IN THE UPPER TRIBUNAL **Case No.** CDLA/2673/2014
ADMINISTRATIVE APPEALS CHAMBER

Before: **M R Hemingway: Judge of the Upper Tribunal**

Decision: **The decision of the First-tier Tribunal made when sitting at Enfield under reference SC921/13/02399 involved an error of law and is set aside.**

I substitute my own decision to the effect that the appellant is not entitled to disability living allowance because he is not ordinarily resident in Great Britain.

This decision is made under section 12 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

The decision in summary

1. This is the claimant's appeal to the Upper Tribunal against a decision of the First-tier Tribunal ("the tribunal") made on 14 January 2014, dismissing the appeal to it directed against the respondent's original decision of 25 January 2013 to the effect that there is no entitlement to disability living allowance. My decision is that the decision of the tribunal involved an error of law and, in consequence, I set its decision aside. However, I substitute my own decision to the same effect.

The background

2. The claimant is a child and a national of Israel. He was born on 22 July 2001. He has brought this appeal through his mother and appointee. She is a dual Israeli and British national. The claimant has autistic spectrum disorder, oppositional defiance disorder, severe mood dysregulation and shows signs of conduct disorder and hyperactivity.

3. The appointee, the claimant and two siblings of the claimant arrived in the United Kingdom on 21 July 2011. The claimant's father remained in Israel. The appointee has said, and it is not disputed, that when she came to the UK and brought her children with her she was fleeing domestic violence. The claimant is attending school and, as to his education, there is in existence a statement of special educational needs made in accordance with section 324 of the Education Act 1996.

4. On 11 July 2012 the respondent received a claim for disability living allowance made on behalf of the claimant. A standard application form had been completed by and signed by the appointee. The respondent sought further information as a result of which it became apparent that the claimant had come to the UK in possession of a visit visa and had been granted leave to enter for a period of six months. Pausing there, I am told that no attempt was made to obtain further leave either before or after the expiry of that six month period and no attempt was made to otherwise regularise his immigration status. Thus, he became and remains an overstayer.

5. The respondent refused the application for disability living allowance on 25 January 2013 on the basis that "the conditions relating to residence in Great Britain are not satisfied". An appeal to the tribunal was lodged.

The legislation

6. At this point, and before considering the decision made by the tribunal, it is appropriate to set out something of the legislative background.

7. Disability living allowance is a benefit available for both children and adults. However, there are what are referred to as "residence and presence" conditions. As to which, section 71(6) provides as follows:

> "A person shall not be entitled to a disability living allowance unless he satisfies the prescribed conditions as to residence and presence in Great Britain."

8. Those prescribed conditions are to be found in the Social Security (Disability Living Allowance) Regulations 1991. As at the material time with which this appeal is concerned, they were in this form:

> "**Conditions as to residence and presence in Great Britain**
>
> **2.** - (1) Subject to the following provisions of this regulation, the prescribed conditions for the purposes of section 71(6) of the Act as to residence and presence in Great Britain in relation to any person on any day shall be that –
>
> (a) on that day –
>
> (i) he is ordinarily resident in Great Britain; and
>
> (ib) he is not a person subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act 1999 or section 115 of that Act does not apply to him for the purposes of entitlement to disability living allowance by virtue of regulation 2 of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, and
>
> (ii) he is present in Great Britain;
>
> (iii) he has been present in Great Britain for a period of, or for periods amounting in aggregate to, not less

than 26 weeks in the 52 weeks immediately preceding that day …"

9. Other legislation provides for certain categories of persons to be debarred from receiving benefits due to their immigration status. In this context, the salient parts of the Immigration and Asylum Act 1999 read as follows:

> **" 115. - Exclusion from benefit.**
>
> (1) No person is entitled to …
>
> (d) disability living allowance, …
>
> under the Social Security Contributions and Benefits Act 1992 while he is a person to whom this section applies …
>
> (3) This section applies to a person subject to immigration control unless he falls within such category or description, or satisfies such conditions, as may be prescribed.
>
> (4) Regulations under subsection (3) may provide for a person to be treated for prescribed purposes only as not being a person to whom this section applies. …
>
> (9) "*A person subject to immigration control*" means a person who is not a national of an EEA State and who –
>
> (a) requires leave to enter or remain in the United Kingdom but does not have it;
>
> (b) has leave to enter or remain in the United Kingdom which is subject to a condition that he does not have recourse to public funds;
>
> (c) has leave to enter or remain in the United Kingdom given as a result of a maintenance undertaking; or
>
> (d) has leave to enter or remain in the United Kingdom only as a result of paragraph 17 of Schedule 4. …"

10. The relevant parts of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 state as follows:

> " (1) …
>
> (2) For the purposes of entitlement to … disability living allowance … a person falling within a category or description of persons specified in Part II of the Schedule is a person to whom section 115 of the Act does not apply.

(3) …"

Turning to Part II of the Schedule:

> "Part II - Persons not excluded under section 115 of the Immigration and Asylum Act from entitlement to … disability living allowance …
>
> 1. A member of a family of a national of a State contracting party to the Agreement on the European Economic Area signed at Oporto on 2 May 1992 as adjusted by the Protocol signed at Brussels on 17 March 1993.
>
> 2. …"

11. The way in which the above provisions are potentially relevant to this appeal to the Upper Tribunal will be explained below.

The appeal to the First-tier Tribunal

12. As indicated above, an appeal was pursued to the tribunal. The appellant's appointee provided written evidence including a statement from her and a letter asserting that the claimant is ordinarily resident in the UK, that he is settled here and that he is not to be treated as being subject to immigration control because he falls within Part II of the 2000 Regulations referred to above.

13. After an initial adjournment the tribunal held an oral hearing of the appeal on 14 January 2014. The appointee was in attendance, though not represented, and she gave oral evidence. A presenting officer attended on behalf of the respondent. The tribunal's decision was to dismiss the appeal and this was confirmed in a decision notice issued on the date of the hearing. The tribunal subsequently produced its statement of reasons for decision ("statement of reasons") on 24 March 2014. It is clear from its statement of reasons that the tribunal did not go into the question of ordinary residence at all. Rather, it based its decision to dismiss the appeal upon its view that the claimant was a person subject to immigration control as defined above. Specifically, it said this:

> " 5. We also found that [the claimant] is an Israeli citizen born to a mother with dual British and Israeli citizenship and a father who is Israeli. This is what we were told and what we accepted. [The claimant] was not a refugee nor did he have exceptional leave to remain, nor did he have unlimited leave to enter or to remain. See p.78 onwards. This si (sic) what we were told and what we accepted.
>
> 6. The position of [the claimant] has not been regularised. His father had promised to pay for visas but had reneged on this promise. [The appointee] has no funds. Entry was permitted on the basis of no recourse to public funds, a point accepted by [the appointee].
>
> 7. [The claimant] was a person subject to immigration control and as such was not entitled to disability living allowance."

14. What the tribunal was really saying, in effect, was that the claimant was a person subject to immigration control because he required leave to enter or remain in the

United Kingdom but did not have it and that he did not fall within any of the circumstances which would lead to section 115 being disapplied with respect to him.

The proceedings before the Upper Tribunal

15. It appears that it was only at this stage that the appointee secured the assistance of the Harrow Law Centre who have represented her and the claimant ever since. They lodged an application for permission to appeal to the Upper Tribunal contending, principally, that the tribunal had erred in law in failing to conclude that, since the appointee is a British (albeit dual) national, and since the United Kingdom of Great Britain and Northern Ireland is a signatory to the Oporto Agreement, the claimant is, therefore, a member of the family of a national of a State contracting party to that agreement and does, therefore, fall within the exemption at Part II, paragraph 1 above.

16. Permission to appeal was granted, on 30 April 2014, by a district tribunal judge of the First-tier Tribunal.

17. I subsequently issued directions and received written submissions of 24 October 2014 and 25 March 2015 from the respondent and written submissions of 4 December 2014 and 30 April 2015 on behalf of the claimant. I held an oral hearing of the appeal, on 2 September 2015, at the request of the claimant's representatives. Shortly prior to that hearing I received a skeleton argument of 20 August 2015 supplied by the respondent and, at the hearing, I was given a document headed "appellant's note of argument". I also received a very comprehensive bundle of authorities. I heard oral submissions, at the hearing, from Mr Cooper on behalf of the respondent and Mr Jiminez on behalf of the claimant. I subsequently received further submissions addressing an issue raised for the first time at the hearing concerning an argument that the terms of the UN Convention on the Rights of the Child could be used as an aid to construction of the term "ordinarily resident" as used in Regulation 2 of the above regulations.

The arguments before the Upper Tribunal

18. It appeared, from the written submissions and prior to the oral hearing, that there were to be three issues which would have to be considered namely:

(i) whether the claimant could be ordinarily resident in circumstances where he was not lawfully resident in the UK?

(ii) whether, if he could be so ordinarily resident, the claimant could fall within an exemption to the exclusion of persons subject to immigration control from entitlement to disability living allowance and;

(iii) whether, having regard to the ordinary residence issues, the claimant could have a right to reside in the United Kingdom derived through his British citizen mother's EU citizenship rights under Article 20 of the Treaty on the Functioning of the European Union following what was said in C-34/09 *Ruiz* and *Zanbrano.*

19. However, at the hearing, Mr Jiminez, entirely correctly in my view, indicated he would no longer pursue any point on right to reside grounds, so it is not necessary for me to say anything more at all about that, thus, leaving the first two of the above issues only. It was also apparent and agreed by the parties that the question of immigration control would only arise if the ordinarily resident issue was resolved in favour of the claimant. In other words, if the claimant was not ordinarily resident he could not establish entitlement in any event. Finally, with respect to concessions, Mr Jiminez said with respect to the second of the three issues set out above, that he accepted that the appointee had not exercised any "treaty rights" because whilst she is a British (albeit dual) citizen she has never been in any other EU country so that, for example, the Immigration (European Economic Area) Regulations 2006 would not apply to her and that, further, if the Upper Tribunal were to conclude, as is argued by the respondent and as was found to be the case in *CDLA/708/2007*, paragraph 1 in Part II of the Schedule to the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 is intended to enable the UK to comply with its obligations under the EEA agreement, then a purposive approach to its interpretation would have to be taken following *Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] C-106/89*.

20. As to the ordinarily resident issue, Mr Jiminez accepted that there was, from the claimant's point of view, unhelpful dicta contained in the well known judgment in *R v Barnet London Borough Council Ex parte Shah* [1983] 2 WLR 16. That was a case where the House of Lords dealt with the meaning of 'ordinary residence' in the context of local authority education grants. It was held that unless it could be shown that the relevant statutory framework or the legal context in which the words 'ordinarily resident' were used required a different meaning to be given to them, it was settled law that they referred to a person's abode in a particular place or country which he had adopted voluntarily and for settled purposes, which could include education, as part of the regular order of his life for the time being, whether of short or long duration, with the exception that, if his presence in a particular place or country was unlawful, he could not rely on his unlawful residence as constituting ordinary residence. Lord Scarman stated the following:

> "Unless, therefore, it can be shown that the statutory framework or legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that 'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration.
>
> There is, of course, one important exception. If a man's presence in a particular place or country is unlawful, e.g. in breach of the immigration laws, he cannot rely on his unlawful residence as constituting ordinary residence (even though in a tax case the Crown may be able to do so): in re *Abdul* Manan *[1971] 1 WLR 859* and *Reg v Secretary of State for the Home Department*, Ex parte Margueritte [1982] 3 WLR 753, CA. There is, indeed, express provision to this effect in the Act of 1971, section 33(2). But even without this guidance I would conclude that it was wrong in principle that a man could rely on his own unlawful act to secure an advantage which could have been obtained if he had acted lawfully."

21. On the face of it, therefore, the judgment in *Shah* does not assist the claimant because his stay in the UK was unlawful once his visit visa had expired and that was prior to his application for disability living allowance. Mr Jiminez, though, contends that what was said in *Shah* has no application to this case for a number of reasons.

22. First of all, as he correctly points out, none of the litigants in *Shah* were in the UK unlawfully. Indeed, four of the student litigants had limited leave to remain on the basis of their studies and the fifth had indefinite leave to remain. Thus, he says, the words of Lord Scarman quoted above were obiter dicta and not to be regarded as binding. He further contends, in any event, that those words were, as he puts it in his written submission of 4 December 2014, "disapproved" in *Mark v Mark* [2015] UKHL 42 and also in *A v A (Children Habitual Residence)* [2014] AC 1.

23. In *Mark v Mark* the House of Lords was concerned with a husband and wife, both Nigerian nationals, and the wife's petition for divorce and application for ancillary relief made in July 2000. She had had limited leave to remain in the UK but, at the material times, had become an overstayer such that she was not lawfully resident. The main issue was whether she was "habitually resident" such that the proceedings she wished to pursue could be entertained in the UK. It was held that the UK courts did have jurisdiction to entertain the proceedings. It was said that habitual residence was an expression used in a variety of statutes for a variety of purposes and could have a different meaning according to the statutory context. Mr Jiminez argued that habitual residence and ordinary residence are interchangeable concepts. He properly acknowledged that at paragraph 36 of the judgment in *Mark v Mark* it was said that there would be certain statutory provisions, in particular those conferring entitlement to some benefit from the State, where it would be proper to imply a requirement that the residence be lawful but contended that, like the words quoted from *Shah* above, those words were to be regarded as obiter.

24. At paragraph 36 of the judgment in *Mark v Mark* this was said:

> " 36. I conclude, therefore, that residence for the purpose of section 5(2) of the 1973 Act need not be lawful residence. The question of whether the residence is habitual is a factual one which should be answered by applying the test derived from the 1928 tax cases, laid down by Lord Scarman in Ex p Nilish Shah [1983] 2 AC 309. It is possible that the legality of a person's residence here might be relevant to the factual question of whether that residence is 'habitual'. A person who was on the run after a deportation order or removal directions might find it hard to establish a habitual residence here. But such cases will be rare, compared with the large numbers of people who have remained here leading perfectly ordinary lives here for long periods, despite having no permission to do so. The husband's first reaction, to admit that the wife was habitually resident here for the purpose of these proceedings, was obviously correct on the facts of this case. There will, however, be other statutory provisions, in particular those conferring entitlement to some benefit from the State, where it would be proper to imply a requirement that the residence be lawful."

25. In *A v A* the Supreme Court was concerned, again, with the concept of habitual residence. The case related to children and the meaning of the phrase as used in section 3(1) of the Family Law Act 1986. It was held, here, that habitual residence was a question of fact requiring an assessment of whether the relevant child or children had some degree of integration in the social and family environment of the country concerned. Mr Jiminez, as I understand it, contended that that was inconsistent with what had been stated in *Shah* and suggested there was uncertainty that even the ratio in *Shah* had survived. This, also, provides a segue into his next point which was to the effect that the position of a child (and of course the claimant in this case is a child) and the position of an adult are different. He argued that *A v A* and *LC (Children)* re [2014] AC 1038 had indicated that the ratio in *Shah* was not to be

applied, at least with respect to children, and that the sorts of factors referred to above in *A v A* should be considered instead.

26. At the oral hearing, Mr Jiminez pointed out that the remarks of Lord Scarman in *Shah* appeared to be directed against adults rather than children. He submitted it should be assumed, as a general rule, that a child under the age of 16 would share the same place of ordinary residence as his parents. He argued that it would have been easy for Parliament to have inserted a requirement that a person had to be lawfully ordinarily resident if that was intended and that such had not been done. He argued that section 115 of the Immigration Act 1999 contains provisions relating to persons legally here and the ability to claim benefits so that, since matters are catered for there, there is no need to imply a requirement of lawful residence in regulation 2 of the 1991 Regulations. He also raised a new argument. This was based on the United Nations Convention on the Rights of the Child. He pointed out that, according to Article 3(1) the best interests of a child "must be a primary consideration" and that this was an aid to interpretation of ambiguous legislation. The phrase "ordinarily resident" was, he submitted, ambiguous. Whilst this case did not raise human rights arguments the principle was, nevertheless, applicable to cases which involve only domestic legislation. In effect, his argument was that the requirement to consider the best interests of a child meant that the phrase should be interpreted in a way which would not require a child to be lawfully resident in order to validly claim disability living allowance.

27. As to Mr Jiminez' arguments surrounding the question of whether the claimant should be treated as a person not subject to immigration control on the basis of the Oporto Agreement point, he submitted that on a plain reading of the legislative provisions set out above the claimant fell within the exception contained within paragraph 1 of Part II. This was, quite simply, because his mother, a British (albeit dual) citizen, was a national of a State contracting party to the agreement on the European Economic Area (the Oporto Agreement) signed on 2 May 1992, and that it followed, therefore, that he is a member of the family of such a national. He pointed to two conflicting decisions being *CDLA/708/2007* (referred to above at paragraph 19 of this decision) and *JFP v Department for Social Development (DLA)* [2012] NICom 267. In the former a British Deputy Commissioner (as he then was) had held that the exemption only applied to family members of EEA nationals who had exercised free movement rights. That was a case involving, as here, a child claimant who suffered with various disabilities and who was a foreign national but, unlike here, was not in the UK unlawfully. However, he had only limited leave to enter the UK which was subject to a condition that he should not have recourse to public funds. Nevertheless, a claim for disability living allowance had been made on his behalf but it was said he fell within the exemption in paragraph 1of Part II because he was a member of the family of a national of a State contracting party to the Oporto Agreement as he had a sister who was a national of the Republic of Ireland. The then Social Security Commissioner deciding the case expressed the view that, at first glance, the argument on behalf of that appellant appeared to be unanswerable but added:

> " 16. However, I have concluded that matters are not quite so straightforward. Paragraph 1 is plainly intended to comply with the United Kingdom's international obligations under the EEA agreement. In my judgment it follows that the phrases 'member of a family' and 'national of a State contracting party to the Agreement on the European Economic Area' should both be interpreted in accordance with that Agreement."

And he continued:

" 24. Taking into account the Agreement as a whole, and the provisions quoted above in particular, I have concluded that the scheme of the Agreement is to extend the provisions of European Community law relating to the free movement of goods, persons, services and capital to the EFTA states. That geographical extension of the single market is subject to the modifications stipulated in the various Annexes and Protocols. But the effect of those modifications is generally to restrict the right of certain EEA nationals rather than to extend them. I therefore conclude that:

(a) the claimant's sister has no greater rights under the EEA Agreement than she does as an Irish national and EU Citizen under EC law;

(b) under the EEA Agreement, the claimant derives no greater rights from his relationship with his sister than he derives from that relationship under EC law.

25. Under EC law, the claimant has no rights as a member of his sister's family because:

(a) he is not her spouse, or an ascendant or descendant relative. Neither is he dependent on her. He is therefore not her 'family member' for the purposes of the Citizenship Directive (see Article 2(2), of the Citizenship Directive);

(b) Council Regulation (EEC) 1408/71 has no application to the case because the sister has never been employed or self-employed and is therefore outwith the personal scope of that Regulation (see Article 2); and

(c) the claimant's sister is not a 'worker' for the purposes of Council Regulation (EEC No 1612/68 and, in any event, the claimant does not fall within any of the categories of family member upon whom rights are confirmed by Title III of Part I of the Regulation (Workers Families).

26. As the claimant has no rights under EC law by virtue of being his sister's brother, and as I have concluded that the EEA Agreement does not confer any greater right on him, it cannot be correct to interpret paragraph 1 of Part II of the Schedule to the 2000 Regulations as bearing its ordinary English meaning. To do so would be to interpret a provision that is intended to give effect to the EEA Agreement as bestowing a right under the domestic law of the UK that the claimant is not entitled to assert under that Agreement or under EEC law.

27. I therefore conclude that:

(a) 'national of a State contracting party to the Agreement on the European Economic Area' in paragraph 1 must be construed as a reference to an EEA national who is exercising his or her rights or freedoms under EEA Agreement (whether or not he or she also has equivalent rights under EC law); and that

(b) 'member of a family' of an EEA national must be interpreted as meaning a person who has rights under the EEA Agreement as such a family member."

Pausing there, and for clarity, EFTA stands for European Free Trade Association. But Mr Jiminez submitted the reasoning in *JFP* should be preferred, that reasoning being to the effect that the exemption in paragraph 1 of Part II was unambiguously worded and the ordinary meaning of the legislation should, in consequence, be followed. It is also to be noted

that, in fact, the Northern Irish Commissioner in *JFP* was also of the view that if an interpretative approach based on the purpose of the legislation was to be taken then the starting point should be the purpose of the legislative provisions themselves, matters of domestic United Kingdom law, rather than an approach based on rights arising in European Union law. That, said the Northern Irish Commissioner, would, on analysis, lead to a conclusion that the overall appearance of the legislative provisions amounted to a scheme to introduce, amongst other things, new provisions for the support of asylum seekers with a primary purpose of removing entitlement to social security benefits for those subject to immigration control but subject to exceptions for those falling within a prescribed category or description or fulfilling prescribed conditions (see paragraph 52 of the decision in *JFP*). At this point though I remind myself that Mr Jiminez did accept that the appointee had not exercised EEA free of movement rights in that she had travelled from Israel to England without travelling to any other countries and that if the 2000 Regulations, set out above, were seeking to implement EU law then the interpretative approach as adopted in *CDLA/708/2007* would be correct. At the hearing Mr Jiminez also argued strongly (indeed this seemed to form the main plank of his argument concerning why I should follow the reasoning in *JFP*) to the effect that the failure of the respondent in *JFP* to seek permission to appeal to the Court of Appeal meant that the interpretation and reasoning in that case had been accepted as being correct and that, therefore, the Respondent in this appeal was effectively debarred from arguing to the contrary.

28. The respondent's arguments in the written submissions and as pursued by Mr Cooper at the oral hearing were in these terms: It was clear from the judgment in *Shah* that, with respect to the interpretation of the requirement for ordinary residence "context is everything". Thus, there would be a different interpretation dependent upon different legislative provisions and the purposes of such legislation. The words of Lord Scarman concerning the inability of persons to rely upon unlawful residence as constituting ordinary residence were, technically, obiter dicta but those words constituted a very powerful and authoritative statement. The judgment in *Shah* had not been disapproved in *Mark v Mark*, rather, that case was simply an illustration of the fact that context is everything. Where legislation is concerned with the obtaining of some benefit from the State it would be proper to imply the requirement that residence be lawful though it might not be in other contexts. There had been a number of court judgments since *Shah* which had supported the approach that a requirement of lawful residence was to be implied where some form of benefit in a wider sense was at stake. It was not necessary to expressly insert a requirement of lawfulness and even where such had been done as it had in relation to student loan requirements, the Court of Appeal had in *R(Arogundade) v Secretary of State for Business, Innovation and Skills* [2013] EWCA Civ 823 concluded such was unnecessary.

29. As to the claimant's special position as a child, and the argument that a child has no choice but to live with the responsible parent, whilst that is a feature of this case, the provisions permit a child to claim disability living allowance in his or her own right and the legislation applies to all claimants. Thus, it cannot simply be said that what has to be done is to look at the mother of a child claimant's residence and say because her residence is lawful the child's should be treated as such too.

30. The interests of a child do have to be taken into account with respect to interpretation of legislation but without any attendant human rights arguments the basic principle of construction is that a Convention, such as the one relied upon by Mr Jiminez, is not part of

domestic law so that there is only a requirement to interpret the legislation in accordance with the Treaty where possible. That requirement does not mean it is impermissible to have a residence test which is applicable to a child. The mere fact that a child can claim the benefit in his or her own right "goes a long way in favour of a child".

31. As to the Oporto Agreement point Mr Cooper submitted that the approach in *CDLA/708/2007* was to be preferred to that in *JFP*. That was because the former had interpreted paragraph 1 purposively, rather than giving it a literal interpretation or "plain meaning". That was correct because paragraph 1 was intended to comply with the UK's obligations under the EEA agreement, the purpose of which was to extend certain provisions of EC law to the EFTA states. He went on to say that, as in fact has been accepted by Mr Jiminez, it is axiomatic that a purposive approach should be applied when interpreting provisions in domestic legislation which give effect to EU law and he relied upon *Marleasing*, cited above. At the oral hearing he argued that the literal approach to the interpretation of legislative provisions was outmoded, that a purposive approach could be adopted even absent ambiguity in the relevant provision and that the failure of the Department of Social Development in Northern Ireland to appeal to the Court of Appeal did not represent any acceptance of the reasoning contained within *JFP*.

My consideration of the competing arguments

32. It would seem to me that what was said in the case of *Shah* represents a suitable starting point for a consideration of the arguments surrounding the meaning of the phrase "ordinarily resident" as it was used in the 1991 Regulations, before subsequent amendment, and which was concerned with entitlement to disability living allowance.

33. Mr Jiminez is correct in saying that the words of Lord Scarman to the effect that if a person's presence in a particular place or country is unlawful then he cannot rely on that unlawful residence as constituting ordinary residence are obiter. However, I agree with Mr Cooper that those words, nevertheless, represent a powerful statement as to the view taken by the House of Lords at the time. Further, I do not accept Mr Jiminez' contention that what was said in *Shah* was disapproved in *Mark v Mark*. Rather, *Mark v Mark* built upon what had been stated in *Shah*. An important point made in *Shah*, as Mr Cooper says, is that the context in which phrases such as "ordinarily resident" are used will be important when interpreting its meaning, and, in particular, it seems to me, when considering whether a requirement of lawful residence is to be implied. That is why Lord Scarman said what he did about the importance of the statutory framework or legal context prior to making his observations about unlawful presence. In *Mark v Mark*, as noted above a divorce case, the petitioner for divorce was not seeking to obtain any benefit, either a State benefit or a benefit in the wider sense such as, for example, an education maintenance grant, and, largely for that reason, it was not necessary to imply a requirement that her habitual residence had to be lawful. It is also pertinent, of course, that in *Mark v Mark* it was stressed, as again has been noted above, that there will be other statutory provisions, in particular those conferring entitlement to some benefit from the State, where it would be proper to imply a requirement that residence be lawful. To that extent, in fact, it might be thought that there is consistency in the judgments in *Shah* and in *Mark v Mark*. Further, although Mr Jiminez suggested that, at least in respect of cases relating to children, even the ratio in *Shah* had come to be doubted, the approach regarding the implying of a need for lawful residence in specific contexts where a benefit is sought, has been followed in a number of more recent cases. Thus, in *R(YA) v Secretary of State for Health*

[2010] 1 WLR 279, it was held that an unsuccessful asylum claimant was neither lawfully nor ordinarily resident for the purposes of his being eligible for free National Health Service provided treatment. Similarly, in *R(Arogundade)* cited above, a Nigerian national who had overstayed her visa and had spent time in the UK without leave from January 2004 to September 2009 was unable to show that she had been "ordinarily resident", for the purposes of entitlement to a student grant under the Education (Student Support) Regulations 2009 during that period. It was proper to imply a requirement of lawful residence. The judgment echoed the view of Lord Scarman that it was wrong in principle that a person could rely on an unlawful act to secure an advantage which could have been obtained if he or she had acted lawfully.

34. Mr Jiminez sought to make much of the various cases which had dealt with the question of the habitual residence of children. However, none of the cases he has put forward involved a child who was unlawfully present in the UK nor a claim for a State benefit. In *A v A*, for example, the subject matter was custody rights as it was too in *LC (Children)*, re [2014] AC 1038. It seems to me that the cases concerning children do demonstrate that a somewhat different general approach to ordinary residence might have to be taken in respect of a child but do not go so far as to indicate that that is or might be so in the circumstance where a child claimant in the UK unlawfully seeks access to a State benefit. I do not think, therefore, that Mr Jiminez derives any significant assistance from any of those cases.

35. Mr Jiminez contends that there is no need to imply a "lawful" requirement into the "ordinarily resident" test within the 1991 Regulations because the question of lawfulness is already catered for in section 115(9)(a) of the Immigration and Asylum Act 1999. I do not see that the omission of the word "lawfully" or a word of equivalent meaning within regulation 2(1)(a)(i) of the Social Security (Disability Living Allowance) Regulations 1991 is significant. The absence of such a word has not, as can be seen from what has been said above, prevented courts from indicating that it is appropriate to imply such a requirement in certain circumstances, in particular, where some form of benefit is being claimed by a person not lawfully in Great Britain. In *R(Arogundade)*, a case discussed by both representatives at the oral hearing and referred to by already, and which was concerned with the issue of ordinary residence for the purposes of a student loan, it was said that the insertion of such a word had been unnecessary because the requirement could be properly implied. As to the point about illegality having been catered for, in any event, within section 115(9) of the 1999 Act, I do not think it is illogical that a requirement of lawfulness should be implied in regulation 2(1)(a)(i) despite that. First of all, the requirements are cumulative. There was no reason to suppose that a sort of double lawfulness requirement was not intended in the sense that what was required was a lawful immigration status (subject to limited exceptions) and a connection with Great Britain demonstrated by a period of lawful ordinary residence. Secondly, there has been a consistent pattern in the higher courts of implying a lawfulness requirement in any cases where a benefit is in issue so it would be odd if that were not to be done with this particular provision.

36. There is then the argument based upon the UN Convention on the rights of the child. I have summarised the arguments of the parties, as to that, above.

37. Article 3 of the Convention, upon which Mr Jiminaz sought to rely, reads as follows:

> "Article 3.

> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. State Parties undertake to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
>
> 3. State Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

38. Mr Jiminez also relies upon the judgment in *Mathieson v Secretary of State for Work and Pensions* [2015] UK SC 47, a case concerned with the potential discriminatory effect of rules relating to payment of disability living allowance in respect of a long-term hospitalised child. There was, on the facts of that case, held to be a breach of Article 14 of the European Convention on Human Rights when read in conjunction with Article 1 of the First Protocol. Mr Jiminez acknowledged that, here, there are no human rights arguments but said that, nevertheless, the judgment could be taken as authority for the proposition that where there was ambiguous legislation, and he suggested the term "ordinarily resident" was ambiguous, conventions such as the UN Convention on the Rights of the Child would be an aid to statutory construction and that, in effect, the most favourable interpretation from the point of view of a child should be adopted. Further, although he did not expressly make this point, if that Convention has relevance then it may well be that the UN Convention on the Rights of Persons with Disabilities, also ratified by the UK, will do too. That provides that in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

39. In Mathieson it was noted that the UN Committee on the Rights of the Child, in General Comment No. 14(2003) on Article 3.1 had said that, as an interpretative principle, where a legal provision is open to more than one interpretation, that which more effectively serves the best interests of a child should be adopted.

40. It is right to say, as Mr Cooper points out, that in *Mathieson* the court was concerned with human rights arguments. It was the same in *Zoumbas v Secretary of State for the Home Department* [2013] UK SC 74, another case to which Mr Jiminez refers me. Absent any human rights arguments I would accept Mr Cooper's submission to the effect that, when approaching statutory construction, the UK courts will not "ordinarily reach" for the international conventions because they are not themselves part of UK law, but that it is sometimes appropriate to use them as an aid to interpretation on the basis of the assumption that when Parliament legislates it seeks to do so in accordance with the UK's international obligations. The instant case, as noted, does not involve human rights issues. The issue here, again as Mr Cooper points out, is whether the claimant can satisfy fundamental conditions of entitlement to disability living allowance which apply to all claimants, whether adult or children, namely the requirement to be ordinarily resident. I do not consider, in these circumstances, that *Mathieson* is authority for the proposition that the UN Convention on the Rights of the Child should be used as an aid to construction in this case. In any event, even if

it were, in principle, available as such an aid I do not see how it would assist with the interpretation of the phrase "ordinarily resident" which I do not accept as being ambiguous, despite Mr Jiminez' submission that it is, and I regard the obligation to make the best interests of the child "a primary consideration", in the context of interpretation, to be unhelpful or uninformative in interpreting such a phrase. The concept is simply too generalised.

41. It follows from the above, therefore, that I have reached a conclusion that the phrase ordinarily resident, in the way in which it applies to legislation concerned with entitlement to disability living allowance does contain an implied requirement that any such residence is lawful and that that is so whether the person concerned is an adult or a child.

42. My having reached a negative conclusion (from the claimant's perspective) regarding the ordinarily resident issue, two things follow. The first is that whatever view I reach regarding the Oporto Agreement argument does not matter in the sense that it will not be determinative for the purposes of this appeal. Indeed, it was accepted that, if I reached the view that I have in fact reached regarding the ordinarily resident issue, that would be so. Secondly, my conclusion as to that means, technically, that the First-tier Tribunal did err in law in failing to consider the question of whether the claimant was ordinarily resident. In the circumstances I have decided to set its decision aside. I have also decided, however, given the considerable efforts made by the parties in advancing the arguments before me, to indicate my view as to the Oporto Agreement issue.

43. Given the concessions he has made Mr Jiminez' arguments cannot succeed if I am to conclude that paragraph 1 is intended to comply with the UK's obligations under the EEA agreement and that the failure to appeal to the Court of Appeal in *JFP* does not amount to a binding and ongoing concession that the reasoning contained therein is correct. As to the former, it does seem to me readily apparent that the Oporto Agreement is indeed an Agreement with the purpose of extending the provisions of European Community law regarding a range of matters to the EFTA states. It does, then, seem to me to follow that paragraph 1 of Part II is, in fact, intended to comply with the UK's obligations under the EEA agreement. So, it is a provision in domestic legislation giving effect to EU law. Hence, and in line with the reasoning in *Marleasing*, a purposive approach is to be taken. In short, I accept the relevant reasoning contained in *CDLA/708/2007*. I cannot see that the failure on the part of the respondent in Northern Ireland to seek to appeal *JFP* to the Court of Appeal should be taken as any acceptance that the reasoning is correct or that such failure, if that is the right word, should prohibit the respondent in this case or for that matter the respondent in Northern Ireland, from arguing the point again, particularly, where, as here, there are conflicting decisions. As Mr Cooper pointed out in oral argument, there is really no basis to conclude that such an acceptance or concession was being made, there might well be other reasons why an appeal was not pursued, it was open to the respondent in Northern Ireland to take the view that sooner or later there would be another appeal where the arguments could be ventilated and, additionally and in any event, the respondent in Great Britain in this case is not the same as the respondent in Northern Ireland in that case. So, whilst what I have had to say about the matter might strictly be regarded as obiter, bearing in mind that I have resolved this case primarily on the basis of the ordinarily resident issue, I prefer the arguments of Mr Cooper to those of Mr Jiminez and I prefer the reasoning of the Deputy Commissioner to the Commissioner in Northern Ireland. I would wish to stress, in this context, that I have great respect for the detailed analysis contained in both decisions but I am in the somewhat invidious position of not being able to decide that both of them are correct.

Disposal of the appeal

44. Given the view I have taken regarding the meaning of the phrase "ordinarily resident", in context, it is right to say that the appellant could never have succeeded in establishing entitlement. Accordingly, had the First-tier Tribunal considered the issue it would inevitably have concluded, on the facts, that entitlement to disability living allowance could not be established. I have, therefore, decided not to remit to the First-tier Tribunal because to do so would be to require it to undertake a pointless exercise with only one possible available outcome. In the circumstances, whilst setting aside the First-tier Tribunal's decision, I have decided to remake the decision myself as indicated above.

45. Finally, I have made mention above of the fact that it appears no attempt has ever been made to approach the Home Office, on behalf of the claimant, in order to seek to regularise his immigration status. I do not know what would happen with respect to any such application, if made, but it seems to me a little odd that no such application has been made and it also occurs to me that, if such an application were to succeed, that might resolve the difficulty which has led to this child claimant failing to establish entitlement to disability living allowance. Of course, whether any such application to the Home Office is or is not made is not a matter for me.

Conclusion

46. The appeal to the Upper Tribunal is dismissed.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated: 25 January 2016