Michaelmas Term
[2012] UKSC 49
On appeal from: [2011] EWCA Civ 806

JUDGMENT

Jessy Saint Prix (Appellant) *v* Secretary of State for Work and Pensions (Respondent)

before

Lord Neuberger, President
Lady Hale
Lord Mance
Lord Kerr
Lord Reed

JUDGMENT GIVEN ON

31 October 2012

Heard on 15 October 2012

Appellant
Richard Drabble QC

(Instructed by Child
Poverty Action Group)

Respondent
Jason Coppel
Denis Edwards
(Instructed by DWP/DH
Legal Services)

Intervener (The Aire Centre)
Jemima Stratford QC
Charles Banner
(Instructed by Freshfields
Bruckhaus Deringer LLP)

LADY HALE (with whom Lord Neuberger, Lord Mance, Lord Kerr and Lord Reed agree)

1. The issue in this case is whether a woman who has temporarily left work because of the late stages of pregnancy and early aftermath of childbirth is to be treated as a 'worker' for the purpose of the right of free movement enshrined in article 45 of the Treaty on the Functioning of the European Union (TFEU) and more specifically the right of residence conferred by Article 7 of Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (the Citizenship Directive). Upon this depends her entitlement to income support, a non-contributory, means-tested benefit. Under UK domestic law, a pregnant woman within 11 weeks of her expected date of confinement is not required to be available for, or actively to seek, work. However, a national of another EU state will be excluded as a 'person from abroad' unless, in this case, she falls within Article 7.

The facts

2. The claimant is a Frenchwoman (and qualified teacher) who came to the United Kingdom on 10 July 2006. She worked in various jobs, mostly as a teaching assistant, from 1 September 2006 until 1 August 2007. She then enrolled on a Post-Graduate Certificate in Education course in the University of London, the envisaged period of study being from 17 September 2007 until 27 June 2008. She became pregnant with an expected date of confinement of 2 June 2008. She therefore withdrew from her course as of 1 February 2008. She undertook agency work from 22 January 2008, hoping to find work in secondary schools. As none was available, she took agency positions working in nursery schools. By 12 March 2008, when she was nearly six months' pregnant, the demands of caring for nursery school children became too strenuous and she stopped this work. She looked for lighter work for a few days but none was available. On 18 March 2008, she made a claim for income support. Her evidence is that, as it was now 11 weeks before her expected date of confinement, she was advised by her general practitioner to do so. On 4 May 2008, the Secretary of State refused her claim. Her baby was born prematurely on 21 May 2008 and she returned to work three months later.

3. On 4 September 2008, the First Tier Tribunal allowed the claimant's appeal against the refusal of income support. But on 7 May 2010, the Upper Tribunal allowed the appeal of the Secretary of State. On 13 July 2011, the Court of Appeal

dismissed the claimant's appeal: see [2011] EWCA Civ 806. She now appeals to the Supreme Court of the United Kingdom.

Relevant domestic law

4. The relevant domestic legislation is complex. By virtue of regulation 4ZA of and paragraph 14 of Schedule 1B to the Income Support (General) Regulations 1987 (SI 1987/1967), a 'woman who . . . is or has been pregnant but only for the period commencing 11 weeks before her expected week of confinement and ending fifteen weeks after the date on which her pregnancy ends' falls within a 'prescribed category of person' for the purpose of section 124(1)(e) of the Social Security Contributions and Benefits Act 1992 and is thus eligible for income support. Unlike the closely related Jobseeker's Allowance, there is no requirement for such a person to be available for work or actively seeking employment. A pregnant woman who is available for or actively seeking work may claim Jobseeker's Allowance until six weeks before her expected date of confinement, but from then until two weeks after she ceases to be pregnant, she is deemed incapable of work and so cannot do so: see regulation 14 of the Social Security (Incapacity for Work) (General) Regulations 1995. Thus without other sources of income (including stutory maternity pay and other social security benefits for which some but not all pregnant women are eligible) she will be left destitute unless income support is available.

5. However, a 'person from abroad' is effectively excluded from entitlement to income support because the 'applicable amount' prescribed for such a person is 'nil': see the 1992 Act, section 124(1)(b) and paragraph 17 of Schedule 7 to the 1997 Regulations. Regulation 21AA of those Regulations tells us what a 'person from abroad' means. By regulation 21AA(1), it means 'a claimant who is not habitually resident in the United Kingdom . . .' By regulation 21AA(2), 'No claimant shall be treated as habitually resident in the United Kingdom . . . unless he has a right to reside in . . . the United Kingdom . . .' This is subject to various exclusions in regulation 21AA(3) which do not concern us. However, by regulation 21AA(4):

> 'A claimant is not a person from abroad if he is –
>
> (a) a worker for the purposes of Council Directive No 2004/38/EC;
>
> (b) a self-employed person for the purposes of that Directive;

(c) a person who retains a status referred to in sub-paragraph (a) or (b) pursuant to article 7(3) of that Directive;

(d) a person who is a family member of a person referred to in sub-paragraph (a), (b) or (c) within the meaning of article 2 of that Directive;

(e) a person who has a right to reside permanently in the United Kingdom by virtue of Article 17 of that Directive.'

Thus EU citizens who are 'workers' in the United Kingdom within the meaning of EU law are put in the same position as habitually resident citizens of the UK for the purpose of entitlement to income support (and indeed other benefits, such as housing benefit and child benefit, to which it is the passport or which have a similar rule of entitlement).

European Union law

6. The relevant provisions of European Union law are article 45 of the TFEU and Article 7 of the Citizenship Directive. Article 45 enshrines the principle of freedom of movement for workers and requires 'the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'. Neither Article 45 TFEU nor Article 7 of the Directive defines 'worker'. The central issue in this case is whether a pregnant woman who temporarily gives up work because of her pregnancy remains a 'worker' for this purpose.

7. Article 7 of the Citizenship Directive, so far as relevant, provides as follows:

'1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member state; . . .

> 3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:
>
> (a) he/she is temporarily unable to work as the result of an illness or accident;
>
> (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;
>
> (c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case the status of worker shall be retained for no less than six months;
>
> (d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.'

It is noted that not all of the persons covered by Article 7(3) will be involuntarily unemployed or unable to work.

8. Reference was also made in the course of argument to Articles 16(3) and 24. Article 16(3) provides that the continuity of residence required to obtain the right of permanent residence in the host Member State is not affected by a temporary absence of up to twelve months for important reasons 'such as pregnancy and childbirth, serious illness, study or vocational training'.

9. Article 24(1) requires that 'Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty'.

The parties' arguments

10. It is common ground between the parties that the term 'worker' includes (i) a person who currently has a contract of employment with an employer, but who is on paid or unpaid maternity leave; and (ii) in certain circumstances, a person who does not currently have a contract of employment but is actively seeking work in the host country: see *R v Immigration Appeal Tribunal, Ex p Antonissen* (Case C-292/89) [1991] ECR I-745. It is also common ground between the parties that the claimant does not fall within any of the categories of person specified in Article 7(3) who are to 'retain the status' of worker for the purpose of Article 7(1)(a). In particular, although she had understandable reasons for not continuing to work or look for work, there is no finding that she was in fact unable to do work of any kind, nor would such inability have been the result of 'illness or accident'. Pregnancy on its own is not an illness: *Webb v EMO Air Cargo (UK) Ltd* (Case C-32/93) [1994] ECR I- 3567.

11. The claimant, with the support of the AIRE (Advice on Individual Rights in Europe) Centre, submits that an EU citizen who travels to another Member State in order to work there, does work there, but temporarily ceases work owing to the demands of pregnancy, remains a 'worker'. They rely upon the long-standing and well-settled approach of the CJEU giving a broad and purposive interpretation to the term 'worker' having regard to social as well as economic considerations. Examples given are *Levin v Secretary of State for Justice* (Case 53/81) [1982] ECR 1035, at para 13; *Kempf v Staatssecretaris van Justitie* (Case 139/85) [1986] ECR 1741, at para 13; *Lair v Universität Hannover* (Case 39/86) [1988] ECR 3161; *Antonissen*, above; and *Orfanopoulos v Land Baden-Württemberg* (Joined Cases C-482/01 and C-493/01) [2004] ECR I-5257. In *Lair*, in particular, at para 31, the Court observed that 'the rights guaranteed to migrant workers do not necessarily depend on the actual or continuing existence of an employment relationship'. In *Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr under Kunst* (Case C-413/01) [2003] ECR I-13187, it was held that a person might retain her 'worker' status after the ending of a fixed-term contract.

12. Furthermore, they argue that the Court has on a number of occasions given significant weight to the prospect of EU citizens being deterred from exercising their free movement rights if these are too narrowly interpreted: examples are *R v Immigration Appeal Tribunal and Surinder Singh, Ex p Secretary of State for the Home Department* (Case C-370/90) [1992] ECR I-4265 and *Metock v Minister for Justice, Equality and Law Reform* (Case C-127/08) [2009] QB 318. If a pregnant woman loses the status of 'worker' she may also lose her right to reside in the host state (there is even a risk that she might be threatened with removal). It would be a substantial deterrent to the free movement of female workers if they were faced with the prospect of being left destitute, and threatened with removal to their home country, should they become pregnant and temporarily give up work in the later

stages of pregnancy. After all, there comes a point in any pregnancy where a woman has to give up actual work for a short while just in order to give birth, but she will not fall within the literal wording of article 7(3)(a).

13. It is argued that it would be wrong to place decisive weight on the continuation of a contract of employment in such circumstances. In *CIS/1042/2008*, the Secretary of State conceded to the Social Security Commissioner that a self-employed woman who takes a break for reasons of maternity remains a 'self-employed person' for the purpose of Article 7. It would be particularly unjust if a woman who is wrongfully dismissed from her employment because of her pregnancy, which is contrary to both EU and domestic law, loses her character as a worker unless she registers as a job-seeker. There is, it is said, no logical basis for treating an agency worker without the protection of maternity leave differently from an employee who takes maternity leave or a self-employed woman who gives herself a break. None of them has left the labour market in any permanent sense.

14. Further, it would be anomalous if a pregnant woman who gave up work and returned to her home country for up to a year did not lose her continuity of residence for the purpose of Article 16, while a pregnant woman who gave up work for up to six months but remained in the host country would do so. The latter retains a significantly closer connection with the host country but would have to start her qualifying period of residence all over again.

15. The Secretary of State, on the other hand, points to the mention of codification of existing Community instruments in recital (3) to the Directive. He argues that Article 7 was intended to be a codification of the existing law. Thus 'worker' in Article 7(1) should be taken to have the meaning that it had acquired in 2004 and Article 7(3) is an exhaustive list of the people who then fell outside that meaning but were nevertheless to be treated as if they were workers. The fact that a person might have good reasons for giving up work or looking for work for a while does not mean that he or she retains the status of worker.

16. In support of that proposition he relies, in particular, on *Secretary of State for Work and Pensions v Dias* [2009] EWCA Civ 807, [2010] 1 CMLR 112; (Case C-325/09) [2011] 3 CMLR 1103. According both to the English Court of Appeal and to the Advocate-General's opinion, endorsed by the Court, the status of worker was lost when, at the end of her period of maternity leave, a mother decided not to return to work but to continue to care for her son, albeit that she might return to work in the future. This was consistent with the decision in *Johnson v Chief Adjudication Officer* (Case C-31/90) [1991] ECR I-3723 that a mother was not a member of the 'working population' when devoting herself to looking after her

children. Leaving because of the late stages of pregnancy, it is argued, is no different from leaving to take care of a child.

17. The Secretary of State further submits that the claimant's case leaves it uncertain whether and for how long a pregnant women who has no continuing employment contract and is not self-employed remains a 'worker' and points out that some women, once pregnant, may never return or intend to return to work. The claimant in response submits that, on the analogy with maternity leave, she should be regarded as a worker for the period during which national law regards it as reasonable that she be absent from work because of the late stages of pregnancy and the immediate aftermath of childbirth, that is for up to 11 weeks before her expected date of confinement and up to 15 weeks after the pregnancy ends (see paragraph 4 above).

18. Both parties rely upon the Court's statement in *Martinez Sala v Freistaat Bayern* (Case C-85/96) [1998] ECR I-2691, at para 32: 'Once the employment relationship has ended, the person concerned as a rule loses his status of worker, although that status may produce certain effects after the relationship has ended, and a person who is genuinely seeking work must also be classified as a worker'. The Secretary of State argues that that encapsulates the meaning of 'worker', characterised by the continuation of an employment relationship or by genuinely seeking work. The claimant argues that 'as a rule' indicates that other analogous situations are not excluded and this is such an one.

19. The claimant makes a separate but related argument, that if Article 7 were not to encompass the situation under discussion, this would constitute direct discrimination against women and be therefore contrary to the fundamental principle of equal treatment. It is well-established that, where pregnancy is the ground for less favourable treatment, there is no need to identify a male comparator: see *Webb v EMO Air Cargo (UK) Ltd* [1994ECR I-3567. This goes further than saying that inability to work because of pregnancy should be equated with inability to work for other reasons. As the Advocate-General said in that case, at para AG 14,

> 'Nor does it seem to me to be possible a fortiori to draw comparisons . . . between a woman on maternity leave and a man unable to work because, for example, he has to take part in a sporting event, even if it were the Olympic Games. Other considerations apart, a sportsman, even a champion (whether a man or a woman) is confronted with a normal choice reflecting his needs and priorities in life; the same cannot reasonably be said of a pregnant woman, unless the view is taken – but it would be absurd – that a woman who wishes to keep her job always has the option of not having children.'

Pregnancy is not just a lifestyle choice. Equal treatment encompasses the reasonable response of a working woman to the physical demands and limitations of late pregnancy and childbirth. UK law gives sensible recognition to these, not only for the sake of the mother but also for the sake of her child, by not requiring that she seek or be available for work from 11 weeks before the expected date of confinement until 15 weeks after her pregnancy has ended (whether with a live or a still birth). Excluding a woman who makes that choice from the right of residence which she would have retained had she not become pregnant is, it is argued, direct discrimination on grounds of sex.

20. The Secretary of State argues that there is no sex discrimination. The claimant was refused income support because she does not have a right to reside in the UK as required by regulation 21AA(2) or Article 7 of the Citizenship Directive. Any discrimination is on grounds of her nationality and, as the Supreme Court held in *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, [2011] 1 WLR 783, is indirect and justified. In any event, even if it were sex discrimination, this would not constitute a ground for the Court of Justice to strike down Article 7, which is plainly lawful as far as it goes. If there is a lacuna, it is for the EU legislature to rectify.

The Court's view

21. The Supreme Court is not persuaded that the case of either side is *acte clair*. We believe it likely that the Council and Parliament did think, when enacting the Citizenship Directive, that the Directive was codifying the law as it then stood. But we are not persuaded that in doing so it was precluding further elaboration of the concept of 'worker' to fit situations as yet not envisaged. The Court has developed the concept of EU citizenship in a number of ways: see, for example, *Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703. We are further conscious that pregnancy and the immediate aftermath of childbirth are a special case. Equal treatment of men and women is one of the foundational principles of EU law. Only women can become pregnant and bear children. Thus in this respect they cannot be compared to men. Pregnancy is not to be equated with illness or disability. But unless special account is taken of pregnancy and childbirth, women will suffer comparative disadvantage in the workplace. There are also good reasons in health and social policy for allowing women to take a reasonable period of maternity leave without losing the advantages attached to their status as workers. This is different from leaving the workforce in order to look after children. Both men and women may do this and there is no sex discrimination involved in denying them both the status of worker for the time being. We do not see the sex discrimination argument as invalidating Article 7, but as indicating that it would be consistent with the fundamental general principles of EU law for the Court to develop the concept of 'worker' to meet this particular situation.

The questions referred

22. Hence we refer the following questions to the CJEU:

1. Is the right of residence conferred upon a 'worker' in Article 7 of the Citizenship Directive to be interpreted as applying only to those (i) in an existing employment relationship, (ii) (at least in some circumstances) seeking work, or (iii) covered by the extensions in article 7(3), or is the Article to be interpreted as not precluding the recognition of further persons who remain 'workers' for this purpose?

2. (i) If the latter, does it extend to a woman who reasonably gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy (and the aftermath of childbirth)?

   (ii) If so, is she entitled to the benefit of the national law's definition of when it is reasonable for her to do so?