IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. *UA-2021-000531-USTA*
[2024] UKUT 212 (AAC)

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

Secretary of State for Work and Pensions

Appellant

- v –

VB (1)
AD (2)

Respondent

Before: Upper Tribunal Judge Ward

Decision/Hearing date: 20 and 21 November 2023

Representation:

Appellant:	James Cornwell, instructed by Government Legal Department
Respondent:	Adrian Berry (pro bono), instructed by solicitor, Child Poverty Action Group

DECISION

The decision of the Upper Tribunal is to allow the Secretary of State's appeal on a point of law but to remake the decision in favour of the claimants. The decision of the First-tier Tribunal made on 20 April 2021 under number SC201/20/00309 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remake it as follows:

> The claimants' appeal is allowed. VB had a qualifying right to reside for the purposes of the joint claim for universal credit made on 20 March 2020, which was therefore to be paid at the rate for joint claimants plus their child.

REASONS FOR DECISION

Introduction

1. In this decision I refer to the Appellant as either "SSWP" or "the Secretary of State". The Respondents are referred to by their initials or as "the claimants".

2. AD and VB are now married and previously were at all material times a couple. AD is a British Citizen; VB is Norwegian.
3. On 8 April 2020 SSWP held that VB lacked a qualifying right to reside for universal credit ("UC") purposes and so UC was paid on their joint claim at the rate for a single person plus their child.
4. VB appealed to the First-tier Tribunal ("FtT"). AD played no active part, but he was in formal terms a respondent, albeit not recognised as such in the FtT's paperwork. The reason why this is so is set out in Schedule 1 to the present decision.
5. AD is correctly a respondent to the present appeal and on the application of CPAG was from the date of hearing recognised as such, without objection from SSWP.
6. At the time of the decision under appeal, EU law continued to apply, with only minimal modifications, in the UK. Although Norway is not a member state of the EU, it is common ground that EU law on freedom of movement applied to Norwegian nationals via the Oporto agreement. I am grateful to Mr Weatherhogg for his post-hearing submission giving the detail of why this is so, set out in Schedule 2 to the present decision.
7. The FtT allowed VB's appeal on the basis of the Court of Appeal's decision in *Fratila and Tanase v SSWP* [2020] EWCA Civ 1741. That decision was later reversed by the Supreme Court, following the decision of the CJEU in C-709/20 *CG v Department for Communities in Northern Ireland*, but that left open a possibility that a person might in certain circumstances be able to rely on the EU Charter of Fundamental Rights. In the present case VB and AD do not seek to argue that their circumstances would entitle them to rely on that aspect of the decision in *CG*.
8. Accordingly, it is common ground that the decision of the FtT was in error of law. The issue before me is how the case should be remade,
9. There are three alternative bases on which the claimants contend that VB did have a right to reside at the material time: (a) that she was self-employed; (b) that she was self-sufficient; and (c) that she retained worker status. I consider each in turn.

Evidential matters

10. VB had filed two witness statements, with supporting exhibits. On 16 November (so with one clear working day before the start of the hearing) she applied for permission to file a third witness statement, supported by further exhibits. SSWP objected on the basis that it was very late, including being 14 days after the skeleton argument. No attempt had been made to raise the further evidence with those advising the Secretary of State. Some of the evidence clearly existed when VB's earlier witness statements were prepared and could have been included then. The Secretary of State does not have unlimited resources and so could not respond immediately. The Secretary of State could not accept that VB's activity was genuine and effective and Mr Cornwell sought an opportunity to put in a submission later if having considered the material further the Secretary of State was minded to change his position.

11. I decided to admit the third witness statement. Though there is no good reason why they were not filed earlier, the exhibits do not appear particularly hard to assimilate. Any prejudice to SSWP was mitigated by allowing him the opportunity to apply within 7 days to file a supplemental submission addressing the additional evidence, as was suggested by Mr Cornwell. Given the purpose of benefits adjudication is to ensure that individuals receive neither more nor less than their legal entitlement, it would be undesirable for the amount to be determined without reference to evidence known to be available at the time the decision fell to be made, in this instance on re-making by the Upper Tribunal.

Findings of fact

12. My findings of fact are as set out in the chronology below and in para 12. Mentions later in the decision to "Line X" are to the relevantly numbered line in the table.

Line ref	Date	Event
1	Pre 2017	VB worked for a 3 year period in Italy as a designer for a company engaged in the lingerie industry
2	**2017**	
3	July 2017	VB enters UK and commences work as au pair. No findings as to the terms can be made.
	2018	
4	August 2018	Work as au pair ceases
5	27 August	VB commences work as wardrobe manager on around £45,000 p.a
6	September	Approximate date of conception of 1st child
	2019	
7	Various unknown dates	VB assembles images on Pinterest under the broad headings "Caftan", "housecoat", "Lingerie" and "projects to try". Under each heading a number of images are assembled, ranging from 23 to 54
8	Before 19 January	VB purchases fabric dyes.
9	21 January	Work as wardrobe manager ends. VB offered alternative role (a demotion) which unable to take due to pregnancy. Reaches financial settlement with employer via ACAS.
10	8 February	VB has unsuccessful job interview for post involving machine sewing/hand sewing
11	Feb-April	VB receives negative replies from 7 job applications, the great majority linked to sewing or fashion in some way
12	5 April	End of 2018-19 tax year. AD's profits from self-employed business around £24,000
13	10 April	Approximate date 11 weeks before Expected Date of Delivery
14	June	Buys sewing machine
15	26 June	1st child born. Had the intention to set up own lingerie business from around this time
16	August	VB and AD receive £15,000 from AD's mother to do up their houseboat
17	September	Awarded pre-settled status

18	5 November	Buys lingerie in style similar to what she would go on to develop
19	20 December	VB has computer serviced
	2020	
20	Early March	VB, then also in receipt of NHS CBT following post-natal mental health difficulties, meets employment adviser via Talk Changes NHS service to discuss future work/employment possibilities
21	16 March	Prime Minister says people are to stop non-essential contact
22	During March	AD has to stop his business due to COVID lockdown
23	During March	VB starts planning her own business, spending “some hours each week”
24	20 March	AD and VB jointly claim universal credit. They have around £4300 in their bank accounts between them. VB states that she was not working and would not be starting self-employment within the next month.
25	26 March	COVID lockdown measures become law.
26	27 March	VB purchases, in a variety of colours and sizes, fabric flowers and gemstone beads; also thread. The cost is 2,948.17 NOK, equivalent to around £162.
27	5 April	End of 2019-20 tax year. AD’s profits around £23,000
28	8 April	Date of DWP’s decision under appeal to the FtT. Universal credit awarded at a rate reflecting AD and their child but not VB.
29	8 June	VB purchases silk fabric, patterns for lingerie, lace trim. Some items are purchased in multiple quantities. The total cost of purchases on that day was £383.69
30	8 July	Application: freelance seamstress
31	18 August	Job application: sewing machinist/seamstress
32	28 August	AD and VB marry
33	10 September	AD reports (VB’s own UC login being ineffective) that they have married and that VB is in gainful self-employment.
34	19 September	Application: home-based womenswear seamstress
35	25 September	AD and a business associate take out a 12 month licence of a unit at a business centre. The space is shared between the three of them: VB uses it for designing and producing lingerie and for marketing (though no output from that marketing is in evidence). AD pays a share covering both himself and VB
36	Unknown date in Oct	Starts sewing face coverings for a company
37	1 October	Date of start of business as reported on VB’s tax return for 6.4.20-5.4.21
38	6 October	Application: freelance seamstress
39	27 October	VB purchases at a cost of £70 further lace trimming, in a variety of colours and styles. Delivery is to the business centre address.
40	31 October	VB purchases further items, including further lace trim; silk and recycled sari fabric
41	3 November	Application: freelance seamstress
42	21 Nov	VB purchases further lace trimmings, again in different colours and styles. A quantity of 10 of one item is purchased.

43	23 Nov	VB and AD advised that decision of 8 April unchanged following notification of 10 September
44	30 Nov	VB purchases bra strap elastic in 4 different colours and sizes
45	3 December	HMRC acknowledge recent submission of VB's registration confirming she had commenced self-employment
46	December	Early sales of a camisole and a slip dress
	2021	
47	February	First sales via Etsy (3 that month, continuing at between 1 and 5 sales per month during remainder of 2021)
48	5 April	VB's business turnover in 2020-21 tax year £500 and net profit £257
49	26 May	VB (with a business associate) enters into a 12 month licence of a different business unit, in her own name
50	26 August	AD receives final payment of universal credit. Because of his fluctuating and project-based income he has received £0 universal credit in 9 of the 17 assessment periods since the claim.
	2022	
51	January	AD and VB withdraw universal credit claim.
52	Each month	Sales via Etsy continue. There are 61 sales, compared with 27 the previous year
53	5 April	VB's business turnover in 2021-22 tax year £7207 and net profit £3007
54	July	VB entitled to settled status
55	12 December	VB applies for settled status
	2023	
56	Each month	Sales via Etsy continue
57	21 March	VB granted settled status
58	5 April	VB's business turnover in 2022-23 tax year £10374 and net profit £8624
59	April	VB engages a contractor, mainly for sewing, with some work on VB's web page
60	2 May	AD and VB's 2nd child born
61	May-Oct	In addition to sales via Etsy, sales at local fairs and markets: average monthly sale = £380 approx

13. VB has skills as a seamstress. It is not disputed that, at the point when her employment as a wardrobe manager finished, she was involuntarily unemployed. Thereafter, she did not register as unemployed. Though she expected to find work quickly, that expectation was not based on a substantial track record of employment in the UK. In her view, a contributory factor to her lack of success in the (at least) 8 job applications she made between January and April 2019 (lines 10 and 11) was that her pregnancy was becoming increasingly visible. If she was unaware of any entitlement to support, that was because she did not think to ask, despite the fact that most Western European countries offer benefits for the unemployed and despite her partner being British and likely to know at some level about the existence of UC. She was able to live on her savings and on AD's earnings from his self-employed work.

Self -employment

14. Art. 49 TFEU provides:

> "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."

15. Directive 2004/38 confers by art.6 an essentially unrestricted right of residence in another Member State for a period of up to three months. Article 7(1) then provides that

> "All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
> (a) are…self-employed persons in the host Member State;…"

16. The regulations implementing the Directive were the Immigration (European Economic Area) Regulations 2016/1052 ("the IEEA Regulations"). Reg 4(1)(b) provided that:

> "(1) In these Regulations—
> …
> (b) *"self-employed person"* means a person who is established in the United Kingdom in order to pursue activity as a self-employed person in accordance with Article 49 of the Treaty on the Functioning of the European Union[.]"

17. Regulation 13 gives effect to art.6 and reg. 14 (with reg. 6) to art.7. It was not suggested there was any material gap between the EU and domestic provision.

18. Freedom of establishment is not a concept peculiar to social security (though it has implications there, as in this case). It falls to be applied in an immigration context and also serves wider purposes, described in C-55/94 *Gebhard* at [25]:

> "The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons."

19. C-268/99 *Jany v Staatssecretaris van Justitie* concerned the association agreements between Poland and the EU and Czech Republic and the EU, but the Court made clear at [38] that the relevant provision fell to be interpreted in the same way as the equivalents in the Treaty. At [33] the Court held:

> "According to settled case-law, the pursuit of an activity as an employed person or the provision of services for remuneration must be regarded as an economic activity within the meaning of Article 2 of the EC Treaty (now, after amendment, Article 2 EC), provided that the work performed is genuine and effective and not such as to be regarded as purely marginal and ancillary (see, *inter alia*, Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraphs 53 and 54)."

20. That test has been applied in a small number of decisions of this Chamber, such as *HMRC v HD and GP* [2017] UKUT 0011 (AAC) and *SSWP v HH* [2015] UKUT 0583 (AAC). Those were cases where the activity, such as it was, either was, or had been, "up and running".

21. Decisions on the relevance of preparatory steps in the context of art.49 are extremely sparse. I consider below those to which I was referred by counsel. My own researches were unable to uncover any others.

22. R(IS) 6/00 was a case concerned with Directive 73/148/EEC, which preceded Directive 2004/38/EC.

23. Mr Commissioner Mesher noted the submissions by Mr Kovats (counsel for the adjudication officer), which he understood to be in the following terms:

> "In order for freedom of establishment under the Directive to have any reality, a right of residence has to be recognised before the person actually begins to trade. If a person were not allowed to be resident in order to carry out the necessary preparation to begin trading, the right of establishment might be illusory. Therefore, whether the right of residence was under Article 4(1) or Article 1(1)(a), it should cover persons who have a present wish to pursue activities as self-employed persons and who are presently taking some steps to fulfil that wish. Mr. Kovats submitted that where a person merely has a wish to pursue activities at some time in the future, there is no right of residence."

At [31] he held:

> "Construing the Directive as a whole in the light of the purpose of securing freedom of establishment, there must be some right of residence (I do not need to decide whether it is a right of permanent residence or not) pursuant to the Directive in the circumstances identified by Mr. Kovats. The difficult question is whether the right extends not merely to those who are taking steps towards offering their services to the public (or whatever final step is appropriate to the nature of the business) in a Member State, but also to those who wish to do

that, but have not yet taken any steps beyond arriving in the Member State concerned. In my judgment, it does not. It would be going further than justified by the purposes of the Directive to extend a right of residence, rather than the mere right of entry to the Member State under Article 3, to such persons. It also seems to me that the crucial factor is not so much whether the person's intentions are for the present or for the future or are conditional in some way, but whether the person is taking steps towards offering services to the public, or otherwise setting up as a self-employed person. But exactly what steps will lead to the conclusion that there is a right of residence pursuant to the Directive will depend on the particular circumstances of individual cases and I should not attempt to give any further guidance."

24. I was also referred to *SSWP v JS (IS)* [2010] UKUT 240 (AAC). That was not a case about preparatory steps but about whether a person who had been self-employed necessarily no longer was if she was not currently providing services. Upper Tribunal Judge Jacobs said at [5]:

"I do not accept that a claimant who is for the moment doing no work is necessarily no longer self-employed. There will commonly be periods in a person's self-employment when no work is done. Weekends and holiday periods are obvious examples. There may also be periods when there is no work to do. The concept of self-employment encompasses periods of both feast and famine. During the latter, the person may be engaged in a variety of tasks that are properly seen as part of continuing self-employment: administrative work, such as maintaining the accounts; in marketing to generate more work; or developing the business in new directions. Self-employment is not confined to periods of actual work. It includes natural periods of rest and the vicissitudes of business life. This does not mean that self-employment survives regardless of how little work arrives. It does mean that the issue can only be decided in the context of the facts at any particular time. The amount of work is one factor. Whether the claimant is taking any other steps in the course of self-employment is also relevant. The claimant's motives and intentions must also be taken into account, although they will not necessarily be decisive."

25. Mr Berry invites me to follow R(IS) 6/00 and to apply it to the facts found so as to hold that VB was entitled to benefit from art.49 (and its associated implementing EU and domestic legislation). Mr Cornwell submits that as R(IS)6/00 was based on the previous Directive and predates *Jany*, I should in preference follow *Jany* and *JS* (which did concern Directive 2004/38/EC), to the extent that they are in conflict with it.

26. I return below to those competing submissions but first need to note an issue specific to the application of art.49 and its associated legislation in the social security context. Section 12(8)(b) of the Social Security Act 1998 provides as follows:

"(8) In deciding an appeal under this section, the First-tier Tribunal—
…

(b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made."

27. The Upper Tribunal when remaking the FtT's decision is in the same position, while s.8(2) of the 1998 Act makes clear the similar limitation on the administrative decision-maker.

28. However, it is settled law that evidence of subsequent events may be taken into account for what light it sheds on the circumstances obtaining at the date of decision: R(DLA) 2/01 and 3/01.

29. Returning to Mr Cornwell's submissions, I accept that there are some differences between the two Directives but am not persuaded that any of them provides a sufficient basis for distinguishing R(IS) 6/00. The principal difference on which he relies is the introduction, by art.6 of Directive 2004/38/EC, of the free-standing right of residence, not subject to conditions, for the first 3 months. However, Mr Berry is right in submitting that the purpose of the Citizenship Directive was to strengthen rights: see C-127/08 *Metock* at [59]):

> "As is apparent from recital 3 in the preamble to Directive 2004/38, it aims in particular to 'strengthen the right of free movement and residence of all Union citizens', so that Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals."

30. I prefer Mr Berry's submission on this point. The Directive introduced rights under art.6 for any citizen of the Union, irrespective of their desire to exercise freedom of establishment, freedom of movement as a worker or any of the other categories conferring longer rights of residence and has no evident link to determining the scope of the latter. There are differences in the rights conferred in the first three months on those who rely on the art.6 right and those who, even in the first three months, rely on some other right, such as that of a worker, or the self-employed. Further, it cannot be assumed that the necessary steps to set up an operating business in a host Member State (to the extent that, as in consequence of *Jany* we now know it needs to be, it is genuine and effective) could be accomplished in a three month period anyway, thus it would remain necessary, regardless of the art.6 right, to determine in some cases at what point steps towards operating such a business would fall within art.49. Whilst I accept that Mr Commissioner Mesher's reasoning was based on the need to make freedom of establishment effective, that same need persists in the legislative context applicable to the present case, for the reasons I have given.

31. I also do not accept Mr Cornwell's submission that R(IS) 6/00 should not be followed because it predates *Jany*. The learned Commissioner rejected the notion that a mere intention to set up a business would be sufficient and held that concrete preliminary steps were required, it being a question of fact in all the circumstances of the case whether sufficient steps had been taken. That approach is equally valid following *Jany*, now that thereby the bar has been set that a business must be genuine and effective. The effect of *Jany* is that preparatory steps for an activity

such as the therapeutic but uncommercial writing and publishing of a book in *HH* would not be sufficient, that activity not being genuine and effective, even if all the necessary preparatory steps had been taken.

32. That is not to say that the ruling in *Jany* that an undertaking must be "genuine and effective" does not give rise to additional issues, but the Commissioner did not need to consider them. They are, however, at the heart of the present case.

33. The dilemma is that any interpretation must allow people to exercise the rights conferred by art.49. A new business is unlikely to be fully formed, but rather will need to be planned and built up. From the viewpoint of benefit adjudication, while it may be relatively straightforward in most cases to determine whether an extant business is "genuine and effective", assessing whether preliminary steps are towards a genuine and effective business requires skills more commonly associated with investors. There is an unavoidable risk that a negative determination will be overturned on appeal if (as R(DLA)2/01 and 3/01 permit) one can rely on how a business turned out, where it is evidence of how circumstances were, down to the date of decision. Conversely, a decision favourable to a claimant might in fact prove to be unjustified by how matters turned out if the subsequent fortunes of the projected business provide evidence that at the date of decision it never was going to be genuine and effective.

34. For the reasons in [29] and [30], I see no reason not to follow R(IS) 6/00, but they must be preparatory steps to a projected genuine and effective business. Nor should the aim of the concept of establishment as described in *Gebhard* be overlooked: if that aim is to be served, there must in my view be a reasonable degree of proximity in time between the preliminary steps and the implementation of the genuine and effective business which is being set up.

35. While I have ruled on the competing submissions before me, I am doubtful to what extent Mr Cornwell's submission on behalf of the Secretary of State leads to a different outcome. If one asks whether the preparatory steps are all part of a genuine and effective business, allowing that running such a business will necessarily involve doing things other than direct sales etc as *JS* indicates, an evaluative judgment as to the business of which such steps form part is genuine and effective is still required.

36. I turn to applying my ruling to the facts of the case. Mr Berry submits that VB had, since her first child was born, the intention to set up in the future a luxury fashion business. Her evidence is that she was spending "some hours" each week planning the business, alongside caring for her son. She discussed her options with an employment adviser. She purchased materials on 27 March (before the date of the DWP's decision) and on a number of occasions subsequently in the second half of 2020. During the same period she was designing and making products, attending to marketing and the like. In July 2020 she sought freelance work and obtained it in October 2020. A studio was rented in September 2020, in part to enable her to work. In December 2020 she registered as self-employed with HMRC and started trading on Etsy.

37. Mr Cornwell resists these submissions, suggesting that there is no real corroborative evidence that VB formed an intention to set up her own business from around June 2019 or was considering such matters as branding, concept design and styles before March 2020. VB's own witness statement says that she started planning her business during the period March-November 2020. In the couple's claim for UC (20 March 2020) she had answered "no" to the questions including "are you currently working". Purchases made before the date of decision were minimal in extent, having a value of around £162. Work claimed to have been done on planning the business from March 2020 onwards is unparticularised and without corroborative evidence: there is a lack of, for example, designs, business plans and examples of marketing from that period. Registration with HMRC is neither a necessary nor sufficient condition of self-employment for art.49 purposes and in any event occurred 8 months after the decision. The same is true of commencing sales on Etsy. Applications for, or carrying out, freelance work in August/October 2020 cannot support a contention that VB was self-employed in March 2020. The initial studio letting appears to relate to AD's own self-employed business. VB declared no self-employed income to the DWP while AD was claiming universal credit, indicating either that there was none, or that universal credit may need to be repaid.

38. Mr Cornwell made a number of further points concerning lack of corroborative evidence, but they have been overtaken by VB's third witness statement and its accompanying exhibits.

39. In considering the circumstances obtaining at 8 April 2020, there are a number of steps VB took whose potential significance needs to be considered.

40. During 2019 VB had compiled themed collections of substantial numbers of images on Pinterest. I note her 3 years of previous experience as a lingerie designer and that she had sufficient sewing skills to have been able to contemplate making numerous applications, albeit largely unsuccessful, for work in the clothing and fashion industry. It is unsurprising, her work as a wardrobe manager ending or having ended, that she should have been assembling images on Pinterest which caught her eye. They could, taken together with other evidence, help demonstrate preparatory steps for a business, although would not do so without more.

41. In June 2019 (close to the time of her first child's birth) she had bought a sewing machine. In December 2019 she had had her computer serviced. Both of these might have had relevance to the business she was subsequently to run, but equally could have been for hobby or other personal, or family, use. The evidence does not suggest that they were seen at the time as being part of setting up the future business. In her first witness statement, VB states that it was in March 2020, as well as resuming her search for work, she took steps towards setting up her own business as a luxury fashion (lingerie) designer/maker and finding freelance work. She goes on to explain that purchases made from March to November 2020 were of items needed to produce lingerie for her own business/freelance work and that it was during that period that she started planning her own business. Further, the

range of options considered with the employment adviser in early March tends to suggest that the business was at most one possible idea among others in contemplation at that point, rather than something that had been being actively worked on prior to that date. I therefore do not regard actions taken prior to March 2020 as steps taken towards setting up the business.

42. Mr Cornwell is correct to draw attention to the lack of corroborative evidence (despite the three witness statements submitted) to the fruits of the business planning claimed to have been carried out in March (with an estimate, expressed with appropriate caution, of about 8 hours a week). I make no finding as to the number of hours devoted to business planning, but I accept that there was at that point some planning going on. It is consistent with it following closely after the meeting with the employment adviser reviewing options. It is also consistent with embarking on the purchase on 27 March 2020 of a variety of decorative items such as might be incorporated into garments – beads, fabric flowers and thread (line 26). While it is true that the amount of money spent on the order was not that large in objective terms, it was still a sizeable amount for a couple with a young child, who had just claimed universal credit and in the uncertainty of the early days of the Covid-19 pandemic, suggesting a compelling reason to make the purchase. Importantly, the significance of that purchase as at the date of decision may be considered with the benefit of subsequent evidence. On 8 June, VB, still in the difficult circumstances described, spent £383.69 on items needed for the sewing and decoration of lingerie, often in multiple quantities. That is strongly suggestive of preparation for making and selling, rather than personal use, and further such purchases followed thereafter. The purchase on 27 March in my view has to be seen in the same way.

43. I am not intending to suggest that when making those purchases VB was yet running a business. On 20 March (line 24) she had told the DWP that she would not be starting self-employment within the next month. I am not impressed by the explanation that she gives in her third witness statement that she had not yet declared herself to HMRC as self-employed and obtained a UTR number, so did not think her self-employment was "official" yet (that consideration did not prevent AD from telling the DWP in September that she was self-employed) but what she told the DWP was in substance accurate. What in my view she was doing from March 2020 on was taking steps <u>preparing to be self-employed</u>. Hers is a small, creative business, in which sourcing the materials to incorporate in very personal products that would appeal to her customers would be critical and I accept that that was what was happening with the purchases from 27 March onwards. One of the reasons why there is not more evidence of other forms of preliminary steps is that VB had already taken steps that would come to serve her for her business, such as buying a sewing machine or having her computer serviced, even if at the time they were undertaken that was not unequivocally as part of setting up her business. Nor would I expect to have seen sophisticated evidence of a marketing strategy: Etsy is a platform widely used by crafters and has provided the vast majority of VB's sales to date and would have been an obvious way of getting started. As (at that point) a one-woman business and one that was not dependent on obtaining

external funding, there was little in terms of management tasks that would call for extensive documentary output that could now have been produced as evidence.

44. I find that the business started on 1 October 2020. That was what VB herself had told HMRC in a context (her tax return) where the need for accuracy and honesty will have been obvious to her and was specific to the business (as opposed to any other form of self-employment). Her husband had 3 weeks earlier reported that she had commenced gainful self-employment but it is unclear what this was referring to (not least in the absence of any reported earnings) and to the extent that it is necessary to attribute a specific date to the start of the business I prefer the evidence on VB's tax return. It is consistent with having obtained around that time, with the assistance of her husband, the use of a shared business unit. Shortly afterwards VB was purchasing supplies in a range and quantity suggestive of commercial rather than personal use (lines 39, 40, 42 and 44). Early sales followed (lines 45 and 46), starting a couple of months later.

45. The level of sales and profit in the tax year 2020-21, if it stood alone, would not be such as to lead me to consider that the activity was genuine and effective. However, I would consider that the future development of the business reflected in the increased turnover figures (lines 53 and 58) provide evidence that what was starting up at or around that date was the early stages of a genuine and effective business. There does not appear to have been any significant change of circumstances (such as, by way of example, an order from a major retailer) interrupting the essentially linear development of the business.

46. Applying R(IS) 6/00 inter alia by having regard to the particular characteristics of the business, I conclude that as at the date of the decision under appeal, VB had taken steps appropriate to the business she was later to launch (and which was genuine and effective) to prepare for doing so. She had moved beyond the stage of a mere idea or intention and brought herself within the scope of art.49 TFEU and accordingly had a right to reside for the purposes of universal credit. The fact that she had only taken such steps a short while before the date of the DWP's decision under appeal is immaterial.

47. Although that conclusion is sufficient to resolve the case in the claimants' favour, in case it goes higher I will also address the other two grounds on which Mr Berry submits the decision should be remade in the claimants' favour.

Self-sufficiency

48. It is important to emphasise at the outset that as this ground is being considered as a fall-back against the possibility that I am wrong in the preceding section, I proceed in what follows on the footing that as at the date of decision VB was not exercising rights of freedom of establishment under art.49 TFEU.

49. The recitals to Directive 2004/38/EC include the following:

"(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.
Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens… for periods in excess of three months should be subject to conditions.

(16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system… .

(21) However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status… , prior to acquisition of the right of permanent residence, to these same persons."

(I note in passing that I have previously held that the relevance of recital (16) is not confined to the context of "expulsion" referred to and it was not suggested that it is.)

50. Article 7(1) provides:

"1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

…

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State[.]"

51. Article 8 provides:

"3. For the registration certificate to be issued, Member States may only require that

…

— Union citizens to whom point (b) of Article 7(1) applies present a valid identity card or passport and provide proof that they satisfy the conditions laid down therein;

.

4. Member States may not lay down a fixed amount which they regard as "sufficient resources" but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State."

52. Under reg.6 of the IEEA Regulations, a self-sufficient person is a "qualified person". Who is a self-sufficient person is defined by reg 4:

"(c) *"self-sufficient person"* means a person who has—
(i) sufficient resources not to become a burden on the social assistance system of the United Kingdom during the person's period of residence; and
(ii) comprehensive sickness insurance cover in the United Kingdom[.]"

Paragraphs (3) and (4) make further provision, but as it is common ground (see [53]) that VB had sufficient resources up to the date of the claim for UC and SSWP's submission that she was not thereafter does not turn on those paragraphs, they need not be set out.

53. SSWP accepts that following C-247/20 *VI v Commissioners of HM Revenue ad Customs* [2022] 1 WLR 2902, affiliation to the public health insurance system of the host state is sufficient to meet the requirement for comprehensive sickness insurance cover and that there is no reason to suppose that VB was not affiliated to the NHS. Consequently, the only issue under this ground concerns the sufficiency of resources.

54. In the period between January 2019 (when VB's job came to an end) and March 2020 (when the claimants made their UC claim) VB claims to have had available

(a) the profits of AD's business (roughly £24,000 in tax year 2018/19 and roughly £23,000 in tax year 2019/20);
(b) the houseboat where they were living, which they owned;
(c) VB's savings of approx.£5,000; and
(d) from August 2019, a one-off gift of £15,000 from AD's mother to do up the houseboat.

55. SSWP concedes that in the above period, VB and AD would not have received any payments of UC (had they applied), so they met the threshold in reg.4 of the IEEA Regulations and had "sufficient resources".

56. It is disputed whether that changed when they made their claim for UC for reasons set out below. In any event, if it did, C-140/12 *Pensionsversicherungsanstalt v Brey* [2014] 1 WLR 1080 establishes that claiming social assistance dos not automatically mean that the right to reside is lost. Rather, as was said in [77] of that case:

> "[…] a mechanism, whereby nationals of other Member States who are not economically active are automatically barred by the host Member State from receiving a particular social security benefit, even for the period following the first three months of residence referred to in Article 24(2) of Directive 2004/38, does not enable the competent authorities of the host Member State, where the resources of the person concerned fall short of the reference amount for the grant of that benefit, to carry out – in accordance with the requirements under, inter alia, Articles 7(1)(b) and 8(4) of that directive and the principle of proportionality – an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned."

57. At para 72:

> "By making the right of residence for a period of longer than three months conditional upon the person concerned not becoming an 'unreasonable' burden on the social assistance 'system' of the host Member State, Article 7(1)(b) of Directive 2004/38, interpreted in the light of recital 10 to that directive, means that the competent national authorities have the power to assess, taking into account a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that Member State's social assistance system as a whole. Directive 2004/38 thus recognises a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary (see, by analogy, *Grzelczyk*, paragraph 44; *Bidar*, paragraph 56; and *Förster*, paragraph 48)."

Brey, addressing circumstances where a person has previously met the requirement for self-sufficiency, thus provides a limited exception to the general aim of art.7(1)(b) as articulated at [76] of C-333/13 *Dano* of "prevent[ing] economically inactive Union citizens from using the host member state's welfare system to fund their means of subsistence."

58. Guidance as to how to approach the exercise was provided in para 78:

> "In particular, in a case such as that before the referring court, it is important that the competent authorities of the host Member State are able, when examining the application of a Union citizen who is not economically active and is in Mr Brey's position, to take into account, inter alia, the following: the amount and the regularity of the income which he receives; the fact that those factors have led those authorities to issue him with a certificate of residence; and the period during which the benefit applied for is likely to be granted to him. In addition, in order to ascertain more precisely the extent of the burden which that grant would place on the national social assistance system, it may be relevant,

as the Commission argued at the hearing, to determine the proportion of the beneficiaries of that benefit who are Union citizens in receipt of a retirement pension in another Member State."

59. That therefore is the exercise to be conducted in the present case. I considered the application of those principles in some detail in *AMS v SSWP (PC) (Second interim decision)* [2017] UKUT 48; [2018] AACR 27. That case also explains why dicta at [62] in C-67/14 *Alimanovic* suggesting that the accumulation of claims would be bound to represent an unreasonable burden were delivered in the context of the particular national benefit concerned and the associated mechanisms for retaining worker status and did not detract from the need for an induvial assessment where Brey requires one.

Self-sufficiency – the case for VB

60. As to whether VB continued to have sufficient resources at the time of the claimants' UC claim, Mr Berry submits that the additional monthly amount which the family would have received had VB been awarded UC was £184.15 (i.e. the difference between the applicable single person rate and the couple rate). At the time of claim, VB and AD had about £4,300 in their bank account, equating to about 23 months' worth of the difference between the two rates. Whether the above conclusions as to VB's self-employment are correct or not, Mr Berry submits that at some point before the end of 2020 VB would undoubtedly have had a right to reside as self-employed and so the distance their savings had to stretch would be less.

61. In the alternative, Mr Berry submits that if VB did not remain self-sufficient following the joint claim for UC, she did not represent an unreasonable burden on the UK social assistance system.

62. In *SSWP v WV* [2023] UKUT 112 (AAC) I rejected a submission by SSWP that the point at which a person will be granted settled status does not provide an outer date to the amount of benefit falling to be taken into account (and so contributing to the "burden" on the host Member State.) It is only during the pre-settled status period that, because of its exclusion from being a qualifying right to reside for UC purposes, a person is dependent on fulfilling the condition of some other right to reside (such as self-sufficiency). Thereafter, the UK has made a policy decision that having settled status – after 5 years of residence, not 5 years of residence in accordance with the Directive, renders a person eligible for benefits. Granting a benefit during the pre-settled status period (and so the burden which would arise by virtue of granting it) has no causal effect after 5 years. The Court of Appeal has given the Secretary of State permission to appeal in *WV* and the case is to be listed in late October 2024. I have not been invited to stay the present case behind the Court of Appeal's consideration of SSWP's appeal and do not consider it appropriate to do so given my conclusion on self-employed status above and so will continue to apply the law as I decided it in *WV* to be.

63. As applied to the present case, VB entered the UK in July 2017 and so would qualify for settled status in July 2022, which provided an end date to the period (variously expressed as 27 or 28 months) for which she would potentially cause a “burden” on the UK’s social assistance system, irrespective of other events.

64. Mr Berry invites me to conclude that in fact the period would be shorter, either because it was likely that VB would acquire some other qualifying right to reside or the family’s income would resume to a sufficiently high level that the family would no longer qualify for UC. I am ruling on the self-sufficiency point on the basis that my conclusion on self-employment were to be held incorrect and not to stand. On that basis, bearing in mind that the decision under appeal was taken at the height of the Covid-19 pandemic, I consider that it would be undue speculation to conclude that on the circumstances obtaining at the date of decision (even with the benefit of subsequent evidence referable to those circumstances) the 28 month period could be truncated on other grounds to any specific date. Mr Berry simultaneously relies upon statements by the then Prime Minister as to the anticipated short duration of measures against coronavirus (which later proved to be ill-founded) and outcomes regarding the couple’s economic activity and income at a later date: this appears to be an attempt to ignore later evidence as to the “circumstances obtaining” in the first case and to rely on it in the latter.

65. As to the other factors submitted to be relevant, Mr Berry draws attention to VB’s ties to the UK, having a British citizen partner and child; that she had paid into the UK social assistance system; and that her personal circumstances - losing a job due to pregnancy, setting up a business, pregnancy and maternity and looking for work, suggested a “get-up-and-go approach to building a life in the UK”.

66. It is, though, also necessary to consider the collective impact, in particular to identify the relevant cohort. In Mr Berry’s submission the cohort is those :

    (a) who are working age EEA nationals;
    (b) with pre-settled status;
    (c) without any other right to reside
    (d) who had sufficient resources (in reliance on resources other than social assistance); and
    (v) who, but for their right to reside as a self-sufficient person, would be an ineligible partner of a UC claimant.

67. A number of submissions are then made on the footing that that is, indeed the cohort. I return to them, having considered Mr Cornwell’s submissions on behalf of SSWP.

Self-sufficiency – the case for SSWP

68. Mr Cornwell submits that the submission that the couple were self-sufficient even after their claim for UC based on being able to pay the shortfall out of their savings is unsustainable for four reasons.

69. The first is that SSWP's position is that as well as income limits there are also capital limits for UC. If the couple had paid the shortfall out of savings, it would take them even further below the UC capital threshold. The financial conditions mean that it is appropriate for a person to retain the capital, while still being eligible for UC. The flaw I perceive in this argument is that the capital limit permits people to build up a degree of savings "for a rainy day", without disqualifying them for UC. While they are not at liberty to deprive themselves of capital for the purposes of obtaining UC (see reg.50(1) of the UC Regulations), by reg 50(2):

> "(2) A person is not to be treated as depriving themselves of capital if the person disposes of it for the purposes of—
> …
> (b) purchasing goods or services if the expenditure was reasonable in the circumstances of the person's case."

It can hardly be said to be unreasonable that a person could reduce their capital in order to meet their living expenses at the rate stipulated by UC.

70. I also consider it highly unlikely that SSWP's position on this particular point represents the legislative intention under art.8(4) of the Directive, which its reference in the alternative to "minimum social security pension" suggests that it is concerned with levels of income.

71. However, because of my conclusion in the following paragraph, this is not a matter I need to decide.

72. Mr Cornwell's second ground is that Mr Berry's argument on this point is inherently and impermissibly retrospective because it could not be known at the date of decision how many assessment periods UC would be payable in and thus the drain on the couple's savings. While it is true that it could not be known how many assessment periods UC would be payable for, in my view, based on authorities such as *VP v SSWP* [2014] UKUT 32 (AAC) and *SG v Tameside MBC* (HB) [2010] UKUT 243, it is clear how many they would need to be able to fund, namely enough until VB would obtain a right to reside on other grounds – namely settled status. So, if I am wrong as to self employment, she would, on the view I took in *VP*, have needed capital resources for 27 or 28 months, but only had them for 23.

73. I need not dwell on Mr Cornwell's other objections to the submission for VB on this point: I agree with him that in the circumstances the question I have to consider is whether the claim for UC would place an unreasonable burden on the UK's social assistance system.

74. He makes the preliminary submission that VB's reliance on links with the UK is inconsistent with what I said in *AMS*. I agree only in part. At [62], summarising, I said:.

> "What then is required? The claimant's "circumstances" are those in which she finds herself. Contrary to Mr de la Mare's submission, I am not persuaded that past matters said to go to links with the UK are relevant to her "circumstances" within the meaning of *Brey* and Article 8(4)."

75. Without burdening this decision with extensive quoting from *AMS*, the thrust of that decision so far as relevant was that it was current circumstances that were relevant, not matters of personal past history. It was not relevant that, for instance, AMS's late husband had served in the British army: consideration of such circumstances would be different in every case, was not required by *Brey* and would impose an unmanageable administrative burden. So while I agree that it is not necessary to have regard to VB's previous work in the UK (in part not evidenced in any event) it undoubtedly was part of her current circumstances at the date of claim that she was in a settled relationship with a UK national and the mother of a British son.

76. SSWP accepts that the difference between the couple and single rates of UC is £184.15 per month.

77. Submissions that the period of reliance would have been reduced by VB subsequently becoming self-employed and/or by AD's income picking up do not shed light on the circumstances obtaining at the date of decision. On the fallback position that I am wrong on self-employment, I accept Mr Cornwell's submission insofar as it relates to specific dates at which one or both of those eventualities could be taken to occur.

78. Mr Cornwell submits that the period of prospective reliance is significant, whether this is taken as 17 months (when AD stopped getting any payments of UC) or 22 months (when the claim actually ended, and involved an impermissible degree of looking forward from the circumstances at 8.4.20. The period until VB could have got settled status is longer still. I agree with Mr Cornwell that the 17 and 22 month periods could not be known at the date of decision. The period until VB could obtain settled status however could be and, for the reasons set out above, that is what I consider the relevant period to be. True it is that in fact VB was not granted settled status until 21.3.23 having applied on 5.12.22 but it is common ground that that has become irrelevant following the decision in *R(Independent Monitoring Authority for the Citizens' Rights Agreements) v Secretary of State for the Home Department* [2022] EWHC 3274 (Admin).

79. The overall burden of VB being eligible for UC at £184.15 per month would equate to over £2,200 annually; that in Mr Cornwell's submission is the appropriate figure rather than the difference based on the actual amount of UC claimed, but on the assumption that payment was additionally made in respect of VB (the £1659.17 relied upon by VB).

80. In my view it is the 27 month period which falls to be considered and not a shorter period for any of the reasons Mr Berry has advanced. I agree that the burden requires to be calculated by reference to 27 months of the agreed £184.15 figure,

i.e. £4,972. (There will in reality have been upratings in benefit rates, but they will not have been so significant as to affect the outcome of the decision).

81. As to the cohort, Mr Cornwell submits that that the cohort cannot be defined by reference to highly particular circumstances of a claimant, such as their savings, or their subsequent post-claim history.

82. More generally, he submits any EEA national without other qualifying right to reside relying on their British or non-EEA national partner's wages or self-employed income would be in the same cohort. In particular, he disputes that the cohort can be limited to those with pre-settled status or who are of working age.

83. I agree that it does not appear relevant whether or not members of the cohort are of working age as it is possible to work (or be a partner) above that age.

84. The cohort of those with pre-settled status is a large one. Between April 2020 and December 2022 1.4 million applicants were grated pre-settled status. Overall the number of people with that status is around 2.3 million. Notwithstanding the deadline of 30 June 2021 for applications, it remains possible to make a late application if there are reasonable grounds for the delay, while the deadline does not in any event apply to certain categories. The category is not altogether closed, although in the majority of cases, people will progress to settled status and with time the cohort of those with settled status will diminish.

85. Whether the cohort should be limited to those with pre-settled status is in my view an issue that is more theoretical than real. Submissions as to the effect of a grant of pre-settled status are currently before the courts and tribunals in a number of cases, but it is not necessary to explore that here. What one can say is that, given the numbers who have applied, the likelihood that there would have been significant numbers of people who would otherwise fall within the cohort and who did not have pre-settled status (nor had progressed to settled status) would be unlikely to prove significant. It is important to stress that even on what is common ground, we are looking at those who have been self-sufficient on the basis of their British or non-EEA national partner's wages or self-employed income and who then cease to be, and have no other right to reside.

86. There is no entirely accurate evidence before me as to the split between claims made by partners and those made by single claimants. Although the evidence is that in the year 2020-2021 81% of households on UC were single claimants (with or without children), that includes households which contain "ineligible partners" (i.e. where the claim was in fact made by a couple but, as here, unsuccessfully). Mr Berry draws attention to the DWP's quality statement on the relevant statistics, which says:

> "As family type is determined by the standard allowance awarded, a small number of couples may be recorded as a single person with or without children because they are awarded a single person's standard allowance as their partner is ineligible for universal credit."

87. Mr Cornwell submits that the reference to a "small" number has to be understood in the context of the overall UC caseload (which as at November 2022 stood at 4.9million).

88. Mr Berry counters that the "small number" is presumably insignificant enough that the overall statistics on family type were considered useful, even though they had the effect of recording couples with an "ineligible partner" as being single.

89. He further cites DWP internal guidance that there are various types of ineligible adults, who may thus be found to be an "ineligible partner", including those who are:

    (a) subject to immigration control;
    (b) not habitually resident in the UK;
    (c) aged under 18 (with certain exceptions);
    (d) abroad for longer than the permissible period;
    (e) under a prison sentence imposed by a court;
    (f) serving a sentence of imprisonment detained in a hospital;
    (g) detained in custody pending trial or sentence upon conviction; or
    (h) on temporary release from custody.

    Because of the structure of the benefits legislation, an EEA national without a qualifying right to reside would be a subset of (b). One may fairly add that and EEA national without a qualifying right to reside because they had previously been self-sufficient reliant on their partner's income, but had then ceased to be, would be a subset of a subset.

90. Overall, there were around 400,000 claims for UC monthly, peaking – with the initial impact of the pandemic - at about 1.5 million claims in April 2020 (the month of decision in the present case). In April 2020 113,000 habitual residence tests were completed in respect of EEA nationals. Some 8% failed – so 9,040. There are numerous reasons why people may have failed such a test. Being an ineligible partner is one of them.

91. That is a snapshot in a single month and a highly unusual one because of the pandemic. If one takes the 12 month period up to an including April 2020, there were (with rounding) 408,900 Habitual Residence Tests caried out in respect of EEA nationals, of which 39,500 (approx. 9.7%) failed.

92. What I do not have for the purposes of the present exercise is data about the proportion of partners within those who fail the habitual residence test (so that must be left to inference from the material cited at [86].

93. Nor do I have any data about the proportion of EEA nationals asserting a right to reside under EU law who do so on the basis of self-sufficiency alone. What can be said is that following the decision in *VI* which means that affiliation to the publicly funded health service can constitute comprehensive sickness insurance cover and

given the breadth of the resources on which a person is permitted to rely for such a purpose given the line of authority derived from C-200/02 *Zhu and Chen* and C-408/03 *Commission v Belgium*, it has become easier for a partner to make out a case of being self-sufficient than it once was. However, cases such as *VP* at [83]-[84] demonstrate that what has to be shown in order to qualify may be far from straightforward. Further, many partners will themselves work or have worked and retained worker status and so will not need to point to self-sufficiency for their right to reside.

94. The evidence on collective impact in cases of this type rarely if ever tells one all one would wish. However, as

    (a) the number of couples recorded as single because one is ineligible is "small" (albeit within the context of large numbers of UC claims);

    (b) there are numerous reasons why a person might be "ineligible", although I accept not being habitually resident, including failing as an EEA national to have a right to reside, is likely to figure prominently among them in numerical terms;

    (c) those having had a right to reside on the basis of self-sufficiency (only) and then having lost it will be a distinctly limited group; and

    (d) those who are in the circumstances of (c) may not have had their previous sufficiency of resources as the result of a partner's income

I conclude that the number of cases likely to be affected by a ruling in VB's favour, though not de minimis, will be small. Even if people without pre-settled status are not excluded from the cohort (those with settled status are irrelevant for this purpose), it would not make a significant difference. Those within the cohort who do have pre-settled status will cease to be part of it when they acquire settled status, so the cohort is a diminishing one.

95. The potential cost to the DWP as the result of VB's membership of the cohort, as it appeared at the date of the decision udner appeal, was £4,972 (in total, not annually). I accept that others in the cohort would reach settled status sooner, and others later, than VB, which would affect the cost attributable to them.

96. I have to take into account both VB's circumstances and the potential collective impact. It is an exercise in proportionality within the confines of arts.7(1)(b) and 8(4) of the Directive and one which I regard as quite finely balanced on the limited evidence available.

97. I resolve it by having regard to the words of *Brey* at [72] (underlining added):

    "By making the right of residence for a period of longer than three months conditional upon the person concerned not becoming an 'unreasonable' burden on the social assistance 'system' of the host Member State, Article 7(1)(b) of Directive 2004/38, interpreted in the light of recital 10 to that directive, means

that the competent national authorities have the power to assess, taking into account a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that Member State's social assistance system as a whole. Directive 2004/38 thus recognises a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary (see, by analogy, *Grzelczyk*, paragraph 44; *Bidar*, paragraph 56; and *Förster*, paragraph 48)."

98. Looking at the matter down to the date of the DWP's decision, while it was not possible to know how long the effects of the pandemic would last, it was clear that it was an event which had interrupted AD's business and its ability to contribute to maintaining VB and their child. There was no indication that the consequences would be permanent and indeed subsequent evidence referable to the date of decision has shown that it had within it the capability of being revived. The importance of the aim of protecting the finances of Member States is apparent from the Recitals to the Directive. However, in balancing whether, in the circumstances of having previously been self-sufficient, a total refusal of the couple element of UC was necessary in order to attain it, the emphasised extract above suggests that it might not be. VB was encountering essentially "temporary" difficulties, making the degree of financial solidarity as underlined above "particularly" to be recognised. In finding on this ground for the claimant, after taking this into account, it is fair to observe that the answer might not inevitably be the same in a situation where a claimant's difficulties were not essentially temporary. That would have to await a case where that situation arises.

Retained worker status

99. Article 7(3) of Directive 2004/38/EC provides that a person retains worker status if

"(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months[.]"

100. Reg. 6(2) of the IEEA Regulations so far as material provided:

"(2) A person who is no longer working must continue to be treated as a worker provided that the person—
…
(b) is in duly recorded involuntary unemployment after having been employed in the United Kingdom for at least one year, provided the person—
(i) has registered as a jobseeker with the relevant employment office; and

(ii) satisfies conditions A and B;

(c) is in duly recorded involuntary unemployment after having been employed in the United Kingdom for less than one year, provided the person—
(i) has registered as a jobseeker with the relevant employment office; and
(ii) satisfies conditions A and B;
…
(5) Condition A is that the person—
(a) entered the United Kingdom in order to seek employment; or
(b) is present in the United Kingdom seeking employment, immediately after enjoying a right to reside under sub-paragraphs (b), (d) or (e) of the definition of qualified person in paragraph (1) (disregarding any period during which worker status was retained pursuant to paragraph (2)(b) or (c)).

(6) Condition B is that the person provides evidence of seeking employment and having a genuine chance of being engaged."

101. The decision in *KH v Bury MBC and SSWP* [2020] UKUT 50 (AAC) established that the requirement within Condition B to show a "genuine chance of being engaged" was inconsistent with EU law. That case concerned reg.6(2)(b) but SSWP accepts that the same applies to reg.6(2)(c).

102. Mr Berry submits that by combining her period of work as an au pair and that as a wardrobe manager, VB falls within paragraph (b); but that even relying solely on the wardrobe manager post, she falls within paragraph (c). Which sub-paragraph is potentially applicable is a matter I do not need to resolve for the purposes of this ruling.

103. He then submits that, having been made (as is accepted) involuntarily unemployed when the wardrobe manager post finished, VB was job-seeking up until the late stages of pregnancy. That took her to the start of the period in which he submits she could retain her status as a worker relying on C-507/12 *Saint Prix*. In his submission, VB was still in her *Saint Prix* period when she claimed UC within one year of when her son was born, thereby registering with the employment office, and resumed looking for work (though also taking steps to set up her own business).

104. VB's employment as wardrobe manager finished in January 2019. The joint claim for universal credit was made in March 2020. To bridge that gap on behalf of the claimants, Mr Berry submits:

(a) had they claimed in January or February 2019 the claimants would not have been entitled to UC and VB would not have been entitled to contributory JSA. As the only way of registering with the jobcentre is to apply for benefits (or credits) and to do so promptly would have been futile so far as those purposes were concerned, that is relevant to considering whether there was "undue delay" which is the test according to *SSWP v MK* [2013] UKUT 0163 (AAC). He relies on arguments raised in *SSWP v PC* (UC) [2024] UKUT 186 (AAC) in which Mr

Cornwell appeared and in which no decision had been issued at the time of the oral hearing, but now has been.

(b) VB could not have been expected to register as a jobseeker during her *Saint Prix* period and so what has to be justified is the period between her job ending and entering that period. He points out that under reg.89(1)(c) of the Universal Credit Regulations 2013 a claimant who is within 11 weeks of the expected week of childbirth is not subject to work-related requirements so the Secretary of State would not have checked if she was remaining in touch with the labour market, which is the purpose of the registration requirement (citing *VP*).

(c) There is no outer limit at which point delay becomes "undue" but the longer the delay, the more compelling must be the reasons for it (see *MK* at [72] and *VP* at [56]).

(d) Further reasons why the delay between late January 2019 and 10 April 2019 (or thereabouts) (i.e. the date approximately 11 weeks before the Estimated Date of Delivery), alternatively the date 8-9 weeks before it (so late April) when VB stopped looking for work because of her advanced pregnancy was not "undue" are:

(i) it was reasonable to seek work through agencies rather than to take the step of registering with the jobcentre which would appear immaterial given the claimants' ineligibility for benefit (see (a) above);
(ii) VB was not familiar with the benefits system in the UK;
(iii) if VB had been refused benefit, the Secretary of State would not have taken steps to monitor her continuing link with the labour market;
(iv) VB expected to find work readily given her skills as a seamstress, an expectation supported by the interviews she obtained;
(v) obtaining a job was in VB's view made harder because she was visibly pregnant. That was not something which any help the jobcentre might have provided could do anything about.

105. Mr Cornwell counters by submitting:

(a) It is accepted that <u>if</u> VB obtained *Saint Prix* protection, then at the time of her UC claim and the decision on it, she would be a worker on a *Saint Prix* basis. However, a *Saint Prix* period can only arise if a woman is a worker or has retained worker status (even if pregnancy may also have some effect on the ability of women who do not fall within those categories to engage in the labour market). While it follows from *Saint Prix* and from SSWP v SFF [2015] UKUT 502 (AAC) that it is in principle possible for a woman to retain worker status under art.7(3)(c) of the Directive and then to enter into a *Saint Prix* period, VB did not retain worker status at the time when any putative *Saint Prix* period would have started.

(b). It is accepted that claiming UC on 20 March 2020 could in principle amount to registering as a jobseeker with the relevant employment office and duly

recording her unemployment. However, this was 14 months after her employment ended.

(c) At no point between 21 January 2019 and late April 2019 or 10 April was her unemployment "duly recorded" nor had she "registered as a jobseeker with the relevant employment office".

(d) In terms of the domestic law, neither condition A, nor that part of condition B which remained relevant following *KH v Bury* was met.

(e) A *Saint Prix* period only arises if a period of retained worker status persists to the start of a *Saint Prix* period, otherwise there is nothing for the *Saint Prix* period to bite on.

(f) Even if (which is not accepted) a putative *Saint Prix* period would stop the clock running in terms of the requirements of art.7(3)(c) and the associated domestic implementing legislation, VB would still have to show that there was no "undue delay" between her job ending and the start of any putative *Saint Prix* period.

(g) There was undue delay because:

(i) though VB claims to have been unfamiliar with the UK benefits system, there is no evidence that she made any enquiries and benefits for unemployment are widely available in European social assistance systems and ignorance of the law is no excuse;
(ii) her expectation of finding work was not a reasonable one. Indeed, the difficulties in obtaining work which she asserts she experienced because of her pregnancy make it less reasonable;
(iii) the fact that VB was financially supported by AD does not detract from the intended purpose of the legislation, namely to allow states to monitor a person's connection to the labour market;
(iii) the system of registering as a jobseeker through claiming benefits is a lawful one. The fact that VB might not have claimed successfully does not absolve her from the need to have registered. Failure to have done so defeated the UK's ability to monitor her connection to the labour market;
(iv) the submission that SSWP would not have taken steps to monitor VB's connection to the labour market can at most only apply to the period from at earliest 10 April 2019. In respect of the period before then, had she applied for UC or contributory jobseeker's allowance and been refused, she would have complied and the SSWP would thereby have monitored her connection to the labour market.

106. In *Saint Prix* the CJEU (at [47]) held:

"Article 45 FEU must be interpreted as meaning that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of "worker", within

the meaning of that article, provided she returns to work or finds another job within a reasonable period after the birth of her child.”

107. The ruling thus concerns “retaining” worker status going forward into a *Saint Prix* period and Mr Cornwell is correct in submitting that it is necessary for VB to have retained worker stats through to the start of a claimed *Saint Prix* period.

108. While it is perhaps an odd feature that the route intended by the UK for persons to comply with the formalities required under art.7 of the Directive is to make a claim for benefit, even in circumstances where they do not require benefit or such a claim is doomed to fail, it is not submitted that it is unlawful. *SSWP v Elmi* [2009] UKUT 287 (AAC) and (on appeal) [2011] EWCA Civ 1403 (both reported at [2012] AACR 22) concerned a situation where the claimant had notified SSWP that she was looking for work, but not by the anticipated route: that is not the situation here.

109. Nor, for reasons I gave at paras 24-30 of *SSWP v PC*, is it relevant if SSWP does not, or even could not, actually monitor connection with the labour market (e.g. by reason of reg.89(1)(c) of the Universal Credit Regulations 2013 where a claimant is within 11 weeks of childbirth).

110. The duty of a person seeking to retain worker status is to comply with the requirements of the Directive, so that the state may, if it sees fit, monitor and check a person’s continuing link with the labour market.

111. In *SSWP v MK* [2013] UKUT 0163 (AAC) Upper Tribunal Judge White held:

> “69. I have concluded that where there is delay of more than a very few days between the end of employment and the completion of the formalities required to take the benefit of Article 7(3)(b) of the Citizenship Directive, the proper approach is to ask whether, having regard to all the circumstances of the case, there has been undue delay in meeting the requirements of the Citizenship Directive. I believe that an approach which focuses on undue delay is likely to be more easily and more consistently applied by decision makers and tribunals than a requirement for prompt completion of the requirements.
>
> 70. What then is involved in a test of undue delay? There must be a full enquiry into the reasons for, and circumstances of, any delay in completing the requirements specified in Article 7(3)(b) of the Citizenship Directive. In practice, that will be delay in making a claim for a jobseeker’s allowance, since that is the normal means by which the requirements are met.
>
> 71. Undertaking this enquiry will require decision makers and tribunals to make full and careful findings of fact about what a claimant did between the ending of employment and the completion of the requirements of Article 7(3)(b) of the Citizenship Directive. In the light of those findings, decision makers and tribunals are required to exercise a judgment as to whether there are reasonable grounds for the delay such that it is not right to regard it as an undue delay.

> 72. It follows that the longer the delay, the more compelling must be the reasons for it. I do not specify any outer limit beyond which a delay will necessarily be regarded as an undue delay."

112. In *MK*, the delay was of around three months, which at [82] Judge White thought the claimant would "have something of an uphill task" to show did not constitute "undue delay".

113. The "undue delay" test has been applied in a number of Upper Tribunal decisions, including *SSWP v MM (IS)* [2015] UKUT 0128 (AAC), *VP v SSWP* [2014] UKUT 32(AAC); [2014] AACR 25 and *FT v LB Islington and SSWP* [2015] UKUT 121 (AAC) as well as in *SSWP v PC*.

114. VB's evidence was that she was job seeking between becoming involuntarily unemployed on 21 January and a time around 8-9 weeks before the birth of her son (i.e. late April).

115. If, as she says, she did not register with the job centre as she did not know if she would be entitled to any support and was not familiar with the benefits system in the UK, it could only be on the basis that she made no enquiries, whether online or of her British husband or of friends. The general principle is that ignorance of the law is no excuse and particularly where no attempt at inquiry has been made, it is in my view a factor which counts against justifying the delay.

116. In *SSWP v PC*, I accepted that "the availability of resources to tide a person over may have some relevance to whether there has been undue delay." Here VB herself had savings of around £5,000 and was able to rely on support from AD thanks to the profits of his business and her own savings.

117. VB's job search, so far as it is in evidence, during the period 21 January – late April 2019 involved 1 rejection following interview and 7 rejections without interview. VB felt that she was at a disadvantage because of pregnancy, which, as Mr Cornwell suggests, tends to make it less reasonable to rely on her own job search as a reason for not registering.

118. I accept that it is unremarkable for a person to seek work directly with employers or through agencies. However, the question is not one of the reasonableness or otherwise of a person's actions on a general level. To obtain the benefit of retained worker status, the formalities of the Directive have to be complied with. These include, specifically, registering with the jobcentre.

119. Here the delay in registering up to when on VB's case she could have entered into a Saint Prix period is between 11 and 13 weeks and so in accordance with *MK* requires more compelling reasons.

120. While every case such turns on its own facts, I considered it instructive to compare other cases. In *FT v LB Islington and SSWP* [2015] UKUT 121 (AAC), where it was conceded that a delay of approximately similar length was not "undue".

However, in that case, there were factors which differentiate it from this one, including the claimant's track record of finding work in the UK and the unusually detailed evidence regarding the steps she had taken to look for work. Further, as noted, the point was conceded rather than adjudicated upon. In *VP* a much shorter period (45 days) was held to involve "undue delay" even though the claimant thought there might be other work "in the pipeline". As noted, justifying the three month delay in *MK* was considered "something of an uphill task".

121. While there are factors supportive of VB's position, among them her belief, albeit erroneous, that she would be able to get work in her field and the availability of support from AD, there was a lengthy period in which the state was deprived of the ability to monitor her connection with the labour market, which is the very purpose of the legislation. The delay is at the upper end of the periods considered in other cases and on balance, I would conclude that it was indeed "undue".

122. The consequence of that conclusion is that VB never entered into a *Saint Prix* period and when she did register at the jobcentre, by making a joint claim for UC with AD in March 2020, the delay was, at 14 months, far in excess of anything which has been found not to amount to "undue delay" in other cases and, given the structure and purpose of art.7(3), in my view undoubtedly "undue".

123. It follows that the alternative basis for remaking the decision in the claimants' favour based on retained worker status fails.

Closing remarks

124. It remains to thank counsel for their submissions and others who have worked on the case. I am sorry that it has not proved possible to complete this complex decision sooner and offer my apologies to the parties for any inconvenience caused.

C.G.Ward
Judge of the Upper Tribunal
Authorised for issue on 17 July 2024

SCHEDULE 1

Extract from letter dated 17 November 2023 from Child Poverty Action Group (edited for anonymity)

4. It is our understanding that [AD] is in fact already a party to the appeal and so strictly speaking an application for joinder is unnecessary.

5. [AD] is already a Respondent in this appeal for the following reasons:

a. Rule 1(3) of the UT Rules defines a "party" to an appeal in the UT as, inter alia, the respondent and then defines "respondent" as including "any person other than the appellant who … was a party before that other tribunal" from which the appeal is brought (i.e. in this case, the FTT).

b. Rule 1(3) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) defines "party" as including any person who is a respondent in proceedings before the FTT and, in turn, defines "respondent" as including "any person other than the appellant who had a right of appeal against the decision".

c. By virtue of s.12(2) of the Social Security Act 1998 ("SSA 1998") a claimant has a right of appeal against a decision made under s.8 SSA 1998 in respect of a claim for a relevant benefit (which includes universal credit – s.8(3)(aa)). Section 39(1) SSA 1998 defines "claimant" in respect of a couple jointly claiming UC as "the couple or either member of the couple".

d. At the time of the UC claim in issue in this appeal (and at all times since) [AD and VB] were in a couple. The decision of the Appellant taken on 08/04/20 that [VB] was not entitled to universal credit, which is the subject of this appeal, was therefore also a decision on a claim made by [AD], made jointly with [VB]. As such, they were both claimants and so both had a right of appeal against the Secretary of State's decision.

e. Consequently, [AD] was a party before the FTT as a respondent and so too is a party before the UT, albeit prior to today's date he has not taken any steps in the proceedings.

SCHEDULE 2

Text of letter dated 19 December 2023 from Mr Richard Weatherhogg of the Government Legal Department

1. At the conclusion of the hearing on 21 November 2023 there was one outstanding point. Although there was no dispute between the parties that a non-EU EEA national (such as VB, being a Norwegian national) is, for the purposes of the appeal, to be treated in the same way as an EU national, precisely how the analysis worked in respect of a non-EU EEA national claiming a right to reside as a self-sufficient person

had not been fully identified. Following further investigation, the Secretary of State briefly sets out below the answer to that outstanding question.

2. The position in respect of non-EU EEA national workers is straightforward. Part III of the Agreement on the European Economic Area ("EEA Agreement") deals with free movement of persons, services and capital and Ch.1 thereof deals with free movement of workers and self-employed persons. Article 28(1)-(4) EEA Agreement is materially equivalent to Art.45 TFEU. Article 28(5) then provides that: "Annex V contains specific provisions on the free movement of workers". Annex V (as amended by Art.2(1) of the Decision of the EEA Joint Committee 158/2007 of 7 December 2007 ("the Decision")) reads: "The act referred to in point 3 of Annex VIII to this Agreement (Directive 2004/38/EC of the European Parliament and of the Council), as adapted for the purposes of the Agreement shall apply, as appropriate, to the fields covered by this Annex" - those fields being free movement of workers.

3. The position in respect of free movement of non-EU EEA nationals who are self-employed persons is also straightforward. Part III, Ch.2 EEA Agreement deals with freedom of establishment. Article 31(1) EEA Agreement is materially identically worded to Art.49 TFEU (which deals with freedom of establishment, including of self-employed persons). Article 31(2) EEA Agreement then provides that: "Annexes VIII to XI contain specific provisions on the right of establishment". Annex VIII at point 3 under "Acts referred to" (as amended by Art.1(1) of the Decision) includes Directive 2004/38/EC ("the CRD") and states at point 3(a): "The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations: … The Directive shall apply, as appropriate, to the fields covered by this Annex" - those fields being freedom of establishment.

4. On analysis it is apparent that Art.31 EEA Agreement (and also Annex VIII) also covers the position of self-sufficient persons, being treated as a form of establishment. That is on the following basis.

5. When the EEA Agreement was first adopted, amongst the Community instruments annexed to it was Directive 90/364/EEC on the right of residence. That Directive contained the predecessor right to that now under Art.7(1)(b) CRD. Article 1(1)(a) of Directive 90/364/EEC provided that: "Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law …, provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence". Directive 90/364/EEC was referred to in the original Annex VIII to the EEA Agreement (given effect to by Art.31(2) – see above). Given the wording of Art.1(1)(a) of Directive 90/364/EEC specifies that those falling within its personal scope must not have any other Community law right of residence the inclusion of this Directive (notwithstanding it only relates to the self-sufficient) in Annex VIII was deliberate.

6. That position was then reflected in the Immigration (European Economic Area) Order 1994 (made under s.2(2) of the European Communities Act 1972 ("ECA 1972")

to implement the then new EEA Agreement), which defined “EEA nationals” in reg.2(1) to include nationals of Norway and in reg.6(1)(f) defined a qualified person, inter alia, as a self-sufficient person (defined by reg.6(2)(f) as in Directive 90/364/EEC). The Explanatory Note to that Order explained that it gave effect to, inter alia, Directive 90/364/EEC which had effect in relation to nationals of Contracting States to the EEA Agreement. The Immigration (European Economic Area) Regulations 2000 were then to similar effect, still reflecting the Directive 90/364/EEC definition of self-sufficiency in regs.3(1)(e) and (2).

7. The CRD was then adopted in 2004. The Immigration (European Economic Area) Regulations 2006 (again made under s.2(2) ECA 1972), implementing the CRD, defined “EEA national” and “EEA State” in reg.2(1) as including Norway, defined a self-sufficient person in reg.4(1)(c) (read with regs.4(3), (4)) as per the then new Art.7(1)(b) CRD (read with Art.8(4) CRD), and then defined in reg.6(1)(d) a qualified person as, inter alia, a self-sufficient person. The Explanatory Note to the 2006 Regulations stated, in material part, that: “Directive 2004/38/EC provides for the free movement of Union citizens and their family members within the territory of the member States. The repealed Directives were extended to Norway, Iceland and Liechtenstein by the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 (OJ No. L 1, 3.1.94, p.3) and it is envisaged that Directive 2004/38/EC will also be extended to these States. … As was the case with the Regulations implementing the repealed Directives, these Regulations will also apply to nationals from Norway, Iceland, Liechtenstein and Switzerland … as well as to Union citizens ... This will avoid having to apply a slightly different free movement regime to nationals from Norway, Iceland, Liechtenstein and Switzerland … from that which has to apply to Union citizens … under Directive 2004/38/EC.” (emphasis added)

8. The CRD was, indeed, subsequently extended to the non-EU EEA States by the Decision, which added references to the CRD to Annexes V and VIII and deleted references there to, inter alia, the now repealed Directive 90/364/EC. That position was then continued in the Immigration (European Economic Area) Regulations 2016.