DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 25 September 2015 at Fox Court under reference SC242/15/05196) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: on her claim for income support, made on 7 September 2014 and refused on 13 November 2014, the claimant was a person from abroad as she had no right to reside. Her applicable amount is therefore nil and she is not entitled to income support.

REASONS FOR DECISION

A. The claimant's circumstances

1. There is no dispute about the relevant facts of this case. The claimant is Portuguese and was born in this country on 2 June 1997. She was brought up and educated here and has never been absent from the country for any significant length of time. She was abandoned by her mother at the age of 16, after which she lived first with her aunt and then with her godmother. She then went to live in a hostel. Her father was always in Angola and her mother had returned there. She has never worked.

B. Adjudication history

2. This is an appeal brought by the Secretary of State with the permission of the First-tier Tribunal. The adjudication history is as follows. The claimant made a claim for income support on 7 September 2014, but the Secretary of State refused the claim on 13 November 2014 on the ground that the claimant was a person from abroad whose applicable income was nil. Entitlement to income support depends on the claimant's applicable amount, so fixing that at nil effectively barred her from entitlement. She was a person from abroad because she did not have a right to reside in the United Kingdom. The First-tier Tribunal allowed the claimant's appeal. It accepted that she did not fit into any established category of right to reside, but found that there was a gap in the scope of EU law given her circumstances.

C. The submissions to the Upper Tribunal

3. The Secretary of State's submission is short and to the point. It comes to this: there was no gap in EU provision that is relevant to this case. The claimant claimed an inactive benefit and the general rights given to EU citizens are not unconditional, but are subject to the conditions and limitations set out in Directive 2004/38.

4. The claimant's representative has responded to the appeal. Her argument is this. The Supreme Court in *Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1 does not rule out the possibility of it being disproportionate to deny a right to reside to someone who is claiming an income-related benefit. The First-tier Tribunal, having heard evidence from the claimant and her support worker, made findings of fact that it was entitled to make.

5. The Secretary of State has not replied to those arguments.

D. Mirga

6. I accept that the tribunal was entitled to make the findings of primary fact that it did. They were not in dispute. But that is not a sufficient answer to the Secretary of State's appeal. The question is whether the tribunal's application of those facts was permissible.

7. I am bound by *Mirga* and have to decide what the decision means and how it applies. The question is whether in the circumstances of this case it would be disproportionate to deny the claimant a right to reside. The Supreme Court decided that generally this would not apply. It did, though, acknowledge that there might be exceptions, albeit in the most guarded of terms.

8. The Court of Justice of the European Union has accepted that there can be circumstances in which it would be disproportionate to rely on the precise requirements of EU law on the right to reside. The classic example of proportionality overriding the precise terms of EU legislation on the right to reside is *Baumbast v Secretary of State for the Home Department* Case C-413/99. As the full name of the case shows, this was an immigration case, not a social security one. The Court decided that Mr Baumbast had a right to reside as a self-sufficient person, despite not satisfying every particular of the definition. The only element missing was that he did not have *comprehensive* sickness insurance. He did, though, have sickness insurance, albeit that it did not include emergency cover, and he was covered for emergency treatment in Germany. So, this was a case in which Mr Baumbast for all practical purposes satisfied the conditions for an accepted category of right to reside.

9. In *Mirga*, one argument was that Ms Mirga was a worker. She was born in 1988 and came to this country in 1998 with her family. They left to return to Poland in 2002 but came back in 2004. As she was Polish, she had to have completed 12 months of continuous registered work before she could acquire worker status. She completed her education and did about eight months registered work. She later did three months unregistered work. Even if that work had been registered, she would not have acquired worker status as (i) the total

time she had been in work did not reach the total of 12 months required and (ii) the gaps between employments prevented the work being continuous. The Supreme Court draw on the terms of the relevant Articles of Directive 2004/38 and on the preambles to show that they disclosed a policy of limited access to social assistance. In that context, the Court decided that it would not be disproportionate to deny her a right to reside. As Lord Neuberger explained:

> 69. Where a national of another member state is not a worker, self-employed or a student, and has no, or very limited, means of support and no medical insurance (as is sadly the position of Ms Mirga …), it would severely undermine the whole thrust and purpose of the 2004 Directive if proportionality could be invoked to entitle that person to have the right of residence and social assistance in another member state, save perhaps in extreme circumstances. It would also place a substantial burden on a host member state if it had to carry out a proportionality exercise in every case where the right of residence (or indeed the right against discrimination) was invoked.

10. It is always a mistake to reason from the facts of one case to the facts of another, as small differences may be significant. The facts of Ms Mirga's case are, though, relevant to show the uncertain, and certainly limited, scope for proportionality in a social security case. Lord Neuberger did not even acknowledge that there definitely was any possibility. In [69], he only said 'save *perhaps* in extreme circumstances'; and he began [70] with the words '*Even if* there is a category of exceptional cases'.

11. On the facts, the claimant's case is not as strong as Ms Mirga's. She has spent more of her life in this country than Ms Mirga had, but she has never worked or been self-employed, she has never been a student, and she has never had sufficient resources or the necessary sickness insurance to be self-sufficient. She has not come close to satisfying any accepted category of right to reside. This is not a case in which the conditions for a category are so close to be being met that it would be disproportionate to insist on strict compliance.

12. If the claimant is to succeed, it can only be because a new category or an exceptional case has to be constructed on the basis that there is a gap in the EU legislation. That is how the tribunal approached the case. *Mirga* is again relevant to this approach. The policy against proportionality in social assistance cases is also relevant to opening a new category or making an exceptional case. If the policy prevents the application of an existing category that is not quite satisfied, that is a good indication that the absence of a category allowing more easy access to a right to reside is not an omission that the courts should fill. Rather the absence is an indication of the scope of the policy.

13. For completeness, I should also mention the possibility of discrimination. I have already mentioned the argument that Ms Mirga was a worker. The Supreme Court also rejected an argument that the failure to provide for social assistance in the circumstances was discriminatory. As Lord Neuberger explained:

> 54. … a Union citizen can claim equal treatment with nationals of a country, at least in relation to social assistance, only if he or she can satisfy the conditions for lawful residence in that country. …

E. Conclusion

14. On my analysis, the tribunal was wrong to find a gap in the EU right to reside provisions. On the evidence before the tribunal, there was only one decision open to it, which was that the Secretary of State had applied the law correctly to the claimant's case. I have re-made the decision to that effect.

Signed on original
on 17 October 2016

Edward Jacobs
Upper Tribunal Judge