Neutral Citation Number: [2024] EWCA Civ 240

Case No: CA-2023-000277

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE KING'S BENCH DIVISION
ADMINISTRATIVE COURT
The Hon. Mr Justice Eyre
[2023] EWHC 31 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/03/2024

Before :

LADY JUSTICE MACUR
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE PHILLIPS

- -

Between :

The King on the application of Antoine Lucas Roehrig	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Jessica Simor KC, Adrian Berry & Admas Habteslasie (instructed by **Solange Valdez-Symonds, Project for the Registration of Children as British Citizens**) for the **Appellant**
David Blundell KC, Julia Smyth & Nicholas Chapman (instructed by **Goverment Legal Department**) for the **Respondent**

Hearing dates : 16 - 17 January 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 12 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Macur :

Introduction

1. This is an appeal against the decision of Eyre J ([2023] EWHC 31 (Admin)) dismissing Mr Roehrig's claim for judicial review of the decision made by the Secretary of State for the Home Department ("SSHD") refusing his application for a British passport.

2. The issue in this appeal, as it was in the court below, is whether Mr Roehrig (hereinafter called the appellant) automatically acquired British citizenship at birth pursuant to section 1(1)(b) of the British Nationality Act 1981 ("BNA").

3. Section 1(1)(b) of BNA provides that:

   "*A person born in the United Kingdom after commencement shall be a British citizen if at the time of the birth his father or mother is— ...*

   (b) settled in the United Kingdom."

4. For present purposes, references to a person being "settled" in the UK are defined as them being "*ordinarily resident in the United Kingdom ... without being subject under the immigration laws to any restriction on the period for which he may remain*" (Section 50(2) BNA).

   However, section 50 (3) provides:

   "(3) ... a person is not to be regarded for the purposes of this Act—"

   a) as having been settled in the United Kingdom at any time when he was entitled to an exemption under section 8(3) or (4)(b) or (c) of the Immigration Act 1971 ..."

5. Section 8(3) of the Immigration Act 1971 ("IA 1971") concerns members of a mission (within the meaning of the Diplomatic Privileges Act 1964) who are not British citizens, or a person who is a member of the family and forms part of the household of such a member, or a person equivalent to a "diplomatic agent." Section 4(b) and (c) respectively refers to members of a Commonwealth force, or a colony or other protected state undergoing training in the UK with any division of the home forces, and those posted for service as a member of a visiting force designated by an Order in Council under section 1 of the International Headquarters and Defence Organisations Act 1964.

6. Whilst none of these exemptions apply in this case, the provision is reproduced here having regard to an argument deployed on behalf of the appellant.

7. 'Immigration laws' are defined by section 50(1) BNA to mean "*in relation to the United Kingdom ... the Immigration Act 1971 and any law for purposes similar to that Act which is for the time being or has at any time been in force in any part of the United Kingdom*".

The facts

8. The facts are uncontroversial. The appellant was born in the United Kingdom ("UK") on 20 October 2000. His mother ("AM") was a French national who entered the UK in June 1995 in exercise of her rights as a 'worker' under relevant European Union ("EU") law and has lived in the UK ever since, subsequently acquiring British citizenship in 2011. (In this judgment I adopt Eyre J's deliberate reference to the term EU, albeit that EEC, EC or EEA may be more appropriate acronyms dependent upon timescale.) At the time of the appellant's birth, AM was a "qualified person" (see below) and ordinarily resident in the UK.

9. On 14 December 2020, the appellant applied for a British passport. The SSHD refused the application stating: "As you were not able to provide documentary evidence to show your Mother was free from immigration time restrictions at the time of your birth, we are not able to issue a passport to you at this time…"

The challenge

10. The appellant sought to judicially review the SSHD's decision on the basis that his mother's rights derived from the EU Treaties as given effect by section 2 of the European Communities Act 1972 ("ECA"). Therefore, her residence was not subject to any restrictions under "the immigration laws" as defined in the BNA, because her residence was regulated by EU law.

11. Notably, the SSHD had, prior to 2 October 2000, adopted and applied the legislation in the manner for which the appellant contends, and treated children born before 2 October 2000 to EU citizens who were "qualified persons" as having acquired British citizenship by birth. The SSHD then determined that she had applied the legislation wrongly. Thereafter, children born after 2 October 2000 to EU citizens who were "qualified persons", such as the appellant, were not automatically treated as been born to a parent "settled" in the UK. (See: The Immigration (European Economic Area) Regulations 2000, which came into force on 2 October 2000 in [20] below.)

EU legislation

12. Article 18(1) of the "Consolidated Version of the Treaty Establishing the European Community" ("the EC Treaty") provided that, subject to Article 39 limitations justified on grounds of public policy, public security or public health, every citizen of the EU:

> "*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 this Treaty and by the measures adopted to give it effect*."

13. Regulation (EEC) No 1612/68 of the Council of 15 October 1958 ("the 1968 Regulation") provided for freedom of movement for workers of Member States within the Community with the right to take up an activity as an employed person and to pursue such activity in accordance with the laws, regulation and administrative action governing the employment of nationals.

14. Directive 68/360/EEC of the same date obliged Member States to “abolish restrictions on the movement and residence of EU citizens and members of their families” to whom Regulation (EEC) No 1612/68 applied. This meant the abolition of entry and exit visas, the obligation to allow entry into the country on production of a valid identity card or passport and a right of residence exercisable prior to the production of any documentation. Member States were obliged to issue residence permits which could not be for less than five years and had to be “automatically renewable” subject to specific exceptions based on public health, public safety, or national security.

15. Albeit post the appellant’s date of birth, it is appropriate to note Chapter IV of Directive 2004/38/EC (“the 2004 Directive”) which is headed “Right of Permanent Residence” (and see the associated Immigration (European Economic Area) Regulations 2006 (“I(EEA)R 2006”) in [21] below) as in force at the time of the decision in *Secretary of State for the Home Department v Capparelli* [2017] UKUT 162 which is discussed below. Article 16 provides the “general rule for Union citizens and their family members” to be that, subject to legal residence for a continuous period of five years in the host Member State, they shall have the right of permanent residence there, which would only be lost through absence from the host Member State for a period exceeding two consecutive years. Section II concerns “administrative formalities”. Article 19 provides that “upon application Member States shall issue Union citizens entitled to permanent residence, after having verified duration of residence, with a document certifying permanent residence.”.

The UK as a Member State

16. The UK became a Member State of the European Communities on 1 January 1973. Section 2 of the European Communities Act 1972 (“ECA”), which came into force on the same day, made provision that:

> *“(1)All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly ; and the expression " enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.”*
>
> *(2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by regulations, make provision—*
>
> *(a)for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or*

> *(b)for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above ;and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the Communities and to any such obligation or rights as aforesaid. In this subsection " designated Minister or department" means such Minister of the Crown or government department as may from time to time be designated by Order in Council in relation to any matter or for any purpose, but subject to such restrictions or conditions (if any) as may be specified by the Order in Council."*

17. The Immigration (European Economic Area) Order 1994 ("the 94 Order") came into force on 20 July 1994 and provided for an EU national's right of admission to the UK and residence of "qualified persons" without leave and the grant and renewal of residence permits, only to be refused on grounds of public policy, public health or national security.

18. A "Statement of Changes to Immigration Rules" ("the IR 1994") was laid before Parliament and came into effect on 1 October 1994. Unless expressly indicated, the amended Rules did not apply to those entitled to enter and remain in the UK by virtue of the 1994 Order.

19. However, under the heading "Settlement", Regulation 255 was expressed to be applicable to "EEA nationals and their families". It provided that an EEA national (other than a student) and the family member of such a person, who has been issued with a residence permit or residence document valid for 5 years, and who has remained in the United Kingdome in accordance with the provisions of the 1994 Order for 4 years and continues to do so may, on application, have his residence permit or residence document (as the case may be) endorsed to show permission to remain in the United Kingdom indefinitely." The appellant's mother did not apply for such a residence permit.

20. Section 7 of the Immigration Act 1988 ("the IA 1988") was subsequently enacted to the effect that:

> "*A person shall not under the principal Act [that is the 1971 Act] require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable Community right or of any provision made under section 2(2) of the European Communities Act 1972.*"

21. The 1994 Order was revoked by the Immigration (European Economic Area) Regulations 2000 ("IR 2000"), which came into force on 2 October 2000. Regulation 8

purports to identify persons who are “subject to restriction on the period for which they may remain” by exception. That is, if not falling within one of five specified categories, “a qualified person or family member …is not, by virtue of his status as a qualified person or the family member…to be so regarded for those purposes.” Regulation 14(1) specified that, as a “qualified person” AM was entitled to reside in the United Kingdom, without the requirement for leave to remain under the IA 1971, for as long as she remained a “qualified person”. Regulation 15 obliged the Secretary of State to issue a residence permit to a qualified person on application and production of a valid identity card or passport issued by an EEA state and proof that he was a qualified person.

22. The Immigration (European Economic Area) Regulations 2006 (“I(EEA)R 2006) gave effect to the 2004 Directive. By regulation 15 an EEA national who, as the appellant’s mother, had resided in the UK for a continuous period of five years would acquire the right to reside in the United Kingdom permanently. Once acquired, the right of permanent residence would be lost only through absence from the UK for a period exceeding two consecutive years. By regulation 16(1) the Secretary of State must issue a registration certificate to a qualified person immediately on application and production of (a) a valid identity card or passport issued by an EEA State; and (b) proof that he is a qualified person. By regulation 18, the Secretary of State must issue an EEA national with a permanent right of residence under regulation 15 with a document certifying permanent residence as soon as possible after an application for such a document and proof that the EEA national has such a right is submitted. The permanent residence card is valid for ten years from the date of issue and must be renewed on application: regulation 18(3) A document certifying permanent residence will cease to be valid if the holder ceases to have a right of permanent residence under regulation 15. Significantly, Schedule 2, paragraph 2(1) provides that for the purposes of the IA 1971 and the BNA, a person who has a permanent right of residence under regulation 15 shall be regarded as a person who is in the United Kingdom without being subject under the immigration laws to any restriction on the period for which he may remain.

The judgment under appeal

23. I commend a full reading of Eyre J’s cogent and lucid judgment. However, I do not think it necessary to reproduce it here, or otherwise to refer to it in any detail, since the grounds of appeal retread much of the same ground traversed in the court below.

24. Eyre J found that from the time of her arrival in the UK in 1995 until 2 October 2000, AM was entitled to enter and remain in accordance with section 7 of IA 1988 and the 1994 Order (see above). Thereafter, section 7 and regulation 14 of IR 2000 entitled her to stay as long as she continued to be a ‘qualified’ person. By the time of the appellant’s birth on 20 October 2000, his mother was entitled by virtue of regulation 15 of the IR 2000 and Rule 255 of the IR to apply for a residence permit and for that to be endorsed as showing permission to remain in the United Kingdom indefinitely. This would have to be issued subject to the production of the correct documentation. However, the appellant’s mother had not applied for such a permit and her status remained that of a qualified person; at [43] and [46].

25. Eyre J’s reading of *Secretary of State for the Home Department v Capparelli* [2017] UKUT 62 was that McCloskey J, President had determined that those exercising rights under EU law were outside the scope of the immigration laws: at [64]. However, upon analysis, he found reason to distinguish the case; at [71] to [74].

26. Eyre J considered the reasoning of the Immigration Appeal Tribunal in *Gal v SSHD (unreported, 26 January 1994)*, to be persuasive; at [75].

27. He considered that the similar terms "so long as" in section 8(4) of the IR 71 and "for as long as" in regulation 14 of the IR 2000 gave "real force" to the argument that in the absence of a similar express exclusion to that applied in the case of service personnel and diplomats from being regarded as 'settled', then 'qualified persons' satisfied the definition of being 'settled'. However, there were a number of factors operating against that argument. First, section 8(4) states in terms that the provisions of the Act "shall … not apply" to the personnel in question. Second, it was necessary to exercise a degree of caution in drawing conclusions as to what the position of service personnel would have been without section 50(3) BNA. Finally, it was to be noted that both section 8(4) and regulation 14 were dealing with particular and different circumstances and the analogies between them are not complete.

28. In [89] of his judgment, after further analysis of the appellant's submissions he concluded that the IR 2000 were immigration laws of similar purpose to the IA 1971. He was also satisfied that the qualification to which AM was subject by reason of regulation 14, namely that she was only entitled to remain so long as she was a qualified person, was a restriction under such laws. "*The fact that the regulation was thereby reflecting the provisions of EU law does not prevent the restriction being one under the immigration laws. Putting the matter shortly it is a restriction contained in the immigration laws and its ultimate source does not alter its nature as being a restriction under those laws."* It followed that the issue whether AM was settled in the UK on 20 October 2000 depended upon the alternative challenge that such a restriction was "on the period for which she may remain"; at [90].

29. As to that issue, Eyre J considered himself bound by this Court's decision in *R (Coomasaru) v Immigration Appeal Tribunal* [1983] 1 WLR 14; at [105]. He dismissed the appellant's arguments that the ordinary meaning of "period" clearly related to a period of time the duration of which can be identified at the start of the period; at [106] to [109].

The grounds of appeal

30. Ms Simor KC, leading Mr Berry, and Mr Habteslalsie, for the appellant resurrect the arguments advanced at first instance as indicated in summary below.

Ground 1

31. AM's right to be present in the UK at the time of the appellant's birth derived from EU law. The IA 1988 removed a domestic law obligation to obtain leave to enter and remain to ensure the UK's compliance with EU law. The IR 2000 only purported to reflect rights that derived from EU law. Neither EU law nor laws made pursuant to section 2 of the ECA 1972 are laws for "purposes similar" to the IA 1971. McCloskey J's analysis in *Capparelli* represents the correct approach. It was unlawful as a matter of EU law to maintain immigration controls in relation to nationals of EU Member States.

32. Further, both EU citizens and groups specified by section 8 of the IA 1971 are exempted from the requirement for leave to enter the UK and both groups are defined on the basis of a qualifying condition as to their status. It is implicit from the only reasonable reading

of section 50(3) and (4) that service personnel and diplomatic agents would, were it not for those provisions, be settled in the UK. The Judge was wrong to ignore the analogy.

33. The reference in the definition of "immigration laws" to "any law for the purposes similar" to the IA 1971, properly interpreted, is intended to cater for situations where there might be different domestic laws to like effect in the remainder of the UK and the "Islands", being the Channel Islands and Isle of Man. These are places that form part of the 'United Kingdom' only for the purposes of section 50 of the BNA 1981. Therefore, the phrase "any law for purposes similar" serves a precise statutory purpose.

Ground 2

34. Alternatively, as a matter of statutory interpretation, "restrictions as to the period for which [AM] may remain" in the UK should be understood as referring to restrictions imposed on the time duration of her stay. The Judge failed to give due weight to the natural and ordinary meaning of the words used by Parliament.

35. The Judge's analysis is at odds with the broader statutory scheme, in which the statutory scheme of the BNA 1981 in respect of those who are 'settled' parallels that of the IA 1971. The IA 1971 draws a distinction between restrictions as to time period and other conditions, as demonstrated in section 3. Section 3(2) refers to "the period for which leave is to be given" and "conditions" to be attached" and there is a distinction drawn in section 3(1)(b) between leave "either for a limited time <u>or</u> for an indefinite period". Section 3(3)(a) provides that "a person's leave may be varied, whether by restricting, enlarging or removing the limit on its duration, or by adding, varying or revoking conditions, but if the limit on its duration is removed, any conditions attached to the leave shall cease to apply".

36. *Coomasaru* is distinguishable from the present case. It was a case decided in the context of a grant of permission to enter and remain only for so long as the person concerned was employed by a specific employer. The applicant's mother was subject to the open-ended nature of EU free movement rights for "qualified persons".

37. It was common ground that indefinite leave to remain would suffice for settled status, yet a person with such leave only has leave to remain for as long as they abide by certain conditions.

38. The analogy between those exempted from the IA 1971 under section 8 and the effect of section 50(3) and (4) applies equally under Ground 2. Those persons are defined with reference to qualifying conditions which could cease.

39. Finally, the analysis argued for by the appellant is consistent with how the SSHD applied the BNA 1981 up until the hearing before Eyre J in respect of births prior to 2 October 2000, and in accordance with the terms of the decision letter referred to in [7] above.

The Response

40. Mr Blundell KC, leading Ms Smyth, and Mr Chapman, responding on behalf of SSHD likewise relies upon previously deployed argument on the issues of statutory

construction and immigration control. In short, they contend that Eyre J's judgment was correctly reasoned.

Ground 1

41. An EU national was not "settled" simply by virtue of exercising a "qualified person's" right to reside in the UK because the period of entitlement was contingent upon them continuing to fulfil the condition upon which that entitlement was based. The restriction is a restriction "under the immigration laws," because it arises out of the domestic statutory framework by which the rights of EU nationals to enter and continue to remain in the UK is regulated. That framework includes a series of statutory instruments with "Immigration" in the title including, at the relevant time, the Immigration (European Economic Area) Regulations 2000.

42. Eyre J was clearly right to conclude that laws regulating the circumstances in which EU citizens are permitted to enter and remain in the UK are laws "for purposes similar to" the Immigration Act 1971. The primary function of the IA 1971 is to provide for the circumstances in which persons who are not British citizens are permitted to enter and reside in the UK. The IR 2000 made further provision for the circumstances in which EEA nationals were permitted to enter and remain in the UK.

43. Eyre J was right in his analysis of the exemption provided in sections 50(3) and (4) BNA which addresses the position of members of diplomatic missions and members of certain armed forces. The position of EU citizens is different. The 1971 Act does not make the same provision for them, either in section 8 or elsewhere. Further, whilst they are not required to hold leave to enter or remain, this is only true if they are exercising an enforceable EU right. These sections do not undermine the clear meaning of "immigration laws".

44. It is common ground that neither British nationality nor citizenship is consequent upon the freedom of movement of EU citizens. Nationality is to be determined as a matter of domestic law and, in this case, by construction of the provisions of the BNA.

Ground 2

45. There is no sensible basis for distinguishing this Court's decision in *Coomasaru*. The fact that a person can move from one form of EU right of residence to another does not change the fundamentally contingent, impermanent nature of those EU rights.

46. Importantly, those with indefinite leave to remain or permanent residence under EU law, are in a materially different position to an EU worker. Indefinite leave to remain and permanent residence entail a permanent right which will endure unless some positive step is taken to end it. One of the primary circumstances in which indefinite leave to remain and permanent residence may be lost is if the person leaves the UK for a certain period, not if they remain here.

Discussion

47. It is common ground that British nationality is to be determined in accordance with domestic law, and more specifically with regards to the statutory interpretation of the

provisions of the BNA. The decision under review is not subject to the SSHD's exercise of discretion.

48. The question of ordinary residence and settlement will be determined on the facts. The relevant date is 20 October 2000, the appellant's date of birth.

49. There is no doubt that, from the time of her arrival in the UK until at least the date of the appellant's birth, AM was exercising her EU rights of 'free movement' to enter and remain within a Member State as a "worker". Section 2(1) of ECA 1972 guaranteed the rights of citizens of Member States to be given legal effect "in accordance with the Treaties" without the necessity of further enactment. Section 7(1) of IA 1988 confirms this in terms; see [19] above. She was a "qualified person" as defined by European and domestic legislation; (see IR 2000, Regulation 5).

50. Therefore, as an EU citizen exercising enforceable rights of free movement, was she subject to domestic "immigration laws" as defined by section 33 of IA 71? There are only two directly relevant authorities that the parties have identified on this issue, namely *Gal* and *Capparelli*, neither of which decisions were subject of appeal to this Court.

51. The focus in *Gal (supra)* concerned the rights of residence of the wife (since estranged) and children of a qualified worker who, at the time when they lived together in the UK, had been exercising his EU rights of free movement. The husband had since separated from his wife and departed the UK. The Immigration Appeal Tribunal ("IAT") was principally concerned with the definition of "settled" in section 33(2A) IA 1971, the terms of which were materially identical to those in section 50(1) BNA at the material times. Counsel for the wife did not argue that the "laws" applicable to the wife were not "immigration laws" as being "any law for purposes similar to [IA 1971]" which has been or is in force. However, premising their judgment by noting that the "immigration rules apply to those with Community enforceable rights only insofar as permitted by Community Law," the IAT said at page 6:

> "The purpose of HC 621 para 151 [then in force] is to translate the European law rights specified therein into leave under English law. (*Layne* [1987] Imm AR at p 247). It is therefore a provision of English law and the relevance of European law within it to simply define the claims which can be the basis of indefinite leave to remain."

The IAT went on to say at page 9:

> "… although at present there is no direct legislative provision relating to the entry and stay in this country of those having an enforceable community right save the provisions of the immigration rules the European Laws made applicable in this country under the European Communities Act 1972 are "Immigration Laws" for the purpose of the 1971 Act." (Emphasis provided)

52. In *Capparelli* McCloskey J, President, reviewed the IAT decision in *Gal*, which neither party had identified as relevant and upon which he had not been addressed. He

bemoaned the absence of "comprehensive adversarial argument" but was satisfied that *Gal* was correctly decided although the underlying reasoning was flawed for the reasons reproduced below.

53. In paragraph 14 of the judgment, he referred to the Home Office policy as regards the period prior to 2 October 2000 in paragraph 8.1 of the then current Home Office Nationality Instruction entitled "European Economic Area and Swiss Nationals" which read: –

> "Evidence that the person concerned was exercising any description of EEA free movement right in the UK on the relevant date should be accepted as evidence that he or she was not, then, 'subject under the immigration laws to any restriction on the period for which [they] might remain in the United Kingdom'."

54. He went on to determine:

> "18. Although in Gal the IAT accepted that the phrase "immigration laws" encompasses the EU rules on free movement, I would question the correctness of this. Since 1971, via Section 33(1) of the Immigration Act of that year, the definition of "immigration laws" has been:
>
> "'Immigration laws' means this Act and any law for purposes similar to this Act which is for the time being or has (before or after the passing of this Act) been in force in any part of the United Kingdom and Islands."
>
> I consider that the ordinary and natural meaning of these words does not encompass the EU rules on free movement. The definition makes no mention of EU laws, primary or secondary. Furthermore, the 1971 Act pre-dated the accession of the United Kingdom to the EU and this definition was not amended subsequently. Notably, this definition was repeated when the 1981 Act was introduced: see section 50(1). In my judgement "immigration laws" are confined to laws made by the United Kingdom Parliament. If this phrase were designed to extend to any provisions of EU law, one would expect clear words to this effect: there are none. To complete this discrete analysis, paragraph 5 of the Immigration Rules makes clear that they have no application to EU citizens exercising Treaty rights:
>
> "Safe [sic] where expressly indicated, these Rules do not apply to those persons who are entitled to enter or remain in the United Kingdom by virtue of the provisions of the 2006 EEA Regulations. But any person who is not entitled to rely on the provisions of those Regulations is covered by these Rules."
>
> 19. I consider that the FtT fell into error in its consideration and application of the definition of "settled" in section 50(2) of the

> 1981 Act. This error arose from its concentration on the phrase "ordinarily resident" only, at the expense of and neglecting the second part of the definition namely "without being subject under the immigration laws to any restriction on the period for which he may remain." For the reasons explained in [18] I consider that the reasoning in Gal was incorrect. The IAT should have held that this second part of the definition of "settled" cannot sensibly be applied to a EU citizen exercising Treaty rights since the "immigration laws," correctly defined and understood, do not apply to such persons. In other words, in the case of EU citizens, no question of a time restriction under the immigration laws can arise. It follows that EU citizens can never satisfy the second part of the definition. Approached in this way, the FtT's error was to conclude that the Appellant's parents were, at the material time, viz when he was born, British citizens simply on account of being ordinarily resident in the United Kingdom. This finding failed to address the second limb of the definition of "settled." If addressed correctly, the FtT would in my judgement have been bound to conclude that it was not satisfied, for the reasons explained above.
>
> 20. In short, there is no merger of United Kingdom immigration laws and EU Treaty free movement rules. The view expressed in Gal that the latter are immersed within the former is, in my estimation, misconceived. These are two quite separate legal regimes in the context under scrutiny."

55. Therefore, applying the reasoning of McCloskey J, President, in *Capparelli* the answer to the question posed in [49] above would be 'no'. However, the decision presents the appellant with something of a 'curate's egg.' Ms Simor relies upon McCloskey J's reasoning as to the ordinary and natural meaning of "immigration laws" as defined by IA 1971, the lack of any subsequent amendment upon the UK's accession to the EEC/EU and that the BNA had adopted the definition in paragraph 20 of his judgment. However, she recoils from McCloskey J's denouement that "EU citizens can never satisfy the second part of the definition." As to this, Ms Simor submits that logically, if there is no domestic law restriction upon the period of time in which an EU citizen could remain, then they were entitled to be regarded as "settled" in accordance with the well understood principles of "ordinary residence"; see *Shah v Barnet LBC* [1983] 2 AC 309.

56. Mr Blundell also disagrees with McCloskey J's conclusion that an EU citizen could never be "settled" for the purposes of BNA for the diametrically opposite reason that UK immigration laws do apply and provide a "route to settlement" for an EU citizen in the UK as a qualified person. He relies on the reasoning in *Gal*, which McCloskey J rejected, to the effect that the ECA 1972 gave effect to and regulated on the domestic plane the rights of EEA nationals to enter and remain in the UK; the relevant regulations laid before Parliament in accordance with section 2(2) which concerned an EU citizen's rights of entry and residence, as listed above, comprised "immigration laws".

57. I respectfully disagree with McCloskey J's view that the IAT in *Gal* were saying that "immigration laws" encompasses the EU rules on free movement. It appears to me that

the IAT gave a far more nuanced explanation of the *relevance* of EU law rights in formulating provisions in domestic law in accordance with a Member State's obligation to give effect to the same.

58. Like Eyre J, I find difficulty in understanding McCloskey J's reference to the disapplication of the Immigration Rules which appeared to demonstrate that he was aware of domestic regulation of EU citizens, then contained within I(EEA)R 2006. (See [21] above). A further appraisal of the same regulations would reveal the regulation of a qualified person's right to apply for permanent residence.

59. That is not to say that I cannot detect the logic in McCloskey J's approach if he did, and was correct to, determine that an EU national exercising rights of free movement as a qualified worker was exempt from domestic "immigration laws." In the circumstances, it is impossible for them to meet the definition of "settled" in BNA on a strict interpretation of 50(3) BNA.

60. Whatever the merits of that view, the judgment read as a whole provides no support for the appellant's case. However, I agree with Mr Blundell, no principle of general application should be derived from the judgment in *Capparelli* for the purpose of the analysis of domestic legislation enacted to meet the requirements of Council directives.

61. In the event, Eyre J did not find it necessary to determine whether McCloskey J's approach was wrong or whether there was a 'powerful reason' not to follow it, for he considered the appellant's circumstances in that case to be distinguishable. That is, Mr Capparelli was born in 1986 prior to implementation of section 7 of IA 1988 and the 1994 Order. McCloskey J had not been considering whether the 2000 Regulations were immigration laws for the purpose of BNA. I consider that Eyre J was entitled to take this view and his reasons to distinguish *Capparelli* are unassailable.

62. This still leaves the question of whether the relevant 'laws, regulations, and administrative provisions' in force on 20 October 2000 are/were "<u>for purposes similar to</u> IA 1971." Whilst it is the substance of such laws which is determinative of their purpose, I consider that Mr Blundell's submission that the titles of the regulations hold some significance to be well made.

63. Ms Simor argues that the definition of "immigration laws" in section 50 of the BNA must have reference to the legislation which would have been known to Parliament at the time of the 1981 Act. She relies upon Bennion, Bailey and Norbury on Statutory Interpretation (8th edition, 2020) at section 14.2, for the principle of updating construction, which refers specifically to Lord Wilberforce's speech in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 at 822, in which he said that "*In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs*." However, that is to fail to read the speech as a whole, which also considered the impact of a fresh state of affairs upon legislation which a court may determine to fall within the original Parliamentary intent. As Lord Bingham said in *R (on the application of Quintavalle) v Human Fertilisation and Embryology Authority* [2003] UKHL 13 at [9], "*There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking.*"

64. In this regard it is to be noted that, section 33 IA 71 defines “immigration laws” by reference to “this Act and any law for purposes similar to this Act which is for the time being or has (before or after the passing of this Act) been in force in any part of the United Kingdom and Islands” (emphasis provided). Section 50(1) BNA defines “immigration laws” as “(a) in relation to the United Kingdom, means the Immigration Act 1971 and any law for purposes similar to that Act which is for the time being or has at any time been in force in any part of the United Kingdom”; (emphasis provided). I do not accept Ms Simor’s submission that this definition is referring to analogous legislation in “the Islands,” that is the Channel Islands and Isle of Man. This interpretation runs counter to the use of the word “any” law in “any” part of the UK. Neither is the interpretation for which she argues borne out by the terminology of section 33 IA 1971 in which “immigration laws” means this Act and any law for purposes similar to this Act which is for the time being or has (before or after the passing of this Act) been in force in any part of the United Kingdom and Islands. (Emphasis provided)

65. What then is “the purpose” of IA 1971? The answer is provided by section 3(2) of IA 2000 which provides for the Secretary of State to lay before Parliament “Immigration Rules” as to “the practice to be followed in the administration of [IA 1971] for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances”.

66. The IR 2000 were in force at the time of the appellant’s birth and are stated to have been laid before Parliament by the Secretary of State, as designated Minister, for the purposes of section 2(2) of the ECA. I do not accept Ms Simor’s submission that this means they were enacted solely for the purpose of “implementing any Community obligation of the United Kingdom” and therefore that they were not a law for “purposes similar” to IA 1971. Section 2(2)(b) specifically provides that such regulations may make provision “for the purpose of dealing with matters arising out of or related to any such obligation or rights”.

67. The 1994 Order was laid before Parliament under section 3(2) of the IA 1971 and expressly made provision for “settlement” of EEA nationals and their families in rules 255 to 262, as indicated in [18] above. The explanatory note of IR 2000 indicates that the Regulations re-enact with amendments the provisions of the 1994 Order and provide “a comprehensive scheme whereby Community nationals and their family members can assert rights of entry into, or residence in, the United Kingdom” implementing various European Community Directives. Consequently, I regard it is unrealistic to suggest that the Regulations were not for “similar purpose” to IA 1971.

68. I do not consider that the exceptions and exemptions provided for in section 8 (3) and (4)(b) or (c) of the IA 1971 provides an analogy that assists Ms Simor’s argument. Those identified in the exceptions and exemptions fall within closely identified groups who are required to enter and/or remain in designated roles and are subject to exemption from immigration control in that context rather than as a “qualified” individual entitled to enter or remain by virtue of an enforceable Community right; see section 7(1) of IA 1988. The former are described as “entitled to an exemption” from the provisions of the Act. The terms of section 7 of IA 1988 makes a clear differentiation as to the position of an EU national. See [19] above.

69. Further, I consider that the framing of section 50(4) of BNA is instructive of the fact that 'settlement' would not otherwise be presumed for the purpose of BNA but for the 'exemption'. That is:

> "A person to whom a child is born in the United Kingdom after commencement is to be regarded for the purposes of section 1(1) as being settled in the United Kingdom at the time of the birth if—"
>
> (a) he would fall to be so regarded but for his being at that time entitled to an exemption under section 8(3) of the Immigration Act 1971; and
>
> (b) immediately before he became entitled to that exemption he was settled in the United Kingdom; and
>
> (c) he was ordinarily resident in the United Kingdom from the time when he became entitled to that exemption to the time of the birth. (emphasis provided).

70. Therefore, drawing the strands together, I agree with Eyre J that the IR 2000 were immigration laws for the purposes of the relevant provisions of BNA. They provided a clear "route to settlement" for an EU national who was a qualified person. AM would qualify and have been entitled to apply shortly before the appellant's birth for her residence permit to be endorsed to show permission to remain in the United Kingdom indefinitely pursuant to paragraph 255 of the 194 Order and Regulation 15 of IR 2000. The fact that she did not do so did not mean that her continued residence in the United Kingdom was illegal, but her failure to do so surely deprived the appellant of opportunity to establish that his mother was "settled" at the time of is birth.

71. I would dismiss this ground of appeal.

Ground 2

72. I consider this ground of appeal to be capable of rapid dispatch. In my view, Eyre J was right in his identification of the principle to be derived from *Coomasaru* which transcends the facts of the case and Ms Simor's further submissions.

73. Mr Coomasaru was a citizen of Sri Lanka who entered the UK as a visitor in August 1973. He obtained a job in the Sri Lanka Students Welfare Centre but his right to remain in the UK was restricted and limited. He remained in the United Kingdom until April or May 1978 when he went abroad. On his return on May 20, 1978, he was at first refused re-admission but on June 7, 1978, he was granted leave to enter for 12 months subject to the restriction that he could take no employment save as sub-warden of the Sri Lanka Students' Welfare Centre. The applicant no longer held that appointment. The Secretary of State refused to revoke or vary the conditions under which the applicant had been allowed to enter the United Kingdom in June 1978 and that decision was upheld on appeals by the applicant to an adjudicator and to the IAT. The applicant contended that when he left the United Kingdom in 1978 for the trip from which he returned on May 20, 1978, he was already "settled in the United Kingdom" within the meaning of section 2 (3) (d) of the IA 1971 and paragraph 51 of the Statement of

Immigration Rules for Control on Entry: Commonwealth Citizens (H.C. 79), and that he should have been admitted unconditionally. Woolf J refused the applicant leave to apply for judicial review of the appeal tribunal's decision. His appeal against that decision was dismissed.

74. Sir John Donaldson MR at page 17 C - F, agreeing with Dillon LJ addressed the issue of settled both for the purposes of the section 2 (3) (d) of IA 1971 and for the purposes of the Statement of Immigration Rules for Control on Entry: Commonwealth citizens (H.C. 79). That is, "*No immigration officer had authority to grant the applicant diplomatic status, but the officer concerned with his entry on May 11, 1975, was entitled to grant him permission to enter and remain so long as he was employed with the Sri Lanka High Commission. This, as I see it, is precisely what he did. It is true that it is an unusual form of permission, but for present purposes that is immaterial. It is equally immaterial that in granting permission in this form the officer thought that the applicant had diplomatic status and was exempt from control so long as he retained that status. What matters is that this form of permission involved a restriction on the period for which the applicant might remain, namely so long as he was employed with the Sri Lanka High Commission, and so prevented his acquiring the status of one who is settled in the United Kingdom.*"

75. I find no plausible basis to distinguish the case or to decline to follow it as wrongly decided. Specifically, I regard the authority which Ms Simor initially suggested overruled *Coomasaru*, namely *Stevens v Governor and Another* (Bermuda) [2014] 3 LRC to be without any precedential or persuasive value.

76. In that case, the applicant, a Canadian citizen, had been resident in Bermuda for about 18 years. In April 2011 he married a Bermudian woman, and in May 2012 he applied for naturalisation as a British Overseas Territories ('BOT') citizen pursuant to section 18(2) of BNA. The requirements for naturalisation, which were set out in Sch 1 to the Act at para 7(c), were that on the date of the application [the applicant] was not subject under the immigration laws to any restriction on the period for which he might remain in that territory. The application was refused since the applicant was considered to be subject to such restrictions. The applicant applied to judicially review the decision in the Supreme Court of Bermuda.

77. Giving judgment, Hellman J said the 1981 Act should be given a uniform interpretation throughout the territories in which it applied. Guidance issued by the Secretary of State did not have a statutory basis but was nevertheless of assistance in construing the 1981 Act, in that it showed how it was interpreted by the Border Agency responsible for its enforcement in the United Kingdom. Read in the light of the guidance, 'not subject under the immigration laws to any restriction on the period for which he might remain in that territory' in para 7(c) of Sch 1 meant 'not restricted under the immigration laws to a definite period of time for which he might remain in the United Kingdom' or, as the case may be, Bermuda. 'Restriction' meant 'restriction to a definite period of time.'

78. This judgment does not commend itself on a number of fronts. First, it is a decision made *per incuriam*. The Court was not referred to *Coomasaru* and Hellman J specifically bemoaned the fact that he had not had the benefit of "an opinion of a Home Office lawyer" before deciding upon his construction of the relevant statutory provision in para 7(c) of Sch 1 BNA which required the applicant to be "not subject under the immigration laws to any restriction on the period for which he might remain in that

territory". If he had not been referred to the guidance, he "might have been tempted to agree with [the adjudicator] on … his interpretation of para 7(c)… [which] best comports with the ordinary, natural meaning of the statutory language, …"

79. Far more persuasive for its reasoning on this point is *Gal*. Although *Gal* concerned the position prior to the EEA Order 1994 it raised the same question as arises in this case: is an EEA national exercising free movement rights in the UK "settled" in the statutorily defined sense? The IAT's answer was no. it decided that since an EU national could only remain in the UK for as long as they met the conditions of their underlying EU right of residence, they could not be treated as "settled".

80. The IAT stated (at p.10):

> "*We accept that so long as Mr. Zilberberg qualified for a residence permit he had a right of residence but to be "settled" a person must have no restriction "for the period which he could remain". Mr. Zilberberg could remain under his European Law right only for a period during which he qualified under European Law for residence i.e. he met the terms of any particular European Law category on which he relied. So as an employee he had to remain a "worker" within the meaning of European Law. Even the residual residence category requires non-recourse to public funds.*
>
> *The period for which Mr. Zilberberg could remain was not restricted directly by time but so long as qualifications are needed the period is restricted and, more, is restricted as to its duration. The need for continued qualification is to be contrasted with indefinite leave to remain which may only be terminated by deportation. It follows that Mr. Zilberberg was never settled in this country …"*

81. Ms Simor argues that "settled status" does not depend upon application to and endorsement by the Home Office. AM was ordinarily resident in the UK and it is reasonable to assume that the Parliamentary draftsman's mind had regard to the necessary elements of ordinary residence in defining "settled"; achieving indefinite leave to remain, or permanent residence by way paragraph 255 of the 1994 Order or regulation 15 IR 2000, is no bar to deportation if the interests of public safety, public security or public health so demand.

82. I agree that permanent residence or indefinite leave to remain does not confer the status of right of abode upon a qualified person, but I disagree with the submission above. First, section 50(2) of BNA not only refers to ordinary residence but additionally and explicitly requires that residence be "without being subject under the immigration laws to any restriction on the period for which he may remain". Secondly, the argument fails to differentiate "settled status" for the purpose of section 1(1)(b) of BNA and "right of residence". Third, I agree with Mr Blundell that there is a qualitative difference which attaches to indefinite leave to remain or permanent residence as an enduring right for which only a positive step to end will suffice, for example being absent from the UK for a continuous period of two years, as opposed to a contingent right to remain dependent upon objective circumstances which maintain it, for example by continuing

to be a "worker". Finally, Parliament was entitled to regard the bureaucratic validation process as necessary and reasonable to authenticate the applicant as a qualified person throughout the specified period with a view to evidence "settlement." This does not derogate from the Council Directive and is in accordance with domestic law.

83. For the reasons indicated above, I do not regard the analogy Ms Simor draws between service personnel and EU citizens to assist her argument.

84. Finally, the simple answer to Ms Simor's point that the terms of the SSHD's decision, which refer to immigration time restrictions (see [71] above) support the interpretation for which she contends, is that neither the terms of the letter nor the previous policy of the Home Department determine the statutory construction of the BNA.

85. The reasoning in *Coomasaru* appears to me to entirely dispose of the point in ground 2. The phrase in section 2(3)(d) as was considered by this Court in *Coomasaru*, was substituted by BNA 1981 in identical terms. It is plainly right that a "period" is not only referrable to time but may also be qualified by circumstances.

86. The attempt to differentiate Mr Coomasaru's situation from that of AM based on her right to move between different types of qualification in the UK is clearly contrived. Until AM acquired indefinite leave to remain, the period in which she was entitled to remain in the UK was restricted to her status as a 'qualified person' on whatever basis that may be.

87. The general provisions for regulation and control enacted in section 3 of IA 1971 were to the same effect when under consideration in *Coomasaru* as they were on 20 October 2000. Limited leave to enter into or to remain in the UK could be made subject to time period and condition. The two are not mutually exclusive concepts as is clear from the provisions of sections 3(1) (b) and (c) and 3(3). The statute refers to 'period; not 'period of time.' The ordinary meaning of 'period' does not require to have a temporally defined start and end. Therefore, AM in the exercise of her enforceable rights of free movement was not constrained to a period of time measured by the calendar, rather the constraint was measured by a continuation of her status.

88. It follows that I reject Ms Simor's submissions as to the "plain meaning" of the phrase "restrictions as to the period for which [the appellant's mother could] remain" or that the case was decided *per incuriam* because it failed to take into account the entirety of section 3 of IA 1971.

89. I would dismiss this ground of appeal also.

Conclusions:

90. I note that in paragraph 87 of his judgment, Eyre J erroneously referred to the IR 2000 as disapplying the leave to enter and remain regime of the IA 1971 for EU nationals, rather than section 7 of the IA 1988. I do not regard the error to contaminate the point he made, for in previous paragraphs he clearly delineated between the primary act and regulations. Otherwise, I endorse his judgment on the critical issue of statutory construction for the reasons he gave as may be considered to be supplemented herein.

91. Subject to My Lady and My Lord, Nicola Davies, and Phillips LJJ, I would dismiss this appeal.

Lady Justice Nicola Davies:

92. I agree.

Lord Justice Phillips:

93. I also agree.