**Pregnancy-related employment breaks, the gender dynamics of free movement law and curtailed citizenship**

Case C-507/12, *Jessy Saint Prix v Secretary of State for Work and Pensions,* Judgment of the European Court of Justice (First Chamber) of 19 June 2014, EU:C:2014:2007

**1. Introduction**

The movement of people across borders is one of the most contested topics within current political discourse on the future of the European Union. Various (often unsavoury) depictions of ‘migration’ within Europe have dominated headlines in recent months.[[1]](#footnote-1) The relevance of this broader context may not be immediately apparent to the case which forms the basis of the analysis here, namely *Jessy Saint Prix v Secretary of State for Work and Pensions,* a case regarding the potential for ‘migrant worker’ status under Union law to have continuing effects beyond the cessation of the employment relationship, which found its way to the CJEU via the Supreme Court of the United Kingdom. Nevertheless, elements of this case reflect similar sentiments to those surrounding the reporting of the global migrant crises. In particular, the restrictive stance adopted by the UK government in arguing to limit the entitlement of Ms Saint Prix, a woman experiencing (temporary) difficulties due to her absence from the labour market as a consequence of pregnancy and childbirth, is symptomatic of the often antagonistic and prohibitive climate in which migration is discussed and within which migrants must survive.[[2]](#footnote-2)

Of course, *Jessy Saint Prix* is important for reasons that extend far beyond an exemplification of the present migration climate. For example, the case has interesting implications for how far the free movement framework established under Directive 2004/38 can be considered as complete statement of the law. In this regard, in emphasising the non-exhaustive nature of Article 7(3) of the Directive, *Saint Prix* exemplifies how Union primary law continues to be important for understanding the scope of, as well as enforcing, rights. This analysis, in the commentary section, will address the implications of the judgment for two particular areas. First, this case has significance for the gender dynamics of free movement law. Specifically, it offered the CJEU an opportunity to consider the impact of pregnancy and childbirth on the status of migrant women under the law on the free movement of workers. It throws into sharp focus the absence of equality under the legislative framework, set out in Directive 2004/38 on the free movement rights of Union citizens and their family members,[[3]](#footnote-3) in relation to the circumstances in which ‘worker’ status can continue for migrants despite a break in the employment relationship. As will be demonstrated further, the CJEU did seek to address the lack of parity accorded to ‘male’ and ‘female’ employment breaks under Article 7(3) of Directive 2004/38, which affords no express coverage to pregnancy-related breaks, at least for Ms Saint Prix. Nevertheless broader issues about the extent to which EU free movement law can genuinely claim to embody a commitment to gender equality are yet to be addressed. Secondly, *Saint Prix* raises questions about the extent to which the citizenship provisions of the Treaty may offer protection to individuals not able to demonstrate continuing status as a worker under the Directive. When this judgment is situated against recent case law on migrants’ rights of residence and access to social benefits,[[4]](#footnote-4) it appears that those not able to return to work within a period deemed as reasonable by national courts, may find themselves in a precarious situation.

**2. Facts**

Ms Jessy Saint Prix, a French national and qualified teacher, arrived in the UK in July 2006. She worked, initially, as a teaching assistant (from September 2006 – August 2007) before enrolling on a Post Graduate Certificate in Education course, to be completed at the University of London (from September 2007 – to June 2008). In February 2008 she withdrew from the course as she was pregnant, the baby being due in early June 2008. Following her withdrawal from her studies, Ms Saint Prix sought employment in a secondary school and registered with an employment agency to assist her in this process. However, as no positions at secondary school level were available, she instead worked in a series of nursery school roles. When she was almost six months pregnant, in March 2008, the demands of caring for pre-school children had become too strenuous and Ms Saint Prix stopped this work. She initially searched for lighter work but, when none was available, made a claim for Income Support (which her general practitioner supported). This benefit is available to certain groups of people with a very low income. By this point, the estimated due date, or date of confinement, was 11 weeks away. This is significant because under UK law this is the point at which pregnant women may become eligible to receive Income Support.[[5]](#footnote-5) It is not necessary for a woman in such circumstances to be available for work or actively seeking employment.[[6]](#footnote-6) However, in May 2008 Ms Saint Prix’s claim was refused by the Secretary of State, on the basis that she was a “person from abroad” not habitually resident in the UK. Underlying this decision was the finding that she did not qualify as a worker for the purposes of applying Directive 2004/38 and, as such, could not be considered as having a right to reside in the territory. Ms Saint Prix’s baby was born prematurely on 21 May 2008. She returned to work just three months later.

The First Tier Tribunal, in September 2008, upheld Ms Saint Prix’s appeal, however the Secretary of State’s appeal to the Upper Tribunal was upheld in May 2010. The Court of Appeal then confirmed the Upper Tribunal’s decision in July 2011. Ms Saint Prix, with the support of the AIRE Centre,[[7]](#footnote-7) appealed to the UK’s Supreme Court. At issue throughout the course of this case was the correct interpretation of Article 7(3) of Directive 2004/38. This provision provides a number of circumstances in which a migrant who has been a worker pursuant to Article 45 TFEU (or self-employed according to Article 49 TFEU) to retain the status despite no longer being in the labour market. These include: being temporarily unable to work as the result of an illness or accident; being involuntarily unemployed after one year of employment and registering as a job-seeker; and embarking on vocational training relating to the former work. O’Brien has already noted how, somewhat perplexingly, the provision is silent on “female social security ‘risks’”.[[8]](#footnote-8) Pregnancy is such a ‘risk’ that clearly impacts on women, but obligations relating to care that necessitate a break from employment can also be included in this category as a consequence of the still prevalent trend for women to more likely be primarily responsible for providing care than men.[[9]](#footnote-9) One of the issues before the CJEU in *Saint Prix*, was whether the grounds in Article 7(3) were exhaustive – as the UK government were arguing – or if other circumstances, specifically a temporary inability to work due to pregnancy and/or the aftermath of pregnancy, could also come within the scope.

It was in October 2012 that the Supreme Court referred the following questions to the CJEU:[[10]](#footnote-10)

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

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

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

**3. Advocate General Wahl’s Opinion**

Advocate General Wahl delivered his opinion on 12 December 2013.[[11]](#footnote-11) He immediately situated the dispute at issue within the broader context of free movement, which necessitates the abolition of discrimination on grounds of nationality, and equality on the grounds of sex, “both of which undoubtedly enjoy constitutional status in EU law.”[[12]](#footnote-12) Advocate General Wahl also made clear in his opening that, in his view, a woman in the situation of Ms Saint Prix was to be regarded as a worker under Article 45 TFEU and, more specifically, as being covered by Article 7 of Directive 2004/38. Such a conclusion was necessary in order to avoid impinging upon both the principle of non-discrimination on the ground of nationality and that of equality on the ground of sex.[[13]](#footnote-13)

Throughout, the opinion took particular issue with the arguments of the UK Government.[[14]](#footnote-14) For example, Advocate General Wahl dismissed the suggestion of the Government that the lack of express reference to pregnancy in Article 7(3) was indicative of a deliberate policy choice to exclude it from the scope of the provision.[[15]](#footnote-15) The Advocate General noted early on that the UK Government was the only party that made submissions before the Court that failed to recognise that to deny Ms Saint Prix qualified as a worker required the adoption of a very narrow interpretation of Article 45 TFEU and Article 7 of Directive 2004/38.[[16]](#footnote-16) The Advocate General drew on case law, such as *Lair,[[17]](#footnote-17)* to stress that the Court had consistently provided for workers’ rights to extend beyond the employment relationship in certain circumstances (such as involuntarily unemployment).[[18]](#footnote-18) He then made reference to the case of *Orfanopoulos[[19]](#footnote-19)* to make the point that the Court has previously found that a prisoner, who was employed in the host Member State prior to imprisonment, was not considered to have lost his status as a worker, “provided that he secure[d] employment within a *reasonable* time of his release.”[[20]](#footnote-20) He did go on to suggest, however, that *Orfanopoulos* could not be applied directly to Ms Saint Prix’s situation as it had been decided prior to the adoption of Directive 2004/38 and, under this regime, residence beyond three months is governed by Article 7(3).[[21]](#footnote-21) Nevertheless, the Advocate General also stressed that the concept of worker flows ostensibly from Article 45 TFEU and, as matter of primary law, cannot be altered by an instrument of secondary law.[[22]](#footnote-22)

According to the Advocate General, “the most appropriate point of reference for assessing the position of a woman in Ms Saint Prix’s position is to be found in the exception to the general rule, provided for in Article 7(3)(a), which refers to temporary inability to work because of illness or accident.”[[23]](#footnote-23) He does concede later on that this sits a little uneasily with the clear line of case law on discrimination, starting with *Webb,[[24]](#footnote-24)* which held in very definite terms that pregnancy is not to be equated with illness.[[25]](#footnote-25) For the Advocate General, the incongruity of the effect of applying Article 7(3) in a literal way – in that not equating pregnancy with illness would result in EU law providing protection for illness, but not for pregnancy – warranted a fresh perspective on the issue of whether pregnancy and illness are capable of being compared.[[26]](#footnote-26) Advocate General Wahl was also very clear that to exclude pregnancy-related absences in employment from Article 7(3) would afford less protection to women and, consequently, would breach the principle of non-discrimination on grounds of sex as set out in Article 23 of the Charter of Fundamental Rights of the European Union.[[27]](#footnote-27) While the Advocate General did not expressly address the issue of whether Article 7(3) should be interpreted in an exhaustive manner, the fact that he was prepared to accept the departure from the *Webb* approach of separating pregnancy from illness in this way, in order to ensure protection was extended to Ms Saint Prix, perhaps indicates that he indeed considered it as so. The Advocate General clearly bases the opinion on the idea that pregnancy can be included within the ambit of the ‘illness’ exception in Article 7(3). Despite the comment noted above about ‘worker’ being a concept of Article 45 TFEU,[[28]](#footnote-28) there is no suggestion that he considered that primary law could provide entitlement beyond that set out in the Directive.

The Advocate General then devoted time to “delimiting the extent of the protection afforded to pregnant women”,[[29]](#footnote-29) deeming it necessary to place limits on the period that the status of worker could be retained for. In his view, it would be sufficient to include within the ambit of Article 7(3) the period when the “physical condition of the woman” genuinely prevented work as, to do otherwise, would ignore the aim of Directive 2004/38 to set out conditions governing free movement and residence.[[30]](#footnote-30) Essentially, the Advocate General felt that national law should provide the assessment of whether a particular period spent away from the labour market could be deemed reasonable. In particular, the national rules setting out the time period during which pregnant women are not required to work, or actively seek work, would be relevant, as would the provisions on the availability of social assistance to women during that time.[[31]](#footnote-31)

At this point, Advocate General Wahl, turned to the potential for nationality-based discrimination should a Member State, like the UK, not extend protection for migrant workers that was comparable with the rights of nationals:[[32]](#footnote-32)

[G]iven that, within 11 weeks of her estimated date of confinement (and for 15 weeks after the end of her pregnancy) a UK national is not only exempted from being available for work, or from having actively to seek work, but is also entitled, subject to certain conditions, to Income Support for this period, the same rules ought equally to apply to a woman in Ms Saint Prix’s circumstances.[[33]](#footnote-33)

The ultimate conclusion of Advocate General Wahl was that Article 7(3)(a) of Directive 2004/38, read in the light of Article 45 TFEU, should be interpreted as meaning that a woman who is temporarily unable to work because of the physical constraints of the late stages of pregnancy must retain the status of worker. This status can continue until such a time as it is reasonable for her to return to work after the birth of her child.[[34]](#footnote-34) Interestingly, the Advocate General devoted some time at the end of the opinion to challenge a presumption that underpinned the UK Supreme Court’s reference to the CJEU. Essentially, it was assumed by the Supreme Court that, in the event of worker status not applying to Ms Saint Prix, that she would have no valid claim to Income Support because she would not have a right to reside. Advocate General Wahl pointed out the possibility of Ms Saint Prix having a right to reside on the basis of Article 21 TFEU, the more general right to free movement for Union citizens, subject to the “limitations and conditions” as set out in the Treaty and secondary legislation. Considered in light of the principle of proportionality, the Advocate General, felt that Ms Saint Prix may have had a convincing claim to residence on this basis.[[35]](#footnote-35) In particular, he emphasised the temporary nature of her difficulties, and that the social assistance in the form of Income Support would only be required for a short time.[[36]](#footnote-36)

**4. The Judgment of the CJEU**

The Court delivered its judgment on 19 June 2014 and began its consideration of the substantive issues by acknowledging Directive 2004/38’s aim 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.”[[37]](#footnote-37) The Court then acknowledged the lack of express provision in Article 7(3) to enable those in the position of Ms Saint Prix, a woman temporarily unable to work because of the late stages of her pregnancy and the aftermath of childbirth, to retain the status of worker..[[38]](#footnote-38)

Although the Court reached the same overall conclusion on the main issue as the Advocate General, the approach and tone of the judgment was quite different to that of the opinion. The Court, unlike the Advocate General, was quick to distinguish the issue of pregnancy from that of illness,[[39]](#footnote-39) relying on its well-established case law beginning with *Webb[[40]](#footnote-40)* (which the AG had acknowledged) to stress the impossibility of Article 7(3)(a) – which covers a temporary work absence due to illness – being relevant to Ms Saint Prix. The Court was very clear to stress “that pregnancy is not in any way comparable with a pathological condition.”[[41]](#footnote-41) This contrasts markedly with the approach of the Advocate General which had been to embrace, in the particular circumstances, an analogy between pregnancy and illness as a way to overcome the lack of express provision for pregnancy. He had sought to demonstrate the absurdity of the situation under the Directive in that, had Ms Saint Prix been ill, the law would have provided her with protection during her absence from work, whereas, as her absence was pregnancy-related, the legislation did not include any such (overt) protection.

The Court did, though, in a manner similar to the Advocate General, make clear that the conditions listed in Article 7(3) of the directive were not exhaustive, contrary to the contentions of the UK Government.[[42]](#footnote-42) It has long been the approach of the Court to insist that the term ‘worker’ in Article 45 TFEU, as a gateway to rights attaching to one of the fundamental freedoms, be given a very broad interpretation.[[43]](#footnote-43) Prior to the adoption of Directive 2004/38, the status has been found to have effects both prior to and following the existence of the employment relationship itself.[[44]](#footnote-44) Continuing this trend, the CJEU pointed out that the directive may well have codified the law in the area but it could not have limited the application of the concept of worker under the TFEU more broadly.[[45]](#footnote-45)

The Court then turned to the specific circumstances of Ms Saint Prix and emphasised that she had been employed in the UK less than three months before the birth of her child. It was at this point that the physical constraints of pregnancy and the immediate aftermath of childbirth had necessitated her leaving the employment market. She had then returned to work three months after the birth of her child and, moreover, had not left the UK during that time.[[46]](#footnote-46) After pointing out such factual detail, the Court went on to make the key pronouncements relevant to the decision in the case: first, it stated that a woman should not, in principle, be deprived of the status of worker within the meaning of Article 45 TFEU by virtue of being required to give up work due to the constraints of the late stages of pregnancy and immediate aftermath of childbirth.[[47]](#footnote-47) Secondly, the Court sought to place this statement in context by limiting the scope of the time period that a woman could be expected to be absent from the labour market. As such “the fact that she was not actually available on the employment market (…) for a few months does not mean that she has ceased to belong to that market during the period, *provided she returns to work or finds another job within a reasonable period after confinement”* (emphasis added).[[48]](#footnote-48) Here, the Court, following the Advocate General, drew an analogy with the case of *Orfanopoulos,[[49]](#footnote-49)* which had found that rights flowing from Article 45 TFEU were not necessarily extinguished during a period of imprisonment.[[50]](#footnote-50) The Court then gave some guidance to national courts on the issue of what would constitute a reasonable period of time between childbirth and commencing work.[[51]](#footnote-51) Essentially, it urged them to consider the specific circumstances of the case, as well as the national rules on maternity leave, in accordance with the Union level provisions contained in the Pregnancy Directive.[[52]](#footnote-52)

The Court agreed with the Commission’s argument that Union citizens may well be deterred from exercising free movement rights if pregnancy-related absences from employment carried a risk, even for a short time, of worker status being lost.[[53]](#footnote-53) The CJEU went on to consider Article 16 of Directive 2004/38, which deals with the acquisition of permanent residence after five years by Union citizens exercising free movement rights. This provision contains, in Article 16(3), a stipulation that continuity of residence is not affected by an absence of a maximum of up to 12 months for important reasons such as “pregnancy and childbirth.”[[54]](#footnote-54) The Court relied on this express protection for pregnancy-related absence within the scope of Article 16 to support the finding that absence from the labour market for analogous reasons should also be granted protection when determining worker status, despite the lack of express coverage in Article 7(3).

Finally, the Court answered the questions of the UK Supreme Court by reiterating that Article 45 TFEU must be interpreted to mean that a “woman who gives up work, or seeking work, because of the late stages of pregnancy and the aftermath of childbirth retains the status of ‘worker’ (…) provided she returns to work or finds another job within a reasonable period after the birth of her child.”[[55]](#footnote-55)

**5. Comment**

The outcome of this case was positive in so far as the Court accepted that female migrant workers who temporarily give up work because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth are entitled to continue to hold the status of migrant worker pursuant to Article 45 TFEU, for a reasonable period. Significantly, this in turn can provide access to valuable entitlements in the host Member State, such as Income Support and other benefits available to nationals in analogous circumstances. Nevertheless, this judgment also exposes some troubling trends in the direction of the Court’s jurisprudence. The remainder of this analysis will consider how the decision here leaves a number of issues in need of further clarification, in particular as regards to the (lack of) emphasis the Court placed on equality on the grounds of sex as a constitutional principle, and the extent to which citizenship of the Union may (not) provide a safety-net for those unable to qualify as a worker, for example because they are unable to find a job within a reasonable period of time.

*5.1 Gender equality: a (largely) overlooked principle*

The EU’s record over the years of addressing gender inequality, largely in the workplace, is frequently lauded as being comprehensive and progressive.[[56]](#footnote-56) The presence of key articles in the Treaty, such Article 157 TFEU on equal pay, combined with a legislative commitment to the pursuance of equality directives,[[57]](#footnote-57) and willingness on the part of the Court to interpret the relevant provisions in a teleological and forward-looking way,[[58]](#footnote-58) has constitutionalised aspects of equality law in the Union. The scope of this provision has been particularly invaluable in terms of its promotion of equal opportunities, its protection against discrimination in the workplace, and its recognition of the need to make available rights connected to pregnancy, maternity and parental leave, as well as for part time workers.[[59]](#footnote-59) Taking this record into account, it seems all the more surprising – and alarming – that Article 7(3) of Directive 2004/38 was (and is) silent on the issue of the pregnancy. Busby has described the *Saint Prix* decision as “throw[ing] a spotlight on a particularly inimical corner of EU law which somehow appears to have developed without regard to the fact that a large proportion of the European labour market consists of women of childbearing age.”[[60]](#footnote-60)

In spite of the decision being favourable to the specific circumstances of Ms Saint Prix, the Court is not immune from criticism in terms of the commitment it demonstrated to the principle of gender equality in its judgment. There is very little consideration of the principle of gender equality by the CJEU; indeed there is no doubt that the free movement aspects of the case receive more attention. Given the questions referred, this is perhaps understandable. Nevertheless, whereas the Advocate General expressed the constitutional significance of both the principles of sex equality and protection from nationality-based discrimination,[[61]](#footnote-61) the Court’s response on this issue was more muted. For example, it did not make reference to its back catalogue of case law on pregnancy and discrimination,[[62]](#footnote-62) other than in the context of discussing the appropriate connection (or absence of one) between pregnancy and illness. Substantive equality, previously said by the CJEU to be the basis of the pregnancy rights contained in the Pregnancy Directive,[[63]](#footnote-63) receives no attention and there is no clear declaration that pregnancy and childbirth – necessitating a break in employment - should not result in a woman, effectively, being treated in a disadvantageous way.[[64]](#footnote-64) It is disappointing that that the Court did not take the opportunity to re-confirm the principles established in this case law, or to reassert their constitutional nature in the same way as the Advocate General, to send a clear message as regards to their continuing significance.

It is also quite telling that, in contrast to the Advocate General who considered the gender discrimination elements more directly, the Court did not bring the Charter of Fundamental Rights, specifically Article 23 which enshrines the principle of equal treatment between men and women, into its deliberations. Given the tendency of the Court in its case law on the equality principle to combine the authority of the Charter with that of the general principles,[[65]](#footnote-65) and to generally be less tentative in its application of the Charter than it was in the immediate aftermath of its adoption, this is worthy of note. Had the CJEU been more responsive to the gender equality dimensions of *Saint Prix* and framed some discussion in the context of the Charter in this way, the constitutional relevance of the issues at stake in *Saint Prix* would have been emphasised to a greater extent*.* Moreover, more prominence would have perhaps been given to the state of affairs that led to the case in the first place: the gender-disparate way in which the secondary legislation on continuing worker status is framed and phrased. It would appear that the highly regarded and well developed body of equality law and policy has failed to have a tangible impact in so far as free movement law and policy is concerned. Had the Court given more consideration to both the principles of equality and free movement in its judgment, there would have arguably been scope for it to articulate the importance of the connection between these two principles. Previously, there has been little attempt to integrate the equality framework in a mobility context. This was acknowledged by Ackers in the 1990s,[[66]](#footnote-66) who demonstrated the dominance of the male breadwinning model within the free movement provisions (as they were then) and the case law. O’Brien, writing more recently, has shown the continued existence of “rights cliff edges” under the free movement regime, frequently faced by women, who are more likely to perform “unpaid work, informal care work, or reproductive work”.[[67]](#footnote-67) Such work falls outside the scope of the “worker” concept in Article 45 TFEU. The Court has insisted on maintaining the requirement that the work be “part of the normal labour market” which excludes (and clearly does not value) those individuals not categorised as carrying out “genuine and effective” work.[[68]](#footnote-68)

To bring the discussion back to *Saint Prix,* notwithstanding the positive result for Ms Saint Prix on an individual basis, the judgment entrenches such pre-existing gender stratifications within the free movement provisions. It is regrettable that the Court did not take the opportunity to frame its approach in a way that recognises the need for equality to be more explicitly considered as part of the free movement framework. It may not have had an impact on the result of the case, but a different approach – and statements made to support it – would have contributed to the broader and evolving *acquis.* From this perspective, acknowledgement of the relationship between equality and free movement in its judgment here, could have been a step towards a more explicit appreciation of how the equality principle could be more directly applied within the free movement context.[[69]](#footnote-69) Overall, while the CJEU has much to be proud of in terms of the role it has played historically in innovating the framework on equality, and in promoting protection from discrimination, there was scant evidence of dynamism in the *Saint Prix* judgment.

The submissions of the UK government in *Saint Prix* were also disconcerting from a gender equality perspective. The government was forthright in its arguments as to why Ms Saint Prix did not qualify as a worker and, as a result, did not qualify for Income Support. The Advocate General, as has already been noted above, was very keen to counter the contentions.[[70]](#footnote-70) It is troubling that the government deemed it acceptable and necessary to submit that pregnancy had been deliberately omitted from Article 7(3) of the Directive; in other words, that the government was, obviously, of the view that pregnancy-related breaks in employment constituted a valid reason to restrict the protection available to women.[[71]](#footnote-71) Not only is this disappointing from the point of view of fairness, it is also a somewhat irrational response to a fairly limited “threat”. The majority of pregnant migrant workers would not need to seek Income Support, or another social assistance benefit, owing to the availability in many instances of statutory maternity pay or maternity allowance. Essentially, it is only likely to be those who do not meet the relevant criteria, for example by not having worked for the required qualifying period, for eligibility to such entitlements. Further, as Busby points out, “those who are already employed at the time that they temporarily cease work on the grounds of pregnancy will be protected from dismissal and will have secured a right to return under the rights conferred by the Pregnant Workers’ Directive.”[[72]](#footnote-72)

Whilst quantitatively the number of women likely to find themselves in a situation similar to that of Ms Saint Prix is likely to be small, from a *qualitative* point of view the effect of a refusal of a benefit such as Income Support, intended to assist the most vulnerable members of a community, may well be extensive. Lady Hale, giving the leading judgment in the UK’s Supreme Court, pointed out the potential very negative consequences of the domestic provisions for migrant women:

A pregnant woman who is available for or actively seeking work may claim Jobseeker’s Allowance until six weeks before her expected date of confinement, but from then until two weeks after she ceases to be pregnant, she is deemed incapable of work and so cannot do so: see regulation 14 of the Social Security (Incapacity for Work) (General) Regulations 1995. Thus without other sources of income (including statutory maternity pay and other social security benefits for which some but not all pregnant women are eligible) she will be left destitute unless Income Support is available.[[73]](#footnote-73)

On the one hand, whilst it is tempting not to over-emphasise the UK government’s submissions, after all they were not accepted by the CJEU; on the other hand, it is also surely the case that the approach here is indicative of the wider migration policy agenda in the UK. With regard to this, it is significant that the arguments showed remarkably little regard for either the situation of individual migrant women who may experience particular hardship as a consequence of the national provisions, or for the principle of gender equality more broadly.

*5.2 Union citizenship: a safety-net with ever gaping holes*

One of the main distinctions between the Advocate General’s opinion and Court’s judgment is the consideration given in the former to the consequences of a Union citizen, such as Ms Saint Prix, *not* retaining the status of worker. There had been an assumption made by the national referring court that if Ms Saint Prix was found not to qualify as a worker, this would extinguish any concomitant right to rely on the principle of non-discrimination on grounds of nationality to access Income Support. As has already been mentioned above, the Advocate General considered Article 21 TFEU to provide an alternative source of protection in the event that a migrant had failed to retain the status of worker.[[74]](#footnote-74) Advocate General Wahl placed emphasis on the temporary nature of Ms Saint Prix’s troubles and that the social assistance would only be required for a limited time.[[75]](#footnote-75) The CJEU did not address this issue, which is perhaps not surprising in light of the focus of the questions referred by the CJEU, but it is also questionable whether the Court would be inclined to be as “generous”, even if directly asked about the possibility of Article 21TFEU supporting a right to reside (and, in turn, a right to claim social assistance available to nationals by relying on the principle of equal treatment).

The politically charged nature of the current migration and free movement discourse has been succinctly captured by Thym in a contribution to this journal. He explains how factors such as the rise in the number of Eurosceptic parties in a number of Member States, and particular political issues in the UK (which, inevitably, were heightened in the build up to the 2015 General Election), have enabled free movement to acquire a symbolic status which “serves as a projection sphere for economic, social and political unease about wider globalization processes.”[[76]](#footnote-76) In essence, the Court does not exist in a vacuum devoid of awareness of this political context relating to free movement.[[77]](#footnote-77) Thym points to recent citizenship case law concerning non-workers, particularly *Dano,[[78]](#footnote-78)* as characterising a “noteworthy shift of emphasis which accentuates Member State interests, while side-lining countervailing constitutional arguments that could have justified a different outcome.”[[79]](#footnote-79) Increasingly, the CJEU emphasises the limitations and conditions on the exercise of free movement, and is more willing to accept that an economically inactive person constitutes an unreasonable burden. Recently, in *Alimanovic,[[80]](#footnote-80)* the Court appears to have further entrenched its retreat from the expansive conceptualisation of citizenship. This case concerned a woman who had been in work, but only for 11 months, and not within the previous year. The Court in this case was quick to apply Article 7(3) in a rather literal sense, stressing that the claimant had been unemployed for longer than the six months specified in the provision.[[81]](#footnote-81) This approach stands in contrast to that adopted in *Saint Prix* itself. As was considered earlier, the Court was keen to emphasise, when considering the non-exhaustive nature of the provision, how the status of worker stems directly from the Treaty as opposed to the secondary legislation.[[82]](#footnote-82) Perhaps even more tellingly in *Alimanovic,* the Court alsorefused to conduct an “individual assessment” of the claimant’s circumstances,[[83]](#footnote-83) or even to refer to the supposed “fundamental” nature of the status of Union citizenship, a hallmark of the citizenship case law since *Grzelcyk.[[84]](#footnote-84)*

Of course, to return more directly to the circumstances of *Saint Prix,* the claimant here *was* still considered to be a worker and, therefore, the right to reside (and connected right to equal treatment) remained in tact. A migrant worker who leaves the labour market may then, due to the application of Article 7(3) of the Directive, find themselves protected in this way by virtue of the ‘retained’ worker status. However, for those unable to retain that status in the Article 7(3) sense, such as the claimant in *Alimanovic,* the situation becomes more precarious, in that they must navigate the process essentially as an “initial” work seeker without any recognition being given to that time already built up in the labour market. Although Article 45 TFEU continues to govern the situation of such “initial” work seekers, the scope of their right to reside and, particularly, their stake to equal treatment-derived, social protection-related (social assistance) rights, is more curtailed and unclear than those with the retained status.[[85]](#footnote-85)

Taking this distinction between former workers with retained status and those whose status is reverted to “initial” work seeker into account, it is important to keep in mind that the Court’s *Saint Prix* judgment included a caveat in relation to the scope of the retention of worker status for individuals in the situation of Ms Saint Prix. Both the Court and the Advocate General stressed that a woman could continue to be a worker after giving up work because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth *provided she returns to work or finds another job within a reasonable time after the birth of her child.* Presumably, those that do not, will again revert to the status of “initial” work seekers. It will be the role of national courts, taking into account national rules on maternity leave to make the determination on reasonableness.[[86]](#footnote-86) This raises a number of issues. First, it creates some uncertainty for women in the same situation as Ms Saint Prix, who rely on their retained worker status for a period but then struggle to find employment upon their return to the labour market, either because their employer has gone out of business or due to difficulties finding work that can accommodate the changed family circumstances. It is also not clear whether a woman who does have difficulty in securing employment beyond the “reasonable time” would be required to pay back money received as a benefit. This could potentially be a very stressful experience for the migrant and her family members.

Secondly, the need to return to work in a “reasonable” time poses particular difficulties for women with ill babies or babies that have additional needs and for whom a prompt return to work is simply not feasible (or desirable, from their point of view).[[87]](#footnote-87) This links to the broader issue about how EU free movement law fails to value unpaid care work, despite the often significant nature of the work involved, in terms of time and resource.[[88]](#footnote-88) The CJEU has been consistent in its refusal to include unpaid care work within the scope of economic activity.[[89]](#footnote-89) Consequently, it seems likely that a woman unable to return to work in a “reasonable” time, even when this is due to having to care for her ill baby, would be able to demonstrate fulfilment of the conditions needed to claim a retained work status and would, instead, have to rely on the more insecure work seeker status in order to try to assert rights to enable her and her family to survive in the Member State. Indeed, the case of *Dias* involved a woman who did not work while she was caring for her ill child. Here, the woman was not treated as a worker (with retained status), although this was not directly considered by the CJEU in that case. The Advocate General in *Saint Prix,* however, picked up on *Dias* and distinguished it from *Saint Prix* on the basis that “the mother’s absence from work extended beyond the time when there was a medical reason for her not to return to work.”[[90]](#footnote-90) This illustrates quite starkly the reluctance to even give serious consideration to the potential to recognise that pregnancy and childbirth at times may necessitate flexibility with regards to the ability of women to return to the labour market as promptly as seems to be expected. If there is a failure to acknowledge this socially and politically, the legal framework governing the rights of migrant workers, including (and perhaps especially) those that apply when the worker leaves the labour market, is at present also failing to incorporate or promote any such flexibility. As they are currently being conceptualised by the Court, the citizenship provisions of the Treaty, traditionally so intertwined with free movement and the protection and promotion of *individual* rights in a *proportionate* manner, will not be able to offer a safety-net to those unable to satisfy the *Saint Prix* requirement to return to work within a reasonable period.

**6. Conclusion**

The case of *Saint Prix* presented the Court with a somewhat rare opportunity to consider together the constitutionally significant principles of gender equality and free movement of workers. Free movement is intrinsically connected with citizenship; after all, the right to move to another Member State remains one of the core entitlements of the citizenship package given to nationals of the Member States.[[91]](#footnote-91) Whilst the outcome for Ms Saint Prix was not negative as such, the tone of the judgment, and its apparent reluctance to really engage with an analysis of the free movement and citizenship framework through a lens of equality on the ground of sex, is disappointing. This judgment, by embodying a subdued approach to both of the key aspects, can be seen as symbolising the tensions and stagnation that exists across the Union’s institutions with regard to both principles. For the free movement of workers and citizenship, as has been referred to on a number of occasions here, times are troubled. The political context is restrictive and inflammatory and looks set to remain so as the Member States, largely but not exclusively as the bequest of the UK, continue to consider the potential for renegotiation of EU policies such as free movement. The Court’s case law is also moving towards a less expansive interpretation of the citizenship provisions which significantly limits the scope for the status to impact on the lives of people, for example by securing their residence status or granting them access to a social benefit. *Alimanovic* is the latest example of the depletion in the power of Union citizenship to extend migrant EU citizens valuable access to residence and, moreover, benefits when times become most difficult. For equality law, there is little appetite for fresh action on the part of the Union in this area (at least so far as hard law is concerned). The lack of agreement regarding the Commission’s 2008 proposal for a new Equality directive,[[92]](#footnote-92) and continued slow progress of the discussions in Council,[[93]](#footnote-93) is indicative of the disinclination to genuinely reopen or update the secondary legislation in this area.

The two issues at the heart of this case, promotion of (gender) equality and the entitlement of those exercising free movement rights, frequently find themselves at the forefront of discussions on EU membership and the future of the Union. They are also, arguably, the main aspects of EU law that have the potential to be most transformative in people’s lives, for example by providing a framework for protection from discrimination in the workplace, or by facilitating a right to work in a different labour market, whether that be to improve a career trajectory or simply secure a job when one cannot be found in a home state. This illustrates how the *Saint Prix* judgment is particularly underwhelming from the perspective of the future of Social Europe. Free movement (which connects so intrinsically to citizenship) and equality are hallmarks of this concept and are frequently lauded as the main “success stories” of the EU’s social dimension. The evident retreat in the scope of protection extended to some migrant citizens, combined with a reluctance to genuinely incorporate a gender equality dimension into the *Saint Prix* judgment itself, sends a clear signal that the Court of Justice of today will not be championing the social aspects of integration quite in the same way that the Court of previous decades did.

Samantha Currie[[94]](#footnote-94)\*

1. E.g. ‘Hundreds of migrants feared drowned off Libya in another boat tragedy’, *The Telegrpah*, 28 August 2015< http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/11829747/Hundreds-of-migrants-feared-drowned-off-Libya-in-another-boat-tragedy.html >; Migrant boat disaster: “irresponsible” rhetoric blamed for failure to restart rescue’, *The Guardian,* 18 April 2015 < http://www.theguardian.com/world/2015/apr/18/mediterranean-migrant-rescue-operation-rhetoric-blamed >, Sandford, ‘Martin Schulz attacks ‘cynical’ EU governments over migrants crisis’, *Euronews,* 29 August 2015 < http://www.euronews.com/2015/08/29/schulz-attacks-cynical-eu-governments-over-migrants-crisis/ >, European Council, Press Release, *Informal meeting of EU heads of state or government on migration,* 23 September 2015 < http://www.consilium.europa.eu/press-releases-pdf/2015/9/40802202698\_en\_635791230000000000.pdf >. Although it is also important not to overlook the news stories that have celebrated the more humane responses to migrants and refugees, e.g. Pidd, ‘Refugees Welcome! Meet the British Families who have opened their doors to asylum seekers’, *The Guardian,* 7 September 2015 < http://www.theguardian.com/world/2015/sep/07/british-families-open-homes-asylum-seekers-refugees > [↑](#footnote-ref-1)
2. By way of example, in the UK amendments to benefit entitlement were introduced in 2014, many of which explicitly targeted EU citizens. These include the disqualification of EU workseekers from Housing Benefit, a reduction in access to jobseeker’s allowance (from six months to three), and introduction of a three-month residence rule for eligibility to Child Benefit. For a thorough analysis of the UK restrictions see O’Brien, ‘The pillory, the precipice and the slippery slope: the profound effects of the UK’s legal reform programme targeting EU migrants’, 37(1) *Journal of Social Welfare and Family Law* (2015), 111. See also Puttick, ‘EEA workers’ free movement and social rights after *Dano* and *St Prix*: Is a Pandora’s box of new economic integration and “contribution” requirements opening?’, 37(2) *Journal of Social Welfare and Family Law* (2015), 253. In Case C-308/14 *Commission v UK,* elements of the UK’s restrictions have been challenged in proceedings brought by the Commission. On 6 October 2015 Advocate General Cruz Villalón’s Opinion was published. In a restrictive Opinion, the AG proposes that the Commission should dismiss the action of the Commission and that the “right to reside” test in the UK is essentially proportionate. [↑](#footnote-ref-2)
3. O.J. 2004, L 158/77. [↑](#footnote-ref-3)
4. E.g. Case C-333/13 *Dano* ECLI:EU:C:2014:2358; Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597. [↑](#footnote-ref-4)
5. As set out in the Income Support (General) Regulations 1987 (SI 1987/1967), Schedule 1B and the Social Security Contributions and Benefits Act 1992, s. 124(1)(e). [↑](#footnote-ref-5)
6. In contrast, those wishing to claim jobseeker’s allowance do need to satisfy such conditions. [↑](#footnote-ref-6)
7. < http://www.airecentre.org > [↑](#footnote-ref-7)
8. O’Brien, ‘I trade, therefore I am: Legal personhood in the European Union’ 50 CMLRev (2013)*,* 1643 at 1663. [↑](#footnote-ref-8)
9. E.g. Pickard, ‘Informal care for older people provided by their adult children: Projections of supply and demand to 2041 in England’ (2008) *Report to the Strategy Unit and Department of Health* (London, Personal Social Services Research Unit). See also the report from the Equality and Human Rights Commission, *Women, Men and Part-time Work*, Briefing Paper, January 2013 < http://www.equalityhumanrights.com/about-us/devolved-authorities/commission-scotland/legal-work-scotland/articles/women-men-and-part-time-work > [↑](#footnote-ref-9)
10. *Jessy Saint Prix v Secretary of State for Work and Pensions* [2012] UKSC 49, on appeal from [2011] EWCA Civ 806. [↑](#footnote-ref-10)
11. ECLI:EU:C:2013:841. [↑](#footnote-ref-11)
12. Opinion, para. 2. [↑](#footnote-ref-12)
13. Ibid., paras. 1-2. [↑](#footnote-ref-13)
14. Ibid., para 13. [↑](#footnote-ref-14)
15. Ibid., para. 25. [↑](#footnote-ref-15)
16. Ibid, para. 18. [↑](#footnote-ref-16)
17. Case 39/86 *Lair,* ECLI:EU:C:1988:322. [↑](#footnote-ref-17)
18. Opinion, paras. 15-16. [↑](#footnote-ref-18)
19. Case C-482/01 *Orfanopoulos*, ECLI:EU:C:2004:262. [↑](#footnote-ref-19)
20. Opinion, para. 17 [↑](#footnote-ref-20)
21. Ibid., para. 20. [↑](#footnote-ref-21)
22. Ibid., para. 29 [↑](#footnote-ref-22)
23. Ibid., para. 21 [↑](#footnote-ref-23)
24. Case C-32/93 *Webb,* ECLI:EU:C:1994:300. [↑](#footnote-ref-24)
25. Opinion, para 32. [↑](#footnote-ref-25)
26. Ibid., paras. 33-34. [↑](#footnote-ref-26)
27. Ibid., para. 35. Charter of Fundamental Rights of the European Union, O.J. 2012 C 326/391. [↑](#footnote-ref-27)
28. Ibid., para. 29 [↑](#footnote-ref-28)
29. Ibid., paras. 37-41. [↑](#footnote-ref-29)
30. Opinion, para. 37. [↑](#footnote-ref-30)
31. Ibid., para. 38 [↑](#footnote-ref-31)
32. Ibid., para 39. [↑](#footnote-ref-32)
33. Ibid., para. 39. [↑](#footnote-ref-33)
34. Ibid, para. 41. [↑](#footnote-ref-34)
35. Although the AG relied on Case C-140/12 *Brey,* ECLI:EU:C:2013:565,as authority for the principle that national authorities must undertake an overall assessment of the factual circumstances in individual cases in order to decide whether it would be proportionate to extend rights of residence and social assistance, he drew a contrast with the appropriate outcome in each case. The claimant in *Brey* was categorized as “no longer economically active in any meaningful sense”, hence the payment of the relevant benefit risked constituting an “indefinitely recurring event” (para. 49). [↑](#footnote-ref-35)
36. Opinion, paras. 44-52, see especially para.49 [↑](#footnote-ref-36)
37. Judgment, para. 25; Directive 2004/38, Recitals 3-4 [↑](#footnote-ref-37)
38. Ibid., paras., 27-28. [↑](#footnote-ref-38)
39. Ibid., para. 29. [↑](#footnote-ref-39)
40. Cited at *supra* note 24. [↑](#footnote-ref-40)
41. Judgment, para 29. [↑](#footnote-ref-41)
42. Ibid., paras. 31 and 38 [↑](#footnote-ref-42)
43. See, *inter alia,* Case 75/63 *Hoekstra* ECLI:EU:C:1964:19, Case 53/81 *Levin* ECLI:EU:C:1988:322, Case 66/85 *Lawrie-Blum* ECLI:EU:C:1986:284. [↑](#footnote-ref-43)
44. See, *inter alia,* Case 48/75 *Royer* [1976] ECLI:EU:C:1988:322, Case C-292/89 *ex parte Antonissen* ECLI:EU:C:1997:106, Case C-413/01 *Ninni-Orasche* ECLI:EU:C:2003:600. [↑](#footnote-ref-44)
45. Judgment, para. 32. [↑](#footnote-ref-45)
46. Ibid., para. 39. [↑](#footnote-ref-46)
47. Ibid., para. 40. [↑](#footnote-ref-47)
48. Ibid., para. 41. [↑](#footnote-ref-48)
49. Cited at *supra* note 19. [↑](#footnote-ref-49)
50. Judgment, para. 41. [↑](#footnote-ref-50)
51. Ibid., para 42. [↑](#footnote-ref-51)
52. Directive 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding O.J. 1992, L 348/1. [↑](#footnote-ref-52)
53. Judgment, para. 44. [↑](#footnote-ref-53)
54. Ibid., para. 45. [↑](#footnote-ref-54)
55. Ibid., para. 47. [↑](#footnote-ref-55)
56. E.g. Hepple, ‘Equality Law’ in Hepple and Veneziani (eds), *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries* (Oxford: Hart, 2009). [↑](#footnote-ref-56)
57. Including: Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation *OJ L 204/23*; Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373/37; Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity OJ L 180/1; Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJL 006/24. [↑](#footnote-ref-57)
58. **Including Case 43/75 Defrenne v SABENA (No 2)** ECLI:EU:C:1976:56; **Case 170/84 Bilka** ECLI:EU:C:1986:204; **Case C-262/88 Barber** ECLI:EU:C:1993:949; **Case C-177/88 Dekker**ECLI:EU:C:1990:383. [↑](#footnote-ref-58)
59. Beveridge, ‘Gender, the Acquis and Beyond’ in Dougan and Currie (eds) *50 Years of the European Treaties: Looking Back and Thinking Forward* (Oxford: Hart, 2009). [↑](#footnote-ref-59)
60. Busby, N. ‘Crumbs of Comfort: Pregnancy and the Status of ‘Worker’ under EU Law’s Free Movement Provisions’ 44(1) *Industrial Law Journal* (2015), 134 at 138. O’Brien has also demonstrated the negative consequences of this “pregnancy gap” in Article 7(3). For example, it has led to decisions of lower courts in the UK to deny access to social assistance to women with sick babies. Such migrant women had been unable to return to work and, therefore, no longer qualified as workers. See O’Brien, C. (2013) cited at *supra* note 8. [↑](#footnote-ref-60)
61. Opinion, para 2. [↑](#footnote-ref-61)
62. Such as, *inter alia,* **Case C-177/88 *Dekker*** ECLI:EU:C:1990:383 and Case C-207/98 *Mahlburg* ECLI:EU:C:2000:64. [↑](#footnote-ref-62)
63. e.g. Case C-104/09 *Alvarez* ECLI:EU:C:2010:561, para 34. [↑](#footnote-ref-63)
64. See also Busby, *supra* note 60. [↑](#footnote-ref-64)
65. E.g. Case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21; Case C-236/09 *Test-Achats ASBL* ECLI:EU:C:2011:100. [↑](#footnote-ref-65)
66. Ackers, *Shifting Spaces: Women, Citizenship and Migration in the European Union* (Ashgate, 1998); Ackers, ‘Women, Citizenship, and European Community Law: The Gender Implications of the Free Movement Provisions’ 16 *Journal of Social Welfare and Family Law* (1994)*,* 393. [↑](#footnote-ref-66)
67. O’Brien, *supra* note 8. [↑](#footnote-ref-67)
68. Case 344/87 *Bettray* ECLI:EU:C:1989:226; Case 196/87 *Steymann* ECLI:EU:C:1988:475; Case C-456/02 *Trojani* ECLI:EU:C:2004:488*.* [↑](#footnote-ref-68)
69. On the process of constitutionalisation, see Bell, ‘Constitutionalization and EU Employment Law’, University of Leicester School of Law Research Paper No. 13-05 (2013). [↑](#footnote-ref-69)
70. Opinion, paras. 23-36. [↑](#footnote-ref-70)
71. See further on this O’Brien (2013) *supra* note 8 and Busby *supra* note 60. [↑](#footnote-ref-71)
72. Busby *supra* note 60, p139. [↑](#footnote-ref-72)
73. Supreme Court judgment, *supra* note 10, para. 4 [↑](#footnote-ref-73)
74. Opinion, para. 49. [↑](#footnote-ref-74)
75. This reflects the Case C-184/99 *Grzelcyk* ECLI:EU:C:2001:458 line of case law. [↑](#footnote-ref-75)
76. Thym, ‘The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens’ 52 CMLRev (2015), 17 at 20. [↑](#footnote-ref-76)
77. See also Thym, ‘When Union citizens turn into illegal migrants: the *Dano* case’ 40(2) ELRev(2015)*,* 249. [↑](#footnote-ref-77)
78. Case C-333/13 *Dano* ECLI:EU:C:2014:2358. Ms Dano, an economically inactive Romanian national resident in Germany, was found not to have a right to reside due to her lack of compliance with the provisions of Directive 2004/38 (she did not possess sufficient resources to avoid becoming an unreasonable burden). Consequently, she had no right to rely on the principle of equal treatment to access the social benefit at issue. The outcome and Court’s reasoning in the judgment contrasts with the earlier case of Case C-85/96 *Martinez Sala* ECLI:EU:C:1998:217. [↑](#footnote-ref-78)
79. Thym *supra* note 76 at 25. [↑](#footnote-ref-79)
80. Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597. [↑](#footnote-ref-80)
81. *Alimanovic* judgment, para. 55. [↑](#footnote-ref-81)
82. Judgment, para. 32. [↑](#footnote-ref-82)
83. *Alimanovic* judgment, paras. 59-62. [↑](#footnote-ref-83)
84. It would appear, then, that the restrictive stance of the Court will not be limited only to non-economic migrants. In *Alimanovic,* the claimant may not have been found to satisfy the conditions to qualify as a “former worker” under the Directive, but she was not economically inactive in quite the same sense as the claimant in *Dano.* Ms Alimanovic’s labour market participation was fairly recent and had lasted for almost a year. [↑](#footnote-ref-84)
85. Work seekers have a right to reside under Article 45 TFEU in order to enhance the potential of work being secured. Under Directive 2004/38, there is an initial right to reside for three months (Article 6) and they cannot be expelled by the Member State providing they can provide evidence they are continuing to look for work and have genuine chances of being engaged (Article 14(4)(b)). In terms of work seekers’ broader equal treatment rights, Article 24(2) of the Directive allows Member States to derogate from the equal treatment principle in so far as social assistance rights for work seekers are concerned. Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597is one of the more recent judgments of the CJEU relevant to the scope of work seekers’ equal treatment rights. See also Case C-138/02 *Collins* ECLI:EU:C:2004:172and Cases C-22/08 and C-23/08 *Vatsouras* ECLI:EU:C:2009:344. [↑](#footnote-ref-85)
86. In the UK context at least, there has recently been a decision of the Upper Tribunal which suggests that this should not be interpreted restrictively ([2015] UKUT 502 (AAC). Judge Ward held that the reasonable period for which a woman can have a right to reside during pregnancy and the aftermath of childbirth should be 52 weeks, depending on individual circumstances. This contrasts with the 26 weeks set out in guidance from the Department of Work and Pensions (DMG Memo 25/14). [↑](#footnote-ref-86)
87. Ms Saint Prix herself, even though she returned to work after only three months absence, delayed her return as a consequence of her baby being seriously ill with a heart condition. Her baby died at only one year old as a result of this condition. [↑](#footnote-ref-87)
88. O’Brien *supra* note 8 and Busby *supra* note 60. [↑](#footnote-ref-88)
89. Case C-77/95 *Zuchner* ECLI:EU:C:1996:425; Case C-325/09 *Dias* ECLI:EU:C:1992:327. [↑](#footnote-ref-89)
90. Opinion, para. 24. [↑](#footnote-ref-90)
91. Articles 18-25 TFEU. [↑](#footnote-ref-91)
92. Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM/2008/0426 final. [↑](#footnote-ref-92)
93. Council of the European Union, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation – Progress Report, 16 November 2015 (2008/0140). [↑](#footnote-ref-93)
94. \* School of Law and Social Justice, University of Liverpool. I am very grateful to Professor Helen Stalford for commenting on an earlier draft and for the very helpful comments of the anonymous reviewer. The usual disclaimer applies. [↑](#footnote-ref-94)