IN THE UPPER TRIBUNAL **Case No** CE/4503/2014
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is dismissed. The decision of the First-tier Tribunal sitting at Enfield on 11 February 2014 under reference SC921/12/01122 did not involve the making of an error of law.

REASONS FOR DECISION

1. The appellant is a young woman of Swedish nationality and Somali origin, born in May 1991. She has right-sided hemiplegia and learning disabilities and at the time of her claim for employment and support allowance ("ESA") was in receipt of DLA. There is some confusion about the date of decision(s) under appeal to the First-tier Tribunal ("FtT") and their associated claim(s). A claim appears to have been made on 8 May 2010 with a decision on 4 September 2010 (which may not have been notified to the appellant) and a further claim made on 21 July 2011 leading to a decision on 19 September 2011. It appears to be common ground that the appeal is to be taken as relating to the latter. Both had held that the appellant lacked the right to reside under reg 70 of the Employment and Support Allowance Regulations 2008/794 and so was not entitled to ESA.

2. The overall amount of time which has passed is very considerable and is regrettable. It is in substantial degree (though not entirely) caused by, first, a series of necessary adjournments in the FtT to seek evidence relating to any work record of the appellant's father and stepfather and the benefits history of her mother; and then a series of delays, principally during the Upper Tribunal proceedings, while key decisions in other cases made their way through the higher courts. To that must be added delays caused by pressure of work and I apologise for any inconvenience caused as a result.

3. The appellant had (and still has) the advantage of legal help from solicitors and counsel (Mr Desmond Rutledge), who had prepared written submissions in connection with the FtT proceedings, but who would not have been in a position under the Legal Help scheme to attend the FtT hearing and did not do so. The submissions had evolved, responding to emerging case law. By the time of the FtT hearing they were:

(a) the appellant had a right to reside as a child of a migrant worker in order to access education under (then) Art 12 of Regulation 1612/68 (now Art 10 of Regulation 492/2011);

(b) the decision of the Court of Justice of the European Union (CJEU) in C-140/12 *Brey* required the FtT to carry out an overall assessment of the specific burden which granting the benefit would place on the social assistance system of the UK as a whole, by reference to the claimant's personal circumstances;

(c) I observe that whether *Brey* was an aspect of applying the doctrine of proportionality was not entirely clear at the time and it was not presented as a point distinct from *Brey*, but the submission made clear that it was seeking to argue that the application of the right to reside test to refuse benefit was disproportionate given the appellant's individual circumstances.

An earlier argument, that the appellant's mother had acquired a permanent right of residence as the primary carer of a child in education, from which the appellant then stood to benefit, was rightly abandoned in the light of the decision in C-529/11 *Alarape*.

4. The FtT found as fact (statement of reasons paras 17-22, anonymised for the purposes of this decision):

(a) The appellant is a Swedish citizen who came to the UK in 2004.

(b) The appellant has significant learning difficulties and requires full time care and support which she receives from carers at home for thirteen hours a day and where appropriate at college. She is not capable of independent living or of self care. She would not be capable of any employment.

(c) The appellant is not a worker, is not self-employed and is not a work seeker. She is the daughter and stepdaughter of Swedish citizens. Her mother has not exercised her EEA right to be in the UK as a worker or work seeker. Indeed the fact that her mother receives income support demonstrates that she is not exercising her rights as a worker. The mother's immigration status is unknown.

(d) The appellant's stepfather was both a worker [the FtT had earlier found this had been in the course of the 2003-4 tax year] and a jobseeker though he left the UK for Africa in 2007 and no status derives from him to benefit the appellant.

(e) The appellant will require support for the whole of her life.

(f) The appellant is not integrated into UK society. One of the biggest concerns those supporting her have is her social isolation.

5. The FtT concluded that the appellant had neither a right to reside in her own right nor as a derived right and it was not proportionate to disapply the relevant conditions and so to allow the appeal.

6. An application was made to the FtT for permission to appeal. This resulted in a decision purporting to refer the matter to the Upper Tribunal under section 9(5)(b) of the Tribunals, Courts and Enforcement Act 2007. This was incorrect as there was not the necessary valid exercise of the power of review, no clear error of law had been identified and the decision of the FtT had not been set aside. On 14 January 2015 I treated the papers which the Upper Tribunal had subsequently received as instead constituting an

application for permission to appeal and gave such permission. No objection to that procedure was received from either party.

7. The grounds of appeal were:

(a) the FtT failed to rule on the argument that the appellant could benefit from Art 10 of Regulation 1612/68, despite having made a finding that her step-father had been a worker in the UK prior to leaving the UK in 2007 (this ground was subsequently abandoned by a reply dated 10 June 2015);

(b) the FtT erred by confining the impact of *Brey* to where the situation leading to a lack of resources was temporary in nature;

(c) the FtT's finding that the appellant is not integrated into UK society due to the severity of her disability is a flawed approach to the concept of integration in Directive 2004/38/EC ("the Directive") and contravenes the Directive's prohibition of discrimination on the grounds of disability at Recital (31) thereof.

8. The respondent was directed to include in his submission details of past benefit claims made by the appellant's mother (and of any determination with regard to the right to reside made in connection with them) and a clarification of the dates of claim(s)and decision(s) under appeal. As to those matters, the respondent indicated that the appellant's mother had claimed income support as a lone parent in 2005, having recently separated from her husband. The records remaining available did not indicate that any consideration had been given to her immigration status; no explanation could be advanced for that failure. She had made claims for ESA in 2013 and 2014. In connection with the second of these a decision was taken on 8 May 2014 that the appellant's mother had never been a "qualified person" i.e. for the purpose of the Immigration (EEA) Regulations 2006/1003 ("the 2006 Regulations") and so did not have a right to reside. The significance of all this I that it addresses a concern which the Upper Tribunal had in the exercise of its inquisitorial jurisdiction that insufficient efforts might have been made by the respondent to provide all the relevant evidence to the FtT and by the FtT to follow up any gaps there might have been. If there were any such shortcomings, they were not material.

9. What remained was the application of *Brey* and proportionality. In his reply of 10 June 2015, Mr Rutledge applied for the present case to be stayed behind *Mirga v SSWP*, in which a hearing before the Supreme Court had taken place and judgement was awaited. On 27 January 2016 the Supreme Court gave judgment ([2016] UKSC 1), following which the stay in the present case was lifted. A submission was directed as to the implications of *Mirga* for the present case and also of decisions of the CJEU which had been given in the interim, such as C-67/14 *Alimanovic* and C-299/14 *Garcia-Nieto.*

10. At this point it is appropriate to turn to *Mirga*. Ms Mirga claimed income support when aged 18 or so when pregnant. Her mother had sadly died and she was estranged from her father. She had done odd bits of work, but because of the implications of the Worker Registration Scheme then

applicable to Polish nationals (as Ms Mirga was) her work was insufficient to found any rights. Nor was she self-employed, self-sufficient or a student or in any other way within any of the express provisions of the Directive or of the 2006 Regulations. She had failed in successive appeals to the FtT, the Upper Tribunal and the Court of Appeal. Two issues were raised on her behalf before the Supreme Court. First, it was submitted that as a "worker", albeit one whose work was temporarily interrupted by pregnancy, Article 21 gave her the right to "reside freely" and the denial of income support to her, at a time when she needed it in order to be able to live in the UK, was an impermissible interference with that right, as she would in practice be forced to return to Poland. The second argument was that the decisions refusing Ms Mirga benefit were flawed because no consideration was given to the proportionality of refusing her social assistance bearing in mind all the circumstances of her case and in particular there was a failure to address the burden it would place on the system if she were to be given the assistance she sought. Both grounds required consideration to be given to, among other authorities, *Brey*. Indeed, I find it difficult in the light of what is said in *Baumbast* (below) about how a claim based on proportionality operates, to separate out the conceptual basis for the two grounds.

11. As the first, Lord Neuberger, giving the judgment of the Court, noted at [43] that rights under Article 21 TFEU are qualified by the words "subject to the limitations and conditions laid down in the Treaties and in the measures adopted to give them effect". These included the Directive, the terms of which Ms Mirga was unable to meet. At [44] he noted the key structural features of the rights conferred by the Directive, observing in [46] that:

> "the Directive makes it clear that the right of residence is not to be invoked simply to enable a national of one member state to obtain social assistance in another member state. On the contrary: the right of residence is not intended to be available too easily to those who need social assistance from the host member state."

12. He then turned to considering *Brey* and other recent cases from the CJEU which, he noted, were relevant to both grounds of appeal. At [49] he noted the ruling in *Brey* that the Directive precluded national legislation which

> "automatically - whatever the circumstances - bars the grant of a benefit, such as the compensatory supplement … to a national of another member state who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside … since obtaining that right of residence is conditional on that national having sufficient resources not to apply for the benefit."

13. He noted at [52] and [53] how in C-333/13 *Dano v Jobcenter Leipzig* the CJEU had relied on passages from *Brey* to emphasise that the relevant Treaty rights were indeed subject to restrictions and that the right of nationals of one Member State to reside in another was not unconditional.

14. He noted [74] of *Dano* and its subsequent approval in C-67/14 *Alimanovic*, where the Grand Chamber expressed it in terms that:

> "if someone has recourse to "assistance schemes established by the public authorities", he may "during his period of residence, become a burden on the public finances of the host member state which could have consequences for the overall level of assistance which may be granted by that state".

Lord Neuberger took the view at [48] that any possibility that *Brey* might have helped Ms Mirga on her first ground had been removed by *Dano* and *Alimanovic* and at [57] that that ground failed.

15. As to the second ground, Lord Neuberger distinguished C-413/99 *Baumbast*, the case from which many submissions based on proportionality in this context are derived. Mr Baumbast was resting his case on the ground of being a self-sufficient person (something which would have met the requirements of - these days - the Directive). He observed:

> "60. …It is clear from paras 88 and 89 of the judgment that the applicant had sufficient resources to be self-sufficient in practice, and that he had medical insurance. His only possible problem was that the insurance may have fallen short of being "comprehensive" in one respect, namely that it was not clear whether it covered "emergency treatment". The court held that, on the assumption that the insurance fell short in this connection, it would nonetheless be disproportionate to deprive the applicant of his right to reside.
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> 61. In para 92, the court pointed out that there were strong factors in the applicant's favour, namely that he had sufficient resources, that he had worked and resided in the UK for "several years", that his family had also resided in the UK for several years, that he and his family had never received any social assistance, and that he and his family had comprehensive medical insurance in Germany. In those circumstances, the court said in para 93 that it would be "a disproportionate interference with the exercise" of the applicant's right of residence conferred by what is now article 21.1 of TFEU to refuse to let him stay in the UK because of a small shortfall in the comprehensiveness of his medical insurance.
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> 62. I do not consider that the appellants derive any assistance from *Baumbast*. Mr Baumbast's case was predicated on the fact that he did not need any assistance from the state. Even if the decision is relied on by analogy, it is of no help to the appellants. The thrust of the court's reasoning in that case was that, where an applicant's failure to meet the requirements of being "a self-sufficient person" was very slight, his links with the host member state were particularly strong, and his claim was particularly meritorious, it would be disproportionate to reject his claim to enjoy the right of residence in that host state. Even though the applicant had a very strong case in the sense that he fell short of the

self-sufficiency requirements in one very small respect, the court decided that he could rely on disproportionality only after considering the position in some detail.

16. Turning to *Brey*, Lord Neuberger observed that:

> "66…[I]t appears to me that the reasoning in *Brey* cannot assist the appellants on the instant appeals, in the light of the subsequent reasoning of the Grand Chamber in the subsequent decisions in *Dano* and *Alimanovic*.
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> 67. The observations of the Grand Chamber in *Dano* discussed in para 53 above are in point. In *Alimanovic*, para 59, the Grand Chamber specifically mentioned that the court in *Brey* had stated that "a member state [was required] to take account of the individual situation of the person concerned before it … finds that the residence of that person is placing an unreasonable burden on its social assistance system". However, the Grand Chamber went on to say that "no such individual assessment is necessary in circumstances such as those in issue in this case". In para 60, the Grand Chamber explained that:
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> > "Directive 2004/38, establishing a gradual system as regards the retention of the status of 'worker' which seeks to safeguard the right of residence and access to social assistance, itself takes into consideration various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity."
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> The court then went on to explain that article 7 of the 2004 Directive, when read with other provisions, "guarantees a significant level of legal certainty and transparency in the context of the award of social assistance by way of basic provision, while complying with the principle of proportionality". (In this connection, the Grand Chamber took a different view from that taken by Advocate General Wathelet in paras 105-111 of his Opinion, upon which Mr Drabble had understandably relied.)
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> 68. In my view, this makes good sense: it seems unrealistic to require "an individual examination of each particular case". I note that this was a proposition which the Second Chamber rejected, albeit in a somewhat different (and probably less striking) context, on the ground that "the management of the regime concerned must remain technically and economically viable" - see *Dansk Jurist-og Økonomforbund v Indenrigs-og Sundshedsministeriet* (Case C-546/11) [2014] ICR 1, para 70, which was cited with approval in the present context by Advocate General Wahl in *Dano* at para 132 of his Opinion.
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> 69. Where a national of another member state is not a worker, self-employed or a student, and has no, or very limited, means of support and no medical insurance (as is sadly the position of Ms Mirga and Mr Samin), it would severely undermine the whole thrust and purpose of the 2004 Directive if proportionality could be invoked to entitle that

> person to have the right of residence and social assistance in another member state, save perhaps in extreme circumstances. It would also place a substantial burden on a host member state if it had to carry out a proportionality exercise in every case where the right of residence (or indeed the right against discrimination) was invoked.
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> 70. Even if there is a category of exceptional cases where proportionality could come into play, I do not consider that either Ms Mirga or Mr Samin could possibly satisfy it. They were in a wholly different position from Mr Baumbast: he was not seeking social assistance, he fell short of the self-sufficiency criteria to a very small extent indeed, and he had worked in this country for many years. By contrast Ms Mirga and Mr Samin were seeking social assistance, neither of them had any significant means of support or any medical insurance, and neither had worked for sustained periods in this country. The whole point of their appeals was to enable them to receive social assistance, and at least the main point of the self-sufficiency test is to assist applicants who would be very unlikely to need social assistance.
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> 71. Whatever sympathy one may naturally feel for Ms Mirga and Mr Samin, their respective applications for income support and housing assistance represent precisely what was said by the Grand Chamber in *Dano*, para 75 (supported by its later reasoning in *Alimanovic*) to be the aim of the 2004 Directive to stop, namely "economically inactive Union citizens using the host member state's welfare system to fund their means of subsistence".

17. In *AMS v SSWP (second interim decision)* [2017] UKUT 48, I had to consider a much narrower question with regard to the application of *Brey*, namely whether it had any continuing effect, and if so what, to those who had formerly had sufficient resources and did have comprehensive sickness insurance cover, in the light of the particular provisions in Articles 7(1)(b) and 8(4) of the Directive in that regard. In that context, I had to express respectful doubts about whether Lord Neuberger's judgment accurately reflected what the CJEU had said in *Alimanovic*, a case in which, in order to succeed, the claimants as former workers would have needed to retain worker status for longer than the Directive provided:

> "43. What the CJEU had actually said at [61] of *Alimanovic* was this:
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> > "By enabling those concerned to know, without any ambiguity, what their rights and obligations are, the criterion referred to both in Paragraph 7(1) of Book II, read in conjunction with Paragraph 2(3) of the Law on freedom of movement, and in Article 7(3)(c) of Directive 2004/38, namely a period of six months after the cessation of employment during which the right to social assistance is retained, is consequently such as to guarantee a significant level of legal certainty and transparency in the context of the award of social assistance by way of basic provision, while complying with the principle of proportionality."

> Article 7(1) of the Directive is where rights of residence for more than three months are set out. In the passage quoted immediately above, though, the CJEU was referring to Paragraph 7(1) of Book II, which referred to the relevant German benefits legislation containing the exclusion for jobseekers, the Sozialgesetzbuch Zweites Buch – see the definition in [3] of the judgment and the discussion at [14] and [15]. There is evident scope for confusion of the identically numbered provisions. In [61] of *Alimanovic* the only provision from the Directive which the CJEU was endorsing for its legal certainty and transparency was Article 7(3)(c). It was in my respectful view not making a point by reference to Article 7 as a whole.
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> 44. The point is however academic if I am correct in my view that [61] of *Alimanovic* was not being relied upon by the Supreme Court in order to say that the whole of Article 7 of the Directive has the features noted at [60] of *Alimanovic.* The Supreme Court in my respectful view was, rather, relying on the CJEU's endorsement of a rule-based approach in the circumstances of *Alimanovic* rather than a case-by-case one (as also in *Dansk Jurist*, noted at [68] of *Mirga*) in order to rebut the submission on behalf of Ms Mirga and Mr Samin that they should be permitted effectively a free-standing argument based on proportionality, when they did not and had not, complied with any of the limbs of Article 7. As I have indicated above, in my view that is a different question from the need for an assessment based on what the Directive itself requires."

I continue to hold the view expressed in [44] of *AMS.*

18. It is clear from *Mirga* that for a proportionality argument to stand any chance of success, the case must involve "extreme circumstances" and will be "an exceptional case" (Mirga [69] and [70]). I term these, together, the "exceptionality requirement". I am mindful that in those paragraphs Lord Neuberger was guarded as to whether a window of opportunity to rely on proportionality exists at all, even when the exceptionality requirement is fulfilled. In the remainder of this decision I proceed on the basis that it may do so. In assessing what might fulfil the exceptionality requirement, one has to bear in mind the purposes of the Directive as expounded in *Dano*, *Alimanovic* and *Mirga* itself and the clear preference of the Supreme Court for a rule-based system over one based on the examination of individual circumstances. It is clear from the Supreme Court's review of the authorities that reliance on *Brey* can get the appellant no further than this.

19. Lord Neuberger's judgment does not elaborate on why it was relevant (para 62) that "Mr Baumbast's case was predicated on the fact that he did not need any assistance from the state". Presumably, if Mr Baumbast, lacking in medical insurance for emergency treatment in the UK had had the misfortune to suffer a heart attack whilst in the UK, he might well have needed such assistance. I proceed on the basis that the above remarks are to be taken as a reaffirmation of the significance of the remarks in *Brey*, *Dano* and *Alimanovic* concerning the importance of the conditions in the Directive

attaching to the right of free movement in protecting public finances (though that is of course not all those conditions seek to do) rather than as creating any sort of knock-out blow preventing anyone from seeking to rely on proportionality in the context of a claim for social assistance of one sort or another.

20. On any view, however, given the decision in *Mirga*, a claimant seeking to rely on proportionality to displace the limitations in the Directive is facing a considerable uphill struggle. On what basis, then, does Mr Rutledge submit that the present appellant should succeed?

21. As a preliminary, I note that Mr Rutledge makes only a brief submission on the EU cases, noting in summary that (a) the principles in *Alimanovic* are incorporated in the *Mirga* judgment; and (b) *Garcia-Nieto* simply affirms and applies those principles to another set of facts.

22. He submits that following *Mirga* there is no longer a need to identify a lacuna in the Directive, as had previously been found to be the case in R(IS) 4/09 and, he might have added, *Kaczmarek v SSWP* [2008] EWCA Civ 1310. I do not consider the Supreme Court did say so in *Mirga*. If the Supreme Court had been intending to overrule *Kaczmarek*, a Court of Appeal authority of relatively long standing in this fast-moving area, I consider it is likely that they would have expressly said so, but that case is not mentioned in their decision and appears not to have been cited, presumably as the grounds of appeal did not require it.

23. In a number of Upper Tribunal decisions post *Mirga*, the need to be able to point to a lacuna – or gap – in the EU legislation has been re-affirmed: see *SSWP v PS-B (IS)* [2016] UKUT 05611 (AAC) at [12] and *SSWP v AC* [2017] UKUT 130 (AAC) at [10]. The reason is that given by Upper Tribunal Judge Rowland in *JK v SSWP (SPC)* [2017] UKUT 0179 (AAC) at [21], where he also explains the link between the need for a lacuna and the conclusions reached – albeit not expressed by reference to the lacuna principle- in *Mirga*:

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

24. I respectfully agree with that view. If the Supreme Court's decision is to be interpreted in "lacuna" terms, although the Court was evidently conscious both that Ms Mirga's circumstances failed to fall within the Directive and that *Baumbast* provided a route through which that failure could be rectified if

considered appropriate, it failed to plug that gap and must I think be taken by implication as having concluded there was not a lacuna which required filling.

25. *Kaczmarek's* reminder that the Directive serves as a "useful benchmark and a steer as to the ambit of proportionality" does not mean that it is set in stone, especially with the passage of time since the making of the relevant legislation (just as the passage of time was a factor for the Court in *Baumbast*.) However, the existence of young people who for a variety of reasons are not in a position to assert rights either as the family member of a Union citizen who does benefit from the Directive or in their own right (e.g. as a worker) is not a wholly new issue which could only have emerged following the making of the Directive; rather, the predecessor legislation to the Directive, which also envisaged freedom of movement by (among others) workers, the self-employed and the self-sufficient and (as variously defined) their family members also had the potential to give rise to young people finding themselves in such situations.

26. What is very clear is that the Directive regards the rights of children and young adults and those who are dependent on others as arising as family members and as dependent on accompanying or joining a Union citizen moving to or residing in another member State (Arts 2 and 3), something which the latter could with essentially only accomplish under EU law by complying with the terms of the Directive. When the Directive was made, there were legislative changes both as to who constituted a "family member" and as to the position of family members following the death or departure of the Union citizen. Even in the latter case, the family members are not given a free-standing independent right, but have to meet the conditions of Article 7(1). Though examining related areas, the legislator had no appetite for conferring free-standing rights on individuals in difficult family circumstances unless they met the condition imposed by the Directive. As Upper Tribunal Judge Jacobs pithily put it in *PS-B* at [12], "the absence is an indicator of the scope of the policy".

27. Reference to *Mirga* in its earlier stages suggests a rationale for the approach of the EU legislator. In *RM v SSWP (IS)* [2010] UKUT 238(AAC) Judge Rowland noted how:

> "There is no general provision in either Article 18 or, more importantly, the Directive, requiring hard cases to be examined on a case-by-case basis to see whether the refusal to recognise a right of residence would be incompatible with the Convention or, if not actually incompatible with the Convention, would nonetheless be regarded as unduly harsh given the personal circumstances of the claimant. It seems to me that the reason for that is that individual Member States have a duty to act consistently with the Convention in their own immigration systems and because the European Union is content for individual Member States to judge whether a right of residence should be granted in other cases that do not fall within the scope of the Directive. I observe that paragraph (6) of the preamble to the Directive expressly leaves the position of extended family members to be "examined by the host

> Member State on the basis of its own national legislation" and it seems to me that the Directive anticipates that each Member State will have domestic legislation adequate to deal with hard cases falling outside the scope of the provisions in the Directive itself. Otherwise, there would surely be provision in the Directive itself for doing so.

28. I place weight, as did Judge Rowland, on the existence of mechanisms such as the provision for national law to determine who are "extended family members" for the purposes of Article 3 as indicating that the legislator considered not every matter had to be addressed by EU law rather than national law and it is telling that left to national law were family relationships of a less definite sort where a wider range of factors may be in play. The present case is not about whether the appellant is an "extended family member" but whatever merit there may be in the case in my view, as will be apparent, likewise turns on a range of "softer", more discretionary considerations. Judge Rowland went on to suggest a need for domestic immigration authorities to be encouraged to play a fuller part in addressing the immigration status of EU nationals such as Ms Mirga and the same point may be made in relation to the present appellant.

29. Judge Rowland's decision was criticised by counsel for Ms Mirga in the Court of Appeal for "in effect side-lining the fundamental rights issues as if they were matters only for decision by the immigration authorities" (see [2012] EWCA Civ 1952 at [19]) but the appeal was dismissed and I can find nothing in the decisions of the Court of Appeal or Supreme Court to cast doubt on Judge Rowland's analysis in this regard.

30. Mr Rutledge submits that there are some similarities of the circumstances of the present case and *Mirga* but that a distinguishing feature of the present case is the appellant's dependence on her mother for emotional and practical support. That is a difference, though not one that necessarily works in the present appellant's favour given that she had the support of a mother and siblings, whereas Ms Mirga may have been on her own to a greater extent. It seems to me that the attempts to distinguish *Mirga* for legal purposes on the basis of the factual differences which there inevitably are between cases is not going to succeed and it is more constructive to examine whether any circumstances of the appellant are sufficient to bring the case within the *Mirga* exceptionality requirement as interpreted above.

31. It is possible to view the exceptionality requirement as creating a two stage process such that first of all, it is necessary to consider whether it is an exceptional case, for if it is not, the door will not even be ajar to a proportionality argument. If it is, but not otherwise, there is a substantive proportionality exercise to be done. The structure of Mr Rutledge's submission follows the two-stage process, but the arguments are substantially the same for both stages. This decision is being given without an oral hearing and no point has been raised in the written submissions as to whether it is a two-stage process and, if so, where the initial hurdle is to be set. I prefer to leave that pair of issues for a case in which they arise. It is not feasible in the present case to attempt to rule (if such be the test) on whether it meets the

exceptionality requirement without engaging with the substantive arguments and to those I now turn.

32. Mr Rutledge relies on the appellant being severely disabled both physically and mentally and heavily reliant on others to live in the community; her age and disability make her not economically self-sufficient. I place relatively little weight on this. The Directive itself makes provision in Art 3, to a degree, for those who are - for what may be a range of reasons – dependent or who on serious health grounds strictly require personal care, but those rights are dependent on a valid exercise of rights of freedom of movement by Union citizens and here there has been no such exercise by the appellant's mother. The effect of the submission would be to make the UK a sort of insurer of last resort for the financial support, through the benefit system, of those with disabilities such as the appellant has, even though they have no right to reside in the UK. That would be to drive a coach and horses through the balancing of competing interests, including the protection of the finances of Member States by the Directive, as expounded in the case law reviewed above. Such matters should for the reasons above be left to the immigration authorities, in the event that an application for leave were to be made to them.

33. Mr Rutledge than relies on the fact that the appellant's mother appears to have been paid social assistance in error up to 2014 through, as he puts it, no fault on her part and that, the appellant, her mother and her siblings having been in receipt of social assistance since November 2005 (if not earlier), "consequently, they have become fully integrated into UK society."

34. The matter had to be looked at on the basis of the circumstances obtaining at the date of the respondent's decision under appeal (Social Security Act 1998, s.12(8)) but while that weakens Mr Rutledge's point, it does not destroy it. However, matters of integration are unevidenced save in respect of the appellant and the evidence and findings in respect of her spoke of the concern as to her "social isolation". If, as may have been the case, the appellant's mother was paid income support in error for some years without the respondent checking her right to reside, the only point I can see in consequence is that it may have provided a period of time in which integration could take place, but as noted, in the case of the appellant it did not and as to the remainder of the family (if their interests and those of the appellant could not be meaningfully disentangled given the age and circumstances of the children at the time), there is no evidence.

35. Mr Rutledge then relies on the appellant having no links with Sweden, that her home is with her family in the UK and that it would be unrealistic to expect her to return to Sweden; indeed, there would be a "likely damage" to her well-being as a disabled person if she lacked the resources to remain in the UK with her family.

36. This is a matter of speculation. There is no evidence as to what her situation would in fact be if she were to return to Sweden. At the material time in the UK she was receiving support from education and social services and

disability living allowance and her mother was receiving carer's allowance on respect of her; however, it is not intrinsically likely that there would not be appropriate provision in Sweden for those of its own nationals with disabilities and care needs, nor that, as a national of that country, once she had become habitually resident there she could not access whatever social assistance is available to nationals of that country. There is no reason on the material before me to suppose that the decision to remain in the UK rather than return to the country of which they are nationals was other than a matter of family choice: it does not follow that it is disproportionate to apply the restrictions in the Directive even if the consequence is that the appellant is denied social assistance in order to protect the UK's public funds against the consequences of the exercise of that choice.

37. In any event, for the reasons I have given, even if these considerations were to be better evidenced than they are, the appropriate vehicle to examine this would be an application to the Secretary of State for the Home Department.

38. Mr Rutledge seeks to rely on Article 26 of the Charter of Fundamental Rights of the European Union, which his submission does not entirely accurately summarise but which provides:

> "Integration of persons with disabilities
>
> The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community."

39. I proceed on the (possibly generous) basis that the UK is, by considering whether proportionality requires the terms of the Directive not to be enforced, indeed "implementing Union law" for the purposes of Article 51 of the Charter. However, I am not persuaded that entitlement to ESA falls within what Article 26 is aimed at, given that there are separate provisions in Article 34 expressly concerned with social security and social assistance. In any event, by Article 52:

> "1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
>
> 2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties."

40. There can in my view be little doubt that the protection of the budget of Member States through the regulation of the right of residence is, in the light of the case law reviewed above, an "objective of general interest recognised by the Union". In that event, we are taken to the application of a

proportionality test, so the argument is circular. It is not possible to add to the weight of a proportionality case by saying that a proportionality test needs to be applied.

41. Further, the question is not purely one of disability rights but of the conditions attaching to freedom of movement (of people with disabilities and everyone else). If Article 26 has any purchase at all on an argument that a person should be able to rely on it to access benefit in a particular Member State, it is a "right… for which provision is made in the Treaties" (i.e. Article 21), which "shall be exercised under the conditions and within the limits defined by those Treaties" – which in turn takes us back to, among other things, the Directive.

42. Here is a convenient place to deal with Mr Rutledge's point, not subsequently developed, that the decision betrayed an incorrect approach to the concept of integration and failed to respect the non-discrimination principle of recital (31). There is no absolute principle that integration is to be promoted any more than that freedom of movement should be. The Directive strikes a balance between a number of aims, including to an extent the promotion of integration and it is not an error to give effect to it in accordance with its terms. Recital (31) refers to the duty to "implement this Directive without discriminating between the beneficiaries of this Directive" on grounds which include disability. The present appellant is not a beneficiary of the Directive as her mother has no rights under it and it was found (a finding not challenged in this appeal) that the appellant could derive no rights under it from her step-father either.

43. Mr Rutledge argues that the points considered above outweigh the objective of "protecting the social assistance system of the UK from benefit tourism" and suggests that, for three reasons, the appellant's case represents a closed class. I do not agree with any of the reasons advanced. The appellant's situation is not based on the assumed failure to apply the habitual residence test to her mother at the proper time – on the evidence, that is simply irrelevant. That income support based on incapacity has been replaced by income-related ESA is a difference without substance. Both are subject to a right to reside test and similar issues would be just as likely to occur in relation to ESA claimants. As to Mr Rutledge's submission that "claims by EEA nationals are subject to greater scrutiny following the package of measures introduced in 2014 aimed at restricting EEA nationals' access to out of work benefits", while this may be true in relation to jobseekers' allowance and housing benefit, there have been no such changes in the applicability of the right to reside test for sick or disabled people who claim income-related ESA or its predecessor benefit.

44. In a brief reply, Mr Page for the respondent submits that the "extreme circumstances" envisaged by the Supreme Court in *Mirga* were those of Mr Baumbast, a set of circumstances in which nearly all the conditions of entitlement were met and that is not the appellant's situation. It is not easy – nor, I would suggest, appropriate - to delimit in advance the circumstances which might meet the exceptionality requirement. Clearly those of Ms Mirga

and those of Mr Samin, whose case was heard at the same time, difficult though their circumstances plainly were, were insufficient to meet the test. However, I would not wish to exclude the possibility that something other than a "near miss" case such as Mr Baumbast's could do so.

45. In conclusion, for the reasons I have given, I am not attracted by the features of the appellant's case on which Mr Rutledge relies as making it disproportionate to rely on the Directive, under which she does not qualify, so as to limit the right of residence which Article 21 might otherwise confer. Those features, such as they are, do not outweigh the interests of Member States in protecting their public finances against additional claims on their social assistance budget, whether for the reasons submitted by Mr Rutledge or otherwise.

46. There is one final matter to address. Mr Rutledge has sought in his reply to raise the right to argue that the appellant's mother's entitlement to social assistance was transitionally protected under reg 6 of the Social Security (Habitual Residence) Amendment Regulations 2004/1232. He does so on the basis that her only claim for income support mentioned in the respondent's response was made on 15 November 2005 but in effect that the family must have been living on something since their arrival in the UK in February 2004 and that that "something" would engage those Regulations. However, para 2 of the respondent's reply makes clear the answer – that before she separated from her husband, he had been in receipt of jobseekers allowance in respect of her and all of the children. She had therefore not been in receipt of a specified benefit at the material time for the purposes of the transitional protection (it appears to have been her husband's JSA claim, not a joint one). I am not sure where the point would lead even if established, but for the reasons given, it fails.

CG Ward
Judge of the Upper Tribunal
10 October 2017
(typographical errors corrected 12 October 2017)