Upper Tribunal
(Immigration and Asylum Chamber)

Kovacevic (British citizen – Art 21 TFEU) Croatia [2018] UKUT 00273 (IAC)

THE IMMIGRATION ACTS

Heard at Field House on 12 June 2018	**Decision & Reasons Promulgated** ……

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANITA KOVACEVIC
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Blundell, instructed by the GLD
For the Respondent: Mr R De Mello and Mr N Garrod, instructed by David Tang & Co

(1) A Union citizen who resides in a Member State of which he or she is a national is not a beneficiary under Article 3(1) of the Citizen's Directive.

(2) A dual Croatian/British citizen who was residing in the United Kingdom when Croatia joined the EU and who has never exercised EU Treaty rights does not acquire a right of residence under Article 21 TFEU.

DECISION AND REASONS

1. Anita Kovacevic (hereafter claimant) is a national of Croatia. She lawfully entered the UK in September 1995 and worked and resided in accordance with the Immigration Rules until she naturalised as a British citizen in May 2007. On naturalisation, and in line with Croatian law, she retained her Croatian nationality. She has been a dual national since May 2007. She has continuously worked in the UK.

2. The claimant's husband, Redha Zekri, is an Algerian national. He entered the UK on or around August 1996. They married in June 2014. Croatia became an EU Member State on 1 July 2013.

3. In July 2014 the claimant's husband submitted an application for a residence card as the spouse of an EEA national exercising Treaty rights in the UK and, on the same date, the claimant applied for a registration certificate under regulation 16 of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") as proof of her right of residence in the UK as a qualified person (defined in regulation 6 as an EEA national present in the UK as, *inter alia*, a worker or self-employed person). Both applications were rejected on 6 August 2014 on the basis that the claimant, as a naturalised British citizen, did "… *not qualify as a Croatian exercising a treaty right in the United Kingdom*."

4. On 20 November 2014 the claimant made a further application for a registration certificate and her husband made a further application for a residence card. The covering letter accompanying their applications asserted that, although a naturalised British citizen, she was also a Croatian national and was able to choose to exercise her European Treaty rights as a European citizen. The husband's application was refused on 9 January 2015 because the claimant was a British citizen and not subject to worker authorisation. The Secretary of State relied on regulation 2(1) of the 2006 Regulations which, following an amendment in 2012 stated,

   "EEA national" means a national of an EEA State who is not also a British citizen.

5. Before the amendment to regulation 2(1) the definition of an EEA national did not exclude someone who was also a British citizen. British citizens who were also nationals of another EEA State were consequently able to rely on the 2006 Regulations. They could not do so following the amendment.

6. Despite the refusal to issue her husband's residence card, a registration certificate was nevertheless issued to the claimant on 9 January 2015 on the basis that she was "… *a Croatian national exempt from worker authorisation*." The refusal to issue a residence card to the claimant's husband was a decision that did not attract a right of appeal. He obtained permission to challenge the lawfulness of the Secretary of State's decision through judicial review proceedings.

7. On 20 July 2015 the Secretary of State revoked the claimant's registration certificate because she was a British citizen and so not an EEA national as defined in regulation 2(1) of the 2006 Regulations. On 23 December 2015, following the commencement of separate judicial review proceedings, the Secretary of State made a new decision revoking the claimant's registration certificate. This decision attracted a right of appeal under regulation 26 of the 2006 Regulations which the claimant exercised. Her judicial review challenge was withdrawn by consent on 19 January 2016. Her husband's judicial review challenge was stayed following a hearing in the Administrative Court on 9 February 2016 pending the final outcome of the claimant's appeal. On the same day Mrs Justice Lang made a reference to the Court of Justice of the European Union (CJEU) in a similar judicial review challenge concerning Mr Lounes, the Algerian national spouse of Mrs Ormazabal, a Spanish national (Lounes, R (on the application of) v Secretary of State for the Home Department [2016] EWHC 436 (Admin)). Mrs Justice Lang stated, at [63],

> In my judgment, a reference to the CJEU is required since it is unclear whether the 2012 amendment to the definition of "EEA citizen" in the EEA Regulations 2006, and the decision that Mrs Ormazabal, who is a Spanish national, can no longer rely on her rights as a Union citizen under the Directive within the U.K. following naturalisation as a British citizen, unlawfully restrict the right to free movement under TFEU Article 21 and Directive 2004/38/EC.

8. Mrs Justice Lang referred the following questions to the CJEU.

> Where a Spanish national and Union citizen:
>
> i) moves to the United Kingdom, in the exercise of her right to free movement under Directive 2004/38/EC; and
>
> ii) resides in the United Kingdom in the exercise of her right under Article 7 or Article 16 of Directive 2004/38/EC; and
>
> iii) subsequently acquires British citizenship, which she holds in addition to her Spanish nationality, as a dual national; and
>
> iv) several years after acquiring British citizenship, marries a third country national with whom she resides in the United Kingdom;

are she and her spouse both beneficiaries of Directive 2004/38/EC, within the meaning of Article 3(1), whilst she is residing in the United Kingdom, and holding both Spanish nationality and British citizenship?

9. On 11 July 2016 the claimant's appeal was allowed by Judge of the First-tier Tribunal Herbert. Having set out the parties' competing arguments, Judge Herbert stated (at [73] to [76])

> I find that following the case of Rottman v Fristaat C-135/08 2010 that the Respondent is not entitled to revoke a Residence Card even though she has dual nationality. The Respondent I find is not entitled to dictate which nationality the Appellant deploys in respect to her private and family life and that of her dependants. It [sic] also find that the revocation of the registration card was disproportionate in all the circumstances.
>
> I am however aware that the Upper Tribunal (Administrative Appeals Chamber) has recently stated two cases to await the decision in the case of Lounes with similar questions arise.
>
> Having carefully considered the submissions made by the Respondent and by the claimant, I formed the view that the correct course of action is to make this decision notwithstanding the pending outcome of the case of Lounes.
>
> I am aware that Mrs Justice Lang referred four questions to the CJEU for consideration concerning Directive 2004/38/EC. Those considerations are similar to the ones before me in this case and therefore it is likely that decision may become irrelevant in due course. I am unable to stay these proceedings pending that Determination however.

10. An application by the Secretary of State for permission to appeal to the Upper Tribunal was granted by Judge of the First-tier Tribunal Grant-Hutchison on 17 November 2016 on the basis that Judge Herbert arguably misdirected himself in failing to apply McCarthy v Secretary of State for the Home Department C-434/09, [2011] ECR I-3375 ("McCarthy No 1"), and by failing to give adequate reasons for his conclusions. It was additionally arguable that the First-tier Tribunal judge should have stayed the hearing to await the outcome of the reference to the CJEU. The Upper Tribunal hearing was stayed pending the CJEU's decision in Lounes.

11. On 14 November 2017, the Grand Chamber of the CJEU handed down its answer to the reference from the Administrative Court (Lounes v Secretary of State for the Home Department (Article 21 TFEU - Directive 2004/38/EC) Case C-165/16, ("Lounes")). In brief summary, the CJEU concluded that neither Mr Lounes nor his dual national spouse were able to derive a right of residence under Directive 2004/38/EC ("the Citizens Directive") as they fell outside the definition of beneficiaries in Article 3 of the Directive. A third country national was however eligible for a derived right of residence pursuant to article 21(1) TFEU, on conditions which must not be stricter than those provided for by Directive 2004/38/EC 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.

12. The Secretary of State essentially contends that Lounes disposes of the claimant's argument under the Directive and that, as the claimant did not exercise Treaty rights before naturalising as a British citizen, her circumstances are akin to those in McCarthy No 1 and should be treated as a purely domestic situation. The claimant essentially contends that she benefits from the full range of rights under EU law as she has been lawfully resident since entering the UK and that her circumstances disclose sufficient links with EU law such that she has established a right of residence under Article 21 TFEU.

The legislative framework

The TFEU

13. Article 20 of the TFEU provides, in material part,

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

14. Article 21(1) provides,

> Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

The Citizens Directive

15. Article 3(1) of the Citizens Directive, which is headed "Beneficiaries", states,

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

16. Article 6 of the Citizens Directive establishes an initial right of residence in another Member State for Union citizens and their family members for up to 3 months. Article 7 establishes a right of residence for more than 3 months in another Member State for Union citizens who are, *inter alia*, workers and self-employed persons, and this right extends to their family members for as long as the Union citizen meets the requirements of Article 7. A Union citizen and their

family members will have attained a permanent right of residence in a host Member State under Article 16 if they have resided legally for a continuous period of 5 years. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for more than 2 consecutive years. A person with the right to permanent residence can only be removed from the territory of a host Member State on serious grounds of public policy or public security (Article 28).

The 2006 Regulations

17. Regulation 13 of the 2006 Regulations gives effect to Article 6 of the Citizens Directive, and regulations 14 (read in conjunction with the definition of a 'qualified person' in regulation 6) and 15 transpose Articles 7 and 16 of the Citizens Directive. Regulation 2 is set out in paragraph 4 above. Under regulation 16(1) the Secretary of State must issue a registration certificate to a qualified person on production of a valid ID card or passport and proof that the person is a qualified person.

Lounes

18. Ms Ormazabal, a Spanish national, moved to the UK in September 1996 to study, and had been employed since September 2004. It was not disputed that she had exercised her right to freedom of movement and had acquired a right of residence in the United Kingdom as a Spanish national under the Citizens Directive. In August 2009 she became a naturalised British citizen. She continued to retain her Spanish nationality. She married Mr Lounes, an Algerian national, in May 2014 and he applied for a residence card as the family member of a qualified person. Following the amendment to regulation 2 of the 2006 Regulations the Secretary of State no longer considered Mr Lounes' wife as an EEA national and his application was refused.

19. The issues the CJEU set as its task to consider were outlined at [30].

> … whether Directive 2004/38 and Article 21(1) TFEU are to be interpreted as meaning that, in a situation in which a Union citizen (i) has exercised his right of free 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 has a right of residence in the Member State concerned, on the basis of either Directive 2004/38 or Article 21(1) TFEU.

20. At [34] to [37] the CJEU reiterated that the purpose of the Citizens Directive is to "*facilitate and strengthen the exercise of the right of Union citizens to move and reside freely within the territory of the Member States*", and that the subject matter of the Citizens Directive concerns the "*conditions governing the exercise of that right*." As

Member States cannot, as a principle of international law, refuse their own nationals the right to enter and remain, the Citizens Directive "… *is not intended to govern the residence of a Union citizen in the Member State of which he is a national.*" Ms Ormazabal's naturalisation altered the legal rules applicable to her because she now had an unconditional right to reside in the UK. As such, she ceased to fall within the definition of 'beneficiary' in Article 3(1) of the Citizens Directive and, as the Citizens Directive is concerned with the conditions governing the exercise of the right to free movement, the CJEU concluded that the Directive no longer applied to her as her residence was inherently unconditional (paragraphs 41 & 42).

21. The CJEU then considered whether Mr Lounes was able to derive a right of residence through the rights accruing to his wife directly under Article 21(1). At [49] the CJEU rejected the UK government's contention that the case concerned a 'purely domestic situation'.

> In the circumstances of the present case, it must be noted that, contrary to what the United Kingdom Government in essence maintains, the situation of a national of one Member State, such as Ms Ormazabal, who has exercised her freedom of movement by going to and residing legally in another Member State, cannot be treated in the same way as a purely domestic situation merely because the person concerned has, while resident in the host Member State, acquired the nationality of that State in addition to her nationality of origin.

22. At [50] the CJEU noted that there is a link with EU law with regard to nationals of one Member State who are lawfully resident in the territory of another Member State of which they are also nationals and, at [51], stated,

> 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.

23. The CJEU concluded, at [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.

24. The CJEU set out its reasoning at [54] to [60] and identified the conditions for the grant of a derived right of residence under Article 21(1).

> 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.*, EU:C:2014:135, paragraphs 50 and 61, and of 10 May 2017, *Chavez-Vilchez and Others*, EU:C:2017:354, paragraphs 54 and 55).

25. At [62] the CJEU formalised its response to the Administrative Court's request, rejecting the argument of a right of residence based on the Citizens Directive but finding instead a derived right under Article 21 TFEU.

> In view of all the foregoing, the answer to the question is that Directive 2004/38 must be interpreted as meaning that, in a situation in which a Union citizen (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.

26. We were informed that Mr Lounes' challenge in the High Court settled in April 2018, that the Secretary of State agreed to quash his decision and to remake it within 3 months, and that the relevant EEA Regulations (now the Immigration (European Economic Area) Regulations 2016) will be amended in the very near future to implement the decision in Lounes.

The parties' submissions

27. Mr Blundell's submissions pivot on what is said to be a fundamental distinction between the present case and Lounes. Unlike Ms Ormazabal, the claimant moved to the UK and obtained her British citizenship *before* the accession of Croatia to the EU. The prior exercise by Ms Ormazabal of her free movement rights as an EU national in order to move to and reside in the UK before taking British citizenship was critical to the CJEU's reasoning and conclusion. Mr Blundell supports this contention by reference to paragraphs 49, 51, 53 to 55, 58 to 59 and 62 of Lounes where the CJEU repeatedly referred to Ms Ormazabal's exercise of free movement rights, indicating the significance of that fact. The prior exercise of the right to free movement was a condition precedent necessary to trigger a right of residence. Simply being a dual national in respect of two Member States was insufficient. The question whether the Secretary of State was entitled to revoke the claimant's registration document (the subject of this appeal) therefore turns on whether the claimant was entitled to benefit from her rights as an EU national as a dual national resident in one of her state of nationality. The CJEU expressly rejected the contention that a right of residence could be derived from the Citizens Directive based on its analysis of Article 3.

There was no dispute that the claimant never exercised her free movement rights before obtaining British citizenship. She entered and resided in the UK under domestic immigration law until she naturalised as a British citizen. The claimant and her husband are therefore substantially in the same position as the protagonists in McCarthy No 1 and their circumstances disclosed a 'purely domestic situation' only. Since Judge Herbert's decision was reached on the simple basis that the claimant was a dual national, his decision disclosed a material legal error and should be set aside.

28. Mr de Mello contends that the claimant is entitled to a registration certificate and that the certificate cannot be revoked simply because she is also a British citizen. Her entitlement stems from Articles 20 and 21 TFEU, which bestow rights on the nationals of Member States as part of their 'legal heritage'. When Croatia joined the EU the claimant acquired a new right (described as a 'vested or inherited' right) to reside in the UK under the EU Treaties. Her previous acquisition of British citizenship did not affect future rights that she may derive from her Croatian nationality and the rights of EU citizenship cannot be withdrawn or limited by the U.K.'s definition of an EEA national in the 2006 Regulations.

29. Mr de Mello submits that the fact that the claimant moved to the UK before Croatia became a full member of the EU does not alter this analysis and he relies on the Opinion of the Advocate-General in Micheletti (C-369/90) which considered the decision in Auer (C-136/78). The claimant's lawful right of residence in the UK, which was said to be in compliance with the conditions in Article 7(1) of the Citizens Directive, could be taken into account in deciding whether she presently benefits from the terms of the Directive. In submitting that the claimant remains a beneficiary under Article 3 of the Citizens Directive Mr de Mello relied on several authorities including Ziolkowski and Szeja v Land Berlin [2011] ECR I-14051. He contends that Article 3 of the Citizen's Directive and Article 21 TFEU only requires one movement of cross-border activity if the claimant is to benefit under Community law, and that the more favourable treatment, compared with the position of UK nationals and their spouses, is only conferred on the husband which is a consequence of the obligations arising from the Directive (Article 7(2)). He submits, *inter alia*, that if the claimant relinquished her British citizenship she will continue to be a beneficiary under Article 3 (1), that a UK national and his 3rd country spouse who move to another Member State and return to the home Member State will be in a better position because they only have to move once in order to become Article 3(1) beneficiaries whereas the dual national will have to move twice, that the appellant's analysis would discourage integration and impede free movement, and that the claimant continues to be a worker within the meaning of Article 7 (1) of the Citizens Directive as evidenced by her registration certificate.

30. Mr de Mello contends that the current definition of an EEA national in regulation 2 of the 2006 Regulations amounts to a de facto deprivation of EU

citizenship as her Croatian nationality does not benefit the claimant in the host member state. He places particular reliance on the decision of Garcia Avello v Etat Belge, Case C-148/02 [2004] 1 CMLR 1 and submits that the claimant has demonstrated four links with Community law as (1) she has always worked; (2) she was issued with a registration certificate; (3) she possesses the nationality of another Member State (Croatia); and (4) she wants to regularise her husband's status under EU law.

31. The claimant's submission that she is entitled to a registration certificate, and that this cannot be revoked on the basis of her acquisition of British citizenship, is consistent with The Hague Convention of 12 April 1930 on certain questions relating to the conflict of nationality laws. Article 3 of the Convention provides, "*Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses*." Mr de Mello submits that the grant of a residence certificate to the claimant is confirmation of her entitlement to reside in the UK under EU law, which reflects her contention that a Croatian national holding dual UK nationality before Croatia joined the EU acquires a new right to reside under Community law by reason of her Croatian nationality without such rights being pre-emptively curtailed by reason of her holding dual nationality.

32. The CJEU case law, it is argued, suggests that a third country national may be in a better position than a dual EU national, a situation that requires resolution. It remains unclear how the home Member State treats dual EU nationals in respect of issuing them registration certificates. The claimant contends that, as an EU dual national, she should be treated in a better and more preferential way than a third country national family member as a consequence of having dual nationality.

Discussion

33. Despite the impressive array of arguments utilised by Mr de Mello in reliance on the Citizens Directive, in our judgment he cannot overcome the clear and decisive ruling of the Grand Chamber in Lounes and the unambiguous terms of Article 3(1). The Grand Chamber concluded, at [41] and [42], that a Union citizen who resides in a Member State of which she is a national is not a beneficiary under the Citizen's Directive. We agree with Mr Blundell's submission that none of Mr de Mello's submissions can assail this fundamental conclusion and the CJEU's reasoning. The subject matter of the Citizens Directive concerns the conditions governing the exercise of the right to move freely and reside within the territory of the Member States and, as a national of a Member State enjoys an unconditional right to reside in that State, the Citizens Directive cannot govern the claimant's residence.

34. We therefore need only briefly consider some of the cases upon which Mr de Mello placed particular reliance to support his contention that the claimant

acquired a new right to reside in the United Kingdom when Croatia joined the EU. Auer (C-136/78) concerned an Austrian national who obtained a veterinary qualification in Italy and then set up practice in France and later obtained French nationality. The European Court of Justice (ECJ) stated, at [28]

> There is no provision of the Treaty which, within the field of application of the Treaty, makes it possible to treat nationals of a member-State differently according to the time at which, or the manner in which, they acquired the nationality of that state, as long as, at the time at which they rely on the benefit of the provisions of Community law, they possess the nationality of one of the member-States and that, in addition, the other conditions for the application of the rule on which they rely are fulfilled.

35. Both this case and Micheletti (C-369/90), where the Advocate-General relied on Auer, concerned the imposition of additional conditions in respect of individuals who had already exercised their right to free movement and residence. In any event, the general principle stated by the ECJ is qualified with the important proviso that the other conditions for the application of the rules of the Treaty must be met.

36. In Ziolkowski and Szeja v Land Berlin [2011] ECR I-14051 the ECJ held that, although periods of residence completed in the territory of the host Member State by a national of another State before the accession of the latter State to the EU did not fall within the scope of EU law, but solely within the law of the host Member State, provided the person could demonstrate that such periods were completed in compliance with the conditions in Article 7(1) of the Citizens Directive, they could be taken into account for the purpose of the acquisition of the right of permanent residence. Mr de Mello submits that the claimant's period of lawful residence in the UK prior to Croatia's accession to the EU can be taken into account in determining whether she is a beneficiary under the Citizens Directive. Ziolkowski however does not concern a dual national, and relates to a situation where the Citizens Directive was clearly engaged and the right to free movement had been exercised. It is not in contention that the claimant has not exercised any free movement rights. Nor does the case say anything about the acquisition of citizenship, which, as considered in Lounes [39], gives rise to a change in the legal rules applicable to an individual, under both national law and the Citizens Directive.

37. With respect to rights derived directly from Article 21(1) TFEU, we see considerable force in Mr Blundell's analysis of Lounes. Ms Ormazabal was able to claim a right of residence in reliance on Article 21(1) because she had already exercised her right to freedom of movement in her capacity as a Union citizen. It was the actual exercise of that right that triggered the protections derived from EU law (Lounes, at [55]). The claimant has never exercised her right to freedom of movement as a Union citizen as she was not a Union citizen when she entered and resided in the UK before becoming a British citizen. In our judgment it was central to the CJEU's ruling that Mr Lounes' wife had exercised her Treaty rights (see Lounes, at [24], [38], [49], [51], [53], [54], [57], [58] and [59]). The CJEU's

reasoning was clearly premised on the prior exercise by Ms Ormazabal of her right to free movement when she was a beneficiary under Article 3(1) of the Citizens Directive and her acquisition of an extended or permanent right of residence in the UK before naturalisation. If she had not exercised her right to move and reside in the United Kingdom Ms Ormazabal's circumstances would constitute a 'purely domestic situation'.

38. Purely domestic situations were considered, in the context of dual nationals, in McCarthy No 1. This case concerned a dual British and Irish citizen. Ms McCarthy was born and had always lived in the UK and did not claim to be a worker, a self-employed person or a self-sufficient person. She married a third country national and then obtained an Irish passport. She and her husband applied for residence documents as, respectively, a Union citizen and the spouse of a Union citizen. These applications were refused because Ms McCarthy was not a "qualified person". A preliminary ruling was sought as to whether Article 3(1) of the Citizens Directive or Article 21 TFEU was applicable to a situation concerning a Union citizen who had never exercised the right to free movement, and who had always resided in a Member State of which she was a national and who was also a national of another Member State.

39. The CJEU held that a literal, teleological and contextual interpretation of Article 3(1) of the Citizens Directive meant that it did not apply to someone who had never exercised their right of freedom of movement, who had always resided in a Member State which they were a national and who was also a national of another Member State (at [30] to [43]). The CJEU held in particular, that the reference to residence in the Citizens Directive was linked to the exercise of the freedom of movement for persons (at [35]), and that the fact that a Union citizen is a national of more than one Member State does not mean that she had made use of her right of freedom of movement (at [41]).

40. The CJEU then considered the applicability of Article 21 TFEU. At [46] the CJEU observed that, "… *the situation of a Union citizen who, like Mrs McCarthy, has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation*." The CJEU's assessment at [47] to [49] is particularly pertinent.

> 47 Indeed, the Court has stated several times that citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000, paragraph 41 and case-law cited). Furthermore, the Court has held that Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status (see *Ruiz Zambrano*, paragraph 42).
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> 48 As a national of at least one Member State, a person such as Mrs McCarthy enjoys the status of a Union citizen under Article 20(1) TFEU and may therefore rely on the rights pertaining to that status, including against his Member State of origin, in

particular the right conferred by Article 21 TFEU to move and reside freely within the territory of the Member States (see Case C-33/07 *Jipa* [2008] ECR I-5157, paragraph 17 and case-law cited).

49 However, no element of the situation of Mrs McCarthy, as described by the national court, indicates that the national measure at issue in the main proceedings has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU. Indeed, the failure by the authorities of the United Kingdom to take into account the Irish nationality of Mrs McCarthy for the purposes of granting her a right of residence in the United Kingdom in no way affects her in her right to move and reside freely within the territory of the Member States, or any other right conferred on her by virtue of her status as a Union citizen.

41. Although the claimant has not resided in the UK for her entire life, she has never, in common with Mrs McCarthy, exercised any Treaty rights. Her admittance to and residence in the UK was accomplished through the provisions of domestic immigration law. After she naturalised as a British citizen her unconditional residence flowed from that status, as did her right to work. In similar vein to Mrs McCarthy, the claimant enjoys the status of a Union citizen under Article 20 TFEU and can rely on the rights pertaining to that status, including the right to free movement under Article 21. The revocation of her registration document does not have the effect of depriving her of the genuine enjoyment of the substance of the rights associated with being a Union citizen, and it does not impede the exercise of her right to move and reside freely within the territory of other Member States. In short, there is nothing preventing her from exercising her free movement rights.

42. Mr de Mello submits however that the claimant's residence in the UK, since Croatia became a Member State on 1 July 2013, does have sufficient links with EU law such as to bring into operation the free movement rights and the rights of residence stemming from Article 21(1) TFEU.

43. We have carefully considered whether the four points advanced by Mr de Mello, as detailed in paragraph 30 above, demonstrate a link with EU law sufficient to trigger Article 21 TFEU. Mr de Mello's first point is that the claimant has always worked. This may be true, but she has never worked as a consequence of the exercise of EU Treaty rights. She first worked in accordance with the immigration rules, and then as a right flowing from the acquisition of British citizenship. We are not persuaded that her work in the UK constitutes a link with EU law. Mr De Mello's second point is that she was issued with a registration certificate. We accept that she was issued with a registration certificate but, in light of the decision in Lounes and the decisive assessment of Article 3(1) of the Citizens Directive, she was never entitled to a registration certificate. Moreover, the certificate did not confer any right. It was merely issued in respect of what was, wrongly, thought to be her right. The document has, in any event, been revoked. Mr De Mello's third point is that the applicant

has Croatian nationality and this provides the link with EU law. We are prepared to accept that a national of one Member State residing in another Member State of which they are also a national can establish a general link with EU law. What is pivotal however is the nature of the link and whether there is any impediment to the exercise of rights stemming from EU law. Given that the revocation of the registration certificate has not deprived the claimant of the genuine enjoyment of the substance of her rights as an Union citizen, and has not impeded her right to move and reside freely within the territory of other Member States, we are not persuaded, in accordance with the principles enunciated in McCarthy No 1, that Article 21 TFEU is engaged. With respect to Mr de Mello's fourth point, it is understandable that the claimant wishes to regularise her husband's immigration status but this does not, independently or in conjunction with any of the other points, establish any linkage with EU law.

44. Mr de Mello relies on Garcia Avello v Etat Belge, Case C-148/02 [2004] 1 CMLR 1. This case concerned a Spanish national and his Belgian wife who resided in Belgium and had 2 children, both dual nationals. Belgian law required the children to take the father's surname only, but Spanish custom was for the children to take the first surname of each of their parents, placing their father's first and their mother's second. The CJEU had to determine whether the issue in contention, a conflict of national rules, came within the scope of Community Law. At [27] the CJEU concluded that a link with Community law did exist in respect of persons in a situation such as that of the children of Mr Garcia Avello, who were nationals of one Member State lawfully resident in the territory of another Member State. At [28] the CJEU stated,

> That conclusion cannot be invalidated by the fact that the children involved in the main proceedings also have the nationality of the Member State in which they have been resident since their birth and which, according to the authorities of that State, is by virtue of that fact the only nationality recognised by the latter. It is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.

45. The judgment in Garcia Avello principally concerned the prohibition of discrimination on the grounds of nationality and the establishment of Citizenship of the Union and the corresponding rights conferred by the European Communities (EC) Treaty on this citizenship. Although the request for a preliminary ruling referred to Article 18 EC, which gave citizens of the Union the right to move and reside freely within the territory of the Member States, Article 18 EC, which is the precursor to Article 21 TFEU, did not form a significant part of the CJEU's analysis.

46. Garcia Avello was considered and distinguished in McCarthy No 1. The CJEU observed that the application of the law relating to surnames by one Member State, to nationals of that Member State who were also nationals of another Member State, meant that the children had two different surnames under the

two legal systems concerned, and that "… *that situation was liable to cause serious inconvenience for them at both professional and private levels resulting from, inter alia, difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in the other Member State of which they are also nationals*" (at [51]). Thus, it was the conflict of rules and the liability to cause serious inconvenience for the Union citizens that constituted an obstacle to freedom of movement (at [52]). No such obstacle exists in the present case.

47. As to Mr de Mello's reliance on The Hague Convention (see paragraph 31 above), this is an unincorporated international treaty and, as such, is not directly enforceable in domestic courts. In any event, we find Article 3 of the Hague Convention takes matters no further as it requires a person having two or more nationalities to be recognised as a national by each state, a matter that is not in dispute in this appeal. Contrary to Mr de Mello's submission that the Secretary of State is treating the claimant as a British citizen alone, it is her failure to exercise her right to move and reside as a Union citizen that, in essence, motivated the revocation of the registration certificate. We note once again that the revocation has not deprived the applicant of the enjoyment of her rights as a Union citizen or inhibited her rights of free movement.

48. The claimant additionally relies on the European Commission's opinion in a letter dated 15 October 2015 in response to correspondence from the claimant's solicitors relating to her husband. The letter concerns the interpretation of the Citizens Directive and the amendment to regulation 2 of the 2006 Regulations following the decision in McCarthy No 1, and expresses concerns that regulation 2 may be drawn too widely given the CJEU's conclusion that Article 21 TFEU "*…is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national, and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States*" (original emphasis). This opinion, which was written prior to the decision in Lounes, has to read in light of the CJEU's conclusions in that case and the indication given by Mr Blundell that regulation 2 will be amended to reflect the principles established in that decision[1].

49. The European Commission's letter also refers to joined cases C-7/10 and C-9/10 Kahveci and Inan, involving Turkish nationals who entered Member States pursuant to the EEC-Turkey Association Agreement, who then naturalised in the host Member State and who were subsequently joined by members of their

[1] This has now been achieved through The Immigration (European Economic Area) (Amendment Regulations 2018, 2018 No 801, coming into force on 24 July 2018

family. According to the European Commission this judgment spoke in favour of the argument that the Citizens Directive is relevant for EU citizens who move to and reside in another Member State and acquire the nationality of that State in addition to maintaining the nationality they acquired at birth. The Grand Chamber's decision in Lounes makes clear that the Citizens Directive is not relevant. We were informed by both representatives that, during the course of submissions before the Grand Chamber, reference was made to Kahveci and Inan, but that these cases did not form part of the Grand Chamber's consideration. We note, in any event, that the Turkish workers would have exercised their rights under the Association Agreement before acquiring the nationality of their host state, which is analogous to the position of Ms Ormazabal. We do not find the Turkish Association Agreement cases inconsistent with our analysis of Lounes.

Conclusion

50. For the reasons we have given we are satisfied that the claimant's circumstances are analogous to that of Ms McCarthy in McCarthy No 1 as there has been no prior exercise of her free movement rights and her rights of residence as a Union citizen. The claimant has not acquired a right of residence in the UK under Article 21 TFEU. The First-tier Tribunal allowed the claimant's appeal essentially because she was a dual national and because the judge did not consider that the Secretary of State was entitled to dictate which nationality the claimant employed in respect of her private and family life. This conclusion was clearly wrong given that the claimant's circumstances constituted a purely domestic situation. We therefore allow the Secretary of State's appeal and set aside the decision of the First-tier Tribunal.

51. We proceed to re-make the decision pursuant to section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. In light of our detailed assessment we find that the claimant was not entitled to a registration certificate under regulation 2 of the 2006 Regulations. Pursuant to regulation 20(2) of the 2006 Regulations the Secretary of State may revoke a registration certificate if the holder of the certificate never has a right to reside under the Regulations. We are satisfied that the claimant never had a right to reside under the Regulations, or indeed under Article 21 TFEU or the Citizens Directive. We therefore find that the Secretary of State was lawfully entitled to revoke the registration certificate erroneously issued to the applicant on 9 January 2015 and dismiss the claimant's appeal.

52. We decline to make a reference to the CJEU. The decision in Lounes conclusively demonstrates that the claimant's submissions with respect to Article 3(1) of the Citizens Directive are unfounded. We are additionally satisfied that our interpretation of Article 21 TFEU, following the judgments in Lounes and McCarthy No 1 is *acte clair*.

Notice of Decision

The First-tier Tribunal's decision contained a material error of law and is set aside. We re-make the decision, dismissing the appeal of Ms Kovacevic.

4 July 2018

Signed
Upper Tribunal Judge Blum

Date