IN THE UPPER TRIBUNAL **Appeal No: CUC/734/2018**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Fox Court on 14 November 2017 under reference SC242/17/03169 involved an error on a material point of law and is set aside.

The Upper Tribunal is not in a position to re-decide the appeal. It therefore refers the appeal to be decided entirely afresh by a completely differently constituted First-tier Tribunal and in accordance with the Directions set out below.

This decision is made under section 12(1), 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007

DIRECTIONS

Subject to any later Directions by a District Tribunal Judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The new hearing will be at an oral hearing.

(2) The appellant is reminded that the issue for the new First-tier Tribunal will be whether she had a qualifying right to reside as at 19 December 2016.

(3) If the appellant has any further evidence that she wishes to put before the tribunal that is relevant to whether she had a qualifying right to reside in the United Kingdom on 19 December 2016, this should be sent to the First-tier Tribunal's office in Sutton within one month of the date this decision is issued.

(4) The First-tier Tribunal is bound by the law as set out below.

REASONS FOR DECISION

1. This appeal concerns the right to reside element of the habitual residence test found in regulation 9 of the Universal Credit Regulations 2013. That regulation provided at the material time as follows:

> "9.—(1) For the purposes of determining whether a person meets the basic condition to be in Great Britain, except where a person falls within paragraph (4), a person is to be treated as not being in Great Britain if the person is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.
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> (2) A person must not be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland unless the person has a right to reside in one of those places.
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> (3) For the purposes of paragraph (2), a right to reside does not include a right which exists by virtue of, or in accordance with—
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> (a)regulation 13 of the EEA Regulations or Article 6 of Council Directive No.2004/38/EC(1); or
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> (b)regulation 15A(1) of the EEA Regulations, but only in cases where the right exists under that regulation because the claimant satisfies the criteria in regulation 15A(4A) of those Regulations or article 20 of the Treaty on the Functioning of the European Union (in a case where the right to reside arises because a British citizen would otherwise be deprived of the genuine enjoyment of their rights as a European citizen).
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> (4) A person falls within this paragraph if the person is—
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> (a)a qualified person for the purposes of regulation 6 of the EEA Regulations as a worker or a self-employed person;
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> (b)a family member of a person referred to in sub-paragraph (a) within the meaning of regulation 7(1)(a), (b) or (c) of the EEA Regulations;
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> (c)a person who has a right to reside permanently in the United Kingdom by virtue of regulation 15(1)(c), (d) or (e) of the EEA Regulations;
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> (d)a refugee within the definition in Article 1 of the Convention relating to the Status of Refugees done at Geneva on 28th July 1951, as extended by Article 1(2) of the Protocol relating to the Status of Refugees done at New York on 31st January 1967;
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> (e)a person who has exceptional leave to enter or remain in the United Kingdom granted outside the rules made under section 3(2) of the Immigration Act 1971;

> (f)a person who has humanitarian protection granted under those rules; or
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> (g)a person who is not a person subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act 1999 and who is in the United Kingdom as a result of their deportation, expulsion or other removal by compulsion of law from another country to the United Kingdom."

The 'basic condition to be in Great Britain' in regulation 9(1) is a reference, in the case (as here) of a single claimant, to sections 3(1)(a) and 4(1)(c) of the Welfare Reform Act 2012. To be entitled to universal credit a single claimant has to meet, amongst other things, the basic conditions of entitlement (s.3(1)(a)), and one of those basic conditions is that the person "is in Great Britain" (s.4(1)(c)). Section 4(5)(a) of same Act provides that regulations may specify circumstances in which a person is to be treated as being or not being in Great Britain.

2. The appellant is a Portuguese national who made a claim for Universal Credit on 4 November 2016. She had been resident in the United Kingdom for 13 years by the date of that claim. On 19 December 2016 a decision maker acting for the Secretary of State decided that the appellant was not entitled to universal credit because, in effect, she did not have a right to reside in the United Kingdom. Her appeal against that decision was dismissed by the First-tier Tribunal in a decision made on 14 November 2017 ("the tribunal"). For the purposes of this further appeal to the Upper Tribunal the sole determinative issue is whether the tribunal erred materially in its approach to whether the appellant had a right to reside in the UK as a dependent family member of her daughter.

3. The tribunal in its decision notice of 14 November 2017 said that its reasons for its decision on the issue of the appellant being a dependent family member of her daughter were that she "did not have a right to reside as a family member of a national of the European Economic Area at the date of her claim [because] although her daughter was a Portuguese national

she also had British citizenship, and the Appellant was unable to derive a right to reside from her under the rules for family members of British citizens". The tribunal also concluded that the appellant had not acquired a right to reside as a family member of her daughter in the period before her daughter [became a British citizen], because it was not shown that her daughter was a worker for 5 years during that period.

4. Pausing at this point, it is noteworthy that the tribunal in these 'reasons' on the face of it did not find against the appellant on the basis that she was not in fact dependant on her daughter. That issue appeared irrelevant to the tribunal's decision because, it would seem, it considered that dependency in fact could not assist the appellant given the tribunal's views about the legal effect of the daughter holding dual nationality at the date of the appellant's claim for universal credit and the daughter not having worked for five years in the UK before she became a dual national.

5. However, by the time the tribunal gave its full reasons for its decision, on 21 December 2017, the issue of 'dependency in fact' did appear to gain some prominence in the tribunal's thinking. The tribunal's full reasons noted that the appellant was a Portuguese citizen who had lived in the UK since 1 February 2003 but had never worked here. On her arrival in the UK on 1 February 2003 the appellant had lived with her daughter but she then moved to live separately from her daughter from 6 June 2005. The daughter held Portuguese nationality at the time her mother arrived in the UK but became a dual Portuguese and British national from 13 October 2019. As to the appellant qualifying as having a right to reside on the basis of her being a dependent family member of her daughter, the tribunal's full reasons said the following.

> "the Appellant appealed on the basis that she was a family member of her daughter. However, while it was accepted that the Appellant was the mother of [the daughter], it was not accepted she was dependent on her; the Appellant declared in her Universal Credit claim that her daughter was not supporting her…Further and in the alternative, the Appellant could not derive rights from her daughter as a family member because her daughter was a British citizen. This is because rights can be derived as a family member of an EEA national, and EEA

> national is defined as a national of an EEA state who is not also a British Citizen (reg 2(1) [of the Immigration (European Economic Area) Regulations 2006]).
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> ....the Tribunal considered whether [the appellant] had accrued five years as a dependent of her daughter [and thus had gained a permanent right to reside in the UK]. It bore in mind that the prevention of a person deriving rights from a family member who held British and another EEA nationality dated only from 16/10/12. There was period prior to that change when the Appellant could potentially derive rights as a family member of her daughter, albeit that her daughter had acquired British citizenship from 13/10/09 (Sch 4 to the [Immigration (European Economic Area) Regulations 2006]). However, the evidence [no national insurance payments recorded as made before 2009] did not show that the daughter was herself a qualified person before 2009...The daughter's oral evidence was that she was a student from 2004 to 2008 had done some jobs, but was also looking after her children. A relationship of dependence was not established in the period between the Appellant getting her own flat in 2005 and 2012, but in any event, that Tribunal concluded that that it was not shown that the daughter herself accrued 5 years as a qualified person between those dates."

6. The appellant was then fortunate to gain the assistance of Simon Howells of Southwark Law Centre, and he has continued to act for her since. He applied to the First-tier Tribunal for permission to appeal against its decision. At the core of his application was the Court of Justice of European Union's decision in *Toufik Lounes v Secretary of State for the Home Department* (case C-165/16) [2018] 3 WLR 375, which in fact had been given on the day the tribunal decided the appeal in this case. The appellant, through Mr Howells, argued that the effect of *Lounes* was that family members were able to derive rights from EEA nationals who were also British Citizens. (The term 'EEA nationals' arises from its use in regulation 2 of the Immigration (European Economic Area) Regulations 2006. It was there used in place of 'EU national' or 'Union Citizen, but more particularly by regulation 2 an 'EEA national' meant a national of an EEA State [i.e. an EU national] who is <u>not</u> also a British Citizen. Where in this decision I use the term 'EEA national' I am using it, unless otherwise stated, in this statutory sense.) I will return later to address the effect of *Lounes*.

7. It was argued on behalf of the appellant that, given what it was said was the effect of *Lounes*, the tribunal had misdirected itself as to the law and in consequence had failed adequately to address (a) first, whether the appellant's daughter had exercised rights as an EU national in the UK prior to becoming a British citizen on 13 October 2009, and (b) second, the evidence of dependency of the appellant on her daughter.

8. The appeal had been decided by a District Tribunal Judge of the First-tier Tribunal and, as is required by paragraph 11(b) of the relevant *Practice Statement*, he determined the application for permission to appeal. Permission to appeal was refused. The judge did so because, although he accepted that *Lounes* was potentially relevant, he did not consider his decision on dependency of the mother on the daughter was not well enough founded. To support this the judge referred to additional evidence to which he had not referred in the full reasons or the decision notice. This evidence was that the appellant had her own council tenancy from 2005 onwards, that she had had her own income in the form of income support for 10 years from 2006 to 2016, and that the daughter (only) visited the appellant fortnightly.

9. Although I did not give permission to appeal on this ground, I should say that I am concerned about a judge using the refusal of permission to appeal decision to supplement or bolster reasons (or findings of fact) which on the face of it he did not rely on (or make) when coming to his decision or giving the full reasons for that decision: see *Brewer v Mann* [2012] EWCA Civ 246 (at paragraph 31). I bear in mind also that although the express power to amend reasons for a decision is provided for in section 9(4)(b) of the Tribunals, Courts and Enforcement Act 2007, that power only arises if the First-tier Tribunal has reviewed the decision but the tribunal here stated that it had decided *not* to review the decision. Therefore, as best as I can understand it, it would seem that what the District Tribunal Judge may have been seeking to communicate as his reasons for refusing permission to appeal (though I accept that he did not say this) was that any error of law he may have made (based on *Lounes* and inadequacy of reasoning and findings of

fact on dependency) was not a material error of law because on the evidence the appeal would have failed in any event. However, the trouble to my mind with this strand of thinking is that (a) it might appear to an aggrieved party as the judge (unfairly) justifying his decision after the event (see *Brewer*), and (b) it may leave unanswered or unclear the extent to which the judge explored with the appellant the evidence on which he is now relying.

10. I gave the appellant permission to appeal on the basis that it was arguable that the tribunal had failed to make sufficient findings of fact as to the nature of the appellant's relationship with her daughter in order to identify whether the daughter was providing the appellant with "material support" at the time of the appellant's claim for universal credit. I stated that other points which may need to be addressed on the appeal to the Upper Tribunal were:

    (i) the relevance (or otherwise) of the daughter's certificate of permanent residence of 7 February 2007. I indicated that the Secretary of State may wish to make enquiries of the Home Office or other relevant Government department or agency as to the basis on which this certificate of permanent residence was issued to the appellant's daughter (and also the basis for her being naturalised as a British Citizen from 13 October 2009); and

    (ii) why even if the appellant did not have a permanent right of residence as at the date of her mother's claim for universal credit on 4 November 2016 (or the decision on that claim), she nonetheless could not establish a right of residence based on her working at that time and her mother therefore having a right of residence as her (dependent) family member?

11. The appeal has since been subject of a number of written submissions on behalf of the parties of and, if I may say so, a degree of reluctance on the part of the Secretary of State, at least initially (when she did not support the appeal), to state a clear view as to the effect of *Lounes*. This saw her argue, in her first submission on the appeal, that "At the time of writing, it is the view of the Secretary of State that the decision in *Lounes* concerns the relationship between a third country national and a person who was an EEA national who also became a British citizen". On this 'time of writing' view, the Secretary of State submitted that as the appellant was a Portuguese national, and so an EEA national, *Lounes* did not apply to her.

12. The appellant, through Mr Howells, took issue with this reading of *Lounes*. She argued (as will be seen in my view correctly) that the proper legal effect of *Lounes* was not limited to third country nationals. That was the factual context in which the decision arose, but the legal analysis underpinning it concerned whether a family member of an EU national who moves to another member state and who subsequently becomes a citizen of that member state whilst remaining a national of his or her country of origin (i.e. a dual national) is able to derive a right of residence in the state where the EU national has acquired citizenship. Put another way, the issue in *Lounes* was whether the EU national loses his or her rights under EU law once they become a citizen of the host member state.

13. The appellant further argued that although *Lounes* was authority that she could not derive a family right directly under Directive 2004/38/EC, it was also authority for the possibility of the her deriving such a right by analogy under Article 21(1) of the Treaty on the Functioning of the European Union if (per paragraph 48 of the judgment in *Lounes*) this was "necessary to ensure that the Union Citizen can exercise [her] freedom of movement effectively". The 'Union citizen' in this case, it was argued, was the appellant's daughter, and if the appellant was in fact dependent on her, the daughter would not be able

to exercise her freedom of movement effectively unless her mother (the appellant) was able to derive a right of residence.

14. Following the above exchange of submissions, I gave further directions in which I said, inter alia, the following (I have omitted the pages references I included):

> "District Tribunal Judge Pierce identified *Lounes* as at least being potentially relevant. That potential relevance is developed in the appellant's grounds to the First-tier Tribunal for seeking permission to appeal….. In short, *Lounes* it is argued is relevant to the argument that the appellant's daughter had a permanent right of residence (and the appellant a right of residence as the daughter's dependent family member), on the basis that the daughter had exercised EU law rights in the UK prior to becoming a UK national on 13 October 2009. It is further argued that Lounes is relevant because it took the focus of the dependency assessment back to the period July 2009 to July 2015 and the First-tier Tribunal failed to enquire adequately into dependency over this period.
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> The Secretary of State's submission on the appeal to the Upper Tribunal on the relevance of *Lounes* is both brief and perhaps only preliminary (given the use of "At the time of writing…."). It appears to argue that *Lounes* is irrelevant because it concerned a third country national and an EU national who also became a British citizen, whereas [the appellant] is a Portuguese national.
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> I have some difficulty with this argument. This is essentially for the reasons set out by the appellant's representative in paragraphs 1-6 of the Observations in Reply, which may arguably better explain the effect of *Lounes*. It seems to me at least arguable that although *Lounes* concerned a third country national, the critical focus in the decision was on the rights of his wife as a dual Spanish/UK worker: see, for example, paragraphs 49, 51 and 53 of *Lounes*. It was the wife's right in *Lounes* which then, on the face it, was the basis of the derivative right of residence that accrued to her third country national husband: see paragraph 60 of *Lounes*.
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> At present I struggle to see why these principles from *Lounes*, if I have understood them correctly, would not apply to the appellant's daughter as a dual EU/UK national, and from which the mother's dependent family member status could arise (if established on the facts and, for the purposes of this 'error of law' appeal, where those facts have been adequately investigated by the First-tier Tribunal). However, as I say, the Secretary of State's argument appears to proceed on the basis that *Lounes* is of no relevance and cannot apply.
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> If the Secretary of State wishes to maintain her position as to the scope of *Lounes* and its (ir)relevance to this appeal then I consider she needs to set out her position on *Lounes* in more detail and with greater clarity than she has to date, if necessary with the benefit of legal

> advice. That in turn will inform my consideration of whether an oral hearing is needed on this appeal."

15. In the light of these Directions, the Secretary of State filed further written submissions in which she resiled from her earlier argument. She accepted that *Lounes* was applicable. In the Secretary of State's view, the effect of *Lounes* is that an EEA national who is also a British Citizen may continue to be treated as an EEA national where the British citizenship was acquired (i) after the person had (or had acquired) EEA citizenship, and (ii) after that person had exercised free movement rights in the UK. The submission went on to note that the appellant's daughter had started work on 13 July 2009 and that date fell three months before the daughter became a dual national (i.e. also became a British Citizen) on 13 October 2009. The submission conceded that if the appellant was a dependent relative of her daughter prior to 13 October 2009 and the daughter had at that point in time been exercising Treaty rights, "*Lounes* could mean that the [daughter] was a "qualified person" after becoming a British Citizen, and the [appellant] could derive rights from her".

16. The Secretary of State's submission went on to argue that if the daughter had carried on working for five years continuously from 13 July 2009 she would have acquired, applying *Lounes*, a permanent right to reside by 13 July 2014. Moreover, if the appellant had remained dependent on her daughter throughout those five years, she too would have acquired a permanent right to reside as family member of a "qualified person" under the Immigration (European Economic Area) Regulations 2006. However, in the Secretary of State's view it was not clear if the daughter had worked continuously for those five years, and further findings were required on that issue and whether the appellant had remained dependent on her daughter during this period. A related issue as to the continuity of the daughter's qualifying residence in the five year period was whether it was broken by breaks in working or

whether it was maintained by periods of studying and/or vocational training, and whether any periods out of the UK may have affected it.

17. The Secretary of State's submission also addressed the document issued to the appellant's daughter by the UK authorities "Certifying Permanent Residence [in the UK]". The Home office had advised in relation to this document that it had been issued to the appellant's daughter on 7 February 2007 "under European Economic Area (EEA) regulations on the basis that [the daughter] had exercised Treaty Rights as a student for a period of 5 continuous years". The Secretary of State conceded that this document had not been addressed by the tribunal and also conceded, albeit somewhat opaquely, that the appellant may also benefit from this right of residence held by her daughter, if she had been dependent on her daughter at the relevant time. I should add, however, that, as the appellant's representative very fairly points out, any continuous five year period of dependency based on this document could, seemingly, only arise for the period *from* 7 February 2007 onwards given the terms of the derogation contained in article 7(4) of Directive 2004/38/EC. This article on its face expressly provides that a family member in the ascending line does not have a right of residence as a dependent of a person who is exercising a right of residence as a student.

18. In my judgment the Secretary of State concession in her later submission as to the legal effect of *Lounes* is correct, and that judgment's relevance to this appeal is well founded. In a nutshell, the legal effect of *Lounes* is that dependent EEA family members of dual nationals can derive rights of residence in circumstances where the dual national has exercised EU Treaty rights in the host member state prior to acquiring the citizenship of that state.

19. The relevant scope of *Lounes* was touched upon by Upper Tribunal Judge Poynter in *AS v SSWP* (UC) [2018] UKUT 260 (AAC), though he did not need to decide the point. Judge Poynter there stated (at

paragraphs 31-36, which I quote in full as they also set out the key passages from the CJEU's judgment in *Lounes*):

> "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).
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> 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.
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> 33 The Grand Chamber's ruling in *Lounes*, namely that
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>> "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.
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>> 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."
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> reflects the facts of that case.
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> 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:
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>> "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.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."

20. In my judgment, what Judge Poynter described as an at least arguable effect of *Lounes* is its legal effect. That effect arises from what the CJEU said in paragraphs 58-61 of *Lounes*; words which are of general application and are not, in my judgment, limited to the 'third country national' facts of the case in *Lounes*. As a result, the terms of Directive 2004/38/EC and the Immigration (European Economic Area) Regulations 2006 were, and are, to be applied to the appellant's and her daughter's circumstances.

21. In consequence of the above conclusion as to the scope of *Lounes*, in my judgment the tribunal erred materially in law in its decision in not making any adequate investigation as to the appellant's dependency on her daughter for relevant periods in the past.

22. In these circumstances I need not address whether any other error of law affected the tribunal's decision (e.g. the additional reasoning provided in the refusal of permission to appeal). Nor need I address the debate between the representatives of the parties before me about any breaks in the daughter's employment in the 2012-2013 tax year and the relevance thereto, or otherwise, of the decision of the Upper Tribunal in *OB v SSWP* (ESA) [2017] UKUT 0255 (AAC); and even less so need I address whether the continuity of residence was affected by any periods of absence from UK by appellant and/or her daughter. These issues will fall to be addressed on the facts, if necessary, before the new First-tier Tribunal to which this appeal is being remitted.

23. I should say, however, that if by her most recent written submission summarised above the Secretary of State is arguing that the factual basis stated by the Home Office for the issuing of the document certifying permanent residence may need to be revisited by the First-tier Tribunal, the evidential and legal basis for such an argument would need to be fully set out by her in advance of the rehearing of this appeal by the new First-tier Tribunal. If no such argument is advanced then the new First-tier Tribunal need not go behind the document on page 111 as it will not be an issue raised by the appeal.

24. For the reasons given above, the tribunal's decision dated 14 November 2017 must be set aside. The Upper Tribunal is not able to re-decide the first instance appeal. The appeal will have to be re-decided completely afresh by an entirely differently constituted First-tier Tribunal (Social Entitlement Chamber), at an oral hearing.

25. The appellant's success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about whether her appeal will succeed on the **facts** before the First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

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

Dated 14th June 2019