states applying national measures.
>
> Polish nationals admitted to the labour market of a present member state following accession for an uninterrupted period of 12 months or longer shall also enjoy the same rights.
>
> The Polish nationals mentioned in the second and third subparagraphs above shall cease to enjoy the rights contained in those subparagraphs if they voluntarily leave the labour market of the present member state in question
>
> Polish nationals legally working in a present Member State at the date of accession, or during a period when national measures are applied, and who were admitted to the labour market of that Member State for a period of less than 12 months shall not enjoy these rights."

Paragraph 12 provides:

> "Any present member state applying national measures in accordance with paragraphs 2 to 5 and 7 to 9, may introduce, under national law, greater freedom of

> movement than that existing at the date of accession, including full labour market access. From the third year following the date of accession, any present member State applying national measures may at any time decide to apply articles 1 to 6 of Regulation (EEC) No 1612/68 instead. The Commission shall be informed of any such decision."

National law

9. The United Kingdom, Sweden and the Republic of Ireland chose to exercise their right to derogate from articles 1 to 6 of Regulation 1612/68, which deal with eligibility for employment, by applying national measures to regulate access to their labour market by nationals of the A8 states. The United Kingdom did this by making amendments to the Immigration (European Economic Area) Regulations 2000 (SI 2000/2326) ("the 2000 Regulations") and by the 2004 Regulations. The effect of these amendments was to provide nationals of the A8 states with access to the labour market of the United Kingdom subject to the conditions set out in the 2004 Regulations. The other member states put in place or maintained more restrictive provisions than those adopted by the United Kingdom, Sweden and Ireland. The question whether the conditions in the 2004 Regulations are compatible with Community law is the central issue in this appeal.

10. The 2000 Regulations provide nationals of all the member states of the EU with a right of entry into and residence in the United Kingdom, and a right of access to its labour market, in conformity with the Treaty obligations set out in articles 18 and 39EC. Regulation 12(1) provides that an EEA national must be admitted to the United Kingdom if he produces, on arrival, a valid national identity card or passport issued by an EEA state. Regulation 14(1) of the 2000 Regulations provides that a qualified person is entitled to reside in the United Kingdom, without the requirement for leave to remain under the 1971 Act. "Qualified person" means a person who is an EEA national and in the United Kingdom as, inter alia, "a worker": reg 5(1). A worker does not cease to be a qualified person solely because he is temporarily incapable of work as a result of illness or accident or because he is involuntarily unemployed, if that fact is duly recorded by the relevant employment office: reg 5(2). Regulation 3(1) provides that "worker" means a worker within article 39EC. The word "worker" is not defined by that article. So it must be given a wide meaning that is consistent with the aims and principles of the Treaty.

11. The 2004 Regulations were made to give effect in the United Kingdom to the derogation provisions in the Act of Accession as to access to the labour market during the accession period from 1 May 2004 to 30 April 2009. Subject to various exceptions required by paragraph 2 of Part 2 of Annex XII to the Act of Accession which are not relevant to this case, the basic rule of the scheme that it sets out is that a national of an A8 state working in the United Kingdom during the accession period is an accession state worker requiring registration: 2004 Regulations, reg 2(1). He ceases to be an accession state worker requiring registration if he legally works in the United Kingdom without interruption for a period of 12 months falling wholly or partly after 30 April 2004: reg 2(4). But he will only be treated as legally working in the United Kingdom during that period if he is working for an authorised employer: reg 2(7)(b). Regulation 4 deals with the right of residence of workers from the A8 states during the accession period. Reg 4(1) derogates from the relevant Community provisions on the abolition of restrictions on movement and residence within the Community for workers of member states. Reg 4(4) provides:

> "An accession state worker requiring registration shall only be entitled to reside in the United Kingdom in accordance with the 2000 Regulations as modified by regulation 5."

12. Regs 5(1) and 5(2) of the 2004 Regulations provide:

> "(1) The 2000 Regulations shall apply in relation to an accession State worker requiring registration subject to the modifications set out in this regulation.
>
> (2) An accession state worker requiring registration shall be treated as a worker for the purpose 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."

13. Regs 7(1), 7(2) and 7(3) of the 2004 Regulations provide:

> "(1) By way of derogation from article 39 of the Treaty establishing the European Community and articles 1 to 6 of the Regulation (EEC) No 1612/68 on freedom of

> movement for workers within the Community, an accession state worker requiring registration shall only be authorised to work in the United Kingdom for an authorised employer.
>
> (2) An employer is an authorised employer in relation to a worker if –
>
> (a) the worker was legally working for that employer on 30 April 2004 and has not ceased working for that employer after that date;
>
> (b) the worker –
>
> (i) during the one month period beginning on the date on which he begins working for the employer, applies for a registration certificate authorising him to work for that employer in accordance with regulation 8; and
>
> (ii) has not received a valid registration certificate or notice of refusal under regulation 8 in relation to that application or ceased working for that employer since the application was made;
>
> (c) the worker has received a valid registration certificate authorising him to work for that employer and that certificate has not expired under paragraph (5); or
>
> (d) the employer is an authorised employer in relation to that worker under paragraph (3) or (4).
>
> (3) Where a worker begins working for an employer on or after 1 May 2004 that employer is an authorised employer in relation to that worker during the one month period beginning on the date on which the work begins."

Reg 7(5)(b) provides that a registration certificate expires on the date on which the worker ceases working for that employer.

14. Reg 8 of the 2004 Regulations sets out the system that is to be followed for obtaining a registration certificate. The application can only be made by an applicant requiring registration to work for an employer who is working for that employer at the date of the application. It must be made in writing to the Secretary of State. Except in the case of a first registration, the application must be accompanied by, among other things, a letter from the employer confirming that the applicant began working for the employer on the date specified in the application. If the Secretary of State is satisfied, he sends the applicant

a registration card with a reference number, for use in subsequent applications, and a registration certificate. The registration certificate stated, among other things, that it authorised the worker to work for the employer stated in the certificate and that it would expire on the date the worker ceased working for that employer. Reg 9(1) provides that, subject to various exceptions which do not apply to this case, an employer who employs an accession state worker requiring registration during a period in which the employer is not an authorised employer in relation to that worker shall be guilty of an offence.

15. In order to qualify for income support a person must be habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland. Unless he is habitually resident in one of these places he will be treated as a "person from abroad". The applicable amount for the purposes of income support in the case of a "person from abroad" is nil: Income Support (General) Regulations (Northern Ireland) 1987 (SR 1987/459), Schedule 7, para 15.

16. Following the changes made to the 2000 Regulations by the 2004 Regulations, the 1987 Income Support Regulations were amended by the Social Security (Habitual Residence Amendment) Regulations (Northern Ireland) 2004 (SR 2004/197). Prior to the amendment, the expression "person from abroad" was defined simply as a claimant not habitually resident in the United Kingdom: reg 21(3). A person who was exercising a right of residence in the United Kingdom under Community law was entitled to benefit. The effect of the 2004 amendments is that an A8 state national requiring registration under those Regulations is to be treated as habitually resident in the United Kingdom, but only if he has a right to reside here. This is the effect of reg 21(3E), as inserted by reg 3 of the amendment Regulations, which provides that for the purposes of the definition of a person from abroad no person shall be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland if he does not have a right to reside there. An accession state worker requiring registration has a right to reside in the United Kingdom only during the period while he is working for an authorised employer, and he does not cease to be an accession state worker requiring registration until he has worked for an authorised employer without interruption for a period of 12 months.

The facts

17. The appellant is a national of the Republic of Poland. She came to Northern Ireland for the purpose of seeking employment on 1 July 2004. From 9 July 2004 to 7 January 2005 she worked for Monaghan Mushrooms Ltd in Co Tyrone picking mushrooms. She applied for a registration certificate under reg 8 of the 2004 Regulations. On 5 November 2004 she was issued by the Home Office with a registration certificate. It recorded her starting date as 9 July 2004 and gave the name of Monaghan Mushrooms as her employer. Thus far she had complied with the requirements of reg 5 of the 2004 Regulations. Monaghan Mushrooms was an authorised employer in relation to her for the first month of her employment starting on 9 July: reg 7(3). There was a gap until 5 November 2004. This appears to have been due to a delay in the issuing of her registration certificate by the Home Office. Thereafter Monaghan Mushrooms was an authorised employer in relation to her because she had received a valid registration certificate which had not expired as she was still working for that employer: reg 7(2)(c).

18. On 7 January 2005 the appellant left Monaghan Mushrooms. She secured further work with two other employers through an agency. She worked for Smirnoff Vodka in Belfast for about three weeks from 8 January 2005. From the end of January 2005 she worked for Linwoods. On 10 July 2005, one year after she started work with Monaghan Mushrooms, she stopped working. By that date she had worked for an uninterrupted period of 12 months. But she had not applied for a registration certificate in connection with her employment either with Smirnoff or with Linwoods. This did not matter in the case of her employment with Smirnoff. She was with that employer for period of less that one month. So she was covered during that period by reg 7(3), as she was for the first month of her employment with Linwoods. But after that initial period Linwoods was not an authorised employer in relation to her as none of the conditions of reg 7(2) were satisfied. She was still an accession State worker requiring registration under reg 2(1) of the 2004 Regulations, as she had not yet worked for an authorised employer in the United Kingdom for an uninterrupted period of 12 months: reg 2(4). But, as she was no longer working for an authorised employer, she was no longer entitled to be treated as a worker for the purpose of the definition of “qualified person” in reg 5(1) of the 2000 Regulations: 2004 Regulations, reg 5(2). This in turn meant that she no longer had a right of residence: reg 4(4).

19. In the meantime the appellant had been joined in Northern Ireland first by her daughter who arrived in January 2005 and then by her partner, her child's father, who arrived in April 2005. At the end of June 2005 she left her partner due to domestic violence. She stayed with a friend for three weeks and then moved to a Women's Aid hostel in Portadown. On 22 July 2005 she applied for income support for herself and her daughter. Her claim was disallowed on the ground that, as she was an accession state worker requiring registration who was not entitled to be treated as a qualified person in reg 5(1) of the 2000 Regulations, she had no right to reside in the United Kingdom. To qualify for that right she required to have worked for an authorised employer for an uninterrupted period of 12 months, and the only registration certificate that she was able to produce related to her first employer for whom she had not worked since January 2005. She appealed to a Social Security Appeal Tribunal which on 18 November 2005 allowed her appeal on the ground that income support was a social advantage and that the Income Support Regulations discriminated against her contrary to article 7(2) of Regulation 1612/68. To give effect to that article she was to be treated as habitually resident in the United Kingdom for the purposes of the Income Support Regulations despite her failure to register with Linwoods.

20. The respondent appealed against this decision to the Social Security Commissioner. On 23 August 2006 the Commissioner allowed the appeal and set aside the decision of the tribunal. The appellant then appealed to the Court of Appeal in Northern Ireland by way of case stated. The judgment of the Court of Appeal was delivered on 9 May 2007 by Girvan LJ. He said that, on the facts as set out in the sated case, there was insufficient evidence to establish conclusively that the appellant would have qualified for income support as a worker admitted to the United Kingdom labour market. There was no finding of fact as to why she left her work or whether she was still genuinely seeking work when she was seeking income support. Although the tribunal appeared to have accepted that she was a worker as she was still intent on finding work, this was a matter that would have to be remitted to the Commissioner for further inquiry if her decision was wrong in law.

21. On the issue of law however the Court of Appeal upheld the decision of the Commissioner. A wide discretion had been conferred on member states by the Act of Accession. The conditions on which accession workers were to be admitted to the national labour market had been left to the member states, so they must be determined in accordance with national law. The appellant had failed to satisfy the requirements of the 2004 Regulations. They had a national legal basis

which was consistent with the right given to member states. The appellant had been unable to demonstrate that the registration scheme lacked rationality or proportionality. So she was not entitled to the benefit.

The issues

22. The central issue is whether the registration requirements in reg 7 of the 2004 Regulations on which the appellant's right to reside in the United Kingdom under the worker registration scheme depends are compatible with Community law. For the appellant Mr O'Hara QC said that her primary argument is that she is entitled, relying directly on article 39EC and article 7(2) of Regulation 1612/68, to the same social and tax advantages as workers who are nationals of the United Kingdom. If this argument is right, any failure to comply with the registration requirements must simply be disregarded. Her second argument is that the right to reside test, which is linked to the requirement to register the initial employment and to re-register all subsequent changes during the first 12 months, is unnecessary and disproportionate.

23. The Child Poverty Action Group and the Public Law Project, intervening, support the appellant's second argument. Their case is that the registration requirements are incompatible with Community law because they are an unlawful interference with Community law rights and because the consequences of a failure to register amount to a disproportionate penalty. As Mr Drabble QC put it, where a Member State decides, pursuant to the derogation, that it will admit accession nationals into the labour market by permitting them to work, national measures governing the legality of that work must pursue a legitimate aim and be proportionate. He submitted that the requirement to re-register failed to satisfy that test, in view of the consequences of a failure to comply with it.

24. The respondent's primary argument is the reverse of the appellant's primary argument. Mr Lewis QC said that the effect of the derogation is that the question whether national rules are disproportionate restrictions on a Community law right of access to the labour market does not arise. The rules define the scope of the right under national law. This is not a right that is derived from Community law. His alternative submission was that the 2004 Regulations performed a legitimate aim and were a proportionate way of ensuring

that the United Kingdom has timely and accurate information on the accessing of its labour market by A8 state nationals.

Discussion

25. The first question is whether the appellant can rely directly on article 39EC and article 7(2) of Regulation 1612/68 to qualify for income support, despite the fact that she was not authorised to work for an authorised employer under reg 7 of the 2004 Regulations for the whole of the 12 month period. In my opinion the answer to it is to be found in paragraph 2 of Part 2 of Annex XII to the Act of Accession.

26. Absent the derogation provisions in that paragraph, a worker who is a national of any member state has the same rights of access to the labour market and to the social advantages that go with it as those of any other member state. That is the effect of article 39EC read together with article 7 of the Regulation. It is not open to the United Kingdom to impose restrictions on workers who are nationals of other member states that are incompatible with the fundamental rules of Community law. But, as paragraph 1 of Part 2 of Annex XII makes clear in the case of Poland, article 39EC is subject to derogation in the case of the freedom of movement of workers from nationals of the A8 states. Paragraph 2 of Part 2 states, by way of derogation, that for the two year period from the date of accession the member states will apply national measures, and that they will continue to apply such measures until the end of the five year period following the date of accession. The effect of that paragraph was to enable the United Kingdom, notwithstanding the fundamental rules of Community law as to freedom of movement of persons, to lay down its own rules for access to its labour market by A8 state nationals.

27. It is true that paragraph 2 does not mention article 7 of Regulation 1612/68. It states that the liberty that is given to the member states to apply national measures is by way of derogation from articles 1 to 6 of the Regulation. But I think that there are two reasons for the fact that article 7 is not mentioned in this paragraph. The first is that mention of it was unnecessary. Access to labour markets is treated in Title I of the Regulation as a question of eligibility. The fundamental rules about the eligibility for employment of any national of a member state are set out in articles 1 to 6. A national of a member state who takes up employment in another member state under those rules is a worker for the purposes of article 7, but not otherwise. Taking Poland as the example, displacement of articles 1 to 6 by national measures was

all that the derogation provision in paragraph 2 of part 2 of Annex XII needed to do to ensure that access to employment in the 15 existing member states by workers from Poland was controlled by national measures during the five year period. The second is that its exclusion from derogation ensured that any workers from Poland who did obtain access to the labour market in an existing member state under its national measures enjoyed the same guarantees against discrimination as regards conditions of employment and social and tax advantages as national workers. But the rights conferred on Polish workers by article 7 were to depend on their compliance with the national measures. It is those measures that determine their eligibility to obtain access to the national labour market on which the rights given by article 7 in their turn depend. The reference to Polish nationals "admitted to the labour market of a present member state" in the third subparagraph of paragraph 2 of Part 2 of Annex XII is a reference to Polish nationals who have been admitted to it under the national measures regulating access.

28. Mr O'Hara sought to rely in support of his primary argument on *Lopes da Veiga v Staatssecretaris van Justitie* (Case 9/88) [1989] ECR 2989. That was a case about the Act concerning the Conditions of Accession to the European Community of Spain and Portugal annexed to the Treaty of Accession that was signed on 12 June 1985. The proceedings were between a Portugese national who was employed on vessels flying the Dutch flag and the State Secretary of Justice about the grant of a residence permit. In para 10 of his opinion Advocate General Darmon said that as soon as the Act of Accession came into force workers who were nationals of the new member state and who were already employed in the territory of one of the member states of the Community must be able to enjoy the freedoms which the Treaty guarantees. In para 10 of its judgment the court said that the fact that the provisions of Title I of Regulation 1612/68 had been suspended by the transitional arrangements did not provide a reason for refusing to allow the provisions of Title II dealing with employment and equality of treatment to be applied to a person already employed in the territory of one of the old member states. The second subparagraph of paragraph 2 of part 2 of Annex XII gives effect to that decision in the case of Polish nationals who were legally working in an existing member state at the date of accession. The 2004 Regulations too were careful to provide that an A8 state national was not an accession state worker requiring registration if he was legally working in the United Kingdom on 30 April 2004 and had been legally working in the United Kingdom without interruption for a period of 12 months ending on that date: reg 2(3). But these provisions which apply to the decision in *Lopes da*

Veiga are of no assistance to the appellant, as she did not arrive in Northern Ireland until after the accession date.

29. The next question is whether, as Mr Lewis submitted, the United Kingdom has a complete discretion to determine the conditions on which nationals from the A8 states may obtain access to its labour market, or whether Community law requires that the measures that it selects must have a legitimate aim and be proportionate. He took as his starting point a series of propositions which I would regard as impeccable. The word "worker" in article 7 of Regulation 1612/68 refers to a national of one member state who is admitted to the labour market in another member state. A national of an A8 state is a "worker" in the United Kingdom for the purposes of article 7 only if he complies with the national measures that regulate access to the labour market in this country. This is because articles 1 to 6 of the Regulation have been suspended during the accession period and the national measures as to eligibility have taken their place. Cases such as *Royer v Belgium* (Case 48/75)[1976] ECR 497 and *Trojani v Centre public d'aide sociale de Bruxelles* (Case C- 456/02) [2004] ECR I-7573, where the rights relied on were conferred directly by the Treaty or provisions adopted for its implementation, are distinguishable. So long as the requirements of the national rules are satisfied an A8 state national is entitled to the benefit of article 7(2) of the Regulation because he is a person who is admitted to the labour market, but not otherwise. Conversely an A8 state national is not admitted to the labour market if he does not comply with the national measures. So he is not in a position to acquire the rights that Community law gives to workers. In other words, access by an A8 state national to the Community rights in an existing Member state that the EC Treaty gives to workers there depends on his satisfying the national measures that give access to its labour market. So long as those measures are satisfied the United Kingdom is under a Community law obligation to give him the benefit of article 7(2), but not otherwise.

30. The proposition that I cannot accept however is that the national measures that the United Kingdom selects have nothing to do with Community law, so the issue as to whether they are proportionate is irrelevant. The only authority that the United Kingdom has to introduce national measures to give access to nationals of an A8 state to its labour market in place of article 39EC and Title I of Regulation 1612/68 is that which is given to it by paragraph 2 of Part 2 of Annex XII. As article 10 of the Treaty of Accession makes clear, this derogation from the application of the original Treaties and acts adopted by the institutions of the Community was agreed to by the member states under the umbrella of Community law. Furthermore the fact that the derogation

does not extend to article 7 of the Regulation shows that where the national measures of an existing member state give the status of "worker" to an A8 State national he is entitled to all the rights in that state that Community law gives to workers. It is not possible to detach the opportunity that is given to the member states to apply national measures from its Community law background. The conclusion that any national measures that the member states introduce under the authority of paragraph 2 must be compatible with the authority given to them by the Treaty of Accession and with the Community law principle of proportionality seems to me to be inescapable.

Proportionality

31. This brings me to the issue about proportionality, which is the most troublesome aspect of this case. The principle of proportionality requires that the means employed to achieve an aim recognised by Community law as legitimate correspond to the importance of that aim and are necessary for its achievement. There is no doubt that it was legitimate for the United Kingdom to exercise the right of derogation that the Treaty of Accession provides and to introduce regulations that gave effect to it. The question is whether a national measure which says that only those A8 state nationals who work for an authorised employer for an uninterrupted period of 12 months are entitled to the status of "worker", having regard to the consequences of according them that status, is disproportionate. The consequence of the appellant's failure to re-register after she left the employment of Monaghan Mushrooms was, as Mr Drabble put it, a complete denial of Community law rights. She lost the right to reside in the United Kingdom and, as a consequence of losing that right, access to social security benefits. Admittedly, she would qualify for those benefits if she were to work for an authorised employer for a further uninterrupted period of 12 months. But loss of access to the benefits for the time being is, it is said, too severe a penalty for someone who can prove that she has already worked without interruption for the whole of the 12 months period.

32. Reference was made to a number of decisions of the ECJ which illustrate the approach which that court takes to issues of proportionality where a national measure restricts the free movement of goods or the freedom to provide services. For example, in *Canal Satélite Digital SL v Administracíon General del Estado*, (Case C-390/99) 22 January 2002, para 33, the court said that the question must be examined in the light of the articles of the Treaty in order to determine whether the national measure at issue pursued an objective of public interest and whether it

complied with the principle of proportionality, that is to say whether it is appropriate for securing the attainment of that objective and does not go beyond what is necessary in order to attain it. In *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL* (*MRAX) v Belgium* (Case C-459/99) [2002] ECR I-6591, a case about a residence permit, the court said in paras 77-80 that Community law did not prevent Member States from prescribing for breaches of national provisions concerning aliens any sanctions necessary to ensure the efficacy of those provisions provided that those sanctions were proportionate, but that a measure which was based solely on a failure to comply with legal formalities and which impaired the very substance of a right conferred by Community law on a person married to a Community national would be manifestly disproportionate: see also *Criminal proceedings against Skavani and Chryssanthakopoulos* (Case C-193/94) [1996] ECR I-929; *Oulane v Minister voor Vreemdelingenzaken en Integratie* (Case C-215/03) [2005] ECR I-1215; *Commission of the European Communities v Belgium* (Case C-408/03) [2006] ECR I-2647. I do not find these decisions helpful in the present case where the rights conferred directly on workers by the Treaty and Regulation 1612/68 have been suspended by way of derogation in favour of national measures applied by member states.

33. Mr Lewis submitted that differential treatment between nationals of the A8 states and other EU nationals that resulted from the worker registration scheme pursued a legitimate aim. The purpose of the scheme was to enable the United Kingdom to monitor and review the arrangements for access by A8 state nationals to its labour market to determine whether further steps needed to be taken to prevent its disruption during the accession period as a result of the accession of the A8 states. In the *Lopes da Veiga case* [1989] ECR 2989, para 10 Advocate General Darmon said, in the context of the accession arrangements for Portugal's accession to the European Community, that the ratio of such derogations was to prevent disruption of the labour markets of the old member states through the massive influx of Portugese nationals seeking employment. Mr Lewis said that the same ratio applied to the accession arrangements in the case of Poland. As for proportionality, the worker registration scheme was objectively justified. The United Kingdom had adopted less severe restrictions than most of the other member states. Those that it had adopted defined when and how an A8 state national was permitted access to the labour market. An A8 state national who did not comply with those measures simply did not have access during the period of non-compliance to the labour market for the purpose of establishing an uninterrupted period of 12 months employment. This was not to be seen as a sanction which

denied the existence of a Community right. It was a consequence of a failure to comply with the 2004 Regulations.

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 and articles 1 to 6 of Regulation 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 combating this abuse.

35. Similar concerns about the impact of enlargement on the benefit system led to the amendment to the social security regulations that prevents the appellant from obtaining income support. The Social Security (Habitual Residence) Amendment Regulations 2004 (SI 2004/1232) introduced into the income-related benefit rules for Great Britain the same amendment for the habitual residence test as that which was introduced for Northern Ireland by the Social Security (Habitual Residence) Amendment Regulations (Northern Ireland) 2004. They were referred when in draft to the Social Security Advisory Committee. The Committee's Report was presented to Parliament in April 2004 (Cm 6181). In his introduction to the Report the Secretary of State said that the underlying purpose of the Regulations was to safeguard the UK's social security system from exploitation by people who wished to come to the United Kingdom not to work but to live off benefits. They were intended to support the Government's policy of opening the United Kingdom's labour market immediately to workers from the A8 states. But it was recognised that any resulting influx of people from abroad might lead to additional and inappropriate demands on the UK's social security system.

36. The appellant does not suggest, I think rightly, that these aims were not legitimate. Were the provisions of the 2004 Regulations proportionate to those aims? The debateable ground on this issue is quite narrow. I do not think that it can reasonably be suggested that it is disproportionate for A8 state nationals to be required to apply for a registration certificate for the first employment that they obtain in the United Kingdom unless they fall within the categories listed in reg 2 which are exempt from it. Information about the numbers coming here from the A8 states is a necessary requirement if the extent of the influx is to be monitored effectively. The fact that an A8 state national who does not register does not have access to the income-related benefits system because he has no right to reside here is part and parcel of the same requirement. Registration brings with it the package of benefits that a worker is entitled to because article 7 of Regulation 1612/68 requires that he must not be treated differently. Failure to register does not. This is simply because the United Kingdom has chosen to make registration a requirement that an A8 state national must satisfy to become a worker here. It is entitled to insist, by way of derogation, that the mere fact that the person is working in the United Kingdom is not enough.

37. The debateable ground is whether the requirement that A8 state nationals must re-register if they change their employment within the 12 month period is proportionate. Mr Drabble did not criticise other aspects of the scheme as being either unsuitable or unnecessary. He confined the interveners' submission to the re-registration requirement which, as he pointed out, was not addressed by the Court of Appeal in Northern Ireland or by the Court of Appeal in England when it refused permission for judicial review of the scheme in *R (D) v Secretary of State for Work and Pensions* [2004] EWCA Civ 1468, holding that the scheme as a whole was a reasonable and proportionate concomitant of the permitted derogation: per Maurice Kay LJ, para 17. He said that disbarring the appellant and others in her position from social security benefits because of a failure to comply with the formality of re-registration despite the fact that she had worked here for an uninterrupted period of 12 months impaired the very substance of the qualified rights that the Treaty of Accession conferred on A8 state nationals. It was a disproportionate penalty. If the only point of the worker registration scheme was to count them on their first arrival, the consequences of a failure to re-register to the individual would seem, he said, to be wholly out of proportion to that aim.

38. Mr O'Hara drew attention in his final speech to a joint Accession Monitoring Report by the Home Office, the Department for Work and Pensions, HM Revenue and Customs and Communities and Local Government for the period May 2004 to December 2006. A note on the worker registration scheme data published in this report states:

> "Applicants must register more than once if they are employed by more than one employer. They must also re-register if they change employer. Each application to the WRS therefore represents one job, not one applicant. To avoid counting applicants more than once, each applicant is represented only once in this report, with information relating to the **first** job for which he/she registered."

Mr O'Hara said that this showed that data monitoring was conducted only at the first stage. If this was so, the requirement to re-register carried with it a disadvantage that was unreasonable and disproportionate.

39. I think, for my part, that Mr O'Hara was reading too much into this note. It is true that the information in the Monitoring Report concentrates on the first job for which the applicant was registered. But I am not persuaded that the way this statistical exercise was carried out means that the other information that the scheme produces is being treated as irrelevant. The aim of the scheme was to enable the Government to monitor the impact of A8 state nationals on the United Kingdom's labour market and to discourage them from working illegally. To obtain a complete picture, information about the sectors in which they were employed during the whole of the uninterrupted period of 12 months, after which effect would have to be given to the third subparagraph of paragraph 2 of Part 2 of Annex XII, was likely to be as important as information about the number of arrivals. Information about the sector of first registration only would not enable changes of employment from one sector to another during the 12 month period to be monitored. These points have to be seen in the context of paragraph 12 of Part 2 of Annex XII to the Accession Act. It allows Member States to decide at any time after the third year following the date of accession to decide to apply article 1 to 6 of Regulation 1612/68 instead of national measures. On 24 April 2006 the Minster for Immigration, Citizenship and Nationality announced in a written statement that he had decided that the worker registration scheme would continue beyond 1 May 2006. But the need for the scheme would be kept under review.

Monitoring of the information that the scheme provides is part of this process.

40. Then there is the important question of access to social security benefits. The Secretary of State for Work and Pensions said in paragraph 4 of his introduction to the Report on the 2004 Social Security Regulations that their underlying purpose was to safeguard the United Kingdom's social security system from exploitation by people who wished to come to the UK not to work but to live off benefits. The terms on which A8 state nationals are to have access to the labour market are critical to achieving that purpose. Access to that market confers on them the status of workers. So they become entitled immediately, under article 7 of Regulation 1612/68, to the same social advantages as nationals. And the third subparagraph of paragraph 2 of Part 2 of Annex XII provides that A8 state nationals admitted to the labour market of an existing member state following accession for an uninterrupted period of 12 months or longer are to enjoy access to the labour market of that state. This is a right that is given to them by Community law, with all the other rights that go with it, at the end of that period. But it is given only to those who are, as the subparagraph puts it, "admitted" to that labour market during that period. The proportionality of the formalities of registration and re-registration and of the consequences of a failure to comply with these requirements must be judged in that context.

41. Commissioner Rowland addressed these issues in the cases of *CIS/3232/2006, CIS/160/2007, CJSA/700/2007 and CIS/775/2007*, in all of which the claimants were employed for a year without having been registered that long. They raised the question whether the requirement that the employment must have been registered was a legitimate one. At the end of his reasons which were given on 12 March 2008 he said that he was not persuaded that, viewed in their context, the administrative formalities that the United Kingdom has imposed for admission to the labour market and the consequences of failing to comply with them were disproportionate: para 47. He saw the requirement in reg 2(4) of the 2004 Regulations that A8 state nationals must have worked "legally" without interruption for 12 months before they no longer require to be registered as a rational way of imposing pressure on them to register employment when taking advantage of the rights afforded to them to enter the United Kingdom's labour market. This was desirable for the provision of statistics: para 41. In para 37 he observed that the formality of registration ensured that contemporaneous evidence of past employment was available in the event of a claim for a right of residence or a benefit where entitlement depends on such a right.

42. Commissioner Rowland's treatment of the argument that the sanction for failing to register was disproportionate – in two of those cases it was a delay in registering that was the problem, and in two others there was a period of registration followed by a period of more than 30 days when the employment was not registered – is of particular interest. He accepted that the sanction was not technically a penalty. Nonetheless it imposed a cost in cases where a person had actually worked for 12 months uninterruptedly but was not authorised to work for the whole of that period and wished to claim a form of social assistance. A failure to register for a short period might result in a loss of benefit for a much longer period: paras 40, 41. In para 46 however he observed that, although the consequences might produce some hard cases, they were the same as those contemplated by the Treaty of Accession for workers who become temporarily sick or unemployed after being employed for just under 12 months. The Treaty envisages those who interrupt their activities in the labour market having to start the qualifying period all over again. In other words, the consequence of late registration or a failure to re-register fits into that pattern. He accepted that it might have been possible to devise other sanctions for a failure to register. But most of them would have downsides as well as upsides. Some of them would affect people who were not adversely affected by the present scheme.

43. Mr Drabble submitted that Commissioner Rowland's reasoning was flawed because he misconstrued the width of the derogation. I agree in part with this criticism. In para 42 of his reasons the Commissioner referred to the third subparagraph of paragraph 2 of Part 2 of Annex XII, which confers rights under Community law on those who have been "admitted to the labour market" of an existing member state following accession for an uninterrupted period of 12 months or longer. In para 43 he said that in relation to the United Kingdom this term must involve becoming employed because A8 state nationals are not admitted to the labour market when merely looking for work, and that it must also mean not just becoming employed but also remaining employed. So far, so good. But he went on to say that the reference to admission "for an uninterrupted period of 12 months or longer" showed that a person had been admitted to the labour market for that period only when the period had elapsed. If by this sentence the Commissioner meant that the person was not admitted to the labour market until the end of that period, his construction of the phrase would have been wrong. Admission to the United Kingdom labour market is obtained as soon as the A8 state national begins work for an authorised employer: reg 5(2) of the 2004 Regulations. But the sentence is rather compressed, and I am not convinced that the Commissioner misunderstood the subparagraph.

44. In any event this point does not affect Commissioner Rowland's assessment of the issue of proportionality, which I would respectfully endorse. I think that he was right to have regard to the need for a system which imposed some degree of pressure on A8 state nationals to register their employment, on the desirability of up-to-date statistics and means of verification, and on the problems that devising other possible sanctions for a failure to register or re-register might give rise to. The right that the Accession Treaty gives to regulate access to the labour market during the accession period carries with it the right to ensure that the terms on which access is given are adhered to. Regulation of the right of access and monitoring its exercise are appropriate and necessary consequences of making that right available. Furthermore, it does not seem to me that there is any difference in principle between the consequences of late registration, which have not been criticised as disproportionate, and those that flow from a failure to re-register. They are the result, in both cases, of the same basic failure. The terms on which access is given have not been adhered to, so the rights that flow from it are not available. This may come with a cost, depending on the person's circumstances. But, for the reasons that the Commissioner gave and the other reasons that I have mentioned in the previous paragraphs of this opinion, I do not think that the consequences in either case when examined in their whole context are unreasonable or disproportionate.

Conclusion

45. In my opinion the Court of Appeal reached the right decision in this case, for reasons which it has now been possible to explain more fully after further argument. I would dismiss the appeal and affirm the decision of the Social Security Commissioner

BARONESS HALE OF RICHMOND

My Lords,

46. As my noble and learned friend, Lord Hope of Craighead, has so clearly demonstrated, we are here concerned with national measures which implement EU law in relation to one of the fundamental rights protected by that law, the freedom of movement for workers. That this is so is reinforced by the *vires* under which the Regulations with which we

are principally concerned, the Accession and (Immigration and Worker Registration) Regulations 2004, were made. They were made by the Secretary of State as a Minister designated for the purpose of section 2(2) of the European Communities Act 1972, which gives such a Minister power to make regulations for the purpose of implementing community law, and in the exercise of the powers conferred on him by section 2 of the European Union (Accessions) Act 2003, which is headed "freedom of movement for workers". The conclusion is indeed inescapable, as Lord Hope explains, at para 30 that "any national measures that member states introduce under the authority of paragraph 2 [of the Treaty of Accession] must be compatible with the authority given to them by the Treaty of Accession and with the Community law principle of proportionality".

47. I agree with Lord Hope that the measures taken were compatible with the authority given by the Treaty of Accession. I cannot, however, agree that they were compatible with the community principle of proportionality. According to the classic statement in *Fromancais v Forma* [1983] ECR 395, para 8:

> "In order to establish whether a provision of community law is consonant with the principle of proportionality it is necessary to establish, in the first place, whether the means it employs to achieve its aim correspond to the importance of the aim and, in the second place, whether they are necessary for its achievement."

48. One must therefore first establish the aim which the measure sought to achieve, and then ask whether the means used were suitable to achieve that aim, and then whether they were necessary, in the sense that the adverse impact upon an interest worthy of protection was justified in view of the importance of the objective pursued. It seems to me that proportionality must be judged, not in relation to an aim which the measure *might* lawfully have had, but in relation to the aim that it actually *did* have. The fact that the UK could lawfully have imposed much more extensive restrictions, in order to protect its own labour market from a sudden influx of workers from the accession states, is in my view irrelevant. The UK chose to open its doors from the outset. The measures which it employed had the much more limited aim of monitoring what took place. The sanction, of depriving a worker who had been employed here for 12 months of the social benefits to which she would normally be entitled as a result of having joined the UK

workforce, is neither suitable nor necessary for the achievement of that limited aim. In short, it is disproportionate.

49. The facts of this case illustrate very clearly both the working of the scheme and the gravity of the sanction. The appellant is Polish. She came to this country on 1 July 2004, two months after the accession of Poland to the European Union. She started work on 9 July 2004 picking mushrooms for Monaghan Mushrooms Ltd of Dungannon. She applied to the Home Office for a registration certificate. We are not told when she applied but the certificate was issued on 5 November 2004. This meant that her employers were and had always been an "authorised employer": see the 2004 Regulations, reg 7(2)(c). They would in any event have been an authorised employer for the first month after she started work: see reg 7(2)(d) and (3). And even if no certificate had been issued, they would have been an authorised employer provided that she had applied for a certificate within the first month after she started work and not been refused one: see reg 7(2)(b).

50. She left that job on 7 January 2005 and on 8 January she began work as a packer for Smirnoff Vodka in Belfast. That work was obtained through an employment agency. It is not entirely clear whether Smirnoff or the agency was her employer, but the way in which the facts are told by the Social Security Appeal Tribunal suggests that it was the agency. If so, more shame on them for not ensuring that she applied for a registration certificate. She did not do so. But either Smirnoff or the agency were an authorised employer for the first month after she started work for them: see reg 7(2)(d) and (3). She stayed with Smirnoff for three weeks and then moved, at the end of January, to work for Linwoods in Armagh, baking and packing bread. If Linwoods were her employers they were an authorised employer for the first month after she started work with them: see reg 7(2)(d) and (3). This takes us up to the end of February 2005, almost eight months after she started work. Once again, she did not apply for a registration certificate for her job with Linwoods. But had she done so at any time and had the certificate been issued before she left, Linwoods would have been an authorised employer: see reg 7(2)(c). If the agency were her employer, then she would not have needed to apply for another certificate when she moved to Linwoods. Either the agency, or both Smirnoff and Linwoods, were guilty of a (not very serious) criminal offence in employing her without a certificate or evidence that she had applied for one: reg 9.

51. She did not commit a criminal offence under the Regulations, but the consequences for her were much more serious. She last worked on

10 July 2005. She had therefore been in continuous employment for more than 12 months and if registered throughout would have been entitled to benefits. We do not know why she left work. Her three year old daughter joined her here in January 2005. The father of her child came over in April 2005, living in Newry. Mother and daughter moved in with him in May. At the end of June, they left the family home because of domestic violence and initially moved in with a friend and then to a Women's Aid hostel in Portadown on July 21. The appellant made her application for income support on 22 July 2005. These circumstances may have little relevance in law but they tend to indicate two things: first, that she was going through a very difficult time when she ceased work; and second, that there is nothing at all to suggest that she came here to work with a view to claiming benefits in due course. Indeed, the Tribunal which heard her case in November 2005 stated that she was continuing to seek work although not required by the benefit rules to do so.

52. The issue of the certificate is a purely administrative act. No discretion is exercised. No check is made to ensure that the employer is complying with employee protection legislation, paying the national minimum wage, properly deducting tax and employee national insurance contributions and paying the employer's contributions. The Home Office is obliged to issue the certificate if the formalities have been correctly complied with and it is satisfied that the worker began working for the employer on the date specified in the application: see reg 8(5), (6). Nor does it appear that any great haste is shown in issuing the certificates which have been applied for. We do not know exactly when the appellant applied for her certificate, but it is likely to have been before 9 August 2004, within the first month of her starting work with Monaghan Mushrooms, yet the certificate was not issued until 4 November.

53. These provisions make it clear how limited was the aim of the registration scheme. It was not specifically aimed at "avoiding benefit tourism" or "preventing undue burden on the resources of the host member state" as the Commissioner put it. That is achieved by the 12 month rule. The aim of the registration scheme was described thus by the Department for Work and Pensions in the Explanatory Memorandum to the Social Security Advisory Committee:

> "The workers' registration scheme is intended to involve a light-touch system of registration, with minimal burdens on employers. Its purpose is to allow A8 nationals access to the UK labour

> market in a way that enables the Government to monitor the numbers working and the sectors where they are employed. It will not be a barrier to those who want to work: on the contrary, it should encourage those A8 nationals working here illegally to regularise their status and begin contributing to the formal economy."

Mr Lewis, who appeared for the Department, did not seek to argue that the aims were any more than to ensure "that the UK has timely and accurate information on A8 nationals accessing the labour market". The great bulk of his argument was addressed, not to the proportionality issue, but to whether the rules restricted a community law right at all. We are all agreed that they did.

54. Nor was the aim to limit the numbers of A8 workers here, or to impose quotas in particular sectors, or to require them to have particular qualifications. All of that might have been done under the Treaty of Accession but the UK chose not to do it. The aim was simply to monitor the situation. This would enable the UK to decide whether some rather heavier touch regulation might be needed in the second year and whether to continue the scheme after the first two years were up. An incidental benefit could be to encourage workers to work for regular employers, who might pay them the minimum wage, deduct the correct tax and ensure that the correct national insurance contributions were paid. But that could only be incidental as the scheme took no steps to ensure that this took place.

55. As monitoring is the principal aim, a registration scheme of some sort is a legitimate way to achieve it. This scheme could have been better designed and implemented for that purpose. The one month rule, for example, could mean that some A8 workers were never counted at all. The long delay between application and issue could mean that many certificates were out of date when issued because the worker had moved on. The £50 fee for each application is a positive deterrent to migrant workers who are likely to be lowly paid. But in fact the Department was not really interested in counting the number of jobs which a particular worker did rather than the number of workers who came in. The Accession Monitoring Report for May 2004 to December 2006 (published by the Home Office, Department for Work and Pensions, HM Revenue and Customs, and Communities and Local Government, 27 February 2007, p 2) explains that only the first job for which a worker is registered is counted for the purpose of that report.

56. As monitoring is the aim, however, it is difficult to see how the future denial of benefits to a person who has worked here for at least 12 months is even a *suitable* means of achieving it. It is just the sort of formal requirement (such as completing the census forms) to secure which minor criminal sanctions are usually considered appropriate. Given the lack of familiarity of many migrant workers with the UK system, it would obviously be more effective to target those sanctions against employers and employment agencies than against the employees. The employers should be fully aware of what needs to be done if an accession worker is employed.

57. It is even more difficult to see how denial of benefits can be a *necessary* means of achieving the monitoring aim. The consequences for the worker's right to freedom of movement are severe. She was allowed to come and to work here for 12 months. But she has been denied what she would otherwise be entitled to, having worked for so long. And by that stage the benefits for the monitoring scheme scarcely exist, but could in any event be achieved by allowing retrospective registration. The worker would still, of course, have to prove that she had indeed qualified by having worked here for the required period. The consequences of the sanction are particularly severe in a case such as this, where the claimant has registered once. She has therefore been counted for the main purpose of the scheme, which is to count heads rather than jobs.

58. Even if encouragement to join the formal economy were an aim, a more suitable and proportionate means of achieving it would be by criminal sanctions against employers. The scheme does provide for sanctions against employers and an extended time limit for prosecution applies. But we have no information about how vigorously this has been pursued, either in general or in this particular case. If the agency (or Smirnoff or Linwoods) had been clear that they would be prosecuted for every A8 worker they took on without a certificate, the appellant would not have been in the predicament in which she found herself on 22 July 2005. The perils for them would not be disproportionate whereas the perils for her undoubtedly were.

59. For these reasons, I would have allowed the appeal and restored the decision of the appeal tribunal.

LORD CARSWELL

My Lords,

60. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Hope of Craighead. For the reasons which he has given I too would dismiss the appeal and affirm the decision of the Social Security Commissioner.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

61. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hope of Craighead. For the reasons which he gives I too would dismiss the appeal and affirm the decision of the Social Security Commissioner. In deference to the contrary conclusion arrived at by my noble and learned friend Baroness Hale of Richmond I add just the following brief paragraphs.

62. It is impossible, I accept, not to feel a measure of sympathy for the appellant. She was after all, allowed to come and work here and no one disputes that she completed (if only just) the 12 months' work which could so easily have qualified her for the income support and other benefits she then sought to claim. But to qualify under the Regulations she needed to have worked for authorised employers and to this end she was required to have registered her work with them. This she failed to do in respect of her final period of employment with Linwoods.

63. Is it then to be said that this requirement to register, and more particularly the adverse consequences of non-registration, were disproportionate so as to invalidate the scheme? To my mind not.

64. It is obvious that different, and very possibly better, schemes might have been devised which would no less effectively have ensured that the government's main aims were met. My Lords' judgments make

this plain. But I for my part cannot think that we are justified in subjecting this particular scheme to so high a degree of scrutiny as to insist upon the selection of the best possible scheme. The UK was generous in its approach towards aspiring workers in the A8 states joining the Union in 2003. Our doors were opened wide. The government's right to impose conditions upon such workers is not contested. Why then should not a blunt requirement to register have been imposed to give a measure of clarity and certainty to the position? Without that it would not always be easy to establish one way or the other whether the necessary 12 months' work had indeed been uninterruptedly completed. And why should not the sanction (if that indeed is how an unregistered worker's inability to claim benefits is to be regarded) for non-registration fall on the employee, rather merely than the employer? After all, he or she is the principal beneficiary of the open door policy and it is he or she who would similarly fail to qualify for benefits if, for whatever reason, a year's work were not to be completed—as would have been the situation in this very case had the appellant fallen ill a mere two days earlier. And why should not pressure be put upon those in fact working or minded to work here illegally to encourage them to regularise their employment and account for their earnings?

65. I would be troubled by an approach which examined too closely and judged too nicely the suggested advantages and disadvantages of the registration requirement in fact imposed. To my mind nothing could be more calculated to disaffect those charged with deciding how the UK should react to opportunities for derogation such as arose in the present case. If Community law is really to be regarded as requiring your Lordships to strike down an essentially generous scheme such as was decided upon by government here, the UK may be expected to harden its heart in future.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

66. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Hope of Craighead, Baroness Hale of Richmond, and Lord Brown of Eaton-under-Heywood.

67. I agree entirely with what Lord Hope says in paras 25 to 30 of his opinion as to the legal source of the Secretary of State's powers to make the 2004 Regulations and the fact that they must be compatible with the Community law principle of proportionality. However, on the issue of whether the 2004 Regulations actually satisfy that principle, I agree with Lady Hale that, for the reasons she gives in paras 47 to 58 of her opinion, they do not do so, and there is nothing of real substance that I can usefully add to what she says on the point.

68. I accept, of course, that it would be quite wrong for this court to conclude that the scheme contained in the 2004 Regulations was disproportionate simply because it was not the best possible scheme. However, that is not the test on which Lady Hale's analysis relies. As she says in para 56 of her opinion, the outright denial of future benefits to a person who has worked here for 12 months is simply not a suitable means of achieving the primary aim of the scheme, and it is even harder to justify the very serious sanction of denial of benefits as a necessary means of achieving that aim. Given those factors, coupled with the penal nature of that sanction from the point of view of those such as the appellant, and the fact that there can be, indeed is, a far fairer and more proportionate sanction in the form of criminal proceedings against employers, I consider that the scheme under consideration in this case does not satisfy the proportionality requirement.

69. The Government could have adopted a much more restrictive scheme than it actually did, but that cannot of itself justify the conclusion that every aspect of the scheme it did adopt in the 2004 Regulations is proportionate. I am prepared to assume for present purposes that it is a relevant factor when the question of proportionality of the adopted scheme falls to be considered. However, even making that assumption does not assist the Secretary of State in the present case, in my view. In a nutshell, as I see it, what the Government has done here is to open up the labour market relatively generously with one hand, while, by imposing an unnecessary and harsh sanction for failing to comply with a purely procedural requirement, it has, in many cases, severely and arbitrarily undermined that generosity with the other hand.

70. Accordingly, I too would allow this appeal.