IN THE UPPER TRIBUNAL **Appeal No: CE/2435/2016**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal dismisses the appeal by the appellant.

The decision of the First-tier Tribunal sitting at Nottingham on 24 May 2016 under reference SC319/16/00501 did not involve any error on a material point of law and is not set aside.

Representation: Heather Sargent of counsel, instructed by the AIRE Centre represented the appellant.

James Cornwell of counsel, instructed by the Government Legal Department represented the Secretary of State for Work and Pensions.

REASONS FOR DECISION

Introduction

1. This appeal is concerned with the 'right to reside' test found, in this appeal, in regulation 70 of the Employment and Support Allowance Regulations 2008. It is not disputed that if the appellant did not have a right to reside in the United Kingdom under regulation 70 then the respondent's decision of 10 February 2016 to the effect that he was not entitled to employment and support allowance ("ESA") was correct.

2. Only two issues of law now arise on this appeal, and even the first of those now falls away given the concurring views of the parties before me. The first issue concerns whether the appellant could derive any benefit, in terms of a right to reside, from Article 12.1 of Directive

2004/38/EC ("Article 12"). The second issue depends upon whether the appellant's late wife ("JM") had accrued a permanent right of residence under Article 17.1(a) of Directive 2004/38/EC ("Article 17") as a worker who had ceased paid employment "to take early retirement". It is argued under this second issue that if the appellant's wife (now sadly deceased) had accrued such a right of permanent residence then that would have clothed the appellant with a continuing right of residence as her family member.

Summary of Decision

3. It is accepted by both parties that Article 12.1 did not (and could not) provide the appellant with any right of residence on his wife's death. I accept that is the case.

4. I have also concluded that, even if this is a point which the appellant can take before me, the appellant's late wife did not cease her paid employment to take early retirement in 1993 (even though with the benefit of hindsight it may now be said that she had in fact ceased to be a member of the working population at that point in time), and accordingly the appellant could not, and cannot, derive a right to reside under Article 17.1(a).

5. A prior issue arises on the Article 17 argument as to whether it is open to the appellant to make that argument, or on what basis it is open to him to make that argument, before the Upper Tribunal. The Secretary of State's argument in summary is that no such argument was made to the First-tier Tribunal nor was it obvious on the evidence that such an argument might arise, and accordingly it cannot be said that the First-tier Tribunal erred in law in failing to address this potential basis for the appellant having a right to reside. She also argues, if needed, that

the particular language of Article 17.1(a) of "to take early retirement" can have no application to circumstances that arose in 1993[1].

6. It is conceded before me that there is no other basis on which the appellant may have had a right to reside at the time of his claim for ESA and the respondent's decision on that claim in February 2016. Or put more accurately, it is accepted that there is no basis for arguing that the First-tier Tribunal erred in law in concluding that the appellant did not have a right to reside on any other basis. And it is also now accepted that there is no other basis on which it may be argued that the First-tier Tribunal erred materially in law in its decision.

The relevant facts in outline

7. The appellant is a Portuguese national who was born in May 1959. He came to the United Kingdom on 1 September 2003. There is no history of his having ever worked in the UK since his arrival. It would seem that sometime between 2005 and 2007 (the precise date does not matter) he started a relationship with the woman who was later to become his wife. I will refer to her as JM. They began to live together in 2009 and around that time the appellant became JM's carer. They married on 28 January 2012. Sadly, JM died on 8 December 2015. The appellant is thus a widower. It seems he was in receipt of Carer's Allowance as JM's carer from around November 2009 to February 2016.

8. The appellant applied for ESA on 4 January 2016 on the basis that he was a person incapable of work. In connection with that claim he stated that he was not employed, self-employed, a student, a work-seeker or

[1] It appears to be accepted (or at least it is not open to the Secretary of State to argue the contrary at Upper Tribunal level), however, following the Court of Appeal's decision in *RM(Zimbabwe) v Secretary of State for the Home Department* [2013] EWCA Civ 775; [2014] 1 WLR 2259, that if all the arguments under Article 17.1(a) aligned in the appellant's favour his not having become a family member of his late wife until 2012 would not count against him having a right to reside based on her having ceased work to take early retirement in 1993 (some 16 years before they met).

self-sufficient. The claim was disallowed on 10 February 2016 on the basis, in short form, that the appellant had no right to reside in the UK. His appeal against this decision was dismissed by the First-tier Tribunal on 24 May 2016. It is against that tribunal decision that the appellant now appeals to the Upper Tribunal, with permission having been granted for that further appeal by the First-tier Tribunal.

9. The appellant's late wife, JM, was a Spanish national who was born in February 1952. She came to the UK in September 1972. In a letter to the Department for work and Pensions dated 21 November 2013, which was seeking a reconsideration of a refusal to award her State Pension Credit on the ground that she had no right to reside in the UK, JM stated the following (amongst other things). She had met a British National ("WB") in 1973 and had married him in April 1978. She had worked in different jobs (care assistant, further education college lecturer and teaching assistant) between 1988 and 1993, but had stopped working at her then husband's (WB's) request. JM had had three children with WB, but she separated from him in January 2007. She and WB divorced in August 2011.

10. As it is of some importance in relation to the arguments made under Article 17, it is to be noted that one of appellant's main arguments before the First-tier Tribunal (which continued up until the hearing of the appeal before the Upper Tribunal) was that his late wife had had a right to reside at the time of her death (and he therefore a derivative right to reside as her family member) based upon her having worked in the UK as late as 2006. It thus had been argued that JM had been a 'worker' under EU law in 2006 and had retained that 'worker' status up until her death.

Legal Issues

11. It is accepted before me by both parties that any right to reside the appellant may have had could only be one derived from any right to reside that his late wife possessed. The issue for me is whether the

First-tier Tribunal erred materially in law in its approach to whether JM prior to her death enjoyed any EU right of residence from which the appellant, as her family member, continued to benefit by the time of his claim for ESA.

Article 12

12. Article 12 is titled "*Retention of the right of residence by family members in the event of death or departure of the Union citizen*". The relevant part of it for this appeal is Article 12.1, which is worded as follows:

> "1. Without prejudice to the second subparagraph, the Union citizen's death or departure from the host Member State shall not affect the right of residence of his/her family members who are nationals of a Member State.
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> 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)".

13. In directions I gave on the appeal I raised the following about Article 12.1.

> ".....if, however, [JM] had an EU right to reside (i.e. something other than the indefinite leave to remain seemingly granted to her in 1988), or perhaps even if she had no such EU right, would Article 12(1) of Directive 2004/38/EC apply? Article 12 as a whole may be said to be somewhat delphically worded. Where for example is the second *sub*paragraph located (and where then is the first subparagraph if the first paragraph is what is numbered (1))? Does the "second subparagraph" used at the beginning of Article 12(1) just mean the passage of text indented after the first paragraph in (1), namely "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)"?
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> Further, do the words "acquiring the right of permanent residence" apply, taking the facts of this case, to [the appellant] or [JM], or both? The more natural reading would be it applies to the [appellant] only, but what if he already had such a permanent right through [JM] having resided here legally for 5 years, pursuant to Article 16(1) and (2) of the same Directive? What effect can the "second subparagraph" in Article 12(1) have in that situation? Putting this to one side, what right of residence, if any, did (using the facts of this case) [JM] need to have had at the time of her death for her death not [to] have affected [the appellant]? Article 12 falls within Chapter III of Directive

> 2004/38/EC. It is concerned with the **Right of Residence**. By Article 3(1) of the same Directive the "Rights of Residence" in Chapter III also apply to family members of "Union citizens". That would here seem to translate into [JM] being the *Union citizen* and [the appellant] being her *family member* at the time of her death. Is the effect of Article 12(1) therefore that *if* [JM] had a Chapter III right at the date of her death (and such right was conferred on [the appellant] as her family member prior to her death), that right (and for present purposes any right under Chapter III can suffice for the purposes of argument), continues in respect of the family member even if he is not in fact exercising that right, and it is only if he wishes to attain a permanent right of residence that he needs (per "the second subparagraph") to himself meet the condition of being a "worker" etc under Article 7(1)? If this correct, however, why can the "he" here not gain a right of residence in his own right by being a worker and then potentially satisfy the permanent right of residence criteria under Article 16 by a combination of Article 7(1) and 7(2) for five years?
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> An alternative might be to say that the death of the "Union citizen" does not affect an EU right of residence her family member holds independently, but it is difficult to see why the right held by the family member could be affected by the death as it would be a right standing independent from any right he has conferred as a family member of the Union citizen before her death.
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> A (more radical) alternative would be to read Article 12(1) as conferring a non-permanent (non-accruing) right of residence on the family member simply by virtue of the Union citizen's death, even if the latter did not have a right of residence at the date of her death, though that would jar with the heading to Article 12 ("retention") and the general thrust of the whole Directive and Chapter III of it."

14. As noted above, both parties before me accepted that Article 12.1 of itself did not confer any separate right to reside on the appellant. Ironically given the opaqueness of the language used, both parties agree in essence that Article 12.1 is there merely to clarify that the death of a person with a right to reside does not affect any right to reside of a family member of the deceased which that family member held independent of any right of residence he or she held as the family member of the deceased before their death.

15. Dealing first with a more minor matter, it seems to be agreed that the reference to "the second subparagraph" must be a reference to the sentence beginning "Before acquiring…", however odd it may be to therefore identify the paragraph beginning "1. Without prejudice to,….." as the first subparagraph. That on the face of it is how the Court of

Appeal interpreted this use of "subparagraph" when it considered the very same wording used in the similarly structured Article 13.2 of the same Directive: see *Ahmed –v- SSHD* [2017] EWCA Civ 99; [2017] 1 WLR 3977.

16. For the appellant's argument that Article 12.1 is merely clarificatory or declaratory and creates no separate right of residence, he relies first on a comparison with the French text of Article 12.1, which he says is more clearly worded. That text is as follows:

> "Sans préjudice du deuxième alinéa, le décès du citoyen de l'Union ou son départ du territoire de l'État membre d'accueil n'affecte pas le droit de séjour des membres de sa famille qui ont la nationalité d'un État membre. Avant l'acquisition du droit de séjour permanent, les intéressés doivent remplir eux-mêmes les conditions énoncées à l'article 7, paragraphe 1, points a), b), c) ou d)."

He argues that the material parts of this text translate into the following in English.

> "Before acquiring the right of permanent residence, the persons concerned must themselves ["euxmêmes"] meet the conditions laid down in points a), b), c) or d) of Article 7(1)".

17. This translation would seem to support the argument advanced before me, and may in some sense be said to be admissible given the ambiguous language of Article 12.1 as set out above. However, I would be concerned to rely on an unofficial English translation of one of the official EU languages against what is the official English text of the relevant piece of EU law.

18. Of greater strength, in my view, is the second argument the appellant makes on the meaning of Article 12.1. This relies on one of the *travaux préparatoires* in relation to Directive 2004/38/EC: the Explanatory Memorandum to the "*Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member*

States" (COM(2001) 257 final). The proposal was submitted by the European Commission on 29 June 2001. The Explanatory Memorandum to the proposal provides an article-by-article commentary on the (then draft) provisions of what was to become Directive 2004/38/EC. It states the following in respect of Article 12.1:

> "Family members who are Union citizens have a residence entitlement in their own right: their right of residence is not affected by the death or the departure of the Union citizen on whom they depend. The purpose of this paragraph is merely to make it clear that, in the event of the death or departure of the Union citizen, these persons must themselves satisfy the conditions for the exercise of the right of residence laid down in Article 7(1) until they acquire the permanent right of residence" (my underlining added for emphasis).

Given the ambiguity in the language of English text of Article 12.1, it seems to me that this part of the *travaux préparatoires* is admissible in order to understand the scope of Article 12.1.

19. The Secretary of State's analysis of Article 12.1, which she does not consider differs in effect from the analysis of the appellant (on which I would agree), is as follows:

> "….the effect of Art.12(1) is that:
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> 1) By virtue of the first sub-paragraph, the death/departure of the "main" Union citizen cannot affect any (past or ongoing) RTR that the family member has in his/her own right (i.e. under Art.7(1)(a), (b) or (c) or a permanent RTR under Art.16). The provision is declarative in that regard.
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> 2) By virtue of the first sub-paragraph, the death/departure of the "main" Union citizen does not affect the status of accrued legal residence as a family member under Art.7(1)(d), e.g. for the purposes of satisfying the 5 years legal residence requirement under Art.16 for obtaining a right to permanent residence.
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> 3) By virtue of the second sub-paragraph, following the death/departure of the "main" Union citizen the family member must comply with the conditions under Art.7(1)(a) to (d) in order to have a RTR, unless they have already obtained a right to permanent residence."

20. I agree with these concurring analyses as to Article 12.1 lacking any substantive content and only being clarificatory or declaratory. I am

mindful that I have not had competing argument on this point, but bear in mind that the appellant is now represented by the AIRE Centre and would have expected it to have advanced any contrary argument if such was available. In any event, it seems to me difficult to play down the significance of what is said in the Explanatory Memorandum (which appears to be supported by the French text of Article 12.1). I further agree that Article 12.1 therefore does not, and cannot, act to confer a (separate) right to reside on the appellant from (a) any he may already have held on his wife's death (which it is accepted he did not), or (b) any derivative right to reside he may have held at his wife's death based on her having a right to reside and he being a 'family member' of hers at the time of her death. Accordingly, the First-tier Tribunal committed no material error of law in not analysing the reach of Article 12.1.

21. I note that Upper Tribunal Judge Markus QC has arrived at a similar conclusion in respect of the scope of Article 13 of Directive 2004/38/EC: see GA –v- SSWP (PC) [2018] UKUT 172 (AAC).

22. The sole issue then left to consider on this appeal is whether the First-tier Tribunal erred in law in failing to consider whether the appellant had a (permanent) right to reside as family member of his wife at the time of her death based on her having satisfied Article 17.1(a) of Directive 2004/38/EC. To that I now turn.

Article 17

23. The relevant parts of Article 17 of Directive 2004/38/EC is in the following terms (in English – it is common ground before me that reference to the French (or any other official EU language) text of Article 17 does not assist in its elucidation):

> "Article 17
> Exemptions for persons no longer working in the host Member State and their family members
>
> 1. By way of derogation from Article 16, the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by:

> (a) workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years…….
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> 3. Irrespective of nationality, the family members of a worker or a self-employed person who are residing with him in the territory of the host Member State shall have the right of permanent residence in that Member State, if the worker or self-employed person has acquired himself the right of permanent residence in that Member State on the basis of paragraph 1.
> 4. If, however, the worker or self-employed person dies while still working but before acquiring permanent residence status in the host Member State on the basis of paragraph 1, his family members who are residing with him in the host Member State shall acquire the right of permanent residence there, on condition that:
> (a) the worker or self-employed person had, at the time of death, resided continuously on the territory of that Member State for two years".

The underlining is mine and has been added to emphasise the wording which it is argued by the appellant applied to give his late wife a permanent right of residence at the time of her death (and thus the same to him as her family member).

24. The terms of Article 17.1(a) were transposed at the relevant time into domestic law in regulation 15(1)(c) and (d), when read with regulation 5(2)(a)(ii), of the Immigration (European Economic Area) Regulations 2006. Read together those regulations provided that:

> "15.-(1) The following persons shall acquire the right to reside in the United Kingdom permanently…..(c) a worker…who [ceases working to take early retirement]; and (d) a family member of a worker…..who [ceases working to take early retirement]"

25. The appellant's argument on Article 17.1(a) was straightforward. It was that his late wife, JM, had ceased paid employment to take early retirement in 1993 when she stopped working in 1993 as her (then) husband did not want her to continue working. At that point she had been working in the UK for at least the preceding twelve months and had resided continuously in the UK for more than three years. She therefore enjoyed the right of permanent residence in the UK pursuant

to Article 17.1(a), and the appellant had the same right pursuant to Article 17.3, as the family member of his wife residing with her in the UK.

26. The appellant sought to derive support for this argument by submitting that the purpose of Article 17 is to conserve the rights previously provided by Regulation (EEC) 1251/70 and Directive 75/34/EEC. He relied in this respect on recital 19 to Directive 2004/38/EC, which is worded as follows:

> "Certain advantages specific to Union citizens who are workers or self-employed persons and to their family members, which may allow these persons to acquire a right of permanent residence before they have resided five years in the host Member State, should be maintained, as these constitute acquired rights, conferred by Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State and Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity".

27. The fundamental difficulty with this argument as it was originally put to me is that it was an argument for the appellant to make on the evidence to the First-tier Tribunal. Translating it to the error of law jurisdiction of the Upper Tribunal results in it having to be an argument that the First-tier Tribunal erred in law in failing to consider this argument on the evidence before it. It was argued that the First-tier Tribunal ought to have exercised its inquisitorial function to explore this issue once it found as a fact (as recorded in paragraph 26 of its statement of reasons) that the "Appellant's wife ceased activity and ceased being a worker in 1993", and its failure to do so amounted to an error of law.

28. The focus on Article 17 as a submission on the appeal to the Upper Tribunal only became apparent part way through the oral hearing of this appeal. It had not been foreshadowed in any of the arguments made to the First-tier Tribunal, or indeed to the Upper Tribunal up

until Miss Sargent's skeleton argument for the hearing before me, and even there it was only as a second alternative argument. As the effect of my directions for the oral hearing was for the Secretary of State's skeleton to be served at the same time, and thus without sight of the appellant's skeleton, understandably nothing in the Secretary of State's skeleton argument addressed the Article 17 argument. The bulk of the arguments on Article 17.1(a) thus took place at the hearing before me and in written submissions after the hearing.

29. The Secretary of State deploys three main submissions against this argument. The first two submissions when taken together are in my judgment decisive in the Secretary of State's favour on this appeal and leads to its dismissal, though I shall address the third submission as well.

30. The first submission is that no argument was made to the First-tier Tribunal by the appellant's representative relying on Article 17.1(a) nor was it "*Robinson* obvious" from the evidence that such a point arose (the latter is a reference to *R v Secretary of State for the Home Department, ex p Robinson* [1997] 3 WLR 1162).

31. In social security terms this submission translates under section 12(8)(a) of the Social Security Act 1998 into whether Article 17.1(a) was an "issue raised by the appeal" (in which case the First-tier Tribunal would have been obliged to consider it), or was an issue not "raised" but which as a matter of its discretion the First-tier Tribunal ought to have taken into account. As I understand the appellant's argument it must found on the former because if the issue was not raised on the appeal then an additional layer of difficulty arises in terms of showing in an error of law jurisdiction that an issue not raised ought, as a matter of the First-tier Tribunal's discretion, to have been brought into consideration by it.

32. The scope of section 12(8)(a) was addressed by Court of Appeal in *Hooper v Secretary of State for Work & Pensions* [2007] EWCA Civ 49; *R(IB)4/07*, where it said this at paragraphs [25] to [28]:.

> "What is meant by "an issue raised by the appeal"? In addressing this question, it is necessary to keep in mind that, as is common ground, the process before the tribunal is inquisitorial and not adversarial: see the comments at paras 14, 56 and 61 in *Kerr v Department for Social Development* [2004] UKHL 23, [2004] 1 WLR 1372 in an analogous context. It seems that this question has not been the subject of decision by this court, but it was considered by the Northern Ireland Court of Appeal in *Mongan v Department of Social Development* [2005] NICA 16 reported as R4/01 (IS). That decision was concerned with the meaning of article 13(8)(a) of the Social Security (Northern Ireland) Order 1998 which is identical to section 12(8)(a) of the 1998 Act. The court gave valuable guidance as to what is meant by "an issue raised by the appeal". It is desirable that I should set it out in full:
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> > "[14] The terms of article 13(8)(a) of the 1998 Order make it clear that issues not raised by an appeal need not be considered by an appeal tribunal. The use of the phrase "raised by the appeal" should be noted. The use of these words would tend to suggest that the tribunal would not be absolved of the duty to consider relevant issues simply because they have been neglected by the appellant or her legal representatives and that it has a role to identify what issues are at stake on the appeal even if they have not been clearly or expressly articulated by the appellant. Such an approach would chime well with the inquisitorial nature of the proceedings before the tribunal.
> >
> > [15] It is now well established that appeal tribunal proceedings are inquisitorial in nature – see, for example the recent Decision of a Tribunal of Social Security Commissioners CIB/4751/2002, CDLA 4753/2002, CDLA 4939/2002 and CDLA 514/2002. Mr McAlister relied on this decision, however, to support his contention that the tribunal was not required to consider matters that had not been raised by the parties to the proceedings. In that case it was held that 'raised by the appeal' should be interpreted to mean "actually raised at or before the hearing by one of the parties." In so far as the decision suggests that an appeal tribunal would not be competent to inquire into a matter that arose on an appeal simply because it was not expressly argued by one of the parties to the appeal, we could not agree with it. It appears to us that the plain meaning of the words of the statute, taken together with the inquisitorial nature of the appeal hearing, demand a more proactive approach. If, for instance, it appeared to the tribunal from the evidence presented to it that an appellant might be entitled to a lower level of benefit than that claimed, its inquisitorial role would require a proper investigation of that possible entitlement.

> [16] Mr McAlister suggested that even if the tribunal had a duty to consider issues not explicitly raised, this was a limited responsibility and he referred to an unreported decision C5/03-04 (IB) in which Commissioner Brown held that the tribunal was not required "to exhaustively trawl the evidence to see if there is any remote possibility of an issue being raised by it." We accept that there must be limits to the tribunal's responsibility to identify and examine issues that have not been expressly raised and we agree with the observation of Commissioner Brown. But as she said in a later passage in the same case, issues "clearly apparent from the evidence" must be considered.
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> [17] Whether an issue is sufficiently apparent from the evidence will depend on the particular circumstances of each case. Likewise, the question of how far the tribunal must go in exploring such an issue will depend on the specific facts of the case. The more obviously relevant an issue, the greater will be the need to investigate it. An extensive inquiry into the issue will not invariably be required. Indeed, a perfunctory examination of the issue may often suffice. It appears to us, however, that where a higher rate of benefit is claimed and the facts presented to the tribunal suggest that an appellant might well be entitled to a lower rate, it will normally be necessary to examine that issue, whether or not it has been raised by the appellant or her legal representatives.
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> [18] In carrying out their inquisitorial function, the tribunal should have regard to whether the party has the benefit of legal representation. It need hardly be said that close attention should be paid to the possibility that relevant issues might be overlooked where the appellant does not have legal representation. Where an appellant is legally represented the tribunal is entitled to look to the legal representatives for elucidation of the issues that arise. But this does not relieve them of the obligation to enquire into potentially relevant matters. A poorly represented party should not be placed at any greater disadvantage than an unrepresented party."

Mr Cox submits that we should adopt this guidance without qualification. Mr Chamberlain accepts the guidance with one qualification. He submits that "not raised by the appeal" means "not raised by the appellant". He says that an injunction to the tribunal that it need not consider issues not raised by the appeal would be otiose, since issues not raised by the appeal are irrelevant and should not be considered in any event. But Mr Chamberlain concedes that the tribunal should adopt a broad, generous and non-legalistic approach to deciding whether an issue has been raised by the appellant. Thus, it may be sufficient for the appellant to appeal against a decision without stating the grounds relied on, provided that he or she places before the tribunal sufficient facts for the issue to be clear.

Section 12(8)(a) refers to an issue raised by the appeal. I see no reason not to give the statute its plain and natural meaning. But in view of the way in which Mr Chamberlain suggests "raised by the appellant"

> should be interpreted, it seems to me that there is no real difference between "raised by the appeal" and "raised by the appellant" as interpreted by him. The starting point will always be the decision of the SSWP that the appellant is seeking to challenge. But it is clear that the fact that an issue is not identified by the appellant in his appeal notice or even during the oral argument does not mean that it is not "raised by the appeal".
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> I would endorse the valuable guidance given in *Mongan*. The essential question is whether an issue is "clearly apparent from the evidence" (para 15 in *Mongan*). Whether an issue is sufficiently apparent will depend on the particular circumstances of the case. This means that the tribunal must apply its knowledge of the law to the facts established by them, and they are not limited in their consideration of the facts by the arguments advanced by the appellant. I adopt the observations of this court in *R v Secretary of State for the Home Department ex p Robinson* [1998] 1 QB 929 at p 945 E-F in the context of appeals in asylum cases. But the tribunal is not required to investigate an issue that has not been the subject of argument by the appellant if, regardless of what facts are found, the issue would have no prospects of success."

33. The Secretary of State stressed under this submission that the focus of the argument before the First-tier Tribunal was on, inter alia, whether the appellant's late wife had been working in 2006 and had retained that 'worker' status up until her death; and no part of her arguments, made by a professional welfare rights adviser, to the First-tier Tribunal relied on Article 17 or her having retired early in 1993. The Secretary of State moreover pointed to JM's letter to the state pension credit office of 21 November 2013 in which she had said "I stopped working in 1993 as my husband didn't want me to" and later on in the same letter said "Since 2009 up to my retirement date [the appellant] and myself were living together as husband and wife, he being also my carer". These statements, the Secretary of State argued, raised no "*Robinson* obvious" (or, put another way following *Mongan* and *Hooper*, "clearly apparent from the evidence") evidential claim that the appellant's late wife had ceased working in 1993 to take early retirement: indeed the later statement in the letter appeared to show a clear view on JM's part that she had not retired in 1993. The Secretary of State argued in addition that the First-tier Tribunal's finding about JM having ceased activity and ceased being a worker in 1993 was not in the context of her having retired in 1993. On the evidence and arguments before it no issue was raised

before the First-tier Tribunal about whether the appellant's late wife had ceased work in 1993 "to take early retirement".

34. The second submission, which relates to the first submission, is that on the evidence there was simply nothing to establish that the appellant's late wife had ceased work in 1993 to take early retirement. The argument here relied on the evidence referred to immediately above but also argument as to the meaning of "workers who cease paid employment to take early retirement". The Secretary of State pointed out, accurately it would appear and without dissent from the appellant, that this phrase (or any part of it), is not defined in the Directive in which it appears. Nor, unlike Article 12, is its meaning illuminated by the available *travaux preparatoires*; perhaps unusually given that on the face of it this is an addition to that which had gone before in Article 2 of Regulation (EEC) 1251/70 (see below). And the industry of both parties had been unable to find any discussion of the phrase in the context of Article 17.1(a) in any caselaw, CJEU or otherwise.

35. Reference was made by the Secretary of State to the commentary to Article 17 in Volume III of the Social Security Legislation series published by Sweet and Maxwell (2017/2018 edition), in which the authors refer to the main beneficiaries under Article 45(3)(d) of the Treaty on the Functioning of the European Union being "workers (who after a requisite period of work in the host Member State) have come to the end of their working life on reaching state pensionable age or on taking early retirement caused by ill-health, accident at work or occupational disease" (my underlining). This is not, however, a commentary directly on Article 17.1(a). Nor, as the Secretary of State accepts, does it provide a reasoned basis for the relevant words in Article 17.1(a) being qualified by the words I have underlined. The underlined words have a more natural fit with Article 17.1(b) of the Directive, but that would make it less likely that they also qualify Article 17.1(a), and if that is so then the phrase "to take early retirement" appears devoid of any further qualification.

36. The Secretary of State also referred me to two cases decided by the ECJ in which "early retirement" is discussed. The first of these is *Noij v Staatssecretaris van Finnancen* (C-140/88) [1992] CMLR 737 at [10]. Mr Noij was a Netherlands national who settled in the Netherlands after working underground for 25 years as a miner in Belgium. Although he was in receipt of a retirement pension under Belgian law, he was subject, as a Netherlands resident, to the general social security scheme of that country. As a result, he was called on to pay, *inter alia,* contributions under the Netherlands Algemene Wet Bijzondere Ziektekosten (General Law on Exceptional Medical Expenses) although his sickness benefits were payable by the Belgian institution until he reaches the age of 65. Mr Noij argued that the charging of the said contributions, which were calculated on the basis of his Belgian retirement pension and amounted to 23% of that pension, was incompatible with the provisions of Regulation (EEC) No 1408/71. The ECJ said the following of relevance:

> "8. In the first part of Question 1 the national court seeks in substance to ascertain whether the rules of Community law, and in particular the provisions in Titles II and III of Regulation No 1408/71, preclude a person who has worked as an employed person in the territory of one Member State as a result of which he receives a retirement pension and later establishes his residence in another Member State in which he does not carry on any activity from being subject to the legislation of the latter State and accordingly being required to pay contributions for compulsory insurance calculated on the basis of his income including the aforesaid pension.
>
> 9 It should be noted in the first place that none of the provisions of Title II of Regulation No 1408/71 is applicable in a case such as this. Mr Noij is not in one of the situations referred to in Article 13(2)(b), (c), (d) or (e) or in Articles 14 to 17. As for Article 13(2)(a), according to which 'a worker employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State', it applies only to those working as employed persons.
>
> 10 The latter provision is designed to resolve conflicts of legislation which may arise where, during a single period, the place of residence and the place of employment are not situated in the same Member State. Such conflicts can no longer arise in the case of workers who

> have definitively ceased all professional or trade activity." (my underlining added for emphasis)

37. A similar view was expressed in the later case of *Commission v Netherlands* (Case C-198/90) [1991] ECR I-5799, in which the Court of Justice said (again at paragraph [10]):

> "Contrary to the Commission's assertion, Article 13(2)(a) is not applicable to employed persons who have taken early retirement. In fact, as the Court has already held, that provision is designed to resolve conflicts of legislation which may arise where, over the same period, the place of residence and the place of employment are not situated in the same Member State. Such conflicts can no longer arise in the case of workers who have definitively ceased all occupational activity (see the judgment in Case C-140/88 *Noij* v *Staatssecretaris van Financiën* [1991] ECR 1-387, paragraphs 9 and 10)."

38. I am not sure how far these cases assist with understanding the meaning of the phrase "workers who cease paid employment to take early retirement" in Article 17.1(a). One obvious point is that neither of them was concerned with the meaning of the language used in Article 17.1(a). I would accept that a person who has retired (early or otherwise) may be said to have definitively ceased all occupational activity; and the need for a definite occurrence is likely to be greater in early retirement cases given that the obvious marker of pensionable age has not yet been met. However, this does not in my judgment greatly assist with how the "definitively" is to be established, or more importantly whether the worker ceased paid employment *to take* early retirement. The italicised words are important and must be given meaning. In my judgment the active quality of the verb 'to take' puts a necessary focus on why the worker ceased paid employment at the time she or he did so. That active and intentional language sits far less easily in my judgment with a backward looking exercise of seeking to identify when a person may in fact with the benefit of hindsight have ceased all occupational activity and so, on that basis, may be said to have retired. Such an exercise, leaves the words "to take" devoid of any effective meaning.

39. For these reasons I agree with the Secretary of State's submission that ceasing paid employment to take early retirement requires a definitive step by the retiree to leave the labour market and one which involves a positive decision by the retiree to take early retirement. (As I understand it, the appellant does not now really dissent from dissent form this.) It is not simply a status that may be identified retrospectively by the application of hindsight. How such a positive decision is shown will be a matter for the evidence in the individual case. It may, most obviously, be shown by the person accessing some early retirement allowance or pension from an employer or private/occupational pension provider. However, I decline to rule on what may or may not constitute good evidence of a person having ceased paid employment to take early retirement in what is essentially an evidential matter.

40. Drawing the two submissions together, I further accept the Secretary of State's argument that the evidence before the First-tier Tribunal in this appeal fell very far short of showing any positive decision in 1993 by JM to cease her paid employment to take early retirement. All that the evidence showed, and importantly in the context of an argument that JM had retained her 'worker' status from 2006, was that JM at the age of 41 had chosen to stop working in 1993 at her then husband's request, with no evidence that she had sought (or was able) to access any early retirement benefits from any pension provider or employer, and where she had described herself as having a retirement date after 2009. On that evidence and on my view as to the scope of Article 17.1(a) of Directive 2004/38/EC, there was in my clear judgment no failure on the part of the First-tier Tribunal to consider this as an issue raised by the appeal. The First-tier Tribunal accordingly did not err in law in coming to its decision and its decision stands as the determinative decision as to the appellant's entitlement to ESA on his January 2016 claim for that benefit.

41. The third submission was in alternative to the first two submissions. The Secretary of State argued under this third submission that even if, contrary to the first two submissions, the appellant's late wife had "ceased paid employment to take early retirement" in 1993 (and, I would add, this was an obvious issue which the First-tier Tribunal ought to have taken as being raised by the appeal), she could not at that time have acquired a (permanent) right of residence under Article 2.1(a) of Regulation (EEC) 1251/70 as that regulation did not confer any right of residence on the taking of early retirement. All Article 2.1 of Regulation 1251/70 provided for was as follows:

> "The following shall have the right to remain permanently in the territory of a Member State:
>
> (a) a worker who, at the time of termination of his activity, has reached the age laid down by the law of that Member State for entitlement to an old-age pension and who has been employed in that State for at least the last twelve months and has resided there continuously for more than three years;
>
> (b) a worker who, having resided continuously in that State for more than two years, ceases to work there as an employed person as a result of permanent incapacity to work. If such incapacity is the result of an accident at work or an occupational disease entitling him to a pension for which an institution of that State is entirely or partially responsible, no condition shall be imposed as to length of residence;
>
> (c) a worker who, after three years' continuous employment and residence in the territory of that State, works as an employed person in the territory of another Member State, while retaining his residence in the territory of the first State, to which he returns, as a rule, each day or at least once a week."

42. Moreover, the Secretary of State argued that the appellant's reliance on recital 19 to Directive 2004/38/EC was misplaced as it is concerned with *maintaining* previously acquired rights but the appellant could not acquire a right of residence under Regulation (EEC) 1251/70 on taking early retirement. And JM was not in the position of the husband in the *RM* case (see footnote 1 above) as the husband in *RM* **had** satisfied the retirement condition under Article 2.(1) of Regulation 1251/70 and therefore had obtained a permanent right of residence

before 30 April 2006, which Article 17 of Directive 2004/38/EC then maintained.

43. This third submission advances arguably powerful arguments. However I decline to rule on them as there is no need for me to do so given my clear view, for the reasons given above, that the Secretary of State succeeds on the first two submissions she makes.

44. My conclusion on the failure of the appellant to establish any error of law on the part of the First-tier Tribunal in respect of the application of Article 17.1(a) of Directive 2004/38/EC makes it unnecessary for me to address other arguments that arose before me (e.g. whether had the appellant's late wife acquired a permanent right of residence under Article 17.1(a) in 1993 this could subsequently have been lost by a period of residence not in compliance with EU law following *SSWP –v- Dias* (case C-325/09) [2011] 3 CMLR 40; [2012] AACR 36).

45. I should, however address, albeit briefly, the appellant's alternative argument that a reference should be made to the CJEU for a preliminary ruling on the meaning of the phrase "to take early retirement" in Article 17.1(a). I have refused to make such a reference because in my judgment it is not necessary for the proper resolution of this appeal. The appellant now accepts that the phrase "requires a definitive step by the retiree to leave the labour market i.e. a positive act or decision by the retiree". In these circumstances, even on the appellant's case for the reasons I have already given I do not consider the First-tier Tribunal erred in law in failing to address a "clearly apparent from the evidence" issue on the appeal as to whether the appellant's late wife had ceased paid employment in 1993 to take early retirement. A reference is therefore not needed to resolve the issues arising on this appeal.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 27th April 2018