IN THE UPPER TRIBUNAL **Upper Tribunal case No.** CF/1789/2016
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

Date of hearing: 7 March 2020 (with subsequent written submissions)

Venue: Field House, Bream's Buildings, Central London

Attendances: For the Appellant Mr Bagshaw (non-legally qualified advocate), instructed by Citizens Advice Liverpool.
For the Respondent, Mr Rainsbury (of counsel), instructed by HMRC Legal Services.

Decision: The decision of the First-tier Tribunal (7 March 2016, Liverpool, file reference SC 068/15/04138) did not involve the making of a material error on a point of law. Under section 11 of the Tribunals, Courts and Enforcement Act 2007, this appeal is **DISMISSED**.

REASONS FOR DECISION

Introductory

1. Despite the length of the reasons for this decision, the conclusion may be simply stated. A street musician, or busker, as that undertaking is conventionally understood, cannot be a self-employed person for the purposes of establishing a right to reside in the UK under EU law.

2. In these reasons:

- "2006 Regulations" means the Immigration (European Economic Area) Regulations 2006;

- "Child Benefit Regulations" means the Child Benefit (General) Regulations 2006;

- "the Directive" means Council Directive *2004/38/EC;*

- "*Jany*" means the decision of the European Court of Justice in *Jany and Others v Staatssecretaris van Justitie,* Case C-268/99 (20 November 2001);

- "*JR*" means the decision of the Upper Tribunal in *JR v Secretary of State for Work & Pensions* [2014] UKUT 154;

- "*Tolsma*" means the decision of the European Court of Justice in *Tolsma* (case C-16/93)

- "Treaty" means the Treaty on the Functioning of the European Union;

- "*van Roosmalen*" means the decision of the European Court of Justice in *van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen*, Case 300/84 (23 October 1986)

Background

HMRC's decision on Mrs N's child benefit claim

3. Mrs N's child benefit claim, dated 2 April 2015 was made in respect of one child. Her claim form stated that she:

- was a Romanian national (and hence an EEA national);

- arrived in the U.K. more than three months ago;

- was a self-employed *Big Issue* seller, and had been so since 4 December 2015. She earned about £280 per month; and

- was married to Mr N, also a Romanian national. His self-employment in the UK began on 20 July 2010, and he earned £400 per month.

4. On 22 April 2015, HMRC asked Mrs N to complete the form *UK Child Benefit for People Coming from Abroad*. Mrs N's completed form stated that:

- she arrived in the UK in December 2010;

- she intended to stay in the UK with Mr N for ten years; they had both come to the UK to look for work;

- her self-employed work involved standing outside a supermarket offering *Big Issue* magazines for sale to passers-by. She sold about 40 magazines each week and incurred weekly travel expenses of £40;

- Mr N worked for 25 hours per week as a street musician and earned £5,200 per annum. He had "several hundred" customers, i.e. passers-by;

- neither Mrs N nor Mr N had a VAT registration number, separate business bank account nor accountant. They had not registered as self-employed with H.M.R.C;

- in Romania, Mrs N had worked as a casual agricultural labourer and Mr N as a street musician; and

- Mr & Mrs N's child started UK state education in September 2014.

5. On 4 June 2015, HMRC refused Mrs N's child benefit claim on the ground that she did not have a right to reside in the UK. Her subsequent appeal to the First-tier Tribunal mainly focussed on the legal implications of her work selling the *Big Issue* which, for present purposes, I need not go into. Insofar as Mr N's situation was concerned:

(a) Mrs N's request for mandatory reconsideration of HMRC's decision argued that Mr N's self-employment was genuine and effective but did not give further details;

(b) by letter dated 22 September 2015, HMRC sought further information about Mr N's work including a breakdown of hours worked, invoices and receipts, and asked whether he was registered for Class 2 National Insurance contributions. The letter also sought further information about Mrs N's *Big Issue* sales. Mrs N responded to the request for *Big Issue* information but not to the queries about Mr N.

Proceedings before the First-tier Tribunal

6. Mrs N's notice of appeal to the First-tier Tribunal was drafted by her representative at Wavertree CAB. The notice of appeal did not address Mr N's situation although subsequent written submissions argued that he had worked as a street musician in the UK since 2010, his

work was regular, typically 4 hours each day, he worked 4-5 days each week, had weekly earnings of £80-90, and his work was not ancillary to any other 'relationship'. If Mrs N failed to establish a right to reside in her own right, argued Mrs N's representative, she could establish a right to reside as a family member of a 'qualified person' namely her self-employed husband.

7. The First-tier Tribunal heard and dismissed Mrs N's appeal on 7 March 2016. Both Mr and Mrs N attended with their representative. A Romanian language interpreter also attended. The Tribunal's record of proceedings suggests that neither Mrs N nor Mr N gave oral evidence. Instead, their representative appears to have made submissions (and given evidence) on their behalf, which, in relation to Mr N, included that he was a self-employed street musician, earning £80-90 for 4-5 days' work per week.

8. The First-tier Tribunal found that there was no evidence to support the argument that Mr N worked as a street musician as claimed. Neither receipts nor any other supporting evidence was supplied. In one part of the statement of reasons, the Tribunal found that Mr N's self-employment could not be considered genuine and effective but, in another part, it found there was no evidence that he was genuinely self-employed. Either way, the tribunal decided that Mr N was not self-employed such as to establish a right to reside as a qualified person under the 2006 Regulations.

9. The First-tier Tribunal concluded that Mrs N did not have a right to reside, either in her own right or as the spouse of a 'qualified person' (i.e. a self-employed EEA national).

Proceedings before the Upper Tribunal

Upper Tribunal's grant of permission to appeal

10. The Upper Tribunal granted Mrs N permission to appeal to the Upper Tribunal. The relevant parts of the permission determination read as follows:

> "2. Mrs [N], a Romanian national, claimed child benefit. HMRC refused her claim on the basis that she did not have the right to reside in the UK.
>
> 3. HMRC rejected Mrs [N]'s argument that she had a right to reside as a self-employed person (a *Big Issue* vendor). HMRC also rejected her argument that her husband had a right to reside as a self-employed person (a street musician). Mrs [N] claimed her husband worked 4 hours per day, 5 days per week, earning £80-90.

> …6. Mrs [N]'s representative criticises the conduct of the First-tier Tribunal hearing, arguing it asked no questions of either Mrs or Mr [N]. However, on the material before me, it is not open to me to find that the First-tier Tribunal prevented them from giving direct evidence (rather than through their representative). Mrs [N] was represented at the hearing and the Tribunal's record of proceedings does not indicate that the representative took issue with the conduct of the hearing.
>
> …8. In relation to Mr [N], the First-tier Tribunal decided he could not be genuinely self-employed as a street musician because he "was unable to provide any receipts for his earnings or any other supporting evidence". If Mr [N] was a street musician, could he reasonably be expected to produce receipts for his earnings? The Tribunal may have erred in law by placing irrational weight on this aspect of the evidence. However, this would only be a material error if a street musician is capable of being a self-employed person for the purposes of [Directive 2004/38/EC].
>
> 9. Perhaps surprisingly, there does not appear to be any relevant case law authority about the employment status of street musicians / buskers [*for the purposes of the right to reside*]. There is the decision of the European Court of Justice in *Tolsma* (case C-16/93) which concerned the VAT liability of a street barrel organ player who sought donations from passers-by. The Court decided that Mr Tolsma fell outside VAT Directives because there was no supply of services effected for consideration. However, that concerned a different branch of European law and does not necessarily have relevance under …[Directive 2004/38/EC].
>
> 10. I grant permission on these grounds:
>
> (1) so that the Upper Tribunal may consider whether a street musician whose income consists of donations from passers-by is capable of being a self-employed person for the purposes of the…Directive; and
>
> (2) if so, whether the First-tier Tribunal erred in law by placing reliance on Mr [N's] inability to supply receipts for earnings."

Conduct of the hearing before the Upper Tribunal

11. At the start of the hearing, Mr Bagshaw for the Appellant informed me, without contradiction from HMRC's counsel, that he first saw HMRC's skeleton argument some 10 minutes before the hearing. Upper Tribunal case management directions had required skeleton arguments to be supplied to the Upper Tribunal and copied to the other party no later than seven days before the hearing. However, Mr Bagshaw did not request an adjournment and was content for the hearing to proceed. I informed Mr Bagshaw that he should inform if,

during the hearing, he considered that his late receipt of HMRC's skeleton argument limited his ability properly to represent his client.

12. Later in the hearing, in responding to the oral submissions of Mr Rainsbury, counsel for HMRC, Mr Bagshaw informed me that he wished to repeat that he was prejudiced by his late sight of HMRC's skeleton argument. I was previously unaware that Mr Bagshaw considered himself prejudiced. I may have failed to hear an earlier complaint of prejudice made by Mr Bagshaw but I am almost certain no such complaint was made at the start of the hearing during our discussion about his late receipt of HMRC's skeleton argument. In the light of Mr Bagshaw's complaint, I informed him that I was prepared to allow him two further weeks after the hearing in which to supply written submissions on any points which he had omitted to deal with at the hearing due to his late sight of HMRC's skeleton argument. Mr Bagshaw was content with this proposal and I duly informed him that he had two weeks in which to supply such further written submissions. As was the case at the start of the hearing, Mr Bagshaw did not request an adjournment.

13. Mr Bagshaw did supply further written submissions, which were described as Mr N's response to HMRC's skeleton argument. Unfortunately, the written submissions were not forwarded to myself upon their receipt at the Upper Tribunal. I became aware of them only once I had completed an initial draft of these reasons, which was written on the assumption that Mr Bagshaw had declined the opportunity to supply post-hearing written submissions, and the decision was about to be issued. It was necessary for me reconsider my decision and reasons in the light of Mr Bagshaw's further written submissions. I apologise to the parties for the resultant delay in finalising this decision. In fact, as I explain below, this was not the only administrative delay to bedevil this appeal.

14. I should also mention that, at the hearing, Mr Bagshaw forcefully criticised HMRC for failing to supply a skeleton argument in accordance with Upper Tribunal case management directions. However, those directions also required the parties to provide an agreed bundle of case law authorities and legislative provisions no later than two days before the hearing. There was no agreed bundle (which may have been as much HMRC's fault as the Appellant's). Instead, I received a bundle from each party. HMRC's bundle was properly paginated and tabbed. The Appellant's bundle, however, was a large sheaf of loose-leaf, mainly summary, case reports, held together by a plastic band. The bundle was neither paginated nor tabbed. Moreover, the bundle omitted some of the legislation and case law authorities relied on by Mr Bagshaw at the hearing. I explained at the hearing why a properly structured bundle is necessary for the efficient conduct of hearings before the Upper Tribunal.

Legal Framework

Child benefit legislation

15. Section 146(2) of the Social Security Contributions and Benefits Act 1992 provides that "no person shall be entitled to child benefit for a week unless he is in Great Britain in that week". Regulation 23(1) of the Child Benefit (General) Regulations 2006 provides that, for the purposes of section 146(2), a person who is not ordinarily resident in the UK shall not be treated as being "in Great Britain".

16. Under regulation 23(4)(a) of the Child Benefit Regulations, a person shall not be treated as being in Great Britain, where the person makes a claim for child benefit on or after 1 May 2004, if (a) the person does not have a right to reside in the UK or (b) the person does have a right to reside but it is of a type specified in regulation 23(4)(b), which is not a material issue in the present case.

17. Regulation 23(5) of the Child Benefit Regulations provides that a person is to be treated as being in Great Britain "only if that person has been living in the United Kingdom for 3 months ending on the first day of the week referred to [in section 146(2]". However, regulation 23(5) does not apply "where the person the person –

> (a) most recently entered the UK before 1 July 2014;
>
> (b) is a…self-employed person in the United Kingdom for the…of…[the] Directive 2004/38/EC…; [or]
>
> …(e) is a family member [as defined in Article 2 of the Directive] of a person referred to in…(b)…".

18. HMRC do not dispute that Mrs N & Mr N most recently entered the UK before 1 July 2014. While that would appear to disapply the three-month rule in regulation 23(5) in Mrs N's case, it would not disapply the general requirement in regulation 23(4)(a) for a person to have the right to reside in the UK. In this case, the relevant issue before the First-tier Tribunal was whether Mr N had the right to reside in the UK as a self-employed person.

Immigration (EEA) Regulations 2006 ("2006 Regulations")

19. The 2006 Regulations, which sought to implement the Directive define "self-employed person" as "a person who establishes himself in order to pursue activity as a self-employed person in accordance with Article 43 of the Treaty establishing the European Community" (regulation 4(2)(c)).

20. The list of qualified persons in regulation 6(1) of the 2006 Regulations includes "a person who is an EEA national and is in the UK as…(c) a self-employed person".

21. Regulation 14(1) of the 2006 Regulations provides that "a qualified person is entitled to reside in the United Kingdom for so long as he remains a qualified person". Regulation 14(2) provides that "a family member of a qualified person residing in the United Kingdom under paragraph (1)…is entitled to reside in the United Kingdom for so long as he remains the family member of the qualified person or EEA national". It was by this route that Mrs N sought to rely on the right to reside that she argued was vested in Mr N

Directive 2004/38/EC: legislative context

22. The Directive is preceded by a number of recitals, including:

- "(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.";

- "(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons…in order to simplify and strengthen the right of free movement and residence of all Union citizens.";

- "(10) 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 for Union citizens and their family members for periods in excess of three months should be subject to conditions.";

- "(20) In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law."

23. In making the Directive, the European Parliament and Council of the European Union expressly had regard to certain Articles of the Treaty establishing the European Community namely 12, 18, 40, 44 and 52. These are now to be read as references to Articles of the Treaty on the Functioning of the European Union ('the Treaty'), respectively 18, 21, 46, 50 and 59. Those Articles include the following provision:

(a) *Article 21.1,* which provides that "every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect";

(b) Article 46, which requires the European Parliament and the Council to "issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45";

(c) Article 50, which requires the Parliament and the Council to "act by means of Directives" in order to *"*attain freedom of establishment as regards a particular activity". Article 49 provides that "freedom of establishment shall include the right to take up and pursue activities as self-employed persons";

(d) Article 59, which requires the Parliament and the Council to issue directives "in order to achieve the liberalisation of a specific service". Article 59 is part of Chapter 3 (Services) of Title IV in Part Three of the Treaty. Article 57, also within Chapter 3, provides that "services shall be considered to be "services" within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons".

24. Article 43 of the Treaty Establishing the European Community is referred to in the 2006 Regulations' definition of 'self-employment', which is now to be read as a reference to Article 49 of the Treaty. To recap, the definition refers to "a person who establishes himself in

order to pursue activity as a self-employed person in accordance with Article [49]". Article 49 provides:

> "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."

The Directive

25. Article 1 of the Directive provides:

> "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…"

26. Chapter III of the Directive is headed "Right of residence", and includes Article 7 headed "Right of residence for more than three months". Article 7(1) provides:

> "All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
>
> (a) are…self-employed persons in the host Member State…".

27. The Directive does not define "self-employed persons".

Case law authorities

28. Two cases were the focus of the arguments in this case, *Jany* and *van Roosmalen*. I shall therefore look at both in some detail.

Jany and Others v Staatssecretaris van Justitie, Case C-268/99 (20 November 2001)

29. *Jany* involved Polish and Czech nationals who contested the Dutch Secretary of State for Justice's decision to refuse them residence permits, which had been sought to enable the nationals to work in the Netherlands as self-employed prostitutes. The appellants relied on rights under Association Agreements entered into between the European Community, and the Czech Republic and the Republic of Poland. In other words, the case concerned the Czech and Polish nationals prior to their home countries' accession to the European Union.

30. For present purposes, the Association Agreements were identical. I shall refer to the Association Agreement with Poland whose provisions included:

- "the treatment accorded to workers of Polish nationality legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals" (Article 37(1));

- "Each Member State shall grant…a treatment no less favourable than that accorded to its own … nationals for the establishment of Polish… nationals…and shall grant in the operation of Polish… nationals established in its territory a treatment no less favourable than that accorded to its own…nationals" (Article 44(3));

- "For the purposes of this agreement:

  (a) "establishment" shall mean
    (i) as regards nationals, the right to take up and pursue economic activities as self-employed persons…
  (c) "economic activities" shall in particular include activities of an industrial character, activities of a commercial character, activities of craftsmen and activities of the professions" (Article 44(4)).

31. The Dutch Secretary of State's refusal to grant residence permits relied on domestic legislation that authorised denial of a permit to any foreigner on grounds of public interest.

32. Question 3 referred to the European Court of Justice was whether the Association Agreements would "allow prostitution to be excluded from the notion of 'economic activities as self-employed persons' on the ground that prostitution did not come within the description in [Article 44(4)(c)], for reasons of a moral nature, on the ground that prostitution is prohibited in (a majority of) the associate countries, and on the ground that it gives rise to problems concerning the freedom of action of prostitutes and their independence which are difficult to monitor?"

33. Question 4 was whether "Article 43 (ex Article 52) and Article 44 of the [Association Agreement] permit a distinction to be drawn between the notions of "activities as self-employed persons" and "economic activities as self-employed persons" contained in those respective provisions so that the activities carried out by a prostitute in a self-employed capacity come within the term used in Article 43 (ex Article 52" of the EC Treaty but not within that used in [Article 44 of the Association Agreement?"

34. The Court examined Question 4 before Question 3. Its analysis was as follows:

(a) "33. According to settled case-law, the pursuit of an activity as an employed person or the provision of services for remuneration must be regarded as an economic activity within the meaning of Article 2 of the … Treaty…provided that the work performed is genuine and effective and not such as to be regarded as purely marginal and ancillary (see, *inter alia*, Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraphs 53 and 54).";

(b) Since the essential characteristic of an employment relationship for the purposes of the Treaty is the performance of a service, for a certain period of time, for and under the direction of another for which remuneration is received, "any activity which a person performs outside a relationship of subordination must be classified as an activity pursued in a self-employed capacity for the purposes of Article 52 of the Treaty (see Case C-107/94 *Asscher* [1996] ECR I-3089, paragraphs 25 and 26)" (paragraph 37);

(c) the term 'economic activities as self-employed persons', as used in the Association Agreement, did not have "any meaning other than its ordinary meaning of economic activities carried on by a person outside any relationship of subordination with regard to the conditions of work or remuneration and under his own personal responsibility" (paragraph 37). There was no difference in meaning between the term 'economic activities of self-employed persons', as used in the Association Agreement, and the term 'activities of self-employed persons', as used in the Treaty (paragraph 38);

(d) there was nothing in the Agreement to suggest an intention "to limit the freedom of establishment which they conferred on Polish…nationals to one or more categories of activities pursued in a self-employed capacity" (paragraph 39);

(e) it was also necessary to examine whether prostitution carried on in a self-employed capacity could be regarded as an economic activity within the meaning of the Association Agreement (paragraph 43). The Association Agreement's definition of economic activities was not limited to the activities listed in the definition (paragraph 46);

(f) "prostitution is an activity by which the provider satisfies a request by the beneficiary in return for consideration without producing or transferring material goods" (paragraph 48). It followed that "prostitution is a provision of services for remuneration which, as indicated in paragraph 33 above, falls within the concept of 'economic activities" (paragraph 49).

34. The Court's answer to Question 4 was that "economic activities as self-employed persons [referred to in the Association Agreements]…have the same meaning and scope as the activities as self-employed persons referred to in Article 52 of the Treaty". The activity of prostitution pursued in a self-employed capacity could be regarded as a service provided for remuneration so that it fell within both terms (paragraph 50).

35. Question 3 was whether the Association Agreements were to be construed so that prostitution fell outside the relevant provisions because it could not be considered an economic activity pursued in a self-employed capacity, as referred to in the Agreements, in view of its illegal nature, for reasons of public morality and the potential for the individuals to be parties to disguised employment relationships without the ability to act freely (paragraph 51).

36. In answering Question 3 the Court's findings included:

- it was not for the Court to substitute its own assessment regarding matters of morality for that of Member State legislatures (paragraph 56);

- conduct accepted by a Member State of its own nationals could not be regarded as constituting a genuine threat to public order of such a nature as to justify restrictions of entry on nationals of other states (paragraph 60, 61). In the Netherlands, "window prostitution and street prostitution are permitted … and are regulated there at communal level";

- given the terms of the Association Agreements, it was necessary to determine whether the activity proposed to be undertaken in the host Member State was to be performed in an employed or self-employed capacity (paragraph 65);

- it was for the national court to determine, in the light of evidence, whether "the conditions allowing it to be concluded that prostitution is being carried on by the person concerned in a self-employed capacity are satisfied". The conditions identified by the Court at (paragraph 70) were whether an activity was:

> "- outside any relationship of subordination concerning the choice of that activity, working conditions and conditions of remuneration;
>
> - under that person's own responsibility; and
>
> - in return for remuneration paid to that person directly and in full."

37. Those three conditions are sometimes referred to as the *Jany* test.

van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen, Case 300/84 (23 October 1986) ('*van Roosmalen*')

38. *van Roosmalen* arose from the Dutch authorities' refusal to award an invalidity pension to a Dutch national who had worked as a missionary priest. For most of Father van Roosmalen's working life, from 1955 to 1980, his mission was in Zaire.

39. It seems that Father van Roosmalen had been supported by his parishioners rather than his religious order. At one point, the Court's decision refers to Father van Roosmalen as having been maintained by his parishioners rather than paid by his Order (paragraph 13). To my mind, 'maintained' normally denotes an individual whose basic needs are provided for by someone lese rather than an individual who is supplied with cash sums with which to satisfy those needs himself. Despite that, the Court approached *van Roosmalen* on the basis that it involved supply of 'income' by third parties namely parishioners, presumably in Zaire, which Father van Roosmalen could then use to meet his needs. The Advocate General's opinion was even more explicit on this point, referring to "an occupation in respect of which they *receive income* permitting them to meet all or some of their needs, even if that income is supplied by third parties benefiting from the services of a missionary priest" (my emphasis). I observe that, despite reading the judgment several times, it is not clear to me how maintenance by parishioners came to be understood as the provision of income to Father van Roosmalen

which he could then use to meet his needs himself although it is, of course, possible that something has been lost in translation.

40. The relevant Dutch legislation required an individual to have been incapacitated for work in the Netherlands for a continuous period of 52 weeks, and for the incapacity to persist thereafter. The legislation also provided for entitlement in the case of persons who became incapacitated before returning to the Netherlands but only if the person had also been incapacitated for a continuous period of 52 weeks since returning to the Netherlands. Mr van Roosmalen was adjudged not to have satisfied the relevant conditions.

41. The issues before the European Court of Justice included the meaning of the term 'self-employed person' as used in Regulation *1408/71* (which then governed co-ordination of social security schemes of Member States) as amended by Regulation *1390/81*. The Court's findings included:

- originally, Regulation *1408/71* applied only to employed persons. The term 'employed persons' had been recognised as a term of community law, to be interpreted broadly in order to contribute towards establishment of the greatest possible freedom of movement for migrant workers;

- Regulation *1408/71's* amending instrument (*1390/81*) recognised that free movement was not confined to employed persons but also extended to the self-employed, within the framework of freedom of establishment and to provide services. It followed that, in order to achieve the objectives of the European Community, social security co-ordination should extend to self-employment;

- since the amending instrument had the same objectives as Regulation *1408/71* itself, the term 'self-employed' persons should also be interpreted broadly (paragraph 20);

- Regulation *1408/71's* definition of self-employed person differed according to whether an individual was voluntarily or compulsorily insured. In relation to the voluntarily insured, it meant any person who "carries out activity as a…self-employed person" (Article 1(A)(IV)). In relation to compulsorily insured persons, the definition was described by the Court as follows:

> "21…with respect to persons who are compulsorily insured, Article 1(A)(II) refers…either to the manner in which the applicable social security scheme is administered or financed or, in the alternative, to the definition given in Annex

> I to the Regulation. According to section I of that Annex, which is exclusively concerned with the Netherlands, a self-employed person within the meaning of the above-mentioned article means 'any person pursuing an activity or occupation without a contract of employment'";

- the Court went on:

> "22. Consequently, in the context of a voluntary social insurance scheme set up for employed persons, self-employed persons or all residents, the question whether or not a person is 'self-employed' is determined by the type of activity which he pursues or has pursued and the activity cannot be an activity of any kind but must be an occupation. However, having regard to the broad interpretation which must be given to that term, it is not necessary that the self-employed person should receive remuneration as a direct reward for his activity. It is sufficient if he receives, in respect of that activity, income which permits him to meet all or some of his needs even if that income is supplied, as in this case, by third parties benefitting from the services of a missionary priest".

42. The Court's answer to the referred question was:

> "23. Consequently, the reply to the national court must be that the expression 'self-employed person' within the meaning of Article 1(A)(IV) of Regulation No 1408/71. As amended…applies to persons who are pursuing or have pursued, otherwise than under a contract of employment or by way of self-employment in a trade or profession, an occupation in respect of which they receive income permitting them to meet all or some of their needs even if that income is supplied by third parties benefitting from the services of a missionary priest".

The arguments

The Appellant

43. At least initially, the Appellant Mrs N argues that HMRC's reliance on *Tolsma* (case C-16/93) is misguided. *Tolsma* was not about the concept of self-employment and, moreover, did not establish that 'service effected for consideration' is the sole prerequisite for a determination that the self-employment test in paragraph 70 of *Jany* is satisfied.

44. Neither the Treaty nor the Directive seek to impose a narrow definition of self-employment. The absence of a definition in Article 49 of the Treaty arguably discloses an

intention that 'self-employment' should bear an ordinary and broad meaning. The principle of freedom of movement for self-employed workers within the EU should not be obstructed by restrictive case law definitions. Limiting self-employment to particular types of contractual relationship would be incompatible with the fundamental nature of the right of free movement; as would a limited interpretation of measures adopted in implementation of that right (*Hoekstra*, Case C-75/63). On the other hand, ascribing to 'self-employment' an economic rather than legal status would be consistent with the broad scope of the fundamental freedom. The right to pursue self-employment in host Member states is expressly included within the right of free movement (Article 49 of the Treaty). It should therefore be interpreted broadly and, if necessary, so as to extend the principle beyond its well-established application to employed workers (*van Roosmalen*, at paragraph 20; Case C-344/87, *Bettray*, at paragraph 11; Cases C-22/08 & C-23/08 *Vatsouras* & *Koupatantze* at paragraph 26; Case C-413/01, *Ninni-Orasche*, at paragraph 23).

45. Articles 48 and 52 of the Treaty are based on the same principle, both as regards entry into, and residence in, the territory of a Member state. It follows that those principles also apply to the pursuit of economic activities within a state's territory (*Ascher* at paragraph 29).

46. The 'genuine and effective' work test is the objective means for determining whether self-employed, and employed, EU citizens have a valid right to reside in a host Member State, regardless of their motivations or objectives (Case C-53/81, *Levin*, at paragraph 22; *Ninni-Orasche* at paragraph 28; *LN* at paragraphs 46 and 47). If work is genuine and effective, it can be taken as read that it contributes towards economic activity and raising standards of living (*Levin* at paragraph 15 and 16). If work is not genuine and effective, the person is not regarded as self-employed and so cannot attain a right to reside on that basis.

47. In the absence of a legislative, or binding case law, definition of 'remuneration' for the purposes of self-employment, each case should be considered on its merits. This is consistent with Upper Tribunal decisions to the effect that self-employment questions are to be determined on the evidence in each particular case (*Secretary of State for Work & Pensions v JS (IS)* [2010] UKUT 240 (AAC); *HMRC v HD* [2017] UKUT (AAC)). The fact that a service is effected for consideration may be compelling evidence that the remuneration element of the *Jany* test is met. The absence of consideration, however, does not permit an inference to be drawn that the remuneration condition is unsatisfied unless, that is, there is no alternative evidence of remuneration. Mrs N concedes that a street musician would not usually provide a service effected for consideration. However, street musicians do provide a service to the public in the form of musical entertainment. The question is whether the service is provided for remuneration or some other purpose. If a street musician sought no donations, the

remuneration condition would not be met, but it does not necessarily follow that a street musician who solicits donations provides a service for some reason other than remuneration.

48. A street musician's conduct is determinative of his intention and purpose in going about playing music in public areas. If the monies received are used as income for necessary expenses of life, such as food, clothing and housing, it may reasonably be concluded that the musician is self-employed, in an everyday sense at least. The Appellant concedes that this might not render the street musician self-employed for right to reside purposes where the activity is no more than marginal or ancillary. Questions as to whether an activity is marginal or ancillary are to be determined on their facts taking into account matters such as the income received and time spent performing.

49. The existence of a direct link between services provided and consideration received is relevant only to the question whether a transaction is taxable (Case C-102/86, *Apple and Pear Development Council*). It is not relevant to the question whether a particular activity amounts to self-employment. While the absence of a contractual relationship of 'reciprocal performance' might militate against a finding that payments are made directly, that is not fatal to Mr N's attempt to establish self-employed status. Payments need not be made directly provided that a person is working for a profit-making objective or pecuniary advantage, and the income in question "permits him to meet some or all of his needs" (*van Roosmalen* at paragraph 22). Mr Bagshaw for Mrs N accepts that *van Roosmalen* did not concern a non-contributory benefit such as child benefit but that was not a principled reason for distinction.

50. Arguably, the decisions in *van Roosmalen* and *Jany* are inconsistent. *Van Roosmalen*, at paragraph 22, finds that remuneration need not necessarily constitute a direct reward. It is sufficient that a person receives income to meet some or all of his needs. *Jany*, on the other hand, refers to remuneration paid to a person directly and in full. However, it should be remembered that the cases had different contexts. *Jany* concerned (a) the activity of prostitution so that there was perceived to be a need for a strict definition of self-employment in order to discourage movement of Polish and Czech nationals into the European Union for the purposes of prostitution; and (b) only an Association Agreement between the European Community and the Polish and Czech Republics. *Jany* is authority only for the proposition that the Association Agreement might have precluded immigration controls of the type in issue in that case.

51. Alternatively, if *Jany* has a wider scope than that contended for in Mrs N's principal submission, the stringency of the *Jany* test is indicative of the need particular to that case to

distinguish between employment and self-employment. The same need does not arise under the Directive.

52. For the above reasons, if *Jany* and *van Roosmalen* are in conflict, the Upper Tribunal should prefer *van Roosmalen*.

53. I understand Mr Bagshaw for Mrs N to argue that *Jany* should be interpreted in the light of the Advocate-General's opinion (although the opinion was absent from his authorities bundle). Mr Bagshaw drew attention to and, as I understand it, relied on the Advocate-General's opinion that consideration was an essential element. I asked Mr Bagshaw to clarify the point at the hearing because, on the face of it, it weakened his case because consideration appears absent in the case of a street musician who solicits donations from passers-by. Mr Bagshaw then told me that his submission was that, in referring to consideration, the Advocate-General had in mind only the workings of the association agreement. I found that clarification difficult to follow.

54. Mrs N submits that her case is supported by Regulation *883/2004*, which is the current European legislation about co-ordination of Member States' social security systems. This argument was put for the first time at the hearing not having been foreshadowed in either Mrs N's written submissions nor her skeleton argument. Further, Regulation *883/2004* was not included in the Appellant's bundle. Despite this, Mr Rainsbury for HMRC very fairly did not object.

55. Article 1(b) of Regulation *883/2004* defines "activity as self-employed person" as "any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situations exists". The reference to 'equivalent situation' shows that the meaning of 'self-employed' goes beyond those activities recognised as self-employment for the purposes of a Member State's social security legislation.

56. The Appellant also relies on the general definition of "taxable person" in Article 4(1) of Directive *77/338/EEC*, which is "any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity". Directive *77/338/EEC* is about VAT. The activities specified in Article 4(2) include "all activities of…persons supplying services". Article 4(4) goes on to provide that "the use of the word "independently" in paragraph 1 shall exclude employed and other persons from tax in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions,

remuneration and the employer's liability". Mr Bagshaw argues that this shows a legislative contrast with self-employment, and emphasises the independent nature of self-employment together with the absence of a requirement for a remunerated relationship. Since both this VAT Directive and the European legislation that bears directly on Mr N's situation are concerned with economic activity, the VAT Directive is relevant in interpreting that legislation. If that is so, it is not clear to me why *Tolsma*, as Mr Bagshaw also argued, should be left out of account.

57. At the hearing, in response to my questions, Mr Bagshaw argued that monies received by Mr N were not gifts because gifts, by their nature, are not solicited. In fact, he added that the act of solicitation could provide the necessary direct element referred to in the third *Jany* criterion.

58. As I have already mentioned, Mr Bagshaw for Mrs N supplied post-hearing written submissions. The submission begins with arguments under the heading 'Ground 1':

(a) while *Jany* at paragraph 33 states that the provision of services for remuneration is to be regarded as an economic activity, the Court did not hold that 'economic activity can only be regarded as such if services are provided for remuneration'. This point is supported by the reference in paragraph 49 to prostitution falling "within the concept of economic activities";

(b) *Jany* at paragraph 71 states that the service of prostitution, assuming the three *Jany* conditions are satisfied, ranks as the performance of an economic activity by a self-employed person. Here, 'service' is incidental to the activity of prostitution. It is neither a pre-condition of self-employment nor does it form "part of any of the three tests by which it is defined". Indeed, paragraph 34 draws a distinction between employment and self-employment in that the former involves a person performing a 'service' for and under the direction of another while the latter involves a person performing an 'activity' outside a relationship of subordination;

(c) when defining self-employment, EU 'statutes' simply refer to an "activity" or, in the case of Regulation EC No.883/2004, as "an activity or equivalent situation". No EU statute, which includes the Treaty and the 2006 Regulations, define self-employment so as to confine the concept to activities consisting of services. While Article 4(2) of the Sixth Council Directive on tax harmonisation refers to "all activities of producers, traders and persons supplying services", it does so in order to exclude from taxation other economic activities carried out by independent persons. This shows that, under Article 4(2), economic activities must exist that do not consist of or involve supplying services;

(d) nevertheless, whether or not a person provides services is "a helpful evidential tool towards establishing whether the person is self-employed". This is illustrated by *JR* in which the Upper Tribunal considered services provided in return for payment of Carers Allowance in the contexts of both "worker and self-employment". Whether services were provided was used as an evidential tool, together with the question of remuneration, in "determining the factual position as to the nature of the activity of question". It is to be noted that, at paragraph 12, the Upper Tribunal in *JR*, having noted that 'worker' has an autonomous EU meaning which must be interpreted broadly, went on to note that the concept has limits and , according to *Levin* at paragraph 17, only covers those who "pursue or are desirous or pursuing an economic activity". Accordingly, the question to be asked in the present case is whether Mr N was pursuing or desirous of pursuing an economic activity, rather than 'was he providing a service to the public'? However, it is conceded that the answer to the latter question may go some way towards answering the former question;

(e) alternatively, if the provision of services is a necessary condition of self-employment, *Tolsma* at paragraph 17 states that, in the context of a street musician, "there is no necessary link between the musical service and the payments to which it gives rise". The reference to 'musical service' cannot be obiter because *Tolsma* was decided in the light of the Advocate-General's opinion, which posed the question, in the footnote to paragraph 18 of the opinion, whether a street musician could ever be providing a service;

(f) HMRC rely on the Upper Tribunal's decision in *JR*. In that case, however, the Tribunal 'made much' of certain features of the Carers Allowance regime namely that it could not be known where, when or how caring is performed, whether it is useful or of any particular quality. The situation of a street musician is far removed from that. The street musician operates from a pitch at certain hours and days of the week in full public view, and the quality of his performance is likely to determine the level of remuneration. While there is no 'control' over the activity of a street musician, control was only relevant in *JR* when the Upper Tribunal considered whether an individual was a worker in employment;

(g) if HMRC consider *JR* to be relevant by highlighting the need for consumer, rather than employer, control their argument is misconceived. Consumers cannot control where, when and how an orchestra performs. Their control is limited to paying to attend a concert venue. Similarly, those passing-by a street musician, while they are passive consumers, "exercise a degree of control in that they do not have to pay for music that they do not like". If a street musician's music is unpopular, he will earn less money. While direct control, in the form of requests for specific tunes, is absent, that is only because a street musician's income would be

substantially reduced were he to wait for requests from passers-by. Nevertheless, a street musician does solicit for remuneration. Passers-by know that what they throw into a collecting tin is a payment in return for musical services, regardless of individual motives for making those payments;

(h) this part of Mr N's submission is summarised in the following terms:

> "…the supply of services is a helpful evidential tool towards establishing a state of self-employment but it is not a legal requirement which in its absence such a state cannot exist. Where the service is also effected for consideration, that is a further evidential tool towards establishing whether a person is self-employed or not (at para. 133 Advocate-General's opinion in *Jany*), but it is only a legal requirement as far as liability to pay value added tax is concerned."

59. The written submission goes on to make further arguments under the heading 'Genuine and Effective Work Principle – Normal Labour Market Test':

(a) the 'normal labour market' test is not applicable to self-employed persons, which is why *Trojani*, at paragraph 27, excludes "paid activities from the right to freedom of establishment as a self-employed persons under what was then Article 43 EC". The normal labour market test applies only to employment relationships, that is as a means of establishing whether work is 'real' or 'genuine';

(b) *Trojani*, at paragraph 18, and *Bettray*, at paragraph 17, hold that activities cannot be real and genuine if they constitute a person's means of rehabilitation or reintegration. *Trojani*, at paragraph 22, went on to hold that it is for the national court to establish the existence of the constituent elements of any paid employment relationship, namely subordination and payment of remuneration and, at paragraph 23, that the national court "would have to establish that the paid activity in question is real and genuine". At paragraph 24, *Trojani* holds that, in performing that exercise, the court must ascertain whether services performed are capable of being regarded as forming part of the national labour market;

(c) to conclude, the normal labour market test is a purposive test directed at whether work undertaken is real or genuine, since in some cases payment by an employer may bear little or no relationship to the work actually performed. However, the test cannot be applied to self-employment "as any income generated by them is a product of their economic activity, so the level of that remuneration is a valid and objective means by which that activity can be tested as to whether it is genuine and effective".

60. The post-hearing written submission accepts that 'non-subordination' and 'own responsibility' are "essential elements of self-employment".

61. Under the heading 'Remuneration Principle', the submission argues:

(a) in *JR*, the Upper Tribunal took into account that Carers Allowance payments bore no relation to the caring work performed, and that the 35 hours care per week entitlement condition equated to payments that fell well below the statutory minimum wage. While *JR* concerned both workers and the self-employed, and there is no national minimum wage for the self-employed, if a street musician's income is very low, he may fail to satisfy the 'genuine and effective test' so that he cannot be regarded as self-employed;

(b) in *Tolsma*, both the Court's decision and the Advocate-General's opinion confined themselves to the question whether, in the case of a street musician, "consideration existed for a service supplied". That was the relevant question for VAT purposes and, accordingly, it was not used to determine whether a street musician was self-employed;

(c) *Tolsma*, at paragraph 17, held that there was no necessary link between the musical service provided and the payments to which it gave rise, but such a link was necessary under Article 2(1) of the relevant VAT Directive. However, "that is not the same as saying that there was no link whatsoever between the service provided and solicited non-contractual payments";

(d) HMRC seem to rely on *Trojani*, at paragraph 22, on the basis that it refers to 'consideration' and 'remuneration' interchangeably. However, all the Court really found was that, in finding that benefits in kind and money transferred to Mr Trojani constituted consideration for services provided by him, the existence of the constituent elements of an employment relationship were established including the payment of remuneration. In other words, the presence of consideration was simply "evidence towards establishing the payment of remuneration";

(e) regarding the third condition in *Jany*, it is important to remember the context to that case. In dealing with self-employment generally, paragraph 37 referred only to the first and second conditions. The third condition is not mentioned until paragraph 70 "where the Court states that three rather than two conditions need to be applied as to "whether the conditions allowing it to be concluded that prostitution is being carried on by the person concerned in a self-employed capacity are satisfied"". Here, the Court was seeking to exclude cases where payments were "going, either directly or indirectly or in full or in part, to pimps";

(f) Mr Bagshaw accepts that the third *Jany* condition has been widely used in "ascertaining self-employment generally", i.e. in cases whose facts diverge from those in *Jany*. Nevertheless, if the third condition is applied to street musicians, it is capable of being satisfied. Payments are made directly if put in a collection tin or similar in the musician's immediate vicinity. Payments are also made in full "so long as all or part of those payments do not go to a gang-master or similar third party". The amounts of payments may vary widely but their non-contractual nature simply enables the payer to place his own subjective value on the music provided. The quality of music, however, is a factor in the payer's valuation "and goes some way towards determining the level of remuneration granted". The payer's motive is irrelevant so long as he is aware that payment is being made for the musical service provided;

(g) a street musician may be readily distinguished from a beggar. Payments to a beggar are clearly not in return for any service provided nor may a beggar properly be described as working for payment. Work for payment should be "read in a common sense way" (*CD v HMRC (TC)* – no citation supplied - and *R/IS/93*).

62. The written submission also makes further arguments in relation to ground 2 but it is not necessary to set these out here.

H.M.R.C.

63. HMRC's initial written response to Mrs N's appeal argued that a street musician was capable of being a self-employed person for the purposes of the Directive. Prior to the hearing, however, with my permission HMRC resiled from that position. At the hearing, Mr Rainsbury for HMRC argued that a person who performs music in public in order to solicit donations from passers-by cannot be a self-employed person for the purposes of the Directive.

64. HMRC submit that, while the relevant European legislative instruments do not define self-employment, certain principles are established in case law. In *Jany*, the Court of Justice held that the following conditions must be met:

(i) the activity must be carried on outside any relationship of subordination concerning the choice of that activity, working conditions and conditions of remuneration;

(ii) the activity must be carried on under the person's own responsibility;

(iii)the activity must be carried on in return for remuneration, paid to the person directly and in full.

65. Mr Rainsbury argues that *Jany* is not limited to the interpretation of terms used in the Association Agreement. The Court of Justice set out general principles. Mr Rainsbury accepts that, on the face of it, *Jany* and *van Roosmalen* might appear in conflict. However, *van Roosmalen* was not seeking to set out general principles and is best understood by reference to its particular facts.

66. Mr Rainsbury submits that, in order to be self-employed, a person must be engaged in 'effective and genuine' economic activity:

(a) in determining the existence of effective and genuine economic activity, a national court must base its examination on objective criteria and assess, as a whole, all the circumstances of a case concerning both the nature of the activities concerned and the employment relationship in issue (*Ninni-Orasche,* Case C-413/01);

(b) an activity is not genuine and effective if purely marginal and ancillary. In *Raulin,* Case C-357/89, the CJEU decided:

> "The national court may, however, when assessing the effective and genuine nature of the activity in question, take account of the irregular nature and limited duration of the services actually performed…The fact that the person concerned worked only a very limited number of hours in a labour relationship may be an indication that the activities exercised are purely marginal and ancillary";

(c) in *Trojani,* Case C-456, the European Court of Justice said that "the national court must in particular ascertain whether the services actually performed…are capable of being regarded as forming part of the normal labour market". Playing street music, regardless of its frequency and duration, cannot be regarded as forming part of the 'normal labour market'. It cannot therefore be a form of genuine and effective economic activity;

(d) the person must be providing a service in order to demonstrate 'economic activity': *Jany* at paragraphs 33, 49 and 71. The Upper Tribunal in *JR* considered whether a person in receipt of Carer's Allowance was either a worker or a self-employed person. The appellant in *JR* needed to establish that he was "a person performing services in return for remuneration" and, if he could not, that would have been fatal both to his argument that he was a worker and that he was self-employed. The Carer's Allowance eligibility criteria did not support a finding that

the appellant was required to do "anything particular by way of caring" nor could the fact that the criteria were adjudged met on the award of the Allowance support any finding as to "what he actually does". It followed that, being in receipt of Carer's Allowance, was not "consistent with the notion of a 'service'". Upper Tribunal Judge Ward added that "people who pay for a service do not do so on the basis that it is likely to be provided but that it is provided";

(e) Upper Tribunal Judge Ward's analysis in *JR* is applicable to street musicians. Passers-by do not ask for music to be played nor do they control where, when or how any music is played. They have no control over whether music is played at all nor, if it is, its quality. These features are not consistent with the provision of a 'service';

(f) *JR* is also relevant to the question whether street music is played in return for remuneration paid to a person directly and in full. Upper Tribunal Judge Ward held that activities carried out pursuant to an award of Carer's Allowance did not amount to a 'service'. The Carer's Allowance eligibility criteria refer to the provision of at least 35 hours of care each week, which equates to an hourly sum of £1.70, and suggested that Carer's Allowance payments were not a remuneration for services as did the fact that 34 ½ hours of weekly care would result in no award of the Allowance together with the statutory prohibition on a person being paid more than one Allowance in respect of a particular day

(g) ultimately, it is for the domestic court to determine, in the light of the evidence, whether a person is self-employed (*Jany* at paragraph 70).

67. HMRC submit that a street musician, or 'busker', cannot satisfy the *Jany* condition. While the first and second conditions might be capable of being satisfied, depending on the evidence, the third, which requires an activity to be carried on in return for remuneration, paid to the person directly and in full, cannot.

68. HMRC's written submissions argued that *Tolsma*, Case 16/93, was persuasive authority in support of the above propositions. *Tolsma* decided:

> "16. If a musician who performs on the public highway receives donations from passers-by, those receipts cannot be regarded as the consideration for a service supplied to them.
>
> 17. Firstly, there is no agreement between the parties since the passers-by voluntarily make a donation whose amount they determine as they wish. Secondly, there is no necessary link between the musical service and the payments to which it gives rise.

> The passers-by do not request music to be played to them; moreover they pay sums which do not depend on the musical service but on subjective motives which may bring feelings of sympathy into play. Indeed some place money, sometimes a considerable sum, in the musician's collecting tin without lingering, whereas other listen to the music for some time without making any donation at all."

69. HMRC's written submissions accepted that *Tolsma* was decided under a very different branch of European law namely V.A.T. and, moreover, was not concerned with the concept of self-employment. It is not therefore binding on the Upper Tribunal in the present case. However, it is persuasive authority for the purposes of the third *Jany* condition. In particular, *Tolsma* supports the proposition that no street musician may be regarded as supplying services effected for consideration. It follows that such a person cannot be regarded as carrying on an activity in return for remuneration.

70. At the hearing, Mr Rainsbury placed less emphasis on *Tolsma*, submitting that reliance on VAT Directives in the present context was only likely to lead to confusion.

71. Further support for the proposition that, absent the carrying out of services for consideration, a person does not carry on an activity in return for remuneration is found in case law:

(a) in *Trojani*, Case C-456/02, it was held (HMRC's emphasis):

> "Having established that the benefits in kind and the money provided by the Salvation Army to Mr Trojani constitute the consideration for the services performed by him by and under the direction of the hostel, the national court has thereby established the constituent elements of any paid employment relationship, namely subordination and the payment of remuneration";

(b) *Steymann*, Case C-196/87, concerned a German national who settled in the Netherlands in order to join a religious community. He carried out plumbing and, in common with other members, general household duties. The community met Mr Steymann's material needs, including provision of pocket money. The Court held that the activities of members of the community constituted economic activity in so far as the services which the community provides to its members may be regarded as the indirect *quid pro quo* for effective and genuine work;

(c) in *CD v HMRC* Upper Tribunal Judge Markus Q.C. decided that the First-tier Tribunal erred in law by relying on *Tolsma* in determining whether an individual was engaged in qualifying remunerative work for the purposes of entitlement to working tax credit. The relevant legislative condition for that benefit did not, as a rule, require remuneration. Working in expectation of payment might suffice.

72. Mr Rainsbury draws attention to the potential consequences were the Upper Tribunal to accept the Appellant's submissions. A new entrant to the UK could sit around all day in public incompetently playing the spoons, for example, eliciting donations motivated by sympathy, and thereby attaining a right to reside as a self-employed person and, in consequence, rights to benefits.

73. On 9 January 2020, I gave directions requiring HMRC to respond to Mr J's post-hearing written submissions with which HMRC duly complied. HMRC were directed, in particular, to respond to Mr J's submissions that, properly construed, the third *Jany* condition, applies only in cases of prostitution and its functions is to inhibit the transfer or payments to pimps. Unfortunately, HMRC's response was not forwarded to me until December 2020. Since early 2020, I have worked mainly from home, and I understand that the Chamber's case file record indicated that the file, together with HMRC's response, was with me at home when it was not. When this oversight became apparent, the case file, with HMRC's response, was sent to me at home via secure courier.

74. HMRC's response to Mrs N's post-hearing submissions begins by summarising their general case:

(a) a street musician does not provide a service (*JR*);

(b) playing street music is not a "genuine and effective" economic activity because it cannot be regarded as "forming part of the normal labour market" (*Trojani*);

(c) street music is not played in return for remuneration paid directly and in full (*Tolsma* and *JR*).

75. The First-tier Tribunal erred in law because it should have dismissed Mr J's appeal on the categorical basis that a street musician is incapable of being a self-employed person for the purposes of the Directive. However, the tribunal's error was immaterial. It arrived at the correct result.

76. More specifically, HMRC's response to Mr N's post-hearing submissions, apart from those related to the third *Jany* condition, argues:

(a) the provision of services is a necessary element of self-employment, as is recognised by both EU and domestic jurisprudence. *Jany*, at paragraph 34, holds that "the essential characteristic of an employment relationship within the meaning of Art.48 of the EEC Treaty (now…Art.39 EC) is the fact that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration, any activity which a person performs outside a relationship of subordination must be classified as an activity pursued in a self-employed capacity for the purposes of Art.52 of the Treaty". *JR*, at paragraph 14, held that the Appellant needed to establish that he was providing services for which remuneration was received. Otherwise he could be neither employed nor self-employed. In neither case was the provision of services treated as merely an 'evidential tool';

(b) any remark made about provision of services in *Tolsma* could not be determinative. It was a VAT case and, moreover, the Court's focus was on the link between service and consideration;

(c) the argument that *JR's* only concern was whether the Appellant was a worker in employment misreads the decision;

(d) listening to street music cannot be compared to the contractual transaction of paying to listen to an orchestral performance;

(e) Mr N himself appears to concede that there is no 'control' over the activities of a street musician;

(f) Mr N's 'labour market' arguments lack coherence and misread *Trojani*. On this issue, there is no principled basis for distinguishing between the employed and self-employed (see *DV v HMRC* [2017] UKUT 155).

77. In relation to the third *Jany* condition, HMRC's response argues:

(a) paragraph 37 of *Jany* must be read with paragraph 33 in which the Court describes as 'settled case law' the principle that "the pursuit of an activity as an employed person or the provision of services for remuneration must be regarded as an economic activity within the meaning of Article 2 of the EC Treaty (now…Article 2 EC), provided that the work performed is genuine and effective and not such as to be regarded as purely marginal and

ancillary". Of itself, this shows that the Court did not intend to limit its general test so that it applied only to the requirement for non-subordination and own responsibility, as Mr N argues;

(b) it cannot have been the Court's intention to establish one test of general application but for an additional requirement to apply (*Jany* condition 3) in the case of prostitution. Had that been the Court's intention, there would be something in the decision to give expression to that intent. Further, Upper Tribunal case law, in non-prostitution cases, applies *Jany* condition 3 without apparent hesitation (*HB v HMRC* [2014] UKUT 544);

(c) a street musician cannot satisfy the third *Jany* condition; his activity is not carried out in return for remuneration, only in the hope of donation, and there is no "directness or fullness in payment".

Parties' arguments on ground 2

78. The second ground of appeal only arises for determination if the first ground succeeds. HMRC concede that it was unrealistic for the First-tier Tribunal to expect Mr N to supply receipts for monies given to him by passers-by. However, this was not the only matter relied on. The tribunal also gave weight to the absence of 'any other supporting evidence'. It was for Mr N (through the Appellant Mrs N) to substantiate the generalised assertions made about the time spent performing in the street and monies received. Mr N did not do so despite it having been made clear to him / Mrs N that he needed to substantiate his claims. This ought not to have been a particularly onerous task. He could, for example, have supplied photographs of his 'pitch', including any collecting tin or hat, witness statements from other street musicians, including any said to have played with Mr N, receipts for travel expenses or an income schedule (as Mrs N supplied in support of her case to have a right to reside in her own right). As it was, the case relating to Mr N never went beyond broad assertions made by third parties. Mr Bagshaw for Mrs N disagrees. In substance, the First-tier Tribunal rejected Mr N's argument that he was self-employed because he failed to provide receipts from those passers-by from whom he received money, which was a wholly unrealistic requirement to impose on a busker / street musician.

Conclusions

79. The Directive supplies no definition of "self-employment". The Treaty contains certain indications as to its meaning of self-employment, for example in providing that the right to take up and pursue activities as a self-employed person is an aspect of freedom of

establishment. But, again, there is no defined term. Certain European legislation does define self-employment, although at times this is done by reference to the domestic law of Member States:

(a) Directive 2010/41/EU, on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, "covers (a) self-employed workers, namely all persons pursuing a gainful activity for their own account, under the conditions laid down by national law" (Article 2);

(b) Regulation (EC) No. 883/2004 on the coordination of social security systems provides, in Article 1, that "activity as self-employed person" means "any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situations exists".

(c) Regulation (EC) No 987/2009, which lays down the procedure for implementing Regulation (EC) No 883/2004 provides, in Article 14(3):

> "For the purposes of the application of Article 12(2) of the basic Regulation, the words 'who normally pursues an activity as a self-employed person' shall refer to a person who habitually carries out substantial activities in the territory of the Member State in which he is established…".

(d) Directive 2006/123/EC, on services in the internal market, says the following in recital 87:

> "…this Directive should not affect the right for the Member State where the service is provided to determine the existence of an employment relationship and the distinction between self-employed persons and employed persons, including 'false self-employed persons'. In that respect the essential characteristic of an employment relationship within the meaning of Article 39 of the Treaty should be the fact that for a certain period of time a person provides services for and under the direction of another person in return for which he receives remuneration. Any activity which a person performs outside a relationship of subordination must be classified as an activity pursued in a self-employed capacity for the purposes of Articles 43 and 49 of the Treaty".

80. The European legislative bodies must have had a reason for not taking a uniform approach to the concept of self-employment. Therefore, caution should be exercised before applying case law about the meaning of self-employed person in one legislative context to another.

Accordingly, in arriving at my conclusions I tend not to rely on case law, such as *Tolsma*, concerned with branches of EU law other than rights of free movement.

81. I deal first with Mrs N's argument that *Jany* was essentially a decision limited to its own place, time and circumstances, i.e. the application of Association Agreements to nationals of candidate States seeking to work as prostitutes in EU Member States. If Mrs N is correct, a major plank of HMRC's case falls away.

82. In my judgment, *Jany* is not confined to its own place, time and circumstances. A central issue in *Jany* was whether terms used in the Association Agreements bore the same meanings as in the Treaty. The Court held that they did and, in so doing, must have known that its findings would be of application to the Treaty. No part of *Jany* has been drawn to my attention in support of the argument that *Jany's* findings about the meanings of certain terms in the Association Agreements, being terms with analogues in the Treaty, were not intended to be an authoritative interpretation for the purposes of the Treaty. Further, I do not see how the Court could have given useful answers to the referred questions without addressing the meaning of certain terms used in the Treaty. I also reject the argument that, given *Jany'*s supposed public morality context, it is a decision best understood by reference to its own facts. In my judgment, the Court was quite clear that its decision was unaffected by any desire to inhibit the practice of prostitution for reasons of public morality. This seems to have become a non-issue once the Court found that the activity in question was not subject to prohibition under Dutch domestic law. It seems that the test in paragraph 70 of *Jany* was formulated during the course of the Court's analysis of the third referred question. However, given the terms in which the test was formulated, that does not disclose an intention to confine the test to cases of self-employed prostitutes.

83. So is *Jany* relevant to interpretation of the Directive? *Jany* was brought by non-EU nationals, and did not involve anyone seeking to rely on rights under the Directive. However, the rights in issue were elucidated by reference to the free movement provisions of the Treaty in so far as they applied to self-employed Member State nationals.

84. It cannot seriously be disputed that the Directive connects with and supports the rights of free movement and residence provided for by the Treaty. Article 1(a) of the Directive provides that it "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…". In other words, the Directive states that it is not the source of such rights. Rather, its purpose is to govern the *exercise* of these rights. In my judgment, the Directive should be interpreted consistently with European case law, including *Jany*, about the nature of

rights of free movement and residence. If for no other reason, this is necessary in order to (a) give effect to Article 1(a) of the Directive, and (b) respect the distinction drawn by the European legislation between the creation of rights of free movement and residence (in the Treaty) and regulation of the exercise of those rights (in the Directive). This can hardly be a contentious point.

85. It follows from the above analysis that, on the face of it, 'self-employment', as used in the Directive, is to be interpreted in accordance with *Jany*. What, then, of *van Roosmalen*? Is that decision as persuasive, for present purposes, to *Jany*? If so, are the decisions in conflict? I shall begin with the second question since, if there is no conflict, the first question need not be answered.

86. As I have explained, *Jany* was decided by reference to the free movement provisions of the Treaty. The issues in *van Roosmalen* concerned the interpretation of a Regulation about co-ordination of social security schemes, although they were analysed by reference to the fundamental principle of free movement. Hence, *Jany* and *van Roosmalen* have similar legal foundations. For this reason, the different legislative contexts do not in my judgment provide an obvious justification for distinguishing the decisions. That said, the circumstances of *Jany* appear to me to have a greater affinity with the circumstances of the present case than those of *van Roosmalen.*

87. In my view, a close reading of *Jany* demonstrates how the Court developed its conception of self-employment:

(a) at paragraph 34 the Court referred to an activity pursued in a self-employed capacity as "any activity which a person performs outside a relationship of subordination". If one refers back to paragraph 33, it may be seen that, by 'activity', the Court meant 'economic activity';

(b) at paragraph 37 the description of self-employment was cast in more specific terms as "economic activities carried on by a person outside any relationship of subordination with regard to the conditions of work or remuneration and under his own personal responsibility";

(c) the concept of 'economic activities' was subject to further elucidation by the Court. At paragraph 48, the Court found that the concept included "an activity by which the provider satisfies a request by the beneficiary in return for consideration without producing or transferring material goods". On my reading, the Court's point was that economic activity encompassed the activities involved in satisfying a beneficiary's request in return for

consideration meaning, in this respect, a beneficiary's request for something other than production or transfer of material goods;

(d) drawing the strings together, at paragraph 70 the Court identified three cumulative conditions which constitute a test for determining whether an activity amounts to self-employment. The activity must be:

> "[1] - outside any relationship of subordination concerning the choice of that activity, working conditions and conditions of remuneration;
>
> [2] - under that person's own responsibility; and
>
> [3] - in return for remuneration paid to that person directly and in full."

88. Mrs N argues that, even if Mr N did not provide a service for remuneration, her appeal might still succeed. Mrs N submits that the key issue is whether a person, such as Mr N, was pursuing, or desirous of pursuing, an economic activity, not whether a person was providing a service to the public. She argues that the provision of remuneration is of evidential, rather than substantive, significance. If I follow *Jany*, I must reject this argument. In my judgment, the test in paragraph 70 of *Jany* requires the payment of remuneration. Otherwise, condition (3) would make no sense. The existence of 'conditions of remuneration' is also part of condition (1), albeit the conditions of remuneration must be 'outside any relationship of subordination'.

89. Mrs N argues that the question whether a service is effected for consideration is another matter of evidential value only. It is not necessary for me to address issues related to consideration, such as whether it differs from remuneration (although I am included to think not given paragraphs 48 and 49 of *Jany*, which appear to treat the concepts as synonyms). This is because *Jany's* three-part test refers to remuneration rather than 'consideration'. For the same reason, I see no need for present purposes separately to address whether it is necessary, in order to establish self-employment, for the activities of street musicians to form part of the national labour market.

90. I now deal with the argument that the third *Jany* condition was intended to apply in some cases of self-employment (i.e. prostitution) but not others. It is true, as Mrs N points out, that, in paragraph 70 of *Jany*, the first and second conditions are dealt with before the third. But that, of course, is to be expected since the conditions are cumulative; something had to come first in the sequence, something else last. I do not accept the argument that condition (3)'s purpose was to inhibit the transfer of cash to pimps so that, outside cases of prostitution,

questions as to payment of remuneration do not arise. I do not discount the possibility that the reference in condition (3) to remuneration being paid directly and in full was influenced to some extent by the activity of 'pimping' and, for that reason, discounting as self-employment cases in which all or a portion of a prostitute's earnings are handed over to a pimp. But, even if that is the case, it does not follow that, outside prostitution cases, issues as to payment of remuneration do not arise. Condition (3) presupposes an agreement as to the amount of remuneration because, in the absence of agreement, no one could know whether remuneration, when it is paid, has been paid in full. This reflects the reference to 'conditions of remuneration' in condition (1). For conditions of remuneration to exist, they must be agreed (and, in the light of condition (1), be outside any relationship of subordination). Whether the route taken is via condition (1) or condition (3), in my judgment the *Jany* test requires some kind of agreement as to remuneration.

91. I must now address whether *Jany* and *van Roosmalen* are in conflict. In my view, *van Roosmalen's* treatment of 'remuneration' is difficult to reconcile with that in *Jany*:

(a) remuneration features in both the first and third *Jany* conditions. Under condition (1), an activity must be outside any relationship of subordination concerning conditions of remuneration. As I have said, that implies the existence of conditions of remuneration, which is reinforced by condition (3) and its requirement for remuneration to be paid to a person directly and in full;

(b) in *van Roosmalen* the Court decided that it was not necessary for a person to receive "remuneration as a direct reward for his activity". Provided the activity took the form of an occupation, it was sufficient for the person to receive, in respect of the activity, income which permitted him to meet all or some of his needs. That requirement could be satisfied even if income were supplied by third parties such as those benefitting from the services of a missionary priest;

(c) while both decisions describe activities involving some type of financial transfer, the range of recipients are not identical. *Jany* condition (3) requires 'remuneration' to be paid to an individual directly and in full. *van Roosmalen*, however, refers to the supply of 'income' by third parties which permit the recipient to meet all or some of his needs. It is possible that, in *van Roosmalen*, the Court considered that 'remuneration' and 'income' were different concepts. The Court may have considered that there was no need for remuneration as a 'direct reward' but there was a requirement for the supply of income. However, another reading is that the Court did not exclude remuneration in its entirety only the requirement for remuneration as a 'direct reward'. Whatever the Court's reasons for distinguishing between

'remuneration' and 'income', if it did in fact draw such a distinction, in my judgment it is tolerably clear what the Court meant here. In order to be self-employed, an individual was not necessarily required to receive sums whose quantification was directly referable to the activity performed. A looser association between income and activities might in suffice.

92. If *Jany* and *van Roosmalen* are in conflict, I prefer *Jany* for the following reasons:

(a) *Jany* involved a far more developed analysis of self-employment, rooted in the free movement provisions of the Treaty. While *van Roosmalen* referred to the need for a broad definition of self-employment, in order to give full effect to the fundamental principle of free movement, its analysis really went no further. *Jany*, by contrast, involved a considered analysis of how fundamental principles of free movement would be facilitated by its approach to the concept of self-employment;

(b) *Jany* was directly concerned with free movement and associated rights, as is the present case. While *van Roosmalen's* conclusion was explained in part by reference to Treaty principles of free movement, the case arose under Community legislation on co-ordination of social security schemes. It also concerned an individual, unlike Mr N, who was already a beneficiary of a Member State's social security scheme being a scheme for which he was voluntarily insured;

(c) I struggle to identify the 'income' that the Court in *van Roosmalen* took to have been supplied to Father van Roosmalen by his Zairean parishioners. It seems that, when the case began, he was described as a person who had been maintained by parishioners in Zaire, which, for reasons I need not go into, ranked as relevant work for the purposes of Dutch invalidity pension rules. At some stage, 'maintenance' became replaced or equated with 'income' but it is not clear to me how or why;

(d) no case has been cited to me in which either the European Court of Justice or the Court of Justice of the European Union applied *van Roosmalen's* findings that (i) there is no requirement for remuneration in the form of a 'direct reward' or (ii) self-employment may be made out merely by the supply of income by third party beneficiaries some or all of which permit the recipient to meet his needs.

93. If *Jany* and *van Roosmalen* are in conflict, I prefer and follow *Jany*. On the assumed facts of the present case, that is on the assumption that Mr N performed as a conventional street musician or 'busker' soliciting donations from passers-by, the First-tier Tribunal made the correct decision even though its assumption that a street musician was capable of being self-

employed was legally flawed. Mr N could not have satisfied the *Jany* test because his activity did not involve any agreement as to remuneration: there could not have been any common advance understanding or meeting of minds as to the amount of remuneration. The giving of donations by passers-by does not involve a common understanding as to the amount of remuneration provided to the street musician, and there is also a good argument that, for the same reason, it does not involve remuneration at all. It is a matter of pure chance whether the sum provided matches the musician's expectation. It follows that questions as to genuineness and effectiveness do not arise.

94. Since Mr N could not have been considered self-employed for the purposes of the Directive (nor the 2006 Regulations), Mrs N could not have established a right to reside as the family member of a qualified person. I therefore dismiss this appeal.

95. It might be argued that *van Roosmalen* does not assist a person in Mr N's position either. *van Roosmalen* refers to an individual pursuing an 'occupation'. Arguably, a street musician does not pursue an occupation since the activity lacks any associated entry criteria, external quality assurance or recognised qualifications. But, even if Mr N was pursuing an occupation, I would decline to hold that, in the light of *van Roosmalen*, he should be regarded as self-employed. As explained above, this is because, in the event of conflict, I prefer, and follow, *Jany*.

96. Mr N advances a number of arguments about the Upper Tribunal's decision in *JR*. Since I decide ground 1 against Mr N by applying *Jany*, I need say no more than that I am satisfied there is nothing in these reasons that is inconsistent with *JR*.

97. Since ground 1 is not made out, ground 2 does not arise.

Mr E Mitchell
Judge of the Upper Tribunal
Authorised for issue on 31 January 2021.