Appeal No. CUC/1974/2018

IN THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Poynter

DECISION

The appeal is allowed.

The making of the decision of the First-tier Tribunal given at Truro on 1 February 2017 under reference SC186/16/02929 involved the making of an error on a point of law.

That decision is set aside.

The case is remitted to the First-tier Tribunal for reconsideration in accordance with the directions given below.

I draw the attention of the parties to the fact that those directions are addressed to them as well as to the First-tier Tribunal and include time limits.

DIRECTIONS

To the Secretary of State

1 The Secretary of State must make a further response to the First-tier Tribunal: giving details of:

(a) the records maintained by the Contributions Agency of all national insurance contributions paid by, or credited to, the claimant's father between the date he entered national insurance and 31 August 2016, the date of the Secretary of State's decision in this case.

(b) every claim for benefit made by the claimant's father before 31 August 2016, including (in the case of each such claim) whether an award of benefit was made and, if so, the period covered by each such award; or confirming that no claim for any benefit was made.

(c) the records maintained by the Contributions Agency of all national insurance contributions paid by, or credited to, the claimant's mother

between the date she entered national insurance and 31 August 2016.

(d) every claim for benefit made by the claimant's father before 31 August 2016, including (in the case of each such claim) whether an award of benefit was made and, if so, the period covered by each such award; or confirming that no claim for any benefit was made.

(e) In relation to the claimant's mother's claim for carer's allowance, the further response must also state whether the claimant's mother has ever been excluded from entitlement to benefit on the ground that she had earnings above the limit prescribed from time to time for the purposes of section 70(1)(b) of the Social Security Contributions and Benefits Act 1992 by regulation 8 of the Social Security (Invalid Care Allowance) Regulations 1976.

Those details are relevant to the claimant's status as a worker and, hence to the appellant's potential right to reside as either a family member of a worker or as someone who, in the past, has resided as such for five years.

2 The further response and the documents that the Secretary of State has been directed to produce must be *received* by the HMCTS's Cardiff Appeals Service Centre no later than **six weeks** after the date on which this decision is *sent* to the parties.

3 As this decision is to be published on the website of the Administrative Appeals Chamber of the Upper Tribunal, the directions above do not include the personal details of the claimant's father and mother. However, those details are stated in the papers, In particular, the father's national insurance number is stated on page 64 and the mother's on page 133.

To the claimant

4 You must (acting through your parents or your solicitors):

(a) Give the First-tier Tribunal written answers to the following questions:

(i) Has your father always been a British citizen?

(ii) If no:

- when did he become a British citizen?

  Copies of your father's registration or naturalisation papers must be provided.

- what was your father's nationality before he became a British citizen?

Evidence of your father's former nationality (*e.g.,* his birth certificate, or a passport issued by a country other than Britain) must be provided.

- has your father retained his former nationality after becoming British (*i.e.,* is he a dual national)?

(iii) If yes, where and when was your father born?

A copy of your father's birth certificate must be provided.

(iv) Is your mother a British citizen?

(v) If yes, has she always been a British citizen?

(vi) If your mother has not always been a British citizen,

- when did she become a British citizen?

  Copies of her registration or naturalisation papers must be provided.

- what was her nationality before she became a British citizen?

  Evidence of her former nationality (*e.g.,* her birth certificate, or a passport issued by a country other than Britain) must be provided.

- has she retained her former nationality after becoming British (*i.e.,* is she a dual national)?

(vii) If your mother has not always been a British citizen, where and when was she born?

A copy of her birth certificate must be provided.

(b) Send the First-tier Tribunal copies of all the documents that are still available proving that your father was in work. These might include (but are not limited to):

(i) letters of appointment;

(ii) employment contracts;

(iii) payslips;

(iv) P45 Forms;

(v) P60 Forms;

(vi) bank statements showing earnings paid into the account.

(c) If your mother has ever worked in the UK, send the First-tier Tribunal copies of all the documents that are still available proving that his father was in work. Examples of such documents are listed in paragraph (b) above.

(d) If the Home Office has ever issued the your father, or your mother, with any of the following documents:

(i) residence permit;

(ii) residence document

(iii) registration certificate;

(iv) residence card;

(v) a document certifying permanent residence;

(vi) permanent residence card;

(vii) registration card;

(viii) a decision refusing to issue, refusing to renew or revoking any of the above documents,

then you must send the Tribunal a copy of every such document.

5 The written answers and the documents that the claimant has been directed to produce must be *received* by the HMCTS's Cardiff Appeals Service Centre no later than **six weeks** after the date on which this decision is *sent* to the parties.

6 You should not regard the fact that your appeal to the Upper Tribunal has succeeded as any indication of the likely outcome of the re-hearing by the new tribunal. You have won at this stage because the tribunal that heard your appeal on 1 February 2017 did not investigate your case thoroughly enough, not because it has been accepted that you are entitled to universal credit. Whether or not you are entitled will now be decided by the new tribunal.

7 I have understood that you would prefer the new tribunal to decide your appeal on the evidence in the papers and without holding a hearing. However, I have directed the tribunal that, in certain circumstances, it must hold a hearing. That is because there are too many unanswered questions in the papers and, if the directions I have given above do not answer those questions the new tribunal will need to be able to talk to you or one of your parents face to face and ask you for more detail.

8 For that reason, you, or one or more of your parents, should go to any hearing that the new tribunal holds.

To the First-tier Tribunal

9 After the expiry of the time limit in Directions 2 and 5 above, the appeal papers must be placed before a salaried judge of the Social Entitlement Chamber for further Directions.

10 If at that point, or after having given supplementary directions, the salaried judge considers that the appeal may be decided in the claimant's favour without holding a hearing, then he or she may do so.

11 Otherwise, the new tribunal must hold an oral hearing at which it must undertake a full reconsideration of all the issues raised by the appeal and—subject to the discretion conferred by section 12(8)(a) of the Social Security Act 1998 and to its duty to conduct a fair hearing—any other issues it considers appropriate to decide.

12 Those issues include those raised at paragraphs 22 to 36 of the Reasons below.

13 The judge who made the decision that I have set aside must have no further involvement in the case.

REASONS FOR DECISION

Introduction

1 The claimant appeals against the above decision of the First-tier Tribunal, , with the permission of Upper Tribunal Judge Mitchell.

2 That decision confirmed an earlier decision made by the Secretary of State on 31 August 2016.

3 The Secretary of State decided that the claimant was not entitled to universal credit because he did not have a right of residence in the United Kingdom and was therefore treated by regulation 9 of the Universal Credit Regulations 2013 as if he were not in Great Britain for the purposes of s.4(1)(c) of the Welfare Reform Act 2012.

4 Judge Mitchell has now released the appeal to me for decision.

5 The Secretary of State's representative supports the appeal (although that support is limited to the issue raised at paragraph 24 below).

The facts

6 The following facts are not in dispute.

7 The claimant was born in February 1997 in Germany and is a German citizen.

8 It follows that, at the date of the Secretary of State's decision, the claimant was 19 years of age.

9 He was therefore less than 21 years of age.

10 The claimant came to the UK on 1 July 2008 when he was 11. Since then he has lived in the UK with his father and mother, at least for part of the time, with his younger siblings.

11 His father is (now) a British citizen.

12 The claimant has the misfortune to be a seriously ill young man. He has never worked in the UK and, given the medical conditions from which he suffers, that is unsurprising. He claimed universal credit on the basis that he had limited capability for work.

13 At the time the Tribunal had to consider, he had just left the special school, where he had been studying since 1 February 2009 and was about to start a course at a local college. Before he started at that school, the claimant had attended a junior school in the UK since 2008.

The First-tier Tribunal's decision

14 On those facts, the Secretary of State decided—and the First-tier Tribunal agreed—that the claimant did not have a right of residence in the UK. Having accepted that the claimant was in fact habitually resident in the UK, the Tribunal's written statement of reasons continues as follows (I have corrected a number of typographical errors):

> "**Right to Reside**
>
> 9. [The claimant] has to fall within one of the following categories:
>
> (a) he is an EEA worker or has retained status as such.
>
> (b) he is an EEA national and is self-employed.
>
> [The claimant] is not currently working and has never been employed in [the] UK, therefore he cannot fall within either of these categories.
>
> (c) he is a family member of either of the above.
>
> [The claimant's] father is not an EEA citizen, he is a British citizen. The EU directive applies to EU citizens who reside in a Member State which is not their own. [The claimant's] father resides in his own State.

> Therefore [the claimant] cannot derive rights under the Directive from his father.
>
> (d) he is a student and has sufficient resources not to be a burden on the UK social assistance system [.]
>
> Universal Credit is part of the UK social assistance system, so the fact that he is seeking to claim Universal Credit excludes him from establishing a right to reside under this provision.
>
> (e) he is an EEA national with a permanent right to reside
>
> [The claimant] must have lived in [the] UK for a continuous period of five years under the provisions of the Regulations or the Directive – effectively [he must have] lived in [the] UK for that period in accordance with paras (a) – (d) above. His residence in [the] UK has not been in accordance with any of these provisions."

Reasons for setting aside the First-tier Tribunal's decision

15 I have set the First-tier Tribunal's decision aside because the reasoning quoted above amounts to a comprehensive failure by the judge to exercise her enabling and inquisitorial jurisdiction and amounts to an error of law

16 If the only relevant facts were those set out at paragraphs 7-13 above, then the case would have been open and shut in the way that the Department presented it to the judge and she accepted.

17 However, there were aspects of the evidence which suggested that other facts were potentially relevant and that the claimant might be able to establish a right to reside in ways that are not set out in the written statement of reasons.

18 Neither the claimant nor his father are lawyers or welfare benefits specialists. At the time, the claimant was unrepresented.

19 The law about the right to reside is not straightforward and the claimant was entitled to expect the First-tier Tribunal to exercise its inquisitorial jurisdiction by asking all the questions that needed to be asked so as to enable the claimant's father to put the claimant's case in the best possible way.

20 The fact that the First-tier Tribunal has such an enabling and inquisitorial jurisdiction is routinely used as a reason for not extending legal aid to tribunal proceedings. The system does not work properly if the First-tier Tribunal confines itself to the facts highlighted by the Department—or by unrepresented claimants who cannot be expected to know what facts are potentially relevant—and rubber-stamps the Secretary of State's decision without investigating the other issues that are apparent from the evidence.

21 In this case, the judge failed to exercise her inquisitorial jurisdiction in the following respects.

22 The judge failed to enquire into the status of the claimant's mother, with whom he also lives in this country. There are no findings of fact about whether the mother is British, or some other nationality. Nor, if she is British, are there any findings of fact about whether she has always been so or whether she acquired British citizenship through naturalisation. There are no findings of fact about whether she has ever worked in the UK and, if so, whether that work—however long it lasted—can be regarded as effective and genuine.

23 Even if the judge's conclusion that the claimant cannot derive a right of residence from his father turns out to be correct, the claimant is under the age of 21 and was therefore a family member of his mother as well as his father and might therefore have been able to derive a right of residence from her.

24 The judge also failed to investigate the obvious issue about whether the father, though he was a British citizen at the time of the Secretary of State's decision, had always been a British citizen.

25 The possibility that the father had not always been a British citizen was raised, if by nothing else, by the fact that the claimant is German.

26 If the father (or, indeed, the mother) had always been British—or if he (or she) had become a naturalised British citizen before his son was born—then the claimant would probably be British too.

27 Under section 2 of the British Nationality Act 1981 a person who is born outside Britain to a British parent acquires British nationality "by descent"—i.e., as opposed to by birth or adoption under section 1 or by naturalisation under section 6—unless that parent is him-, or herself British by descent (as defined in section 14).

28 The facts of the appeal therefore raise the possibility that the claimant is a British citizen—and has a right of residence on that basis—even though he is also a German citizen.

29 However, if it is assumed for the purposes of argument that the father has not always been a British citizen, then a number of other issues required investigation. These include (but are not necessarily limited to :

(a) what nationality the father had before he became British;

(b) when did he become British; and

(c) did he retain his former nationality after he became British?

30 Depending on the answers to those questions, the claimant might have had either of the following rights of residence at the time of the Secretary of State's decision:

(a) a right of residence under Article 10 of EU Regulation 492/11 as the child of a migrant worker who had established himself in education in the United Kingdom;

(b) a permanent right of residence under regulation 15(1)(a) of the Immigration (European Economic Area) Regulations 2016 as an EEA national who had resided in the United Kingdom "in accordance with [those] Regulations" for a continuous period of five years. This is because, if the claimant's father has not always been British but was once the national of another Member State, the claimant's residence with his father in this country while the father was exercising his free movement rights counts as residence for the purposes of regulation 15(1)(a). Such residence is "in accordance with" the 2016 regulations by virtue of regulations 14(2) and 7(1)(b)(i).

31 In addition, although I accept that the judge could not have known this when she gave her decision, the claimant might also have a right to reside under Article 21(1) of the Treaty on the Functioning of the European Union by virtue of the decision of the Grand Chamber of the Court of Justice of the European Union in *Toufik Lounes v Secretary of State for the Home Department* (Case C-165/16).

32 That case was concerned with whether a third-country national spouse of a Spanish citizen who had exercised her freedom of movement rights to live and work in the UK enjoyed a derived right of residence as a family member even though the Spanish Citizen had subsequently become a British citizen while retaining her former Spanish nationality.

33 The Grand Chamber's ruling in *Lounes*, namely that

> "Directive 2004/38/EC … must be interpreted as meaning that, in a situation in which a citizen of the European Union (i) has exercised his freedom of movement by moving to and residing in a Member State other than that of which he is a national, under Article 7(1) or Article 16(1) of that directive, (ii) has then acquired the nationality of that Member State, while also retaining his nationality of origin, and (iii) several years later, has married a third- country national with whom he continues to reside in that Member State, that third-country national does not have a derived right of residence in the Member State in question on the basis of Directive 2004/38.
>
> The third-country national is however eligible for a derived right of residence under Article 21(1) TFEU, on conditions which must not be stricter than those provided for by Directive 2004/38 for the grant of such a right to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by settling in a Member State other than the Member State of which he is a national."

reflects the facts of that case.

34 However, the reasoning that led to that conclusion is potentially applicable beyond those facts. At paragraphs 51-61 of the judgment, the Grand Chamber stated:

> "51 Accordingly, Ms Ormazabal, who is a national of two Member States and has, in her capacity as a Union citizen, exercised her freedom to move and reside in a Member State other than her Member State of origin, may rely on the rights pertaining to Union citizenship, in particular the rights provided for in Article 21(1) TFEU, also against one of those two Member States.
>
> 52 The rights which nationals of Member States enjoy under that provision include the right to lead a normal family life, together with their family members, in the host Member State (see, by analogy, judgment of 25 July 2008, *Metock and Others*, C-127/08, EU:C:2008:449, paragraph 62).
>
> 53 A national of one Member State who has moved to and resides in another Member State cannot be denied that right merely because he subsequently acquires the nationality of the second Member State in addition to his nationality of origin, otherwise the effectiveness of Article 21(1) TFEU would be undermined.
>
> 54 In the first place, denying him that right would amount to treating him in the same way as a citizen of the host Member State who has never left that State, disregarding the fact that the national concerned has exercised his freedom of movement by settling in the host Member State and that he has retained his nationality of origin.
>
> 55 A Member State cannot restrict the effects that follow from holding the nationality of another Member State, in particular the rights which are attendant thereon under EU law and which are triggered by a citizen exercising his freedom of movement.
>
> 56 In the second place, the rights conferred on a Union citizen by Article 21(1) TFEU, including the derived rights enjoyed by his family members, are intended, amongst other things, to promote the gradual integration of the Union citizen concerned in the society of the host Member State.
>
> 57 Union citizens, such as Ms Ormazabal, who, after moving, in the exercise of their freedom of movement, to the host Member State and residing there for a number of years pursuant to and in accordance with Article 7(1) or Article 16(1) of Directive 2004/38, acquire the nationality of that Member State, intend to become permanently integrated in that State.

> 58 As is stated, in essence, by the Advocate General in point 86 of his Opinion, it would be contrary to the underlying logic of gradual integration that informs Article 21(1) TFEU to hold that such citizens, who have acquired rights under that provision as a result of having exercised their freedom of movement, must forego those rights — in particular the right to family life in the host Member State — because they have sought, by becoming naturalised in that Member State, to become more deeply integrated in the society of that State.
>
> 59 It would also follow that Union citizens who have exercised their freedom of movement and acquired the nationality of the host Member State in addition to their nationality of origin would, so far as their family life is concerned, be treated less favourably than Union citizens who have also exercised that freedom but who hold only their nationality of origin. The rights conferred on Union citizens in the host Member State, particularly the right to a family life with a third-country national, would thus be reduced in line with their increasing degree of integration in the society of that Member State and according to the number of nationalities that they hold.
>
> 60 It follows from the foregoing that, if the rights conferred on Union citizens by Article 21(1) TFEU are to be effective, citizens in a situation such as Ms Ormazabal's must be able to continue to enjoy, in the host Member State, the rights arising under that provision, after they have acquired the nationality of that Member State in addition to their nationality of origin and, in particular, must be able to build a family life with their third-country-national spouse, by means of the grant of a derived right of residence to that spouse.
>
> 61 The conditions for granting that derived right of residence must not be stricter than those provided for by Directive 2004/38 for the grant of a derived right of residence to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by settling in a Member State other than that of which he is a national. Even though Directive 2004/38 does not cover a situation such as that mentioned in the preceding paragraph of this judgment, it must be applied, by analogy, to that situation (see, by analogy, judgments of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraphs 50 and 61, and of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraphs 54 and 55)."

35 Even if—which because the First-tier Tribunal did not investigate the point, we do not know—the claimant's father was the citizen of another EEA state before he became British and remains a dual national of that State, the facts of *Lounes* differ from those of this case because the claimant is himself an EEA national, rather than

a third country national; and is the child, rather than the spouse, of the British national.

36 However, it is at least arguable that the reasoning set out above applies in this case. It would be surprising if the father's the right to lead a normal family life, together with his family members can lead to the grant of a derivative right of residence to third country national family members, while denying it to EEA national family members.

37 Finally, as Judge Mitchell pointed out when giving permission to appeal, if the claimant is unable to derive a right of residence by any other route, the facts of the case required the Tribunal to investigate whether the case fell within the exceptional category referred to by the Supreme Court in *Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1 in which it might be disproportionate to apply the precise terms of Directive 2004/38/EC so as to deny an EEA national a right to reside.

38 The Secretary of State's representative submits that that category is very narrow and that the claimant does not fall within it. I acknowledge that that submission may be correct. However, that does not mean the First-tier Tribunal was entitled not to investigate the point.

Reasons for remitting the case to the First-tier Tribunal

39 I have considered whether to retain this case in the Upper Tribunal and remake the decision myself.

40 However, I have decided that the overriding objective, favours further fact finding by the First-tier Tribunal. I acknowledge that there may come a time when it becomes necessary for the Upper Tribunal to resolve the *Lounes* issue and/or the *Mirga* issue. However, I consider it much more probable that if the First-tier Tribunal exercises its inquisitorial jurisdiction properly, the proceedings will be resolved either by the appeal being refused on the basis that:

(a) neither the claimant's father nor his mother have ever been EEA nationals (other than British nationals); or

(b) though EEA nationals, either or both of them was not a qualifying person at the relevant times,

or by it being allowed either on the ground that the claimant is British as well as German, or on one of the two grounds set out in paragraph 30 above.

41 Even if I am mistaken about that, proper fact finding is necessary before either the *Lounes* or the *Mirga* issues can be properly addressed and, as yet, such fact finding has not taken place. It will be quicker and more efficient for it to be carried out locally.

Coda

42 I end this decision by making two further points.

Self-sufficiency

43 First, and to avoid future misunderstandings, the Tribunal's statement that:

> "Universal Credit is part of the UK social assistance system, so the fact that [the claimant] is seeking to claim Universal Credit excludes him from establishing a right to reside [on the basis that he has has sufficient resources not to be a burden on the UK social assistance system]"

is not a correct statement of the law. I will not dwell on the point because it seems probable that the claimant has never had comprehensive sickness insurance and therefore does not have a right of residence as a self-sufficient person or a student. However, the Tribunal's approach to the issue assumes that every *claim* on the social assistance system is a *burden* on the social assistance system, which is not so: see, *e.g., Pensionsversicherungsanstalt v Brey* Case C-140/12.

Decisions without a hearing

44 Far more importantly, the Judge's decision was given without holding a hearing.

45 That fact is not mentioned at all in the decision notice and is only referred to in passing in the written statement of reasons, which states:

> "4. [The claimant] appealed against this decision, and elected to have the appeal dealt with on the papers – i.e.without him attending the tribunal hearing. The matter came before the tribunal at Truro on 1 February 2017 and this is a statement of reasons for the decision of the tribunal."

46 Whatever the position may have been before, the general rule since the formation of the First-tier Tribunal on 3 November 2008 has been that the Social Entitlement Chamber **must** hold a hearing before making a decision which disposes of proceedings: see rule 27(1) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

47 However, that general rule is subject to limited exceptions, one of which is a discretion, conferred by the same regulation, not to hold a hearing if **both:**

> "(a) each party has consented to, or has not objected to, the matter being decided without a hearing; **and**

(b) the Tribunal considers that it is able to decide the matter without a hearing." (my emphasis).

48 The facts that:

(a) the claimant had elected to have the appeal dealt with on the papers, and that

(b) (although the statement of reasons does not mention it) the Secretary of State had also consented to a decision without a hearing,

meant that condition (a) was satisfied.

49 But that was only a *necessary* condition for the Tribunal to have power to make a decision without a hearing: it was not *sufficient*.

50 The Tribunal also had to consider whether it was "able to decide the matter without a hearing" and, taken together with the overriding objective in rule 2, that means it had to consider whether it was able to decide the matter *fairly and justly* without a hearing.

51 If there was ever any doubt about that approach, it was dispelled by the decision in *MM v Secretary of State for Work and Pensions (ESA)* [2011] UKUT 334 (AAC) which also confirmed that the discretion in regulation 27(1)(b) must be exercised consciously and that the fact of the exercise of the discretion together with the reasons why the Tribunal decided to exercise the discretion as it did must be recorded in the written statement of reasons (if one is issued).

52 The statement of reasons in this case gives the impression that the judge did not consider the exercise of the discretion at all. But if she did so, she has certainly failed to record that fact and the reasons why she considered she could decide the case fairly and justly on the written material.

53 The decision in *MM* has been followed on many occasions by other Upper Tribunal judges. That is unsurprising: it is what rule 27(1) says. And this case provides a textbook example of why the requirement is necessary. Had the judge consciously asked herself whether she could reach a fair and just decision on the material available to her on 1 February 2017, then I hope that—for the reasons given above—her answer would have been no. She would then have had a choice between adjourning the proceedings to an oral hearing at a venue near where the claimant lives or, perhaps, giving directions along the lines of those I have given above in an attempt to fill in the gaps in the evidence so that a fair and just decision could subsequently be made without holding a hearing.

54 Be that as it may, the procedure required by 27(1), as explained in *MM*, is not optional and the judge did not follow it. Had she not made other errors of law, I would have set aside her decision and remitted the case on that basis alone.

(Signed on the original)

Richard Poynter
Judge of the Upper Tribunal

25 July 2018