Neutral Citation Number: [2024] EWCA Civ 1454

Case No: CA-2024-000119

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)
Upper Tribunal Judge Ward
[2023] UKUT 112 (AAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 November 2024

Before :

LADY JUSTICE KING
LORD JUSTICE SINGH
and
LORD JUSTICE POPPLEWELL

- -

Between :

SECRETARY OF STATE FOR WORK AND PENSIONS	**Appellant**
- and -	
(1) WILFRIED VERSNICK **(2) ISLA JARVIS-WINGATE**	**Respondents**

- -
- -

James Cornwell (instructed by the **Treasury Solicitor**) for the **Appellant**
The **First Respondent** did not appear and was not represented
Tom Royston and Alexa Thompson (instructed by the **Child Poverty Action Group**) for the **Second Respondent**

Hearing dates: 22-23 October 2024

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Approved Judgment

This judgment was handed down remotely at 2 p.m. on 29 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Singh:

Introduction

1. This is an appeal by the Secretary of State for Work and Pensions against the decision of the Upper Tribunal (Administrative Appeals Chamber) ("UT"), given by UT Judge Ward ("the Judge") on 15 May and sealed on 19 May 2023. With the permission of this Court, the Secretary of State advances three grounds of appeal, which I will address below.

2. The main issue concerns the ability of a European Union ("EU") national to rely on benefits paid to his wife, a British citizen, as evidence of self-sufficiency under Art. 7(1)(b) of Directive 2004/38/EC of the European Parliament and of the Council dated 29 April 2004 ("the Citizens' Rights Directive" or simply "the Directive") such as would have qualified him for Universal Credit ("UC"). It is common ground that the relevant provisions of EU legislation remain applicable to this case despite the fact that the United Kingdom ("UK") has left the EU.

3. Mr Wilfried Versnick ("the First Respondent" or "V") is a Belgian national. Ms Isla Jarvis-Wingate ("the Second Respondent" or "J") is a UK national.

4. The First Respondent is no longer actively participating in these proceedings. The Respondents have separated since the date of the UT decision and the First Respondent has left the UK. The CPAG have confirmed, however, that they remain instructed by him and have received service on his behalf.

Factual background

5. The First Respondent arrived in the UK from Belgium on 17 May 2017 and married the Second Respondent on 7 June 2017. The First Respondent was granted "pre-settled status" under the EU Settlement Scheme for European Union ("EU") and European Economic Area ("EEA") nationals on 19 November 2019 and settled status on 24 May 2022.

6. Before coming to the UK, the First Respondent was self-employed, but his profits appear to have been below the tax threshold. At para 65 of its judgment, the UT noted that his self-employment appears to have been "extremely modest in scale".

7. By the time of the UT decision, the First Respondent had not worked, or sought work, in any capacity since arriving in the UK. However, he acted as a carer for the Second Respondent and received Carer's Allowance, backdated to have effect from 15 September 2017 following a First-tier Tribunal ("FtT") award made on 30 May 2019.

8. The Second Respondent is severely disabled and received "legacy" welfare benefits (Child Tax Credit, income-related Employment Support Allowance ("ESA") and Housing Benefit). She also received Personal Independence Payment at the higher rate for mobility and daily living components, as well as Child Benefit.

9. Upon the Respondents' marriage in 2017, they received the couple rate of ESA, with a couple rate enhanced disability premium and carer premium, but without the Second

Respondent's severe disability premium and deducting the First Respondent's Carer's Allowance income from the Second Respondent's ESA applicable amount. As a result, the Second Respondent's ESA entitlement was reduced by £46.85 per week, from £197.60 to £150.75. The Second Respondent's entitlement to her other legacy benefits was unchanged, although the award of Child Tax Credit was now made to the Respondents as a couple.

10. In 2020, the Respondents moved from Cornwall to Devon, triggering a requirement to move from legacy benefits to UC. The Respondents made a joint UC claim on 28 July 2020.

11. On 13 August 2020, the Appellant refused the joint UC claim as the First Respondent failed the habitual residence test as he lacked a qualifying right to reside in the UK for UC purposes. The Second Respondent was awarded UC at the single person's rate as a result.

12. The total sum received by the couple amounted to £2,365.34 per month. The First Respondent's Carer's Allowance accounted for £291.42 of this, while the Second Respondent's benefits made up the remaining £2,073.92. The UC award as a component of the total was £1,326.64. In its decision, at para 20, the UT noted that the Respondents would have been entitled to £2,712.41 per month if they had both been eligible for UC as a couple, with the joint UC award accounting for £1,673.71 of that total sum. The difference is £347.07.

13. The First Respondent requested a mandatory reconsideration of the Secretary of State's decision. The decision was upheld by the Appellant on 16 September 2020.

14. On 22 September 2020, the First Respondent appealed to the FtT. On 7 January 2021, the FtT allowed the appeal and set aside the Appellant's decision. The Appellant then appealed to the UT.

15. By its decision dated 19 May 2023 the UT allowed the Secretary of State's appeal, concluding that the FtT had erred in law for reasons that are no longer in issue. The UT went on, however, to remake the decision in favour of the First Respondent.

The judgment of the UT

16. On remaking the decision, the UT decided that the First Respondent is to be treated as being in Great Britain for the purposes of section 4(1)(c) of the Welfare Reform Act 2012 ("the 2012 Act"), with the consequence that they are entitled to UC jointly with the amount calculated at the couple rate and not the single person rate.

17. The UT first considered the following questions in its decision:

    (1) whether the First Respondent was entitled to rely on the Second Respondent's state welfare benefits in order to establish self-sufficiency; and

    (2) whether the First Respondent had sufficient resources to be considered self-sufficient prior to the UC claim.

18. On the first question, at para 51, the Judge concluded that there was "no reason in principle" why V should not be able to place reliance on resources made available to him by J, derived in part from social assistance payments made to her, in the period before the claim for UC. Accordingly, at para 56, the Judge reached what he described as his "interim conclusion", that V did have sufficient resources not to become a burden on the social assistance of the UK, down to the point of the claim for UC.

19. As to the assessment of the social assistance burden caused by the First Respondent claiming as part of a couple, the UT concurred with the Appellant's assessment that the ongoing burden was the difference between what the Second Respondent received and what she would have received if it was awarded to them as a couple. That difference was £347 per month: see para 12 above.

20. The Judge then considered that the period for which this burden on the UK's social assistance system would continue was approximately 23 months, from the time when the First Respondent claimed UC until the time when he would acquire settled status.

21. At paras 71-74, the Judge considered what the collective impact of that conclusion would be given that there would be others in the same cohort as the First Respondent, who would also be entitled to rely on their partner's social assistance benefits in order to support their own claim to be self-sufficient. The Judge considered the relevant cohort to be (1) EU nationals, (2) who are partners of UK nationals who are in receipt of social assistance, (3) who are eligible for EU Settled Status, (4) who do not have any other right to reside, and (5) in consequence of whose presence in the household the amount of social assistance paid out remained the same or decreased: see para 71.

22. The Judge considered the 26% increase in the monthly amount to be "a relatively small proportion of [the Respondents'] income", and that the cohort of similar cases is "a small one". He concluded, that the collective impact on the UK's social assistance system would not constitute an unreasonable burden: see para 74 of the UT's judgment.

23. The UT therefore considered that the First Respondent had sufficient resources for the purposes of Article 7(1)(b) of the Directive.

Material legislation

24. Under section 2(1) of the 2012 Act, a claim may be made for UC by either a single person or members of a couple jointly.

25. Section 3(2) provides that joint claimants are jointly entitled to UC if (a) each of them meets the "basic conditions", and (b) they meet the "financial conditions" for joint claimants.

26. Section 4 sets out the basic conditions for this purpose. So far as material, section 4(1) provides that a person meets the basic condition who "(c) is in Great Britain". Subsection (5) provides that, for the basic condition in subsection (1)(c), regulations may specify circumstances in which a person is to be treated as being or not being in Great Britain.

27. For the sake of completeness, I should mention that section 5 sets out the financial conditions for the purposes of section 3, although this is not an issue in this appeal. For those purposes, the financial conditions for joint claimants are that (a) their combined capital, or a prescribed part of it, is not greater than a prescribed amount, and (b) their combined income is such that, if they were entitled to UC, the amount payable would not be less than any prescribed minimum: see section 5(2).

28. The relevant regulations in this context are the Universal Credit Regulations 2013 (SI 2013 No 376). Regulation 9 provides that:

> "(1) For the purposes of determining whether a person meets the basic condition to be in Great Britain, except where a person falls within paragraph (4), a person is to be treated as not being in Great Britain if the person is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.
>
> (2) A person must not be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland unless the person has a right to reside in one of those places."

29. Regulation 9(3) provides that, for the purposes of paragraph (2), a right to reside does not include a right which exists by virtue of, or in accordance with, so far as relevant,

> "(c) a person having been granted limited leave to enter, or remain in, the United Kingdom under the Immigration Act 1971 by virtue of –
>
> (i) Appendix EU to the immigration rules …"

30. Regulation 9(4) provides that a person falls within that paragraph if the person is "(c) a person who has a right to reside permanently in the United Kingdom by virtue of regulation 15(1)(c), (d) or (e) of the EEA Regulations".

31. The relevant immigration regulations are the Immigration (European Economic Area) Regulations 2016 (SI 2016 No 1052).

32. Regulation 4(1) provides that, in those Regulations,

> "(c) 'Self-sufficient person' means a person who has –
>
> (i) sufficient resources not to become a burden on the social assistance system of the United Kingdom during the person's period of residence".

Paragraphs (3) and (4) provide as follows:

> "(3) In sub-paragraphs (1)(c) and (d)—
>
> (a) the requirement for the self-sufficient person or student to have sufficient resources not to become a burden on the social assistance system of the United Kingdom during the intended period of residence is only satisfied if the resources available to the student or self-sufficient person and any of their relevant family members are sufficient to avoid the self-sufficient person or student and all their relevant family members from becoming such a burden; and
>
> (b) the requirement for the student or self-sufficient person to have comprehensive sickness insurance cover in the United Kingdom is only satisfied if such cover extends to cover both the student or self-sufficient person and all their relevant family members.
>
> (4) In paragraph (1)(c) and (d) and paragraph (3), the resources of the student or self-sufficient person and, where applicable, any of their relevant family members, are to be regarded as sufficient if—
>
> (a) they exceed the maximum level of resources which a British citizen (including the resources of the British citizen's family members) may possess if the British citizen is to become eligible for social assistance under the United Kingdom benefit system; or
>
> (b) paragraph (a) does not apply but, taking into account the personal circumstances of the person concerned and, where applicable, all their relevant family members, it appears to the decision maker that the resources of the person or persons concerned should be regarded as sufficient."

33. Regulation 6 provides that in these regulations "qualified person" means a person who is an EEA national and in the United Kingdom as "(d) a self-sufficient person".

34. Regulation 13 provides as follows:

> "(1) An EEA national is entitled to reside in the United Kingdom for a period not exceeding three months beginning on the date of admission to the United Kingdom provided the EEA national holds a valid national identity card or passport issued by an EEA State.
>
> …
>
> (3) An EEA national or the family member of an EEA national who is an unreasonable burden on the social assistance system

> of the United Kingdom does not have a right to reside under this regulation."

35. Regulation 14 provides that a qualified person is entitled to reside in the United Kingdom for as long as that person remains a qualified person: see paragraph (1).

Material provisions of EU law

36. Article 20 of the Treaty on the Functioning of the European Union ("TFEU") establishes the concept of citizenship of the Union. Para (1) provides that every person holding the nationality of a Member State shall be a citizen of the Union. This shall be additional to and not replace national citizenship. Para 2 provides that citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, among other things, "(a) the right to move and reside freely within the territory of the Member States". The article goes on to provide that these rights "shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder."

37. Article 21 of the TFEU also provides that every citizen of the Union shall have the right to move and reside freely within the territory of the Member State, subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give them effect.

38. The relevant directive is the Citizens Rights Directive. The following recitals are relevant:

> "(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.
>
> …
>
> (9) Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice.
>
> (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.

> (11) The fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures.
>
> …
>
> (21) However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons."

39. Article 1 of the Directive lays down, among other things, the conditions governing the exercise of the right of free movement and residence within the territories of the Member States by Union citizens and their family members.

40. Article 2(2) provides that "family member" means, so far as relevant, (a) the spouse.

41. Article 3(1) provides that the 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 Article 2(2) who accompany or join them.

42. Article 6(1) provides that 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.

43. At the heart of the present appeal is Article 7 of the Directive, which provides:

> "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:
>
> …
>
> (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".

44. Article 8 of the Directive provides:

> "Administrative formalities for Union citizens
>
> …

> 3. For the registration certificate to be issued, Member States may only require that
>
> – Union citizens to whom point (b) of Article 7(1) applies present a valid identity card or passport and provide proof that they satisfy the conditions laid down therein; …
>
> 4. Member States may not lay down a fixed amount which they regard as 'sufficient resources', but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State."

45. Article 14 provides:

> "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.
>
> 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."

46. Article 16 provides:

> "General rule for Union citizens and their family members
>
> 1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III."

47. Article 24 provides:

> "Equal treatment

> 1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.
>
> 2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families."

48. Article 27 provides:

> "General principles
>
> 1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends."

Ground 1

49. Ground 1 of the Secretary of State's appeal is that the UT materially erred in law by taking into account resources derived from social assistance when assessing whether the First Respondent was self-sufficient for the purposes of Art. 7(1)(b) of the Directive.

50. There was no dispute before the Upper Tribunal, nor before this Court, that the basic principle of EU law is that "persons who depend on social assistance will be taken care of in their own Member State": see the Opinion of AG Leendert Geelhoed in *Trojani v Centre Public d'Aide Sociale de Bruxelles (CPAS)* (Case 456/02) [2004] 3 CMLR 38, at AG70.

51. The concept of "social assistance" in the context of EU law was explained by the Court of Justice of the European Union ("CJEU") in *Pensions Pensionsversicherungsanstalt' v Brey* (Case-140/12) [2014] 1 WLR 1080, at para 61:

> "… That concept must be interpreted as covering all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State…"

52. However, the Court also pointed out, at para 75, that "the mere fact that a national of a Member States receives social assistance is not sufficient to show that he constitutes an unreasonable burden on the social assistance system of the host Member State."

53. It is common ground that social assistance is not the same thing as all social security or welfare benefits. As the Judge explained, at para 40 of the UT's judgment, there is no suggestion that all the legacy benefits paid to J constituted social assistance for this purpose. Most notably, Personal Independence Payments are paid when a person meets specified criteria concerning the limitations resulting from disability and are payable regardless of how much or how little that person has by way of capital or income. Child benefit is likewise paid as a right and fundamentally regardless of income when certain conditions are fulfilled (although high earners then lose it again through the tax system).

54. Further, as the Judge explained at para 42, the legacy benefits that did constitute social assistance were paid to J in consequence of her being a UK citizen. The Judge did not accept the submission for the Secretary of State that the First Respondent had to show sufficient resources not only for himself but also for J. This was because J had not accompanied him to the UK nor joined him here: she was already here. The Judge said that on no view could the Directive apply to her. It was therefore just for himself that the First Respondent needed to be able to show that he had sufficient resources.

55. That said, as Mr Cornwell emphasises, at para 45, the Judge accepted that "it would be fanciful to conclude that during that period [V] was not living, in substantial measure, on social assistance provided to J."

56. Nevertheless, the Judge went on to conclude, at para 51, that, although in no case has the CJEU had to consider the sufficiency of resources where the origin of those resources was ultimately in whole or part social assistance provided by the State concerned, there is no reason in principle why the First Respondent should not be able to place reliance on resources made available to him by J derived in part from social assistance payments paid to her in the period before the claim for UC.

57. At para 55, the Judge concluded that one has to look at the overall resources of the household which were sufficient in the eyes of the State to meet the needs of both V and J. He said:

> "I therefore do not accept that the fact that the resources were paid to J meant that the provisions she made for [V] out of them,

> plus his carer's allowance, were anything other than sufficient in the sense relevant for present purposes."

58. In order to assess the Secretary of State's criticisms of the UT's reasoning, I must consider some of the EU case law which was cited to us.

59. In concluding that the First Respondent was self-sufficient in this context, the UT relied on a line of authority from the Court of Justice of the European Union ("CJEU") to the effect that EU law lays down no requirement as to the origins of the resources which are relied upon by a person who claims to be self-sufficient. This line of authority started with a decision concerning Directive 90/363/EEC but which the Judge considered to be equally applicable to the Citizens Rights Directive: *Zhu and Chen v Secretary of State for the Home Department* (Case C-200/02) [2005] QB 325, at para 30. As the CJEU explained at paras 31-33 of that judgment, the starting point is that there is a fundamental right in EU law of free movement of persons, which must be interpreted broadly. Further, limitations on that right need to be justified and in particular to comply with the principle of proportionality. At para 33, the Court considered that a requirement as to the origin of the resources was not necessary for the attainment of the objective pursued, namely the protection of the public finances of the Member States and would constitute a disproportionate interference with the exercise of the fundamental rights of freedom of movement and of residence.

60. On the facts of *Zhu and Chen*, the child was born to a Chinese national in Northern Ireland with the specific purpose that she would then attain the nationality of the Republic of Ireland, which is conferred on any person born in the island of Ireland. It was also common ground that the mother had substantial resources and so was not reliant on public funds in the UK or likely to become so, and that the child had sickness insurance. The only question was whether the fact that the child depended on resources from her mother meant that she did not have the necessary resources to be self-sufficient within the meaning of Directive 90/364/EEC. Unsurprisingly, the CJEU held that a child is entitled to rely on the resources of its parents.

61. *Re Conditions of Residence and Deportation: Commission of the European Communities v Belgium* (Case-408/03) [2006] 2 CMLR 41 was a direct action brought by the European Commission against Belgium concerning its legislation which was said to be incompatible with Directive 90/364/EEC. The Belgian authorities took the view that the requirement of sufficient resources laid down in Article 1 of that Directive was in principle to be fulfilled by furnishing a proof of sufficient personal resources. In the case of other sources, the Belgian authorities required evidence of a legal link between the provider and the recipient of the resources which ensured the obligation of assistance. The undertaking of a Belgian citizen to support his long-standing partner who came to live with him from another Member State was not regarded as constituting evidence of sufficient resources. The CJEU followed its earlier judgment in *Zhu and Chen* and held that the requirement as to the origin of the resources was not necessary for the attainment of the objective pursued (the protection of public finances) and therefore would constitute a disproportionate interference with the exercise of the fundamental rights of freedom of movement and of residence: see paras 38-48 of its judgment. The Court recognised that the loss of sufficient resources is always an underlying risk even where the third party has undertaken to support the holder of the

residence permit financially but held that the source of those resources has "no automatic effect on the risk of such a loss arising, as materialisation of such a risk is the result of a change of circumstances": see para 47 of the judgment. Further, at para 48, the Court said that the Directive contains provisions allowing the host State to act in the event of an actual loss of financial resources, to prevent the holder of the residence permit from becoming a burden on the public finances of that State. Again it will be seen that the reason why a person was considered to be self-sufficient was that they had access to resources from a third party, not from the host State whether directly or indirectly.

62. It was common ground before us that the CJEU has continued to apply this doctrine in relation to the Citizens Rights Directive: see e.g. *Alopka v Ministre du Travail, de l'Emploi et de l'Immigration* ECLI:EU:C:2013:645 (Case C-86/12) at para 27. Mr Cornwell placed particular reliance on the following passage in the judgment of the CJEU in *Dano v Jobcenter Leipzig* (Case C-333/13) [2015] 1 WLR 2519, at paras 76-80:

> "76. Therefore, article 7(1)(b) of Directive 2004/38 seeks to prevent economically inactive Union citizens from using the host member state's welfare system to fund their means of subsistence.
>
> 77. As Advocate General Wathelet has observed in points 93 and 96 of his opinion above, any unequal treatment between Union citizens who have made use of their freedom of movement and residence and nationals of the host member state with regard to the grant of social benefits is an inevitable consequence of Directive 2004/38. Such potential unequal treatment is founded on the link established by the Union legislature in article 7 of the Directive between the requirement to have sufficient resources as a condition for residence and the concern not to create a burden on the social assistance systems of the member states.
>
> 78. A member state must therefore have the possibility, pursuant to article 7 of Directive 2004/38, of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another member state's social assistance although they do not have sufficient resources to claim a right of residence.
>
> 79. To deny the member state concerned that possibility would, as Advocate General Wathelet has stated in point 106 of his opinion above, thus have the consequence that persons who, on arriving in the territory of another member state, do not have sufficient resources to provide for themselves would have them automatically, through the grant of a special non-contributory cash benefit which is intended to cover the beneficiary's subsistence costs.
>
> 80. Therefore, the financial situation of each person concerned should be examined specifically, without taking

> account of the social benefits claimed, in order to determine whether he meets the condition of having sufficient resources to qualify for a right of residence under article 7(1)(b) of Directive 2004/38."

63. *Bajratari v Secretary of State for the Home Department* (Case C-93/18) [2020] I WLR 2327 was another case concerning children born in Northern Ireland to third country nationals, who therefore obtained Irish nationality. The only financial resources available to the family came from the father, who had been working illegally since the expiry of a residence card. Nevertheless the CJEU, at para 42, concluded that to impose a requirement relating to the origin of the resources provided by the parent would still constitute a disproportionate interference with the exercise of the Union citizen minor's fundamental rights of free movement and of residence. Nevertheless, as Mr Cornwell points out, this again does not concern resources whose ultimate origins lie in the social assistance system of the host State.

64. Mr Cornwell also relies on the judgment of the CJEU in a post-2020 case: *CG v Department for Communities in Northern Ireland* (Case C-709/20) [2021] 1 WLR 5919, in particular at para 81, where the CJEU said that:

> "… If an economically inactive Union citizen who does not have sufficient resources and resides in the host Member State without satisfying the requirements laid down in Directive 2004/38 could rely on the principle of non-discrimination set out in Article 24(1) of the Directive, he or she would enjoy broader protection than he or she would have enjoyed under the provisions of that Directive, under which that citizen would be refused a right of residence."

65. That said, however, Mr Cornwell was not able to point to a case which is like the present one, where the reliance on social assistance benefits by the EU national is not a direct one but is indirect because he receives benefit in effect from another person such as the Second Respondent.

66. In order to assess whether the UT erred in law in this context, it is important to have a clear appreciation of the structure of its judgment. In my view, the critical part of the Judge's reasoning can be found at para 56:

> "It follows that in my view down to the point of the claim for Universal Credit, [V] did have sufficient resources not to become a burden on the social assistance system of the UK, because resources over and above the carer's allowance came from J and [V]'s presence in the household did not result in any increase in the social assistance payable to J (and thus no burden). …"

67. It can also be seen from para 54 that the Judge considered this point to be crucial:

> "… It follows that when [V] joined the household, the burden on the social assistance system did indeed decrease, rather than increase."

68. It is also relevant to see how the Judge formulated the relevant cohort of other people who would be in the Respondent's position, at para 71. The Judge said that the relevant group could be defined as (a) EU nationals, (b) who are partners of UK nationals who are in receipt of social assistance, (c) who are eligible for EU settled status, (d) who do not have any other right to reside and (crucially) (e) "in consequence of whose presence in the household the amount of social assistance paid out remained the same or decreased (for if it increased, at any rate more than by a *de minimis* amount, they would not meet the Art. 7(1)(b) test in the first place)."

69. It is clear therefore, in my view, that the critical part of the Judge's reasoning was that, on the unusual facts of this case, there would be no increase in the burden on the UK social assistance system as a result of the First Respondent joining the Second Respondent's household. The Judge was (in my view correctly) applying a causal link test, in other words that there has to be a causal link between the exercise of free movement rights by an EU national and the imposition of a burden on the social assistance system of the host State.

70. When read in this way, it can be seen that the reasoning and impact of the Upper Tribunal judgment is relatively narrow. I would accept the submission made by Mr Cornwell on behalf of the Secretary of State that the line of authority from the CJEU which holds that it is not relevant to look at the origin of a person's resources is distinguishable in the present context, because none of those cases was concerned with the situation where the indirect origin of the resources was the social assistance system of the host State. I agree with the submissions for the Secretary of State that the whole purpose of the EU legislation in this context is to enable the host State to take steps to prevent such an imposition on its social assistance system.

71. That said, however, I return to the crucial point in the present case, which is that there was no increase, but rather a decrease, in the burden on the UK's social assistance system by reason of the fact that the Respondent had exercised his free movement rights. It is that fundamental feature of this case which both makes it unusual and also means that the UT did not fall into error as suggested under Ground 1 in this appeal.

Ground 2

72. Ground 2 in this appeal is that the UT materially erred in law in respect of:

(1) its interpretation and application of Art. 8(4) of the Directive,

(2) its reliance on social assistance paid to the Second Respondent but calculated by reference to the First Respondent, and

(3) failing to take adequate account of the sufficiency of those resources to support the Second Respondent.

73. As Mr Cornwell accepts, Ground 2 in the Secretary of State's appeal only arises if she fails on Ground 1. Nevertheless, it appears to me that in truth many of the submissions made by Mr Cornwell under Ground 2 assume that he was right on Ground 1 and fall if (as I have concluded above) he fails on Ground 1.

74. Furthermore, the main criticism which Mr Cornwell makes under Ground 2 concerns the Judge's interpretation and application of Article 8(4) of the Directive. It is significant, however, that the Judge's interpretation of Article 8(4), which Mr Cornwell criticises, and its relationship to Article 7(1)(b), appears at paras 46-48 of the judgment, in other words in the section which led up to his interim conclusion at para 56. This was concerned with the origins of the resources issue, in other words part of the reasoning criticised by Mr Cornwell under Ground 1. Even if Mr Cornwell is right about this aspect of the Judge's reasoning, it seems to me that it has no material impact on the outcome, because (as I have explained above) the critical part of the Judge's reasoning appears at para 56 of the UT judgment. Nevertheless, I will address Ground 2 on its merits.

75. Under Ground 2 Mr Cornwell advances three main submissions.

76. First, he submits that the UT made a material error of law by misinterpreting and misapplying Article 8(4) of the Directive.

77. The UT, at para 46, said that Article 7(1)(b) and Article 8(4) need to be considered together. At para 47 it said that the resources which V had were (a) what his wife made available out of the welfare benefits paid to her (including social assistance calculated on the footing that they were a couple) and (b) what the UK saw fit to pay to him by way of Carer's Allowance, in recognition of the duties he undertook to care for his wife. At para 48, the Judge said that, for the State to say that such resources were inadequate, when they are the very amount stipulated in legislation as corresponding to the needs of a couple in the circumstances of V and J would not be a tenable position, in that it would conflict with Article 8(4).

78. Mr Cornwell submits that what Article 8(4) does in its first sentence is to prohibit a host State from defining a single fixed amount that counts as "sufficient resources". The second sentence of Article 8(4) permits a host State to define a "reference amount": see *Brey*, at para 68. That refers, in the first instance, to the eligibility threshold for social assistance under the State's social assistance system but not the actual amount of social assistance that a claimant may receive. Mr Cornwell submits that the UT wrongly conflated an *eligibility* threshold for an amount *actually* payable by way of social assistance.

79. In my judgment, the Upper Tribunal did not misinterpret Article 8(4). I accept the submissions made about this on behalf of the Respondent by Mr Royston. V and J had the same income as British citizens. What Article 8(4) establishes is a ceiling but it precludes the imposition of a floor by the State. If the ceiling is met, the State cannot say that is not sufficient; but it cannot lay down a minimum floor without addressing the circumstances of the individual case. The UT correctly identified that here the ceiling was met and that was sufficient to deal with this point.

80. Secondly, Mr Cornwell criticises the UT independently of that first submission, because he submits that, on its interpretation of Article 8(4), the welfare payments made to J were only considered "sufficient" because these included an amount of social assistance calculated in part by reference to V. That, he submits, is fundamentally and fatally in tension with the UT's finding that V was not a burden on the UK's social assistance system. At the hearing before us, Mr Cornwell developed this submission by suggesting that the UT decision leads to "stretching" of the social assistance amount between all members of the household.

81. I do not accept this criticism. As Mr Royston submitted before us, the Judge did not engage in impermissible "stretching": he applied the household rate, not the single person rate of the relevant social assistance benefits. I do not regard this as being in tension with the main finding of the UT (the subject of Ground 1 above) but rather an application of it.

82. The third criticism which Mr Cornwell makes under Ground 2 is that, while the Secretary of State accepts that J was not herself a beneficiary of the Directive, in the sense of being a family member within the meaning of Article 3(1), it does not follow that the Directive did not apply to J at all. He submits that V should have had enough resources to maintain his wife and not only himself, otherwise he would be a burden on the UK's social assistance system.

83. I do not accept this criticism either. It is fundamentally inconsistent with the starting point that J herself is a British citizen and is entitled to be in the UK and to receive its social assistance benefits. When EU law requires that a person in V's position must be able to move across frontiers without becoming a burden on the host State's social assistance system, it does not require that he must also have resources to support a family member who is a British citizen, who is already here and is entitled to UK social assistance benefits in her own right. Again, I would stress that what is required is a causal link between the EU national's exercise of free movement rights and the burden on the host State's social assistance system. If part of that burden would have arisen anyway, that causal link is missing.

84. I also accept Mr Royston's submission that the argument for the Secretary of State would lead to an absurd consequence. The Secretary of State would accept that V could come to the UK and live here by himself if he had sufficient resources to support himself but not his wife, but he could not move in with his wife. It would therefore be better for a married couple to live separately. That cannot have been the intended consequence of the Directive.

85. I conclude therefore that the Upper Tribunal did not fall into material error as suggested under Ground 2.

Ground 3

86. Ground 3 in this appeal is that the UT materially erred in law in its assessment of the burden that would be placed on the UK's social assistance system if UC was awarded to the First Respondent. The Secretary of State asserts that the UT erred in respect of:

(1) the time periods relevant to the assessment,

(2) the cumulative burden of the similarly placed cohort,

(3) failing to recognise that an accumulation of claims was "bound" to impose an unreasonable burden on the State's social assistance system, and

(4) inadequacy of reasoning.

87. Ground 3, like Ground 2, only arises if the Secretary of State fails on Ground 1. Mr Cornwell submits that this raises points of law but I do not consider that all of the criticisms made under Ground 3 do so.

88. One has to bear in mind that this Court's jurisdiction on an appeal such as this is only to correct errors of law. In the present context, an appeal lies from the Upper Tribunal to the Court of Appeal "on any point of law": see section 13(1) of the Tribunals, Courts and Enforcement Act 2007. Accordingly, an appeal does not lie to this Court on questions of fact, assessment or evaluation.

89. Further, the Upper Tribunal (Administrative Appeals Chamber) is now the successor to the former Social Security Commissioners. In relation to them, it was said that social security law is "a highly specialised area of law which many lawyers – indeed, I would suspect most lawyers – rarely encounter in practice": see *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734; [2002] 3 All ER 279, at para 15 (Hale LJ). As Hale LJ continued in that paragraph, the first appeal from the first instance tribunal in this context lies to "a highly expert and specialised legally qualified body". She said that, although it is important that there should be a link to the ordinary court system, to maintain both independence of government and fidelity to the relevant general principles of law, "the ordinary courts should approach such cases with an appropriate degree of caution": see para 16. She continued:

> "It is quite probable that on a technical issue of understanding and applying the complex legislation the social security commissioner will have got it right. The commissioners will know how that particular issue fits into the broader picture of social security principles as a whole. They will be less likely to introduce distortion into those principles. They may be better placed, where it is appropriate, to apply those principles in a purposive construction of the legislation in question. They will also know the realities of tribunal life. All of this should be taken into account by an appellate court when considering whether an appeal will have a real prospect of success."

90. A similar point was made by Lord Carnwath, the first Senior President of Tribunals and later a Justice of the Supreme Court, in 'Tribunal Justice – A New Start' [2009] Public Law 48, at 63-64, citing *Cooke* with approval, and in *R (Jones) v First-Tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48, at para 46.

91. The relevant part of the UT's judgment on this topic is at paras 62-74. At paras 62-63, the Judge preferred the submission made by Mr Cornwell on behalf of the Secretary of State. He concluded that the ongoing burden if the First Respondent is taken as entitled to social assistance is £347 per month.

92. At para 64, the Judge rejected Mr Cornwell's submission that he had to take into account the fact that the First Respondent had already (as he submitted) been a burden on the social assistance system of the UK in the past. The Judge held that, for reasons he had already given earlier in the judgment, this was not the case. The First Respondent had been supported by his wife from benefits (including social assistance) paid to her as a British citizen and his presence caused the amount of social assistance in fact to reduce. The Judge did not read the word "paid" in para 69 of *Brey* as directed to anything other than social assistance but, if he was wrong about that, he would place little weight on the receipt of Carer's Allowance, given that it is paid in acknowledgment of at least 35 hours of caring weekly, which at least in part might otherwise have had to be provided to J at public expense.

93. The next issue, which the Judge addressed at paras 65-69, was what the period looking forward should be. He rejected Mr Cornwell's submission that the period should not end on the date when the First Respondent would attain settled status. The Judge said, at para 69, that there could be no objection to taking as an end date in the present context the date at which it is likely that the UK would confer a right of residence on the First Respondent with unrestricted ability to claim social assistance, in other words settled status. That meant that the period which needed to be considered was 23 months.

94. The Judge then, at paras 70-72, identified the relevant group which would be analogous to the First Respondent. I have already described that group earlier in this judgment. He said, at para 73, that the cohort who would meet all of the conditions was likely to be a small one and would also be time-limited by completion of the transition from legacy benefits to UC.

95. Further, at para 74, the Judge said that the monthly amount involved would equate to an increase of some 26 percent of the UC that J would otherwise receive, or an increase of some 15 percent of the household's total benefit income. He considered that that was "a relatively small proportion of their income and has the character of a time-limited top up." As he had concluded that the cohort of similar cases was a small one, he also concluded that the outcome of the assessment which he had to conduct under *Brey* is that "the burden on the UK's social assistance system which would arise by paying Universal Credit to [V] as if he fulfilled the right to reside requirement imposed following the joint claim for Universal Credit would not be an unreasonable one."

96. In my judgment, that was a conclusion at which the Judge was eminently entitled to arrive, especially given the approach which was commended to the ordinary courts by Hale LJ in *Cooke* and by Lord Carnwath in *Jones*. I can detect no error of law in the approach taken by the specialist tribunal in this context.

97. I acknowledge that there are two points of law which Mr Cornwell is able to make under Ground 3. The first relates to the past period, before the claim for UC was made, when J was entitled to legacy benefits. The second relates to the future period after the First Respondent would obtain settled status and would have an entitlement to receive

social assistance on the same basis as British citizens. However, I do not accept his submission that the UT erred in law in relation to either of those periods.

98. In relation to the first period, the Judge was right to reach the conclusion which he did for the reasons he had already given and which are criticised under Ground 1, criticisms which I would reject.

99. In relation to the second period, in my view, the Judge was clearly correct that, once the First Respondent attained EU settled status, it could no longer be said that there was a burden being imposed on the UK social assistance system in any relevant sense. From the point in time when the First Respondent attained settled status, his entitlement to social assistance would be derived from his own rights in this country rather than being a burden on the social assistance system of the UK as a result of his exercise of free movement rights.

100. Turning to the other aspects of Ground 3, on analysis they seem to me not to raise points of law but rather to complain about various questions of fact, assessment or evaluation by the UT.

101. I would therefore reject Ground 3 in this appeal.

Conclusion

102. For the reasons I have given, I would dismiss the Secretary of State's appeal.

Lord Justice Popplewell:

103. I agree.

Lady Justice King:

104. I also agree.