IN THE UPPER TRIBUNAL **UT ref:** UA-2019-001124-HB

ADMINISTRATIVE APPEALS CHAMBER

On appeal from First-tier Tribunal (Social Entitlement Chamber)

Between:

Sandwell Metropolitan Borough Council

Appellant

- v –

KK

First Respondent

-and-

The Secretary of State for Work and Pensions

Second Respondent

Before: Upper Tribunal Judge Wright

Decision date: 4 May 2022
Decided on consideration of the papers

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 28 February 2019 under case number SC024/19/00341 was based on an error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set the decision aside and redecide the first instance appeal. In redeciding the first instance appeal, I set aside Sandwell Metropolitan Borough Council's decision of 25 July 2018 and decide that the claimant was not a person from abroad under regulation 10 of the Housing Benefit Regulations 2006 on her claim for housing benefit dated 18 June 2018. Any other issues relating to the claimant's entitlement to housing benefit on the claim which she made for that benefit on 18 June 2018 must now be decided by Sandwell Metropolitan Borough Council.

REASONS FOR DECISION

1. This appeal is brought by Sandwell Metropolitan Borough Council (Sandwell") against a decision made by the First-tier Tribunal on 28 February 2019 ("the tribunal"). By its decision of that date the tribunal set aside Sandwell's decision of 25 July 2018. Sandwell's decision of that date had been made on a claim for housing benefit made by

the claimant (who is the first respondent on this appeal by Sandwell to the Upper Tribunal) to Sandwell on 18 June 2018.

2. In its decision of 25 July 2018 Sandwell decided that the claimant was not entitled to housing benefit because she was a "person from abroad" under regulation 10 of the Housing Benefit Regulations 2006 ("the HB Regs"). It added as an additional reason for its decision that the claimant "does not have a derivative right of residence as she does not meet the criteria to be considered for this as she had not exhausted all other rights of residence at the time she made her claim for HB". This additional reason pithily sums up the legal issue which lies at the heart of this appeal.

3. It was and is not disputed that the claimant at the material time had a derivative right to reside in the United Kingdom as the primary carer of the child of an EEA national who had been employed in the UK under Article 10 of Regulation (EU) No 492/2011.

4. Sandwell's basis for refusing her housing benefit was that the claimant (a) had no other qualifying right to reside in the UK, and (b) her derivative right to reside did not count for benefit purposes because she had not exhausted her right to reside in the UK as a jobseeker in June 2018.

5. The tribunal allowed the claimant's appeal. It found, in effect, against Sandwell on point (a) above. It held that the claimant had acquired a permanent right to reside in the UK based on her parents' employment in the UK. It is of importance, as the tribunal recognised, that the tribunal's decision on the claimant having a permanent right of residence in the UK was based on the further evidence (both oral and documentary) provided by the claimant to the tribunal at its hearing of her appeal on 28 February 2019. Sandwell did not attend that hearing.

6. As to (b), the tribunal's decision was somewhat unclear. In its Decision Notice it said it was satisfied, notwithstanding its conclusion that the claimant had a permanent right of residence, that she would also have a derivative right to reside in the United Kingdom as the primary carer of a child in full-time education in the UK. However, by the time the tribunal came to gives its full reasons for its decision, it reduced this to saying (at paragraph [14] of its reasons) that "[a]lthough she has a right to reside as a primary carer of a child this was not applicable as at the date of this decision but may potentially be relevant in relation to other claims". This reasoning appears more aligned with Sandwell's view that a derivative right to reside could not count while a 'primary' right of residence was also in place.

7. I gave Sandwell permission to appeal on the basis that it was arguable that the tribunal erred in law on two grounds.

8. The first ground was that, in a context where Sandwell had expressly sought evidence from the claimant about her parents' employment in the UK between August 2004 and October 2011 but where she had not provided any such evidence to Sandwell, it was arguably unfair for the tribunal to have decided the appeal on the basis of evidence which was only made available by the claimant to the tribunal at the hearing of the appeal without giving Sandwell the opportunity to respond to such evidence before deciding the appeal: see *Basildon DC v AC* (HB) [2011] UKUT 16 (AAC).

9. The second ground, which is an alternative ground of appeal to the first as it assumes it was fair for the tribunal to decide the appeal on the evidence before it at the hearing on 28 February 2019 without giving Sandwell an opportunity to respond, was

that the tribunal arguably had erred in law in failing adequately to explain in its fact-finding and reasoning the precise evidential basis for its conclusion that both of the claimant's parents had acquired a permanent right of residence in the UK before she had ceased to be a 'family member' of either of them. For example, Sandwell's ground six in its grounds of appeal on its face raised pertinent criticisms in respect of the 'mother's documentary evidence' on pages 71-74 (evidence which was only provided by the appellant at the oral hearing on 28 February 2019) and how based on it the tribunal could properly have concluded the mother had gained a permanent right to reside. Even if this potential error as regards the tribunal's fact-finding and reasoning may not have mattered if it had provided a sound basis for the claimant's father having established a permanent right of residence in the UK whilst the claimant was a member of his family, the soundness of the tribunal's reasoning and fact-finding on the father's permanent right of residence was also open to question as it depended on the evidence given by the claimant at the hearing, evidence which arguably was not properly addressed or explained by the tribunal in its fact-finding and reasoning.

10. However, I said when giving Sandwell permission to appeal that even assuming either of the above grounds of appeal was made out, a serious issue would arise about whether any such errors of law would be material to the decision to which the tribunal came. This would turn on whether the claimant's derivative right to reside based on her being the primary carer of her daughter in education could in any event count as a right to reside for benefit purposes.

11. The argument made and maintained by Sandwell against the claimant's derivative right to reside under Article 10 of Regulation (EU) No 492/2011 applying needs a little unpacking. It depends on the regulations 6, 14 and 16 of the Immigration (EEA) Regulations 2016 ("the EEA Regs"). These provided, insofar as is material, as follows (I have placed in bold the key provisions in regulation 16):

> **"'Qualified person"**
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> 6.—(1) In these Regulations—
>
> "jobseeker" means an EEA national who satisfies conditions A, B and, where relevant, C;
>
> "qualified person" means a person who is an EEA national and in the United Kingdom as—
>
> (a) a jobseeker;
>
> (b) a worker;
>
> (c) a self-employed person;
>
> (d) a self-sufficient person; or
>
> (e) a student…..
>
> **Extended right of residence**
>
> 14.—(1) A qualified person is entitled to reside in the United Kingdom for as long as that person remains a qualified person.

Derivative right to reside

16.—(1) A person has a derivative right to reside during any period in which the person—

(a) is not an exempt person; and

(b) satisfies each of the criteria in one or more of paragraphs (2) to (6).

(3) The criteria in this paragraph are that—

(a) any of the person's parents ("PP") is an EEA national who resides or has resided in the United Kingdom;

(b) both the person and PP reside or have resided in the United Kingdom at the same time, and during such a period of residence, PP has been a worker in the United Kingdom; and

(c) the person is in education in the United Kingdom.

(4) The criteria in this paragraph are that—

(a)the person is the primary carer of a person satisfying the criteria in paragraph (3) ("PPP"); and

(b)PPP would be unable to continue to be educated in the United Kingdom if the person left the United Kingdom for an indefinite period.

(7) In this regulation—

(a) "education" excludes nursery education but does not exclude education received before the compulsory school age where that education is equivalent to the education received at or after the compulsory school age;

(b) "worker" does not include a jobseeker or a person treated as a worker under regulation 6(2);

(c) an "exempt person" is a person—

(i) who has a right to reside under another provision of these Regulations;

(ii) who has the right of abode under section 2 of the 1971 Act(13);

(iii) to whom section 8 of the 1971 Act(14), or an order made under subsection (2) of that section(15), applies; or

(iv) who has indefinite leave to enter or remain in the United Kingdom.

(8) A person is the "primary carer" of another person ("AP") if—

(a) the person is a direct relative or a legal guardian of AP; and

(b) either—

(i) the person has primary responsibility for AP's care; or

(ii) shares equally the responsibility for AP's care with one other person who is not an exempt person.

(9) In paragraph (2)(b)(iii), (4)(b) or (5)(c), if the role of primary carer is shared with another person in accordance with paragraph (8)(b)(ii), the words "the person" are to be read as "both primary carers".

> (10) Paragraph (9) does not apply if the person with whom care responsibility is shared acquired a derivative right to reside in the United Kingdom as a result of this regulation prior to the other person's assumption of equal care responsibility.
>
> (11) A person is not be regarded as having responsibility for another person's care for the purpose of paragraph (8) on the sole basis of a financial contribution towards that person's care."

12. Sandwell's argument is attractive in its simplicity. It is based entirely on the wording of regulation 16 of the EEA Regs. Sandwell argues that the claimant **was** an "exempt person" under the EEA Regs on the relevant dates because she was at the time a 'jobseeker' under regulation 6(1)(a) of the EEA Regs. Accordingly, the effect of regulation 16(1)(a) and 16(7)(c)(i) of the EEA Regs was to render her unable to rely on any derivative right to reside she may otherwise have had under regulation 16(3) (or 16(4)) of the EEA Regs because of her being an exempt person.

13. When giving Sandwell permission to appeal I said that although the above argument appeared a tenable reading of the terms of regulation 16 of the EEA Regs, I struggled to see the lawful basis for denying the claimant a right to reside in circumstances where under EU law she satisfied Article 10 of Regulation (EU) No 492/2011. I suggested that the wording of regulation 16(1)(a) of the EEA Regs arguably could not oust a person's directly effective rights under EU law on which she had been entitled to rely in the UK. I noted to similar effect the preliminary observations of Upper Tribunal Judge Jacobs at the second bullet point in paragraph [10] of *HK v SSWP* [2017] UKUT 421 (AAC). Judge Jacobs had there said the following (dealing with the equivalent provisions in the immediate predecessor to the 2016 EEA Regs):

> "Depending on the evidence and the tribunal's decision on regulation 6(2)(a), it may be necessary to consider regulation 15A of the 2006 Regulations. This deals with the right to reside that is conferred on a child's primary carer in order to give effect to the child's right to education. Neither the Secretary of State nor the claimant's representative wanted an oral hearing to discuss these issues. In those circumstances, I prefer not to embark on an analysis in order to give directions to the tribunal on the law that may or may not apply depending on the evidence at the rehearing. I will limit myself to pointing out a couple of the problems that the tribunal may have to consider.
>
> • The regulation defines 'primary carer' in terms of responsibility for the child's care. Does that mean the person who actually delivers the care or the person who has the responsibility to ensure that it is delivered? Does responsibility mean legal or practical responsibility? The answers may be require an analysis of the caselaw of the Court of Justice of the European Union from which the primary carer's right to reside derives.
>
> • The tribunal accepted and repeated the argument put by the Secretary of State that the claimant could not benefit from regulation 15A as his wife had not exhausted all her rights to reside. I do not understand what that means, how it is derived from the language of the legislation, or how it is consistent with the caselaw of the Court of Justice of the European Union that the regulation was designed (I assume) to codify."

14. I further suggested when giving permission to appeal that if my suggested analysis was correct then either regulation 16(1)(a) may be unlawful as being contrary to EU law or its terms should not be read as mandatory and exclusionary.

15. Before turning to what effect regulation 16(1)(a) of the EEA Regs may have had as a matter of EU law, I should first address whether the tribunal erred in law in coming to its decision. In my judgment, it did err law. I leave to one side whether it erred in law in deciding the appeal on evidence Sandwell did not have the opportunity to hear and respond to. It may be argued that this is simply a consequence Sandwell has to bear as a result of its failing to attend the hearing of the appeal and in circumstances where it remained a possibility that the tribunal would hear and receive evidence from claimant about her parents' rights of residence in the UK. A material distinction with the *Basildon* case cited above may arguably be that in that case the claimant gave evidence "unexpectedly" and "which was materially different from the evidence he had given previously". Moreover, the matters on which that claimant had given evidence were ones for which the local authority was likely to have held records and which it could therefore have sought to rebut. It may be argued, by contrast, that in this case the claimant's evidence about her parents' working and benefits histories in the UK was neither unexpected nor did it differ from evidence she had given before. It was just a more detailed piece of the general evidence she had given before and in a context where Sandwell had already prompted her to try and provide such evidence.

16. Where Sandwell's absence from the hearing before the tribunal has more purchase, however, is in the adequacy of the tribunal's explanation for its decision. The adequacy of a First-tier Tribunal's reasoning and fact-finding will depend, amongst other things, on matters which it may consider were common ground or known to the parties to the appeal. Sandwell was not, however, present at the appeal to hear the claimant's evidence and it was entitled to know what the tribunal made of the claimant's evidence. The tribunal's reasons for its decision on this appeal lacked any of the necessary detail of what it found as fact about the claimants' parents' work records in the UK over the five year period needed to establish a permanent right of residence based on the claimant's testimony. Referring to the audio record of proceedings and saying the tribunal accepted the claimant's evidence, as the tribunal here did, was not sufficient because that fails to tell Sandwell (or indeed any reader of the tribunal's decision) what exactly that evidence was. That deficit is amply borne out by the questions Sandwell raised in its grounds of appeal. For example, nowhere does the tribunal set out the details of the employers for whom the claimant's father worked in UK or how much he was paid by those employers. Nor did the tribunal address whether, for the period up to the end of April 2009, any of the fathers' employers for whom he worked, or the father himself as a Polish national, had been registered under the 'Workers Registration Scheme'. In the alternative, if the father's work as a butcher and then as a carpenter was carried out in a self-employed capacity, this is not stated nor did the tribunal make any findings about the father's earnings from any such self-employment.

17. I am therefore satisfied that tribunal erred in law in coming to its decision in failing to provide an adequate explanation for why it concluded that the claimant had a permanent right of residence in the UK by June 2018. As the tribunal did not make a clear finding in the alternative that the claimant's appeal should succeed on the basis of her having a derivative right to reside in the UK as the primary carer of child in education, I set its decision aside as being materially in error of law.

18. At the time when I gave permission to appeal, Sandwell had sought and was relying on advice it had received from the DWP policy division in London about the intended effect of regulation 16 of the EEA Regs where a claimant had another right of residence under those regulations. As the Secretary of State seemed at that stage to be joining with Sandwell in its argument about the exclusionary effect of regulation 16(1)(a) of the EEA Regs, I joined her to these appeal proceedings.

19. The Secretary of State has since filed a helpful submission on the appeal in which she stands aside from supporting Sandwell's argument and accepts that the claimant's derivative right to reside was effective and gave her a right reside on her claim for housing benefit in June 2018. I accept the Secretary of State's argument.

20. The Secretary of State makes a number of important points in her argument.

21. First, the EEA Regulations have been revoked by the Immigration and Social Security (EU Withdrawal) Act 2020, subject to saving provisions (e.g. for those who were lawfully resident in the UK under the EEA Regulations immediately prior to 31 December 2020). However, the issue in this appeal is whether the claimant was entitled to housing benefit at the time of her claim in June 2018 and the legal framework governing the position after the UK's exit from the European Union does not affect that issue.

22. Second, as a matter of pure domestic law, an EU citizen with a right to reside as a jobseeker is not entitled to housing benefit, whether that is her sole right of residence or whether she concurrently satisfies the criteria for another right of residence under regulation 16 of the EEA Regulations. This is for two reasons (again solely on the basis of domestic law as it then was). The first reason is because a right of residence as a jobseeker does not constitute habitual residence for the purposes of housing benefit: see regulation 10(3A)(b) of the HB Regs. The second reason I have already summarised as Sandwell's argument above: a person does not have a derived right of residence under regulation 16 of the EEA Regs if they are an 'exempt person', which includes a person (such as a jobseeker) with a right to reside under another provision of the EEA Regulations.

23. Third, Article 14(4)(b) of Directive 2004/38/EC ("the Directive") provides a right of residence for jobseekers from other Member States. This was transposed into UK law by regulations 6(1) and 14(1) of the EEA Regulations. The exclusion of jobseekers from entitlement to housing benefit is authorised by Article 24(2) of the Directive. Article 24(1) establishes a right to equal treatment for EU citizens residing in another Member State on the basis of the Directive, but Article 24(2) provides a derogation from that right in the following terms:

> "By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b)."

The 'longer period provided for in Article 14(4)(b)' is the right of residence for jobseekers. It is on this basis that Member States were and are entitled to withhold social assistance from jobseekers.

24. Fourth, Article 10 of Regulation (EU) No. 492/2011 provides that:

> "The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general

> educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory."

25. As the Grand Chamber of the Court of Justice of the European Union ("CJEU") itself set out in *Jobcenter Krefeld-Widerspruchsstelle v JD* (Case No. C-181/19) EU:C:2020:794("Krefeld"), (at paragraph [35]), the following derived rights of residence flow from Article 10:

> "…first, that the child of a migrant worker or of a former migrant worker has an independent right of residence in the host Member State, on the basis of the right to equal treatment as regards access to education, where that child wishes to attend general education courses in that Member State. Second, recognition that that child has an independent right of residence entails that the parent who has primary care of that child should be recognised as having a corresponding right of residence (see, to that effect, judgments of 17 September 2002, *Baumbast and R*, C-413/99, EU:C:2002:493, paragraphs 63 and 75, and of 23 February 2010, *Teixeira*, C-480/08, EU:C:2010:83, paragraph 36)."

26. These derived rights of residence were transposed into UK law by, respectively, regulations 16(3) and 16(4) of the EEA Regulations.

27. Fifth, and decisively, until *Krefeld* there was no direct CJEU authority on the application of the Article 24(2) derogation to jobseekers with a concurrent right of residence under another provision of EU law. However, this point is addressed head-on and answered in *Krefeld*, where the CJEU held that:

> "65…consideration of the context of Article 24 of Directive 2004/38 confirms the interpretation that the derogation from the principle of equal treatment, provided for in Article 24(2) thereof, is appliable only in situations that fall within the scope of Article 24(1), namely situations where the right of residence is based on that directive, and not in situations where that right has an independent basis in Article 10 of Regulation No 492/2011….
>
> 70…the fact that jobseekers have specific rights under [Directive 2004/38] cannot, having regard to the independence of the bodies of rules established by that directive and by Regulation No 492/2011 respectively, entail a diminution in the rights that such persons can derive from that regulation" (the underlining is mine and has been added for emphasis).

28. The effect of *Krefeld*, therefore, as the Secretary of State accepts and (rightly) argues for on this appeal, is that Article 24(2) of Directive 2004/38/EC does *not* authorise the withholding of social assistance from jobseekers with a concurrent right of residence under Article 10 of Regulation (EU) No 492/2011.

29. Putting this another way, the domestic law provision in regulation 16(1)(a) of the EEA Regs could not, as a matter of then directly applicable EU law, have had the effect of excluding the claimant from relying on her derivative right to reside as a primary carer of a child in education on her June 2018 claim for housing benefit.

30. I note the Secretary of State's argument that the claimant may not in fact have had a concurrent right to reside as a jobseeker in June 2018. If that was the case then reliance on *Krefeld* would not be necessary as regulation 16(1)(a) of the EEA Regs would not have applied on the facts and the claimant would have been entitled, even under the EEA Regs alone, to rely on her derivative right to reside under regulation

16(3) (or 16(4)) of the EEA Regs. I do not consider it is either necessary or proportionate for me to now seek to try and decide this factual issue. At all material times the principal parties in this appeal (that is, the claimant and Sandwell) have proceeded on the basis that as at June 2018 the claimant was a 'jobseeker' under regulation 6(1)(a) of the EEA Regs. It was only on this basis that the effect of the claimant's derivative right of residence came into issue. Moreover, the Secretary of State's own evidence before the tribunal showed that the Secretary of State had by a decision dated 16 July 2018 awarded the claimant jobseeker's allowance ("JSA") with effect from 9 June 2018. The argument the Secretary of State now makes (which in fairness she says she only does "for completeness") involves her in arguing, in effect that that earlier award of JSA was wrongly made. I do not consider it would either be fair or proportionate for to me to seek to unpick this decision nearly four years later and in circumstances where the point has never previously been in issue and where at highest the evidence against the claimant having been a jobseeker is, in the Secretary of State's word, 'equivocal. I am also mindful here that the claimant has not at any stage engaged on Sandwell's appeal to the Upper Tribunal and so the prospect of now fairly establishing the relevant evidence on this issue may well be slim. I further bear in mind that it is unnecessary to decide this point for the purposes of disposing of this appeal. On either analysis, it is the claimant's derivative right of residence which provides a proper basis for holding that she was not a person from abroad under regulation 10 of the HB Regs in June 2018.

31. I am therefore satisfied that, the claimant in June 2018 having a right of residence under Article 10 of Regulation (EU) No 492/2011, any concurrent right of residence she then had as a jobseeker did not preclude her from being entitled to housing benefit on her 18 June 2018 claim for that benefit.

32. I should add that I have declined to decide whether the claimant also had a permanent right of residence in the UK in June 2018 based on her parents' work and benefit histories in the UK and whilst she was a family member of either of them. The tribunal's fact-finding and reasoning on this issue provides no secure basis for my redeciding this issue. Furthermore, the claimant has failed to engage at any stage on these Upper Tribunal appeal proceedings. This includes her failing to respond to a request made by me in earlier directions made on this appeal about whether she would wish the issue of her permanent residence in the UK as at June 2018 to be redecided if the tribunal's decision was to be set aside. The finding that her derivative right of residence does count for housing benefit purposes is sufficient to dispose of this appeal in her favour on this issue. Deciding whether she had *another* right of residence in June 2018 would not benefit her in terms of her then entitlement to housing benefit. Further, I am not deciding that she did not have a permanent right of residence in the UK in June 2018. That issue remains, if necessary, open. For all these reasons, I decline to decide the issue of permanent residence as well.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 4 May 2022