IN THE UPPER TRIBUNAL **Appeal No.** UA-2021-001684-USTA
ADMINISTRATIVE APPEALS CHAMBER (previously known as CUC/686/2021)

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

Between:

Secretary of State for Work and Pensions

Appellant

- v –

WV

Respondent

Before: Upper Tribunal Judge Ward

Hearing date: 7 November 2022 (with post-hearing submission)

Representation:
Appellant: James Cornwell, instructed by Government Legal Department
Respondent: Martin Williams, Child Poverty Action Group

DECISION

The decision of the Upper Tribunal is to allow the Secretary of State's appeal but to remake the decision in favour of the claimant. The decision of the First-tier Tribunal made on 7 January 2021 under number SC200/20/00413 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remake it as follows:

The claimant's appeal against the decision of 13 August 2020 is allowed. He is to be treated as being in Great Britain for the purposes of section 4(1)(c) of the Welfare Reform Act 2012, with the consequence that universal credit is to be paid on the joint claim by the claimant and his wife by reference to the couple rate and not the single person rate.

REASONS FOR DECISION

The issue

1. This appeal raises a previously untested point at Upper Tribunal level concerning the ability of an EU national to assert that he has sufficient resources for the purposes of regs 4 and 6 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") and art.7(1)(b) of Directive 2004/38/EC ("the Directive"). In the interests of preserving a degree of anonymity, I refer in the remainder of this decision, without disrespect, to the claimant as "C" and his wife as "J". J is a UK citizen. C is a Belgian national. The issue, put at its shortest, is whether in asserting self-sufficiency, C can rely on benefits that were in payment to J, given that she is a UK national, and what follows if he can. The context is the change from legacy benefits, the majority of which did not require a claimant's partner to have a right to reside, to universal credit, which does. The consequence of that was that SSWP's decision under appeal, taken on the joint claim of C and J for universal credit, awarded it only at the single person's rate. The detail of the phased introduction of universal credit is not needed here, but the obligation to claim universal credit rather than legacy benefits was triggered when C and J moved to a new area.

2. The point is an interesting, if somewhat technical, one, which has been pursued with vigour and clarity by both representatives, to whom I am grateful.

3. It is accepted that C meets the further requirement for asserting self-sufficiency, to have comprehensive sickness insurance cover, in the light of the decision in C-247/20 *VI v HMRC*.

Preliminary

4. SSWP's decision under appeal was taken on 13 August 2020 and thus falls within the "implementation period" for the UK's withdrawal from the European Union. Accordingly, EU law is to be applied.

5. C, who held pre-settled status at the time of SSWP's decision, was subsequently awarded settled status and has been entitled to universal credit since 22 May 2022. The present appeal thus concerns a "closed" period from 28 July 2020 to 21 May 2022.

6. C's appeal to the FtT was allowed following a telephone hearing on 7 January 2021. In barest summary, the FtT's decision rested (a) on the Court of Appeal's judgment in *Fratila and Tanase v SSWP* [2020] EWCA Civ 1741, which was subsequently reversed by the Supreme Court; and (b) on the view that as there was a perceived lacuna in the legislation in its failure to make provision for some EU citizen carers, it would be disproportionate to apply the Directive and the 2016 Regulations so as to hold that C did not have the right to reside. Mr Williams does not invite me to uphold the FtT's decision in his client's favour on either of these bases and I say no more about them.

7. Because of the subsequent course of the *Fratila* litigation and the close link of the issues in *Fratila* with those in C-709/20 *CG v Department for Communities in Northern Ireland*, the present case was at one time seen as a potential lead case to explore the issues, then unexplored at Upper Tribunal level or above, concerning the relevance and application of the EU Charter, as referred to at [84] to [93] of *CG*. The

way in which submissions in the present case developed meant that it proved not to be suitable for that purpose and those issues came to be considered by the Upper Tribunal in *SSWP v AT (AIRE Centre and IMA intervening)* [2022] UKUT 330 (AAC), in which there has been a subsequent appeal to the Court of Appeal in which, at the time of issue of this decision, judgment is awaited. A number of other points were raised in *AT*, which to date it has not been necessary to address, though it yet may be, depending on the outcome of appeal(s) in that case. These include (a) whether it amounts to unlawful discrimination contrary to the Withdrawal Agreement to refuse a claimant universal credit when they have a residence document (i.e. granting them pre-settled status) issued under that Agreement and (b) whether reg.9(3)(c)(i) of the Universal Credit Regulations 2013 is *ultra vires*, as not made within the purposes for which the enabling power (Welfare Reform Act 2012, s.4(5)) is conferred.

8. Mr Williams sought, at the skeleton argument stage (which was before the hearing in *AT* and when the course of that case was accordingly unclear), to introduce points (a) and (b) above into the present case, with a view to preserving the claimant's ability to benefit from their consideration in *AT* if the existing issue in this case were to go against him. He has subsequently abandoned the attempt in relation to (a). I refuse permission to introduce (b). CPAG have been instructed since February 2022. On 1 June 2022 CPAG indicated that they might seek to defend the FtT's decision on additional grounds. On 25 July they were directed to set out particulars of such grounds within 21 days which, with the benefit of a very short extension, they did on 19 August. The particulars included, in addition to the point which continues to be pursued, a potentially wide-ranging point (subsequently dropped at skeleton argument stage); they did not include either points (a) or (b) above. I directed that the submission that the decision should be remade in C's favour would be considered solely by reference to the two grounds raised in the particulars. Points (a) and (b) were known to CPAG through also acting on *AT*. It is entirely speculative whether, and if so when, (a) or (b) will need to be considered in *AT* and thus giving an interim decision in this case and staying points (a) and (b) as Mr Williams suggests would result in - particularly if *AT* were to go beyond the Court of Appeal - unknowable and potentially extensive delay. SSWP has already had to bear a heavy burden of responding to grounds which, with CPAG becoming instructed, have evolved considerably (that is not intended as a criticism). The basis of (b) is wholly undeveloped. In the circumstances I have outlined, I do not consider it is in the interests of justice or furthers the overriding objective to permit the very late additional introduction of (b) into this case. As is apparent from this decision, Mr Williams does not need it in any event.

Factual summary

9. C, when resident in Belgium, was self-employed; it appears the profits from his work were below the Belgian tax threshold. He came to the UK on 17 May 2017 and on 7 June 2017 married J. J has a son, born in January 2002. Since coming to the UK, C had not worked in any capacity at the time of the FtT's decision, but had been acting as a carer for J. With effect from 15 September 2017 he has been in receipt of carer's allowance.

10. J is severely disabled and was formerly in receipt of "legacy" welfare benefits, namely child tax credit, income-related employment and support allowance ("irESA") (she was in the support group) since 2011 and housing benefit. She has been receiving personal independence payment at the higher rate for both mobility and

daily living components since 2015 (and prior to that was in receipt of disability living allowance). She also received child benefit.

Benefit scenarios analysed

11. In order to assess the submissions in this case, it is necessary to determine the effects of (a) C joining J's household on her legacy benefit entitlement; (b) C and J's benefit income following their claim for universal credit with universal credit awarded at the single person rate; (c) what C and J's benefit income would be if instead universal credit were awarded at the couple rate; and (d) what universal credit J would receive if C was not living with her. The interactions of the conditions of entitlement of the benefits concerned are complex. I do not set them out in detail as the parties have helpfully submitted agreed tables (albeit they differ as to the consequences that flow from them), on which I gratefully draw below. All figures are shown using 2020/21 benefit rates.

Effect of C joining household of J on her award of irESA

12. J's irESA (paid weekly) prior to C joining the household was as follows:

Applicable amount	
Personal Allowance	£74.35
Severe Disability Premium	£66.95
Enhanced Disability Premium (single person rate)	£17.10
Support Component	£39.20
Total Applicable Amount	*£197.60*
Income	
No Assessable Income	£0.00
ESA Payable = **Applicable Amount - Income**	**£197.60**

13. After C joined the household, J's irESA (paid weekly) was as follows:

Applicable amount	
Personal Allowance	£116.80
Enhanced Disability Premium (couple rate)	£24.50
Carer premium	£37.50
Support Component	£39.20
Total Applicable Amount	*£218.00*
Income	
C's Carers Allowance	£67.25
ESA Payable = **Applicable Amount - Income**	**£150.75**

14. Therefore, C's presence in the benefit unit caused the following changes to the award of irESA:

Change	**Without C Rate**	**With C Rate**	**Difference**
J is entitled within applicable amount to the couple rate of the personal allowance and not the single person rate	£74.35	£116.80	£42.45
J is entitled within applicable amount to the couple rate of the enhanced disability premium rather than the single person rate	£17.10	£24.50	£7.40
J ceases to be entitled to the severe disability premium within her applicable amount	£66.95	£0	-£66.95
J entitled to the carer premium within her applicable amount	£0	£37.50	£37.50
Change to applicable amount			**£20.40**
Reduction in irESA due to C's receipt of carer's allowance		-£67.25	£-67.25
Net change to J's irESA caused by C's presence			**-£46.85**

15. In terms of other benefits that were received:

a. J was the housing benefit claimant. The amount of housing benefit awarded would not have changed due to C's presence.

b. J's award of child tax credit as a single person would have ended. An award at the same rate would have been made to the couple. This benefit was paid on account of the needs of J's British child.

c. J's award of child benefit would remain the same.

d. J's award of personal independence payment ("PIP") remained the same.

e. C commenced receiving carer's allowance.

Total benefit income prior to the universal credit claim

16. Prior to the claim for universal credit on 28 July 2020, the following benefits were in payment:

Claimant	**Benefit**	**Amount/Week**	**Amount/Month**
C	CA	£67.25	£291.42
J	PIP	£151.40	£656.06
J	irESA	£150.75	£653.25
J	CTC	£65.35	£283.18
J	CB	£21.05	£91.22
J	HB	£123.12[1]	£533.52
Total		**£578.92**	**£2,508.65**

[1] The two-bedroom LHA (Local Housing Allowance) Rate for the relevant BRMA (Broad Rental Market Area) as at June 2020.

Total benefit income once UC awarded at single person rate

17. The UC award to J as a single person was as follows:

UC Component	**Amount per month**
Standard Allowance	£409.89
Child element	£281.25
Limited Capability for Work-Related Activity ("LCWRA")	£341.92
Housing Element	£585.00
Less:	
- C's Carers Allowance ("CA")	- £291.42
UC Sub-total	**£1,326.64**

18. The total benefit income was therefore:

Benefits	
UC – J	£1,326.64
PIP - J	£656.06
CB – J	£91.22
CA – C	£291.42
Total	**£2,365.34**

Total UC that would be awarded to C and J if C entitled

19. If C and J had been awarded UC as a couple then the amount of UC would have been as follows:

UC Component	**Amount per month**
Standard Allowance	£594.04 (couple rate)
Carer Element	£162.92
Child element	£281.25
LCWRA	£341.92
Housing Element	£585.00
Less:	
- C's CA	- £291.42
UC Sub-total	**£1,673.71**

20. The total benefit income per month would have been as follows:

Total Benefits	
UC – Joint Claim	**£1,673.71** (from above)
PIP – J	£656.06
CA – C	£291.42
CB- J	£91.22
Total	**£2,712.41**

Total UC that would be awarded to J if C was not living with her at all

21. If C was not living with J, then J would receive UC as follows:

UC Component	**Amount per month**
Standard Allowance	£409.89 (single person rate)
Child element	£281.25
LCWRA	£341.92
Housing Element	£585.00
UC Sub-total	**£1,618.06**

The law

22. The following provisions of the Treaty on the Functioning of the European Union are relevant:

Art. 20 provides:

> "1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union ...
>
> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
>
> (a) the right to move and reside freely within the territory of the Member States;
>
> …
>
> These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder."

Art. 21 provides:

> "1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect …"

23. Relevant Recitals to the Directive are as follows:

> "(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.
>
> …
>
> (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.
>
> …
>
> (16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion …
>
> …
>
> (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 jobseekers to Union citizens other than those who are workers or self-employed persons or who retain that status … prior to acquisition of the right of permanent residence, to these same persons.
>
> …"

24. Material provisions in the Articles of the Directive are the following:

Art. 1(a):

> "This Directive lays down… the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members."

Art. 2:

"Definitions

For the purposes of this Directive:

1. “Union citizen” means any person having the nationality of a Member State;

2. “Family member” means:

(a) the spouse

…”

Art. 3:

“Beneficiaries

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

…”

Art. 7:

“Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

…

(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; …”

Art. 8(4):

“Administrative formalities for Union citizens

…

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.”

Art. 14:

> "Retention of the right of residence
>
> …
>
> 2. Union citizens … shall have the right of residence provided for in Articles 7, … as long as they meet the conditions set out therein.
>
> In specific cases where there is a reasonable doubt as to whether a Union citizen … satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.
>
> 3. An expulsion measure shall not be the automatic consequence of a Union citizen's … recourse to the social assistance system of the host Member State. …"

25. A claim for universal credit may be made by a single person or by a couple jointly. Claimants are required by the combined effect of sections 3 and 4(1)(c) and (5) of the Welfare Reform Act 2012 and regulation 9 of the Universal Credit Regulations 2013 to meet conditions of being in Great Britain and of having a qualifying right to reside. There is no dispute that the only possible right to reside falling to be considered in this case is the right to reside as a self-sufficient person and that, if established, it would be a qualifying right to reside for universal credit purposes. The relevant definition in domestic law at the material time was to be found in regulation 4(1)(c) of the 2016 Regulations in the following terms:

> "(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; and
> (ii) comprehensive sickness insurance cover in the United Kingdom."

26. It is common ground that J is not herself a beneficiary of the Directive, as she falls outside art.3. Her right to reside and entitlement to benefits, in her own right, arises because she is a UK national.

Submissions for C

27. Mr Williams submits that such recourse to benefits, paid for such a reason, cannot be a relevant burden on the UK's social assistance system. The principle behind the Directive is, he submits, as articulated by the Advocate General in C-456/02 *Trojani v Centre Public d'Aide Sociale de Bruxelles* that "persons who depend on social assistance will be taken care of in their own Member State." That principle was cited with approval by the Court of Appeal in *Abdirahman v SSWP* [2007] EWCA Civ 657 at [32iv]. The existence of the basic principle is not in dispute; the difference is as to what flows from it.

28. He further submits that, while J is indeed a "family member" of C, the purpose of the Directive is such that it cannot mean that art.7(1)(b), which would require C not only to "have" sufficient resources for himself, but also for her, applies to her.

29. As to whether C can rely on J's benefits to establish sufficiency of resources, Mr Williams relies on authorities which suggest that it is irrelevant to consider the source of funds on which a person relies for the purpose of demonstrating their self-sufficiency.

30. In C-200/02 *Zhu and Chen*, a case considering the predecessor Directive 90/364 but the principles of which are equally applicable to Directive 2004/38, the Court held:

> "30. According to the very terms of Article 1(1) of Directive 90/364, it is sufficient for the nationals of Member States to 'have' the necessary resources, and that provision lays down no requirement whatsoever as to their origin."

31. The reason was explained as follows:

> "32. Moreover, the limitations and conditions referred to in Article 18 EC and laid down by Directive 90/364 are based on the idea that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States. Thus, although, according to the fourth recital in the preamble to Directive 90/364, beneficiaries of the right of residence must not become an 'unreasonable' burden on the public finances of the host Member State, the Court nevertheless observed that those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the principle of proportionality (see, in particular, *Baumbast and R*, paragraphs 90 and 91).
>
> 33. An interpretation of the condition concerning the sufficiency of resources within the meaning of Directive 90/364, in the terms suggested by the Irish and United Kingdom Governments would add to that condition, as formulated in that directive, a requirement as to the origin of the resources which, not being necessary for the attainment of the objective pursued, namely the protection of the public finances of the Member States, would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence upheld by Article 18 EC."

32. C-408/03 *Commission v Belgium* concerned Belgian legislation which provided that resources from another person could only be taken into account if there was a legal obligation to pay them. That was rejected, the Court following *Zhu and Chen* and observing at [46] that:

> "the requirement of a legal link, as advocated by Belgium, between the provider and the recipient of the resources is disproportionate in that it goes beyond what is necessary to achieve the purpose of Directive 90/364, which is the protection of the public finances in the host Member State."

The Court went on to note at [48] (in a reference to the predecessor to art.14 of the Directive) that:

> "It is for that reason that in order to protect the legitimate interests of the host Member State, Directive 90/364 contains provisions allowing that 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."

33. In C-218/14 *Kuldip Singh v Minister of Justice and Equality* one of the referred questions, in a context where rights under art.13 were asserted by a third country national following a divorce from an EU Citizen, was:

> "Are the requirements of Article 7(1)(b) of Directive 2004/38/EC met where an EU citizen spouse claims to have sufficient resources within the meaning of Article 8(4) of the directive partly on the basis of the resources of the non-EU citizen spouse?"

The Court followed existing authority, including the passage from *Zhu and Chen* cited at [30] above, again holding that a requirement as to the origin of resources would be disproportionate. Thus it mattered not that some of the EU citizen's resources had been derived from the economic activity of the third country national in the host Member State.

34. C-93/18 *Bajratari v Secretary of State for the Home Department* concerned whether it was permissible to take into account resources provided by a parent who was working without the required residence card and work permit and so illegally. It was held that a further requirement relating to the origin of the resources provided by that parent would constitute a disproportionate interference with the exercise of the Union citizen minor's fundamental rights of free movement. The host State could rely on art.14 to check that the conditions in the Directive continued to be fulfilled (at [4]) and (at [40]) to act in the event of actual loss of resources.

35. Mr Williams makes the further points (a) that the amount of social assistance actually went down when C joined J; (b) that even if, contrary to his other submissions, C's carer's allowance did fall to be taken into account, the increase was a very modest one; and (c) the Directive only seeks to prevent individuals becoming an "unreasonable" burden. As to that, not only was the amount of any burden on the social assistance system caused by C's presence either small, or, as he maintains, nil, but, in the context of legacy benefits – unlike universal credit – the United Kingdom had not sought to impose a "right to reside" condition on the partners of claimants, thereby (in his submission) acknowledging the reasonableness of the burden that such partners would place on the social assistance system.

Submissions for the Secretary of State

36. While Mr Cornwell accepts that the Court has expressed itself in sweeping terms in *Zhu and Chen*, and subsequently, that no additional requirement can be imposed as to the origin of resources, he correctly points out that it has never been asked to consider the situation where the origin of the resources has been social assistance emanating from the State against which it is sought to assert a right of residence. Properly understood, art.7(1)(b) does not extend to reliance on such social assistance, for the purpose of the article is "the protection of the public finances of the Member State" and resources are needed to guard against "becoming" a burden

(citing *VP v SSWP* [2014] UKUT 32 (AAC); [2014] AACR 25). Cases in the line from *Zhu and Chen* to *Bajratari* provide no protection as they address the loss of resources (as resources are properly understood) but if welfare benefits are accepted as a valid resource, they can be relied upon as long as the benefits remain payable. To take into account J's resources, derived entirely from welfare benefits, provides the public finances of the host State with no protection at all. J's resources should therefore not be taken into account at all and it matters not whether the level of her benefit goes up or down with the arrival of C (albeit the rationale applies a fortiori where his arrival causes an increase in social assistance paid out).

37. To the above submissions, Mr Cornwell adds, the requirement under art.7(1)(b) is for the person asserting the right to "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" (emphasis added). The definition of "family member" in art.2 does not exclude those who are nationals of the host State. In Mr Cornwell's submission, to have a right to reside under art.7(1)(b), C would need to have sufficient resources for J as well (even though she is a British citizen).

Consideration of submissions

38. It is evident from recitals (10), (16) and (21) and arts. 7, 8 and 14 of the Directive that protecting the "social assistance" system of Member States is a powerful factor leading to the limitations and conditions laid down by the Directive, to which the right of free movement laid down in arts.20 and 21 TFEU is subject. What constitutes "social assistance" for the purposes of the Directive was explained in C-140/12 *Pensionsversicherungsanstalt v Brey* at [61]:

> "[T]hat 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."

39. C-411/20 *S v Familienkasse Niedersachsen-Bremen der Bundesagentur für Arbeit* ("*S*") concerned whether the provisions against discrimination on the ground of nationality applied so as to prevent Germany from refusing to grant to S, during the first three months of her stay in Germany, certain family allowances. Had those allowances constituted "social assistance", Germany would have been entitled, in reliance on art.24(2) of the Directive to refuse them, even during the first 3 months of S's stay in Germany when S's stay was lawful under art.6(1). The Court held that the family allowances in question were social security (and not social assistance). The Court held that the expression "social assistance" in the Directive meant what it said, rejecting Germany's submission that the economic effect on the Member State was the same whether the benefits constituted social assistance or not:

> "52. First of all, as regards Article 24(2) of Directive 2004/38, there is nothing in the wording of that provision to suggest that, by that provision, the EU legislature intended to allow the host Member State to derogate from the principle of equal treatment to which Union citizens legally resident in its

> territory must in principle be entitled in respect of benefits other than social assistance. On the contrary, as the Advocate General observed in point 57 of his Opinion, it is clear from that provision that it concerns only social assistance.
>
> 53. Next, as regards the regulatory context of Article 24(2) of Directive 2004/38, it should be recalled that, as is apparent from paragraph 31 above, Article 14(1) of that directive maintains the right of residence of up to three months as long as Union citizens and their family members 'do not become an unreasonable burden on the social assistance system of the host Member State'. Article 14 thus supports the interpretation that the possibility of derogating from the principle of equal treatment, on the basis of Article 24(2) of Directive 2004/38, is limited to social assistance and that it cannot extend to social security benefits.
>
> 54. Finally, that interpretation is consistent with the objective of Article 24(2) of Directive 2004/38, which aims, <u>according to recital 10 of that directive, to maintain the financial balance not of the social security system of the Member States but of their 'social assistance system'.</u>
>
> 55. It follows that, as the Advocate General observed, in essence, in point 62 of his Opinion, the derogation from the principle of equal treatment provided for in Article 24(2) of Directive 2004/38 is not applicable to a situation in which, during the first three months of his or her residence in the host Member State, a Union citizen does not seek 'social assistance', within the meaning of that provision, but rather 'family benefits', within the meaning of Article 3(1)(j) of Regulation No 883/2004, read in conjunction with Article 1(z) of that regulation." (Emphasis added)

40. There is no suggestion that all the legacy benefits paid to J constituted "social assistance" for this purpose. Most notably, personal independence payment (like disability living allowance before it) is paid when a person meets specified criteria concerning the limitations resulting from disability and are payable regardless of how much, or how little, the person has by way of capital or income. Child benefit is likewise paid as of right and fundamentally regardless of income when conditions are fulfilled (albeit high earners then lose it again through the tax system). It is accepted though that a number of the benefits she received did constitute social assistance.

41. Thus, while it is indeed the case that J's resources are derived from welfare benefits not all of them constitute "social assistance" (which, as shown above, is the concern of the Directive rather than "welfare benefits" or the protection of public finances in any wider sense).

42. Further, and more fundamentally, those that do were and are paid to J in consequence of her being a UK citizen. By providing social assistance to J in the period before she was joined by C, the UK was "taking care of" J in her own Member State, as envisaged by the principle from *Trojani* quoted above.

43. Mr Cornwell's submission in relation to authorities from *Zhu and Chen* to *Bajratari* in my view is to put the cart before the horse: just because the sort of mechanism envisaged by *Commission v Belgium* against the risk of loss <u>may</u> have limited or even no effect in such a context, does not mean that what constitutes a resource needs to be changed.

44. I cannot accept Mr Cornwell's submission that C has to show sufficient resources for himself and J. Art.3 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 point 2 of article 2 who accompany or join them." J has not moved to or resided in a Member State other than her own. Even if "family members" in art.2 does not include any limitation of nationality on its face, J still would not be, for the purposes of art.3, a "family [member] as defined in point 2 of article 2 who accompany or join them." Even if the latter limb could potentially apply to a British citizen (which I should not be taken as holding), J neither accompanied C to the UK, nor joined him here; she was here already. Thus on no view could the Directive apply to her. It is therefore just for himself that C needs to be able to show resources, but that does not resolve the central issue.

45. Clearly, once she was joined by C, the overall amount of welfare benefits paid to the household increased (albeit if, as Mr Williams submits, carer's allowance is not "social assistance", the amount of social assistance paid decreased) and it was on that combined, pooled, income that C and J, as a couple, lived. Because of the make-up of benefits J received, it would be fanciful to conclude that during that period C was not living, in substantial measure, on social assistance provided to J.

46. Art.7(1)(b) and art.8(4) need to be considered together. Under the former, the question is whether (given the conclusion I reached above) C has "sufficient resources for [himself] not to become a burden on the social assistance system of the host Member State during [his] period of residence. Under the latter:

> "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."

47. The resources which C "has" (in the sense of the *Zhu and Chen* line of authority) (or, more accurately, had prior to the enforced claim for universal credit) 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.

48. 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 C and J would not be a tenable position, in that it would conflict with art.8(4).

49. What the Secretary of State is left with is an argument that the European legislator cannot have intended that a person can assert a right of residence against a State relying on resources ultimately derived from that State. I am unable to derive that from Recital 10 as Mr Cornwell invites me to. I do accept that self-sufficiency has to be assessed without taking into account any social assistance which might be

paid to the person seeking to assert the right, were he eligible for the assistance: see C-333/13 *Dano v Jobcenter Leipzig* at [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".

As stated at [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",

but what is meant by this appears at [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" (emphasis added).

50. There is no suggestion that that is what C has done. There is no suggestion that the marriage is a sham. What he has done is to marry, and care for, J, a person with a considerable level of disability who (rather than C) was the person in receipt of the resources. Those resources were modest but they were made available to C and he "had" them so far as needed for his circumstances and they were sufficient. As seen from authorities cited above, conditions as to the origin of sums provided to another by way of resources have been consistently rejected as disproportionate by the CJEU.

51. While I accept Mr Cornwell's point that 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, for the reasons above, I do not consider that, had it done so, it would have done anything other than followed the consistent line of authority from *Zhu and Chen* to *Bajratari*. There is therefore in my judgment no reason in principle why C 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 universal credit claim. Mr Cornwell's characterisation of it as "bootstrapping" may have been a tempting label to adopt to characterise reliance on resources derived (directly or at one remove) from the State in order to assert a right of residence against it but for the reason I have given, it is on the facts of the present case not outwith what is contemplated by the Directive.

52. It is clear from [14] that, when C joined the household, there were adjustments downwards in the amount of ESA which J received, but that C started to receive carer's allowance. If those two changes are taken together, there was an increase, albeit a modest one, in the amount of benefit paid to the household, but that matters

not given that what the Directive is concerned with is social assistance (not benefits generally), unless the carer's allowance itself constitutes "social assistance".

53. Mr Williams submits that C's carer's allowance was not social assistance for this purpose and thus that one should have regard only to the reduction in J's ESA following C's joining the household. The authority relied upon by Mr Williams and by which he says, at its highest, the Upper Tribunal is bound, is C-299/05 *Commission v Council and Parliament*. In my view the case is distinguishable, but be that as it may, Mr Cornwell, on instructions, concedes that carer's allowance is not "social assistance" for the purposes of the Directive. It may be thought something of a quirk that the amount of social security paid to the household has gone up but the amount of social assistance has gone down, although that would also occur where, for instance, someone with a pension joined the household.

54. While I do not consider that the Upper Tribunal is bound by *Commission v Parliament,* in the light of that decision so far as it goes and in particular in view of the rejection in *S* of the argument (recorded in AG Szpunar's Opinion at [55]) that the effects of other forms of social security may be the same as those of social assistance, I am content to accept Mr Cornwell's concession. It follows that when C joined the household, the burden on the social assistance system did indeed decrease, rather than increase.

55. Mr Cornwell suggests that C's argument faces the difficulty that either some of the social assistance is in substance his (in which case it cannot be taken into account following *Dano*) or that it is not, in which case it is J's benefit, which has to be stretched so as to cover C, thus implying that his resources are not sufficient. However, the social assistance was paid to J, not C, and 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 C and J. I therefore do not accept that the fact that the resources were paid to J meant that the provision she made for C out of them, plus his carer's allowance, were anything other than sufficient in the sense relevant for present purposes.

Interim conclusion: C initially had sufficient resources

56. It follows that in my view down to the point of the claim for universal credit, C 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 C's presence in the household did not result in any increase in the social assistance payable to J (and thus no burden). For this reason, I need not address, and place no reliance on, the submission by Mr Williams that by not imposing a right to reside requirement on an EU citizen partner under the legacy benefits, the Secretary of State was accepting the reasonableness of the burden such spouses imposed: in the present case, there was no burden.

Brey: the assessment requirement

57. We thus arrive at the position where C did have sufficient resources until the time when, following his and J's move to a different local authority area, they were

required to claim universal credit and J lost her entitlement to the legacy benefits. In C-140/12 *Pensionsversicherungsanstalt v Brey* the CJEU held:

> "63. Consequently, the fact that a national of another member state who is not economically active may be eligible, in light of his low pension, to receive [an Austrian subsistence benefit] could be an indication that that national does not have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host member state for the purposes of article 7(1)(b) of Directive 2004/38: see Trojani's case [2004] ECR I-7573, paras 35—36.
>
> 64. However, the competent national authorities cannot draw such conclusions without first carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned."

and at [72]:

> "By making the right of residence for a period of longer than three months conditional on the person concerned not becoming an "unreasonable" burden on the social assistance "system" of the host member state, article 7(1)(b) of Directive 2004/38, interpreted in the light of recital (10) to that Directive, means that the competent national authorities have the power to assess, taking into account a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that member state's social assistance system as a whole. Directive 2004/38 thus recognises a certain degree of financial solidarity between nationals of a host member state and nationals of other member states, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary: see, by analogy, Grzelczyk's case [2002] ICR 566, para 44; Bidar's case [2005] QB 812, para 56 and Förster's case [2008] ECR I-8507, para 48."

58. The Upper Tribunal considered the scope of the *Brey* judgment in *VP v SSWP* [2014] UKUT 32 (AAC); [2014] AACR 25, concluding that the decision only required an individualised assessment of the type described above where a person had initially had a right to reside on the basis of self-sufficiency, but lost it. The Secretary of State reserves the right to argue, if this case goes higher, that even in such circumstances an individualised assessment is not required, in particular in the light of *Mirga v SSWP* [2016] UKSC 1 [2016]1WLR 481, per Lord Neuberger at [68] and C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* at [59].

59. Meanwhile, *Brey* (as understood in *VP*) has been applied by the Upper Tribunal in a small number of decisions, most relevantly for present purposes *AMS v SSWP (Second interim decision)* [2017] UKUT 48; [2018] AACR 27. The decision attempts to articulate what are relevant factors when conducting an assessment of such a type. It is not necessary to quote at length from it here. It is however useful to set out para 69 of *Brey*, which I do not regard as confined to the expressly-stated context of expulsion:

> "Furthermore, it is clear from recital (16) in the Preamble to Directive 2004/38 that, in order to determine whether a person receiving social assistance has become an unreasonable burden on its social assistance system, the host member state should, before adopting an expulsion measure, examine whether the person concerned is experiencing temporary difficulties and take into account the duration of residence of the person concerned, his personal circumstances, and the amount of aid which has been granted to him."

60. In *Alimanovic* at [62], the CJEU ruled that no individualised assessment was needed in relation to the subject matter of that case (retention of "worker" status) because the gradated system in the Directive in that regard was itself proportionate. Nonetheless, it took the opportunity to comment that:

> "62 Moreover, as regards the individual assessment for the purposes of making an overall appraisal of the burden which the grant of a specific benefit would place on the national system of social assistance at issue in the main proceedings as a whole, it must be observed that the assistance awarded to a single applicant can scarcely be described as an "unreasonable burden" for a member state, within the meaning of article 14(1) of Directive 2004/38. However, while an individual claim might not place the member state concerned under an unreasonable burden, the accumulation of all the individual claims which would be submitted to it would be bound to do so."

61. In *AMS* I commented in relation to this paragraph:

> "51. What is required is a collective assessment. That much is clear from *Brey* [77] which refers to the "burden…on the social assistance system as a whole".
>
> 52. I derive only limited additional assistance in this respect from *Alimanovic* [62]. It is not clear that it was needed for the purposes of the decision that either someone met the requirements for retaining worker status or they did not and the provisions of the Directive in that regard, which were held to be sufficient, did not raise any question of whether an "unreasonable burden" would arise. Further, the paragraph addresses Article 14(1), which is concerned with the rights of EEA citizens in the first three months, which was not the position of Ms Alimanovic or her family. The CJEU's observation that "the accumulation of all the individual claims which would be submitted to it would be bound to do so" can only be understood as the consequences if the gradated system for retaining worker status were, in effect, to be torn up. It cannot have intended (least of all in a case which did not involve Article 8(4)) to do away with the individual assessment which Article 8(4) of the Directive requires or to make it nugatory by saying that an individual assessment of a person's circumstances will always be outweighed by the total impact of claims. In my view it neither adds to, nor detracts from, what is said in *Brey* at [77], where a case under Article 7(1)(b) is concerned."

The assessment in the present case

62. The first step is to examine the competing contentions as to what additional social assistance spending would be caused by allowing C to claim as a couple with his British spouse. Mr Williams submits that the difference in social assistance that allowing C's claim would represent is a burden of only £55.65 per month to the social assistance system i.e. the figure in [19] minus the figure in [21]. Currently, J's universal credit award is reduced by the amount of C's carer's allowance. If C were not in the household at all, more social assistance would be paid to J (£1,618.06). However, C's presence within the household whilst J is a single claimant (and the fact that his carer's allowance counts as income) means that J's universal credit is only £1,326.64 (see [17]). Mr Cornwell agrees that J's single universal credit award has been reduced but notes that this is compensated for by C's award of carer's allowance which they both have access to as they live in the same household. For that reason, SSWP maintains that the correct burden to consider would be the difference between the universal credit that J gets now (£1,326.64) and what she would get if it were awarded to them as a couple (£1,673.71) (see [19]), i.e. a difference of c.£347 per month. (This figure equates to Mr Williams' figure for the burden (£55.65) plus C's carers allowance (£291.42).)

63. On this I prefer the Secretary of State's position. The exercise which *Brey* requires is to assess the burden which would be caused by granting a benefit when ex hypothesi that benefit would otherwise be refused. To the extent that the assessment is individualised, it is the circumstances of a claimant that are relevant and the exercise does not require other circumstances to be treated as if they are different from how they actually are. Thus, in my view, the correct approach is to take the amount of universal credit which J in fact receives, with C living with her; this means that it is calculated by reference to the single person rate because, leaving aside present matters, C fails to meet the right to reside condition, and reduced by C's carer's allowance, which, despite that failure, falls to be taken into account: see Universal Credit Regulations 2013, reg.22(3). Accordingly, the ongoing burden if C is taken as entitled to social assistance is £347 per month.

64. Whilst I note para 69 of *Brey*, I do not consider that it is relevant to take into account, as Mr Cornwell invites me to, that as at the date of the decision under appeal, C would (as he submits) already have been a burden on the social assistance system of the UK. For the reasons given earlier, he has not. He has been supported by his wife from benefits (including social assistance) paid to her as a British national and his presence caused the amount of social assistance to reduce. There would be a burden going forward, but on the particular facts of this case its reasonableness or otherwise can only properly be assessed by reference to the position going forward. I do not read "aid" in para 69 of *Brey* as directed to anything other than social assistance, but, if I am wrong in that, I 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.

65. How long a period looking forward should be taken into account is also disputed. I do not consider that at the date of the DWP's decision there was any realistic

prospect that C would take up self-employment. He had not done so between his arrival in the UK and that date. His previous unspecified self-employment in Belgium appears to have been extremely modest in scale. There is no evidence of any concrete plan to take up self-employment (or, for completeness, any other economic activity).

66. Is it relevant only to consider the period from C's claim for universal credit to when, 5 years after C's arrival in the UK, he was given settled status and so entitled to social assistance in any event? Cm 9675, the Statement of Changes in Immigration Rules which introduced settled status, was laid before Parliament in July 2018 and its terms are such that it must have been capable of being appreciated, as at the date of the DWP's decision, that C would be likely to get settled status.

67. Mr Cornwell indicates that the Secretary of State

> "does not accept the inference that [C] seeks to draw that by establishing Settled Status as a qualifying right to reside (which is as a result of domestic policy linked to the UK's exit from the EU) as a future prospect, this somehow negates the EU law concept of being an unreasonable burden in the meantime."

However, I consider the point is relevant, not in terms of seeking to "negate" the concept of being an unreasonable burden: rather, it is a question of ascertaining the period over which the extent of the burden has to be determined, precisely in order to decide whether the burden is, or is not, unreasonable.

68. The grant of pre-settled (applicable by analogy to, settled) status to those who had exercised freedom of movement rights before the Brexit withdrawal date was considered in C-709/20 *CG v Department for Communities* at paras 87 and 88:

> "In the present case, it is apparent from the order for reference that the UK authorities granted CG a right of residence even though she did not have sufficient resources. As noted in paragraph 82 of the present judgment, those authorities applied more favourable rules, in terms of the right of residence, than those established by the provisions of Directive 2004/38, with the result that that action cannot be regarded as an implementation of that directive. In so doing, those authorities by contrast recognised the right of a national of a Member State to reside freely on its territory conferred on EU citizens by Article 21(1) TFEU, without relying on the conditions and limitations in respect of that right laid down by Directive 2004/38.
>
> It follows that, where they grant that right in circumstances such as those in the main proceedings, the authorities of the host Member State implement the provisions of the FEU Treaty on Union citizenship…"

69. In my view inter alia because the grant of pre-settled status has been held to be an implementation of EU law, there can be no objection to taking as an end date in the present context the date as at which it was likely that the UK, in the exercise described in the above extracts from *CG*, would confer on C a right of residence with

unrestricted ability to claim social assistance i.e. settled status. That means that the period needing to be considered is 23 months.

70. The likely cost, ignoring any benefit upratings for simplicity, is therefore 23 x £347.07 = £7982.61.

71. When it comes to collective impact, the parties, understandably for their respective reasons, seek to define the relevant group of accumulated claims differently – Mr Williams narrowly, Mr Cornwell broadly. It seems to me that the relevant group is:

> 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
> 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).

72. There are two areas in which the EU national partner's presence might make a difference to the amount of social assistance payable to the British national: (a) the need to bring into account the EU national's resources (such as C's carer's allowance) and (b) the effect on the allowances used for the calculation of social assistance. In relation to (a) apart from receipt of carer's allowance, other scenarios which might have this consequence would be if the EU national partner moving in with his or her British partner received a pension or had some unearned income, such as interest on a relatively small amount[2] of savings. In relation to (b), in cases where disability is not a factor, the normal effect of the presence of a partner in the household will be to increase the relevant allowance from the single rate to the couple rate. It will be primarily in those cases where there is disability, with the sort of consequential effects on the calculation of the relevant allowances seen in this case, that there is any realistic possibility of the amount of social assistance paid out with the arrival of the partner decreasing.

73. I have not been offered any figures for any of the possible cohorts put forward or any of the elements within them. In those circumstances I have to reach a view as best I can and conclude that, for the reasons in the two preceding paragraphs, the cohort who meet all the conditions described is likely to be a small one. It will also be time-limited by completion of the transition from legacy benefits to universal credit.

74. The monthly amount involved would equate to an increase of some 26% on the universal credit J would otherwise receive, or an increase of some 15% on the household's total benefit income. While it would clearly be significant to a household on benefits, it is a relatively small proportion of their income and has the character of a time-limited top-up. As I have concluded that the cohort of similar cases is a small one, I conclude that the outcome of the assessment which I consider to be mandated by the decision in *Brey* is that the burden on the UK's social assistance system which

[2] Capital over £16,000 would disqualify from universal credit in any event.

would arise by paying universal credit to C as if he fulfilled the right to reside requirement imposed following the joint claim for universal credit would not be an unreasonable one.

Conclusion

75. It follows therefore that the claim for universal credit must be calculated on the footing set out at the head of these Reasons.

Postscript: joint claims – a procedural issue

76. Finally, I record a submission by Mr Williams which appears well-founded so far as it goes but is of no great consequence in the present case. Throughout this case, the appeal has been treated as C's appeal, even though it concerns a joint claim for universal credit. Mr Williams points out that by a combination of Social Security Act 1998 s.12(2) and the definition of "claimant" in s.39(1) in relation to a couple jointly claiming universal credit, J also had a right of appeal. He submits that the DWP may need to review its forms but that is not a matter for me. He also suggests that tribunals may wish to enquire whether both members of a couple are pursuing an appeal and to consider joining the other member in appropriate cases. However, he accepts that in the present case, J's interests are adequately served by C pursuing the appeal.

C.G.Ward
Judge of the Upper Tribunal
Authorised for issue on 15 May 2023