**IN THE UPPER TRIBUNAL** **Case No.** CE/1947/2015
**ADMINISTRATIVE APPEALS CHAMBER**

**Before:** Mr E Mitchell, Judge of the Upper Tribunal

**Decision:** The decision of the First-tier Tribunal, sitting at Swindon on 20 March 2015, (First-tier Tribunal ref: *SC 205/14/00345*), did not involve a material error on a point of law. This appeal is **DISMISSED**.

## REASONS FOR DECISION

### Introduction

1. British citizens are not EEA nationals for the purposes of the Immigration (EEA) Regulations 2006 (the regulations which, until the enactment of 2016 Regulations of the same name, sought to give effect to Directive 2004/38/EC). British citizens may have family members who are EEA nationals (or third country nationals). The European Court of Justice (ECJ) has held that, in certain circumstances, family members of EU citizens must have the right to reside in a returning EU citizen's home State that reflects the rights conferred on the family member of an EEA national. Regulation 9 of the Immigration (EEA) Regulations 2006 seeks to confer on EEA nationals the right identified by the ECJ.

2. The principal issue in this case is whether regulation 9, in order to conform to the requirements of EU law, must extend to the case where a British citizen marries an EEA national after returning to UK, having previously been exercising Treaty rights in another Member State. I decide that the regulations do not need to be read in this way in order to confirm to the requirements of EU law.

### Background

*The Secretary of State's decision*

3. Mrs B is a French national, born in 1956. She came to the UK with Mr B, a British citizen, whom she married in England shortly after their arrival. Mr B died in 2008.

4. The record of a conversation between Mrs B and a DWP official stated: Mrs B had not worked in the UK due to alcoholism and the demands of caring for Mr B; since Mr B's death, she supported herself from savings and the proceeds of the sale of Mr B's family home; she had always used the NHS in England and had never had private medical insurance. None of this was subsequently disputed by Mrs B.

5. On 16 July 2014 Mrs B claimed income-related Employment & Support Allowance (ESA). On 19 September 2014, the Secretary of State decided that Mrs B did not have a right to reside in the UK so that she was a 'person from abroad' with an prescribed ESA amount of nil. Mrs B appealed to the First-tier Tribunal.

*Proceedings before the First-tier Tribunal*

6. Mrs B's notice of appeal, dated 15 December 2014, argued:

- She met Mr B in the 1970s. Their son was born in 1972. Mr B was then married to someone else. Other evidence supplied by Mrs B indicates that Mr B contracted two further marriages, both of which ended in divorce, before marrying Mrs B in 2002;

- Mrs B and Mr B were engaged in 1998, the year in which Mr B returned to Europe from America to live with Mrs B in her Paris apartment. Mr B met all bills and outgoings. He was a self-employed art dealer but otherwise had independent means and was self-sufficient;

- Mr B had private health insurance from 27 April 1998 to 7 January 2008 (confirmed by a letter from Axa PPP Healthcare dated 5 December 2014);

- Mr B resided in the "UK legally as an EU national who was self-sufficient with comprehensive sickness insurance" and "as a family member [Mrs B] resided with him from July 2002 until his death in 2008". Accordingly, Mrs B "was residing as a family member of an EU national with a right to reside as a self-sufficient person at the time of his death";

- Mrs B "was an EU national [who] lived in the UK as [Mr B's] family member for over five years before his death". She had a right to reside as a family member at the time of his death which she retained under article 12 of Directive 2004/38".

7. Mrs B's representative, Wiltshire CAB, also supplied the First-tier Tribunal with a written submission that argued:

- In France, Mr B was exercising his Treaty rights;

- Mrs B had mental health problems – anxiety, depression and panic attacks – which developed after she was stabbed in 1989. The attack also led to alcohol addiction but this had been under control since 2007;

- Mr B lived in the UK as a self-sufficient person from December 2002 until his death in 2008 and thereby established a permanent right to reside on the basis of five years legal

residence. Mrs B lived with him as his wife during this period and so she also had a permanent right to reside;

- Following Mr B's death, Mrs B continued to be habitually resident in the UK;

- If Mrs B could not establish a right to reside under the "specific provisions" of Directive 2004/38, it should be considered whether the length of time for which she had resided in the UK as the wife of a self-sufficient person, without placing any burden on the UK social security system for 12 years, justified the grant of a right to reside;

- Mrs B had recently been awarded Personal Independence Payment (enhanced rate for daily living activities).

8. On 20 March 2015, the First-tier Tribunal decided Mrs B did not have a right to reside in the UK, for the purposes of the ESA Regulations 2008, and dismissed her appeal. The tribunal's statement of reasons included the following findings and conclusions:

(a) Mr and Mrs B moved to the UK in December 2002 and married shortly after their arrival;

(b) Immediately before moving to the UK, Mr B was self-employed in France;

(c) Neither Mr B nor Mrs B worked after they came to the UK in December 2002;

(d) "there is no dispute that both the Appellant and Mr [B] were self sufficient prior to the Appellant's claim for ESA…and that Mr [B] had private sickness insurance and, as he received no NHS care during his illness, that it was comprehensive sickness insurance for the purpose of the Regulations". As I explain below, the Tribunal must have intended to refer to Mrs B having sufficient resources, rather than that she satisfied the 2006 Regulation's definition of a self-sufficient person;

(e) Mrs B's did not have private health insurance in the UK but was registered with an NHS G.P;

(f) On the Tribunal's findings, regulation 9 of the Immigration (EEA) Regulations did not apply. Mrs B was not married to Mr B at any time while he was residing in an EEA state as a worker or self-employed person. As a result, the condition in regulation 9(1)(b) was not met;

(g) Since Mrs B did not have private health insurance, she could not establish that she was a qualified person in her own right. Her lack of private health insurance meant she could not meet the requirement for self-sufficiency.

9. Mrs B applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal. The First-tier Tribunal granted her permission to appeal. Its determination read:

> "The appellant had been resident in the UK since December 2002 and had not been a burden on the state except for the use of the NHS.
>
> As the appellant's husband was a UK citizen his rights would normally be determined under UK law and not EU law, and the appellant's position as an EEA national would have to be ascertained in her own right.
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> Although it would appear that Reg.9 of the Immigration (EEA) Regulations does not assist the appellant, particularly as reg.9(2)(c) would not appear to be satisfied, the time at which the conditions in reg. 9(2) have to be satisfied is not clear given the different tenses used in reg. 9(2)(b).
>
> Does the fact that the appellant has been awarded a Personal Independence Payment and the Secretary of State has determined therefore that the UK is the competent state affect the issue?"

**Relevant law**

*Employment & Support Allowance Regulations 2008*

10. A "person from abroad" has an ESA prescribed amount of nil. A person from abroad is a person who is not habitually resident in the UK (regulation 70(1) of the 2008 Regulations). A person cannot be treated as habitually resident without a "right to reside" (regulation 70(2)) although certain rights to reside do not count (regulation 70(3)).

11. Further, a person who has a right to reside specified in regulation 70(4) cannot be treated as a person from abroad. These rights include the right to reside permanently in the UK under regulations 15(1)(c) to (e) of the Immigration (EEA) Regulations 2006. A permanent right to reside under regulation 15(1)(a) of the 2016 Regulations – the right sought by Mrs B – is not included. But this is not fatal to her claim. The regulation 15(1)(a) right is not excluded by regulation 70(3). This means a person who relies on the regulation 15(1)(a) right must also satisfy the domestic habitual residence test in regulation 70(1) but it is not disputed that Mrs B meets that test.

*The Immigration (EEA) Regulations 2006 and related EU legislation*

12. For the purposes of the 2006 Regulations, "EEA national" is defined as "a national of an EEA State who is not also a British citizen" (regulation 2). Under this definition, Mrs B was an EEA national but Mr B was not, since he was a British citizen.

13. Regulation 4(1) defines "self-sufficient person". The definition requires a person to have (i) sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence; and (ii) comprehensive sickness insurance cover in the United Kingdom.

14. The definition of "qualified person", in regulation 6(1), includes a person who is in the UK as a self-sufficient person. A qualified person has the right to reside in the UK for so long as she remains a qualified person.

15. Article 7 of Directive 2004/38/EC (which the 2006 Regulations sought to give effect to) provides:

> "All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
>
> …(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State".

16. Regulation 5 defines the term "worker or self-employed person who has ceased activity". It means an "EEA national" who satisfies any of sub-paragraphs (2) to (5) of regulation 5. Given the definition of EEA national, Mr B was not, for the purposes of regulation 5, a worker or self-employed person who has ceased activity.

17. Regulation 8 defines "extended family member". The definition may be satisfied in a variety of ways but, in all cases, requires a person to be either a relative or partner of an EEA national. Given the definition of EEA national, Mrs B was not the extended family member of Mr B under regulation 8.

18. Regulation 9 of the 2006 Regulations is headed "Family members of British citizens". It provides:

> "(1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member of a British citizen as if the British citizen ("P") were an EEA national.
>
> (2) The conditions are that–
>
> (a) P is residing in an EEA State as a worker or self-employed person or was so residing before returning to the United Kingdom;

(b) if the family member of P is P's spouse or civil partner, the parties are living together in the EEA State or had entered into the marriage or civil partnership and were living together in the EEA State before the British citizen returned to the United Kingdom; and

(c) the centre of P's life has transferred to the EEA State where P resided as a worker or self-employed person.

(3) Factors relevant to whether the centre of P's life has transferred to another EEA State include–

(a) the period of residence in the EEA State as a worker or self-employed person;

(b) the location of P's principal residence;

19. The above version of regulation 9 was added to the 2006 Regulations by Statutory Instrument 2013/3032. According to the Explanatory Memorandum that accompanied S.I. 2013/3032, its purpose was to ensure that the 2006 Regulations reflected the decision in *Singh* (see below).

20. Regulation 15(1)(a) of the 2006 Regulations confers a permanent right to reside on "an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years". This includes an EEA national who has resided in the UK as a self-sufficient person for a continuous period of five years.

21. Article 20 of the Treaty on the Functioning of the European Union provides:

"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…

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder."

22. Article 21.1 of the Treaty 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."

*Case law: rights to reside connected to a worker's return to the home member state*

23. As just mentioned, regulation 9 of the 2006 Regulations was amended in 2012 with the intention of reflecting the decision of the ECJ in *Singh* (case C-370/90).

24. Mr Singh, an Indian national, married a British national in the UK in 1982. The Singhs worked in Germany from 1983 to 1985. At the end of 1985, they returned to the UK to start a business. In 1986 Mr Singh was granted limited leave to remain in the UK as the husband of a British national. In July 1987 Mr and Mrs Singh were granted a decree nisi. According to the ECJ's decision "because of that decree the British authorities cut short his leave to remain and refused to grant him indefinite leave to remain as the spouse of a British citizen". Mr Singh brought an appeal against that decision and, until 23 May 1988, he resided lawfully in the UK. On that date, he withdrew his appeal, the event which presumably changed his lawful residence to unlawful residence under UK law.

25. Mr Singh remained in the UK. A deportation order was made on 15 December 1998. At this point, a decree absolute in the Singhs' divorce proceedings had not been pronounced. Mr Singh appealed against the 1998 deportation order. In those proceedings, the High Court referred the following question to the ECJ:

> "Where a married woman who is a national of a Member State has exercised Treaty rights in another Member State by working there and enters and remains in the Member State of which she is a national for the purposes of running a business with her husband, do Article 52 of the Treaty of Rome and Council Directive 73/148 of 21 May 1973 entitle her spouse (who is not a Community national) to enter and remain in that Member State with his wife?"

26. The principle that guided the ECJ in making its decision was described as follows:

> "19. A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State.
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> 20. He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State."

27. Applying this principle of deterrence, the ECJ held:

> "21 It follows that a national of a Member State who has gone to another Member State in order to work there as an employed person pursuant to Article 48 of the Treaty and returns to establish himself in order to pursue an activity as a self-employed person in the territory of the Member State of which he is a national has the right, under Article 52 of the Treaty, to be accompanied in the territory of the latter State by his spouse, a national of a non-member country, under the same conditions as are laid down by Regulation No 1612/68, Directive 68/360 or Directive 73/148, cited above."

28. The ECJ went on to hold in para. 23 that an individual's Treaty rights "cannot be fully effective if such a person may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse" and, accordingly:

> "when a Community national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State."

29. The precise answer to the question referred to the ECJ was:

> "Article 52 of the Treaty and Directive 73/148, properly construed, require a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who has gone, with that spouse, to another Member State in order to work there as an employed person as envisaged by Article 48 of the Treaty and returns to establish himself or herself as envisaged by Article 52 of the Treaty in the territory of the State of which he or she is a national. The spouse must enjoy at least the same rights as would be granted to him or her under Community law if his or her spouse entered and resided in the territory of another Member State."

30. *Akrich* (case C-109/01) was an ECJ decision concerning Moroccan national Mr Akrich who entered the UK in February 1989 on a one month tourist's visa. He made an unsuccessful application for leave to remain as a student. Following a conviction for theft, Mr Akrich was deported (to Algeria) in 1991. Following a previous clandestine entry and deportation, he again entered the UK clandestinely.

31. In 1997, Mr Akrich was deported once again (to Ireland, in accordance with his wishes) by which time he had married a British citizen. In January 1998, he applied for revocation of his deportation order and for entry clearance to the UK as the spouse of a person settled in the UK. At this point, Mr Akrich and his wife were

living and working in Ireland. The Secretary of State refused Mr Akrich's applications, taking the view that the couple's move to Ireland was a temporary absence deliberately designed to manufacture a right to reside of the type identified in *Singh*. The matter came before the Immigration Appeal Tribunal which referred certain questions to the ECJ.

32. The ECJ's answers to the referred questions included the following:

> "In order to be able to benefit in a situation such as that at issue in the main proceedings from the rights provided for in Article 10 of Regulation No 1612/68 [now Directive 2004/38/EC], a national of a non-Member State married to a citizen of the Union must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated.
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> Where the marriage between a national of a Member State and a national of a non-Member State is genuine, the fact that the spouses installed themselves in another Member State in order, on their return to the Member State of which the former is a national, to obtain the benefit of rights conferred by Community law is not relevant to an assessment of their legal situation by the competent authorities of the latter State."

33. *Eind* (case C-291/05) was a decision of the ECJ concerning a Dutch national who moved to the UK in February 2000 in order to work. It is of particular relevance in the present case because it involved family life established after an EEA national moved to a Member State in the exercise of Treaty rights.

34. Mr Eind was joined in the UK by his daughter, a citizen of Surinam (previously Dutch Guiana). She was granted a residence permit by the UK authorities. In October 2001, Mr Eind returned to Holland with his daughter. He was unable to work due to ill-health. The Dutch authorities refused to grant the daughter a residence permit. Since Mr Eind had not, since his return to Holland, been economically active, he could not be treated as a Community national under Dutch law and, hence, his daughter could not attain rights as the family member of a Community national.

35. A Dutch judicial authority referred a number of questions to the ECJ.

36. The first question concerned Article 10 of Regulation 1612/68, the European instrument which, at that time, conferred rights on the family member of a Member State national to install themselves in the Member State in which he or she worked. The ECJ found that "the right of a third-country national who is a member of the family of a Community worker to install himself with that worker may be relied on only in the Member State where that worker resides". The fact that the daughter had been granted a residence permit by UK authorities did not require the Dutch authorities to do so.

37. But that was not the end of the matter. Another question referred to the ECJ was:

> "whether, when a worker returns to the Member State of which he is a national, after being gainfully employed in another Member State, a third-country national who is a member of his family has a right under Community law to reside in the Member State of which the worker is a national, even where that worker does not carry on effective and genuine economic activities"

38. The ECJ again linked the question of a third-country national's rights to the effective exercise of the right of free movement:

> "32…the right of the migrant worker to return and reside in the Member State of which he is a national, after being gainfully employed in another Member State, is conferred by Community law, to the extent necessary to ensure the useful effect of the right to free movement for workers under Article 39 EC and the provisions adopted to give effect to that right, such as those laid down in Regulation No 1612/68. That interpretation is substantiated by the introduction of the status of citizen of the Union, which is intended to be the fundamental status of nationals of the Member States."

39. The Dutch government argued "a Community national is unlikely to be deterred from moving to the host Member State in order to take up gainful employment there by the prospect of not being able, on returning to his Member State of origin, to continue a family life which may have been established in the host Member State". The ECJ held "that approach cannot be accepted" for the following reasons:

> "35 A national of a Member State could be deterred from leaving that Member State in order to pursue gainful employment in the territory of another Member State if he does not have the certainty of being able to return to his Member State of origin, irrespective of whether he is going to engage in economic activity in the latter State.
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> 36 That deterrent effect would also derive simply from the prospect, for that same national, of not being able, on returning to his Member State of origin, to continue living together with close relatives, a way of life which may have come into being in the host Member State as a result of marriage or family reunification.
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> 37 Barriers to family reunification are therefore liable to undermine the right to free movement which the nationals of the Member States have under Community law, as the right of a Community worker to return to the Member State of which he is a national cannot be considered to be a purely internal matter.

> 38 It follows that, in circumstances such as those in the case before the referring court, Miss Eind has the right to install herself with her father, Mr Eind, in the Netherlands, even if the latter is not economically active.
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> 39 That right remains subject to the conditions laid down in Article 10(1)(a) of Regulation No 1612/68, which apply by analogy.
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> 40 Thus, a person in the situation of Miss Eind may enjoy that right so long as she has not reached the age of 21 years or remains a dependant of her father."

*Case law: proportionality, and comprehensive sickness insurance*

40. I observe here that none of Mrs B's three representatives before the Upper Tribunal developed her proportionality argument by reference to any case law. Nevertheless, I shall briefly describe the recent decision of the Supreme Court in *Mirga v Secretary of State for Work & Pensions* [2016] UKSC 1.

41. At paragraph 60, the Supreme Court said:

. "The effect of the decision of [the ECJ in] *Baumbast* [case c-413/99) is that the fact that an applicant may fall short of the strict requirements of having "self-sufficiency" status under what are now the 2004 Directive and the EEA Regulations cannot always justify the host member state automatically rejecting his or her right to reside on the ground that the requirements for that status are not wholly complied with."

42. The sticking-point for Mr Baumbast was the requirement for *comprehensive* sickness insurance. He argued that it would be disproportionate to deny him a right to reside, by reference to the self-sufficiency provisions of Directive 2004/38/EC since he satisfied the 'sufficient resources' test and only marginally failed to satisfy the 'comprehensive sickness insurance' test. As the Supreme Court said in describing Bambaust "his only possible problem was that the insurance may have fallen short of being "comprehensive" in one respect, namely that it was not clear whether it covered "emergency treatment".

43. The ECJ identified certain factors in Mr Bambaust's favour: he had sufficient resources; he had worked and resided in the UK for several years, his family had resided in the UK for several years, neither he nor his family had ever received any social assistance in the UK and he and his family had comprehensive medical insurance in Germany. Those factors persuaded the ECJ. In the Supreme Court's words:

> "the court said in para 93 that it would be "a disproportionate interference with the exercise" of the applicant's right of residence conferred by what is now article 21.1 of TFEU to refuse to let him stay in the UK because of a small shortfall in the comprehensiveness of his medical insurance."

44. The appellants in *Mirga* could derive no assistance from *Bambaust*:

> "62…Mr Baumbast's case was predicated on the fact that he did not need any assistance from the state. Even if the decision is relied on by analogy, it is of no help to the appellants. The thrust of the court's reasoning in that case was that, where an applicant's failure to meet the requirements of being "a self-sufficient person" was very slight, his links with the host member state were particularly strong, and his claim was particularly meritorious, it would be disproportionate to reject his claim to enjoy the right of residence in that host state. Even though the applicant had a very strong case in the sense that he fell short of the self-sufficiency requirements in one very small respect, the court decided that he could rely on disproportionality only after considering the position in some detail."

45. Nor could the appellants in *Mirga* succeed by relying on some more general principle of proportionality:

> "69. Where a national of another member state is not a worker, self-employed or a student, and has no, or very limited, means of support and no medical insurance (as is sadly the position of [the appellants], it would severely undermine the whole thrust and purpose of the 2004 Directive if proportionality could be invoked to entitle that person to have the right of residence and social assistance in another member state, save perhaps in extreme circumstances. It would also place a substantial burden on a host member state if it had to carry out a proportionality exercise in every case where the right of residence (or indeed the right against discrimination) was invoked.
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> 70. Even if there is a category of exceptional cases where proportionality could come into play, I do not consider that either [appellant] could possibly satisfy it. They were in a wholly different position from Mr Baumbast: he was not seeking social assistance, he fell short of the self-sufficiency criteria to a very small extent indeed, and he had worked in this country for many years. By contrast [the appellants] were seeking social assistance, neither of them had any significant means of support or any medical insurance, and neither had worked for sustained periods in this country. The whole point of their appeals was to enable them to receive social assistance, and at least the main point of the self-sufficiency test is to assist applicants who would be very unlikely to need social assistance."

**Proceedings before the Upper Tribunal**

46. Mrs B has had three different representatives during these Upper Tribunal proceedings. In order, these were Avon & Bristol Law Centre, the AIRE Centre and Eric Robinson Solicitors.

47. The Law Centre advanced an argument, in addition to the grounds on which the First-tier Tribunal granted permission to appeal. They argued Mrs B "has the right to reside in the UK as a self-sufficient person who is a national of another EEA member state".

48. Mrs B then changed her representative to the AIRE Centre, who were granted permission to rely on amended grounds of appeal:

(a) the First-tier Tribunal erred by failing to recognise that regulation 9 of the Immigration (EEA) Regulations 1996 applied to Mrs B: "the application of regulation 9, in light of well-established principles of EU law, is not limited to persons who were married prior to their return to the UK". Those well-established principles were not identified;

(b) Mrs B's award of Personal Independence Payment was a material fact relevant in determining whether she had a right to reside;

(c) the Tribunal failed to apply the principle of proportionality in considering whether Mrs [B] was a family member of a "self-sufficient" person within the meaning of the 2006 Regulations, and whether she was a person with "sufficient resources" within the meaning of Directive 2004/38. In the circumstances of this case, the requirement for her to have her own comprehensive health insurance was disproportionate in light of (i) the family's resources, (ii) her late husband's own comprehensive health insurance, and (iii) Mrs B's own ongoing registration with, and use of the French social security authorities and limited reliance on the National Health Service. This last point had not been put to the First-tier Tribunal in evidence.

49. The Upper Tribunal directed the Secretary of State to address certain case law in his response to Mrs B's appeal. The response argues:

(a) the decision of the European Court of Justice (ECJ) in *Singh* [1992] ECR 1-4265 "established the principle that, where an EU migrant working had been working in a Member State other than his home state accompanied by a Third Country National family member (spouse and children), the Third Country National family member had the right to install himself with the worker when she returned to her home state";

(b) *Singh's* rationale was that a person might be deterred from exercising Treaty rights if "on returning to the member State of which he is a national, the conditions of entry and residence of his family were not at least equivalent to those which were granted by Community law in the territory of another Member state";

(c) the issue in *Singh* was whether a Member state was required to grant leave to enter and reside in its territory to the spouse of a national of that state who has gone with the worker to another member state in order to work. The ECJ decided the worker would be deterred from

returning to his home if his spouse and children could not enter and reside in the territory of his member state. Accordingly, those family members has a right to reside under the Treaty;

(d) Subsequently, *Akrich* "put limitations on the *Surinder Singh* principle". In *Akrich* the ECJ held that a spouse, for example, could not install him or herself with the migrant worker in another Member State unless the spouse was already lawfully resident in a Member State when he moving to "another member state to which the citizen of the Union is migrating or has migrated"

(e) the ECJ's decision in *Eind* (c-291/05) involved a Dutch national who went to work in the UK in 2001. His daughter, a Surinamese national joined him directly from Surinam. The Dutch national became ill and returned to Holland. The Dutch authorities refused the daughter's application for a resident permit;

(f) In *Eind* the ECJ held that the right to family reunification (then conferred by article 10 of Regulation 1612/68) did not entail any autonomous right to free movement since the daughter was under age 21 and "relied on the right of the Third Country National who was the member of the family of the Community worker to install herself with that worker";

(g) in *Eind* the ECJ also addressed whether the daughter had a right to reside in Holland simply as a family member of a Dutch national returning home after working in another member state. The Court held that the EEA national would be deterred from exercising his freedom to work in another member state if his daughter did not have the right to install herself with her father, in Holland, even though he was no longer economically active. The right remained subject to the conditions laid down in Article 10(1)(a) of Regulation 1612/68 - while she was under age 21 she would remain a dependant of her father. And "she had a right to reside on the basis of Art 18 EC as this right is subject to the limitations and conditions set out in secondary legislation, in particular to limitations on the right of residence set out in Directive 2004/38";

(h) "The Judge is also referred to *CPC/1492/09* a case of a returning British national from work in Greece when he was accompanied by his wife and mother-in-law both Greek nationals". I have considered that case but am of the opinion that, for present purposes, it takes us no further than the ECJ case law;

(i) the Secretary of State is unaware of any case in which regulation 9 of the Immigration (EEA) Regulations has been held to apply where a person did not become a British citizen's spouse until after the citizen returned to the UK from the Member state in which s/he was exercising Treaty rights;

(j) the fact that Mrs B has been awarded Personal Independence Payment is irrelevant to the question whether she has a right to reside;

(k) there was no proportionality dimension to this case, on its facts.

50. Then the AIRE Centre ceased to act as Mrs B's representative. Mrs B sought and was granted an extension of time to reply to the Secretary of State's response. Mrs B subsequently sought and was granted a further extension of time due to a mental health crisis.

51. Mrs B then secured another representative, Eric Robinson Solicitors. The solicitors supplied a written submission described as supplemental grounds of appeal. These argue:

(a) Mrs B's use of NHS services was not "outside the parameters of normal usage". She received private healthcare for dentistry and detoxification and "has not been an unreasonable burden on the social assistance system". These factual arguments about Mrs B's use of health services were not put to the First-tier Tribunal. No application was made for the admission of new evidence;

(b) Mrs B will supply evidence that the centrality of her and Mr B's lives were in an EEA state (France). Again, no application was made for the admission of fresh evidence;

(c) "it is … averred that the First-tier Tribunal has erred in its consideration of regulation 9 of the Immigration (EEA) Regulations". It must have erred because Mr & Mrs B were married, they lived together in an EEA State and the centre of Mr B's life had transferred to the EEA State of France. The submission did not deal with the point that, on its face, regulation 9 seems not to apply where the British citizen marries the EEA national after returning to the UK;

(d) the First-tier Tribunal wrongly failed to adopt the habitual residence reasoning that must have been applied by the Secretary of State when he awarded Mrs B Personal Independence Payment. It is perverse to award PIP but to refuse ESA on residency grounds;

(e) "it will be evidenced in due course that the Appellant has formed a significant private life in the UK and immersed herself in the community". No application was made for the admission of new evidence.

52. The Secretary of State was directed to supply a written submission explaining whether he objected to the 'supplemental grounds of appeal'. He did not object and maintained any new supplemental grounds had been dealt with in his earlier written response. I treat the grounds of appeal as extending to any new grounds in the supplemental submission provided for Mrs B by Eric Robinson Solicitors. Upper Tribunal directions also required any party who thought a hearing should be held before the Upper Tribunal decided the appeal to make a written application. No such application has been made. I do not think a hearing is necessary in order fairly to decide this appeal. While the legal analysis in the various submissions made by Mrs B's representatives is thin, she has had ample opportunity to advance her case in writing.

**Conclusions**

53. As this appeal has progressed, so the apparent grounds of appeal have grown. In reality, however, the grounds of appeal fall under the following three headings.

*(i) The regulation 9 conditions, including problems with tenses*

54. The First-tier Tribunal granted permission to appeal on the following ground:

> "although it would appear that Reg.9 of the Immigration (EEA) Regulations does not assist the appellant, particularly as reg.9(2)(c) would not appear to be satisfied, the time at which the conditions in reg. 9(2) have to be satisfied is not clear given the different tenses used in reg. 9(2)(b)."

55. The AIRE Centre's written submissions did not address regulation 9 other than to argue that well-established, but unidentified, principles of EU law do not limit its application to persons who were married to a British citizen while he or she was working in another Member State. Eric Robinson Solicitors, argued Mrs B would supply evidence that the centrality of her and Mr B's life was in France and, despite the Secretary of State's reasonably detailed legal analysis of the relevant case, made only a bare assertion that regulation 9 applied in her case.

56. To recap, regulation 9 applies where the following conditions are met:

> "(2) The conditions are that –
>
> (a) P [the British citizen] is residing in an EEA State as a worker or self-employed person or was so residing before returning to the UK;
>
> (b) if the family member of P is P's spouse or civil partner, the parties are living together in the EEA State or had entered into the marriage or civil partnership and were living together in the EEA State before the British citizen returned to the United Kingdom; and
>
> (c) the centre of P's life has transferred to the EEA State where P resided as a worker or self-employed person."

57. "EEA state", in regulation 9(2)(b) clearly does not include the U.K. Regulation 9(2)(a) would not make sense otherwise ("P is residing in an EEA State as a worker or self-employed person or was so residing before returning to the United Kingdom").

58. On the face of it, regulation 9(2)(b) can be satisfied in two ways:

(1) if the "parties" are "living together in the EEA State";

(2) if the parties "had entered into the marriage…and were living together in the EEA State before the British citizen returned to the United Kingdom".

59. (1) looks to a present situation and (2) to the past. Mr and Mrs B were not married when living in France and, in any event, this is not a case in which an individual seeks to take advantage of some right under the 2006 Regulations that is of value to a person who is outside the United Kingdom and seeks entry. (1) cannot apply.

60. On the face of it, (2) cannot apply either since it requires a marriage to have been entered into before the British citizen returned to the United Kingdom. I have not been presented with any reasoned argument that, in order properly to reflect EU law, (2) needs to be read so as to include cases where the parties lived together in the EEA State but did not marry until after the British citizen returned to the UK. In any event, in my view such an argument would not be consistent with the ECJ case law.

61. *Singh* concerned a British national who was married when she exercised her Treaty rights. *Eind* was concerned with a Dutch national who established a family life (was joined by a "family member") while exercising Treaty rights in another Member State. No relevant case has been drawn to my attention in which a nascent family member has been equated with an actual family member for the purposes the right to reside under Article 21 of the Treaty, and which regulation 9 of the Immigration (EEA) Regulations 2006 is intended to embody (Article 21 is the successor to the Treaty article from which the right to reside in *Singh* was derived). I do not find this surprising given the principles applied by the ECJ in *Singh* and *Eind*.

62. In *Singh*, the ECJ expressed concern about the deterrent effect on the exercise of Treaty rights were a national of Member State to find, on returning to his home State, that "the conditions of his entry and residence were not at least equivalent to those which he would enjoy" in another Member State. *Eind* logically extends, or confirms, that this deterrence principle also applies where family life (gaining a "family member") comes into being while an EEA national is in another Member State in the course of exercising Treaty rights. Neither decision, however, holds or suggests that the principle extends to personal connections formed in the course of exercising Treaty rights which have not developed into a relationship amounting to family membership.

63. In my view, the 'litmus test' in *Singh* is whether the conditions of entry and residence in a returning EEA national's home Member State are less advantageous than the national would enjoy as an incident of the exercise of Treaty rights in another Member State. That test was used by the ECJ in *Singh* to judge whether there existed a deterrent to the exercise of Treaty rights. The ECJ did not carry out, or require, a subjective analysis of the deterrent effect of a mismatch in conditions of entry and residence in any particular case. In the present case, when Mr B returned to the UK Mrs B was not his "family member" and so it logically follows that, had Mr B instead moved to another EEA State, Mrs B would not have rights under the Directive as the family member of a worker or self-employed person. There was no deterrent

of the type identified in *Singh* and *Eind*. For this reason, regulation 9 does not need to be construed, in order to confirm with European law, so as to extend to the case where a British citizen marries an EEA national after returning to the UK.

64. Strictly speaking, I do not need to address regulation 9(2)(c). Since the regulation 9(2) conditions are cumulative, Mrs B's inability to bring herself within regulation 9(2)(b) means regulation 9 does not apply. However, it may assist if I offer some views about the meaning of regulation 9(2)(c).

65. Regulation 9(2)(c) is clumsily worded. It refers to the case where "the centre of P's life has transferred to the EEA State where P resided as a worker or self-employed person". This jars internally and with the rest of regulation 9(2)).

66. Regulation 9(2)(c) combines past and present tenses in a single clause. "Has" is the singular present of the verb to have but "resided" is the past tense (or past participle) form of the verb to reside. Use of the present tense to describe the transfer of the centre of P's life connotes an ongoing state of affairs and does not fit with use of the word 'resided' nor with regulation 9(2)(a) and (b). Regulation 9(2)(a) may be satisfied where a British citizen returns to the UK having previously resided in an EEA State as a worker or self-employed person. How can a person simultaneously have returned to the UK but maintain the centre of his or her lie in another EEA State? If the centre of P's life must remain in the EEA State, regulation 9 would not serve its intended purpose of embodying the *Singh* ruling. For these reasons, regulation 9(2)(c) needs to be read as "the centre of P's life has, *or had*, transferred to the EEA State…". This brings regulation 9(2)(c) into accord with regulations 9(2)(a) and (b).

*Relevance of the award of Personal Independent Payment*

67. This is the second ground on which the First-tier Tribunal granted permission to appeal. I did not find it easy to understand initially and none of the written submissions have advanced my understanding. The AIRE centre argued it was a material fact relevant in determining if Mrs B had a right to reside but the argument was not further developed.

68. The 'competent state' is a feature of EU rules for co-ordination of the social security systems of Member States. I have not been informed whether identification of the competent state involves a right to reside analysis, or even whether the DWP turned their mind to competent state issues when awarding Mrs B Personal Independence Payment. But, even if this was considered and, as part of that consideration, a right to reside determination was made, I am sure it could not operate as a general conferral of a right to reside. Mrs B's award of a Personal Independence Payment did not imply, or involve, that she had any right to reside that bound ESA decision making. Similarly, the fact that some sort of residency determination was probably made in awarding Mrs B Personal Independence Payment cannot have generated a definitive finding that she had a right to reside.

*Proportionality and the question whether Mrs B was a "self-sufficient person"*

69. The arguments advanced on Mrs B's behalf were:

(a) Avon & Bristol Law Centre simply asserted that Mrs B "has a right to reside in the UK as a self sufficient person who is a national of another EEA member state";

(b) the AIRE Centre argued that the First-tier Tribunal failed to apply "the principle of proportionality" in considering whether [Mrs B] was a family member of a "self-sufficient" person within the meaning of the 2006 Regulation "and of a person with "sufficient resources". To require Mrs B to have her own comprehensive health insurance was disproportionate in light of (i) the family's resources, (ii) Mr B's comprehensive health insurance, and (iii) Mrs B's ongoing registration with, and use of the French social security authorities and her limited reliance on the NHS;

(c) Eric Robinson solicitors' proportionality arguments were based on factual assertions that were not put to the First-tier Tribunal.

70. Proportionality was not a prominent issue in the submissions put to the First-tier Tribunal. It was not referred to in terms. Rather, it was submitted that the First-tier Tribunal should consider whether a right to reside outside Directive 2004/38/EC was "justified" given the period for which Mrs B had resided in the UK without placing a burden on the UK social security system.

71. The First-tier Tribunal's statement of reasons included a finding that Mrs B was self-sufficient during the period between her arrival in the UK in 2002 and her ESA claim in 2014. The Tribunal must have meant that Mrs B met the 'sufficient resources' limb of the definition of "self-sufficient person" but not the 'comprehensive sickness insurance' limb since it found that Mrs B did not have comprehensive sickness insurance. The issue, therefore, concerns the proportionality of denying Mrs B a right to reside as a self-sufficient person simply because she failed to satisfy the comprehensive sickness insurance part of the definition. Had this part of the test been left out, I do not think it is disputed that Mrs B would have attained a permanent right to reside on the basis of five years' continuous residence in accordance with the regulations (the regulation 15(1)(a) permanent right to reside).

72. On the case as presented to the First-tier Tribunal, I decide it did not make a material error of law by failing to address the proportionality of denying Mrs B a right to reside simply because she failed to satisfy the comprehensive sickness insurance part of the self-sufficiency test. In the light of *Mirga*, Mrs B could not have succeeded with the argument presented on her behalf to the First-tier Tribunal. Unlike *Bambaust*, this was not a near-miss case. Mrs B entirely failed to satisfy the comprehensive sickness insurance test whereas Mr Bambaust failed because his sickness insurance might not have extended to emergency treatment. Moreover,

and as explained below, very few of the other features that counted in Mr Bambaust's favour applied in Mrs B's case.

73. I add that, even if the new factual assertions advanced by Eric Robinson Solicitors for Mrs B were put to and accepted by the First-tier Tribunal, I doubt she would have persuaded the Tribunal that it was disproportionate to deny her a right to reside simply because she failed to meet the comprehensive sickness insurance part of the self-sufficient person test, for the following reasons:

(a) Mrs B's argument would require the comprehensive sickness insurance requirement to be disregarded in its entirety. Mr Bambaust, by contrast, almost met the requirement;

(b) unlike Mr Bambaust, Mrs B never worked in the UK;

(c) unlike Mr Bambaust, the sole purpose of Mrs B's pursuit of a right to reside was to obtain social assistance and, so it seems, on a permanent basis.

**(Signed on the Original)**

Mr E Mitchell
**Judge of the Upper Tribunal**
**1 December 2017**