[2018] AACR 31

(Bolton Metropolitan Borough Council v HY (HB)
[2018] UKUT 103 (AAC))

Judge Ward **CH/2712/2015**
23 March 2018

European Union Law – Regulation 492/2011 – rights under Article 10, whether child must have been installed in the host Member State at a time when at least one of the child's parents resided there as a worker

The claimant, a Dutch national, worked in the UK between May 2013 and September 2013 in employment which was not disputed by the local authority. Her children came to the UK in July 2014. The claimant made a claim for jobseeker's allowance in September 2014, and a claim for housing benefit in October 2014. The local authority rejected the housing benefit claim on the basis the claimant did not meet the requirement to have a right to reside. The claimant appealed to the First-tier Tribunal (Ft-T). The Ft-T allowed the appeal, concluding that a derivative right was established. The local authority appealed to the Upper Tribunal submitting that it was necessary for there to be a common period when the child or children were installed in the UK and the parent was a worker.

Held, allowing the appeal, that:

1. while there are inevitable points of difference in the facts, the structure of paragraph 30 in C-197/86 *Brown* is such that the paragraph must be applied to the present case also. (paragraph 34);
2. what is required is an initial common period when the child is installed and the parent is a worker. That is how the Court of Justice has repeatedly chosen to define the nexus on which access to the right conferred by Article 12 of Regulation 1612/68 and subsequently Article 10 of Regulation 492/11 depends; in the language of C-115/15 *NA*, para 54, when the child is "in their capacity as family members of a migrant worker." (paragraph 40).
3. the children of jobseekers (as opposed to those who retain worker status through looking for work) cannot avail themselves of article 10. *MDB and others v SSHD* [2012] EWCA Civ 1015 is binding authority and is correct. If being a jobseeker counted, such a person could immediately be joined by their children and, whatever the person's subsequent connection with the labour market (or lack of it), the child on entering school would have rights under Article 10 and the parent a derivative right. That would subvert the finely crafted delineation of the rights (and limitations on) jobseekers in C-292/89 *Antoniessen*. (paragraph 33);

The judge set aside the decision of the F-tT and re-made the decision to the effect that the appeal by the claimant against the local authority's decision of 15 October 2014 is dismissed.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Mr Peter Barker t/a HB Anorak, Housing Benefit Consultants appeared for the appellant

Ms Mary Shone of Bolton Citizens Advice appeared for the respondent

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting at Bolton under reference SC122/15/00040 involved the making of an error of law and is set aside. Acting under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007, I remake the decision in the following terms:

The appeal by the claimant against the local authority's decision of 15 October 2014 is dismissed.

REASONS FOR DECISION

1. In this decision I refer to the appellant before me as the "local authority" and the respondent as "the claimant".

2. The claimant is a woman of Dutch nationality and Somali origin. She moved to the UK in December 2012. She worked between 1 May 2013 and 13 September 2013 for 16 hours a week in employment which the local authority did not dispute was genuine. Her children came to the UK in July 2014. She moved into the property which is the subject of the present claim on 14 August 2014. She claimed income based jobseeker's allowance ("JSA") on 16 September 2014. On 2 October 2014 her children started in school. On 14 October 2014 she made the claim for housing benefit which forms the subject of the present case.

3. Although there were suggestions that the claimant had been living in the Netherlands between September 2013 and July 2014, she denied this and her explanation appears to have been accepted by the local authority. There is no objective evidence that during that period she was looking for work.

4. On 15 October 2014, the local authority rejected her claim on the basis that she had not retained worker status under Directive 2004/38/EC ("the Directive") and so did not meet the requirement of reg 10 of the Housing Benefit Regulations 2006 that she had a right to reside.

5. The First-tier Tribunal ("FtT") noted that it was common ground that the claimant did not have a right to reside in her own right. In particular, following the coming into force of the Housing Benefit (Habitual Residence) Amendment Regulations 2014/539[1] it was not possible for her to rely on receiving JSA on the basis that she was a jobseeker.

6. The FtT correctly rejected the local authority's argument that because the work had ended before the children started education, the claimant's claim for a derivative right to reside must fail.

7. The judge evidently had significant concerns as to whether the claimed employment was genuine but eventually concluded on the balance of probabilities that the claimant had worked in genuine and effective work as she claimed. From that, she went straight to concluding that the derivative right was established.

8. The local authority appealed submitting that it was necessary for there to have been a common period when the child or children were installed in the UK and the parent was a worker. The appeal was stayed pending C-115/15 *NA*. Thereafter further written submissions were obtained from the local authority, who by this point had instructed its present representative, and from the claimant. The case was transferred to me to conduct an oral hearing in Manchester. I am grateful to Mr Barker and Ms Shone for their helpful written and oral submissions.

[1] The year given in the statement of reasons is a slip

Regulation (EU) No. 492/11

9. So far as material, the recitals provide:

> "(2) Freedom of movement for workers should be secured within the Union. The attainment of this objective entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment, as well as the right of such workers to move freely within the Union in order to pursue activities as employed persons subject to any limitations justified on grounds of public policy, public security or public health.
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> …
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> (4) Freedom of movement constitutes a fundamental right of workers and their families. Mobility of labour within the Union must be one of the means by which workers are guaranteed the possibility of improving their living and working conditions and promoting their social advancement, while helping to satisfy the requirements of the economies of the Member States. The right of all workers in the Member States to pursue the activity of their choice within the Union should be affirmed.
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> …
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> (6) The right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers be eliminated, in particular as regards the conditions for the integration of the worker's family into the host country."

10. The relevant operative provision is Article 10:

> "The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.
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> Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions."

11. The wording of Article 10 is identical to that in the predecessor provision, Article 12 of Regulation (EEC) No.1612/68 and so authorities on the earlier provision continue to be relevant.

Immigration (European Economic Area) Regulations 2006/1003

12. At the time, derivative rights were provided for by reg 15A of the above regulations (they are now, in modified form, in reg 16 of the Immigration (EEA) Regulations 2016/1052.) Under reg 15A(3)(b) it was a condition of entitlement that the child whose status is being relied upon

> "resided in the United Kingdom at a time when the EEA national parent was residing in the United Kingdom as a worker".

13. Ms Shone accepts that the claimant neither was a worker nor had retained worker status when her children came to the UK and down to the date of the local authority's decision. She further accepts that in consequence the condition in reg 15A(3)(b) cannot be met. Rather, she submits, it is not required as a matter of EU law and the claimant can rely directly on her rights thereunder. Accordingly, I turn to the various authorities.

Case law authorities

14. In C-197/86 *Brown*, Mr Brown had dual British and French nationality. His parents had last resided or worked in the UK before Mr Brown was born and he himself had lived in France until after his baccalauréat, before moving to the UK. When he started a degree course, he sought financial assistance for his studies from the UK state, which was refused on national rules. He sought to rely on, inter alia, Article 12 of Regulation 1612/68. At [29] and [30] the Court held (emphasis added):

> "29. It is relevant to the answer to be given to the fifth question that the petitioner was born after his parents had ceased to work and reside in the United Kingdom. As a result, he never had, in the United Kingdom, the status of a member of a worker's family.
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> 30. The fifth recital in the preamble to Regulation No 1612/68 indicates that that regulation is intended to establish freedom of movement for workers by, *inter alia*, eliminating obstacles to the mobility of workers, in particular as regards the worker's right to be joined by his family and the conditions for the integration of his family into the host country. It follows that Article 12 of the regulation must be interpreted as meaning that it grants rights only to a child who has lived with his parents or either one of them in a Member State whilst at least one of his parents resided there as a worker. It cannot therefore create rights for the benefit of a worker's child who was born after the worker ceased to work and reside in the host State."

15. C-7/94 *Gaal* was about a different issue but in addressing an objection from the German government, the Court at [27] cited *Brown* with approval:

> "On that point, it need only be observed that, as the Court has already held (see Case 197/86 *Brown* v *Secretary of State for Scotland* [1988] ECR 3205, paragraph 30), Article 12 of the Regulation must be interpreted as granting rights only to a child who has lived with his parents or either one of them in a Member State at a time when at least one of his parents resided there as a worker."

16. In 390/87 *Moritz*, Mr Moritz had likewise been in the host Member State at a time when his parent had been working. The subsequent developments are not material to the present case.

17. In C-413/99 *Baumbast*, the facts were that the children of the Baumbast family had resided with Mr and Mrs Baumbast in the UK while Mr Baumbast was working there. There

were various side-issues that are not relevant for present purposes, but the claimant relies on dicta as follows:

> "50. …[I]t must be borne in mind that the aim of Regulation No 1612/68, namely freedom of movement for workers, requires, for such freedom to be guaranteed in compliance with the principles of liberty and dignity, the best possible conditions for the integration of the Community worker's family in the society of the host Member State (see Case C-308/89 *Di Leo* [1990] ECR I-4185, paragraph 13).
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> 51. As the Court pointed out in paragraph 21 of *Echternach and Moritz*, for such integration to come about, a child of a Community worker must have the possibility of going to school and pursuing further education in the host Member State, as is expressly provided in Article 12 of Regulation No 1612/68, in order to be able to complete that education successfully.
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> 52. In circumstances such as those in the Baumbast case, to prevent a child of a citizen of the Union from continuing his education in the host Member State by refusing him permission to remain might dissuade that citizen from exercising the rights to freedom of movement laid down in Article 39 EC and would therefore create an obstacle to the effective exercise of the freedom thus guaranteed by the EC Treaty.
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> 53. Although the Court found in *Echternach and Moritz* that the child concerned could not, after his father's return to his Member State of origin, continue his studies there because there is no coordination of school diplomas, it is none the less the case that the Court's reasoning sought essentially to ensure, in accordance with the aim of integration of members of the families of migrant workers pursued by Regulation No 1612/68, that a child of one of those workers could go to school and pursue further education in the host Member State, under conditions which do not constitute discrimination, in order to be able to complete that education successfully (see, also, Case 42/87 *Commission* v *Belgium* [1988] ECR 5445, paragraph 10).
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> 54. In fact, to permit children of a citizen of the Union who are in a situation such as that of Mr Baumbast's children to continue their education in the host Member State only where they cannot do so in their Member State of origin would offend not only the letter of Article 12 of Regulation No 1612/68, which provides a right of access to educational courses for the children of a national of a Member State 'who is or has been employed' in the territory of another Member State, but also its spirit."

18. In both C-310/08 *Ibrahim* and C-480/08 *Teixeira*, there had been a common period when the child was residing in the UK and the relevant parent was working, so the present issue did not directly arise. Nonetheless, in *Teixeira* at [52] the Court observed, citing *Brown* and *Gaal* that

> "it is settled case-law that Article 12 of Regulation No 1612/68 requires only that the child has lived with his or her parents or either one of them in a Member State while at least one of them resided there as a worker."

19. A materially identical observation appears in *Ibrahim* at [40].

20. Among the questions raised by C-115/15 *NA* was:

> "Does a child have a right to reside in the host Member State pursuant to Article 12 of Regulation No 1612/68 (now Article 10 of Regulation No 492/2011/EU) if the child's Union citizen parent, who has been employed in the host Member State, has ceased to reside in the host Member State before the child enters education in that State?"

The Court answered in the affirmative. In that case there had been a common period of the child's residence and the father's employment. Mr Barker points out that if there was any doubt in the matter from reading the decisions of the Court of Justice or the Court of Appeal, there is a clear finding to that effect at para 72 of the Upper Tribunal's decision ([2013] UKUT 89 (IAC)[2]). The Court of Justice observed (emphasis added):

> "54. The right of access of the children of migrant workers to education in the host Member State, under that provision, depends on the child concerned first being settled in the host Member State, and consequently children who have settled in that Member State in their capacity as family members of a migrant worker, as well as the children of a migrant worker who have resided since birth in the Member State in which their father or mother is or was employed, may rely on that right in that Member State (see, to that effect, judgment of 23 February 2010, *Teixeira*, C-480/08, EU:C:2010:83, paragraph 45).
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> 55. Article 12 of Regulation No 1612/68 seeks in particular to ensure that the children of a worker who is a national of a Member State can, even if that worker has ceased to be employed in the host Member State, undertake and, where appropriate, complete their education in the latter Member State (judgment of 23 February 2010, *Teixeira*, C-480/08, EU:C:2010:83, paragraph 51).
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> 56. As is apparent from the very wording of Article 12 of Regulation No 1612/68, that right is not limited to children of active migrant workers, but applies also to children of former migrant workers. It accordingly follows that the right of children to equal treatment with respect to access to education does not depend on the fact that their father or mother retains the status of a migrant worker in the host Member State (see, to that effect, judgment of 23 February 2010, *Teixeira*, C-480/08, EU:C:2010:83, paragraph 50).
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> 57. Further, the Court has held that the right derived by children from Article 12 of Regulation No 1612/68 is not dependent on the right of residence of their parents in the host Member State, since that provision requires only that the child has lived with his parents or one of them in a Member State while at least one of the child's parents resided there as a worker (see, to that effect, judgment of 23 February 2010, *Ibrahim and Secretary of State for the Home Department*, C-310/08, EU:C:2010:80, paragraph 40)."

Thus, while the question referred in *NA* was not directly relevant to the present case, the Court answered it in terms which again restated the requirement that needed to be met in order to benefit from Article 12, in terms which the present claimant is unable to meet.

[2] "We are satisfied that…the eldest child was born in 2005 and resided in the UK when her father was residing in the UK as a worker."

21. Turing to domestic authority, in *MDB and others v SSHD* [2012] EWCA Civ 1015, the Court of Appeal at [26] expressed some doubt as to whether the test for being a "worker" under Art 12 was the same as under the Directive (it considered the former might be higher), but it accepted a concession that the two tests were the same. It has not been suggested otherwise before me and I proceed on the basis that the tests are indeed the same. I mention this only for completeness in view of Ms Shone's correct concession, recorded at [13].

22. *MDB* (at [22]) is also authority for the proposition that a child does not obtain an Article 12 right simply because his or her parent is a national of another Member State who has been looking for work in the host State. That therefore excludes any possibility of reliance on the period of job seeking implicit in the JSA claim made from 16 September 2014. Ms Shone does not in any event seek to rely on such period, so this is once again for the sake of completeness.

Local authority's submissions

23. For the local authority, Mr Barker submits that only one of the authorities (*Brown*) addresses the question of whether a person may rely on Article 12 to install himself in the host Member State after his parent has ceased to be a worker. While Mr Brown's parents had ceased both to work and to reside in the host Member State before Mr Brown was born (*a fortiori* before he moved to the UK), para 30 of the decision makes clear that the intention of the provision is to eliminate obstacles to the freedom of movement of workers. The present claimant did not need her children to come to the UK to facilitate her freedom of movement as a worker because she was not a worker. The factual difference between the situation in *Brown* and the present case is not significant.

24. In all the other European cases, Mr Brown submits (and it is not disputed) there was a common period when the child was resident and the parent a worker.

25. Being a jobseeker is not sufficient for the purposes of Art 10. Mr Barker relies on the decision of C-138/02 *Collins* at [29] and [33] to demonstrate that for the purposes of Title II of Part I of Regulation1612/68, being a jobseeker is not enough to make a person a worker and the same reasoning should lead the same conclusion in relation to Title III (within which Art 10 falls.).

26. The policy aim is that there should be integration of the worker's family - at the pre-school stage will suffice – and once there has been such integration, the child has the right to begin school.

Claimant's submissions

27. Ms Shone submits that there was no material error in law in the FtT's decision.

28. Article 10 on its face creates a right for the children of workers or former workers: cf. "a national of a Member State who is or has been employed…" (emphasis added). It would have been possible to have drafted the legislation so as to require that the children be resident when the parent is exercising Treaty rights, but that was not done. As to *Brown*, she submits that there is no reason to suppose the decision would have been the same if the Brown family had continued to reside in the UK. On the facts of *Brown*, no integrating in the UK was

possible. By contrast, the present claimant continued to reside here. The purpose of Regulation 492/2011 (and Regulation 1612/68) is eliminating obstacles to freedom of movement and if her children could not join her that would be a significant obstacle to the claimant being part of the labour market (as the claimant had sought to do, as reflected in her claim for JSA).

29. *Baumbast* at [54] appeals to the spirit of the regulation. The general principle is a wide one. Anything making it more difficult for the children to enter education will be an obstacle to freedom of movement.

30. The other EU authorities, not dealing with the situation arising in the present case, do not provide authority against her.

31. As it is concerned with those seeking to enter the labour market, the benefit of Regulation 492/2011 should be extended to all those seeking to enter the labour market, including jobseekers.

32. Mr Barker's rationalisation of the policy is disputed. There is no reason only to limit Article 10 rights to those children who happen to have been installed while their parent is working. Whether the children arrive at that point or later is incidental.

Analysis

33. I do not consider that the children of jobseekers (as opposed to those who retain worker status through looking for work) can avail themselves of Article 10. *MDB* is binding authority on me and is in my respectful view correct. If being a jobseeker counted, such a person could immediately be joined by their children and, whatever the person's subsequent connection with the labour market (or lack of it), the child on entering school would have rights under Art 10 and the parent a derivative right. That would subvert the finely crafted delineation of the rights of (and limitations on) jobseekers in C-292/89 *Antonissen.* Whilst I do not need to consider the point in detail, *Collins* is at least authority for the proposition that "one size does not fit all" for the purposes of the various parts of Regulation 1612/68 and now Regulation 492/11.

34. Ms Shone is of course correct in saying that the terms of Article 10 do not, on their face, require there to have been a common period when the child was residing in the UK and the parent working here. However, the Regulation must be taken as having been prepared with knowledge of how the Court had interpreted its predecessor. While there are inevitable points of difference in the facts of the two cases, I consider that the structure of para 30 of *Brown* is such that the paragraph must be applied to the present case also. I repeat the paragraph here for convenience:

> "30 The fifth recital in the preamble to Regulation No 1612/68 indicates that that regulation is intended to establish freedom of movement for workers by, *inter alia*, eliminating obstacles to the mobility of workers, in particular as regards the worker's right to be joined by his family and the conditions for the integration of his family into the host country. It follows that Article 12 of the regulation must be interpreted as meaning that it grants rights only to a child who has lived with his parents or either one of them in a Member State whilst at least one of his parents resided there

> as a worker. It cannot therefore create rights for the benefit of a worker's child who was born after the worker ceased to work and reside in the host State."

35. The Court acknowledged the policy aim behind the Regulation by referring back to its fifth recital of the Regualtions and then in the penultimate sentence of the paragraph lays down a proposition in general terms which establishes a gatekeeping condition defining the nexus required in order to fall within the policy aim of freedom of movement for workers. I read the final sentence of the paragraph as an application to the particular facts of the case in *Brown*, not as defining the circumstances in which the principle arises. Further, the Court's own understanding of what was decided by *Brown* is very clear from *Gaal*. In *Ibrahim* and *Teixeira*, judgment in both of which was given on 23 February 2010, before Regulation 492/2011 came into being, the Court was referring to the requirement that the child has lived with his or her parents or either one of them in a Member State while at least one of them resided there as a worker as being "settled case-law" There appears nothing else apart from *Brown* and *Gaal* which "settled" that case-law, so that represented the Court's view of how those decisions are to be read. Further again, the Court was at pains to emphasise that the requirement for a common period was the "only" condition, thus (given that there were no issues concerning the common period in either *Ibrahim* or *Teixeira*) reiterating its fundamental importance. More recently, the requirement for the common period when the child was in the host Member State and the parent a worker there was reiterated in *NA.*

36. I do not consider that the factual differences provide a valid basis for distinguishing *Brown*, given the general terms in which the principle of law is phrased. Whilst I accept that in the subsequent cases the point which the present case concerns did not arise directly, the repetition of the relevant principle by the Court of Justice is unremitting.

37. I need deal only briefly with *Baumbast.* Ms Shone's appeal to the reference to the "spirit" of the regulation in [54] does not help me. The remark was made in order to rebut an argument that the right only arose if a child could not complete their education in their Member State of origin. It seems to me that *Baumbast* is at least as unhelpful to Ms Shone's case as it helps it. Paragraphs 50 and 51 refer to "the best possible conditions for the integration of the Community worker's family" and "the child of a community worker". As I have held, being a jobseeker does not suffice; and when her children came over, the claimant had lost the ability to retain (under Article 7(3) of the Directive) the worker status she had acquired by virtue of the work she had been found to have done. Mr Barker is correct to submit that she was not, at that point, a Community "worker" and her children were not, at that point- or subsequently up to the date of the decision under appeal – the children of a Community worker. Adapting his formulation of it somewhat, there is no need to eliminate barriers to the exercise of a right if the parent was not at the material time exercising it.

38. All kinds of things can be construed as operating as a deterrent to free movement, but in reality free movement is a concept modulated by the legislative instruments and decisions of the Court of Justice which address it. There is only limited scope to appeal to such a general principle when the matter has been articulated in the legislation and/or decisions of the Court. As Upper Tribunal Judge Jacobs in IG v Secretary of State for Work and Pensions [2016] UKUT 176 (AAC); [2016] AACR 41 said of a similar appeal to such a principle in a related but not identical context:

> "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… . 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."

39. Further, the Court in *Ibrahim*, *Teixeira* and *NA* was well aware of *Baumbast*, which preceded those cases by a considerable margin, and thus will have given its rulings in those cases in full knowledge of the appeals to principle in *Baumbast* on which Ms Shone relies.

40. What is required is the initial common period when the child is installed and the parent is a worker. That is how the Court of Justice has repeatedly chosen to define the nexus on which access to the right conferred by Article 12 of Regulation 1612/68 and subsequently Article 10 of Regulation 492/2011 depends; in the language of *NA*, para 54, when the child is "in their capacity as family members of a migrant worker". It has done so in terms which are rational and clear, even if the Regulations themselves do not say as much in terms on their face. I see no realistic prospect of the Court choosing to reverse this line of authority of long standing and so see no need to make a reference to it under Article 267. I must accordingly allow the local authority's appeal.