THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL JUDGE

Before: Upper Tribunal Judge Ward

Attendances:

For the Appellant: Mr Martyn West, Appeals Team, Money Matters Advice Service, South Lanarkshire Council

For the Respondent: Mr Chris Pirie, Advocate, instructed by Office of the Solicitor to the Advocate General

DECISION

The appeal is allowed.

The decision of the tribunal given at Hamilton on 2 May 2019 is set aside.

The Judge of the Upper Tribunal remakes the decision that the First Tier Tribunal ought to have given. It is as follows:

> The appeal against the DWP's decision of 30 July 2018 refusing the appellant state pension credit on the basis that he lacked a right to reside is allowed. The appellant had such a right and the respondent must now proceed to examine the remaining aspects of his claim.

REASONS FOR DECISION

The issue – introduction

1. This case raises starkly whether and, if so, how reg.9(1) of the Immigration (European Economic Area) Regulations 2016/1052 ("the 2016 Regulations"), should be construed so as to be compatible with EU law. The particular issue is whether reg.9(1), so construed, may require the British citizen, by reference to whom rights are asserted, to be a "qualified person" under reg 6(1) of those regulations. It may have implications in the contexts of immigration, social security and housing.

2. The background is that the appellant (Mr K) is an Austrian national. His wife, Mrs K, is a British citizen. It is common ground that in 1979, before the couple had met, Mrs K went to Germany to work and did so for many years, eventually accruing a right of permanent residence there under Directive 2004/38/EC ("the Directive"). It was while living and working in Germany that she met and married Mr K. In November 2014, by which time Mrs K was not in good health, they moved to live in Scotland, initially living on savings and the pension from Mr K's job in Germany and

staying with a relative. In around April 2018, with the assistance of the organisation for whom Mr West works, the couple applied for social housing, housing benefit and council tax reduction and Mr K applied for state pension credit. Under section 1(2) of the State Pension Credit Act 2002 and Regulations 2(1) and 2(2) of the State Pension Credit Regulations 2002/1792, it is a condition of entitlement that a claimant has a qualifying right to reside. On 30 July 2018 the Secretary of State decided that Mr K did not have such a right and so his claim was refused. He appealed to the First-tier Tribunal ("FtT"), who on 2 May 2019 dismissed his appeal. He appeals further, with permission given by a District Tribunal Judge.

The European Law

3. Article 21(1) TFEU 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."

4. Among the limitations and conditions referred to in Article 21 are those set out in the Directive. Article 6 of the Directive provides that an EU citizen has a right of residence for up to three months in another Member State without conditions. For periods of residence longer than that, Article 7 confers a right on Union citizens who are workers, self-employed, self-sufficient or students. Article 16 confers a right of permanent residence in another Member State on Union citizens who have resided legally there for a continuous period of five years. The right under Article 16 (in itself) only applies in the Member State in which it has been earned. Article 17 confers a right of permanent residence after a shorter period on Union citizens who work for a period and then retire, or who have to stop work as a result of permanent incapacity or are frontier workers. The precise conditions affecting each of these categories need not be set out here. Each of Articles 7, 16 and 17 additionally confers rights on the "family members" of the person concerned. It is not in dispute that Mr K, as Mrs K's spouse, is a "family member". Nor is it contended that Mr K has a right to reside otherwise than through being the family member of Mrs K.

5. The Directive consolidated a number of pieces of earlier legislation, among which were two items relevant to the present case. Regulation 1612/68 made provision for the rights of workers and their families, while Directive 90/364 for the first time made provision for the economically inactive to have rights of free movement, provided they had sufficient resources and comprehensive sickness insurance cover.

6. The Directive applies only to the rights of Union citizens against Member States other than their own. However, in a number of contexts, rulings of the Court of Justice have identified other circumstances in which a right of residence may arise. The present case concerns, in particular, the rulings in *R v Immigration Tribunal and Surinder Singh, ex p Secretary of State for the Home Department* [1992] 3 CMLR 358, C-291/05 *Minister voor Vremdelingenzaken en Integratie v RNG Eind* [2008] 2 CMLR 1 and C-456/12 *O and B v Minister voor Immigratie, Integratie en Asiel* [2014] QB 1163. Those cases provide, to an extent canvassed further below, that where a Union citizen has exercised freedom of movement rights from his state of nationality

to another Member State, upon the citizen's return to his state of nationality, his family members have certain rights as a matter of EU law to enter and reside with him.

The domestic legislation

7. The vehicle for implementing the Directive in the UK has for some years been via the Immigration (European Economic Area) Regulations, the relevant version of which is the 2016 Regulations. The 2016 Regulations contain provisions implementing relevant provisions of the Directive: in particular for present purposes, reg 6 introduces the concept of a "qualified person", defined so as to refer to the categories who have an extended right of residence under Article 7 of the Directive, whilst regs 5 and 15 provide for persons with a permanent right of residence under Articles 16 and 17. Reg 14 provided:

> "(1) A qualified person is entitled to reside in the United Kingdom for as long as that person remains a qualified person.
>
> (2) A person ("P") who is a family member of a qualified person residing in the United Kingdom under paragraph (1) or of an EEA national with a right of permanent residence under regulation 15 is entitled to remain in the United Kingdom for so long as P remains the family member of that person or EEA national."

8. The Regulations also address, in reg 9, the rights referred to in [7] above. As it stood at the date of the Secretary of State's original decision[1], reg 9 was in the following terms:

> **"9.— Family members and extended family members of British citizens**
>
> (1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member ("F") of a British citizen ("BC") as though the BC were an EEA national.
>
> (1A) These Regulations apply to a person who is the extended family member ("EFM") of a BC as though the BC were an EEA national if—
> (a) the conditions in paragraph (2) are satisfied; and
> (b) the EFM was lawfully resident in the EEA State referred to in paragraph (2)(a)(i).
>
> (2) The conditions are that—
> (a) BC—
> (i) is residing in an EEA State as a worker, self-employed person, self-sufficient person or a student, or so resided immediately before returning to the United Kingdom; or
> (ii) has acquired the right of permanent residence in an EEA State;
> (b) F or EFM and BC resided together in the EEA State;

[1] The version in the authorities bundle at the hearing was the current one, which is slightly different but not in any particular which I consider material.

(c) F or EFM and BC's residence in the EEA State was genuine;
(d) F was a family member of BC or EFM was an extended family member of BC during all or part of their joint residence in the EEA State; and
(e) genuine family life was created or strengthened during F or EFM and BC's joint residence in the EEA State.

(3) Factors relevant to whether residence in the EEA State is or was genuine include—
(a) whether the centre of BC's life transferred to the EEA State;
(b) the length of F or EFM and BC's joint residence in the EEA State;
(c) the nature and quality of the F or EFM and BC's accommodation in the EEA State, and whether it is or was BC's principal residence;
(d) the degree of F or EFM and BC's integration in the EEA State;
(e) whether F's or EFM's first lawful residence in the EU with BC was in the EEA State.

(4) This regulation does not apply—
(a) where the purpose of the residence in the EEA State was as a means for circumventing any immigration laws applying to non-EEA nationals to which F or EFM would otherwise be subject (such as any applicable requirement under the 1971 Act to have leave to enter or remain in the United Kingdom).

(5) Where these Regulations apply to F or EFM, BC is to be treated as holding a valid passport issued by an EEA State for the purposes of the application of these Regulations to F or EFM.

(6) In paragraph (2)(a)(ii), BC is only to be treated as having acquired the right of permanent residence in the EEA State if such residence would have led to the acquisition of that right under regulation 15, had it taken place in the United Kingdom.

(7) For the purposes of determining whether, when treating the BC as an EEA national under these Regulations in accordance with paragraph (1), BC would be a qualified person—
(a) any requirement to have comprehensive sickness insurance cover in the United Kingdom still applies, save that it does not require the cover to extend to BC;
(b) in assessing whether BC can continue to be treated as a worker under regulation 6(2)(b) or (c), BC is not required to satisfy condition A;
(c) in assessing whether BC can be treated as a jobseeker as defined in regulation 6(1), BC is not required to satisfy conditions A and, where it would otherwise be relevant, condition C."

The submissions in summary

9. Simplifying for ease of explanation (I return to the detail later), the respondent's argument is that applying reg 9 correctly requires one to look at whether Mrs K following her return was a "qualified person" within reg 6 (i.e. within one of the Article 7 categories) and, since she was not, Mr K could not acquire any right dependent on hers. Further, that there is nothing in EU law which makes impermissible such an

interpretation of reg 9. The argument for Mr K is that there is something in EU law with that effect, namely in particular the decision in *Eind*, and to the extent that reg 9 might provide otherwise, it must yield to the EU law. I turn therefore to the three decisions of the CJEU cited above.

The key authorities

10. As a preliminary, I note that in all three cases the family member seeking to assert rights was not a Union citizen but a third-country national. There is no suggestion in the present case that Mr K as a Union citizen rather than a third-country national would be precluded from asserting rights under the cases in consequence and indeed it would be odd if as a Union citizen he were to have fewer rights than a third-country national.

Singh

11. Mrs Singh was a British citizen and she, together with Mr Singh (an Indian national), had gone to Germany to work, where they remained for around 34 months. They then returned to the UK to set up a business. Mr Singh was granted limited leave to remain under domestic immigration legislation on a series of occasions but following the making of a decree nisi in respect of the Singhs' marriage his leave was cut short, and a deportation order made against him. In resisting it, he came to assert a right to remain based on EU law. The key part of the Court's reasoning was 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.
>
> 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.
>
> 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.
>
> 22. Admittedly, as the United Kingdom submits, a national of a Member State enters and resides in the territory of that State by virtue of the rights attendant

> upon his nationality and not by virtue of those conferred on him by Community law. In particular, as is provided, moreover, by Article 3 of the Fourth Protocol to the European Convention on Human Rights, a State may not expel one of its own nationals or deny him entry to its territory.
>
> 23. However, this case is concerned not with a right under national law but with the rights of movement and establishment granted to a Community national by Articles 48 and 52 of the Treaty. These 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. 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. Nevertheless, Articles 48 and 52 of the Treaty do not prevent Member States from applying to foreign spouses of their own nationals rules on entry and residence more favourable than those provided for by Community law."

Eind

12. Mr Eind, a national of the Netherlands, had gone to the UK where he found work. He was joined by his daughter, a national of Surinam. Some 20 months after he had moved to the UK, Mr Eind returned to the Netherlands. Following his return to the Netherlands, Mr Eind had not been well enough to work or to seek employment, although he had had an interview at the employment office with a view to his re-entering the employment market. During that time, he had been in receipt of social assistance.

13. Miss Eind's application for a residence permit was refused on the ground that, it appears, her father was no longer economically active.[2] Although it may not be what the judgment says, the explanation for the refusal of the permit would make no sense otherwise and the submissions before me proceeded on this basis.

14. The referring court posed a number of questions, of which it is only necessary to refer to (3)(a) and (b):

> "(3) (a) If the Member State of which the worker ("the reference person") is a national is permitted, on the worker's return, to determine whether the conditions laid down in Community law for the issue of a residence permit as a family member are still fulfilled, does a third-country national who is a member of the family of the reference person who has returned from the host Member State to the Member State of which he is a national in order to seek employment there have a right of residence in the latter Member State and, if so, for how long?

[2] The English version of the judgment appears to contain a surplus "not" in "he was not economically non-active for the purpose of the EC Treaty". The equivalent is found in the versions in Dutch (the language of the case) and French. The German version however appears to have sought to remedy the supposed error.

> (b) Does that right also exist if the reference person does not carry on any effective and genuine activities in the … Member State [of which he is a national] and cannot, or can no longer, be regarded as seeking employment, in the context of … Directive 90/364 …, in view of the fact that the reference person is in receipt of welfare benefit by virtue of his Netherlands nationality?"

15. The Court answered question 3(b) but did not consider it was necessary to answer 3(a). In relation to 3(b) (and the referring court's question 2 which it is not necessary to set out) the Court said at [27]:

> "[T]he national court asks, essentially, 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… "

16. In [28] –[30] the Court reminded itself that Article 18(1) EC (the forerunner to Article 21 TFEU) stipulated that rights under it were subject to the limitations and conditions imposed by the Treaty and by the measures adopted for its implementation and that among such limitations and conditions were the requirements of Directive 90/364 for sufficient resources and comprehensive sickness insurance cover if those who were not economically active wished to assert rights of free movement. It further noted that the rights of a family member of a non-active citizen of the Union were linked to the rights of that citizen under that Directive.

17. Material parts of its reasoning and conclusions were expressed in the following paragraphs:

> "32. As was rightly pointed out by the Advocate General in points 101 to 106 of his Opinion, 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.
> …
> 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.
>
> 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.

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.

39. That right remains subject to the conditions laid down in Article 10(1)(a) of Regulation No 1612/68, which apply by analogy.

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."

O and B

18. *O and B* concerned two third country nationals who were in relationships with nationals of the Netherlands. Insofar as the Dutch nationals went to other Member States, they did so not in order to work but in order to spend time with their partners. Such rights as they were exercising appear to have been those under Article 21 TFEU/Article 6 of the Directive and Article 56 TFEU (recipients of services). In considering whether O and B might have a derived right of residence, the Court ruled in the following terms.

"45. … [I]t should be borne in mind that the purpose and justification of that derived right of residence is based on the fact that a refusal to allow such a right would be such as to interfere with the Union citizen's freedom of movement by discouraging him from exercising his rights of entry into and residence in the host Member State (see *Iida*, paragraph 68; *Ymeraga and Ymeraga-Tafarshiku*, paragraph 35; and *Alokpa and Others*, paragraph 22).

46. The Court has accordingly held that where a Union citizen has resided with a family member who is a third-country national in a Member State other than the Member State of which he is a national for a period exceeding two and a half years and one and half years respectively, and was employed there, that third-country national must, when the Union citizen returns to the Member State of which he is a national, be entitled, under Union law, to a derived right of residence in the latter State (see *Singh*, paragraph 25, and *Eind*, paragraph 45). If that third-country national did not have such a right, a worker who is a Union citizen could be discouraged from leaving the Member State of which he is a national in order to pursue gainful employment in another Member State simply because of the prospect for that worker of not being able to continue, on returning to his Member State of origin, a way of family life which may have come into being in the host Member State as a

result of marriage or family reunification (see *Eind*, paragraphs 35 and 36, and *Iida*, paragraph 70).

47. Therefore, an obstacle to leaving the Member State of which the worker is a national, as mentioned in *Singh* and *Eind*, is created by the refusal to confer, when that worker returns to his Member State of origin, a derived right of residence on the family members of that worker who are third-country nationals, where that worker resided with his family members in the host Member State pursuant to, and in conformity with, Union law.

48. It is therefore necessary to determine whether the case-law resulting from *Singh* and *Eind* is capable of being applied generally to family members of Union citizens who, having availed themselves of the rights conferred on them by Article 21(1) TFEU, resided in a Member State other than that of which they are nationals, before returning to the Member State of origin.

49. That is indeed the case. The grant, when a Union citizen returns to the Member State of which he is a national, of a derived right of residence to a third-country national who is a family member of that Union citizen and with whom that citizen has resided, solely by virtue of his being a Union citizen, pursuant to and in conformity with Union law in the host Member State, seeks to remove the same type of obstacle on leaving the Member State of origin as that referred to in paragraph 47 above, by guaranteeing that that citizen will be able, in his Member State of origin, to continue the family life which he created or strengthened in the host Member State.

50. So far as concerns the conditions for granting, when a Union citizen returns to the Member State of which he is a national, a derived right of residence, based on Article 21(1) TFEU, to a third-country national who is a family member of that Union citizen with whom that citizen has resided, solely by virtue of his being a Union citizen, in the host Member State, those conditions should not, in principle, be more strict than those provided for by Directive 2004/38 for the grant of such a right of residence to a third-country national who is a family member of a Union citizen in a case where that citizen has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national. Even though Directive 2004/38 does not cover such a return, it should be applied by analogy to the conditions for the residence of a Union citizen in a Member State other than that of which he is a national, given that in both cases it is the Union citizen who is the sponsor for the grant of a derived right of residence to a third-country national who is a member of his family.

51. An obstacle such as that referred to in paragraph 47 above will arise only where the residence of the Union citizen in the host Member State has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State. Article 21(1) TFEU does not therefore require that every residence in the host Member State by a Union citizen accompanied by a family member who is a third-country national necessarily confers a derived

right of residence on that family member in the Member State of which that citizen is a national upon the citizen's return to that Member State.

52. In that regard, it should be observed that a Union citizen who exercises his rights under Article 6(1) of Directive 2004/38 does not intend to settle in the host Member State in a way which would be such as to create or strengthen family life in that Member State. Accordingly, the refusal to confer, when that citizen returns to his Member State of origin, a derived right of residence on members of his family who are third-country nationals will not deter such a citizen from exercising his rights under Article 6.

53. On the other hand, an obstacle such as that referred to in paragraph 47 above may be created where the Union citizen intends to exercise his rights under Article 7(1) of Directive 2004/38. Residence in the host Member State pursuant to and in conformity with the conditions set out in Article 7(1) of that directive is, in principle, evidence of settling there and therefore of the Union citizen's genuine residence in the host Member State and goes hand in hand with creating and strengthening family life in that Member State.

54. Where, during the genuine residence of the Union citizen in the host Member State, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) of Directive 2004/38, family life is created or strengthened in that Member State, the effectiveness of the rights conferred on the Union citizen by Article 21(1) TFEU requires that the citizen's family life in the host Member State may continue on returning to the Member of State of which he is a national, through the grant of a derived right of residence to the family member who is a third-country national. If no such derived right of residence were granted, that Union citizen could be discouraged from leaving the Member State of which he is a national in order to exercise his right of residence under Article 21(1) TFEU in another Member State because he is uncertain whether he will be able to continue in his Member State of origin a family life with his immediate family members which has been created or strengthened in the host Member State (see, to that effect, *Eind*, paragraphs 35 and 36, and *Iida*, paragraph 70).

55. *A fortiori*, the effectiveness of Article 21(1) TFEU requires that the Union citizen may continue, on returning to the Member State of which he is a national, the family life which he led in the host Member State, if he and the family member concerned who is a third-country national have been granted a permanent right of residence in the host Member State pursuant to Article 16(1) and (2) of Directive 2004/38 respectively.

56. Accordingly, it is genuine residence in the host Member State of the Union citizen and of the family member who is a third-country national, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004/38 respectively, which creates, on the Union citizen's return to his Member State of origin, a derived right of residence, on the basis of Article 21(1) TFEU, for the third-country national with whom that citizen lived as a family in the host Member State."

19. The Court's answer to the questions referred to it is at [61]:

> "In the light of all the foregoing considerations, the answer to the first, second and third questions is that Article 21(1) TFEU must be interpreted as meaning that where a Union citizen has created or strengthened a family life with a third-country national during genuine residence, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004/38, in a Member State other than that of which he is a national, the provisions of that directive apply by analogy where that Union citizen returns, with the family member in question, to his Member State of origin. Therefore, the conditions for granting a derived right of residence to a third-country national who is a family member of that Union citizen, in the latter's Member State of origin, should not, in principle, be more strict than those provided for by that directive 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 becoming established in a Member State other than the Member State of which he is a national."

Consideration of the submissions

20. Mr West for the appellant understandably nails his colours firmly to the mast of what is said in *Eind* at [35] – [38], quoted above, and did not wish to make any additional points in reply to the closely argued submission by Mr Pirie.

21. Mr Pirie's position was to start with an exercise in construing reg 9 which took no account of the EU law background and then to submit that the construction so arrived at was consistent with the EU law position. As to that, he submitted (in summary) that in no case had the CJEU said that national authorities cannot impose a condition of the family member having a right to reside that the Union citizen fulfil in their Member State of nationality conditions equivalent to one of the "qualified person" conditions in the UK. Indeed, *O and B* at [61] provided support for the view that such a condition could be imposed, for reasons discussed further below. The acceptability of a "qualified person" type condition was the only way to explain why *Eind* discussed self-sufficiency although not part of the question raised. The reason behind the conferring of a derived right to reside on a family member of a Union citizen is the need to avoid deterring a Union citizen from exercising their rights of freedom of movement but the CJEU, while taking that on board, has in *O and B* not ruled out all conditions on the exercise of the right. What would be impermissible is to impose on the family members less generous conditions than would be applied to the nationals of EU Member States under the Directive (*Singh*). If such submissions are accepted, regulation 9, construed on the basis mentioned above (which would include giving effect to reg 9(7), is not in conflict with EU law.

22. Whilst I pay tribute to Mr Pirie's resourcefulness, I am unable to accept his submissions. My starting point is EU law and, in particular, *Eind*. The question formulated by the Court at [27] makes clear that it was considering whether Miss Eind had a right even if her father was not carrying on effective and genuine economic activities following his return to the Netherlands. Its categorical answer at [35] and [38] was that she did. To have required Mr Eind to be economically active – whether as employed or self-employed – would have been tantamount to imposing a

condition that – had it been a UK case – he was required to meet either of two of the limbs of the "qualified person" definition. The Court may not have been asked, in terms, whether it would be permissible to set other Article 7 criteria because the situation did not arise, but its decision represents an overwhelming erosion of the ability to do so. I also consider that if it had been the Court's view that a Union citizen could found such a right for their family member, but subject to fulfilment of conditions addressing the Union citizen's activity following his return to his Member State of nationality, the Court would have answered question 3(a) as well, but it did not.

23. Mr Pirie then submits that the Court may have ruled out a condition of economic activity in *Eind*, because, given the basis on which a residence permit had been refused to Miss Eind originally, that was what it was being asked. He goes on to submit that the discussion of Directive 90/364 by the Court shows that the Court was leaving open the door to a State requiring that the conditions of that Directive were fulfilled. Why else, he asks, should the Court have troubled to note at [12] that Mr Eind was covered by sickness insurance in the Netherlands?

24. I do not accept this. It appears from the decision that Directive 90/364 was first raised by the referring court, as part of its question 3(b). If Mr Eind had been considered to meet the requirements of comprehensive sickness insurance cover and sufficient resources it is not easy to see why the Dutch court would have felt it appropriate to refer the case, as it would have been academic. According to the question raised, Directive 90/364 merely provided "context". In my view, the referring court was saying that it was well aware that Directive 90/364 conferred a right to reside on the economically inactive where the relevant conditions were fulfilled and, through them, to their family members; however, it was asking, in a case where those conditions were not fulfilled (reflected in Mr Eind's recourse to social assistance, even though he was covered by sickness insurance), whether a person in Miss Eind's position nonetheless did have a right. Contrary to Mr Pirie's submission, in my view the Court mentioned that Mr Eind had sickness insurance as part of that "context", rather than as an indication that it remained open to the Dutch authorities to impose a condition of self-sufficiency on him and indirectly on his daughter.

25. Further again, the Court's logic for conferring the right was nothing to do with the economic circumstance in which the Union citizen might find themselves upon their return to their Member State of nationality. Rather, the rationale was founded on the need to avoid deterring a person from leaving their Member State of nationality to work elsewhere by denying them the certainty of belong able to continue living with close relatives following their return: [35] and [36]. It is a question of giving useful effect*/"effet utile"* to the right of free movement of workers under Article 39 EC (now Article 45 TFEU).

26. There are circumstances in which to require a returning citizen to fulfil one of the "qualified person" requirements would fly in the face of the rationale, expressed in *Eind*, for the right. One example would be the person contemplating leaving the UK to work in another Member State until retirement, acquiring there a permanent right of residence (as to which see *O and B* at [55], discussed below) and then returning to the UK. Given the way which the CJEU approaches the notion of deterrence,

there might very well be such deterrence if such a person thought that, upon retiring and returning to the UK, they would have to continue to work for a further five year period if their spouse or other family member was to be able to return and reside with them, or that they would have to navigate their way though the legal uncertainties of the "sufficient resources" provisions.

27. I turn to Mr Pirie's remaining points. In relation to *Singh*, he invites me to note that the Court did recognise the deterrence issue, but that it was built into the Court's answer, which indicated that it was not every condition affecting a family member which would operate as a deterrent, but only those which were not at least equivalent (I discuss equivalence at [33] – [35] below). In my view, it is helpful here to look at the sequence of the three lead cases. It shows an evolving position on the part of the Court. It was not in dispute that Mr and Mrs Singh wished to establish themselves in business on their return, with the consequence that the freedom of establishment provisions, then in Article 52 EC, would apply to them. The Court's decision therefore referred to Article 52 applying and it was not necessary for the Court to consider other scenarios, among them what might have been the case had Mrs Singh not been economically active. In *Eind*, the Advocate General made clear at [97] of the Opinion that *Singh* was not to be understood as saying that economic activity on return was required and that was necessarily implicit in the Court's conclusion also. In considering the deterrent effect, there was thus a move away from a concern that one might be precluded from re-entering to establish oneself in business, accompanied by a relevant non-national family member, to a concern in relation to returning to one's state of nationality, so accompanied, more generally.

28. *O and B* represents a further evolution of the expression of the principle, as the Court sought to rationalise it with the emerging concept of Union citizenship. Its preoccupation accordingly was with trying to define what sort of integration and family life in the host Member State would suffice, faced with cases where Article 21 rights had been asserted for reasons other than in order to be economically active as a worker. At [46] – [49] the Court confirmed that the same need to avoid deterring a person from exercising their rights of freedom of movement applied even where the person sought to exercise such rights "solely by virtue of his being a Union citizen": [49]. The Court then goes on to qualify this by considering what sort of exercise of rights under Article 21 could lead to the necessary strengthening of family life in the host Member State, concluding that the exercise of rights under Article 7(1) might well do so, whereas that under Article 6 would not. From this consideration of when family life will be strengthened, the Court proceeds, importantly for present purposes, to the conclusion *a fortiori* that a right of permanent residence in the host Member State suffices (see [55]). Avoiding deterrence and ensuring *effet utile* for the provisions of EU law thus remain at the heart of the decision, even if the expression of it is somewhat different from previously.

29. The Court also expresses itself in somewhat different and less wide-ranging terms than Advocate General Sharpston in her Opinion, but I do not see the Court's failure to adopt her formulations at [95] and [159] of the Opinion (the only passages to which I was taken) as significant in understanding what the Court did say, given that the Advocate General's formulation went wider than is required to support what I regard as the correct reading of the Court's decision.

30. Mr Pirie submits that whilst in *O and B* the Court took the need to avoid deterrence and for *effet utile* on board, it did not rule out all conditions on the exercise of the right. I accept that the question of whether the returning national can be made subject to the requirement to be a "qualified person" does not arise in the case. Much of *O and B* is devoted to considering in what circumstances such a right will arise, rather than the conditions attaching to it. Where a right does exist, the relevant part of para 61 with which we have to be concerned is:

> "the provisions of that directive apply by analogy where that Union citizen returns, with the family member in question, to his Member State of origin. Therefore, the conditions for granting a derived right of residence to a third-country national who is a family member of that Union citizen, in the latter's Member State of origin, should not, in principle, be more strict than those provided for by that directive 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 becoming established in a Member State other than the Member State of which he is a national."

31. The requirement is to apply the Directive "by analogy", a somewhat ill-defined process. We know, however, that, whatever this means, it does not extend to the ability to impose a requirement to be economically active upon return (*Eind*), even though either that, or being a student or self-sufficient, would be a requirement if one was starting *ab initio* in another Member State. Nor can it be the case that the conditions imposed could derogate from the effectiveness of allowing a person who has acquired a right of permanent residence elsewhere to return with the family member concerned (*O and B* at [45)], as would occur if a condition were to be imposed requiring the citizen to re-qualify for permanent residence by a further 5 years as a qualified person before reliance could be placed on the second limb of reg 14(2) (quoted at [7] above). This view is consistent with the idea, seen in both *Eind* and *O and B*, that what earned the Union citizen's ability to confer a derived right upon his family member was his initial exercise of freedom of movement rights to go to another Member State to an extent which passes the *O and B* tests of strengthening family life there.

32. In *Eind*, the Court pointed out that Miss Eind's ability to enjoy such a right remained subject to the conditions laid down in Article 10(1)(a) of Regulation 1612/68. Article 10 provided that:

> ''1. The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State: (a) his spouse and their descendants who are under the age of 21 years or are dependants;
> (b) dependent relatives in the ascending line of the worker and his spouse."

33. I do not accept Mr Pirie's submission that the Court, in saying that the provisions – not some of the provisions – apply by analogy must be taken as referring to all provisions of the Directive, for whatever purpose they were made. Scrutiny of the tenses used by the Court in my view suggests that the position of "a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the member State of which he is a national" (emphasis

added) is to be taken as given and that the Court's concern, reflected in para 61 of *O and B* that conditions be no more onerous than those for which the Directive provides, is directed to conditions which the family member rather than the Union Citizen must fulfil. As I put to Mr Pirie, applying *Eind*, it would not be open to a State, for instance, to say that only descendants under the age of 16 could benefit (rather than 21, as provided by the Directive). Equivalent points may be made in relation to other parts of Art 10 of Regulation 1612/68 or the successor, or other, provisions in the Directive.

34. Mr Pirie submits that an interpretation which precluded a "qualified person" condition would be to put the husband of a returning British national in a more favourable position in the UK than the husband of (say) an Italian national who was not a qualified person and that could not be right. The latter would not have an Article 7 right to reside in the UK but the former would. However, the circumstances of the notional Italian seeking to exercise freedom of movement rights in order to move to the UK, but without possessing any, and those of a British national who has validly exercised Treaty rights to move elsewhere and is now seeking to return to the State of nationality are not comparable, so the point in my view does not assist him.

35. In my view therefore the conditions falling to be applied by analogy are, for the above reasons, not those which concern what the Union citizen does following their return, but those attaching to the family member's right to benefit from it.

36. I was not addressed at the oral hearing on the other authorities relied upon by the FtT, on which it appears the respondent does not seek to rely. In my view, the respondent is right in that regard, for reasons which briefly follow.

37. The FtT had placed some reliance on the Upper Tribunal's decision in *B v SSWP* [2017] UKUT 472. The issue in that case was whether Mrs B, a French national, could rely on reg 9 when she had married Mr B, a British citizen, *after* his return from living in France to the UK. Upper Tribunal Judge Mitchell held at [63] that:

> "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*" (emphasis added).

However, the point he was called upon to decide was not whether Mr B, following his return to the UK, needed to be a "qualified person" but whether the relationship with Mrs B – not yet his wife at the time of his return – was sufficient to enable her to derive a right from him. Under the Directive it would not have been if the couple had entered a different Member State and so reg 9 did not need to be interpreted so as to extend to Mrs B.

38. The emphasis on the relationship between the relative and the British Citizen is similar to what was alluded to in *Eind* at [40]: once Miss Eind reached the age of 21 and was not otherwise dependant on her father, her relationship with him would fall outside what was envisaged by the Directive and so preclude her from relying on a right derived from him. Seen in the context of the decision, I consider that the italicised words are consistent with a more limited view of the effect of reg 9(1). If I

am wrong in that, I note that Judge Mitchell was not being asked to rule on what conditions, if any, the British citizen must fulfil, so it would be surprising if his remarks were intended to extend to that issue. If they were, they would be *obiter dicta,* made in a case without oral argument, and in relation to the matter before me I would respectfully take a different view for the reasons given in this decision.

39. The FtT also sought to rely on C-673/16 *Coman*, where the Court at [25] reiterated the test from *O and B*. The issue was once again about the relationship which the person seeking to derive a right of residence from a Union citizen had to have with him. The Court interpreted "spouse" in the Directive so as to apply to a person who was in a same-sex marriage with the Union citizen. There was no discussion in the case of what, if any, conditions Mr Coman would be required to meet on returning to the Member State of which he is a national (Romania).

40. In my view, the FtT, in relying on such authorities, appears to have failed to consider the full implications of Miss Eind being able to derive a right from her father, even when he, not being engaged in economic activity and requiring social assistance, could not have fulfilled in any other Member State the conditions of Article 7. It follows that in my view it erred in law by treating reg 9(1) as if the imposing of the condition to be a "qualified person" on the British citizen himself was permitted by EU law, when the concern of EU law is that the conditions to be fulfilled by the person seeking to derive a right under the *Singh/Eind/O and B* line of authority should be not less favourable.

An alternative right to reside?

41. At a very late stage in the proceedings, the respondent raised whether Mr K might have a right based on Mrs K having been self-sufficient. There may well have been a time when, relying on their savings, Mr K's pension from his German job and the provision of accommodation by their relative, Mr and Mrs K had indeed had sufficient resources and as Mr K had for a long time worked for Deutsche Post AG, experience of German social security provision suggests that he may well have had sickness insurance cover. However, on the chronology, such a period could not have lasted for 5 years by the date of claim so no right of permanent residence on such a basis could have arisen. As I indicated at the hearing, even if Mrs K had previously been self-sufficient, she clearly was not so at the time of her husband's claim for pension credit and other benefits and their application for public housing. There is however then the impact of the decision in *Pensionsversicherungsanstalt v Brey* (C-140/12) to consider. Although that decision opened the door to a requirement for a personalised assessment in some cases, its impact, originally potentially very wide, has been narrowed down radically by subsequent decisions of the CJEU. One category where domestic law suggests the impact of the decision has survived, at least in principle, is in relation to formerly self-sufficient people: see *AMS v SSWP* (PC)(second interim decision) [2017] UKUT 381; [2018] AACR 27. However, experience of applying the test in the final decision in that case ([2017] UKUT 381 (also at) [2018] AACR 27) suggests that in practice it will be a very unusual case where applying a personalised assessment will lead to a conclusion in favour of a claimant. Given that the point was not raised by Mr K's advisers, not pursued by them with any enthusiasm at the oral hearing and appears to be a

considerable long-shot I do not consider it should stand in the way of giving the present decision.

A reference to the CJEU?

42. Though it remains possible to refer a case to the Court of Justice under Article 267 TFEU, neither party invited me to do so. If I had considered that the matter was not acte clair, I should have considered doing so, to minimise the passage of time which would inevitably ensue if my decision were to be appealed to the Court of Session and that Court were to decide to make a reference. However, in my view the position is acte clair in favour of the appellant. *Eind* is categorical in its rejection of a requirement for economic activity upon the Union citizen's return and not only has been relied upon by the Court in support of its reasoning in *O and B* but also in other cases such as C-40/11 *Iida v Stadt Ulm* at [70]. The argument based on the Court not closing the door to the application of Directive 90/364 appears unduly optimistic when the terms of the questions posed by the referring court are considered. I do not consider there is room for reasonable doubt as to the relevant principle, nor (given the source of the principle is caselaw of the CJEU which in my view is clear and falls to be applied across the European Union) that there is any reason why that conclusion should differ in any other Member State.

The interpretative obligation

43. In *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446, the Court of Appeal, adopted a summary prepared by counsel as to the relevant legal principles so far as the obligation to construe domestic legislation consistently with Community law obligations is concerned. The position appears consistent with the reviews of that obligation in subsequent cases such as *British Gas Trading v Lock* [2016] 1 CMLR 25.

> "37. …
> "In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:
> (a) It is not constrained by conventional rules of construction (Per Lord Oliver in *Pickstone* at 126B);
> (b) It does not require ambiguity in the legislative language (Per Lord Oliver in *Pickstone* at 126B; Lord Nicholls in *Ghaidan* at 32);
> (c) It is not an exercise in semantics or linguistics (See *Ghaidan* per Lord Nicholls at 31 and 35; Lord Steyn at 48-49; Lord Rodger at 110-115);
> (d) It permits departure from the strict and literal application of the words which the legislature has elected to use (Per Lord Oliver in *Litster* at 577A; Lord Nicholls in *Ghaidan* at 31);
> (e) It permits the implication of words necessary to comply with Community law obligations (Per Lord Templeman in *Pickstone* at 120H-121A; Lord Oliver in *Litster* at 577A); and
> (f) The precise form of the words to be implied does not matter (Per Lord Keith in *Pickstone* at 112D; Lord Rodger in *Ghaidan* at para 122; Arden LJ in *IDT Card Services* at 114)."

> 38. …
> "The only constraints on the broad and far-reaching nature of the interpretative obligation are that:
> (a) The meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed." (Per Lord Nicholls in *Ghaidan* at 33; Dyson LJ *in EB Central Services* at 81) An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment; (See *Ghaidan* per Lord Nicholls at 33; Lord Rodger at 110-113; Arden LJ in *IDT Card Services* at 82 and 113) and
> (b) The exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate. (See Ghaidan per Lord Nicholls at 33; Lord Rodger at 115; Arden L in *IDT Card Services* at 113.)"

44. Applying these principles in the light of the caselaw of the CJEU, it is apparent that reg 9(1) is to be interpreted as not requiring, as part of how "these Regulations apply", "BC" to fulfil the condition of being a "qualified person" under reg.6. I appreciate that reg 9(7) makes provision which assumes that a "qualified person" test does have to be applied. If the 2016 Regulations were not intended and required to implement EU law, the interpretation of reg 9 might be different, but the "underlying thrust of the legislation" is to make provision, consistent with EU law, to implement the *Singh*/*Eind*/*O and B* line of authority. If it has failed to do so, then the interpretation of reg 9(1) set out earlier in the paragraph follows and reg 9(7) appears to have nothing to bite upon and to be surplusage. While the issue has been raised in these proceedings only tangentially, I cannot see that the condition in reg 14(2) could be applied so as to require the returning British citizen to have a right of permanent residence (as if under the Directive) either.

C.G. Ward
Judge of the Upper Tribunal

Date: 11 March 2020