



**IN THE UPPER TRIBUNAL**

**Appeal Nos: CJSA/1637/2017  
CIS/1888/2017  
CH/1889/2017**

**ADMINISTRATIVE APPEALS CHAMBER**

**Before: Upper Tribunal Judge Wright**

## **DECISION**

**The Upper Tribunal dismisses the appeals of the appellant.**

**The decisions of the First-tier Tribunal sitting at Port Talbot on 17 November 2016 under references SC156/15/01139, SC156/16/00250 and SC156/15/02071 did not involve an error on a material point of law and are not therefore set aside.**

**Representation:** The appellant was represented by Martin Williams of the Child Poverty Action Group at both hearings.

Millie Polimac of counsel appeared at the first hearing for the Secretary of State for Work and Pensions and Ben Lask of counsel represented the Secretary of State at the second hearing, both instructed by the Government Legal Service.

The local authority did not appear at either hearing and took no effective part in the Upper Tribunal appeal proceedings.

## REASONS FOR DECISION

### Introduction

1. There is only one central issue that now arises on these appeals. That issue is whether the appellant had a ‘secondary’ or ‘contingent’<sup>1</sup> right to reside in the United Kingdom based on the right to reside her under school age son had as the ‘family member’ of his father, where the father at the relevant time (as is now effectively conceded) had a right to reside in the United Kingdom as a ‘worker’ but where the appellant was not a ‘family member’ of the father of her son.
2. The short answer, as I have concluded for the reasons given below, is that as a matter of law no such right of residence can arise under EU law. The essential reason for this, put at its very shortest, is that Directive 2004/38/EC, on which the appellant founds her argument, only covers qualifying EU nationals and their family members as identified in that Directive. The Directive does not extend further from such family members to others who themselves are not qualifying EU nationals and who also are not themselves family members of the qualifying EU national.

### Relevant legislation

3. In order to frame the above issue, it is necessary to first set out the relevant legislation that surrounds it.
4. Articles 20 and 21 of the Treaty of the Functioning of the European Union (“TFEU”) provide, so far as is material, as follows.

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<sup>1</sup> I have avoided using the term a ‘derivative’ right to reside given that language was used within and under regulation 15A of the EEA Regs and is now used in regulation 16 of the Immigration (European Economic Area) Regulations 2016. I will use the word secondary right of residence in the rest of this decision to avoid confusion and any elision with the legislatively founded ‘derivative’ rights of residence. I use the word ‘secondary’ in the sense of being a right to reside that is contingent or parasitic upon the right of residence (of the child’s) which arises directly under the EEA Regs 2006 and EU law. I am not using the word ‘secondary’ to denote any *lesser* form of residence right (if such a right to reside is capable of arising).

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**Article 20**

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 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.”

**Article 21**

1. 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 measures adopted to give them effect.”

5. Directive 2004/38/EC (“the Directive”) is central to these appeals. It contains the following provisions of relevance.

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**Article 1**

Subject

This Directive lays down:

- (a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;
- (b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;
- (c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.

**Article 2**

Definitions

For the purposes of this Directive:

- 1) "Union citizen" means any person having the nationality of a Member State;
- 2) "Family member" means:
  - (a) the spouse;
  - (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
  - (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

### **Article 3** Beneficiaries

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

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

### **Article 6**

#### Right of residence for up to three months

1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

### **Article 7**

#### Right of residence for more than three months

1. 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:

(a) are workers or self-employed persons in the host Member State; or

(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; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they 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; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.

#### **Article 12**

Retention of the right of residence by family members in the event of death or departure of the Union citizen

1. Without prejudice to the second subparagraph, the Union citizen's death or departure from the host Member State shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, the Union citizen's death shall not entail loss of the right of residence of his/her family members who are not nationals of a Member State and who have been residing in the host Member State as family members for at least one year before the Union citizen's death.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they 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, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on a personal basis.

3. The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.

### **Article 13**

Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership

1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or

(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or

(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or

(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned

shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they 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, or that they are members of

the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on personal basis.

#### **Article 14**

##### Retention of the right of residence

1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.
  2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein. In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.
  3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.
  4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:
    - (a) the Union citizens are workers or self-employed persons, or
    - (b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged."
6. Lastly, in terms of the legislative jigsaw, are the relevant parts of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regs 2006"). Although these regulations have been repealed and replaced by the Immigration (European Economic Area) Regulations 2016, it was common ground before me that it was the EEA Regs 2006 that applied in this case given the February and March 2015 dates of the respondents' decisions under appeal to the First-tier Tribunal.
7. Although the appellant rested her case on the Directive, and indeed accepted that the EEA Regs 2006 did not cover her situation, I set out the relevant parts of them here, not least because the effect of my

decision is that they did, at least in respect of the issue before me, properly transpose EU law into domestic law.

**“Qualified person”**

**6.**—(1) In these Regulations, “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.

**Family member**

**7.**—(1).....for the purposes of these Regulations the following persons shall be treated as the family members of another person—

- (a) his spouse or his civil partner;
- (b) direct descendants of his, his spouse or his civil partner who are—
  - (i) under 21; or
  - (ii) dependants of his, his spouse or his civil partner;
- (c) dependent direct relatives in his ascending line or that of his spouse or his civil partner;
- (d) a person who is to be treated as the family member of that other person under paragraph (3).....

(3) Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked.....

**“Extended family member”**

**8.**—(1) In these Regulations “extended family member” means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and—

(a) the person is residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of his household;

(b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or

(c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.



(3) A person satisfies the condition in this paragraph if the person is a relative of an EEA national or his spouse or his civil partner and, on serious health grounds, strictly requires the personal care of the EEA national his spouse or his civil partner.

(4) A person satisfies the condition in this paragraph if the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national were the EEA national a person present and settled in the United Kingdom.

(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.

(6) In these Regulations “relevant EEA national” means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purpose of paragraph (5).

**Extended right of residence**

**14.**—(1) A qualified person is entitled to reside in the United Kingdom for so long as he remains a qualified person.

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

(3) A family member who has retained the right of residence is entitled to reside in the United Kingdom for so long as he remains a family member who has retained the right of residence.

(4) A right to reside under this regulation is in addition to any right a person may have to reside in the United Kingdom under regulation 13 or 15.....

**Derivative right of residence**

**15A.**—(1) A person (“P”) who is not an exempt person] and who satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.

(2) P satisfies the criteria in this paragraph if—

(a) P is the primary carer of an EEA national (“the relevant EEA national”); and

(b) the relevant EEA national—

(i) is under the age of 18;

(ii) is residing in the United Kingdom as a self-sufficient person; and

(iii) would be unable to remain in the United Kingdom if P were required to leave.

(3) P satisfies the criteria in this paragraph if—  
(a) P is the child of an EEA national (“the EEA national parent”);  
(b) P resided in the United Kingdom at a time when the EEA national parent was residing in the United Kingdom as a worker; and  
(c) P is in education in the United Kingdom and was in education there at a time when the EEA national parent was in the United Kingdom.

(4) P satisfies the criteria in this paragraph if—  
(a) P is the primary carer of a person meeting the criteria in paragraph (3) (“the relevant person”); and  
(b) the relevant person would be unable to continue to be educated in the United Kingdom if P were required to leave.

(4A) P satisfies the criteria in this paragraph if—  
(a) P is the primary carer of a British citizen (“the relevant British citizen”);  
(b) the relevant British citizen is residing in the United Kingdom; and  
(c) the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave.

(5) P satisfies the criteria in this paragraph if—  
(a) P is under the age of 18;  
(b) P’s primary carer is entitled to a derivative right to reside in the United Kingdom by virtue of paragraph (2) or (4);  
(c) P does not have leave to enter, or remain in, the United Kingdom; and  
(d) requiring P to leave the United Kingdom would prevent P’s primary carer from residing in the United Kingdom.....

(7) P is to be regarded as a “primary carer” of another person if  
(a) P is a direct relative or a legal guardian of that person; and  
(b) P—  
(i) is the person who has primary responsibility for that person’s care; or  
(ii) shares equally the responsibility for that person’s care with one other person who is not an exempt person.

(7A) Where P is to be regarded as a primary carer of another person by virtue of paragraph (7)(b)(ii) the criteria in paragraphs (2)(b)(iii), (4)(b) and (4A)(c) shall be considered on the basis that both P and the person with whom care responsibility is shared would be required to leave the United Kingdom.

(7B) Paragraph (7A) 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 P assuming equal care responsibility.

(8) P will not be regarded as having responsibility for a person’s care for the purpose of paragraph (7) on the sole basis of a financial contribution towards that person’s care.....”

Summary of the central argument and the context within which it arises

8. The argument that the appellant had a secondary right to reside, as described in paragraph 1 above, arises in the following context.
  
9. The appellant, who is an EU national from Poland, made claims for jobseeker's allowance, housing benefit and income support on various dates in early 2015. All such claims were refused in decisions dated, respectively, 7 February 2015, 19 February 2015 and 16 March 2015. On each claim the essential basis for the refusal of benefit was because the appellant did not have a right to reside in the United Kingdom that qualified her to the benefit in question. The three decisions denying her benefit were upheld by a First-tier Tribunal on 17 November 2016 ("the tribunal"). The tribunal addressed a number of arguments that were then being made on behalf of the appellant, but it said this about the secondary right to reside argument (though it characterised it as a 'derivative' right):

"The next argument advanced on behalf of the appellant is that she has a derivative right to reside through her son, for whom she is the primary carer, and who is the family member of an EEA worker.....In her submission, the appellant's representative cited the authorities of *Chen*, *Baumbast*, *Teixeira* and *Ibrahim*. In my judgment, these authorities do not assist the appellant because her son...was neither in education, no[r] self-sufficient, at the relevant time. The appellant's representative argued that the principles established in the cases cited should be extended because the appellant should be entitled to a derivative right to reside as [her son]'s primary carer, apparently regardless of the way in which [her son]'s own right to reside arose. The submission was put on the basis that in order for [the son] to exercise his right of residence it was necessary for the appellant to enjoy a derivative right, because denying this to the appellant would effectively deny [the son] his right of residence. I do not accept that wide-ranging submission. Any derivative right of residence must be established in accordance with Regulation 15A of the 2006 Regulations, and the appellant did not establish this. In particular:

- (a) Any derivative right based on Regulation 15A(2)(b) on the basis that [the son] would be unable to remain in the United Kingdom of the appellant was required to leave, would rely on [the son] being self-sufficient. Regulation 4(5) of the 2006 Regulations means that, in the context of Regulation 15A(2) [the son] and the appellant would have to have sufficient combined resources to be self-sufficient.

(b) The appellant’s assertion that she remained in a durable relationship with [her son’s father] until October 2013 (which I accepted) relied in part on the continued contact between [the father and the son]. Although by January 2015 the appellant was not aware of [the father]’s address, she knew that he was working in Swansea..., and notwithstanding the matter set out in [(a)] above, I am not satisfied [the son] would have necessarily had to leave the United Kingdom if the appellant was denied a derivative right to reside because his father remained in the United Kingdom as a qualified person.”

10. The appellant’s argument before me that she had a secondary right to reside may be unpacked as follows.

11. As I have already indicated, it is accepted that the appellant did not have a right to reside under the EEA Regs 2006 in February and March 2015 (the dates of the three decisions under appeal to the First-tier Tribunal). In particular, regulation 15A of those regulations did not apply as the appellant’s son was not then “in education” (he was only due to enter reception class in September 2015), nor was he self-sufficient at any of the dates of the three decisions under appeal. Notwithstanding these points it is contended that:

(a) the son was a ‘family member’ of his father’s (per Article 2(2)(c) of the Directive). It was legally irrelevant for these purposes that he was not living with his father (per *CF/1863/2007*);

(b) his father, who is also an EU national, at the relevant time had a right to reside as a worker (as is now conceded) and the son had a right to reside as well as his father’s family member (per Article 7(1)(a) and (d) of the Directive); and, which is the crucial step,

(c) the appellant ought therefore to have had a right to reside as the primary carer of her son in order to enable her son’s right to reside in the United Kingdom to remain effective, even though the appellant was not under the Directive a family member of her son’s father.

12. The argument continues that cases such as *Chen* and *Baumbast* (to which I will return) are just examples of an underlying rule or principle of EU law that where the child has a right to reside, his or her primary carer must be accorded a secondary right to reside in order to make the child’s right effective.
13. Before turning to explore this point in more detail, I need first to document another argument that arose on the appeals. That in turn will take me on to address an argument about the Upper Tribunal’s costs jurisdiction in social security cases, after which I will return to the sole determinative issue on these three appeals.

Right of residence as extended family member even though no residence document

14. Both before and at the first hearing of this appeal the Secretary of State argued that the appellant may have acquired a permanent right of residence in the UK based, in part, on her being an ‘extended family member’ of her son’s father, if on the facts she had had a durable relationship with the father, notwithstanding the lack of a relevant residence document. The argument was put in this way in the Secretary of State’s first skeleton argument:

“54. It appears.....that the Appellant was in the country for an initial three-months, then was a worker from August 2007, followed by a period where she retained the status of a worker while she was receiving maternity pay, by virtue of *C-507/12 Saint Prix v DWP*. These three periods equate to 4 years and 9 months. After her maternity pay stopped, she resided with her ex partner with whom she was in a durable relationship for at least a further months. Indeed by October 2013, when she broke up with [him] she would have acquired over 6 years of residence.

55. As the partner of an EEA citizen with whom the Appellant was in a durable relationship the Appellant may have benefited from rights of residence as an extended family member. Regulation 14(2) states that a family member of a qualified person residing in the UK as a qualified person is entitled to reside as long as she remains their family member. As a person in a durable relationship with an EEA national the Appellant would have been an extended family member (Regulation 8(5)). By virtue of Regulation 7(3) a person who is an extended family member and has been issued with an EEA family permit, registration certificate or residence card shall be treated as a

family member so long as he continues to satisfy the conditions in Regulation 8(5).

56. Whilst the Appellant did not have a relevant family permit, registration certificate or residence card, it is submitted that she did not need one for her to qualify as an extended family member, on the proper interpretation of EU law.”

[Argument was then set out as to what the Secretary of State was putting forward as the correct position in EU law.]

15. I was troubled with this argument and Mr Williams for the appellant initially felt himself unable to support it, even though it could have assisted the appellant. The reason for this is the Secretary of State’s argument on its face stood contrary to two decisions of the social security commissioners and the Upper Tribunal on the same point – *CIS/612/2008* and *SS v SSWP* (ESA) [2011] UKUT 8 (AAC) – and also ran counter to the effect of the decision of Grand Chamber of the CJEU in *Secretary of State for the Home Department v Rahman* (Case C-83/11) [2013] QB 249. None of these decisions were addressed by the Secretary of State in her argument. Putting matters very shortly (and I need do no more because, for the reasons given below, this argument has now fallen away, at least at this level of adjudication), the effect of the above caselaw is that the residence document is a necessary *pre-condition* for the existence of a right of residence for an extended family member.
16. It also appeared that the argument may have been being advanced by those acting for the Secretary of State without any consideration across other Departments of State (most notably the Home Office) as to its potential ramifications or correctness.
17. It was in large part for these reasons that the first hearing of this appeal before me had to be adjourned.
18. After the first hearing the Secretary of State provided detailed written submissions in which, inter alia, she argued that the appellant could have no right of residence based on any period of a durable relationship with her ex-partner (i.e. as an extended family member

of his) because she did not at the time hold a relevant residence document or certificate. In other words, the Secretary of State was now arguing the exact reverse of what she had previously been arguing.

19. In fact, the Court of Appeal has decided this point against any right of residence arising for an ‘extended family member’ during the period when the relevant residence document is not in place, and has done so in two cases. The first of these – *Macastena v Secretary of State for the Home Department* [2018] EWCA Civ 1558; [2019] 1 WLR 365 - was decided shortly after the first oral hearing before me on these appeals. It has subsequently been followed and approved by the Court of Appeal in *Secretary of State for the Home Department v Aibangbee* [2019] EWCA Civ 339; [2019] 1 WLR 4747. The Court of Appeal put it thus in *Aibangbee* (at paragraphs [24]-[25]):

“24. That the substantive rights of residence conferred by the Directive are enjoyed by family members as defined in article 2(2), but not by extended family members as referred to in article 3(2), is clear from the wording of the relevant provisions and the structure of the Directive and is confirmed by the judgment in *Rahman*.....

25. The obligation on Member States in article 3(2) can also be expressed as a *right* of the extended family member for his or her application to be facilitated by the Member State; but it is a limited procedural right, distinct from the substantive rights of residence conferred by the Directive.”

20. The court in *Aibangbee* also quoted approvingly from the decision of the Upper Tribunal (Immigration and Asylum Chamber) in *Kunwar (EFM – calculating periods of residence)* [2019] UKUT 00063 (IAC), where Upper Tribunal Judge Grubb said the following on this issue:

"39. In my judgment, the Court of Appeal's decision in *Macastena* confirms, and applies, the scheme of the 2006 Regulations and Directive which I have set out above, drawing the distinction between the right of residence of a 'family member' and the absence of any right of residence for an 'extended family member' until a residence card is issued by the Secretary of State under reg. 17(4) of the 2006 Regulations. Only from that point in time do the 2006 Regulations confer upon the 'extended family member' a right of residence because from that point in time they are treated as a 'family member' and may, if appropriate rely upon the rights of residence recognised in reg. 13(2)

and 14(2). Then and only then, does the individual begin to acquire a period of lawful residence under the 2006 Regulations which can count towards establishing a 'permanent right of residence' on the basis of residing in the UK in accordance with the 2006 Regulations for a continuous period of five years under reg. 15(1)(b)."

21. In the light of *Macastena*, the parties before me agreed I was bound to reject any argument that the appellant may have had a right of residence arising from, and at the time of, her possible relationship as an 'extended family member' of her son's father. Any argument to the contrary is now foreclosed at the level of the Upper Tribunal given the Court of Appeal's decisions in *Macastena* and *Aibangbee*. However, Mr Williams, who may have become somewhat of a convert to the argument, expressly reserved the right to argue this point on behalf of the appellant if the appeals were to progress any further. That, in reality, must mean the appeals reaching the Supreme Court.

#### Costs

22. Mr Williams, however, complained (it seems to me with some considerable justification) that the cost of the first hearing before me had effectively been thrown away because of the Secretary of State running an argument which she declined to press at that hearing and then abandoned after it, and which had the effect that the 'secondary right of residence' argument was not in any proper sense addressed at that hearing. In the light of this, he applied under rule 10(3)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules") for the Secretary of State to pay CPAG's costs in preparing for and attending the first hearing of the appeals on behalf of the appellant.
23. I indicated before and at the second hearing of the appeals the difficulties I considered lay in the way of such an application succeeding. Mr Williams did not seek to grapple with those difficulties but simply asked me nevertheless to rule on the costs application.



24. The starting point for consideration of the costs application is section 29 of the Tribunals, Courts and Enforcement Act 2007, which provides as follows:

**“29 Costs or expenses**

- (1)The costs of and incidental to—  
(a)all proceedings in the First-tier Tribunal, and  
(b)all proceedings in the Upper Tribunal,  
shall be in the discretion of the Tribunal in which the proceedings take place.  
(2)The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.  
(3)Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.  
(4)In any proceedings mentioned in subsection (1), the relevant Tribunal may—  
(a)disallow, or  
(b)(as the case may be) order the legal or other representative concerned to meet,  
the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.  
(5)In subsection (4) “wasted costs” means any costs incurred by a party—  
(a)as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or  
(b)which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.  
(6)In this section “legal or other representative”, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.  
(7)In the application of this section in relation to Scotland, any reference in this section to costs is to be read as a reference to expenses.”

Section 29(3) and the closing words in 29(4) are of importance. Their effect is that the discretion to award costs (including wasted costs) may be mediated and even removed if the Tribunal Procedure Rules so provide. I turn, therefore, to the UT Rules and what they say on costs, which is contained in rule 10 of those rules.

25. Rule 10 of the UT Rules provides, so far as is material, as follows:

“10.—(1) The Upper Tribunal may not make an order in respect of costs (or, in Scotland, expenses) in proceedings transferred or referred by, or on appeal from, another tribunal except—

(aa) in a national security certificate appeal, to the extent permitted by paragraph (1A);

(a) in proceedings [F4transferred by, or on appeal from,] the Tax Chamber of the First-tier Tribunal; or

(b) to the extent and in the circumstances that the other tribunal had the power to make an order in respect of costs (or, in Scotland, expenses).

(2) The Upper Tribunal may not make an order in respect of costs or expenses under section 4 of the Forfeiture Act 1982 F6 .

(3) In other proceedings, the Upper Tribunal may not make an order in respect of costs or expenses except—

(a) in judicial review proceedings;

(b).....

(c) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs; ...

(d) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings;.....”

(the underlining is mine in both places and has been added for emphasis)

26. It was common ground before me, and is in any event correct, that the First-tier Tribunal from which these appeals came to the Upper Tribunal had no legal power to order an award of costs to be made. This is because under rule 10 of its rules – the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 – the “Tribunal may not make any order in respect of costs (or, in Scotland, expenses)”.

27. The problem, in my judgment, in founding the present application for costs on rule 10(3) of the UT Rules is that that rule only applies in proceedings *other than* on an appeal from the First-tier Tribunal. That in my judgment is the effect of the words I have underlined in rule 10(1) and (3) above. However, the proceedings before me **are on appeal from another tribunal** and so cannot be the ‘other proceedings’ covered by rule 10(3). That then leaves the sole costs rule being the one in rule 10(1), but that only allows cost to be made on appeal from the First-tier Tribunal “to the extent and in the circumstances that the [First-tier Tribunal] had the power to make an order in respect of costs” (per rule 10(1)(b)), and it is rightly conceded that the social

entitlement chamber of the First-tier Tribunal had, and has, no power to award costs. Accordingly, in such an appeal neither part of rule 10 of the UT Rules can assist the appellant.

28. For these reasons, I must reject the application for costs made on behalf of the appellant. On appeals from the social entitlement chamber of the First-tier Tribunal the Upper Tribunal has no power to award costs to any or either party on the appeal before it, however egregious the default of the other party. I return, therefore, to the main argument on these appeals.

Secondary right of residence as primary carer of child who has right to reside as the family member of another person

*The appellant's argument*

29. The appellant argued that she had a secondary right of residence that arose from her son's right of residence under Article 7(1)(d) of the Directive because: "[i]t is a general principle of EU law on free movement that where a child has a right of residence then the primary carer of that child will also have a right of residence in order to render the right of the child effective". She later refined the argument to being one that:

"EU law residence rights must be capable of being genuinely enjoyed (ie they must be rendered effective or, which is the same thing, protected in substance). That is the general principle which we say applies here. It is stated concisely by Lady Justice Arden at [paragraph 6] of *Sanneh*[[2015] EWCA Civ 49; [2016] QB 455] "[t]he EU law principle of effectiveness means that rights given by EU law must be protected in substance".

30. The above general principle was said to be evidenced by three decisions of what is now the Court of Justice of the European Union ("CJEU"). The first decision is *Baumbast, R v Secretary of State for the Home Department* (case C-413/99) [2002] ECR I-7091. The appellant relied on paragraphs [71]-[75] of the court's judgment.

"71. In circumstances such as those of the main proceedings, where the children enjoy, under Article 12 of Regulation No 1612/68, the right to continue their education in the host Member State although the parents who are their carers are at risk of losing their rights of

residence as a result, in one case, of a divorce from the migrant worker and, in the other case, of the fact that the parent who pursued the activity of an employed person in the host Member State as a migrant worker has ceased to work there, it is clear that if those parents were refused the right to remain in the host Member State during the period of their children's education that might deprive those children of a right which is granted to them by the Community legislature.

72. Moreover, in accordance with the case-law of the Court, Regulation No 1612/68 must be interpreted in the light of the requirement of respect for family life laid down in Article 8 of the European Convention. That requirement is one of the fundamental rights which, according to settled case-law, are recognised by Community law....

73. The right conferred by Article 12 of Regulation No 1612/68 on the child of a migrant worker to pursue, under the best possible conditions, his education in the host Member State necessarily implies that that child has the right to be accompanied by the person who is his primary carer and, accordingly, that that person is able to reside with him in that Member State during his studies. To refuse to grant permission to remain to a parent who is the primary carer of the child exercising his right to pursue his studies in the host Member State infringes that right.

74. As to the Commission's argument to the effect that a right of residence cannot be derived from Article 12 of Regulation No 1612/68 in favour of a person who is not the child of a migrant worker, on the ground that possession of that status is a *sine qua non* of any right under that provision, having regard to its context and the objectives pursued by Regulation No 1612/68 and in particular Article 12 thereof, that provision cannot be interpreted restrictively (see, to that effect, *Diatta*, paragraph 17) and must not, under any circumstances, be rendered ineffective.

75. In the light of the foregoing, the answer to the second question must be that where children have the right to reside in a host Member State in order to attend general educational courses pursuant to Article 12 of Regulation No 1612/68, that provision must be interpreted as entitling the parent who is the primary carer of those children, irrespective of his nationality, to reside with them in order to facilitate the exercise of that right notwithstanding the fact that the parents have meanwhile divorced or that the parent who has the status of citizen of the European Union has ceased to be a migrant worker in the host Member State.”

31. The second case is *Kunquian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* (Case C-200/02) [2004] ECR I-09925; [2005] 1 QB 325. Putting matters shortly, in that case the court determined that the child, who was an Irish national, had a right of residence in the UK as a ‘self-sufficient’ person under what is now Article 21 of TFEU and what was then

Directive 90/364/EEC (and is now Article 7(1)(b) of the Directive) in circumstances where it was her third country national (Chinese) parent's resources which gave her that 'self-sufficiency' and ensured she was not an unreasonable burden on the public finances of the host Member State (i.e. the UK). Turning then to the third country national (i.e. non-EU) parent, the court said this:

“42. Article 1(2)(b) of Directive 90/364, which guarantees 'dependent' relatives in the ascending line of the holder of the right of residence the right to install themselves with the holder of the right of residence, regardless of their nationality, cannot confer a right of residence on a national of a non-member country in Mrs Chen's situation either by reason of the emotional bonds between mother and child or on the ground that the mother's right to enter and reside in the United Kingdom is dependent on her child's right of residence.

43. According to the case-law of the Court, the status of 'dependent' member of the family of a holder of a right of residence is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence (see, to that effect, in relation to Article 10 of Regulation No 1612/68, Case 316/85 *Lebon* [1987] ECR 2811, paragraphs 20 to 22).

44. In circumstances such as those of the main proceedings, the position is exactly the opposite in that the holder of the right of residence is dependent on the national of a non-member country who is her carer and wishes to accompany her. In those circumstances, Mrs Chen cannot claim to be a 'dependent' relative of Catherine in the ascending line within the meaning of Directive 90/364 with a view to having the benefit of a right of residence in the United Kingdom.

45. On the other hand, a refusal to allow the parent, whether a national of a Member State or a national of a non-member country, who is the carer of a child to whom Article 18 EC [now Article 21 of TFEU] and Directive 90/364 grant a right of residence, to reside with that child in the host Member State would deprive the child's right of residence of any useful effect. It is clear that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence (see, *mutatis mutandis*, in relation to Article 12 of Regulation No 1612/68, *Baumbast and R*, paragraphs 71 to 75).

46. For that reason alone, where, as in the main proceedings, Article 18 EC and Directive 90/364 grant a right to reside for an indefinite period in the host Member State to a young minor who is a national of another Member State, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State.”

32. It was argued that the Opinion of the Advocate General in *Chen* illuminated the above reasoning of the Court. However, as that reasoning was not adopted or commented on by the court, I consider it best to leave the Advocate General’s Opinion out of account.
33. The last case on which the appellant relied for the general principle described in paragraph 29 above is *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm)* (Case C-34/09) [2011] ECR I-01177; [2012] QB 265. In this case the children concerned had a right of residence in the EU state in which they lived (Belgium) and they were nationals of that state under its domestic law. However, the parents of the children, who were third country nationals (from Colombia), held no such right of residence under Belgian domestic law and neither they nor the children had a right of residence in any other EU state. Having observed, importantly, in paragraph [39] that Directive 2004/38 did not apply, the CJEU went on:

“40 Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State (see, inter alia, Case C-224/98 *D’Hoop* [2002] ECR I-6191, paragraph 27, and Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 21). Since Mr Ruiz Zambrano’s second and third children possess Belgian nationality, the conditions for the acquisition of which it is for the Member State in question to lay down (see, to that effect, inter alia, Case C-135/08 *Rottmann* [2010] ECR I-0000, paragraph 39), they undeniably enjoy that status (see, to that effect, *Garcia Avello*, paragraph 21, and *Zhu and Chen*, paragraph 20).

41 As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see, inter alia, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31; Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 82; *Garcia Avello*, paragraph 22; *Zhu and Chen*, paragraph 25; and *Rottmann*, paragraph 43).

42 In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (see, to that effect, *Rottmann*, paragraph 42).

43 A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.

44 It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

45 Accordingly, the answer to the questions referred is that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.”

34. Although I was not referred to them, two other decisions of the CJEU contain statements along similar lines to those in the three cases on which the appellant relies.
35. The first of the cases, *Alokpa and others v Ministre du Travail, de l'Emploi et de l'Immigration* (Case C-86/12), concerned a third country national, from Togo, Mrs Alokpa, whose children, who lived with her, held French citizenship. Mrs Alokpa was refused a right of residence in Luxembourg and had been ordered to leave that country. It was her case that she was unable to settle in France, where the father of the children lived, because neither she nor the children had any continuing relationship with the father and because the children needed medical treatment in Luxembourg as a result of their premature births.
36. The analysis of the CJEU in *Alokpa* is in many ways the same as that in *Chen*. The court began by noting that any rights of a third country national by TFEU are not autonomous rights of that person “but rights derived from the exercise of freedom of movement by a Union citizen”. Further, the purpose and justification of such a derived right of

residence is based on the fact that the refusal to allow the right would be such as to interfere with freedom of movement by discouraging the EU national from exercising his or her freedom of movement rights (paragraph [22]).

37. Mrs Alokpa was not herself within Article 3(1) of the Directive because she was not ‘dependent’ relative of her children. However, although it was for the national courts to determine whether this was made out on the facts, following *Chen* if the children on their own or through Mrs Alokpa had sufficient resources and the comprehensive sickness insurance cover so as to satisfy Article 7(1)(b) of the Directive, Article 21 of TFEU and the Directive “allow a parent who is that minor’s primary carer to reside in the host Member State” (paragraph [29]).

38. The CJEU also addressed the reach of Article 20 of TFEU. It did so in the alternative on the contingency that Mrs Alokpa could not establish a right to reside under Article 21 and the Directive. The reasoning of the court here follows that in *Zambrano*:

“33.....if the referring court holds that Article 21 TFEU does not preclude Mrs Alokpa from being refused a right of residence in Luxembourg, that court must still determine whether such a right of residence may nevertheless be granted to her, exceptionally – if the effectiveness of the Union citizenship that her children enjoy is not to be undermined – in light of the fact that, as a consequence of such a refusal, those children would find themselves obliged in practice to leave the territory of the European Union altogether, thus denying them the genuine enjoyment of the substance of the rights conferred by virtue of that status.”

39. The second case is the Grand Chamber’s judgment in *Alfredo Rendón Marín v Administración del Estado* (Case C-165/14) [2017] QB 495, the analysis in which virtually mirrors that in *Alokpa* on Article 21 and Article 20 of TFEU.



40. Having reviewed the relevant caselaw on the general principle argued for by the appellant, I make two observations at this stage. First, in all the above cases the child’s right of residence arose directly under the EU legal instrument concerned and not indirectly on the back of (e.g. as a family member of) another person’s EU right of residence; albeit the child’s legal right of residence may have arisen in fact because of the work or finances of a parent. Second, Article 20 of TFEU and its ‘required to leave the territory of the EU’ test is not applicable on these appeals. This is because it is the appellant’s argument that her son’s right of residence was a right to reside in the UK, as the family member of a worker in the UK, under Article 7(1) of the Directive, and it is that ‘in the UK’ right of residence, and not a more general right of residence somewhere in the EU, which it is necessary for her also to have in order to render effective her son’s right of residence.
41. As for the test of whether it was necessary for the appellant to have a right of residence as the primary carer for her son in order to render effective his right of residence UK, in the context where the son’s father was living and working in the UK, the appellant argued that the appropriate test was that set down by the Grand Chamber of the CJEU in *Chavez-Vilchez and others v Raad van bestuur van de Sociale verzekeringsbank and others* (Case C-133/15) [2018] QB 103. *Chavez-Vilchez* concerned Article 20 of TFEU and a *Zambrano* type test of being required to leave the EU in circumstances where the primary carer mother of the EU national child was a non-EU national but where the other parent was an EU national. The Grand Chamber ruled as follows:

“Article 20 TFEU must be interpreted as meaning that for the purposes of assessing whether a child who is a citizen of the European Union would be compelled to leave the territory of the European Union as a whole and thereby deprived of the genuine enjoyment of the substance of the rights conferred on him by that article if the child’s third-country national parent were refused a right of residence in the Member State concerned, the fact that the other parent, who is a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a

relationship of dependency that the child would indeed be so compelled were there to be such a refusal of a right of residence. Such an assessment must take into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child’s physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child’s equilibrium.

Article 20 TFEU must be interpreted as not precluding a Member State from providing that the right of residence in its territory of a third-country national, who is a parent of a minor child that is a national of that Member State and who is responsible for the primary day-to-day care of that child, is subject to the requirement that the third-country national must provide evidence to prove that a refusal of a right of residence to the third-country national parent would deprive the child of the genuine enjoyment of the substance of the rights pertaining to the child’s status as a Union citizen, by obliging the child to leave the territory of the European Union, as a whole. It is however for the competent authorities of the Member State concerned to undertake, on the basis of the evidence provided by the third-country national, the necessary enquiries in order to be able to assess, in the light of all the specific circumstances, whether a refusal would have such consequences.”

42. In *Patel v SSHD* [2017] EWCA Civ 2028, [2018] 1 WLR 5425, the Court of Appeal said the following about *Chavez-Vilchez*:

“25. It seems clear therefore that the underlying principle in *Zambrano* is undisturbed by *Chavez-Vilchez*, albeit that in the case of a child dependent on one parent who is a third country national with no right of residence, the State must ensure a careful process of enquiry. However, the third-country national bears the evidential burden of establishing that the child citizen will, in practice, be compelled to leave the EU, unless rights of residence are granted to the (principal) carer parent.

26. As always with CJEU authority, the context must be borne in mind when looking at the conclusions of the Court. In *Chavez-Vilchez*, the reference came before any final decision by the referring court. The Dutch court was looking for guidance. There were no crisp findings of fact in respect of the eight different cases. However, the assumption which runs through the cases, whether the EU citizen father assisted with child care or not, was that the EU citizen parent would remain in the Netherlands whatever the outcome of the case. None of these cases were family units with parents living together. In each case the context was: if the non-EU citizen mother leaves and the EU citizen father remains, will the EU citizen child be compelled, in practice, to leave?

72. In my judgment, the decision in *Chavez-Vilchez* represents no departure from the principle of EU law laid down in *Zambrano*, although it does constitute a reminder that the principle must be

applied with careful enquiry, paying attention to the relevant criteria and considerations, and focussing not on whether the EU citizen child (or dependant) can remain in legal theory, but whether they can do so in practice. There is no alteration in the test of compulsion.

77. ....The correct approach would have been to ask is the situation of the child or children such that, if the non-EU citizen parent leaves, the British citizen will be unable to care for the child or children, so that the latter will be compelled to leave. In so doing, the Tribunal must pay regard to all the relevant circumstances indicated by the CJEU in *Chavez-Vilchez*.....”

(I have, again, underlined certain passages in the judgment to emphasise them.)

The decision in *Patel* has been appealed to the Supreme Court and judgment is awaited after a hearing before that court on 7 May 2019.

43. It was argued on behalf of the appellant that the test as adumbrated in *Chavez-Vilchez* should be adjusted to apply in the context of this case, with the relevant criterion being instead whether the appellant’s son would be compelled to leave the UK were his mother, the appellant, to be denied a right of residence in the UK and thus required to leave the UK. This adjustment was argued for because the son’s right was said to be a right to reside in the UK. It was further argued that the tribunal’s finding that the appellant’s son “would [not] have necessarily had to leave the United Kingdom if the appellant was denied a derivative right to reside because his father remained in the United Kingdom as a qualified person” was not based on any proper enquiry into the evidence, given the relevant factors that *Chavez-Vilchez* required to be addressed. For example, there was no finding on whether the father would have been willing and able to take on his son’s care.
44. I have set out parts of what was said in *Chavez-Vilchez* and *Patel* in case these appeals are to be appealed further. They only have a relevance, however, if the appellant is correct in her argument about the general principle of EU law set out above. The tests in *Chavez-Vilchez* and *Patel*, if applicable, are instruments for determining

whether on the facts a carer would be required to leave. They do not answer the logically prior question of whether under EU law there is a right of residence.

*Discussion and conclusion*

45. In my judgment, the Secretary of State is correct in her arguments against the contention that a secondary right of residence could vest in the appellant. There are two main aspects of her argument, which in my view are related. First, in none of the cases advanced by the appellant have the CJEU purported to found its conclusion on any general principle of EU law. Second, and in my judgment more importantly, it is not possible to reconcile such a principle with the terms and purposes of the Directive. The argument about the caselaw is best seen, in my view, as a stepping stone to the Directive’s purposes and terms and one which illuminates the scope of the Directive. I say this for these reasons.

46. It is true in one sense that the decision in *Baumbast* went no further than deciding a matter of interpretation about Article 12 of Regulation EC 1612/68 and that *Chen* was to like effect in interpreting Directive 90/364, it being necessarily implicit “in those same provisions” (per para. [46] of *Chen*) that the child was entitled to be accompanied in the host Member State by her primary carer. Similarly, even though *Zambrano* was about Article 20 of TFEU and being required to leave the territory of the EU, it, too, was based on an interpretation of the relevant EU legal instruments and not on any stated general or wider principle.

47. As a forensic point, all this is true. In none of the cases has the CJEU sought expressly to propound or identify the general principle for which the appellant contends, or at least initially contended. Nor do those cases obviously identify an underpinning general principle of ‘effectiveness’. In any event, the EU law principle of effectiveness spoken of by Lady Justice Arden in paragraph [6] of *Sanneh* attaches

to rights given by EU law; of itself that principle does not in EU law create any right where none exists independent of the principle. It is an instrumental principle of the law rather than one that is itself constitutive<sup>2</sup>. Beyond this, however, I do not consider that the caselaw of the CJEU on its own necessarily determines the argument one way or the other; though even this does not assist the appellant’s case because it is for her to establish that there is such a principle. However, what she can point to is a seemingly consistent line of CJEU authority in which a right of residence was conferred on the primary carer in order to render effective the child’s EU law right, albeit in each case arising in the specific context of the EU law rights engaged rather than because of any overarching or independently existing general principle of EU law. It is for these reasons that I consider the clearly necessary focus has to be to consider the appellant’s argument in the context of the specific right of residence of the child in play. That right was conferred by Article 7(1)(d) of the Directive.

48. It was common ground before me, and in any event is plainly correct as a matter of law, that the Directive has to be considered in the context of Article 21 of TFEU and the right of free movement it gives under the Treaty. The right of free movement is, per Art. 21, “subject to the limitations and conditions laid down in the Treaties and by measures adopted to give them effect”. The Directive is such a measure. More importantly, and as was accepted by the appellant, the caselaw of the CJEU shows that where a situation is governed by the Directive but the Directive does not confer a right of residence on the facts of a particular case, Article 21 of TFEU may not be invoked to create such a right: see *Singh v Minister of Justice and Equality* (Case C-218/14)

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<sup>2</sup> The above comments are made in respect of paragraph [6] of *Sanneh*, on which the appellant placed particular reliance. In so far as the ‘effective citizenship principle’ in *Sanneh* is concerned (per para. [3] of *Sanneh*) with *Zambrano*, Article 20 of TFEU and being required to leave the territory of the EU, it does not apply in these appeals. Lady Arden at paragraph [72] of *Sanneh* also spoke in terms of some wider effective citizenship principle concerned with “creating rights to reside where that is necessary to make a person’s EU citizenship status meaningful and effective”. As to this ‘wider principle’ I would observe that, first *Sanneh* was not concerned with the Directive, and, second, that whatever Lady Justice Arden may have meant about “creating rights”, such a principle cannot, in my respectful judgment, act to confer a right that the Directive has precluded, as to do so would be to negate the ‘limitations and conditions’ to which the Article 21 TFEU right of free movement is expressly subject.

[2016] QB 208. TFEU only comes into consideration where the situation falls outside the scope of the Directive altogether: *Zambrano* at paragraph [39] and *O v Minister voor Immigratie, Integratie en Asiel* (Case C-456/12) [2014] QB 1163 at paragraphs [37]-[44].

49. Accordingly, the centrally determinative issue on these appeals is whether Article 7(1)(d) of the Directive conferred a right of residence on the appellant as her son's primary carer. That Article does not confer an express right of residence on the appellant, nor does any other part of the Directive. The issue then becomes whether such a right of residence arises by way of necessary implication from Article 7(1)(d) of the Directive. I am persuaded by the following various arguments put forward by the Secretary of State that it does not.
  
50. First, the right of residence under Article 7(1)(d) is itself a derivative or dependent right. It gave the appellant's son a right of residence in the UK but only because he was the family member of his father's and because his father was a worker and therefore satisfied Article 7(1)(a). It is in this sense that legally it is a dependent or derivative right, the son had no right of residence independent of his father's right. The child's right under Article 7(1)(d) contrasts with the rights of residence held by the children in *Baumbast* and *Chen*. In the former the right of residence under Article 12 of EC Regulation 1612/68 was the child's right to (continue to) attend general educational courses. In that sense it was an independent right of the child's: see *Teixeira v Lambeth and Secretary of State for the Home Department* (Case C-480/09), [2010] ICR 1118, at paragraphs [46]-[54] and *London Borough of Harrow v Ibrahim and Secretary of State for the Home Department* (Case C-310/08), [2010] ICR 1118 at paragraphs [35]-[42]. The following passages in paragraphs 35, 40 and 41 of the Grand Chamber's judgment in *Ibrahim* are worth emphasising:

“35. Article 12 of Regulation No 1612/68, as interpreted by the Court in *Baumbast and R*, means that the child can, in connection with his right of access to education, have an independent right of residence.....

40. The right derived by children from Article 12 of Regulation No 1612/68 is also not dependent on the right of residence of their parents in the host Member State.....

41. To accept that children of former migrant workers can continue their education in the host Member State although their parents no longer reside there is equivalent to allowing them a right of residence which is independent of that conferred on their parents, such a right being based on Article 12.”

51. Similarly, the right of the child in *Chen*, although as a matter of fact based on her mother’s resources, as a matter of law was a free-standing, or independent, right to reside in the UK under what is now Article 7(1)(b) of the Directive.
  
52. However, in these appeals the appellant’s son’s right of residence is itself derived from, and legally is dependent on, his father’s right of residence. The issue therefore becomes whether properly construed Article 7(1)(d) and the Directive more generally allows for a further derived right of residence to arise in respect of the appellant as her son’s primary carer. In my view, the Directive’s terms preclude this. Its scope, and the beneficiaries who it covers, is clearly set out in Article 3(1). That makes it clear that the Directive is to apply “...to all Union citizens who move to or reside in [another] a Member State, and to their family members” (underlining added for emphasis). This necessary ‘family member’ link is repeated in Article 7(1)(d) and is found also in Articles 12, 13 and 14 of the Directive. However, as we have seen in paragraphs 14-21 above, the appellant at the material time(s) was not a ‘family member’ under the Directive of her son’s father. Nor could she be a ‘family member’, in terms of Article 2 of the Directive, of her son’s as she was not, per Article 2(2)(d), a dependent direct relative of her son: it is a central aspect of her case that he is dependent on her as she is his primary carer: see to like effect paragraph [44] of *Chen*.

53. In terms of the Directive (from which the appellant’s secondary right of residence must arise), the appellant is neither a ‘family member’ of her son or her son’s father, and on this analysis I find it difficult to understand the legal basis on which the Directive would impliedly confer a secondary right of residence on her as someone who is not a family member of either of the people who have a right of residence under the Directive. That runs against the focus of Articles 3 and 7(1)(d). It seems to me that the Secretary of State is therefore correct in her argument that:

“...the rights conferred by the Directive are deliberately confined to Union citizens and their family members, as defined in Art. 2(2). (Moreover, pursuant to Art. 7(1)(a)-(c), the Union citizen from whom family members derive their rights must be economically active or self-sufficient [See further para. [85] of *LO v SSWP* (IS) UKUT 440 (AAC)]. As Art. 3 makes plain, they do not extend to a person (such as the Appellant) who is the family member of a family member (such as [the son]), but is not the family member of the Union citizen with the primary right of residence (such as [the appellant’s son’s father]).”

54. I do not consider that reference either to the wording of recital (5) to the Directive – “the rights of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality” – or the CJEU’s language in paragraph [31] of *Tofik Lounes v Secretary of State for the Home Department* (Case C-165/16), [2018] QB 1060, that “the purpose of [the Directive] is to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States which is conferred directly on citizens of the Unions by Article 21(1) TFEU”, adds significantly to this stage of the Secretary of State’s argument, though it does not detract from it. The reference in recital (5) to ‘their family members” still requires consideration to be given to how such family membership is defined in the articles of the Directive. Further, although I can see the force of the appellant’s point that the appellant’s son held an individual right of residence, to the extent that it was a right the son could enforce against the UK in respect of himself:



(a) that was not obviously a *primary* right of residence in the sense the Grand Chamber seems to have been seeking to convey in *Lounes* (that is, of the ‘worker’ or self-sufficient person); and

(b) this does not mean that it was not a derivative right of residence (in the sense described above) and was an independent right of residence, because fundamentally it only applied for so long as the father was a worker. (Nor do I understand how it assists to see the Article 7(1)(d) right as also being part of the Article 21 ‘free movement rights’ of the father (though it is plainly an aspect of not deterring those free movement rights that ‘family members’ can move with the ‘worker’), because the appellant was not a ‘family member’ of the father.)

55. The appellant argues against the Secretary of State’s approach here because she says it is contrary to, or leaves out of account, the decision in *Chen*. I do not agree. Translating *Chen* to the Directive, it decided that the EU child’s legally independent right as a self-sufficient person under Article 7(1)(b) would have been rendered ineffective if her primary carer was not accorded a right of residence under Article 21 of TFEU to be with her, notwithstanding that the primary carer was not under the Directive a ‘family member’ of the EU child. However, as discussed above, this did not result because of any underlying general principle of EU law. The correct approach is to determine the extent of the rights expressly conferred by the Directive or those that may arise by necessary implication. *Chen*, in my judgment, has to be seen as falling into this last (necessary implication) category. It is a ‘cart before the horse’ approach to pray in aid from the outset an unproven ‘general principle’ or notion of ‘effectiveness’ so as to require, by way of implication, a secondary right of residence to arise.

56. The second point on which the Secretary of State relied against Article 7(1)(d) conferring a secondary right of residence on the appellant was that to do so would be fundamentally inconsistent with a significant aim of the Directive. This aim, which was described as a ‘significant aim of the [Directive]’ by the Supreme Court in paragraph [44] of *SSWP v Mirga* [2016] UKSC 1, [2016] 1 WLR 481, is described in recital (10) of the Directive, namely that (and I have underlined the ‘significant aim’:

“Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence of Union citizens and their family members for periods in excess of three months should be subject to conditions.”

57. It is Article 7(1) of the Directive that lays down ‘the conditions’ referred to at the end of recital (10). In order to enjoy a right of residence beyond the initial period of three months a Union citizen must either be economically active, or have sufficient resources himself or herself and for any family members together with comprehensive sickness insurance, or be a student with comprehensive sickness insurance and sufficient resources for him or herself, or be a ‘family member’ (within Article 2(2)) of such a Union citizen. However, providing the appellant with the secondary right of residence claimed by her would mean conferring under the Directive a right of residence on someone who was economically *inactive*, who did *not* have sufficient resources and insurance to support herself and who was *not* a member of a family of someone who satisfied any of the conditions in Articles 7(1)(a)-(c) of the Directive. I agree with the Secretary of State that such a result runs so contrary to the above ‘significant aim’ of the Directive as to make it untenable that such a result may be implied from the Directive.
58. I do not consider I need to go beyond this on this second point of the Secretary of State’s. In particular, it is unnecessary for me to determine whether the Supreme Court in *Mirga* was rejecting an

analogous argument. The import of recital (10) is sufficient in the circumstances of this case.

59. I should say, however, that, contrary to the argument of the appellant, *Teixeria* and *Ibrahim* are not contrary to the Secretary of State's argument here. True it is that, as the Secretary of State accepts, both of those cases decided that the right of residence enjoyed by a primary carer of a child exercising her right of education under Article 12 of EC Regulation 1612/68 was not conditional on the carer having sufficient resources or sickness insurance. However, the explanation for this is: (i) there was no such condition in Article 12 itself (or, put another way, nothing equivalent to recital (10) to the Directive applied), and (ii) the right conferred by Article 12 (now Article 10 of Regulation (EU) 492/2011) was independent of the conditions in the Directive: see *Ibrahim* at paragraphs [44]-[50]. Indeed, once this difference is recognised it puts the focus back on recital (10) and why, notwithstanding its setting out a significant aim of the Directive, its effects would stand to be ignored in cases such as the appellant's.
60. The third and final point the Secretary of State takes against the Directive being interpreted as giving the appellant a secondary right of residence is the inconsistency of such a right being implied when considered alongside other articles in the Directive. In particular, she argues that it is not possible to reconcile the appellant's case with Articles 12 and 13 of the Directive. I shall take each article in turn.
61. Article 12 deals with the retention of the right of residence where the Union citizen's spouse from whom the right of residence was derived dies or leaves the host Member State. In such circumstances, the right of residence is retained by the remaining spouse only if she satisfies Article 7(1) herself (per Art. 12(1)) or has custody of a child in education (per Art. 12(3)). Article 12 thus makes specific provision for the retention of a right of residence by a parent who remains in a Member State and has custody of the child, but only where the child is in education.

62. Article 13 deals similarly with the retention of the right of residence in the circumstances of relationship breakdown. Its effect is that where a Union citizen has a right of residence in the host Member State because of marriage to (or being in a registered partnership with) another Union citizen, that right is retained following divorce (or termination of the partnership) only if, and for as long as, the first Union citizen satisfies Article 7(1). It is not enough under Article 13 for that Union citizen to be the primary carer of the ex-spouse's child.
63. The point the Secretary of State draws, in my view correctly, from these articles is that the Directive has given specific consideration to the parents of children where, to put matters somewhat loosely, the parental relationship has ended, however the Directive has not conferred a right of residence in all circumstances where the Union Citizen concerned is the primary carer of a child of the relationship. Either the primary carer parent must have been married or been in a registered partnership and on divorce or termination herself have satisfied Article 7(1) (none of which the appellant did), or the child she is caring for must have been in education (which also did not apply to this appellant at the relevant time). Again, for the purposes of the argument seeking to imply a secondary right of residence in circumstances where no such right is expressly provided for in the Directive, I do not consider I need go any further. It is sufficient in my view to say that if such a right was intended one would expect to find it in the provisions addressing relationship breakdown and, per Article 12(3), the continuing care of children of such a relationship.
64. For the reasons given above, these appeals are disallowed, which has the effect that the First-tier Tribunal's decisions of 17 November 2016 stand.

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

**Dated 15<sup>th</sup> November 2019**