IN THE UPPER TRIBUNAL **Case No** CPC/5400/2014
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeal fails in the result. Although the decision of the First-tier Tribunal sitting at Weymouth on 28 July 2014 under reference SC192/13/01065 involved the making of an error of law and has been set aside, acting under section 12(2)(b) of the Tribunals Courts and Enforcement Act 2007 and having made further findings of fact, I remake the decision in the following terms:

> The claimant's appeal against the DWP's decision of 15 July 2013 is dismissed. She is not entitled to state pension credit on her claim which was the subject of that decision, as she lacked the right to reside.

REASONS FOR DECISION

1. The claimant is a national of the Netherlands and was born in 1929. Her late husband, a British national who had served in the armed forces, had died in 1994. Her children are British nationals. She came to the UK in 2006. Her admitted and wholly understandable intention was and is to remain in the UK, where one of her sons and now her daughter also live, for the rest of her days. When she came to the UK she had capital of some £53,000, which however became eroded over the years by the need to meet living expenses and on 16 April 2013[1], aged 83, she claimed state pension credit.

2. The DWP has accepted that prior to that claim, the claimant had had sufficient resources for the purpose of Art 7(1)(b) of Directive 2004/38 ("the Directive") and its implementing UK regulations. She had not however had comprehensive sickness insurance ("CSI") until December 2012, when she became entitled (backdated to August 2012) to a modest state retirement pension from the Netherlands, which in turn meant that the UK could charge the Netherlands under the relevant provisions of Regulation 883/2004 with the cost of any healthcare provided to her. The consequence was that she was unable to point to 5 years' residence in accordance with the Directive, which would have given her a right of permanent residence in the UK, by the date of her claim.

3. Reg 2 of the State Pension Credit Regulations 2002/1792 ("the SPC Regulations") requires a claimant to have a qualifying right to reside. It is not necessary to set out the provisions. On 15 July 2013 a decision was taken that her claim failed because she lacked such a right; on 28 July 2014 that decision was upheld by the First-tier Tribunal ("FtT").

[1] The date of claim is variously stated in the papers, but any discrepancy is not material for present purposes.

4. Permission to appeal was given by a District Tribunal Judge. On 16 October 2015, following an oral hearing in Exeter, by a first interim decision I set the FtT's decision aside for failing to deal with a submission that it was disproportionate to enforce against the claimant the requirement that she have held comprehensive sickness insurance for a five year period (less the period of a few months where CSI was provided by reason of the Netherlands retirement pension.) However, I held that the enforcement of that requirement was not disproportionate. Mr Tom de la Mare QC, subsequently instructed pro bono on behalf of the claimant, reserves his right to seek to argue before the Court of Appeal that that was in error.

5. The case then became something of a test case in the Upper Tribunal for examining whether the decision of the Court of Justice of the European Union in C-140/12 *Brey* had any continued effect, following a series of more recent decisions on freedom of movement by the CJEU. Following a further oral hearing, by a second interim decision dated 2 February 2017 (*AMS v SSWP (PC)* [2017] UKUT 0048 (AAC)) I held that:

> "In the circumstances of the present case, where it is not in dispute that for a period prior to her claim for state pension credit the appellant had comprehensive sickness insurance cover and (as was conceded) sufficient resources for the purposes of Art 7(1)(b) of Directive 2004/38/EC ("the Directive"), it is necessary, pursuant to the decision of the Court of Justice of the European Union in C-140/12 *Brey* to carry out – in accordance with the requirements under, inter alia, Articles 7(1)(b) and 8(4) of the Directive – 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. No such assessment having been carried out by either the respondent or the First-tier Tribunal, Directions are given … to enable the Upper Tribunal to do so prior to remaking the decision under s.12 of Tribunals, Courts and Enforcement Act 2007."

6. In accordance with those Directions I have received further evidence and written submissions on that evidence.

7. Reference should be made to the second interim decision for my analysis of what *Brey* requires, which I do not repeat here except where it is necessary to do so for the purposes of this decision.

8. I find the following to have been the claimant's income and outgoings at the date of the DWP's decision. There is inevitably a degree of approximation about some of the figures, but, as will be seen, that is sufficient for the purposes of the decision. All figures are expressed per calendar month. Whilst the financial circumstances of family members would always have had the potential to have changed so as to affect their ability to fund the claimant, I proceed on the basis that given the nature and/or source of the payments and

the fundamentally unchanging nature of the claimant's circumstances, they would on the balance of probabilities be maintained at (at least) this level.[2]

Income		Expenditure	
Netherlands retirement pension[3]	73.22	Rent	525.00
Netherlands Benevolent Society/Koning Willem Fonds	100.00	Council tax (after single person discount)	84.18
Royal British Legion	78.00	Utilities	150.00
Son D[4]	300.00	Groceries	250.00
Son O	120.00		
Daughter	140.00		
Total income	813.00	Total expenditure	1009.18

It appears there was additional help given by way of family members preparing hot meals and buying clothes (although the period covered by this latter category is not entirely clear) and from occasional one-off payments from other family members: further detail is not needed for this decision.

9. The budgetary shortfall was no more than a little under £200 per month and may have been less because of the above matters.

10. There is no evidence of any specific health conditions affecting the claimant at the time of the DWP's decision

11. There is no actuarial evidence before me.

12. It is important to set out in summary how material aspects of state pension credit operate. A figure is taken for the "standard minimum guarantee". For a single person, in rented accommodation and without a disability or caring responsibilities, that figure in July 2013 was £145.40. Expressed as a monthly figure, this amounts to £631.80.

13. The State Pension Credit Act 2002 and the SPC Regulations make provision for what income is to be taken into account and how. There is a list in s.15(1), of which the only one that need concern us is sub-para (j) "income of any prescribed description". This in turn takes us to reg 15(2)(b) of the SPC Regulations, which prescribes "any foreign state retirement pension". I can find no provision which would treat as income for pension credit purposes either the payments from the two benevolent institutions mentioned, or the payments from the claimant's three children.

[2] Son O, whose work is seasonal and whose income is low, refers in evidence to the possibility of contributing an increased amount at certain times of year.
[3] 84.16 Euros converted at 1 Euro: £0.87
[4] 5000 South African Rand

14. The amount of pension credit at stake, as it were, is therefore not the more limited sum needed to top up the claimant's income and expenditure (somewhat under £200 pcm) but the amount of pension credit she would inevitably have stood to receive on the evidence before me: a minimum guarantee figure of £631.80 less the £73.22 retirement pension i.e. £558.58 pcm.

15. Further, as Ms Apps for the Secretary of State correctly points out, receipt of the guarantee element of state pension credit, as would be the present case, operates as an automatic passport to housing benefit and to council tax reduction, respectively under SI 2006/214 reg 26 and e.g. SI 2012/2686, schedule, para 35. Ms Apps suggests (and it has not been challenged) that, based on the local housing allowance rate for the claimant's area and full council tax support, this would amount to a further £6500 per year (£541.67 monthly): I am unclear whether this is a current figure or one for 2013 but the difference is unlikely to be material.

16. Mr de la Mare submits that there is "no question" of the claimant requiring financial support for housing costs. By that, he appears to be envisaging that the claimant could channel her limited income into meeting her rent and utility costs, but at the expense of being left with very little indeed for food and living expenses.

17. It appears to me that it is always open to a claimant not to make a claim for housing benefit and a person who did not do so would, in the absence of a claim, have no entitlement: Social Security Administration Act 1992, s.1. However, there is no way I am aware of by which a person can bind themselves not to claim a benefit to which (provided they meet the relevant conditions) they are entitled by statute.

18. I proceed therefore on the basis that the best available estimate of the value to the claimant, were she not to be disentitled from state pension credit on the ground of lacking the right to reside, and so of the burden to the State in this particular case is the sum of the figures in [14] and [15] – around £1100 pcm.

19. That is so, even though because of the financial support provided by family and by benevolent organisations, the claimant would, provided those payments continued, not require anything like that in order to balance her budget and indeed to effect something of an improvement in her very modest living standards.

20. Whilst I am not to be taken as indicating that it would necessarily have succeeded, her case would have been somewhat stronger if the amount of benefit at stake had merely been a top-up to balance her budget. However, I am not aware of any principle of EU law which would require a Member State to modify its domestic legislation as to which categories of income fall to be taken into account as resources so as to create a result in favour of an EU national claimant which could not otherwise be achieved.

21. I have already noted that there is no evidence of any medical condition that was liable to bring to a premature end the period for which the claimant would be likely to claim. While I do not have actuarial evidence I am remaking the decision some 4 years on and there is no indication that the claimant is not still alive. In default of any other evidence, I take that four years as the minimum for which as at the date of decision she could have been expected to continue to live and to claim.

22. I conclude that "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" is accordingly of, at very least, some £13,200 a year for a period of not less than four years and very possibly some years longer. Whilst I do not treat either as definitive in its own right, it is nonetheless highly relevant to observe that this is not a limited top-up nor a short-term expedient.

23. I acknowledged at [55] of the second interim decision that "an assessment of collective impact may necessarily still be somewhat rough and ready." The evidence now filed contains little directly going to collective impact. Submissions have been made as to which party bears the evidential burden in such a case. It seems to me that it must be the respondent, whether the matter is approached by reference to domestic law (*Kerr v Department for Social Development* [2004] UKHL 23; [2004] 1 WLR 1372) or EU law (e.g. principles of effective remedial protection and *effet utile*). In the event, though, I consider that the collective effect may be inferred even from the limited material I have.

24. In the second interim decision I indicated the type of matters I considered in the light of *Brey* were or were not to be taken into account. I ruled out questions of a person's pre-existing links with a country, which are indeed in the case of this claimant very considerable and were in many ways Mr de la Mare's hoped-for trump card. That in turn makes the potential cohort much less specific and so more numerous.

25. There is nothing unusual about an elderly parent choosing to live somewhere near some of her children. At [31f] of the second interim decision I recorded the evidence that there were 1070 new claims for pension credit made by EEA nationals in 2015 and 1590 in 2016. Of those 29% failed the Habitual Residence Test (of which the Right to Reside is an integral component) in 2015 (the grounds on which they failed are not in evidence), and 25% in 2016. Most people who claim pension credit do so for a substantial period: within the claiamnt's age bracket 88% have claimed for 5 years or more. These figures are sufficient at least to give an order of magnitude figure for the likely level of claims at the date of decision. The figures are not high, but they are figures for new claims and the effect of one claim being allowed that would previously have been turned down is that it continues to run until it comes to an end and meanwhile may be joined by other new claims that have similarly been allowed to succeed when previously they would have been turned down, thus creating a body of ongoing claims. Many will not raise exactly the same issues, but they appear sufficient enough

in number to allow me to infer that the circumstances of an EU national claimant, in her 80s, not otherwise entitled, without adequate funds and for the rest of her life potentially becoming entitled – because of the way the domestic legislation works – to a very high proportion of the maximum pension credit and its passported benefits in full is unlikely to be that unusual. The burden to the State is of claims that are open-ended, by people whose advanced years mean that for the rest of their lives their material circumstances are unlikely to change, for what may, as here, be four-figure sums monthly. Whilst I acknowledge the circumstances of this elderly claimant, I am led to the conclusion that her claim for those reasons represented an "unreasonable burden" on the social assistance system of the United Kingdom, with the consequence that, even when *Brey* is applied, as interpreted in the second interim decision, she lacked the right to reside and her claim accordingly failed. I am sorry that this will be a disappointment to her and her family.

26. Although the Secretary of State succeeds and does not need the points which follow, I say a few words about some of the points made in Ms Apps' supplemental submission of 8 June 2017, lest the case go further.

(a) Para 8: while a fact-finding tribunal is restricted to circumstances obtaining at the date of the DWP's decision (Social Security Act 1998, s.12(8)), later evidence may be considered where it is referable to the circumstances at that date: R(DLA) 2/01 and 3/01. The submission seeking to exclude evidence not known about at the date of claim is misplaced.

(b) Para 11: to test the claimant's resources by reference to "what if " questions – if she had a fall, if her fridge broke down etc. – is both speculative and in my view incompatible with reg 4 of the Immigration (EEA) Regulations 2006/1003 ("the 2006 Regulations").

(c) Para 14: I do not accept the validity of the asserted parallel with the minimum income requirement in the Immigration Rules, which has no obvious link with EU law and is likewise inconsistent with reg 4 of the 2006 Regulations.

(d) Para 15b: the impact of discretionary sources of income is reduced given the structure of state pension credit, for the reasons given above. To the extent that the point continues to arise, to say that their continuation must be "guaranteed" is to set too high a standard of proof.

CG Ward
Judge of the Upper Tribunal
19 September 2017