DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference SC316/15/00566, made on 23 November 2015 at Northampton, did not involve the making of an error on a point of law.

REASONS FOR DECISION

1. The claimant is Polish and was born on 5 August 1994. After her mother's death, her brother was appointed her legal guardian by Court Order in Poland dated 20 May 2008. She came to the United Kingdom on 1 June 2008 to join him.

2. On 4 June 2015, the claimant made a claim for income support on the basis that she was under 21 and had the care of her child who had been born on 24 March 2015. The Secretary of State refused the claim on 17 July 2015 on the ground that the claimant did not have a right to reside in the United Kingdom and was, accordingly, a person from abroad whose applicable amount for income support purposes was nil.

3. The claimant exercised her right of appeal to the First-tier Tribunal. That tribunal dismissed the appeal, but gave her permission to appeal to the Upper Tribunal. The Secretary of State has not supported the appeal and the claimant's representative has made a short reply. The case has now come to me for decision.

4. The basis of the First-tier Tribunal's decision was very simple. The claimant asserted that she had a right to reside on the basis that her brother was her Guardian. I accept that her brother was a worker and as such, in the language of the Immigration (European Economic Area) Regulations 2006, a qualifying person. He has a right to reside in the United Kingdom, as do his 'direct descendants': see Article 2(2)(c) of Directive 2004/38/EC and regulation 7(1)(b) of the 2006 Regulations. The issue is whether the effect of the legal guardianship was that the claimant became a direct descendant of her brother. The tribunal decided that she did not. Its reasons were short but clear beyond any doubt: 'A Guardianship order grants parental rights in relation to a child but does not extinguish pre-existing relationships.' That would certainly be the case under English law. Its effect is to confer rights and responsibilities, but not to change relationships. The Order in this case was made by a court in Poland. If Polish law is different, the claimant has to show that. She has not done so. The result is that the tribunal was right to find that their relationship was that of brother and sister and was not a relationship of descent. Specifically, the Order did not make the claimant's brother her parent from whom she could claim descent. The

claimant's representative has argued that the parental relationship between the claimant and her parents was extinguished on their deaths, so that the brother's parental status would not clash with theirs. That would be correct if the effect of the Order were to make him his sister's parent, but it is not. It gave him rights and duties, but that is not the same as creating a relationship. A relationship is more than a package of rights and duties.

5. The claimant's representative has argued for a purposive interpretation of Article 2: 'A key objective of the Directive is to enable a worker to move freely within the territory of the Member States and to stay there for the purpose of employment. A Union citizen who is the legal guardian of a person under the age of 21 would be deterred from exercising his right to freedom of movement if the young person did not enjoy a right of residence as a family member.'

6. I dealt with a similar attempt to rely on the general principle of freedom of movement in a different context in *IG v Secretary of State for Work and Pensions* [2016] UKUT 0176 (AAC):

> 36. In prohibiting exclusion of entitlement, the Court has, as Mr Mills pointed out, referred to the freedom of movement of workers. The flaw in his reliance on this general principle is that it proves too much by removing the statements that he cites from their context. It is beyond argument that freedom of movement is a fundamental principle of EU law and that it must not be restricted unduly. But that does not mean that it can be applied in every context and without regard to its effect on EU legislation. Mr Mills did not limit or qualify his argument by reference to any conditions other than to rely on the claimant being resident in this country as the dependent of her son who was exercising his freedom of movement as a worker. I reject that argument as presented.
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> 37. Unlimited resort to general principles of freedom of movement, non-discrimination and equal treatment would allow the Court of Justice of the European Union and any national court applying EU law to rewrite any EU subordinate legislation to the extent that it might hamper freedom of movement. Mr Mills argued that in this case it would be an impediment to the claimant's son exercising that freedom if the claimant could not, when she joined him in her retirement, obtain social security for her care needs at a rate appropriate to the living conditions in this country. But where would this argument end? Resort to this basic principle could rewrite vast tracts of Directive 2004/38 and undermine the principle of coordination that is the stated purpose of Regulation 883/2004. The ultimate logic of the argument is to lead to increasing harmonisation of social security benefits across the EU. That is not the purpose of the Regulation, as the Court has regularly stated. It would also allow, or even encourage, forum shopping when claimants or their families have connections with a number of States. That would be inconsistent with the coordination principle on which the Regulation is based.

The same reasoning applies here. I must take account of the obvious purpose of Article 2, which is to enhance freedom of movement. But that does not mean that

I can disregard the terms in which the Article is drafted or its context in the Directive as a whole. If I were to extend the scope of Article 2, the effect would be to reduce the scope of Article 3(2)(a), which applies to 'any other family members'. For those persons, the host State is obliged to 'facilitate entry and residence'. The argument as stated by the claimant's representative would apply just as much to those who are 'other family members' as to 'direct descendants'. But that cannot be right, as it would disrupt the clear distinction between Article 2 and Article 3. In order to sustain his argument, the representative would need to show that someone in the brother's position properly belonged in Article 2 rather than in Article 3. He has not done that. The language of Article 2 is clear as is the contrast between Article 2 and 3. The former is framed in terms of partnership, ascent and descent; the latter is broader and undefined terms. The claimant falls within the language of Article 3, but not of Article 2. I can see no purposive argument that would justify treating Guardianship as moving her from the one Article to the other. An appeal to the basic principle of freedom of movement is not enough.

7. For completeness, I mention the Secretary of State's point that the claimant might be able to acquire a right to reside under Article 3(2)(a), but that this would not arise until the Secretary of State for the Home Department issued the appropriate documentation. She has not done so, so this cannot help the claimant.

Signed on original
on 21 July 2016

Edward Jacobs
Upper Tribunal Judge