



# Reports of Cases

OPINION OF ADVOCATE GENERAL  
WATHELET  
delivered on 28 February 2018<sup>1</sup>

**Case C-618/16**

**Rafal Prefeta**

v

**Secretary of State for Work and Pensions**

(Request for a preliminary ruling  
from the Upper Tribunal (Administrative Appeals Chamber) (United Kingdom))

(Reference for a preliminary ruling — Freedom of movement for persons — Article 45 TFEU — Chapter 2 of Annex XII to the 2003 Act concerning the conditions of accession — Possibility of derogation by the United Kingdom from Article 7(2) of Regulation (EU) No 492/2011 and from Article 7(3) of Directive 2004/38/EC — Derogations in respect of a Polish national who has not completed a period of 12 months' registered work in the host Member State)

## I. Introduction

1. The present request for a preliminary ruling, lodged at the Registry of the Court of Justice on 29 November 2016 by the Upper Tribunal (Administrative Appeals Chamber (United Kingdom)), concerns the interpretation, first, of Annex XII to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded<sup>2</sup> ('the 2003 Act of Accession'); secondly, of Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union;<sup>3</sup> and, finally, of Article 7(3) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.<sup>4</sup>

2. This request for a preliminary ruling has arisen in the context of a dispute between Mr Rafal Prefeta, a Polish national, and the Secretary of State for Work and Pensions (United Kingdom) ('the SSWP'), concerning the latter's refusal to grant Mr Prefeta an income-related Employment and Support Allowance ('the allowance').

<sup>1</sup> Original language: French.

<sup>2</sup> OJ 2003 L 236, p. 33.

<sup>3</sup> OJ 2011 L 141, p. 1.

<sup>4</sup> OJ 2004 L 158, p. 77.

3. The decision of the SSWP not to grant Mr Prefeta the allowance was based on the fact that he did not have the status of worker or, consequently, the corresponding right of residence, which is one of the eligibility requirements for the allowance.

4. National measures adopted on the basis of the derogating provisions laid down in Chapter 2 of Annex XII to the 2003 Act of Accession prevented Polish nationals who had not worked for an uninterrupted period of 12 months as a registered worker, in accordance with national provisions, from relying on national provisions transposing Article 7(3) of Directive 2004/38 in order to retain their status of ‘worker’ and the right of residence conferred on them by virtue of that status.

5. The request for a preliminary ruling concerns the circumstances in which the provisions of Chapter 2 of Annex XII to the 2003 Act of Accession, which derogate from Article 45 TFEU and the first paragraph of Article 56 TFEU, permit, for a transitional period, the present Member States<sup>5</sup> to exclude Polish nationals from the benefits of Article 7(2) of Regulation No 492/2011 and Article 7(3) of Directive 2004/38 and, consequently, permit restrictions on the right of access of Polish nationals to the allowance.

## II. Legal framework

### A. EU law

#### 1. *The 2003 Act of Accession*

6. The 2003 Act of Accession establishes the conditions of accession to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and provides for adjustments to the Treaties.

7. The second and fifth indents of Article 1 of Part One of that act state:

‘...

- the expression “present Member States” means the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland;

...

- the expression “new Member States” means the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic;

...’

<sup>5</sup> See point 7 of this Opinion.

8. Part Four of the 2003 Act of Accession contains the temporary provisions applicable to ‘new Member States’. In Title I of that part, Article 24 of that act provides:

‘The measures listed in Annexes V, VI, VII, VIII, IX, X, XI, XII, XIII and XIV to this Act shall apply in respect of the new Member States under the conditions laid down in those Annexes.’

9. Annex XII to the 2003 Act of Accession is entitled ‘List referred to in Article 24 of the Act of Accession: Poland’. In Chapter 2 of that annex, on the freedom of movement for persons, paragraphs 1, 2, 5 and 9 are worded as follows:

‘1. Article [45] and the first paragraph of Article [56] [TFEU] shall fully apply only, in relation to the freedom of movement of workers and the freedom to provide services involving temporary movement of workers as defined in Article 1 of Directive 96/71/EC between Poland on the one hand, and Belgium, the Czech Republic, Denmark, Germany, Estonia, Greece, Spain, France, Ireland, Italy, Latvia, Lithuania, Luxembourg, Hungary, the Netherlands, Austria, Portugal, Slovenia, Slovakia, Finland, Sweden and the United Kingdom on the other hand, subject to the transitional provisions laid down in paragraphs 2 to 14.

2. By way of derogation from Articles 1 to 6 of Regulation (EEC) No 1612/68 [Regulation of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475)] and until the end of the two-year period following the date of accession, the present Member States will apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Polish nationals. The present Member States may continue to apply such measures until the end of the five-year period following the date of the accession.

Polish nationals legally working in a present Member State at the date of accession and admitted to the labour market of that Member State for an uninterrupted period of 12 months or longer will enjoy access to the labour market of that Member State but not to the labour market of other Member States applying national measures.

Polish nationals admitted to the labour market of a present Member State following accession for an uninterrupted period of 12 months or longer shall also enjoy the same rights.

The Polish nationals mentioned in the second and third subparagraphs above shall cease to enjoy the rights contained in those subparagraphs if they voluntarily leave the labour market of the present Member State in question.

Polish nationals legally working in a present Member State at the date of accession, or during a period when national measures are applied, and who were admitted to the labour market of that Member State for a period of less than 12 months shall not enjoy these rights.

...

5. A Member State maintaining national measures or measures resulting from bilateral agreements at the end of the five-year period indicated in paragraph 2 may, in case of serious disturbances of its labour market or threat thereof and after notifying the Commission, continue to apply these measures until the end of the seven-year period following the date of accession. In the absence of such notification, Articles 1 to 6 of Regulation No 1612/68 shall apply.

...

9. In so far as certain provisions of Directive 68/360/EEC [Council Directive of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485)] may not be dissociated from those of Regulation No 1612/68 whose application is deferred pursuant to paragraphs 2 to 5 and 7 and 8, Poland and the present Member States may derogate from those provisions to the extent necessary for the application of paragraphs 2 to 5 and 7 and 8.’

*2. Regulation No 492/2011*

10. Regulation No 492/2011 repealed and replaced, with effect from 16 June 2011, Regulation No 1612/68.

11. Chapter I of Regulation No 492/2011 is entitled ‘Employment, equal treatment and workers’ families’.

12. Under Section 1 of that chapter, entitled ‘Eligibility for employment’, Articles 1 to 6 prohibit, in essence, any provisions laid down by law, regulation or administrative action, or any administrative practices of a Member State, where they limit application for and offers of employment, or the right of nationals from other Member States to take up and pursue employment, or subject these to conditions not applicable in respect of its own nationals.

13. In Section 2 of that chapter, entitled ‘Employment and equality of treatment’, Article 7 provides:

‘1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.

...’

*3. Directive 2004/38*

14. Directive 2004/38 repealed and replaced, with effect from 30 April 2006, Directive 68/360.

15. Article 7 of Directive 2004/38, entitled ‘Right of residence for more than three months’, provides, in paragraph 1(a) and in paragraph 3(a) to (c):

‘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;

(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 12 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;

...'

16. Article 24(1) of Directive 2004/38, entitled 'Equal treatment', provides:

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

### ***B. United Kingdom law***

17. By the Accession (Immigration and Worker Registration) Regulations 2004/1219 ('the 2004 Regulations'), the United Kingdom had delayed the application of EU rules on the freedom of movement for workers in relation to the nationals of 8 of the 10 Member States which acceded to the European Union on 1 May 2004.<sup>6</sup> These derogations had been adopted on the basis of Article 24 of the 2003 Act of Accession and remained in force until 30 April 2011.<sup>7</sup>

18. At the time of the facts in the main proceedings, the 2004 Regulations had been amended, *inter alia*, by the Immigration (European Economic Area) Regulations 2006/1003 ('the 2006 Regulations').

19. The 2004 Regulations, in the version in force at the material time, provided for a registration system (the Accession State Worker Registration Scheme) applicable to nationals from the eight accession States referred to, who had worked in the United Kingdom during the period from 1 May 2004 to 30 April 2011.

20. Regulation 2 of the 2004 Regulations, entitled 'Accession State worker requiring registration', provided:

'(1) Subject to the following paragraphs of this regulation, "accession State worker requiring registration" means a national of a relevant accession State working in the United Kingdom during the accession period.

...

(4) A national of a relevant accession State who legally works in the United Kingdom without interruption for a period of 12 months falling partly or wholly after 30th April 2004 shall cease to be an accession State worker requiring registration at the end of that period of 12 months.

...

<sup>6</sup> Namely, the Czech Republic, the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania, Hungary, the Republic of Poland, the Republic of Slovenia and the Slovak Republic.

<sup>7</sup> Those limitations were provided for, initially, for the period from 1 May 2004 to 30 April 2009. However, it is apparent from the documents before the Court that, by letter of 8 April 2009, the United Kingdom notified the Commission of its intention to extend for a further two years (that is, until 30 April 2011) the application of its national derogations, under the provision laid down in Chapter 2, paragraph 5, of Annex XII to the 2003 Act of Accession. In its request for a preliminary ruling, the referring court points out that the legality of this extension is the subject of an appeal before the United Kingdom courts. In its written observations, the United Kingdom Government states that the question of the legality of that extension is currently pending before the Court of Appeal in the matter of *Gubeladze v Secretary of State for Work and Pensions*. At the hearing, the United Kingdom Government confirmed that the Court of Appeal had given its judgment in that case on 7 November 2017 and had concluded that the extension by the United Kingdom of the Worker Registration Scheme was disproportionate and therefore incompatible with EU law. However, that judgment is not yet final, as the United Kingdom Government stated at the hearing that it had initiated the appeal procedure before the Supreme Court of the United Kingdom.

(8) For the purpose of paragraphs (3) and (4), a person shall be treated as having worked in the United Kingdom without interruption for a period of 12 months if he was legally working in the United Kingdom at the beginning and end of that period and any intervening periods in which he was not legally working in the United Kingdom do not, in total, exceed 30 days.

...'

21. Under Regulation 4(2) of the 2004 Regulations:

'A national of a relevant accession State shall not be entitled to reside in the United Kingdom for the purpose of seeking work by virtue of his status as a work seeker if he would be an accession State worker requiring registration if he began working in the United Kingdom.'

22. Moreover, Regulation 5(3) and (4) of the 2004 Regulations, in the version applicable to the main proceedings, provided:

'(3) Subject to paragraph (4), regulation 6(2) of the 2006 Regulations shall not apply to an accession State worker requiring registration who ceases to work.

(4) Where an accession State worker requiring registration ceases working for an authorised employer in the circumstances mentioned in regulation 6(2) of the 2006 Regulations during the one-month period beginning on the date on which the work begins, that regulation shall apply to that worker during the remainder of that one-month period.'

23. The 2006 Regulations transposed Directive 2004/38 into United Kingdom law.

24. In the version applicable to the main proceedings, Regulation 6(1) of the 2006 Regulations, concerning the circumstances in which a national of a Member State of the European Economic Area (EEA) may benefit from an extended right of residence in the territory of the United Kingdom, was worded as follows:

'In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as:

...;

(b) a worker;

...'

25. Regulation 6(2) of the 2006 Regulations laid down the conditions that a person who is no longer working must fulfil in order to retain the status of worker within the meaning of paragraph 1(b) of that article, and provided:

'Subject to regulation 7A(4), a person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if

(a) he is temporarily unable to work as the result of an illness or accident;

(b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom, provided that he has registered as a jobseeker with the relevant employment office and

(i) he was employed for one year or more before becoming unemployed;

- (ii) he has been unemployed for no more than six months; or
- (iii) he can provide evidence that he is seeking employment in the United Kingdom and has a genuine chance of being engaged;

...'

26. Under Regulation 7A(4) of the 2006 Regulations:

'Regulation 6(2) applies to an accession worker where he:

- (a) was a person to whom regulation 5(4) of the [2004 Regulations] applied on 30 April 2011; or
- (b) became unable to work, became unemployed or ceased to work, as the case may be, after 1 May 2011.'

### **III. The main proceedings and the questions referred for a preliminary ruling**

27. Mr Prefeta is a Polish national. He arrived in the United Kingdom in 2008 and worked for an interrupted period from 7 July 2009 to 11 March 2011, when his employment came to an end due to an injury sustained outside work.

28. On 5 January 2011, Mr Prefeta obtained, pursuant to the national legislation, a worker registration certificate. It follows that he completed an uninterrupted period of two months and six days of registered work, that is, the period from 5 January 2011 to 11 March 2011.

29. After leaving his employment, Mr Prefeta was in duly recorded involuntary unemployment, as he was registered as a jobseeker with the relevant employment office and he was being paid unemployment benefits (jobseeker's allowance) from 20 March 2011.

30. On 20 October 2011, Mr Prefeta made a claim for the allowance. According to the referring court, the allowance is intended for categories of people whose capacity for work is limited by their physical or mental condition. That court notes that the allowance is not available to jobseekers under EU law or United Kingdom law. The referring court adds that, under United Kingdom law, it is workers, as defined in Regulation 6(1)(b) and Regulation 6(2) of the 2006 Regulations, who are entitled to it.

31. Mr Prefeta's claim was rejected by the SSWP because he was not recognised as a worker, under United Kingdom law, since he was a Polish citizen and had not completed an uninterrupted period of 12 months of registered work.

32. Mr Prefeta brought proceedings before the First-tier Tribunal (Social Entitlement Chamber) (United Kingdom), which upheld the decision of the SSWP. Mr Prefeta then brought an appeal against the decision of the First-tier Tribunal (Social Entitlement Chamber) before the referring court.

33. Before the referring court, Mr Prefeta submitted, in essence, that Regulation 5(3) of the 2004 Regulations was contrary to Article 7(3) of Directive 2004/38 and to Article 7(2) of Regulation No 492/2011.

34. Regulation 5(3) of the 2004 Regulations prevented nationals of the relevant accession States, who have not worked in the United Kingdom with a registration certificate for an uninterrupted period of 12 months, from retaining the status of worker, within the meaning of Article 7(3) of Directive 2004/38, and benefiting from equal treatment under Article 7(2) of Regulation No 492/2011. That limitation could not be justified on the basis of the 2003 Act of Accession, since that act does not permit derogation from those articles.

35. According to the SSWP, the 2004 Regulations are compatible with the 2003 Act of Accession, which provides in Chapter 2, paragraph 2 of Annex XII that ‘Polish nationals legally working ... during a period when national measures are applied, and who were admitted to the labour market of that Member State for a period of less than 12 months shall not enjoy these rights’. According to the SSWP ‘these rights’ include the rights derived from the Treaty enjoyed by ‘workers’ under Article 7(3) of Directive 2004/38 and Article 7(2) of Regulation No 492/2011.

36. The referring court considers that the interpretation of Annex XII to the 2003 Act of Accession is a complex and novel question of EU law. In those circumstances, it decided that it was necessary, in order to resolve the dispute in the main proceedings, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Did Annex XII [to the 2003 Act of Accession] permit [present] Member States to exclude Polish nationals from the benefits of Article 7(2) of Regulation [No 492/2011] and Article 7(3) of Directive [2004/38] where the worker, though he had belatedly complied with the national requirement that his employment be registered, had not yet worked for an uninterrupted registered 12-month period?

(2) If the answer to the first question is “no”, may a Polish national worker in the circumstances in question 1 rely on Article 7(3) of Directive [2004/38] which concerns retention of worker status?’

#### IV. Analysis

37. By its first question, the referring court asks, in essence, whether Chapter 2 of Annex XII to the 2003 Act of Accession, relating to freedom movement for persons, permits the present Member States to exclude Polish nationals from the benefits of two provisions, namely, Article 7(2) of Regulation No 492/2011<sup>8</sup> and Article 7(3) of Directive 2004/38,<sup>9</sup> where the worker, despite having belatedly complied with the national requirement that his employment be registered, had not yet worked for an uninterrupted period of 12 months as a registered worker. By its second question, the referring court raises the question whether and, if so, in which circumstances, a Polish national may rely on Article 7(3) of Directive 2004/38, where, despite having belatedly complied with the national requirement that his employment be registered, he has not yet worked for an uninterrupted period of 12 months as a registered worker.

38. As there is a significant overlap between the questions asked by the referring court, I consider it appropriate to deal with them together.

<sup>8</sup> Which lays down a rule of non-discrimination in matters of social and tax advantages.

<sup>9</sup> Which concerns the retention of the status of worker and the corresponding right of residence.

### A. Preliminary observations

39. It is clear from Chapter 2, paragraph 1, of Annex XII to the 2003 Act of Accession that Article 45 TFEU and the first paragraph of Article 56 TFEU fully apply only, in relation to the freedom of movement of workers and the freedom to provide services involving temporary movement of workers as defined in Article 1, second indent, of that Act of Accession between Poland and the present Member States, subject to the transitional provisions laid down in paragraphs 2 to 14 of the same chapter of that annex.<sup>10</sup>

40. Indeed, those provisions provide for derogations from Articles 1 to 6 of Regulation No 1612/68 and from the provisions of Directive 68/360 which *may not be dissociated* from those of Regulation No 1612/68 whose application is deferred pursuant to paragraphs 2 to 5 and 7 and 8 of Chapter 2, *to the extent necessary* for the application of those paragraphs.<sup>11</sup>

41. Those derogations from Article 45 TFEU and from the first paragraph of Article 56 TFEU, relating to the principles of the freedom of movement for workers and the freedom to provide services involving temporary movement of workers, are obviously to be interpreted strictly.<sup>12</sup>

### B. Permission to exclude Polish nationals from the benefit of Article 7(2) of Regulation No 492/2011

42. It should be noted that in Chapter 2, paragraphs 1 to 14, of Annex XII to the 2003 Act of Accession, there is no reference to Regulation No 492/2011, which is mentioned in the first question referred for a preliminary ruling and which was adopted after the Act of Accession.

43. However, Regulation No 1612/68, which is specifically referred to in those provisions, was repealed by Regulation No 492/2011,<sup>13</sup> the first recital of which states that ‘Regulation [No 1612/68] has been substantially amended several times [and that] in the interests of clarity and rationality the said Regulation should be codified’. I note that Articles 1 to 7 of those two regulations are almost identical.

44. As regards the provisions of Regulation No 1612/68, Chapter 2, paragraphs 1 to 14, of Annex XII to the 2003 Act of Accession relating to freedom of movement for persons<sup>14</sup> provides for derogations only from Articles 1 to 6 of that regulation, which concern ‘eligibility for employment’.

45. Therefore, without prejudice to the applicability *ratione temporis* of Regulation No 492/2011,<sup>15</sup> references to the relevant provisions of Articles 1 to 6 of Regulation No 1612/68, must be understood, *mutatis mutandis*, as references to Articles 1 to 6 of Regulation No 492/2011, even if the relevant provisions of the 2003 Act of Accession are interpreted strictly.

<sup>10</sup> In paragraph 24 of the judgment of 10 February 2011, *Vicoplus and Others* (C-307/09 to C-309/09, EU:C:2011:64), the Court held that ‘if national legislation is justified pursuant to one of the transitional measures referred to in Article 24 of the 2003 Act of Accession, in this case the measure provided for in Chapter 2, paragraph 2, of Annex XII to that act, the question of the compatibility of that legislation with Articles 56 TFEU and 57 TFEU can no longer arise’.

<sup>11</sup> See, inter alia, Chapter 2, paragraph 9, of Annex XII to the 2003 Act of Accession.

<sup>12</sup> See, by analogy, judgments of 23 March 1983, *Peskeloglou* (77/82, EU:C:1983:92, paragraph 12), and of 3 December 1998, *KappAhl* (C-233/97, EU:C:1998:585, paragraph 18). In paragraph 18 of the judgment of 3 December 1998, *KappAhl* (C-233/97, EU:C:1998:585), the Court ruled that ‘the derogations permitted by the Act of Accession from the rules laid down by the Treaty must be interpreted in such a way as to facilitate achievement of the objectives of the Treaty and application in full of its rules’. In paragraph 33 of the judgment of 28 April 2009, *Apostolides* (C-420/07, EU:C:2009:271), the Court held that ‘the Act of Accession of a new Member State is based essentially on the general principle that the provisions of [European Union] law apply *ab initio* and *in toto* to that State, derogations being allowed only in so far as they are expressly laid down by transitional provisions’.

<sup>13</sup> See Article 41 of Regulation No 492/2011.

<sup>14</sup> In particular, paragraphs 2 to 5 and 7 and 8.

<sup>15</sup> See footnote 7 of this Opinion.

46. The other provisions of Regulation No 1612/68, in particular Article 7(2) in Title II of Part I of that regulation, which is entitled ‘Employment and equality of treatment’, and which provides that a worker who is a national of a Member State is to enjoy, in the territory of other Member States, ‘the same social and tax advantages as national workers’, are therefore not covered by the derogations relating to freedom of movement for persons provided for in Chapter 2, paragraphs 1 to 14, of Annex XII to the 2003 Act of Accession.

47. It follows that, since the accession of the Republic of Poland to the European Union, Article 7(2) of Regulation No 1612/68 and, where appropriate, Article 7(2) of Regulation No 492/2011, have been fully applicable to Polish *workers*,<sup>16</sup> who therefore should have been enjoying the same social and tax advantages as national workers,<sup>17</sup> as Chapter 2, paragraphs 1 to 14, of Annex XII to the 2003 Act of Accession did not provide for any derogation from Article 45 TFEU or from the first paragraph of Article 56 TFEU.

48. Consequently, the fact that Mr Prefeta belatedly complied with the national requirement that his employment be registered and has not yet completed an uninterrupted period of 12 months of registered work cannot justify his exclusion, by the United Kingdom, from the benefits of Article 7(2) of Regulation No 1612/68 or, where appropriate, Article 7(2) of Regulation No 492/2011, when he had the status of worker.

49. In the light of the foregoing, I consider that Annex XII to the 2003 Act of Accession does not permit the present Member States to exclude Polish nationals from the benefits of Article 7(2) of Regulation No 1612/68 or, where appropriate, Article 7(2) of Regulation No 492/2011, where they have the status of worker, that is to say, where they pursue an activity as employed or self-employed persons.

### ***C. Permission to exclude Polish nationals from the benefit of Article 7(3) of Directive 2004/38***

#### *1. Arguments of the parties*

50. Mr Prefeta considers that Article 7 of Directive 68/360 and Article 7(3) of Directive 2004/38 provide that, where a worker suffers a misfortune, such as temporary illness, he has the right to remain in the territory of the State where he has been working. He submits, first, that that right does not affect how open or closed the labour market is to the 1. worker; secondly, that that right may be exercised only once the worker has already been allowed access to the labour market; and, thirdly, that that right would not prevent a Member State from operating a scheme in which nationals of accession States may be barred from certain jobs.<sup>18</sup> According to Mr Prefeta, ‘rather than governing an individual’s eligibility for employment, Article 7 of Directive 68/360 and Article 7(3) of Directive 2004/38 provide for the conditions which an EU worker is entitled to enjoy while in a host state. They are dissociable from Title I of Regulation No 1612/68. Indeed, they are closer in theme to the provisions in Title II of Regulation No 1612/68, “*Employment and equality of treatment*”, in particular Article 7 of Title II’.

<sup>16</sup> This implies that, during the entire period when Mr Prefeta worked in the United Kingdom and thus had the status of worker, namely, between 7 July 2009 and 11 March 2011, he should have been enjoying the same social and tax advantages as national workers.

<sup>17</sup> See, by analogy, judgment of 30 May 1989, *Commission v Greece* (305/87, EU:C:1989:218, paragraphs 15 and 16).

<sup>18</sup> According to Mr Prefeta, ‘that is because until an Accession national had completed 12 months as a worker, a state could regulate his ongoing access to the labour market. For example, if Mr Prefeta had taken up a new job, he would have been required to register it with the UK authorities, a condition which would otherwise have been prohibited under Article 3(1) of Regulation No 1612/68’.

51. Mr Prefeta submits that the ‘general purpose of Accession restrictions [is] not frustrated by giving effect to Art 7(3) of Directive 2004/38’. He considers that ‘accession restrictions enable a state temporarily to control the conditions of access to its labour market in order to avoid its disruption during the accession period ... Hence the permissibility of derogation from Title I of Regulation No 1612/68. ... A person’s retained right of residence in the host state when he has temporarily ceased working is not a factor itself capable of disrupting the state’s labour market, because the “worker” is not at that point working. Thus it is not necessary, in order to achieve the objective of the accession restrictions, to imply a power to restrict a right to retain worker status’.

52. The United Kingdom Government considers that Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession does not require that an individual, who has worked for an uninterrupted period of 12 months, but has not obtained a worker registration certificate for that period, be given access to the full range of rights and benefits which a Member State national would be able to claim by virtue of his status as a worker. Furthermore, that act does not require that an individual be permitted to enjoy all those rights where he has, at some point, obtained a worker registration certificate, but has not held that certificate for the full period of work.

53. The United Kingdom Government states that if a Polish citizen, such as Mr Prefeta, who has not worked for an uninterrupted period of 12 months as a registered worker, had access to the full range of rights and benefits enjoyed by nationals of a Member State by virtue of their status as workers, the clarification provided in Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession, according to which an individual *must have been admitted* for a period of 12 months in order to enjoy those rights, would be rendered superfluous. Similarly, this would frustrate the purpose of requiring registration, which was intended, on the one hand, to allow the United Kingdom to assess the conditions for access to its labour market in order to determine whether further steps needed to be taken and, on the other, to encourage nationals of accession States to regularise their status and contribute to the formal economy.<sup>19</sup>

54. The Commission considers that if an accession State worker were able to rely on Article 7(3)(b) and (c) of Directive 2004/38, the United Kingdom would be prevented from giving effect to the very substance of the derogations provided for in the 2004 Regulations, which were aimed at limiting access to its labour market by restricting the right of economically inactive accession State nationals to reside in the United Kingdom for the purposes of seeking employment there. However, as regards Article 7(3)(a) of Directive 2004/38, the Commission considers that Annex XII to the 2003 Act of Accession could not serve as a basis for restricting the right to retain the status of worker because the substance of that provision has no connection with the United Kingdom’s measures regulating access to the labour market.<sup>20</sup>

## 2. *The applicability of Article 7(3) of Directive 2004/38*

55. It should be noted that, Chapter 2, paragraphs 1 to 14, of Annex XII to the 2003 Act of Accession makes no reference to Directive 2004/38,<sup>21</sup> as it predates the adoption and entry into force of that directive.

<sup>19</sup> According to the United Kingdom Government, if those nationals had needed to obtain only one certificate of admission to the United Kingdom labour market in order to acquire the right to social assistance, this would have increased the burden on the United Kingdom’s social security system and removed any incentive for them to keep the registration certificate up to date. They were therefore required to register their work every time they moved employer.

<sup>20</sup> Moreover, the Commission states that it had opened an infringement procedure against the United Kingdom concerning the scope of derogating measures applied to accession State workers, which included, in particular, the derogation from Article 7(3) of Directive 2004/38. However, that procedure did not, ultimately, progress to referral to the Court, as the Commission considered that, following the repeal of those national measures from 1 May 2011, the action would have become devoid of purpose.

<sup>21</sup> And in particular, Article 7(3) thereof, which is referred to in the first question referred by the national court for a preliminary ruling.

56. However, paragraph 9 of Chapter 2 of Annex XII to the 2003 Act of Accession provides for the possibility for present Member States to derogate from the provisions of Directive 68/360 which cannot be dissociated from those of Articles 1 to 6 of Regulation No 1612/68 whose application is deferred pursuant to, in particular, Chapter 2, paragraph 2,<sup>22</sup> of Annex XII to the 2003 Act of Accession, to the extent necessary for the application of that paragraph.

57. The wording of Article 7 of Directive 68/360<sup>23</sup> is, *in essence*, very similar to the wording of Article 7(3) of Directive 2004/38. Indeed, those two provisions set out the circumstances in which an EU citizen who no longer pursues an activity as an employed or self-employed person retains the status of worker.

58. In that regard, it should be noted that in its proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,<sup>24</sup> the Commission stated in its comment on Article 8(7) (now Article 7(3) of Directive 2004/38) that the provisions at issue<sup>25</sup> ‘broadly take over certain provisions of Directive [68/360], with clarifications, and incorporate Court of Justice case-law regarding the retention of worker status where the worker is no longer engaged in any employed or self-employed activity’.

59. Therefore, I consider that notwithstanding the fact that Chapter 2, paragraph 9, of Annex XII to the 2003 Act of Accession makes no explicit reference to Article 7(3) of Directive 2004/38, it is necessary to examine whether that provision cannot be dissociated from those of Articles 1 to 6 of Regulation No 1612/68 whose application is deferred pursuant to Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession and, where appropriate, to what extent it is necessary to derogate from Article 7(3) of Directive 2004/38 for the application of that provision of the 2003 Act of Accession.<sup>26</sup>

22 Although paragraph 9 also refers to paragraphs 3, 4, 5, 7 and 8 which precede it, I consider that only the provisions of *paragraph 2*, which permits the present Member States to restrict the right of access of Polish nationals to the labour market for a period of 12 months, are directly relevant to the main proceedings.

23 Indeed, under Article 7(1), the fact that a Member State national who has a right of residence for the purpose of employment in another Member State is temporarily incapable of work as a result of illness or accident, or because he is in duly recorded involuntary unemployment, does not lead to the withdrawal of the residence permit issued in accordance with Article 4 of that directive. Moreover, under Article 7(2) of Directive 68/360, when the residence permit is renewed for the first time, the period of validity may be restricted to not less than 12 months where the worker has been involuntarily unemployed in the host Member State for more than 12 consecutive months. Judgment of 26 May 1993, *Tsiotras* (C-171/91, EU:C:1993:215, paragraph 10).

24 COM(2001) 257 final (OJ 2001 C 270 E, p. 150), submitted by the Commission on 29 June 2001.

25 Namely, Article 7(3) of Directive 2004/38.

26 It should be noted that Article 45 TFEU grants Member State nationals a right of residence in the territory of other Member States in order to pursue (see Article 45(3)(c) TFEU) or seek paid employment. Judgment of 26 May 1993, *Tsiotras* (C-171/91, EU:C:1993:215, paragraph 8). See also judgment of 26 February 1991, *Antonissen* (C-292/89, EU:C:1991:80, paragraph 14), which concerns not only Article 45(3) TFEU, but also Articles 1 and 5 of Regulation No 1612/68. Indeed, that right of residence is inherent in the right of freedom of movement for workers within the European Union.

3. Can Article 7(3) of Directive 2004/38 be dissociated from Articles 1 to 6 of Regulation No 1612/68 concerning eligibility for work?

60. In the judgment of 21 February 2013, *N.* (C-46/12, EU:C:2013:97, paragraph 47), the Court ruled that ‘the definition of the concept of “worker” within the meaning of Article 45 TFEU expresses the requirement, which is inherent in the very principle of the free movement of workers, that the advantages conferred by EU law under that freedom may be relied on only by people genuinely pursuing or *genuinely wishing to pursue employment activities*’.<sup>27</sup>

61. Although Article 7 of Directive 2004/38 is entitled ‘Right of residence for more than three months’, paragraph 3 thereof provides a non-exhaustive<sup>28</sup> list of the circumstances in which an EU citizen who no longer pursues an activity as an employed or self-employed person for reasons beyond his control, such as involuntary unemployment and temporary incapacity for work as a result of illness or accident, is to retain, in addition to the right of residence to which he is entitled, the status of worker, with a view, *in particular, to his being able to take up a new activity as an employed or self-employed person*.<sup>29</sup>

62. The possibility for an EU citizen<sup>30</sup> to retain the status of worker is therefore related to his demonstrating that he is available or able to pursue a professional activity and thus to re-enter the labour market within a reasonable period of time. I note that Article 7(3)(a) of Directive 2004/38 covers only *temporary* incapacity to work, and that Article 7(3)(b) and (c) of that directive requires that a worker be *registered as a jobseeker* with the relevant employment office.

63. In the light of the foregoing, I take the view that Article 7(3) of Directive 2004/38 covers situations in which European citizens’ reintegration into the labour market is possible, meaning that that provision cannot be dissociated from Articles 1 to 6 of Regulation No 1612/68<sup>31</sup> which regulate eligibility for work.

<sup>27</sup> Emphasis added. See, to that effect, judgment of 19 June 2014, *Saint Prix* (C-507/12, EU:C:2014:2007). As stated, respectively, in paragraphs 28, 40 and 41 of that judgment, ‘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’. However, ‘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’. ‘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*’ (emphasis added). See also judgment of 29 April 2004, *Orfanopoulos and Oliveri* (C-482/01 and C-493/01, EU:C:2004:262, paragraph 50), in which the Court ruled that ‘in respect more particularly of prisoners who were employed before their imprisonment, the fact that the person concerned was not available on the employment market during such imprisonment does not mean, as a general rule, that he did not continue to be duly registered as belonging to the labour force of the host Member State during that period, provided that he actually *finds another job within a reasonable time after his release*’ (emphasis added).

<sup>28</sup> See judgment of 19 June 2014, *Saint Prix* (C-507/12, EU:C:2014:2007, paragraphs 31 and 38), and my Opinion in *Gusa* (C-442/16, EU:C:2017:607, point 72).

<sup>29</sup> See my Opinion in *Gusa*, (C-442/16, EU:C:2017:607, point 77). Indeed, as early as 1964, the Court held that Article 45 TFEU and the legislation on social security for migrant workers in force at that time ‘did not intend to restrict protection only to the worker in employment but tend logically to protect also the worker who, having left his job, *is capable of taking another*’ (emphasis added). See judgment of 19 March 1964, *Unger* (75/63, EU:C:1964:19).

<sup>30</sup> Who no longer pursues an activity as an employed or self-employed person.

<sup>31</sup> That said, I also consider that Article 7(3) of Directive 2004/38 may not be dissociated from Article 7(2) of Regulation No 1612/68 or from Article 7(2) of Regulation No 492/2011. Indeed, provided he retains his status of worker, a person is to enjoy the same social and tax advantages as national workers. In the judgment of 4 June 2009, *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344, paragraph 32), the Court held that EU citizens who retained their status as workers, on the basis of Article 7(3)(c) of Directive 2004/38, were entitled to benefits designed to facilitate access to the labour market.

4. *To what extent is it necessary to derogate from Article 7(3) of Directive 2004/38 for the application of Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession?*

64. Article 7(3)(a) of Directive 2004/38 does not impose any specific requirement as to the duration of the period of employment or self-employment which EU citizens must complete in order to retain the status of worker. It is sufficient that citizens pursue activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary.<sup>32</sup>

65. By contrast, Article 7(3)(b) of Directive 2004/38 requires that the period of employment or self-employment be ‘more than one year’. Moreover, Article 7(3)(c) of that directive provides that European citizens are to retain the status of worker for at least six months if they are 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 12 months.

66. Chapter 2, paragraph 2, first subparagraph, of Annex XII to the 2003 Act of Accession provides, in essence, that during a transitional period, the present Member States may derogate from Articles 1 to 6 of Regulation No 1612/68 in adopting national measures regulating access to their labour markets by Polish nationals. The third subparagraph of that paragraph limits or qualifies that possibility by providing, in essence, that Polish nationals who are *admitted for an uninterrupted period of 12 months or longer* to the labour market of a present Member State following accession will enjoy access to the labour market of that Member State. Furthermore, the fourth subparagraph confirms<sup>33</sup> that Polish nationals legally working in a present Member State during a period when national measures are applied, and who were admitted to the labour market of that Member State for a period of less than 12 months, *are not to enjoy* those rights (emphasis added).

67. According to the Court, the purpose of Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession is to prevent, following the accession to the European Union of new Member States, disturbances on the labour market of the existing Member States due to the immediate arrival of a large number of workers who are nationals of those new States.<sup>34</sup> According to the Court, Articles 56 and 57 TFEU<sup>35</sup> do not preclude a Member State, during the transitional period provided for in Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession, from making the hiring out, on its territory, of workers who are Polish nationals subject to the obtaining of a work permit.<sup>36</sup>

68. I therefore consider that the provisions of Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession establish a special<sup>37</sup> scheme which provides for the possibility for the present Member States to regulate access to their labour markets by Polish nationals.

32 See, to that effect, judgment of 4 June 2009, *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344, paragraph 26 and the case-law cited).

33 I therefore consider that the EU legislature leaves no doubt as to the interpretation, in making reference to a period of employment of 12 months in Chapter 2, paragraph 2, both in the third and the fourth subparagraphs, of Annex XII to the 2003 Act of Accession.

34 Judgment of 10 February 2011, *Vicoplus and Others* (C-307/09 to C-309/09, EU:C:2011:64, paragraph 34 and the case-law cited). Paragraph 26 of that judgment states that ‘Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession derogates from the free movement of workers by not applying, on a temporary basis, Articles 1 to 6 of Regulation No 1612/68 to Polish nationals. Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession provides that, for a period of two years from 1 May 2004 — the date of the Republic of Poland’s accession to the European Union — the Member States are to apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Polish nationals. That provision also provides that the Member States may continue to apply such measures until the end of the five-year period following the date of the accession of the Republic of Poland to the European Union’.

35 I consider that the same reasoning applies in relation to Article 45 TFEU, given the close connection between that provision and Article 56 TFEU in Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession.

36 Judgment of 10 February 2011, *Vicoplus and Others* (C-307/09 to C-309/09, EU:C:2011:64, paragraph 41). See, by analogy, judgment of 18 June 2015, *Martin Meat* (C-586/13, EU:C:2015:405, paragraphs 23 to 26).

37 And circumscribed.

69. In that regard, it is clear from the third and fourth subparagraphs of that provision that the present Member States may make access to the labour market by Polish nationals subject to two cumulative conditions, namely, first, the requirement to be admitted to the labour market, and secondly, the requirement, after having been admitted to the labour market, to work for an uninterrupted period of no less than 12 months. Indeed, it is apparent from the wording of Chapter 2, paragraph 2, third subparagraph, of Annex XII to the 2003 Act of Accession that a Polish national must be *admitted* to the labour market *for a period of 12 months*, which implies, in my view, that the work carried out must follow his admission to the labour market.

70. In my opinion, the term ‘admitted’ entails or necessarily implies a third party action in relation to the citizen concerned. It is not sufficient for him to work. He must have been allowed to do so. This involves, therefore, following a procedure which regulates admission or access to the labour market, such as the obtaining of a work permit, as in the case which gave rise to the judgment of 10 February 2011, *Vicoplus and Others* (C-307/09 to C-309/09, EU:C:2011:64), or a registration system such as that at issue in the main proceedings.<sup>38</sup>

71. In those circumstances,<sup>39</sup> it is only after having fulfilled the two abovementioned cumulative conditions that Polish nationals are to enjoy free access to the labour market in accordance with Articles 45 and 56 TFEU. Therefore, Polish nationals who have been admitted to the labour market but who have ceased working before the expiry of the 12-month period<sup>40</sup> following that admission, and those who have worked for more than 12 months without having been allowed to do so, are in the same situation as those who are seeking employment without yet having ever worked in a present Member State.

72. Indeed, if a Polish national, admitted to the labour market for a period of less than 12 months, or who has worked for more than 12 months without having been admitted to the labour market, could enjoy the status of worker in accordance with Article 7(3) of Directive 2004/38 and, accordingly, enjoy free access to the labour markets of the present Member States, in accordance with Articles 45 and 56 TFEU, this would be contrary to the very wording of Chapter 2, paragraph 2, third and fourth subparagraphs, of Annex XII to the 2003 Act of Accession and would undermine the purpose of those provisions.<sup>41</sup>

73. Consequently, I consider that, in order to apply Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession, it is necessary to derogate from Article 7(3) of Directive 2004/38 by requiring, during the transitional period laid down by that Act of Accession, that Polish nationals be admitted to the labour market of a present Member State for an uninterrupted period of 12 months or more following that admission.<sup>42</sup>

74. In the light of the foregoing, I consider that Annex XII to the 2003 Act of Accession permitted the present Member States to exclude Polish nationals from the benefit of Article 7(3) of Directive 2004/38 where the worker, although subject to the national requirement that his employment be registered, had not yet worked for an uninterrupted period of 12 months following the fulfilment of that requirement. In such circumstances, Polish nationals may not rely on Article 7(3) of Directive 2004/38.

<sup>38</sup> I note that there is nothing in the documents before the Court to indicate that the registration system at issue in the main proceedings was more onerous than a permit system.

<sup>39</sup> Where a present Member State has made use of the option, provided for in Chapter 2 of Annex XII to the 2003 Act of Accession, to derogate from the freedom of movement.

<sup>40</sup> Either for reasons listed in Article 7(3) of Directive 2004/38, or because they have voluntarily left the labour market of the present Member State. See Chapter 2, paragraph 2, third subparagraph, of Annex XII to the 2003 Act of Accession.

<sup>41</sup> See point 65 of this Opinion.

<sup>42</sup> It is apparent from the request for a preliminary ruling that the United Kingdom made use of this possibility in adopting the 2004 Regulations, which provided for a registration system applicable to the eight accession States referred to. See points 17 and 19 of this Opinion. It is apparent from Regulation 2(4) of the 2004 Regulations that a Polish national who legally works in the United Kingdom for an uninterrupted period of 12 months following accession ceases to be subject to registration. Moreover, Regulation 5(3) of the 2004 Regulations limits the possibility for a worker who is subject to registration to retain the status of worker.

## V. Conclusion

75. In the light of all the foregoing considerations, I propose that the Court answer the questions referred by the Upper Tribunal (Administrative Appeals Chamber) (United Kingdom) as follows:

Annex XII to the 2003 Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded did not permit the present Member States to exclude Polish nationals from the benefits of Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, or where appropriate, Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, where they have the status of worker, that is to say, where they pursue an activity as employed or self-employed persons.

Annex XII to the 2003 Act of Accession permitted the present Member States to exclude Polish nationals from the benefit of Article 7(3) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, where workers, although subject to the national requirement that their employment be registered, had not yet worked for an uninterrupted period of 12 months following the fulfilment of that requirement. In those circumstances, Polish nationals may not rely on Article 7(3) of Directive 2004/38.