Supreme Court declares extension of registration scheme for A8 workers unlawful (Secretary of State for Work and Pensions v Gubeladze)

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Immigration analysis: Matthew Fraser, barrister at Landmark Chambers, examines the Supreme Court's decision in Secretary of State for Work and Pensions v Gubeladze that the Secretary of State's decision to extend the worker registration scheme (WRS), which obliged nationals of eight of the ten countries that became members of the EU in 2004 to register before starting employment or taking up new employment in the UK, had been a disproportionate measure which was unlawful under EU law.

Secretary of State for Work and Pensions v Gubeladze [2019] UKSC 31, [2019] All ER (D) 91 (Jun)

What are the practical implications of the judgment?

The practical implications of *Secretary of State for Work and Pensions v Gubeladze* are potentially huge. Practitioners with clients who are EU citizens from the accession eight (A8) countries that joined the EU in 2004 will need to seriously consider the consequences of the judgment.

Firstly, every A8 citizen who paid the £90 fee under the unlawfully extended WRS between 1 May 2009 and 30 April 2011 should be entitled to a refund. It is estimated that there were 100,000 applications to the WRS in 2009 alone.

Secondly, and more importantly, there will be many who have previously been refused certification of permanent residence in the UK on the basis that they failed to comply with the WRS. Many others may have not applied in the first place. The standard route to permanent residence is five years of continuous lawful residence. Non-compliance with the WRS would have rendered residence unlawful for the period of non-compliance. There will be others who, like the respondent in this case, would have been entitled to certified permanent residence on retirement, but were refused due to WRS non-compliance. There will also be knock-on implications in terms of decisions about benefit entitlement and applications for British citizenship.

Thirdly, regulation 9 of the Accession (Immigration and Worker Registration) Regulations 2004, SI 2004/1219—the measure which established the WRS—created a criminal offence if an employer employed an A8 national who was not registered as required under the WRS, subject to certain defences. Those with convictions that relate to employment in the relevant period will wish to see if they can have those convictions overturned.

Fourthly, the Supreme Court's interpretation of Article 17(1)(a) of the Citizens Directive 2004/38/EC, as applying to those who have resided in the UK for three continuous years as a matter of fact (even if not legally under the Citizens Directive), will have major implications beyond the confines of the WRS. In practice, many more EU nationals may be entitled to permanent residence via this route than was previously thought.

That said, the looming changes that would follow from Brexit serve to temper the significance of the judgment. Under the current Appendix EU of the Immigration Rules, the rights to 'settled status' and 'pre-settled status' will depend on factual residence alone, rather than legal residence as a worker or student etc.

What was the background?

The A8 states joined the EU in 2004 with the existing member states being able to apply national measures regulating access to their labour markets by A8 nationals. Existing Member States were allowed to maintain national measures for five years following the date of accession and an additional two years 'in case of serious disturbances of its labour market'.

The UK's national measures included the WRS, which obliged A8 nationals—for their first 12 months of work—to register in accordance with the WRS before starting employment and before taking up new employment. Failure to comply meant that the A8 national would not derive from the work any right to reside in the UK.

The UK decided in 2009 to take advantage of the additional two-year period, so the national measures, including the WRS, were extended to 2011.

The respondent was an A8 national from Latvia who came to the UK in 2008. She worked between September 2009 and November 2012, but was only registered under the WRS from 20 August 2010. She subsequently retired, and was hoping for entitlement to permanent residence under Article 17 of the Citizens Directive, having 'resided [in the UK] continuously for more than three years'. The government had interpreted this requirement to mean 'legal' residence, ie residence in accordance with the Citizens Directive as a worker or student etc. Thus, the appellant refused her claim for state pension credit in October 2012 (based on her purported right to permanent residence) because she did not have three years of 'legal' residence due to non-compliance with the WRS for part of her working period.

The respondent appealed to the First-tier Tribunal and the Upper Tribunal. She was successful before the latter and before the Court of Appeal. The appellant appealed to the Supreme Court.

The issues were:

- whether the UK's power to extend the WRS was subject to the EU principle of proportionality
- if so, whether the decision to extend the WRS was proportionate
- whether Article 17 of the Citizens Directive (and the domestic legislation transposing it) required three years of 'legal' residence rather than simply residence as a matter of fact

The respondent only needed to win on the first two issues or on the third issue. Either route would have been enough to undermine the appellant's refusal of state pension credit.

What did the Supreme Court decide?

In a major defeat for the government, the Supreme Court sided with the respondent on every point.

The court held that the UK's power to extend the WRS was indeed subject to the general principle of EU law that it must be exercised proportionately (ie the burden imposed by the measure must be proportionate to the benefits secured). Previous House of Lords authority on this point (*Zalewska v Department for Social Development* [2008] UKHL 67, [2009] 2 All ER 319) was affirmed as correctly decided. Although the court endorsed the government's position that the principle of proportionality applied only to measures that interfered with a 'protected interest', the court was satisfied that the Act of Accession created protected interests by conferring rights of EU citizenship on A8 nationals, subject to initial tapering exceptions.

The court held that the decision to extend the WRS was disproportionate because the government's evidence confirmed that the extension 'would have only a small and rather speculative mitigating effect in relation to the serious disturbances in the UK's labour market…whereas the burdens and detriments it would impose on employers and A8 nationals working in the UK were substantial and serious'.

Finally, the court concluded that, correctly interpreted, Article 17 of the Citizens Directive (and regulation 5(2)(c) of the Immigration (European Economic Area) Regulations 2006, SI 2006/1003) only required factual residence for three continuous years, rather than legal residence. The court placed particular reliance on the fact that Article 16 of the Citizens Directive (from which Article 17 of the Citizens Directive is a derogation) referred explicitly to 'legal residence', whereas Article 17 of the Citizens Directive referred only to 'residence'. In addition, a comparison of the relevant recitals (17) and (19) of the Citizens Directive supported this. Therefore, even if the WRS extension had been lawful, the non-compliance with it should not have affected the respondent's right to permanent residence and claim for state pension credit.

Interviewed by Robert Matthews.

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