IN THE UPPER TRIBUNAL **Case No** CF/393/2016
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant: Ms Galina Ward, counsel

For the Respondent: Mr Adrian Berry (with him Mr Desmond Rutledge), counsel

Second Interim Decision: A question substantially in the following form is referred to the Court of Justice of the European Union under Article 267 TFEU.

> In circumstances where an EU citizen who is a national of one Member State (i) is present in another Member State (the host Member State), (ii) has been active as a self-employed person within the meaning of Article 49 TFEU in the host Member State, (iii) was paid a maternity allowance from May 2014 (a point at which she considered herself less able to work on account of pregnancy), (iv) has been found to have ceased to be in genuine and effective self-employed activity from July 2014, (v) gave birth in August 2014, and (vi) did not return to genuine and effective self-employed activity in the period following the birth and prior to claiming jobseekers' allowance as a jobseeker in February 2015:
>
> > Must Article 49 TFEU be interpreted as meaning that such a person, who ceases self-employed activity in circumstances where there are physical constraints in the late stages of pregnancy and the aftermath of childbirth, retains the status of being self-employed, within the meaning of that Article, provided she returns to economic activity or seeking work within a reasonable period after the birth of her child?

Within one month of the date of the letter issuing this decision, counsel are to provide the Upper Tribunal with a draft of the proposed reference, agreed so far as possible and marked so as to show any points of disagreement remaining.

REASONS FOR DECISION

Introduction

1. This is the continuation of the test case litigation in the Upper Tribunal seeking to determine whether a woman who has been self-employed before an interruption due to pregnancy, childbirth and its aftermath, can rely on the same principles as the Court of Justice of the European Union declared in C-

507/12 *Saint-Prix* applied to women who had been employed in order to retain the self-employed status she previously enjoyed.

2. An earlier decision dated 12 January 2017 under reference [2017] UKUT 11(AAC) had covered both the present case of Ms HD (as an interim decision) and the case of Ms GP, heard with it, in respect of which it was a final decision. In both cases, the decision of the respective First-tier Tribunals ("FtT") was set aside. In Ms P's case, further facts were found establishing that her self-employed activity had continued throughout the period in question, so she had no need to rely on the argument that the *Saint-Prix* doctrine equally applied to the formerly self-employed.

3. In Ms D's case, the interim decision found that her self-employed activity had become marginal and ancillary approximately one month before her son was born. Detailed findings of fact are set out in para 18 of the interim decision and need not be repeated here. It is accepted by Ms Ward that the circumstances of Ms D's case, including those in which the activity ceased to be genuine and effective, are such that if the principles of *Saint-Prix* apply to the previously self-employed as they do to the previously employed, Ms D would have the right to reside and her claim for child benefit would succeed.

4. Following the reference to the CJEU made by the Irish Court of Appeal in *Florea Gusa v Minister for Social Protection* [2016] IECA 237 it appeared entirely possible that the CJEU's ruling might sufficiently address the matters in the present case so as to make the need for a reference in it otiose. That possibility appeared further strengthened when the Advocate-General's Opinion in the case (C-442/16) was delivered. In the event, though, the CJEU's judgment, delivered on 20 December 2017, was based on only one of the questions out of the three posed by the referring court and canvassed by the Advocate-General. This led to the hearing before me on 8 March 2018 to consider the impact of the judgment in *Florea Gusa* (and any other recent developments), whether the Upper Tribunal could now decide the point (and if so, how) or whether a reference was appropriate.

5. The other "recent development" to be considered was the decision of the Court of Appeal in *Hrabkova v Secretary of State for Work and Pensions* [2017] EWCA Civ 794. I return to it below, but, put briefly, it concerned whether Article 10 of Regulation 492/11, which confers rights on the children of workers or former workers (and hence a derivative right on that child's primary carer), applied equally when the child's parent had been self-employed rather than employed. The Court of Appeal held it did not. There is understood to be an application for permission to appeal to the Supreme Court awaiting decision.

6. In the present case Ms Ward submits that I should find for the appellant (HMRC) and suggests that I should not find against them without making a reference, as the matter is not acte clair in favour of the respondent claimant. Mr Berry submits that it is acte clair in favour of the respondent claimant, but accepts that if I was not persuaded as to that, I could properly make a reference. Indeed, both counsel suggested that if a reference was needed, it

might be appropriate for the Upper Tribunal to make it at this point, so that what is an issue of EU-wide application could be considered by the CJEU, rather than risk the further passage of time which might ensue if there were to be an appeal against a substantive decision by the Upper Tribunal to the Court of Appeal, then possibly leading to a reference at that later stage.

Relevant provisions of EU law

7. Article 49 TFEU provides:

> "RIGHT OF ESTABLISHMENT
> Article 49
>
> (ex Article 43 TEC)
>
> Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."

8. The recitals to Directive 2004/38/EC ('the Directive') provide so far as material:

> "Whereas:
>
> (1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.
>
> (2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.
>
> (3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.
>
> (4) With a view to remedying this sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right, there needs to be a single legislative act to amend Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, and to repeal the following acts: Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for

> nationals of Member States with regard to establishment and the provision of services, Council Directive 90/364/EEC of 28 June 1990 on the right of residence, Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students."

9. Article 7 of the Directive provides:

> "Right of residence for more than three months
>
> 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; or
> …
>
> 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;
> …"

It is common ground, and *Saint-Prix* itself confirms, that a woman who ceases economic activity because of pregnancy, childbirth and its aftermath cannot by virtue of those circumstances alone bring herself within Article 7.

The Gusa case

10. Mr Gusa, a Romanian, had worked in Ireland as a self-employed plasterer from October 2008 to October 2012 but had had to stop because of a lack of customers caused by the economic downturn. He registered as unemployed with the relevant office and claimed jobseeker's allowance under Irish law. His claim was refused on the basis that he could not comply with the Irish regulations implementing the Directive, as he had previously been self-employed rather than employed. When it reached the Irish Court of Appeal, the Court referred three questions to the CJEU, but I only need to set out the first two:

> (1) Does an EU citizen who (1) is a national of another Member State; (2) has lawfully resided in and worked as a self-employed person in a host Member State for approximately four years; (3) has ceased his work or economic activity by reason of absence of work and (4) has registered as a jobseeker with the relevant employment office retain the status of self-employed person pursuant to Article 7(1)(a) whether pursuant to Article 7(3)(b) of Directive 2004/38/EC or otherwise
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> (2) If not, does he retain the right to reside in the host Member State not having satisfied the criteria in Article 7(1)(b) or (c) of Directive 2004/38/EC or is he only protected from expulsion pursuant to Article 14(4)(b) of Directive 2004/38/EC.

The Advocate-General's opinion

11. Advocate-General Wathelet looked at the first question referred from a number of perspectives. At [50] he concluded that, when regard was had to the diferent language versions of Article 7(3)(b), the general scheme of that provision and the objective it pursued, it was to be interpreted "as being indifferent to the way in which the Union citizen pursued the economic activity that earned him the status of "worker" within the meaning of Article 7(1)(a) of [the Directive]."

12. A teleological approach, drawing on the recitals set out above and applying the principle that the provisions of the Directive were not to be interpreted restrictively led him to the conclusion that to distinguish between the previously employed and the previously self-employed on the application of Article 7(3)(b) would be to deny the will of the EU legislature, as expressed in recital 3.

13. When he turned to considering the structure of Article 7, he noted that:

> "62. There is no doubt that, when read in its entirety, Article 7(3) of Directive 2004/38 draws no distinction between citizens who have engaged in paid employment and those who have pursued an activity as a self-employed person. On the one hand, Article 7(1)(a) of Directive 2004/38, to which paragraph 3 refers, expressly provides for both situations. On the other hand, the four scenarios catered for in Article 7(3) are all introduced by the same introductory clause. This too refers, without distinction, to 'a Union citizen who is no longer a worker or self-employed person'. Moreover, that clause expressly reiterates that that citizen '[will] retain the status of worker *or* self-employed person' in the four situations which that provision lists without distinction.
>
> 63. What is more, that reading of Article 7(3) of Directive 2004/38 is supported by the general scheme of Directive 2004/38, which is based not only on Articles 12 and 18 EC (now Articles 18 and 21 TFEU), concerning the prohibition of discrimination on grounds of nationality and the right of Union citizens to move and reside within the territory of the Member States, and Article 40 EC (now Article 46 TFEU), concerning freedom of movement for workers, but also on Articles 44 and 52 EC (now Articles 50 and 59 TFEU), concerning the freedom of establishment and the freedom to provide services."

14. The structure of the Article and its principal objective led him to the "interim conclusion" (at [64]) that Art 7(3)(b) was is directed at Union citizens who have pursued an economic activity for one year, whether as an employed or a self-employed person.

15. The Advocate-General then went on, as a fall-back, briefly to examine the second question. He observed that a Union citizen in Mr Gusa's position qualified "for far more than mere protection from expulsion" and continued as follows (I have added in the authorities cited in his footnotes):

> "72. In actual fact, the issue raised by the referring court is not entirely unprecedented. The Court has already held that it does not follow from either Article 7 of Directive 2004/38 or from the other provisions of that directive that a citizen of the Union who does not fulfil the conditions laid down in that article is, therefore, systematically deprived of the status of 'worker' within the meaning of Article 45 TFEU. The Court inferred from this that it could not be argued that Article 7(3) of Directive 2004/38 lists exhaustively the circumstances in which a migrant worker who

> was no longer in an employment relationship may nevertheless continue to benefit from that status. (*Saint-Prix* at [31] and [38])
>
> 73. Clearly, that analysis of Directive 2004/38, and in particular Article 7(3) thereof, also applies to the situation of a self-employed person who has exercised the freedom of establishment guaranteed by Article 49 TFEU. After all, no distinction may be drawn in this regard according to the basis on which the Union citizen pursued the economic activity in question (as an employed person or a self-employed person), since 'the provisions of the [FEU] Treaty on freedom of movement for persons are intended to facilitate the pursuit by [Union citizens] of occupational activities *of all kinds* throughout the [European Union], and preclude measures which might place [EU] nationals at a disadvantage when they wish to pursue *an economic activity* in the territory of another Member State'. (C-104/06 *Commission v Sweden* at [17]). Moreover, that interpretation is consistent with the Court's case-law to the effect that Articles 45 and 49 TFEU afford the same legal protection and the classification of the basis on which an economic activity is pursued is thus without significance. (C-363/89 *Roux* at [23]; C-151/04 and C-152/04 *Nadin* and *Nadin–Lux* at [47])."

16. He suggested that given that the Directive had been held to be non-exhaustive regarding retention of worker status by a person who had been employed, it must be equally non-exhaustive as regards a formerly self-employed person. He noted that if such a person was not protected, he would be treated as a first-time jobseeker "even though he has contributed to the tax and social security system of the host Member State in the same way as an employed person." He considered such a view consistent with the established position that temporary absences from the employment market did not mean that a person had ceased to belong to the market and finally that

> "78. That approach is consistent with the objective pursued by the provisions of Chapters 1 to 3 of Title IV TFEU, which seek to ensure the free movement of persons and services within the European Union. A Union citizen would be deterred from exercising his right to freedom of movement if, in the event that his economic activity were to slow down through no fault of his own, if only for a short period, he ran the risk of losing his status as a worker in that State."

The Court's Judgment

17. The key passage is the following:

> "35. As regards the general scheme of Directive 2004/38, it should be noted that, as Article 1(a) thereof provides, the purpose of the directive is to define, inter alia, the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens.
>
> 36. To that end, Article 7(1) of the directive distinguishes, in particular, the situation of economically active citizens from that of inactive citizens and students. That provision does not, however, draw a distinction, within the first category, between citizens working as employed persons and those working as self-employed persons in the host Member State.
>
> 37. Thus, as set out in paragraph 27 of the present judgment, Article 7(1)(a) of Directive 2004/38 confers a right of residence on all Union citizens who have the status of 'workers or self-employed persons'. Similarly, Article 7(3) of that directive refers, in its introductory sentence, to Union citizens who, although no longer 'worker[s] or self-employed person[s]', are to retain the status of 'worker or self-employed person' for the purposes of Article 7(1)(a).
>
> 38. Since, as is apparent from paragraphs 30 to 34 of the present judgment, it cannot be inferred from the wording of Article 7(3)(b) that point (b) covers only the situation

> of persons who have ceased to work as employed persons and excludes those who have ceased to work as self-employed persons, point (b) must be read, in the light of the general scheme of Directive 2004/38 and, in particular, the introductory sentence of that provision and Article 7(1)(a) of that directive, as applying to both categories of persons.
>
> 39. That interpretation is supported by analysis of the objectives of that directive and, specifically, Article 7(3)(b) thereof.
>
> 40. First, it is apparent from recitals 3 and 4 of Directive 2004/38 that, with a view to strengthening the fundamental and individual right of all Union citizens to move and reside freely within the territory of the Member States and to facilitating the exercise of that right, the aim of the directive is to remedy the sector-by-sector, piecemeal approach which characterised the instruments of EU law which preceded that directive and which dealt separately, in particular, with workers and self-employed persons, by providing a single legislative act codifying and revising those instruments (see, to that effect, judgment of 19 June 2014, *Saint Prix*, C-507/12, EU:C:2014:2007, paragraph 25).
>
> 41. To interpret Article 7(3)(b) of that directive as covering only persons who have worked as employed persons for more than one year and excluding those who have worked as self-employed persons for that period would run counter to that purpose.
>
> 42. Second, such an interpretation would introduce an unjustified difference in the treatment of those two categories of persons given the objective of that provision, which is to safeguard, by the retention of the status of worker, the right of residence of persons who have ceased their occupational activity because of an absence of work due to circumstances beyond their control.
>
> 43. Just as an employed worker may involuntarily lose his job following, for example, his dismissal, a person who has been self-employed may find himself obliged to stop working. That person might thus be in a vulnerable position comparable to that of an employed worker who has been dismissed. In those circumstances, there would be no justification for that person being ineligible for the same protection, as regards retention of his right of residence, as that afforded to a person who has ceased to be employed.
>
> 44. Such a difference in treatment would be particularly unjustified in so far as it would lead to a person who has been self-employed for more than one year in the host Member State, and who has contributed to that Member State's social security and tax system by paying taxes, rates and other charges on his income, being treated in the same way as a first-time jobseeker in that Member State who has never carried on an economic activity in that State and has never contributed to that system.
>
> 45. It follows from all of the foregoing that a person who has ceased to work in a self-employed capacity, because of an absence of work owing to reasons beyond his control, after having carried on that activity for more than one year, is, like a person who has involuntarily lost his job after being employed for that period, eligible for the protection afforded by Article 7(3)(b) of Directive 2004/38. As set out in that provision, that cessation of activity must be duly recorded."

18. In the light of this answer, the Court concluded there was no need to answer the second question (as to which I have summarised the Advocate-General's reasoning above) (nor indeed the third).

Other relevant authorities

19. In C-147/11 and C-148/11 *Czop* and *Punakova* the Court was considering whether the provisions of Article 12 of Regulation 1612/68 (now re-enacted as Article 10 of Regulation 492/2011), which referred to the right enjoyed by

"children of a national of a Member State who is or has been employed in the territory of another member State" applied where the parent had been self-employed rather than employed. It observed that:

> "30. …It is apparent from the clear and precise wording of Article 12 of Regulation No 1612/68, which refers to 'the children of a national of a Member State who is or has been employed', that that provision applies only to the children of employed persons.
>
> 31 Moreover, the literal interpretation of that provision, according to which it applies only to employed persons, is supported both by the general scheme of Regulation No 1612/68, the legal basis for which is Article 49 of the EEC Treaty (subsequently, after amendment, Article 49 of the EC Treaty, which became, after amendment, Article 40 EC), and by the fact that Article 12 of Regulation No 1612/68 was reproduced not in Directive 2004/38, but in Regulation No 492/11 also governing freedom of movement for workers and based on Article 46 TFEU, which corresponds to Article 40 EC."

20. The case has given rise to some difficulty subsequently, in that the United Kingdom conceded that the father of Ms Punakova's child had been employed, so that as the child's primary carer, she qualified; while in relation to Ms Czop "according to the information provided by the United Kingdom Government at the hearing, Ms Czop has a right or permanent residence under Article 16(1) of Directive 2004/38." The relevance, if any, of these concessions, and the status of the Court's conclusions may be a matter for further litigation in the case discussed below, so I say no more about them here.

21. *Hrabkova v SSWP* [2017] EWCA Civ 794; [2017] PTSR 162 had been decided before the Advocate-General's Opinion, a fortiori the CJEU's judgment, in *Gusa* were available. The case was essentially re-running the point at issue in *Czop* and *Punakova* in the light of the difficulties affecting that decision, to which have briefly referred above. The submissions on behalf of Ms Hrabkova included an overarching submission that "applying EU law principles of freedom of movement and/or non-discrimination, a self-employed person must have the same entitlement to [employment and support allowance – the benefit in issue in that case] as a worker and therefore that Art 10 of Regulation 492/11 should be interpreted as applying additionally to self-employed persons. As to *Czop*, the CJEU had only answered one of the three questions which had been submitted to it and what the Court had said on the point which it did address was obiter in the light of the UK government's concession that Ms Czop had a right of permanent residence in any event. There would be unlawful discrimination against Ms Hrabkova as a self-employed person in comparison with an employed person, or on grounds of nationality. Denial of benefits would impede a self-employed person's right to move in the EU. Article 49 has direct effect. The right approach is to equiparate the position of employed persons and self-employed persons: a number of authorities were cited in support. The issue was not acte clair and a reference should be made under Art 267.

22. Counsel for SSWP in *Hrabkova* resisted these arguments, in particular submitting that it was not appropriate to equiparate the rights of workers and those of self-employed persons. The position of the self-employed and

workers in EU law is not always identical in every respect in every context. There are differences between Arts 45 and 49 TFEU. Any discrimination would be objectively justified. In *Czop* the CJEU had already decided the issue in respect of which a reference was being sought in *Hrabkova.*

23. Arden LJ, giving the judgment of the Court, dismissed the arguments on behalf of Ms Hrabkova. The CJEU had already decided in *Czop* the issue which it was sought to refer. The CJEU had expressly said that the predecessor article did not apply to children of the self-employed. It was consistent with the location of the relevant article within Regulation 492/2011, supported by the "clear distinction" said to exist in EU law between a worker and a self-employed person, and consistent with the earlier decision of the Court of Appeal in *R(Tilianu) v Social Fund Inspector* [2010] EWCA Civ 139; [2011] PTSR 781 (as to which, see below). She was not assisted by the fact that a reference had been made in *Gusa*, in which *Czop* had not been cited. There was no doubt warranting a further reference under Art 267.

24. As to the submission that the employed and the self-employed were to be equiparated, Arden LJ analysed the cases which counsel for Ms Hrabkova had relied upon, concluding that they did not support the proposition asserted. Rather, they were either decided on the basis of nationality (which she termed Category A cases) or they demonstrated the assimilation of the rights of employed and self-employed persons in specific circumstances only ("Category B cases"). The TFEU draws a distinction between the status of "worker" and "self-employed" and it is not open to the courts to treat the two statuses as identical.

25. In *Tilianu*, the Court of Appeal had earlier found against a claimant seeking to argue essentially the same point as Mr Gusa. It was common ground between counsel, and I agree, that that decision can no longer stand in the light of *Gusa* and I say no more about it here.

<u>The submissions</u>

Common ground

26. There was substantial measure of agreement as to the relevant principles to be applied, with which it is not necessary to burden this decision. Both counsel before me accepted that *Gusa* had been decided in the context of Art 7. The Court had engaged in textual analysis of Art 7, supported by consideration of the objectives of the Directive. However, the Advocate-General had addressed wider considerations in the second part of his Opinion.

HMRC's position

27. Ms Ward submitted that the CJEU had decided *Gusa* only on the first question referred to it. Every paragraph in the decision can be referred back specifically to the Directive and not to some wider principle. Though the Advocate-General had floated wider issues in relation to questions 2 and 3, the Court had chosen not to adopt his reasoning on those points. His position on the latter issues was not, as Mr Berry's skeleton argument claimed, based

on "settled" case law. It is accepted that in some cases workers and the self-employed have the same rights, but there is no general principle to that effect. The Court in *Gusa* was not departing from *Czop*: that case was not addressed there.

28. As to *Hrabkova*, Ms Ward submitted that the argument that there was a general principle of equivalence between the employed and the self employed had been considered and rejected. The argument specific to the legislation at issue in *Czop* was also rejected.

29. The present issue was not one of those where workers and the self-employed should be equiparated. An employee who becomes pregnant is in a binary situation: absent the ruling in *Saint-Prix*, a person with a contract of employment is protected, a person without a contract of employment is not. A self-employed person who becomes pregnant is not in a binary situation. Unlike an employee, she is not required personally to carry out the work. It is open to her to take steps to maintain her self-employment through the period of pregnancy and maternity (as Ms P, the claimant in the case previously linked to this one, did) and in due course to resume more fully. If she chooses not to continue the business, she is choosing not to exercise Art 49 rights. The need arose to safeguard a person in the position of Mr Gusa because the absence of work had been beyond his control: such is not the case for a self-employed woman, who can take steps to keep her business alive.

30. HMRC's position as regards the need for a reference is as set out at [6] above.

The claimant's position

31. Mr Berry submits that, whilst the Court in *Gusa* only took up one of the three bases considered by the Advocate-General, leaving the other two, the Court's decision contains dicta as to matters which evidently fortified the Court in its interpretation of Art 7 and which would support the proposition that the previously self-employed should have the benefit of *Saint-Prix* rights. At [36], the Court identifies the key distinction as being whether, not how, a person is economically active. At [40], the Court relies on a teleological approach which had also found favour in *Saint-Prix* itself. Unjustified differences in treatment are seen as contrary to the purposes of the Directive: [41] and [42]. The employed and self-employed may be in comparable circumstances and should not be treated differently [43]. Nor should a self-employed person, who will have been paying taxes and other charges on his income, be treated inequitably:[44].

32. *Hrabkova* and *Czop* concern legislation specifically framed by reference to workers. By contrast, though there are Directives about maternity pay and leave, as regards rights of residence at times of maternity, whether of the employed or the self-employed, the EU simply failed to legislate.

33. Whilst *Hrabkova* is binding on the Upper Tribunal as to its ratio, *Gusa* does not depend on arguments rejected in *Hrabkova.* If Arden LJ's "Category A/Category B distinction has any applicability to the present case, it should be

considered as a Category B case –a specific situation in which the rights of the employed and self-employed should be assimilated.

34. In response to the argument that the formerly employed need protection that the formerly self-employed do not (because the latter can take steps to shape their economic activity even during maternity), in addition to relying on the points emerging from the *Gusa* decision at [31] above, Mr Berry submits (a) that if *Saint-Prix* did not apply to the self-employed, there would be a risk of deterring people from exercising their right of free movement and (b) that the true question to be asked is not whether someone can continue to carry on in some shape or from the business they have got, but whether they should be permitted to retain self-employed status, a distinction which may have implications for a woman's post-pregnancy choices.

35. As regards a reference, his position is as set out at [6].

Analysis

36. I accept that on the present state of the law, there is no general principle that the rights of the employed and the self-employed are to be equiparated. The Court of Justice in *Gusa* had an opportunity, through the Advocate-General's answer to the second question raised, to go down that route, but elected not to take it. Whether or not the Court of Appeal's rejection of the "overarching submission" of equiparation in *Hrabkova* is strictly binding on me (as I consider it is, notwithstanding Arden LJ's observation at [68] that it was not a point she needed to address), it clearly represents the unanimous view of the Court of Appeal in response to a "well-argued and thorough submission" and as such would in event be entitled to considerable respect. Neither in European nor domestic authority is there therefore any encouragement for the view that there is a general principle of equiparation, nor even - given the CJEU's approach in *Gusa*- any likelihood to suppose that a higher court than the Upper Tribunal might take the law in that direction.

37. However, the claimant does not need that in order to succeed. Whether the matter should be taken as a potential Category B case, so that the employed and the self-employed at treated equally in a specific context, is much more debatable. There may be some merit in the distinction Ms Ward makes about the greater freedom of the self-employed woman to shape her economic activity, even at a time of pregnancy and maternity. However, there are all kinds of self-employed activity and it may be that some are more susceptible of being shaped as Ms Ward suggests than others. By virtue of the nature of this Chamber's work, it tends to see many at the smaller-scale end, engaged in modest activities, over which a person may possibly not have a great deal of control. I have no evidence on which to make any kind of finding.

38. What distinguishes *Saint-Prix* is that the Court was not interpreting secondary legislation but ruling on what were the incidents of a particular status under the Treaty (in that case "worker" under Art 45). Perhaps the key paragraph of that case for present purposes is [41]:

> "the fact that she was not actually available on the employment market of the host member State for a few months does not mean that she has cased to belong to that market during that period, provided she returns to work or finds another job within a reasonable period after confinement."

39. While the decision in *Gusa* is indeed tied to Article 7, there is some force in Mr Berry's submission as to the sort of concerns of vulnerability and unfairness which appear to have at least fortified the Court in its interpretation of the language in question. It might well be open to the Court, were it so minded, to develop its view at *Gusa*, [36] so that what mattered was the fact of economic activity, rather than its form, so that [41] of *Saint-Prix* could be applied by analogy.

40. I cannot say that the matter is acte clair either way. There is no merit in my reaching a firm decision, very possibly triggering an appeal to the Court of Appeal, when that Court might itself then fell the need, if it was in a position to do so, to make a reference. The matter is one of the scope of a Treaty article and is potentially widely applicable across the EU. There are cases stayed behind this one in the Upper Tribunal and may well be in the First-tier Tribunal also. It is better to refer the case now.

CG Ward
Judge of the Upper Tribunal
26 April 2018