[2019] AACR 24

(JS v Secretary of State for Work and Pensions (IS) [2019] UKUT 135(AAC))

Judge Wright
16 April 2019 **CIS/1748/2012**

EU law – Right to reside – Whether 'Saint Prix' retention of workers status may extend to other situations where claimant has needed temporarily to cease working – Correct approach to proportionality and lacuna filling after Mirga.

The appellant, a Dutch national came to the United Kingdom in November 2006. He had lived and worked continuously from 3 January 2007 to 23 February 2011. The appellant stopped working because Social Services became involved with his family and suggested that if he gave up his job they would not take the children into care. The appellant's claim for income support in March 2011 was refused on the basis that he did not have a right to reside in the United Kingdom. The First-tier Tribunal (F-tT) refused his appeal against that decision and held that the appellant was not a worker nor was he a jobseeker at the time of the claim. The F-tT gave the appellant permission to appeal to the Upper Tribunal (UT). The issue for the UT was whether the appellant's personal circumstances in March 2011 having given up his employment to care for his very young children conferred on him a right reside under EU law. This involved two arguments: (i) had the appellant remained a 'worker' under EU law by analogy with the pregnant woman temporally unable to work in *Saint-Prix*, and (ii) was it a disproportionate application of the rights of residence arising under EU law to deny the appellant a right to reside?

Held, dismissing the appeal, that:

1. the correct approach to the two arguments involves first identifying whether the relevant legal instruments of EU community law dealing with rights of residence (a) cover the category of case in issue, in the sense of seeking to address the residence rights of those within the category(here, workers with children),but the individual fails to meet the qualifying criteria, or (b) EU law has failed accidentally to cover such a category of case (it has a gap or 'lacuna' in it) and that gap needs to be filled. It is only in the latter circumstance in the context of the 2004 Directive that the proportionality exercise may come in to play, to fill the 'gap'. Proportionality thus cannot be invoked as a stand-alone basis for having a right to reside in circumstances where the individual's situation is covered by the 2004 Directive but where he has failed on the facts to meet the qualification criteria in that Directive. This is because proportionality is built-in to the assessment of whether a right of residence arises under the detailed structure for identifying rights of residence set out in the 2004 Directive (paragraph 20);

2. *Saint-Prix* is not a 'lacuna case (paragraph 28). Moreover, it provides no underpinning legal thesis for identifying other situations in which 'worker' status may remain or be retained under Article 7(3) of the 2004 Directive on ceasing work (paragraph 30). It should be treated as being limited to the special circumstances with which it was concerned (paragraph 33);

3. one critical focus in *Saint-Prix* was on the woman returning to the labour market within a reasonable period after having given birth, and that period and the period needed out of work before giving birth may be relatively straightforward to define in each Member State, but the present case did not provide a similar ease of temporal definition (paragraph 35). Moreover, the condition of pregnancy as well as being time limited is easily definable both factually and legally, but the types of cases or situations where a claimant may have to cease work to care for a child are numerous and varied. (paragraph 36); and a parent who has left work and the labour market in order to care for her children does not retain her status as a 'worker': per *SSWP v Dias* [2009] EWCA Civ 807 (paragraph 38);

4. recourse to proportionality did not assist the appellant either as there was no lacuna needing to be filled (paragraph 46); Article 7 of 2004 Directive has not sought to carve out a retention of the right of residence as a 'worker' for the category of those who leave work and the labour market in order to care

for children (paragraph 48); and other parts of EU law addressing residence rights for those with children had deliberately not sought to cover the appellant's circumstances (paragraph 49).

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The Upper Tribunal dismisses the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Newcastle-upon-Tyne on 7 February 2012 under reference SC236/11/01302 did not involve any error on a material point of law and therefore the decision is not set aside.

This decision is made under section 12(1) and 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

Benjamin Williams of counsel and Mike Robinson of Darlington Citizens Advice Bureau appeared for the appellant.

Julia Smythe of counsel appeared for the Secretary of State.

REASONS FOR DECISION

Introduction

1. This appeal has taken an exceptionally long time to decide. At its heart it concerns whether the appellant had a right to reside at the time he made his claim for income support as far back as 9 March 2011. The particular issue arising on this appeal is whether the appellant's personal circumstances in March 2011 – broadly put at this stage, he had given up his employment in February 2011 to care for his very young (and in one case seriously disabled) children because they otherwise would be 'taken into care' – conferred on him a right to reside under EU law.

2. Part of the reason for the very extensive delay has been the changing focus of the arguments on the appeal, such changes reflecting the developments in the caselaw on 'right to reside'. The hearing of the appeal then took place before me in March of 2017. After that hearing there was a further, extensive period of time in which the appellant and his representative were seeking to obtain from social services more detailed evidence supporting the case that the appellant's children **would** have been taken into care in March 2011 had he not ceased employment. Ultimately, however, those evidence seeking efforts proved unsuccessful. The further very extensive delay since then has been mine, for which I apologise.

Relevant background

3. The appellant's claim in March 2011 for income support was, in effect, refused on the basis that he did not have a right to reside in the United Kingdom and his appeal against that decision was disallowed by the First-tier Tribunal in February 2012. The First-tier Tribunal set out the relevant facts and its reasons why the appeal failed as follows.

> "The appellant.…is a Dutch national and came to the UK in November 2006. He had lived here continuously since then working for [name of employer] at team Valley from 3 January 2007 to 23 February 2011. He left because Social Services became involved with his family and suggested that if he gave up his job they would not take the children into care. He confirmed that he and his wife are now reconciled and that he has been working again from October 2011…The 2 children concerned……[are both] at nursery school currently. [One of the children] has a lot of health problems and had spent a lot of his early life in hospital. He is however much better now……..
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> ……on carefully considering the legislation the Tribunal agreed with the Decision Maker that [the appellant] ….on his own evidence ….was not a worker nor was he a jobseeker at the time of the claim. His children were not in full time education at the time of claim and indeed now are at nursey school only. The Tribunal had great sympathy for the appellant who was completely honest and open in giving his evidence….Unfortunately, [under] the legislation….the Tribunal had no alternative other than to disallow the appeal."

That tribunal gave the appellant permission to appeal to the Upper Tribunal in April of 2012.

4. At the initial stage of the appeal to this tribunal a number of issues arose on the appeal, for example whether the appellant had retained his status as a 'worker' by looking for work even though he had claimed income support instead of jobseeker's allowance and whether he could classify as a 'worker' under EU law by virtue of his being engaged in caring for his disabled child and in receipt of Carer's Allowance as a result of this caring. A further issue then arose as to whether the appellant had in fact ceased to be employed by March 2011 or may have been on some form of special leave of absence.

5. The proceedings were then stayed as the issue of whether receipt of carer's ~~a~~llowance could qualify a person as being a 'worker' was to be decided by the Upper Tribunal in another appeal. In the meantime, the appellant had provided evidence that made it clear that he had terminated his employment with immediate effect on 23 February 2011 and had "permanently terminated his employment" by March 2011. There was therefore nothing in any argument that the First-tier Tribunal had failed to enquire sufficiently into this issue. The carer's allowance argument was rejected in *JR v Leeds CC* (HB) [2014] UKUT 0154 (AAC); the Upper Tribunal deciding that a person in receipt of carer's allowance is not thereby a worker or self-employed for the purposes of Article 7(1) (a) Directive 2004/38/EC ("the 2004 Directive"). No further appeal to the Court of Appeal arose in *JR*. That argument thus also fell away.

6. At a somewhat later date, now in February 2015, evidence was furnished by the respondent showing the appellant had ticked the box saying he was not looking for work

when he had made his claim for income support. The Court of Appeal's decision in *SSWP v Elmi* [2011] EWCA Civ 1403; [2012] AACR 22 could not therefore have assisted him on the facts even if the First-tier Tribunal had investigated this issue further. So that potential argument fell away as well.

7. These arguments having fallen away the appeal was then stayed to await the Supreme Court's decision in *Mirga v SSWP* [2016] UKSC 1; [2016] 1 WLR 481; [2016] AACR 26. The focus on the appeal then shifted to (and has remained on) two potential grounds of appeal.

8. First, although the appellant had resigned from his job and was not under a contract of employment at the time of his claim for income support in March 2011, by analogy with a pregnant woman temporarily unable to work (*Saint Prix –v- SSWP* (case C-507/12); [2014] AACR 18) and prisoners temporarily unavailable to work in the employment market due to imprisonment but who worked before and after imprisonment (*Orfanopoulos and Oliveri* (Joined cases C-482/01 and C-493/01), 29 April 2004), had the appellant remained as a "worker" for the purposes of Article 45 of the Treaty on the Functioning of the European Union (TFEU) for the temporary period from 24 February 2011 until he successfully claimed jobseeker's allowance on 21 July 2011 or his return to work in October 2011? The decision in *Saint-Prix* on its face was arguably authority to the effect that 2004 Directive does not provide an exhaustive definition of those who retain "worker" status on temporarily being unable to work.

9. Second, and in the alternative, based on the same factual considerations, post-*Mirga* was it a disproportionate application of the rights of residence arising under Articles 21 and 45 of TFEU to deny the appellant a right to reside and right to social assistance in the form of income support for the temporary period from the end of February 2011 to 21 July 2011 whilst he was unable to work and was required to care for his children to prevent them being removed from his care?

10. (Both arguments need to be qualified as the issue is whether the Secretary of State acted lawfully as at the date of the 28 March 2011 decision on the income support claim in deciding that the appellant did not have a right to reside, rather than in any looking back exercise from the date the JSA claim succeeded in July 2011: see section 12(8)(b) of the Social Security Act 1998.)

11. These are the key arguments I need to address on this appeal. I will refer to them as the '*Saint-Prix* worker argument' and the 'proportionality argument'. For reasons to which I will come shortly, as a matter of legal analysis the arguments are linked. Before addressing the arguments, I need to say a little more about why the appellant stopped working in February 2011.

The evidence of why the appellant ceased working in February 2011

12. Prior to the hearing before me, save for what the First-tier Tribunal said on this, the evidence on why the appellant ceased work in February 2011 consisted of the following.

13. The documentary evidence before the First-tier Tribunal was limited to one letter written to the appellant on 2 March 2011 by the solicitors acting for him in what I will term the 'family proceedings' concerning the appellant, his wife and their two children. The letter

was written after the date the appellant had left his job and concerned a hearing that had taken place on the date of the letter at Newcastle County Court. Much of the detail in the letter I need not go into. It informed the appellant that the local authority was carrying out a care assessment on the appellant and his wife and until that had been completed an immediate decision could not be made about the children, including whether their mother (the appellant's wife) should return to the family home. The letter referred to the burden on the appellant of being the (sole) carer for the children and went on:

> "I did advise you that it is likely you will have to be the primary carer for [the children] for at least the next few months. This is likely to mean that it will be very difficult for you to work. You can of course work on either a full time or part time basis but as [your wife] is unlikely to be able to look after the children herself for any length of time, you would need to be able to afford child minding or nursery fees for [the children]. The Local Authority are unlikely to be willing or even able to pay more for nursery time than is already provided….it is not the responsibility of Social Services to fund child minding…..
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> It is very important that as you are no longer able to work, that you claim all the benefits you are entitled to….."
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> It should be noted that, as is reflected in the First-tier Tribunal's reasoning, the appellant was recorded as having told the tribunal that he had to leave work because his wife had gone to work and left the children and "social services were involved and suggested if I gave up job, would not take children into care".

14. Further documentary evidence was submitted on this issue in the course of these Upper Tribunal appeal proceedings. This included an earlier letter to the appellant from his solicitors in the family proceedings, dated 17 February 2011. This was before the appellant had resigned with immediate effect from his job on 23 February 2011. This letter referred, amongst other matters, to it having been agreed that the local authority should have interim supervision orders in respect of both children, and that it had been further agreed that the children should continue to live with the appellant. The letter went on to set out, again *inter alia*, that social services were to arrange for the children to attend nursery three times a week, and it warned the appellant that if he and his wife did not comply with the terms of the agreement (which the letter had set out) "then the local authority will immediately remove [the children] from your care and place the children with foster carers". As for continuing to work, the letter said this:

> "You will also need to consider how you are going to arrange being the main carer for [the children] given that you are working. As we have discussed, you may need to make arrangements to find different employment or change your working hours. It may be that you have no option but to stop working at the current time and claim benefits."

15. Just before the hearing of this appeal in April 2017, and at my direction, the appellant provided a written statement on, amongst other matters, why he had given up his job at the end of February 2011. It is dated 22 March 2017 The material parts of that statement read as follows.

> "Just before [my wife] had to leave the home, in February 2011, I had a meeting with Social Services in Gateshead. At this meeting Social Services stated categorically that, unless I gave up my job and be the full carer of my children, they would put both of the [children] into foster care. They told me it was the only option since they had asked my ex to leave the family home. They said part-time work would not be possible since I would be caring for two young children – one severely disabled. Among those present at the meeting were the social worker, the health visitor and head of children's services.
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> I was told I needed to apply for income support due to this condition imposed on me by social services….
>
> In due course [my wife] returned home as social services were satisfied [she could suitably take care of the children]…..
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> When [my wife] returned home, social services told me I could look for a job since they were satisfied she could look after the children when I was away….I was therefore able to claim jobseeker's allowance and look for work."

16. As one of the issues addressed at the hearing before me was the degree to which the appellant had been compelled to give up his job in order to care for his children (in part prompted by the difference in emphasis about this issue between the above statement and the view of the appellant's solicitors in their contemporaneous letters to him (as also set out above)), a considerable period of time after the hearing was devoted by the appellant and his representative to seeking to obtain from the local authority documents that may have corroborated the appellant's written statement of 22 March 2017. In particular, attempts were made to obtain the minutes of the meeting with social services in Gateshead to which the appellant refers in his statement. Those attempts proved in substance to be unsuccessful. All that was added to the evidence was a letter from Gateshead Council dated 25 May 2017, which said the following of relevance.

> "..[the appellant] was the main carer for his children from 05/01/2011 to 14/04/2011 when his wife at the time….was living in temporary accommodation…..
>
> It was made clear by the Local Authority at that time that the care of his children needed to be made [a] priority in order to meet the needs of the children, so he was unable to work…"

17. For the reasons I explain below, deciding just exactly what the appellant was told by social services or the degree of compulsion he had been put under to give up his job in February 2011 is no longer necessary. At the time the two remaining arguments first arose after *Mirga* I thought the practical if not legal compulsion to cease working may have been relevant to assessing whether the appellant had a right to reside in the UK at the time of his income support claim. That is no longer the case.

18. What I am satisfied the evidence does show, however, is that the appellant had ceased working and had left the labour market by the time he made his claim for income support in March 2011. He was therefore no longer a 'worker' in EU law terms in March 2011 in the sense of being in work.

Analysis and Conclusion

19. The shape of the two arguments and their resolution has shifted over the course of these proceedings, with the result that it is not necessary for me to address in this decision all the caselaw to which I was taken. I have been particularly indebted in arriving at my conclusions in this appeal to more recent decisions of the Upper Tribunal in *JK –v- SSWP* (SPC) [2017] UKUT 179 (AAC), *MM -v- SSWP* (ESA) [2017] UKUT 437 (AAC), and *LO – v- SSWP* (IS) [2017] UKUT 440 (AAC); all of which the parties' representatives have been able to address. These decisions set out, to my mind accurately, the correct approach to the exercise of the proportionality assessment post-*Mirga*.

20. This is an important point to make at the outset because that correct approach involves first identifying whether the relevant legal instruments of EU community law dealing with rights of residence (a) cover the category of case in issue, in the sense of seeking to address the residence rights of those within the category (here, workers with children), but the individual fails to meet the qualifying criteria, or (b) EU law has failed accidentally to cover such a category of case (it has a gap or 'lacuna' in it) and that gap needs to be filled. It is only in the latter circumstance in the context of the 2004 Directive that the proportionality exercise may come in to play, to fill the 'gap'. Proportionality thus cannot be invoked as a stand-alone basis for having a right to reside in circumstances where the individual's situation is covered by the 2004 Directive but where he has failed on the facts to meet the qualification criteria in that Directive. This is because proportionality is built-in to the assessment of whether a right of residence arises under the detailed structure for identifying rights of residence set out in the 2004 Directive.

21. This, as I read it, was the point being made by Upper Tribunal Judge Jacobs in paragraphs 9-12 of *SSWP v PS-B* (IS) [2016] UKUT 511 (AAC), where the following of particular relevance was said:

> "9…..The Supreme Court [in *Mirga*] draw on the terms of the relevant Articles of Directive 2004/38 and on the preambles to show that they disclosed a policy of limited access to social assistance. In that context, the Court decided that it would not be disproportionate to deny her a right to reside. As Lord Neuberger explained:
>
> > 69. Where a national of another member state is not a worker, self-employed or a student, and has no, or very limited, means of support and no medical insurance (as is sadly the position of Ms Mirga …), it would severely undermine the whole thrust and purpose of the 2004 Directive if proportionality could be invoked to entitle that person to have the right of residence and social assistance in another member state, save perhaps in extreme circumstances. It would also place a substantial burden on a host member state if it had to carry out a proportionality exercise in every case where the right of residence (or indeed the right against discrimination) was invoked.
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> 10. It is always a mistake to reason from the facts of one case to the facts of another, as small differences may be significant. The facts of Ms Mirga's case are, though, relevant to show the uncertain, and certainly limited, scope for proportionality in a

social security case. Lord Neuberger did not even acknowledge that there definitely was any possibility. In [69], he only said 'save *perhaps* in extreme circumstances'; and he began [70] with the words '*Even if* there is a category of exceptional cases'…….

12. If the claimant is to succeed, it can only be because a new category or an exceptional case has to be constructed on the basis that there is a gap in the EU legislation. That is how the tribunal approached the case. *Mirga* is again relevant to this approach. The policy against proportionality in social assistance cases is also relevant to opening a new category or making an exceptional case. If the policy prevents the application of an existing category that is not quite satisfied, that is a good indication that the absence of a category allowing more easy access to a right to reside is not an omission that the courts should fill. Rather the absence is an indication of the scope of the policy."

22. It is a point which in my view is made more explicitly by Upper Tribunal Judge Rowland at paragraphs 20-21 of *JK v SSWP* (SPC) [2017] UKUT 179 (AAC), where he said:

"20. Clearly the purpose of the [2004] Directive is not just to stop economically inactive Union citizens from gaining access to the host Member State's welfare system. It is also to ensure that those who are, or have been, economically active do have access to a welfare system when they require it and, more pertinently to the present case, that those who have been in the host Member State for long enough, while being either economically active or self-sufficient, acquire a right of permanent residence with the benefits that go with it, so as to give practical effect to the right conferred on Union citizens by Article 21(1) of the Treaty on the Functioning of the European Union "to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by measures adopted to give them effect".

21. However, it seems to me that the reason why it is only in an exceptional case that that a claimant may be able to argue that it would be disproportionate to refuse social assistance when the terms of the Directive are not satisfied is that the parameters of proportionality are to be inferred from the Directive itself (see *Kaczmarek v Secretary of State for Work and Pensions* [2008] EWCA Civ 1310; R(IS) 5/09 at [23]) with the consequence that, absent a lacuna due to an apparent oversight by the Council of Ministers, proportionality must be presumed when the Directive has been properly applied. Hence what the Supreme Court said in paragraph [69] of *Mirga*."

23. And as Judge Rowland had observed at paragraph 9 in his earlier decision in *Mirga* itself (*RM v SSWP* (IS) [2010] UKUT 238 (AAC)), "[t]he question whether there has been an accidental omission from European Community legislation can only be answered by looking at the broad framework constructed by the legislation that does exist". I also consider valuable the observations made later by Judge Rowland in *RM* about needing to "identify a class of persons, who should have been included within the relevant directive" and his view (in paragraph 14) that:

> "……..Article 18 is expressed as being "subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect", which justifies refusing to recognise a right of residence where a European Union citizen does not fall within the scope of Directive 2004/38/EC and the omission is deliberate. R(IS) 4/09 is merely concerned with cases where the omission was not deliberate. There is no general provision in either Article 18 or, more importantly, the Directive, requiring hard cases to be examined on a case-by-case basis to see whether the refusal to recognise a right of residence would be incompatible with the Convention or, if not actually incompatible with the Convention, would nonetheless be regarded as unduly harsh given the personal circumstances of the claimant. It seems to me that the reason for that is that individual Member States have a duty to act consistently with the Convention in their own immigration systems and because the European Union is content for individual Member States to judge whether a right of residence should be granted in other cases that do not fall within the scope of the Directive. I observe that paragraph (6) of the preamble to the Directive expressly leaves the position of extended family members to be "examined by the host Member State on the basis of its own national legislation" and it seems to me that the Directive anticipates that each Member State will have domestic legislation adequate to deal with hard cases falling outside the scope of the provisions in the Directive itself. Otherwise, there would surely be provision in the Directive itself for doing so……."

See further the analysis of Upper Tribunal Judge Ward in *MM v SSWP* (ESA) [2017] UKUT 437 (AAC), in particular at paragraphs 2o-29, which I believe is consistent with the view I have set out in paragraph 20 above.

24. The view I have expressed in paragraph 20 is also supported by Judge Ward's decision in *LO v SSWP* (IS) [2017] UKUT 440 (AAC), where at paragraphs 49-52 he said:

> "49. Although in earlier submissions in the case the existence of the principle was accepted, Ms Smyth submits that the combined effect of these cases and of *Mirga* is that there is no longer any room for the operation of the principle, first articulated in *Kaczmarek v SSWP* [2008] EWCA Civ 1310, that it is permissible to rely on proportionality if, but only if, there is a "lacuna" in the coverage effected by the Directive. As noted at [41], the Supreme Court did not say so in *Mirga*: rather, Lord Neuberger left open the possibility, whilst indicating that despite the difficult personal circumstances of Ms Mirga and Mr Samin, they would in any event not stand to benefit from such a principle. If the Supreme Court had been intending to overrule *Kaczmarek*, a Court of Appeal authority of relatively long standing in this fast-moving area, I consider it is likely that they would have expressly said so, but that case does not appear to be mentioned in their decision.
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> 50. Ms Smyth submits that in contemplating that proportionality might "perhaps in extreme circumstances" be invoked, "the [Supreme] Court [in *Mirga*] had in mind very narrow circumstances, for example where a person fell short of the self-sufficiency condition to a very small extent." Whilst acknowledging that any case would have to be "exceptional", I do not see why the exceptionality need be confined to the nearness of a near "miss" rather than the nature of the circumstances.
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> 51. <u>I consider therefore that there may still be some role for proportionality to fill a lacuna</u>. As to whether a lacuna exists, it is not possible to maintain the position, for all

that its purposes were expressed to include codification, that the Directive is comprehensive as to the rights which the Treaty confers. As Advocate-General Kokott noted in C-480/08 *Texeira* at [48]-[50] (emphasis added):

> "48. It cannot be contended in opposition thereto that all rights of residence of Union citizens and their family members have now been consolidated in Directive 2004/38, and that, consequently, a freestanding right of residence can no longer be derived from Article 12 of Regulation No 1612/68. Admittedly Directive 2004/38 codified existing Community instruments which, until then, had determined the legal position of certain categories of person. Moreover, the directive undeniably applies to all Union citizens and their family members.
> Nevertheless, it does not contain comprehensive and definitive rules to govern every conceivable right of residence of those Union citizens and their family members.
> 49. Thus, for example, like the legislation that preceded it, *Directive 2004/38 lacks express and comprehensive provision for the right of residence of parents who, although not gainfully employed, are the carers of Union citizens who are minors.* Furthermore, Directive 2004/38 does not include express provision as to the right of residence in a Union citizen's home State of family members who are not themselves Union citizens, in the event of that Union citizen returning to his home State.
> 50. Nor does Directive 2004/38 comprehensively determine the questions at issue here concerning rights of residence in connection with the education of children of Union citizens.

52. The congruity of the Court's decision with the Advocate General's Opinion leads one to suppose that the Court did not disagree with this. The emphasised words were clearly relevant also in subsequent cases such as *Ruiz Zambrano* where, so far as I can see, the point was taken for granted and not explicitly referred to in the Advocate General's Opinion or the judgment of the Court. Such a proposition though can only mean that the door may be open to there being a lacuna. <u>The situation may be contrasted with those where the Directive has made provision covering substantially the same ground</u>." (my underlining added in both places for emphasis).

25. I have emphasised the two sentences from the above paragraphs in *LO* because in my view they identify the critical areas of analysis on this appeal and articulate why the two remaining grounds of appeal are linked, and indeed may be said to be the opposite sides of the same coin. This is because the answer to whether the appellant's situation when he ceased his employment in late February 2011 was analogous to Ms Saint-Prix's situation in her late stages of pregnancy may also provide the basis for the answer to whether, if it was not analogous, the failure of the 2004 Directive to cover his situation was 'deliberate' (per *R(IS)4/09*) or in alternative language of *LO* 'covered substantially the same ground', or it constituted a lacuna that a proportionality assessment under the relevant Articles of TFEU may require to be filled so as to provide for a right of residence.

26. It is important to emphasise here that the proportionality assessment here is not an individualised assessment based on the particular facts of this appellant's case but rather requires a rule-based approach to whether a <u>category</u> of case was accidentally overlooked

when the relevant EU law instruments on rights of residence were being crafted: see paragraph 18 of the *MM* case referred to above.

27. I therefore turn to the '*Saint Prix* worker' argument.

Saint-Prix

28. It is important to note at the outset that the decision of the CJEU in *Saint-Prix* was not, in terms of the court's analysis, concerned with there being a lacuna in the 2004 Directive in respect of women who temporarily give up work because of the late stages of their pregnancies. Nor was the CJEU's decision founded on the 2004 Directive deliberately having excluded such women from being covered by its terms. Rather, the decision in *Saint-Prix* is founded squarely on the view that Article 7 of the 2004 Directive **does** cover such women because they retained their status as 'workers' under Article 45 of TFEU and under Article 7 of the 2004 Directive. This was because Article 7(3) of the 2004 Directive did not exhaustively define the circumstances in which a person who had temporarily given up work may retain his or her status as a worker.

29. The appellant founds, understandably, on this last point and the CJEU's restatement that the concept of "worker", given its fundamental importance under TFEU and to the underpinning of freedom of movement within the EU, must be interpreted broadly. These points appear in the following passages of the judgment in *Saint Prix*.

> "25…….it should be stated at the outset that it is apparent from recitals 3 and 4 in the preamble to that Directive that the aim of the Directive is to remedy the sector-by-sector piecemeal approach to the primary and individual right of Union citizens to move and reside freely within the territory of the Member States, in order to facilitate the exercise of that right by providing a single legislative act codifying and revising the instruments of EU law which preceded that directive (see, to that effect, *Ziolkowski* and *Szeja*, C-424/10 and C-425/10, EU:C:2011:866, paragraph 37).
> 26. In that regard, it is apparent from Article 1(a) of Directive 2004/38 that that Directive is intended to set out the conditions governing the exercise of that right, which include, where residence is desired for a period of longer than three months, in particular the condition laid down in Article 7(1)(a) of that Directive that Union citizens must be workers or self-employed persons in the host Member State (see, to that effect, *Brey*, C-140/12, EU:C:2013:565, paragraph 53 and the case law cited).
> 27. Article 7(3) of Directive 2004/38 provides that, for the purposes of paragraph 7(1)(a) of that Directive, a Union citizen who is no longer a worker or self-employed person shall nevertheless retain the status of worker or self-employed person in specific cases, namely where he is temporarily unable to work as the result of an illness or accident, where, in certain situations, he is in involuntary unemployment, or where, under specified conditions, he embarks on vocational training.
> 28. However, Article 7(3) of Directive 2004/38 does not expressly envisage the case of a woman who is in a particular situation because of the physical constraints of the late stages of her pregnancy and the aftermath of childbirth.
> 29. In that regard, the Court has consistently held that pregnancy must be clearly distinguished from illness, in that pregnancy is not in any way comparable with a pathological condition (see to that effect, *inter alia*, *Webb*, C-32/93, EU:C:1994:300, paragraph 25 and the case law cited).

30. It follows that a woman in the situation of Ms Saint Prix, who temporarily gives up work because of the late stages of her pregnancy and the aftermath of childbirth, cannot be regarded as a person temporarily unable to work as the result of an illness, in accordance with Article 7(3)(a) of Directive 2004/38.
31. However, it does not follow from either Article 7 of Directive 2004/38, considered as a whole, or from the other provisions of that Directive, that, in such circumstances, 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.
32. The codification, sought by the Directive, of the instruments of EU law existing prior to that Directive, which expressly seeks to facilitate the exercise of the rights of Union citizens to move and reside freely within the territory of the Member States, cannot, by itself, limit the scope of the concept of worker within the meaning of the FEU Treaty.
33. In that regard, it must be noted that, according to the settled case law of the Court, the concept of "worker", within the meaning of Article 45 TFEU, in so far as it defines the scope of a fundamental freedom provided for by the FEU Treaty, must be interpreted broadly (see, to that effect, *N*, C-46/12, EU:C:2013:97, paragraph 39 and the case law cited).
34. Accordingly, the Court has held that any national of a Member State, irrespective of his place of residence and of his nationality, who has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of his residence falls within the scope of Article 45 TFEU (see, *inter alia*, *Ritter-Coulais*, C-152/03, EU:C:2006:123, paragraph 31, and *Hartmann*, C-212/05, EU:C:2007:437, paragraph 17).
35. The Court has thus also held that, in the context of Article 45 TFEU, a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration must be considered to be a worker. Once the employment relationship has ended, the person concerned, as a rule, loses the 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 (*Caves Krier Frères*, C-379/11, EU:C:2012:798, paragraph 26 and the case law cited).
36. Consequently, and for the purposes of the present case, it must be pointed out that freedom of movement for workers entails the right for nationals of Member States to move freely within the territory of other Member States and to stay there for the purposes of seeking employment (see, *inter alia*, *Antonissen*, C-292/89, EU:C:1991:80, paragraph 13).
37. It follows that classification as a worker under Article 45 TFEU, and the rights deriving from such status, do not necessarily depend on the actual or continuing existence of an employment relationship (see, to that effect, *Lair*, 39/86, EU:C:1988:322, paragraphs 31 and 36).
38. In those circumstances, it cannot be argued, contrary to what the United Kingdom Government contends, that Article 7(3) of Directive 2004/38 lists exhaustively the circumstances in which a migrant worker who is no longer in an employment relationship may nevertheless continue to benefit from that status.
39. In the present case, it is clear from the order for reference, a finding not contested by the parties in the main proceeding, that Ms Saint Prix was employed in the territory of the United Kingdom before giving up work, less than three months before the birth of her child, because of the physical constraints of the late stages of

> pregnancy and the immediate aftermath of childbirth. She returned to work three months after the birth of her child, without having left the territory of that Member State during the period of interruption of her professional activity.
> 40. The fact that such constraints require a woman to give up work during the period needed for recovery does not, in principle, deprive her of the status of "worker" within the meaning Article 45 TFEU.
> 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 ceased to belong to that market during that period, provided she returns to work or finds another job within a reasonable period after confinement (see, by analogy, *Orfanopoulos and Oliveri*, C-482/01 and C-493/01, EU:C:2004:262, paragraph 50).

30. However, notwithstanding these passages, I struggle to identify any underpinning legal thesis on the basis of which it is to be discerned the other situations in which 'worker' status may be retained on ceasing work. I do not find the analogy with the *Orfanopoulos* and *Oliveri* cases of any real assistance in this appeal because paragraph 50 of the ECJ's judgment in those cases appears to have depended on one or both of Mr Orfanopoulos and Mr Oliveri having continued to be duly registered as belonging to the labour force of the host Member State when in prison (and thus unavailable for work due to imprisonment). It was on that precise basis that the worker status was retained, provided that a job was actually found within a reasonable period after release from prison. In this appeal, however, the evidence is clear that the appellant had left the labour market and had not registered with the relevant employment office.

31. The somewhat opaque language of paragraph 50 of *Orfanopoulos and Oliveri* is perhaps better understood when read alongside paragraph 40 of the *Nazli* case to which it refers. *Nazli* was addressed by Judge Ward in the follow-up cases to *Saint-Prix* in *SSWP v SFF and others* [2015] UKUT 502 (AAC); [2016] AACR 16, where, in addressing the *Saint-Prix* 'reasonable period' for being re-employed after pregnancy test, he said at paragraph 23:

> "Such an approach is consistent with cases such as *Nazli*, C-340/97, EU:C:2000:77 and with *Orfanopoulos* in which *Nazli* (a case on the Turkish agreement) was cited with approval. In *Nazli* the CJEU held:
>
> > "40. In particular, while legal employment for an uninterrupted period of one, three or four years respectively is in principle required in order for the rights provided for in the three indents of Article 6(1) to be established, the third indent of that provision implies the right for the worker concerned, who is already duly integrated into the labour force of the host Member State, to take a temporary break from work. Such a worker thus continues to be duly registered as belonging to the labour force of that State provided that he actually finds another job within a reasonable period, and therefore enjoys a right to reside there during that period.
> >
> > 41. It follows from the foregoing considerations that the temporary break in the period of active employment of a Turkish worker such as Mr Nazli while he is detained pending trial is not in itself capable of causing him to forfeit the rights which he derives directly from the third indent of Article 6(1) of Decision No

> 1/80, provided that he finds a new job within a reasonable period after his release.
>
> 42. A person's temporary absence as a result of detention of that kind does not in any way call into question his subsequent participation in working life, as is moreover demonstrated by the main proceedings, where Mr Nazli looked for work and indeed found a steady job after his release."

In other words, where a person faces an unavoidable break in circumstances which are recognised by EU law, the question is whether there is something which "in any way call[s] into question [a person's] subsequent participation in working life." The reasonable period gives the person a fair opportunity to demonstrate that there is no such thing." (my underlining added in both places for emphasis)

32. I therefore reject the appellant's argument that the key to understanding *Saint-Prix* and any principle underlying it based on *Orfanopoulos and Oliveri* lies in identifying whether the person has been forced or required to give up work. That may have been a key factual circumstance in *Orfanopoulos and Oliveri* but (a) none of the court's reasoning was founded on either person having been forced out of work/the labour market, and (b) as I have indicated, on the basis of *Nazli* the critical legal feature was that even whilst in prison under the law the individuals were recognised as being duly registered as belonging to the labour market. By way of contrast, the appellant in this appeal at the material time had, albeit for good reason (taking on the care of his children), left the labour market, was not duly registered as belonging to that market, and was not in a situation recognised by EU law. It is for these reasons that the (ultimately unsuccessful) search to obtain corroboration that social services had, in effect, required the appellant to give up his job to care for his children no longer matters.

33. Returning then to *Saint-Prix*, it seems to me that it is a case which should be treated as being unique to the special circumstances with which it was concerned. And because of this it is not in my judgment an authority that provides any basis for drawing analogies with its circumstances. That perspective in my view is underscored by what the Supreme Court said in giving its view as it made the reference to the CJEU in *Jessy Saint Prix v SSWP* [2012] UKSC 49:

> "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." (again, the underlying is mine and is added for emphasis).

The CJEU in my view was doing no more than providing the answer "to meet this particular situation".

34. Although *Saint-Prix* was expressly not about filling a lacuna in the 2004 Directive, it can just as easily be read as doing so on the basis that the position of pregnant women was an obvious and easily definable category of case that needed protecting and which the 2004 Directive (and other EU law instruments conferring rights of residence) had accidentally failed to address. As can been seen from the discussion below, however, I do not consider the same applies in this case.

35. Even were further attempts made to seek to draw an analogy between the pregnant woman giving up work and the (in effect single) parent doing so to stop his children being taken into care, the basis for doing so in my judgment is insecure. One critical focus in *Saint-Prix* was on the woman returning to the labour market within a reasonable period after having given birth. However, that period and the period needed out of work before giving birth may be relatively straightforward to define in each Member State: see paragraphs 18 and 35 of *SFF*. I cannot see that the case of the parent ceasing work to care for his dependent children because the other parent is elsewhere and not able to do so, and for periods of time which may differ from case to case and for reasons which may also differ (e.g. because of sectioning under the Mental Health Act 1983, imprisonment or simply going abroad), provides a similar ease of temporal definition. This appeal is perhaps a good example of this given the lack of any timetable for how long the appellant may have had to have been out of work caring for his children.

36. The analogy also fails, in my view, in terms of the 'category' basis for the retention of worker status. The condition of pregnancy as well as being time limited is easily definable both factually and legally. However, the types of cases or situations where a claimant may have to cease work to care for a child are numerous and varied. It may, for example, be through pure choice (in the sense of positively wanting to be at home to bring up the child), it may be because of additional caring responsibilities necessitated by limits in social care provision afforded by the statutory authorities, it may be because of relationship breakdown and there being no other parent to care for the child, or it may even be because the parent has felt compelled to do so by instruction from a public authority; and the period 'away from work' may vary in all such cases from a defined temporary period to the indefinite or even permanent.

37. In many if not all of these cases the person will have withdrawn from the labour market (as the appellant did here). However, as it was put by Mr Commissioner Howell QC (as he then was) in paragraph 8 *CIS/3789/2006*:

> "….It may seem harsh, but the status of a "worker" is accorded only to those actually engaged in economic activity in the labour market or as self-employed persons at the material time. Accepting that this description can extend to those temporarily unable to be at their work because of illness or accident, or an involuntary spell of unemployment, it is still not apt to include a person who has withdrawn from employment voluntarily and has been and remains economically inactive, neither in work nor seeking it: albeit for entirely proper and understandable practical reasons such as having had to take a break from the world of work because of the breakdown of a relationship and the continuing family responsibilities of having a young child under school age to look after and another one on the way."

38. Moreover, there is clear authority that a parent who has left work and the labour market in order to care for her children does not retain her status as a 'worker'. This is shown by the Court of Appeal's decision in *SSWP v Dias* [2009] EWCA Civ 807, where at paragraphs 21-22 the court said:

> "Mr Berry's proposition would be an impermissible judicial extension of rules carefully formulated in Europe, first by the courts and latterly by Article 7(3) of Directive 2004/38. The circumstances of a parent, of either sex, who gives up employment to care for a child but anticipates a return after some as yet unknown time are very common. The breadth of the concept of 'worker' has to recognise a balancing of the interests of migrants and of host States and their taxpayers. The codification of the concept which has been accomplished by Article 7(3) of Directive 2004/38 demonstrates where that balance has been struck. The circumstances under consideration are not analogous to those which are set out in that Article but would represent a significant departure from them.
>
> There is, moreover, no true analogy with *Lair*. Ms Lair was held to be entitled to a student maintenance grant if but only if there was "some continuity between her previous occupational activity and the course of study" (see paragraph 37 of the judgment). Ms Dias left employment for reasons which are perfectly understandable socially but which had nothing whatever to do with her occupational activity: indeed precisely the reverse."

See to similar effect *Shabani v SSHD* [2013] UKUT 315 (IAC). I do not consider *Saint-Prix* alters the correctness of either of these decisions in respect of the period falling after the reasonable period of time the woman has to return to work or seeking work following giving birth.

39. However, an additional important feature of all of the examples given in paragraph 36 above is that in all of them the caring for the child may be able to be accommodated in ways that do not necessitate or involve the parent concerned ceasing work. For example, the parent may wish to stay in work and pay for the care for the child from his or her earnings, or the parent may seek to reduce his or her hours of work in order to take on some of the care. Or the parent may even cease work altogether but claim jobseeker's allowance and remain in the labour market looking for work, albeit by restricting the work he was available to do to 16 hours per week: see regulation 13(4) of the Jobseeker's Allowance Regulation 1996.

40. The considerations set out in paragraphs 35-39 above are also relevant to the proportionality argument, to which I come shortly below, but I mention them here because they inform in my view the more indeterminate nature of defining a category of retained worker status based on ceasing work to care for a child.

41. Seeking to draw an analogy with *Saint-Prix* and retention of 'worker' status is therefore inapt. Further, it is not disputed on the facts of this case that the appellant could not meet any of the terms of Article 7(3) of the 2004 Directive so as to retain the worker status he held whilst in work up until 23 February 2011. And, absent any *Saint-Prix* analogy, I cannot discern the lawful basis on which a further 'retention of worker status category' could be arrived at and added to Article 7(3) so as to cover this case.

42. It is convenient at this stage to set out the terms of Article 7 of the 2004 Directive, which provides as follows:

> "7.1. 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
>
> (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
>
> (c) - are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
>
> - have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or
>
> (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).
>
> 2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph l(a), (b) or (c).
>
> 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.
>
> 4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner."

43. As I have said, it is not disputed that the appellant did not satisfy any of retained worker statuses set out in Article 7(3), nor was it disputed that he had ceased to be a 'worker' under Article 7(1) by the time of his claim for income support on 9 March 2011. I have addressed why Article 7(3)(b) and (c) did not apply on the facts, and Article 7(3)(d) has never been in issue. As for Article 7(3)(a), the giving up of work was nothing to do with any illness or accident suffered by the appellant, and the *inability* to work must arise from such a cause for 7(3)(a) to apply: see *CIS/3182/2005* and *R(IS)4/09*.

Proportionality

44. As paragraph 20 above sets out, the correct approach in my judgment to determining this argument is first to decide whether there is a lacuna in EU law (that is, per *RM*, covering those who should have been included in the 2004 Directive) or whether EU law has sought to address the rights of residence for workers with children but the appellant in this case simply failed to meet the criteria for having such a right. Judge Ward put it thus in paragraph 55 of *LO*:

> "In considering whether it would be disproportionate to deny the appellant a right to reside by enforcing against her the limitations in the [2004] Directive, under which….she does not qualify, it is relevant to consider the provision which the Directive does make, for situations that are in some ways analogous……."

45. It is important also to bear in mind, as it was put in paragraph 53 of *LO*, that:

> "….when considering the application of the doctrine of proportionality in any particular case, that needs to be done with a full awareness of the importance of the [2004] Directive to the budgets of Member States, as expressed through the above line of cases [such as *Brey*, *Dano* and *Alimanovic*]. Indeed, though he does not dwell on it

in the decision, it may perhaps be this which lies behind Lord Neuberger's reason at [70] of *Mirga* for distinguishing the cases before him from *Baumbast* that:

> "They were in a wholly different position from Mr Baumbast: he was not seeking social assistance, he fell short of the self-sufficiency criteria to a very small extent indeed, and he had worked in this country for many years. By contrast Ms Mirga and Mr Samin were seeking social assistance, neither of them had any significant means of support or any medical insurance, and neither had worked for sustained periods in this country. The whole point of their appeals was to enable them to receive social assistance, and at least the main point of the self-sufficiency test is to assist applicants who would be very unlikely to need social assistance."

46. In my judgment, there is no such lacuna that requires filling in this appeal. The appellant's further submission after the hearing on the decisions in *JK*, *MM* and *LO* with respect miss the point, as they are seeking to argue for an individualised assessment based on the particular circumstances of this appellant's case rather than seeking to identify the lacuna (as understood above) in EU rights of residence law.

47. Two related considerations in my judgment point decisively against the appellant's case inhabiting such a lacuna.

48. First, the considerations set out in paragraphs 35-39 above. Put shortly, *Saint-Prix* aside, Article 7 of the 2004 Directive has not sought to carve out a retention of the right of residence as a worker category covering those who cease work and leave the labour market to care for their children (and even *Saint-Prix* proceeded on the basis that Ms Saint-Prix did <u>not</u> leave the labour market: see paragraph 20 of *SFF*).

49. Second, the (other) EU law which does seek to address residence rights for workers with children. This includes, but is not limited to, the rest of the 2004 Directive. For example, the caselaw under what is now Article 10 of Regulation (EU) No 492/2011 has provided that the parent primary carer of a child who is in school shall also have a right of residence, so as to ensure the child's effective exercise of the Article 10 rights, provided that one of the child's parents is or has been a worker. Such rights do not, however, cover caring for pre-school aged children (save perhaps for those in nursery education, which did not apply on the facts in this case) and must in my judgment be seen as having deliberately excluded such rights. And, reverting to the 2004 Directive (other than Article 7), Articles 12 and 13 within it have sought to address certain defined circumstances concerned with (to use a neutral phase) a spouse 'leaving'. The effect of those two Articles is that the remaining spouse has to rely on any right of residence under the Directive which he or she may have already held prior to the 'leaving' or which he or she can exercise independently after the leaving. Neither Article would have assisted the appellant. However, the important point is that the Directive has positively sought to address the continuation of rights of residence in circumstances broadly analogous to those in play for the appellant in March 2011 and has not provided for his situation. In the context of the Directive as a whole, in my judgment that lack of provision is deliberate.

50. It is for all these reasons that I cannot find that appellant had a right reside under the income support statutory scheme when he was not working and caring for his children in

March 2011. His position fell to be addressed as Judge Rowland put it when he decided *Mirga* on the basis that:

> "individual Member States have a duty to act consistently with the Convention in their own immigration systems and because the European Union is content for individual Member States to judge whether a right of residence should be granted in other cases that do not fall within the scope of the Directive".