Secretary of State for Work and Pensions v AC
[2017] UKUT 130 (AAC)
CUC/2924/2016

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 14 April 2016 at Fox Court under reference SC242/16/00015) 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 universal credit, made on 13 November 2015 and refused on 24 November 2015, the claimant was to be treated as not being in Great Britain.

REASONS FOR DECISION

A. The Secretary of State's decision

1. The claimant made a claim for universal credit on 13 November 2015. The Secretary of State refused the claim on 24 November 2015 on the ground that she was to be treated as not in Great Britain for the purposes of regulation 9 of the Universal Credit Regulations 2013 (SI No 376).

2. That form of decision is not readily understandable by anyone who doesn't already understand it. Let me explain. In order to be entitled to universal credit, a claimant must satisfy a number of conditions. One of them is that they are in Great Britain. That is what section 4(1)(c) of the Welfare Reform Act 2012 provides. Section 4(5)(a) authorises regulations to be made specifying the circumstances in which a person is to be treated as being, or not being, in Great Britain. Regulation 9 is made under that authority. Reducing regulation 9 to its simplest, a claimant is only treated as being in Great Britain if they have a right to reside here.

B. The claimant's circumstances

3. The claimant was born in 1964 and is Greek. She came to the United Kingdom in 1984, having married her British husband. The couple have three children. They claimed benefits from the late 1980s, when the husband became ill. All claims were made in his name. When his award of employment and support allowance was terminated, he had to claim a jobseeker's allowance pending an appeal, which brought him within the universal credit legislation. As the claimant and her husband were a couple, they had to make a joint claim for universal credit and both had to satisfy the condition that they were in Great Britain. That is what sections 2 and 3(2) of the Welfare Reform Act provides.

C. The appeal to the First-tier Tribunal

4. On appeal, the First-tier Tribunal decided in the claimant's favour. The judge summarised the decision in the tribunal's decision notice:

> [The claimant] is an Appellant who has for a period in excess of 30 years benefited from being included in her husband's benefit claims. She was never required to undergo an habitual residence and right to reside exercise until her family unit came under the provisions for Universal credit (UC). The Appellant's position has remained consistent save for the need to claim UC in her own name. She benefited from income support for several years prior to and including April 2004 when the habitual residence requirements altered. In the circumstances of this case I find the Appellant is habitually resident for the purposes of claiming Universal credit.

5. The judge gave more detail in the tribunal's written reasons. The claimant did not have a right to reside under any of, what I will call for convenience, the accepted categories. That was not fatal because a person may still have a right to reside in other exceptional circumstances. One example was that of *Baumbast v Secretary of State for the Home Department* (Case C-413/99). The judge went on: 'It seems to me that the reasoning behind that decision was to effectively rectify what would otherwise be a lacuna in the legislation exposed by the passage of time, particularly in relation to such an Appellant as this one [who] was resident in the UK in excess of 33 years, had brought up 3 children on the provision of benefits and effectively her circumstances had remained completely unaltered save for the fact that her postcode now required her family to resort to Universal Credit with the underlying feature that she did it to be included as a separate claimant albeit within the family umbrella as a Universal Credit claimant.' The judge decided that it would be disproportionate to refuse the claimant entitlement. 'I consider that a lacuna exists in this case because of those responsible for framing the claiming requirements of Universal Credit have not given consideration to those such as in the position of the Appellant in this case'.

D. The appeal to the Upper Tribunal

6. I do not blame the judge for the somewhat mangled reasoning. The relevant principles are complicated and have recently been the subject of analysis by the Supreme Court in *Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1.

7. I gave the Secretary of State permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal. My comments can stand as a convenient summary of my reasoning on the appeal:

> 1. An appeal to the Upper Tribunal lies on 'any point of law arising from a decision' (section 11(1) of the Tribunals, Courts and Enforcement Act 2007). The Upper Tribunal has a discretion whether to give permission to appeal. It will be exercised to give permission only if there is a realistic prospect of an appeal succeeding, unless there is exceptionally some other good reason to do so: Lord Woolf MR in *Smith v Cosworth Casting Processes*

Ltd [1997] 1 WLR 1538. In this case, there is a realistic prospect that the decision involved the making of an error on a point of law.

2. The tribunal decided that the claimant had a right to reside. It relied on the *Baumbast* decision in order to show that to refuse the claimant a right to reside would (i) be disproportionate or (ii) demonstrate a lacuna in the legislation. The tribunal seems to have used (i) and (ii) interchangeably, although they are different concepts. Be that as it may, the issue for me is not whether the tribunal used the correct language but whether its decision was wrong in law.

3. As to *Baumbast*, I analysed this in *Secretary of State for Work and Pensions v PS-B* [2016] UKUT 0511 (AAC). A copy is attached to this decision. Two features of that decision are significant. One is that Mr Baumbast satisfied the conditions for a right to reside with one small exception. That is far from being the case here. The other feature is that it was not a social security case. That may be relevant, following the decision of the Supreme Court in *Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1, which I also analysed in *PS-B*.

4. As to a lacuna, *Mirga* is again relevant as showing the very limited circumstances in which that approach would be permissible in a social security case.

5. Moreover, there is an issue (identified by the Secretary of State's representative) that the claimant may be entitled to leave to remain under domestic immigration law, if she were to apply. The existence of that possibility may also be a factor indicating that there is no lacuna in the EU legislation. I emphasise that the lacuna must be in the EU legislation, because the tribunal's reasoning in paragraph 7 suggests that it was concerned at a gap in the universal credit legislation.

6. I have set out the issues in some detail. As the claimant will see, they are very technical and she will benefit from the help of a representative. The CAB, a local authority's welfare rights organisation, a local law centre and similar bodies are experienced in advising claimants on social security matters. Their addresses can be found in a telephone book or at a library. A convenient CAB or law centre can be identified from their national websites: www.citizensadvice.org.uk; www.lawcentres.org.uk. These bodies may be able to assist without charge. If the claimant needs more time to find and obtain advice from a representative, I will allow it, within reason.

8. The claimant took my advice and consulted a law centre, which was given more time to make a submission. In the event, the law centre had no response to make and, not surprisingly, the Secretary of State's representative found it unnecessary to reply.

9. The judge's reliance on *Baumbast* was based on a misunderstanding of the reasoning in that case. This is what I said in the *P-B* case:

> 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.

In contrast, this was not a case in which the claimant 'for all practical purposes satisfied the conditions for an accepted category of right to reside.' Quite the opposite. As the judge recognised, the claimant did not fall into any accepted category.

10. If the claimant was to have a right to reside, it can only be because (i) a new category is required in order to prevent a lacuna in the coverage of the right to reside provisions or (ii) an individual exception can be made on the basis of proportionality. This was considered in *Mirga*. This is what I said about proportionality in the *P-B* case:

> 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.
>
> ...
>
> 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.

11. Those paragraphs show why a proportionality analysis cannot help the claimant in this case. In addition, there are two particular difficulties in finding a lacuna in respect of the circumstances of this case. First, the judge found the lacuna in the coverage of the universal credit legislation. That is a matter of domestic law. The circumstances in which a lacuna may be avoided must relate to a potential gap in the EU legislation. So, the judge's reasoning was wrong. Second, as the Secretary of State's representative pointed out in her application for permission to appeal, the claimant may be able to obtain leave to remain in the United Kingdom under domestic immigration law as the wife of a British citizen. That may be the solution to what the judge perceived to be the inequitable position under the universal credit legislation. It was a mistake to focus narrowly on one part of our law (EU law) in identifying whether a problem existed, just as it was a mistake to assume that any solution to the claimant's difficulty had to be found in that part of our law.

12. The result is that the claimant did not have a right to reside at the time of her claim for universal credit. The judge came to the wrong decision and there is only one decision that the tribunal could properly have made, which was to confirm the decision of the Secretary of State. I have re-made the tribunal's decision to that effect.

13. It may be possible to remedy the difficulty the couple have in claiming universal credit through domestic law. The First-tier Tribunal had no power to deal with that issue, which requires an application to the Secretary of State for the Home Department.

Signed on original
on 22 March 2017

Edward Jacobs
Upper Tribunal Judge