

**THE UPPER TRIBUNAL**

**ADMINISTRATIVE APPEALS CHAMBER**

**DECISION OF THE UPPER TRIBUNAL JUDGE**

**Before: A J GAMBLE**

**Attendances:**

**For the Appellant: (Secretary of State): Mr J Komorowski, Advocate, instructed by Ms A Stewart, Solicitor, of the Office of the Solicitor to the Advocate General for Scotland.**

**For the Respondent: (Claimant): Mr S Craig, Welfare Rights Officer of Queens Cross Housing Association, accompanied and assisted by Mr R Cameron, Welfare Rights Officer of Glasgow City Council**

**The Secretary of State's appeal is allowed.**

**The decision of the First-tier Tribunal given at Glasgow on 4 February 2015 is set aside.**

**The judge of the Upper Tribunal gives the decision he considers appropriate in the light of the findings in fact set out in paragraph 7 of the Reasons, viz.; the decision maker's decision of 14 October 2014 is confirmed.**

**REASONS FOR DECISION**

1. This is an appeal by the Secretary of State against the decision of the Glasgow First-tier Tribunal of 4 February 2015. It is brought with the permission of District Tribunal Judge Hutton who constituted that tribunal as a tribunal judge sitting alone.
2. The tribunal allowed an appeal by the claimant against a decision maker's decision of 14 October 2014, left unaltered at mandatory reconsideration on 24 November 2014. By his decision, the decision maker held that the claimant was not entitled to Income Support from her date of claim, 19 September 2014. That was on the ground that she was a "Person from Abroad" with the consequence that she had an "applicable amount" of nil.
3. In allowing the appeal, the tribunal held that the claimant had a "right to reside" in the United Kingdom and that thus she was "habitually resident" here and not a "Person from Abroad". The tribunal identified her "right to reside" as one deriving from her being the daughter of a person with the status of "a worker", her mother.

4. Mr Craig, on the claimant's behalf, sought a hearing. The Registrar granted his request. The hearing took place before me on 8 October 2015 when representation was as recorded above. The claimant did not attend. However Mr Craig was content that I should proceed in her absence. I did so. I am grateful to Mr Komorowski, Mr Craig and Mr Cameron for their contributions to the debate.

5. The representatives of both parties are at one in regard to two important matters. Firstly, they both accept that the claimant cannot derive a "right to reside" from her half sister. Secondly, they agree that there was no finding of fact in the tribunal's Statement of Reasons, documents 56 – 58, that the claimant's mother had ever been a "worker" in the United Kingdom. Indeed the tribunal rather state both in paragraph 11 and paragraph 14 of their Statement of Reasons on document 57 that the claimant's mother had been a jobseeker in the United Kingdom. That statement also records in paragraph 14 that the claimant's father was "a Polish national residing and working in Poland when (the claimant) entered the United Kingdom". Nonetheless they state in their decision on document 56 that the claimant "is a child of an EEA national who has been employed in the UK".

6. I hold that the tribunal's decision is affected by a material error of law. By necessary implication they held that the claimant's mother was "a worker" in the United Kingdom. That was a conclusion unsupported by (and indeed contrary to) their findings of fact, as was submitted orally by Mr Komorowski. Mr Craig had made essentially the same submission in writing in the first paragraph of his response to the Secretary of State's appeal on document 86. I accept these concurring submissions. On the basis of them I set the tribunal's decision aside.

7. I consider it appropriate to determine the appeal by remaking the tribunal's decision under section 12(2)(b)(ii) of the Tribunals Courts and Enforcement Act 2007. In doing so, I make the following findings of fact, on balance of probabilities, under section 12(4)(b) of that Act:

- (i) The claimant is a single young woman. Her date of birth is 28 July 1998. She is a Polish citizen and thus a European Economic Area National.
- (ii) The claimant claimed Income Support on 19 September 2014.
- (iii) At that date she was attending Secondary School in Glasgow, having previously attended Secondary School in Newcastle.
- (iv) The claimant arrived in the United Kingdom on 26 August 2013.
- (v) At all material times, the claimant's father resided outside the United Kingdom.
- (vi) The claimant's mother was a jobseeker in the United Kingdom when the claimant commenced her course of study here. The claimant's mother has since returned to Poland.

8. The key legislative provisions relevant to the present appeal read as follows:

“8. Reg 21AA of the 1987 Regulations provide:

**“21AA. – Special cases: supplemental – persons from abroad**

(1) ‘Person from abroad’ means, subject to the following provisions of this regulation, a claimant who is not habitually resident in the United Kingdom, {&c} ...

(2) No claimant shall be treated as habitually resident ... unless he has a right to reside in ... the United Kingdom, ... other than a right to reside which falls within paragraph (3).

(3) A right to reside falls within this paragraph if it is one which exists by virtue of, or in accordance with, one or more of the following –

...

(b) regulation 14 of ... [the Immigration (European Economic Area)] Regulations [2006], but only in a case where the right exists under that regulation because the claimant is –

(i) a jobseeker for the purpose of the definition of ‘qualified person’ in regulation 6(1) of those Regulations, or

(ii) a family member (within the meaning of regulation 7 of those Regulations) of such a jobseeker ...”

9. The sheet anchor of Mr Komorowski’s contentions both orally and in his Note of Argument is that someone may have a “right to reside” under immigration law and, in particular, under the Immigration (European Economic Area) Regulations 2006 (the EEA regulations), documents 94 – 169, without having such a right for the purposes of securing entitlement to Income Support by achieving the status of “habitual residence” and thus not being a “Person from Abroad”. See especially paragraphs 6 and 9 of his Note of Argument on documents 91 and 92. The distinction between these two aspects of a “right to reside” is the effect of the last words of regulation 21AA(2) i.e. “other than a right to reside which falls within paragraph (3)”. Paragraph (3) then goes on to specify those rights to reside under the EEA Regulations (and the basis for them) which do *not* count for the purposes of regulation 21AA(2). Mr Komorowski submitted both in his Note of Argument and in the oral development of it that the claimant was in the position of probably having a right to reside under the EEA Regulations but not one which availed her under regulation 21AA(2).

10. In response, Mr Craig did not dispute that there was a category of rights to reside conferred by the EEA Regulations which did not count for the purposes of entitlement to Income Support. He could not have taken a different position given the text of regulation 21AA read as a whole. However, in his submission, the claimant’s “right to reside” was not excluded by regulation 21AA(3) with the effect that it did secure her entitlement to Income Support under regulation 21AA(2).

11. More particularly, Mr Komorowski's submission both in writing and orally was that the claimant's "right to reside" in the United Kingdom was covered by regulation 22AA(3)(b)(ii) and was thus *not* one on which she could rely for the purpose of securing entitlement to Income Support. He submitted that the claimant was "a family member" of a "jobseeker" i.e. her mother. That followed from regulation 7(1)(b)(i) of the EEA Regulations as the claimant was "a direct descendant" of a "jobseeker" i.e. her mother and was "under twenty one". Further, he accepted that she was "a family member who has retained the right of residence" despite her mother leaving the United Kingdom. He accepted that the claimant appeared to be covered by regulation 10(3)(a)(ii) and (b) of the EEA Regulations and under that provision had "retained (her) right of residence".

12. The text of regulation 10 of the EEA regulations reads as follows:

**"10. – "Family member who has retained the right of residence"**

- (1) In these Regulations, "family member who has retained the right of residence" means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).
- (2) A person satisfies the conditions in this paragraph if –
  - [(a) he was a family member of a qualified person or of an EEA national with a permanent right residence when that person died]<sup>1</sup>;
  - (b) he resided in the United Kingdom in accordance with these Regulations for at least the year immediately before the death of [the qualified person or the EEA national with a permanent right of residence]<sup>2</sup>; and
  - (c) he satisfies the condition in paragraph (6).
- (3) A person satisfies the conditions in this paragraph if –
  - (a) he is the direct descendant of –
    - (i) [a qualified person or an EEA national with a permanent right of residence]<sup>3</sup> who has died;
    - (ii) a person who ceased to be a qualified person on ceasing to reside in the United Kingdom; or
    - (iii) the person who was the spouse or civil partner of [the qualified person or the EEA national with a permanent right of residence]<sup>2</sup> mentioned in sub-paragraph (i) when he died or is the spouse or civil partner of the person mentioned in sub-paragraph (ii); and
  - (b) he was attending an educational course in the United Kingdom immediately before [the qualified person or the EEA national

with a permanent right of residence]<sup>2</sup> died or ceased to be a qualified person and continues to attend such a course.”

I note that the term “qualified person” includes “a jobseeker” under regulation 6(1)(a) of the EEA Regulations. If she satisfied the above provisions, the claimant received the benefit of regulation 14(3) of the EEA Regulations which reads as follows:

“(3) A family member who has retained the right of residence is entitled to reside in the United Kingdom for as long as he remains a family member who has retained the right of residence.”

13. Mr Komorowski emphasised that, in his submission, the “right to reside” conferred by the provisions just cited from the EEA Regulations only counted for the purposes of immigration law. It was excluded by the terms of regulation 22AA(3)(b)(ii) from having the effect of securing the claimant’s entitlement to Income Support. In his submission, the “right to reside” conferred by the above provisions was conferred on the claimant as “a family member” of a jobseeker. He based that argument on the use of the term “family member” in regulation 10 of the EEA Regulations along with the definition of that term in regulation 7 of those Regulations. Mr Komorowski submitted that support for his interpretation was found in article 7(a) and (c) of the European Citizenship Directive, document 186, which had been implemented in the law of the United Kingdom by the EEA Regulations. Those articles gave no right to either students or family members of jobseekers to claim benefits. He accepted the United Kingdom could confer greater rights than those allowed for in the Directive when implementing it but submitted that this had not taken place in respect of people in the claimant’s situation.

14. In response, Mr Craig, assisted by Mr Cameron, submitted, firstly, that the claimant fulfilled regulation 10(3)(a)(ii) and (b) of the EEA Regulations and, secondly, that those provisions conferred a distinct and discrete “right to reside” on her which was unaffected by the exclusionary terms of regulation 21AA(3). In other words, the “right to reside” was directly conferred on the claimant, in their submission, by the provisions of the EEA Regulations just cited and not under regulation 14(3) of those Regulations on the ground of the claimant being a family member of a “jobseeker”. They submitted that the purpose of the provisions in the EEA Regulations on which they were relying to establish a “right to reside” on the part of the claimant was to protect young people like her who had effectively been stranded or marooned in the United Kingdom.

15. I reject the submissions Mr Craig and Mr Cameron and accept those of Mr Komorowski. It is clear from Mr Komorowski’s analysis of the relevant provisions of the EEA Regulations which I have laid out in paragraphs 11 and 13 above and with which I agree that the right conferred by regulation 10(3)(a)(ii) and (b) of those Regulations is inextricably linked with the provisions of regulation 14(3) of those Regulations and in turn with the definition of “a family member” contained in regulation 7 of those Regulations. I accept Mr Komorowski’s submission that the effect of the provisions in which Mr Craig and Mr Cameron rely when read along with regulation 14(3) of the EEA Regulations is to protect a young person in the position of the claimant from being removed from the United Kingdom by giving her a “right to reside” here under immigration law. It does not confer on her a “right to reside” for the purpose of securing entitlement to Income Support. I accept Mr Komorowski’s argument that the plain and literal reading of the relevant provisions of the EEA Regulations has the effect that the “right to reside” on which Mr Craig and Mr Cameron rely is one covered by the exclusion in regulation 21AA(3)(ii). In other words, it is one which

the claimant has as a “family member” of a European Economic Area national who had been a “jobseeker” in the United Kingdom.

16. It is clear from the discussion in paragraph 5 above that any “right to reside” which the claimant may have can be derived only from her mother and not from either her father or her half sister. For the reasons given in paragraph 15 above, I am satisfied that although she has a “right to reside” deriving from her mother for immigration purposes that right is one which is covered by the exclusionary provisions of regulation 21AA(3) and accordingly confers on her no right to obtain Income Support.

17. Having regard to paragraphs 15 and 16 above it follows that the decision of the decision maker was correct. I therefore substitute a decision confirming it for the decision of the tribunal.

18. It is unnecessary for me to deal with the issue of the claimant being estranged from her parents referred to in paragraph 4 of the tribunal’s decision on document 56 and paragraph 17 of their Reasons on document 58. That is because the claimant is, as a result of this decision, to be treated as a “Person from Abroad” with an “applicable amount” of nil.

19. The appeal by the Secretary of State succeeds.

(Signed)  
A J GAMBLE  
Judge of the Upper Tribunal  
Date: 11 November 2015