IN THE UPPER TRIBUNAL **Case No** CIS/4259/2013
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant: Mr Duncan Wall, Durham Welfare Rights

For the Respondent: Mr Dominic Bayne, (1 May) and Ms Julia Smyth (12 September) (instructed by DWP Solicitor)

Decision: I make an order under rule 14 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the children concerned in this case or their parents.

The appeal is dismissed. The decision of the First-tier Tribunal sitting at Durham on 5 June 2013 under reference SC225/12/02126 did not involve the making of a material error of law and is upheld.

REASONS FOR DECISION

Introduction

1. The present case highlights some of the formidable difficulties in EU law terms which can arise where family relationships have been established when freedom of movement rights are being exercised and subsequently run into difficulty. While the award of jobseekers' allowance, after the DWP's decision which is the subject of the present proceedings, to the appellant may have taken the edge off her income difficulties and her situation may in other respects have moved on, the case has nonetheless taken an inordinately long time, due in no small measure to case law developments elsewhere affecting a number of areas, the role of proportionality in freedom of movement cases; EU citizenship and derivative rights; and unmarried partners. I am grateful to the parties and their representatives for their forbearance and apologise for any inconvenience caused. Because of the extended timescale and the regular emergence of potentially relevant decisions of other courts, the decision has prior to its issue been submitted to the parties' representatives as a draft, lest there be any matter on whi ch they had not previously had a chance to make submissions but would wish to do so. It is right to record that oral and written submissions in the case were principally directed to the proportionality issue only. In particular, no submissions were made, whether in response to the draft decision or otherwise, on the *Surinder Singh* issues nor (as will become apparent, the point fails anyway for lack of evidence) on behalf of the respondent in relation to derivative rights.

2. It is an inevitable consequence of freedom of movement that relationships are formed between people of differing nationalities, who do not necessarily live in the Member State of which they are nationals; that sometimes, children may be born as the result of such relationships; and that sometimes,

regrettably, such relationships founder. Such issues feature in the caseload of this Chamber and there are two more recent cases raising points very similar to the specific point in the present case and which are stayed behind it. A similar trend was noted by Advocate General Sharpston at [128] of her Opinion in C-34/09 *Ruiz Zambrano* and are evident in some of the more recent cases on derivative rights, cited at [80] below.

3. The structure of this decision is as follows:

Chronology

4. The appellant is a Spanish national born in March 1990. She met an Englishman who was working in Spain, Mr B. She formed a relationship with him and moved with him to the UK in September 2009. She worked in the UK for approximately two months in late 2009. On 27 August 2010 she gave birth to twins. Mr B was named on the birth certificates and so had parental responsibility under Children Act 1989, s4(1)(a), as did the appellant. There is no suggestion that the children had ever gone to Spain, at any rate for more than a holiday. The appellant worked again, for the three months to 1 July 2011, stopping because of child care issues. Subsequently, the appellant and Mr B separated and on advice from her solicitor she claimed income support on 13 February 2012, at which point her children were just under 18 months old. What she and the children lived on when her claim was rejected is not in evidence (although by the time of the First-tier Tribunal hearing in June 2013 she was – whether correctly or not - in receipt of child tax credits and child benefit and, it appears, housing benefit: see statement of reasons para 4). There is no suggestion that at the time of her claim for income support she had registered with the jobcentre as available for, and actively seeking, work. It is conceded that she did not have retained worker status. On the chronology there can be no question of remaining a worker though the operation of the CJEU's decision in C-507/12 *Saint Prix*.

5. Proceedings under the Children Act 1989 were commenced, in which she was legally represented. On 5 April 2012 there was a hearing before the District Judge who made an order in terms that, inter alia, in the interim and until further order the twins should reside with Mr B from 5pm on Fridays to 10am on Mondays and with the appellant for the rest of the time. The order contained warnings about the provisions of sections 13(1) and (2) of the Children Act 1989 and the Child Abduction Act 1984 and an information note about how a person with parental responsibility could set about preventing the issue of a passport to the children. I return to these various provisions below. The matter was listed for a further hearing on 7 June 2012.

6. As is now known, the case was subsequently adjourned for mediation, which proved unsuccessful, and eventually listed for a final hearing on 28 April 2014, at which an application by the appellant for permission to take the twins to Spain permanently was refused and an order made for the children to live with each parent under a pattern in which the appellant had them for the greater part of the time. These matters post-dated the date of decision under appeal.

7. On 1 May 2012 the claim for income support was effectively rejected, on the basis that the appellant was a "person from abroad" and her "applicable amount" was £nil. The relevant provisions, which need not be set out, are Income Support (General) Regulations 1987 ("the 1987 Regulations"), reg 21AA and sch 7, para 17.

The First-tier Tribunal's decision

8. The appellant appealed to the First-tier Tribunal ("FtT") which on 5 June 2013 concluded that she did not have the right to reside on any of a number of defined bases. The appellant had been in the UK for more than three months. She was not self-employed, self-sufficient or a student. She had not worked since 1 July 2011 and had given up that work to take over the child care because Mr B had been struggling to manage it. Thus she had not retained worker status. Any efforts to find a job were limited and spasmodic and she had not applied for jobseeker's allowance. She was neither a family member nor an extended family member. Nor did she have rights derived from the rights her children enjoyed pursuant to the judgment in C-34/09 *Ruiz Zambrano*, as there was and is no suggestion that they would have to leave the territory of the European Union. Nor was there any question of her having a right as the primary carer of a child in school as the children were not receiving any form of education outside the home (this was a reference to the rights conferred by Art 10 of Regulation (EU) No 492/2011 and previously found in Art 12 of Regulation 1612/68 – see below.)

9. Finally the tribunal observed:

> "Article 21(1) of the Treaty on the Functioning of the European Union cannot confer rights which go beyond what is conferred by Directive 2004/38 unless it can be shown that there is a lacuna in the Directive. Although the Tribunal has considerable sympathy with [the appellant]

> Article 21 cannot be read as conferring the right of residence whenever it would be "wrong" not to do so."

10. The appellant's grounds initially argued that:

a) education for the purposes of Art 10 of Regulation 492/2011 should extend to children of pre-school age who received education from their carers and not just those in formal education;
b) it was inequitable and contrary to the aims of family law that a person in the appellant's position, should not be able to receive support from the benefit system, would be forced to leave the UK to return to her country of origin; and
c) the tribunal's decision breached Article 8 of the European Convention on Human Rights.

11. Mr Wall has since abandoned ground (a) and rightly so. Wherever the lower age limit falls to be drawn (as to which see e.g. *Shabani v SSHD* [2013] UKUT 315 (IAC)) the conceptual basis for the right is the avoidance of disruption to a child's education, compromising the aim of integrating the migrant worker's family into the host Member State: see C-310/08 *Ibrahim* at [43]. At the material time, because of the young age of the children, there was no possibility of such disruption. He has also acknowledged that an argument that *Ruiz Zambrano* applied, briefly aired in the course of proceedings, was destined to fail. The issues have since crystallised under headings of (a) proportionality; (b) derivative rights; and (c) human rights.

12. The judge who had heard the case granted permission to appeal, observing, without further comment, that "there is an arguable case".

The EU law

13. The relevant articles of the Charter of Fundamental Rights of the European Union provide:

> Article 7
>
> "Everyone has the right to respect for his or her private and family life, home and communications."
>
> Article 24
>
> "1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
> 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
> 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

Article 51

"1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
…"

14. The relevant articles of the Treaty on the Functioning of the European Union ("TFEU") provide:

Article 18 (ex Article 12 TEC)

"Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination."

Article 20 (ex Article 17 TEC)

"1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
(a) the right to move and reside freely within the territory of the Member States;
(b) –(d) [not material]"

Article 21(ex Article 18 TEC)

"1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.
2 and 3 [not material]"

15. There are areas where relevant rights are created by the Court of Justice's interpretation of provisions of the Treaty (and are not found in Directive 2004/38, discussed below). Thus in C-370/90 *Surinder Singh* it was held to be necessary to grant to the spouse of a UK national who had gone to another Member State to work, a right of residence in the UK upon the UK national's return, on the basis that there risked being a "chilling" effect deterring people from exercising their right of free movement if they feared being unable to return with their family. C-310/08 *Ibrahim* and C-480/08

Teixeira concerned the children of workers or former workers and their primary carers, reflecting Art 12 of Regulation 1612/68 and Art 10 of Regulation 490/11*).* C-200/02 *Zhu and Chen* examined the derivative right of the primary carer of a self-sufficient EU citizen child while C-34/09 *Ruiz Zambrano* considered the rights of primary carers of EU citizen children who would be compelled to leave the EU if such a right were not granted. These cases (and others concerning derivative rights) are discussed further below.

16. The recitals to Directive 2004/38 record, so far as material, as follows:

> "(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.
>
> (2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.
>
> (3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.
> …
> (10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions."

17. The Directive "lays down the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members" (Art1(a)). The Directive is, in that regard, as will be seen, non-exhaustive. By Art 3:

> "This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them."

18. As is well known, Article 6 confers an initial right of residence for up to three months. Article 7 sets out detailed provisions conferring a right of residence for more than three months on workers, the self-employed, the self-sufficient and students, and their respective family members, subject to the various conditions there set out. This is reflected in the consideration given by the First-tier Tribunal as set out at [8] above. It is not in dispute that the

appellant could not at the material time bring herself within these provisions. Article 16 then confers a right of permanent residence based on a continuous five year period of lawful residence. At the date of the DWP's decision, this could not apply to the appellant.

19. Not set out in those Articles, but also relevant, is the right to reside of EU national jobseekers. This is derived from C-292/89 *Antonissen* and is effected – put briefly – by a series of carve-outs effected by Articles 14(4)(b) and 24 of the Directive. A fuller explanation of the background can be found in *SSWP v MB (JSA)* [2016] UKUT 372 (AAC) at [9] –[22].

Human Rights Law

20. Article 8 of the European Convention on Human Rights provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

21. A number of provisions of the UN Convention on the Rights of the Child have potential relevance, including Articles 3, 4, 8, 18, 26 and 27. Only some require to be set out:

> **"Article 3**
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
> …
>
> **Article 26**
>
> 1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
>
> 2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

> **Article 27**
>
> 1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
>
> 2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
>
> 3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
>
> …"

UK freedom of movement law

22. The instrument by which the United Kingdom gave effect to EU freedom of movement law at the material time was the Immigration (European Economic Area) Regulations 2006/1003 ("the 2006 Regulations"). It is not necessary to set out the provisions implementing the Articles set out in [18]. Regulation 9 purports to give to returning British nationals who have exercised freedom of movement rights the rights mandated by *Surinder Singh*. Reg 15A, added after the DWP's decision in the present case but giving effect to the other cases noted in [15] above, made provision for a variety of derivative rights. As regards jobseeker status, the definition has since been heavily amended (see *SSWP v MB*) but at the time with which we are concerned, reg 6(4) provided

> ""jobseeker" means a person who enters the United Kingdom in order to seek employment and can provide evidence that he is seeking employment and has a genuine chance of being engaged."

The respondent does not seek to suggest by reference to that definition that the appellant would not have qualified as a jobseeker if looking for work after the life events set out in [4]. Indeed, as noted in [1], subsequent to the events which are the subject of the present appeal, she claimed, and was awarded, jobseekers' allowance.

UK benefit law

23. Income support is a means-tested benefit, the detail of which is contained in the 1987 Regulations. To obtain income support, a person must, inter alia, fall within one of the "prescribed categories of person". These are set out in schedule 1B to the 1987 Regulations and include at para 1 provision for lone parents. At the date of the DWP's decision it provided:

> "A person who is a lone parent and responsible for—
> (a) a single child aged under 7, or
> (b) more than one child where the youngest is aged under 7,
> who is a member of that person's household."

Shortly afterwards the age limit was lowered so as to require the child or youngest child to be under 5. The age had for many years stood as under 16, but was successively lowered to under 12 in 2008 and under 10 in 2009.

24. Income-based jobseekers allowance ("IBJSA") in the form in which it has existed prior to the introduction of universal credit is payable to those who (to simplify) qualify on financial grounds and can meet the requirements of section 1(2) of Jobseekers Act 1995, which include that the person must be available for employment, have entered into a jobseeker's agreement which remains in force and be actively seeking employment. Provision for modifying these requirements exists in the Jobseekers Allowance Regulations 1996/207 ("the JS Regulations"). A person with caring responsibilities (which, by reg 4, includes responsibility for caring for a child) is not required to be available to take up employment immediately, but on 28 days notice, and is entitled to 7 days' notice of a pending interview rather than the more general 48 hours: JS Regulations, reg 5(1A). Such a person may also, subject to conditions, restrict the number of hours for which they are available to less than the normal 40, subject to a minimum of 16 (reg 13(4)-(7)). Additionally (though not relevant in the present case because of the age of the children) a lone parent may restrict his or her availability to a child's normal school hours (reg 13A).

<u>UK family law</u>

25. Where, as in this case, the father's name is on the birth certificates, that gave him parental responsibility under Children Act 1989 ("the 1989 Act"), s.2(2)(b) and 4(1), while the appellant as mother has it under s.2(2)(a). Section 3(1) defines "parental responsibility" as meaning "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property." I take that as being –in general terms – wide enough to extend to determining where a child should live. My understanding is that under s.4(2A) and (3) it is possible for a court to order that a person shall cease to have parental responsibility (but there is no evidence before me suggesting that this was the case here).

26. Even where, unlike the present case, there has been no court order, there are constraints on taking a child abroad imposed (as a matter of criminal law) by the Child Abduction Act 1984. Section 1 of the 1984 Act makes it an offence to take a child under 16 out of the UK without "the appropriate consent". That expression is defined by s.1(3) so as to include, among others, the child's mother and "the child's father, if he has parental responsibility for him". An alternative route to obtaining "the appropriate consent" is by "the leave of the court granted under or by virtue of any provision of Part II of the Children Act 1989" i.e. orders with respect to children in family proceedings.

27. While there is a defence under s.1(5) where the other person has unreasonably refused to consent, quite apart from the exposure to legal risk which that entails, such a defence is (by sub-section (5A)) not available where the person who has refused to consent is a person in whose favour there is a residence order in force with respect to the child.

28. The interim order made by the County Court on 5 April 2012 (and thus current at the date of the DWP's decision) constituted a residence order as defined by s.8 of the 1989 Act. The effect of that (apart from depriving the appellant of the possibility of any defence under s.1(5) of the 1984 Act, noted above) is to bring into play s.13 of the 1989 Act, which at the material time provided:

> "(1) Where a residence order is in force with respect to a child, no person may—
> (a) cause the child to be known by a new surname; or
> (b) remove him from the United Kingdom;
> without either the written consent of every person who has parental responsibility for the child or the leave of the court.
>
> (2) Subsection (1)(b) does not prevent the removal of a child, for a period of less than one month, by the person in whose favour the residence order is made.
>
> (3) In making a residence order with respect to a child the court may grant the leave required by subsection (1)(b), either generally or for specified purposes."

29. The effect of this would appear to be that consent of the father was subject to an additional requirement that it be given in writing and that his ability to give or withhold it was absolute, subject however to the power of the Court to grant leave despite his refusal.

30. In considering such an application, the Court would apply the principle that "the child's welfare should be the paramount consideration" (1989 Act, s.1). In the present case, as has been seen, the Court did (some 14 months later) refuse to make an order permitting the appellant to take the children to Spain permanently. While that is of course after the date of the DWP's decision, it does serve to negative any suggestion that, at the date of decision, all the appellant needed to do in order to return to Spain with the children was to pursue her case with vigour before the County (or Family) Court.

31. For the sake of completeness:

> (a) I note that s.13(2) enables a person with a residence order to take the children out of the UK for up to one month (s.13(2) of the 1989 Act) and thereby not to commit an offence under the 1984 Act (s.1(4)(a) of the Act), but that appears not apt to make any material difference in the context of access to social assistance; and

(b) I also note the ability to apply for a prohibited steps order under s.8 of the 1989 Act precluding a person from taking a child abroad. While there is no mention of such an order in the present case, the existence of such a provision may be relevant to the application of the relevant principles to other cases.

Applicability of *Surinder Singh* on entry to the UK

32. No submission was made the FtT (and none has been made to me) that upon her initial move to the UK from Spain with Mr B the appellant could benefit from the principles in C-370/90 *Surinder Singh*. I have nonetheless briefly considered the point in the light of a recent legal development, as this jurisdiction is an inquisitorial one. Even if indeed she and Mr B were in a "durable relationship" when in Spain, the appellant as a Spanish national in Spain would not have needed to exercise such rights (if any) as were conferred on her as a person in such a relationship by Spanish law within the framework provided by the Directive. In the absence of such an exercise of rights, there can be no question of the UK being fixed with the view of the relationship taken in another Member State (as has been suggested might be the case by, among others, Mr Commissioner Stockman in *JS v DSD* (JSA) [2015] NICom 53).

33. There is no suggestion that the appellant sought, or obtained, from the UK authorities a registration certificate or EEA family permit on the basis of a durable relationship with Mr B. Had she sought one, it would almost certainly have been refused on the basis of how the Secretary of State applied reg 9 of the 2006 Regulations 2006 (see below). Without a positive decision in her favour, she would not on the existing authorities have been an "extended family member": see CIS/612/2008 at [53] and C-83/11 *Rahman*.

34. In *Banger* [2017] UKUT 125 (IAC) the Immigration and Asylum Chamber has made a reference to the CJEU under Art 267 asking, among other questions, whether *Surinder Singh* applies to non-EU unmarried partners. While the circumstances in which an EU national might need to rely on *Surinder Singh* may not be frequent, I do not see why the conceptual basis for that decision – the "chilling" effect on the exercise of freedom of movement rights if a person going to work in another Member State could not later return with a family member (whatever that means in this context) – should not apply regardless of whether the "family member" is an EU national or not.

35. I have considered whether the present proceedings, already long-running though they be, needed to be stayed further, pending the decision of the CJEU in *Banger*. I have concluded that they do not and that it is not necessary to explore the implications of *Surinder Singh* at this point in the narrative further than I have done. Ms Banger, unlike the present appellant, had applied for, and been refused, a residence card (the corresponding document for a third country national), a refusal which she was challenging in the proceedings in the Immigration and Asylum Chamber in which the reference was made. I have also borne in mind that it has not been submitted

to me that *Surinder Singh* could have assisted the appellant when she first moved from Spain; evidence about the durability or otherwise of the relationship is not likely now to be forthcoming; and that even if (by no means a foregone conclusion) *Surinder Singh* were to prove capable of assisting the appellant initially when she moved from Spain, it is far from clear that such a right would continue to subsist following the separation between her and Mr B.

Union Citizenship

36. The status of citizen of the Union is "destined to be the fundamental status of nationals of the Member States" (C-333/13 *Dano* at [58]). The right it creates is directly enforceable (C-413/99 *Baumbast* at [84] – [86]). However, merely because someone is a citizen of the Union will not without more confer a right to reside in another Member State, nor the ability to rely on other provisions of EU law to access social assistance in that other State. People who cannot access social assistance in those circumstances are not left high and dry. As Advocate General Geelhoed stated in *Trojani*:

> "The basic principle of Community law is that persons who depend on social assistance will be taken care of in their own Member State."

37. If the appellant were a single woman without children, she would be free to return to Spain, the Member State of which she is a national. However, that is not the position she is in and it is her inability to access social assistance in the UK, whilst being precluded from returning to the country of which she is a national to do so, which leads to the perhaps odd-seeming situation which is the subject of the appeal. Can established legal principles respond to such a situation?

38. The rights of Union citizens, including that of free movement, are subject to limitations, as noted in *Dano* at [59], but they are not to be applied in a manner which is lacking in proportionality. On that basis, Mr Baumbast, who no longer worked in the UK but elsewhere, for a German company, and whose sickness insurance was in Germany and did not cover emergency treatment in the UK, was able to assert a right to reside, notwithstanding that he did not fulfil to the letter each and every part of the predecessor legislation to what is now Art 7(1)(b) of the Directive. The ECJ held at [94] that:

> "a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality."

AG Geelhoed had expressed the view in his Opinion at [22] – [26] that the predecessor legislation had failed to provide for changes in society, in part

through increased international movement, which had become apparent, so that as a result a lacuna in the legislation ensued. In that situation, the appropriate step was to allow reliance on the Article directly and to apply by analogy the provisions which came closest to covering the situation.

39. To the extent that rights under Articles 20 and 21 may arise directly, both the appellant and her children are Union citizens and can rely on them where they apply. Notably for present purposes, this includes, in the case of the children, seeking to rely on Articles 20 and 21 against the Member State of their nationality: see C-356/11 and C-357/11 *O and S* at [44], citing C-434/09 *McCarthy* and C-256/11 *Dereci*. In *McCarthy*, the Court observed:

> "46…. On this point, it must be observed, however, that the situation of a Union citizen who, like Mrs McCarthy, has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation (see Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 22).
>
> 47. Indeed, the Court has stated several times that citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000, paragraph 41 and case-law cited). Furthermore, the Court has held that Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status (see *Ruiz Zambrano*, paragraph 42).
>
> 48. As a national of at least one Member State, a person such as Mrs McCarthy enjoys the status of a Union citizen under Article 20(1) TFEU and may therefore rely on the rights pertaining to that status, including against his Member State of origin, in particular the right conferred by Article 21 TFEU to move and reside freely within the territory of the Member States (see Case C-33/07 *Jipa* [2008] ECR I-5157, paragraph 17 and case-law cited)."

40. While the existence of the Directive is indirectly of considerable importance to the present case, it is conceded that the appellant cannot qualify under any of its express terms. As the right to move and reside referred to in Article 20 and provided for in Article 21 is "subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect" (i.e. including the Directive), the appellant is, as regards any right she may have in her own right (as opposed to a derivative right from her children) dependent on a proportionality argument, that the limitations created by the Directive should not be enforced against her so as to deprive her of a Treaty right.

Proportionality

41. One of the two grounds of appeal in *Mirga v SSWP* [2016] UKSC 1 concerned whether it was possible for Ms Mirga (and Mr Samin whose case

was heard at the same time) to rely on the doctrine of proportionality in order to argue that, despite not falling within relevant provisions of EU secondary legislation and the domestic legislation implementing it, she could rely directly on her rights under Article 21 TFEU to assert a right to reside and with it (in Ms Mirga's case) to access income support. Lord Neuberger, giving the judgment of the Court, observed at [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."

42. A substantial number of appeals pending before the Upper Tribunal (including this one) had sought to rely on the principle of proportionality and had been stayed pending the decision in *Mirga*. That decision was itself delayed to enable the Supreme Court to have the opportunity to consider the decision of the Court of Justice of the European Union in C-67/14 *Alimanovic*. Since then, the Upper Tribunal has been engaged in a process of seeking to identify those which might have a claim to being in (if such a category exists) the "category of exceptional cases" to which Lord Neuberger referred. In considering whether this case might be such a case, it is necessary to take into account the line of relatively recent decisions of the CJEU concerning the Directive and the Treaty provisions to which it is linked.

43. In relation to C-140/12 *Pensionsversicherungsanstalt v Brey* I note the Court's observations about the twin purposes of the Directive:

> "53…[A]lthough the aim of Directive 2004/38 is to facilitate and strengthen the exercise of the primary and individual right – conferred directly on all Union citizens by the Treaty – to move and reside freely within the territory of the Member States (see Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraphs 82 and 59; Case C-162/09 *Lassal* [2010] ECR I-9217, paragraph 30; and Case C-434/09 *McCarthy* [2011] ECR I-3375, paragraph 28), it is also intended, as is apparent from Article 1(a) thereof, to set out the conditions governing the exercise of that right (see, to that effect, *McCarthy*, paragraph 33, and Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja* [2011] ECR I-14035, paragraphs 36 and 40), which include, where residence is desired for a period of longer than three months, the condition laid down in Article 7(1)(b) of the directive that Union citizens who do not or no longer have worker status must have sufficient resources.
>
> 54. It is apparent from recital 10 in the preamble to Directive 2004/38, in particular, that that condition is intended, inter alia, to prevent such persons becoming an unreasonable burden on the social assistance system of the host Member State (*Ziolkowski and Szeja*, paragraph 40).
>
> 55. That condition is based on the idea that the exercise of the right of residence for citizens of the Union can be subordinated to the legitimate interests of the Member States – in the present case, the

> protection of their public finances (see, by analogy, Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 90; *Zhu and Chen*, paragraph 32; and Case C-408/03 *Commission* v *Belgium* [2006] ECR I-2647, paragraphs 37 and 41)."

44. In C-333/13 *Dano* the Court was dealing with a claim for German special non-contributory cash benefits by a Romanian woman and her young child who had moved to Germany (but not in order to work) and who was not seeking work. The Court held:

> "56. By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 18 TFEU, Article 20(2) TFEU, Article 24(2) of Directive 2004/38 and Article 4 of Regulation No 883/2004 must be interpreted as precluding legislation of a Member State under which nationals of other Member States who are not economically active are excluded, in full or in part, from entitlement to certain 'special non-contributory cash benefits' within the meaning of Regulation No 883/2004 although those benefits are granted to nationals of the Member State concerned who are in the same situation.
>
> 57. It should be observed first of all that Article 20(1) TFEU confers on any person holding the nationality of a Member State the status of citizen of the Union (judgment in *N.*, C-46/12, EU:C:2013:9725, paragraph 25).
>
> 58. As the Court has held on numerous occasions, the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to enjoy within the scope *ratione materiae* of the FEU Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard (judgments in *Grzelczyk*, C-184/99, EU:C:2001:458, paragraph 31; *D'Hoop*, C-224/98, EU:C:2002:432, paragraph 28; and *N.*, EU:C:2013:9725, paragraph 27).
>
> 59. Every Union citizen may therefore rely on the prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU in all situations falling within the scope *ratione materiae* of EU law. These situations include those relating to the exercise of the right to move and reside within the territory of the Member States conferred by point (a) of the first subparagraph of Article 20(2) TFEU and Article 21 TFEU (see judgment in *N.*, EU:C:2013:97, paragraph 28 and the case-law cited).
>
> 60. In this connection, it is to be noted that Article 18(1) TFEU prohibits any discrimination on grounds of nationality '[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein'. The second subparagraph of Article 20(2) TFEU expressly states that the rights conferred on Union

citizens by that article are to be exercised 'in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder'. Furthermore, under Article 21(1) TFEU too the right of Union citizens to move and reside freely within the territory of the Member States is subject to compliance with the 'limitations and conditions laid down in the Treaties and by the measures adopted to give them effect' (see judgment in *Brey*, C-140/12, EU:C:2013:565, paragraph 46 and the case-law cited).

61. Thus, the principle of non-discrimination, laid down generally in Article 18 TFEU, is given more specific expression in Article 24 of Directive 2004/38 in relation to Union citizens who, like the applicants in the main proceedings, exercise their right to move and reside within the territory of the Member States. That principle is also given more specific expression in Article 4 of Regulation No 883/2004 in relation to Union citizens, such as the applicants in the main proceedings, who invoke in the host Member State the benefits referred to in Article 70(2) of the regulation.

62. Accordingly, the Court should interpret Article 24 of Directive 2004/38 and Article 4 of Regulation No 883/2004.

63. It must be stated first of all that 'special non-contributory cash benefits' as referred to in Article 70(2) of Regulation No 883/2004 do fall within the concept of 'social assistance' within the meaning of Article 24(2) of Directive 2004/38. That concept refers to all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that fact 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 (judgment in *Brey*, EU:C:2013:565, paragraph 61).

64. That having been said, it must be pointed out that, whilst Article 24(1) of Directive 2004/38 and Article 4 of Regulation No 883/2004 reiterate the prohibition of discrimination on grounds of nationality, Article 24(2) of that directive contains a derogation from the principle of non-discrimination.

65. Under Article 24(2) of Directive 2004/38, the host Member State is not obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the period of seeking employment, referred to in Article 14(4)(b) of the directive, that extends beyond that first period, nor is it obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies to persons other than workers, self-employed persons, persons who retain such status and members of their families.

> 66. It is apparent from the documents before the Court that Ms Dano has been residing in Germany for more than three months, that she is not seeking employment and that she did not enter Germany in order to work. She therefore does not fall within the scope *ratione personae* of Article 24(2) of Directive 2004/38.
>
> 67. In those circumstances, it must be established whether Article 24(1) of Directive 2004/38 and Article 4 of Regulation No 883/2004 preclude refusal to grant social benefits in a situation such as that at issue in the main proceedings.
>
> 68. Article 24(1) of Directive 2004/38 provides that all Union citizens residing on the basis of the directive in the territory of the host Member State are to enjoy equal treatment with the nationals of that Member State within the scope of the Treaty.
>
> 69. It follows that, so far as concerns access to social benefits, such as those at issue in the main proceedings, a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38."

45. Having reminded itself of the structure of rights conferred by the Directive, the Court continued:

> "74. To accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State.
>
> 75. It should be added that, as regards the condition requiring possession of sufficient resources, Directive 2004/38 distinguishes between (i) persons who are working and (ii) those who are not. Under Article 7(1)(a) of Directive 2004/38, the first group of Union citizens in the host Member State have the right of residence without having to fulfil any other condition. On the other hand, persons who are economically inactive are required by Article 7(1)(b) of the directive to meet the condition that they have sufficient resources of their own.
>
> 76. Therefore, Article 7(1)(b) of Directive 2004/38 seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence."

46. C-67/14 *Alimanovic* at [49]-[50] cited with approval paras 69 and 74 of *Dano* but does not otherwise take matters much further. It did not rule out the applicability of proportionality: rather, it considered that, as regards the retention of "worker" status in circumstances of involuntary unemployment,

proportionality was inbuilt within Art 7 of the Directive: see the discussion in *AMS v SSWP (PC) (second interim decision)* [2017] UKUT 48 (AAC). It was not a case in which reliance was placed on Articles 18 and 21 TFEU directly. C-299/14 *Garcia –Nieto* is to similar effect, endorsing at [38]-[40] the *Dano/Alimanovic* "line" in relation to people in the first three months of residence (I do not accept Ms Smyth's submission that it makes a point about the "economically inactive" more generally).

47. In my view, whilst the Directive might at first sight appear to be concerned, at least primarily, with rights of freedom of movement and residence rather than directly with benefit matters, the line of authority provides a tacit recognition that, when access to welfare benefits is closely linked by national legislatures to the right to reside – as in, inter alia, Austria, Germany and the United Kingdom as these cases reveal – the budgetary implications for Member States of the right to reside being conferred or withheld, while always a consideration as recital 10 records, now have heightened importance.

48. Mr Wall at one stage sought to rely on *Brey* as authority for the proposition that each case requires an examination of the "personal circumstances characterising the individual situation of the person concerned". In the light of the subsequent decisions of the CJEU, it is clear that this does not operate on a generalised level. *Brey* has not been overruled in its application to the previously self-sufficient, but its impact has effectively been confined to that area: *AMS (second interim decision*). There is no evidence that the appellant ever met the requirements for self-sufficiency, which include a requirement for comprehensive sickness insurance cover, and there is no challenge to the FtT's finding that she did not.

49. Although in earlier submissions in the case the existence of the principle was accepted, Ms Smyth submits that the combined effect of these cases and of *Mirga* is that there is no longer any room for the operation of the principle, first articulated in *Kaczmarek v SSWP* [2008] EWCA Civ 1310*,* that it is permissible to rely on proportionality if, but only if, there is a "lacuna" in the coverage effected by the Directive. As noted at [41], the Supreme Court did not say so in *Mirga*: rather, Lord Neuberger left open the possibility, whilst indicating that despite the difficult personal circumstances of Ms Mirga and Mr Samin, they would in any event not stand to benefit from such a principle. If the Supreme Court had been intending to overrule *Kaczmarek*, a Court of Appeal authority of relatively long standing in this fast-moving area, I consider it is likely that they would have expressly said so, but that case does not appear to be mentioned in their decision.

50. Ms Smyth submits that in contemplating that proportionality might "perhaps in extreme circumstances" be invoked, "the [Supreme] Court [in *Mirga*] had in mind very narrow circumstances, for example where a person fell short of the self-sufficiency condition to a very small extent." Whilst acknowledging that any case would have to be "exceptional", I do not see why the exceptionality need be confined to the nearness of a near "miss" rather than the nature of the circumstances.

51. I consider therefore that there may still be some role for proportionality to fill a lacuna. As to whether a lacuna exists, it is not possible to maintain the position, for all that its purposes were expressed to include codification, that the Directive is comprehensive as to the rights which the Treaty confers. As Advocate-General Kokott noted in C-480/08 *Texeira* at [48]-[50] (emphasis added):

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

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

53. What I can accept is that when considering the application of the doctrine of proportionality in any particular case, that needs to be done with a full awareness of the importance of the Directive to the budgets of Member States, as expressed through the above line of cases. Indeed, though he does not dwell on it in the decision, it may perhaps be this which lies behind Lord Neuberger's reason at [70] of *Mirga* for distinguishing the cases before him from *Baumbast* that:

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

54. Ms Smyth submits that there is no need to find that the appellant has a right to reside. *Abdirahman v SSWP* [2007] EWCA Civ 657 acknowledges that some may be lawfully present in the UK but not have such a right and lawful presence is all the appellant needs. I am not attracted by that argument, which sits uneasily with both the legal responsibilities of the appellant towards her children and with the financial implications. However, in view of the conclusion I go on to reach that a right to reside does not arise through the application of the principles of proportionality, I need not dwell on this aspect.

55. In considering whether it would be disproportionate to deny the appellant a right to reside by enforcing against her the limitations in the Directive, under which (and under the 2006 Regulations) she does not qualify, it is relevant to consider the provision which the Directive does make, for situations that are in some ways analogous. Let us imagine that Mr B had been French rather than British and had been living with the appellant in the UK in the same circumstances, with the consequence that the Directive applied. To begin with, the Directive makes a clear distinction between a "family member" and what are sometimes termed "extended family members". Under Article 2(2)

> "Family member" means:
> (a) the spouse;
> (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
> …"

56. Under UK law, notwithstanding the recent challenge in *Steinfeld & Anr v Secretary of State for Education* [2017] EWCA Civ 81 it is not possible for a heterosexual couple to enter into a partnership which would fulfil the requirements of Art 2(2)(b). The legislation did not at the relevant time allow registered heterosexual partnerships or treat them as equivalent to marriage. Nor is there any evidence that, even if such a step be possible under Spanish law, the appellant and Mr B had taken it earlier on.

57. The rights under the Directive of partners not falling within Art 2(2)(b) are addressed by Art 3(2):

> "Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
> (a) …;
> (b) the partner with whom the Union citizen has a durable relationship, duly attested.
>
> The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

58. Article 13 makes provision for the retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership

> "1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.
>
> Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).
>
> 2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:
>
> (a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or
>
> (b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or
>
> (c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or
>
> (d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child,

> provided that the court has ruled that such access must be in the host Member State, and for as long as is required."
>
> Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).
>
> Such family members shall retain their right of residence exclusively on personal basis."

59. While the Article is not without its difficulties of interpretation, what is plain is (a) that it has sought to make provision for the rights of EU nationals following divorce or termination of registered partnerships falling within Art 2(2)(b) and (b) the European legislature has thought about- albeit in the context of third country nationals ("TCNs") - the position of those who have custody of children and, even more directly in point, rights of access to a minor child where a court has ruled that access must be in the host Member State (Art 13(2)(d)).

60. To confer a right of residence upon a Spanish woman who had been living with a hypothetical Frenchman in the UK in such circumstances upon the termination of their unregistered relationship would be to undermine the distinction drawn by Articles 2 and 3 between family members (including registered partners) on the one hand and extended family members (including unregistered partners) on the other.

61. Nor can it in my view be said that the existence of Court orders such as the one in issue in the present case provides a circumstance not considered by the legislature. In my view Article 13(2) contains additional, more demanding conditions, which require to be fulfilled if a TCN is to remain post-divorce (etc.): the legislator is likely to have sought to be stricter towards TCNs than to the family members who were nationals of a Member State, whose situation is considered in Art 13(1). The situations in (a) to (d) of Art 13(2) would a fortiori be covered by the wider rights attaching to nationals of Member States in Art 13(1). While the legislator saw fit to consider the situation akin to the present case in Art 13(2)(d), that was seen as a reason to extend the ability to remain to TCNs post divorce or termination of a registered partnership, but evidently not as a reason to extend it to the children of unmarried partners in unregistered partnerships.

62. It seems to me therefore that the Spanish former partner of a Frenchman in the UK would not be able to argue that there was a lacuna in the Directive – both unmarried partners, and rights of access to children post termination of

registered partnerships, were considered and addressed. Even without the restrictive climate created by the line of cases from *Brey* and *Dano* onwards on a European level and by *Mirga* on a domestic level, in my view an argument that recourse could be had to proportionality so as to permit the appellant in her own right to rely directly on Art 21 would fail.

63. In R(IS)4/09, Mr Commissioner Rowland, discussing "cases where a person could make themselves available for work but may choose not to do so (as is the case with, for instance, single parents)" was content to accept that a right to reside "as a worker" maybe made conditional upon him or her being available for work. I am not entirely clear as to the point being made, but in any event the Commissioner's remarks were obiter and I do not rely on them in support of my conclusion why proportionality cannot avail the appellant. The case is however one (on very diferent facts) where this Chamber (or its predecessor body) did allow a proportionality argument to prevail.

64. Ms Smyth relied upon two decisions of this Chamber where proportionality did not prevail. In *SSWP v SW (IS)* [2011] UKUIT 17, Upper Tribunal Judge Rowland observed, in relation to a claim by an EEA national who was the widow of a British national and a single parent, albeit of an older child (aged around 14):

> "I accept Mr Edwards' submission on behalf of the Secretary of State that there is no lacuna here that may be filled by applying European Union law. Firstly, it must be noted that the Directive carefully avoids giving rights to citizens solely on the basis that they are former dependents of a national of the host Member State. That is regarded as a matter of domestic law for that Member State. Secondly, the claimant could have obtained a right of residence under European Union law simply by looking for work, which she later did. This is not a case where, if the claimant had no other right of residence, her only way of gaining access to social assistance was to leave the country. It is unnecessary for me to consider what the position would have been had she been incapable of work. As I understand it, the claimant was concerned that she needed properly to care for her daughter. However, it was not necessary for her to be looking for what would ordinarily be regarded as full-time work. Caring responsibilities may be taken into account in considering a person's availability for work and entitlement to jobseeker's allowance may be secured in appropriate circumstances even though a person restricts the extent of the employment being sought to 16 hours a week (regulation 13(4) of the Jobseeker's Allowance Regulations 1996 (SI 1996/207)). From the point of view of European Union law, if the claimant had no other right of residence, the requirement that she seek such work seems to me to be proportionate. The First-tier Tribunal therefore also erred in law in relying upon *Baumbast*."

65. In *SSWP v DV-P* [2009] UKUT 17 the claimant was detained under the Mental Health Act (and so, submitted Ms Smyth, was likewise in no position to

travel to his home Member State). Upper Tribunal Judge Jacobs reviewed the legal constraints on the doctrine of proportionality and held that it could not assist the claimant.

66. Cases where proportionality is involved are fact-sensitive. Even *SW*, where some parallels with the present case are particularly marked, involved a child who was much older. It is sufficient to observe that the conclusion I have reached on the proportionality aspect of this case is consistent with those two decisions.

67. I do not consider that the appellant is materially assisted by the provisions of the Charter and at the oral hearing both representatives agreed. On the narrower approach of the CJEU to whether a situation is governed by EU law (such as that in C-40/11 *Iida*) the appellant's situation as a person who, like Mr Iida, did not qualify under the terms of the Directive, might be held to have no connection with EU law. If that approach be not followed – for instance, because her having moved to and worked in, albeit briefly, a Member State other than her state of nationality was considered to provide sufficient connection with EU law, I still would not consider that the Charter assisted her. The situation she found herself in, while not ideal, does not show a lack of respect for family life, for the same reasons as apply in relation to the human rights submission (see [91] – [98] below).

68. So far as her rights as the former partner of a British national go, it is impossible to see why the appellant should be in a better position to rely on Art 21 than the former Spanish partner of a Frenchman in the UK would have been. As already noted, the Directive did not apply to Mr B as a British national and I have excluded above the possibility of relying on the *Surinder Singh* route.

69. I acknowledge that there is a clear view in domestic legislation, via the 1987 Regulations, that a single parent of a child or children under 5 need not look for work. As put by Lady Hale in *R(SG) v SSWP* [2015] UKSC 16 at [202]:

> "The Government accepts that lone parents of children under five should not be expected to look for work, no doubt partly because of the difficulties of finding acceptable and affordable child care, but perhaps also because many parents and child care professionals consider it better for very young children to have the full time loving care of a committed parent rather than be separated from them and be placed in institutional settings, however competent, for a large part of the day."

It is also the case that the ability to claim as a jobseeker always has been subject, at least in theory, to demonstrate a genuine chance of being engaged (and thus that rights thereunder could be lost by extraneous circumstances despite a person's best efforts). For these reasons, being subjected to the regime associated with a claim for jobseeker's allowance, notwithstanding the applicable legislative relaxations of it, would have put her in a less favourable position than a British lone parent of children of equivalent age. More recent

developments, outside the scope of this appeal, such as the attempts to tighten up the provision of reg 6 of the 2006 Regulations relating to whether a person has a genuine chance of being engaged and the withdrawing since SI 2014/539 came into force from EU nationals of the ability to claim housing benefit as a jobseeker will have exacerbated this. It was to a degree, and increasingly has become, a less than stable basis on which to bring up young children. But, as noted by Advocate General Wathelet in *Dano* at [96] (and the reason why, given the conclusion I have reached on proportionality, such provision does not offend against Art 18):

> "In this context, potential unequal treatment in the granting of social assistance benefits between nationals of the host Member State and other Union citizens necessarily results from the link established by the EU legislature in Article 7 of Directive 2004/38 between the requirement to have sufficient resources as a condition for residence and the concern not to create a burden on the social assistance systems of the Member States."

Reference should also be made to the decision in *Patmalniece v SSWP* [2011] UKSC 11 upholding the justification for the indirect discrimination involved in subjecting means-tested benefits to a "right to reside" test. As Mr Wall rightly accepted in argument, the avoidance of discrimination does not therefore help the appellant in establishing a case based on proportionality.

70. The appellant could not in her own right bring herself within relevant provisions of the Directive and for the reasons above proportionality provides insufficient justification for overriding "the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect", to which rights under Art 21 are expressly made subject. So far as her own position was concerned at that time, the appellant would have needed therefore either to explore the potential for obtaining leave to remain outside the Immigration Rules as a matter of UK domestic law or to have established an alternative basis of residence under EU law, such as as a worker or as jobseeker. I respectfully agree with the observations of the tribunal judge quoted at [9] above.

71. It is common ground that there is no other provision of the Directive on which the appellant could rely.

A derivative right via the children?

72. I turn to whether the appellant could have had any form of derivative right through her children. If she could, there would remain the question of what rights, if any, to claim social assistance would attach to that status.

73. Art 3 of the Directive precludes the children from relying on the Directive against their Member State of nationality. That is sufficient to preclude a derivative right arising via that route: C-457/12 *S and G*. However, they can rely on their rights as EU citizens even against their Member State of

nationality. Further, the CJEU has acknowledged that young children need the presence of their primary carer to make the child's right a reality.

74. Thus in *Ruiz Zambrano*, as subsequently considered in cases such as C-256/11 *Dereci*, it was held that the primary carer would have a derivative right if the effect of not granting it would be that the Union citizen child would have to leave the territory of the EU altogether. There is no suggestion that such would be the case here.

75. In *Ibrahim* and *Teixeira*, the primary carers of children in education were able to access social assistance (in those cases, social housing). Whilst the cases reiterate the role of, and rights to be granted to, the primary carer, the origin of the child's rights can be found in Art 12 of Regulation 1612/68, which was not repealed by the legislature when the Directive was brought in. Such rights thus form something of a special case, by virtue of their root in express legislation.

76. In *Zhu and Chen*, the parents of the 8 month old child in the case, Catherine, were citizens of China and evidently quite wealthy. Mrs Chen had arranged to give birth to Catherine in Northern Ireland. That was sufficient to confer a right on Catherine to Irish nationality, which extended to those born on the island of Ireland at that time. When Mrs Chen and Catherine wished to settle in England, Mr and Mrs Chen were able to provide everything that was necessary for Catherine to qualify as a self-sufficient person under the terms of Directive 90/364 (in this regard the predecessor legislation to Directive 2004/38). As she qualified under the relevant Directive and was still a young child, her primary carer (her mother) had to be given a derivative right of residence, in order to give practical effect to the rights which Catherine was asserting.

77. These cases (and *Baumbast*) were reviewed by the Court of Appeal in *Sanneh v SSWP* (and linked cases) [2015] EWCA Civ 49. Arden LJ observed that *Zambrano* was not a one-off but part of a wider picture:

> "71. In my judgment, these cases throw considerable light on *Zambrano* and demonstrate its place in EU law. While *Zambrano* is intended to apply only exceptionally, it is not itself an exceptional or unprincipled piece of jurisprudence. It forms part of the wider principle which I have called the effective citizenship principle. It thus does not in any way disturb the coherence of that principle.
>
> 72. The wider principle… is concerned with creating rights to reside where that is necessary to make a person's EU citizenship status meaningful and effective.
>
> 73. That right to reside stems from Article 20 TFEU."

78. At [3], Arden LJ explains that the question is whether the children would be deprived of "the genuine enjoyment of the substance" of their EU citizenship rights. At [6] and [7] she comments:

> "6. The effective citizenship principle therefore draws together the status of EU citizenship and the EU law principle of effectiveness. The EU law principle of effectiveness means that rights given by EU law must be protected in substance. As it is sometimes put, national law must not make it impossible or excessively difficult to exercise EU law rights.
>
> 7. The principle of effectiveness in these appeals is in conflict with another principle, that of conferral of competences. Under Article 5(1) TEU, the EU, including its institutions such as the CJEU, can only act within the limit of the competences conferred on it by the member states in the EU Treaties".

79. It may be that, as Arden LJ suggests, *Ruiz Zambrano* is a particular application of a more general principle. However, one has to observe that post *Zambrano*, both the CJEU and domestic courts have applied the principle tightly. This, in C-256/11 *Dereci*, the Court observed:

> "65. Indeed, in the case leading to that judgment, the question arose as to whether a refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside and a refusal to grant such a person a work permit have such an effect. The Court considered in particular that such a refusal would lead to a situation where those children, who are citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union (see *Ruiz Zambrano*, paragraphs 43 and 44).
>
> 66. It follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.
>
> 67.That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.
>
> 68. Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to

> reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.
>
> 69.That finding is, admittedly, without prejudice to the question whether, on the basis of other criteria, inter alia, by virtue of the right to the protection of family life, a right of residence cannot be refused. However, that question must be tackled in the framework of the provisions on the protection of fundamental rights which are applicable in each case."

80. From [68] in particular it can be seen that the Court was at pains to make out that, in case where it was concerned with whether someone would be forced to leave the territory of the Union, lesser considerations such as economic reasons, or a desire to preserve the unity of the family or its location, were insufficient.

81. In *Harrison v SSHD* [2012] EWCA Civ 1736 Elias LJ applied *Dereci,* observing:

> "67. … I accept that it is a general principle of EU law that conduct which materially impedes the exercise of an EU right is in general forbidden by EU law in precisely the same way as deprivation of the right. But in my judgment it is necessary to focus on the nature of the right in issue and to decide what constitutes an impediment. The right of residence is a right to reside in the territory of the EU. It is not a right to any particular quality or life or to any particular standard of living. Accordingly, there is no impediment to exercising the right to reside if residence remains possible as a matter of substance, albeit that the quality of life is diminished. Of course, to the extent that the quality or standard of life will be seriously impaired by excluding the non EU national, that is likely in practice to infringe the right of residence itself because it will effectively compel the EU citizen to give up residence and travel with the non-EU national. But in such a case the *Zambrano* doctrine would apply and the EU citizen's rights would have to be protected (save for the possibility of a proportionate deprivation of rights). Accordingly, to that extent that the focus is on protecting the substance of the right, that formulation of the principle already provides protection from certain interferences with the enjoyment of the right.
>
> 68. In my judgment, it is also highly pertinent that the CJEU has confirmed in *Dereci* (paras 67-68) that the fact that the right to family life is adversely affected, or that the presence of the non-EU national is desirable for economic reasons, will not of themselves constitute factors capable of triggering the *Zambrano* principle. In practice these are the most likely reasons why the right of residence would be rendered less beneficial or enjoyable. If these considerations do not engage this wider principle, it seems to me extremely difficult to identify precisely what will. What level of interference with the right would fall short of de facto compulsion and yet would constitute a form of

> interference which was more than simply the breakdown of family life or the fact that the EU citizens are financially disadvantaged by the removal of the non EU national family member? The scope for this right to bite would be extremely narrow and in my judgment there would be very real uncertainty as to the nature and scope of the doctrine. That legal uncertainty would itself be inconsistent with fundamental principles of EU law. I do not accept that the language of the CJEU in *Dereci* is deliberately seeking to leave open this grey area where *Zambrano* may bite."

82. There have been a number of recent cases in relation to derivative rights requiring a brief mention. C-133/15 *Chavez-Vilchez* concerned whether the TCN mothers of children of Netherlands nationality, who might otherwise stand to benefit from the principle in *Ruiz Zambrano* would find their claim defeated because the child had fathers of Netherlands nationality, albeit in varying degrees the fathers' ability to take over responsibility for the child was in question. C-156/14 *Rendón Marín* again concerns a particular aspect of applying *Ruiz Zambrano*: whether it was lawful automatically to refuse a residence permit to a TCN who was the sole carer of two Union Citizen children on the grounds of his criminal record, where the effect of doing so would be to require them to leave the territory of the Union. C-304/14 *CS* again is a case about whether derivative rights arising under *Ruiz Zambrano* may be defeated by other factors – in this case a deportation order on account of a criminal record. In none of these cases does the CJEU extend the basic circumstances in which a derivative right may be found to exist beyond what had been held in *Ruiz Zambrano*.

83. It is striking that these cases invariably feature TCNs as the party seeking to assert a derivative right. That is of course not the case here. However, I can see no reason why, in principle, an EU national not otherwise able to assert a right to reside should not be able to assert a derivative right. I suspect the reasons why so many cases concern TCNs rather than EU citizens are practical ones – the latter will often have other avenues open to them to obtain a right of residence – as a jobseeker, worker etc. – which will not be available to TCNs.

84. It may be that there is something of a difference between the positions articulated by Elias LJ in *Harrison* and Arden LJ in *Sanneh* as to the scope for further derivative rights to exist derived direct from Art 20, in circumstances not falling within the *Ruiz Zambrano* test as interpreted in *Dereci*. The position does not appear altogether clear-cut and I proceed to consider the position on the basis that there may be scope for a further derivative right.

85. I do not consider *Zhu and Chen* provides authority for any more expansive reading of the concept of citizenship of the Union. Catherine qualified under Art 18 (now 21) (i.e. free movement) and under the Directive then in force, not more generally under Art 17 (now 20) (citizenship). Unlike the present case, she was relying on her nationality (Irish) against the UK: she was able to comply with the Directive then in force. The appellant's children by contrast could not comply with the successor Directive 2004/38 because of the

provisions of its Art 3.1. The appellant's children cannot accordingly avail themselves of the specifics of free movement law as regulated by European secondary legislation (unlike Catherine) and the case in my view is not authority for a wider reading of the incidents of EU citizenship. Mr Wall submits that it is not a pre-requisite to be economically independent to obtain a right of residence: that is true for the person with the derivative right, but the person (such as Catherine) from whose rights the derivative right is derived does have to fulfil the relevant conditions.

86. Clearly the Family Courts, for good reason, may need to restrict people's mobility: nothing in this decision seek to question that. The debate is about the consequences of such an order. That would not be, contrary to the submission on behalf of the Secretary of State, "to confer upon a District Judge in family proceedings the power to grant the right to reside", any more than an employer who takes on a worker himself grants such a right.

87. National law must not make it impossible or excessively difficult to exercise EU law rights: *Sanneh* at [6]. It is undeniable that the incidents of EU citizenship under Art 20 include freedom of movement under Art 21. If it were the case that, but for the effect of domestic family law, including the Family Court's order, the children would have been able to travel to Spain with their mother and remain there, they might or might not have been exercising rights under EU law in order to do so. It appears equally possible, depending on matters of foreign law which are not in evidence, that they might have been able to do so relying on their mother's Spanish nationality. At first sight, in a situation where a mother of young children, unable to access social assistance in the UK, returns to Spain, it appears highly unlikely that the children would have met the requirements of the Directive to be considered self-sufficient. Nor does it appear that the children could successfully have asserted *Surinder Singh* rights on a hypothetical move to Spain: even assuming once again that they can be relied upon by EU nationals, C-456/12 and C-457/12 *O and B* makes clear that for the right to have arisen, family life must have been created or strengthened in the host Member State "during the genuine residence of the Union citizen in the host Member State pursuant to and in conformity with the conditions set out in Article 7(1) and (2) of Directive 2004/38" and for most of the time the appellant's residence in the UK did not meet that test.

88. I gave directions for the filing of a further submissions and evidence directed to the legal and factual basis on which it was said the children could have moved to, and resided in, Spain, had they been permitted by the Family Court to do so. Although Mr Wall indicated that such evidence would be forthcoming, after a number of extensions of time, it was not. Even leaving aside the lack of evidence, his submissions on the point indicated that:

> "in taking her own children home therefore the appellant would be entitled to reside in Spain as a national of that country but with her children being UK citizens at the point of entry into Spain, their right to reside would be dependent upon a derivative right from the appellant.

> The right of residence for the mother arises naturally under Spanish law as there is no contention that she renounced her Spanish nationality or citizenship."

This does not support a conclusion that the children would be exercising EU law rights in that regard. There is accordingly no basis for me to conclude that a return to Spain by the appellant, accompanied by her children (had this been permitted by domestic family law) would have been effected by the children relying on any rights associated with their status as citizens of the Union.

89. As was made clear at [77] of *Iida,*

> "It must be recalled that the purely hypothetical prospect of exercising the right of freedom of movement does not establish a sufficient connection with European Union law to justify the application of that law's provisions (see Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 16). The same applies to purely hypothetical prospects of that right being obstructed."

90. In the absence of any reason to conclude that it is the exercise of the children's rights under European Union law which is being impeded by the order of the Family Court, I do not consider that the Charter is engaged as regards the children's rights. If that view be wrong, I do not consider that the children's rights thereunder are infringed , whether under Art 7 (for substantially the same reasons as at [91]-[98]) or under Art 24, as in the circumstances "a personal relationship with direct contact with both his or her parents" is being maintained.

Human Rights

91. The human rights argument was not extensively argued before me and indeed was abandoned (or virtually so) as a separate point by Mr Wall at the rale haring. I deal with it for the sake of completeness. It was put purely on the basis of breach of Article 8: no argument has been advanced based on discrimination under Article 14. In the absence of an Article 14 claim, I do not need to decide on whether Article 8 is engaged, although I note that in *Carson and Reynolds v SSWP* [2003] EWCA Civ 797 the Court of Appeal appears to have proceeded on the basis that the provision of jobseeker's allowance and income support did not engage Article 8.

92. I am clear however that there is no infringement of Article 8. When the benefit cap case, *R(SG) v SSWP*, was in the Court of Appeal as [2014] EWCA Civ 156, the Court rejected a free-standing claim of breach of Article 8 (and that was not one of the issues on which the subsequent appeal to the Supreme Court was permitted.) The Court of Appeal observed at [91] that "Article 8 does not generally require the State to provide a house" (the particular focus of the submission made to it concerning the effects of the benefit cap.) At [92] it cited in support the observation of Laws LJ in *Carson* (at [26]) that:

> "[I]t is in my judgment important to recognise that on the Strasbourg learning art 8 does not require the state to provide a home: see *Chapman v. UK* (2001) 10 BHRC 48 at 72 (para. 99); nor does it impose any positive obligation to provide financial assistance to support a person's family life or to ensure that individuals may enjoy family life to the full or in any particular manner: see *Vaughan v. UK* App no 12639/87 (12 December 1987, unreported), *Anderson and Kullmann v. Sweden* (1986) 46 DR 251, *Petrovic v. Austria* (2001) 33 EHRR 307 at 319 (para. 26)".

93. It did go on at [94] to observe that:

> "Although Article 8 does not in general impose a positive duty to provide support such as housing or welfare benefits, it may do so exceptionally in extreme cases, in particular where the welfare of children or the disabled is at stake."

94. It proceeded to examine how extreme the circumstances would have to be to give rise to a positive duty under Article 8, reviewing *R (Bernard) v Enfield LBC* [2005] LGR 423; *Anufrijeva v Southwark LBC* [2004] QB 1124 and *R(G) v Lambeth LBC* [2012] PTSR 364. In *Anufrijeva* the Court of Appeal observed at [43] that:

> "We find it hard to conceive, however, of a situation in which the predicament of an individual will be such that Article 8 requires him to be provided with welfare support, where his predicament is not sufficiently severe to engage Article 3. Article 8 may more readily be engaged where a family unit is involved. Where the welfare of children is at stake, Article 8 may require the provision of welfare support in a manner which enables family life to continue. Thus, in *J v The London Borough of Enfield* [2002] EWHC Admin 735, where the claimant was homeless and faced separation from her child, it was common ground that, if this occurred, Article 8(1) would be infringed. Family life was seriously inhibited by the hideous conditions prevailing in the claimants' home in *Bernard* and we consider that it was open to Sullivan J to find that Article 8 was infringed on the facts of that case."

95. In *G*, it noted that the European Court of Human Rights had never held that a failure of the State to provide financial or other support to a person represented a violation of Article 8.

96. Seen against these authorities, it can be seen that the appellant's position of being, in effect, forced to rely on claiming IBJSA on the basis identified in [24], with the potential implications identified in [69], while undoubtedly less than ideal, falls well short of the level of hardship which could lead to an breach of Article 8.

97. As regards the UN Convention on the Rights of the Child, its relevance to determining alleged breaches of the European Convention on Human Rights

was examined, with considerable learning and some disagreement, by the members of the Supreme Court in *SG*. As noted above, an argument based on a free-standing breach of Article 8 was not on the table in that appeal. When, during and after the hearing, an argument based on the Convention developed, its potential for assisting a claim based on Article 8 given the limited scope of that Article in imposing a positive duty of welfare provision was given short shrift by both Lord Reed at [78]-[80] and Lord Hughes at [139].

98. I conclude that in a case such as the present, where the level of hardship falls well short of what could constitute a breach of Article 8, if reliance on the Convention be permissible, it would not enable that gulf to be bridged.

Conclusion

99. If I had been able to conclude that the children's rights as EU citizens were being restricted by the legal inability of the appellant to take them out of the UK, I should have needed to consider further whether this might be a situation in which it was necessary to recognise a new category of derivative right for their mother, the appellant, as an aspect of the "effective citizenship" principle to which Arden LJ referred in *Sanneh*. As it is, and with some reluctance, I conclude that there is no basis on which I can hold that the appellant had a right to reside such as would have enabled her to claim social assistance by way of income support on the basis applicable to mothers of such young children generally.

CG Ward
Judge of the Upper Tribunal
9 November 2017