***AT v LB Hillingdon and SSWP (HB*)**
[2023] UKUT 149 (AAC)

IN THE UPPER TRIBUNAL **Appeal No.** UA-2020-000117-HB
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

AT

Appellant

- v –

London Borough of Hillingdon (1)
Secretary of State for Work and Pensions (2)

Respondents

Before: Upper Tribunal Judge Ward

Hearing date: 30 January 2023 (with post-hearing submissions)

Representation:

Appellant:	Her son, Mr M
First Respondent:	Mr S Cullimore, Senior Benefit Officer
Second Respondent:	Denis Edwards, instructed by the Government Legal Department (via videolink)

DECISION

The appeal is dismissed. Although the First-tier Tribunal in its decision on 4 March 2020 under number SC304/18/02850 failed to apply EU law correctly, had it done so, its decision would have been the same on the basis of its findings, which are unassailable in a jurisdiction limited to error of law, and its error was thus immaterial.

REASONS FOR DECISION

1. The Appellant (hereafter "Ms T") appealed, with permission given by a judge of the First-tier Tribunal ("FtT"), against the FtT's decision dated 4 March 2020. That decision had dismissed her appeal against a decision by the First Respondent ("the local authority") which on 27 September 2018 had decided that she was not entitled

to housing benefit in respect of a property of which she was joint tenant with her son, Mr M, on the ground that she lacked a qualifying right to reside.

2. The case potentially gave rise to some difficult issues of EU law and questions of its implementation in the UK. Though now of diminishing significance, it will be seen that the case has identified a respect in which the Immigration (European Economic Area) Regulations 2016/1052 do not accurately reflect Directive 2004/38, which they were required to implement. I joined the Second Respondent ("SSWP"), who initially provided a written submission drafted by counsel on the legal issues involved. As a result of a further submission made by Mr M on Ms T's behalf at a relatively late stage, SSWP, who had previously indicated an intention not to be represented at the hearing, changed that position close to the hearing and counsel was permitted to participate via videolink in view of his other professional commitments.

3. No difficulties were experienced with the videolink arrangements.

Chronology

4. The key chronology is as follows. Ms T, a national of Pakistan, arrived in the UK on 6.12.14 to join her son, Mr M, who was also a national of Pakistan. Mr M had been present in the UK since about 2004. On 12.2.11, Mr M married Ms K, a Lithuanian national and EU citizen exercising Treaty rights in the UK. 5 years after Mr M's marriage to Ms K, that is, on or about 12.2.16, Mr M acquired an EU right permanently to reside in the UK, pursuant to article 16 of Directive 2004/38 ("the Directive"). The divorce of Mr M and Ms K was made final on 12.2.17.

The law

5. The Directive relevantly provides as follows:

Recital (15):

> "Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis."

By art.2:

> "For the purposes of this Directive:
> …
> (2) "family member" means:
> (a) the spouse;
> …
> (d) the dependent direct relatives in the ascending line and those of the spouse…"

By art.13:

> "2. Without prejudice to the second subparagraph, divorce, annulment of marriage… shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:
>
> (a) prior to initiation of the divorce or annulment proceedings…, the marriage…has lasted at least three years, including one year in the host Member State;
> …
> Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they 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, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).
>
> Such family members shall retain their right of residence exclusively on personal basis."

6. The relevant domestic legislation at the time was the Immigration (European Economic Area) Regulations 2016/1052.

Reg. 14(3) provided that:

> "(3) A family member who has retained the right of residence is entitled to reside in the United Kingdom for so long as that person remains a family member who has retained the right of residence."

By reg. 10:

> "(1) In these Regulations, *"family member who has retained the right of residence"* means, subject to paragraphs (8) and (9), a person who satisfies a condition in paragraph (2), (3), (4) or (5).
> …
> (5) The condition in this paragraph is that the person ("A")—
> (a) ceased to be a family member of a qualified person or an EEA national with a right of permanent residence on the termination of the marriage or civil partnership of A;
> (b) was residing in the United Kingdom in accordance with these Regulations at the date of the termination;
> (c) satisfies the condition in paragraph (6); and
> (d) either—
> (i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership, the marriage or civil partnership had lasted for at least

three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

…

(6) The condition in this paragraph is that the person—

(a) is not an EEA national but would, if the person were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; or

(b) is the family member of a person who falls within paragraph (a).

(8) A person ("P") does not satisfy a condition in paragraph (2), (3), (4) or (5) if, at the first time P would otherwise have satisfied the relevant condition, P had a right of permanent residence under regulation 15.

(9) A family member who has retained the right of residence ceases to enjoy that status on acquiring a right of permanent residence under regulation 15."

I note for completeness that, "family member" is defined by reg.7(1): it is not suggested that that there is any material difference between that provision and the relevant part of art.2 of the Directive.

The FtT's decision

7. In summary, the FtT, after detailed examination of the factual evidence, directed itself that reg 10(5) enabled only a former spouse or civil partner to retain rights as a family member following divorce (subject to the fulfilment of certain conditions) and therefore that Ms T could not have benefited from reg 10(5) anyway. Further, Ms T was not the dependent of Mr M (and it was not suggested that she had been the dependent of Ms K). Alternatively, if she had been dependent on Mr M at some point, that had ended on a number of occasions prior to when she made her claim; and once dependency was lost, it could not be regained after the divorce of Mr M and Ms K, because at that later date there was no longer any link to an EEA citizen. Finally, it reminded itself, correctly, that residence cards issued by the Home Office are declaratory rather than constitutive: see (inter alia) *OB v SSWP (ESA)* [2017] UKUT 255 (AAC).

The submissions

8. Although there are other grounds of appeal. to which I return below, Mr M's central submission is that the FtT erred by failing to consider art.13(2), even though he had referred to it in his submissions to them, and that that article goes further than reg.10(5) does. In his submission, even if the FtT was correct in its construction of reg.10(5), the right under art.13(2) is not limited to being conferred on a party to the now dissolved marriage, as reg.10(5) and the FtT's reading of that provision suggest. Rather, it is available to "a Union citizen's family members who are not nationals of a Member State" as, in his submission, Ms T was, where the relevant conditions are met (which they were). Further, his submission is that while Ms T could have satisfied the wording in the sub-paragraph of art.13(2) beginning "Before" by continuing to be the dependant of Mr M, that was not the only route by which he could do so. Ms T could also satisfy it through the self-sufficiency route: there are

various suggestions in the FtTs' decision that it found her to have independent means – albeit it failed to make proper findings on that issue – and following the decision of the CJEU in (C-247/20) *VI v HMRC* affiliation to the NHS will meet the requirements for comprehensive sickness insurance cover.

9. In his initial written submission, Mr Edwards suggested that at the time of the divorce, it is material that Ms T was a family member of Ms K (an EEA citizen) and a dependent of Mr M. The right to reside of Ms T which article 13(2) preserved, is that of being a family member of Ms K (namely, her mother-in-law) and a dependent on BM. Following the divorce, Ms T's right to reside also continued as being a dependent of Mr M, a permanent resident under article 16 of the Directive. However, on either view, the essential characteristic of Ms T's right to reside in the UK is being a dependent of Mr M. This was the legal position both before and after Ms K and Mr M's divorce. He submitted at that stage that "the same result substantially follows from the application of regulations 10(5) and 10(6) of the Regulations".

10. Mr Cullimore submitted that the FtT carried out a fact-finding exercise. He referred to *E and R v SSHD* [2004] EWCA Civ 49. He cited para 35, but that concerns a particular provision in the rules of the former Immigration Appeal Tribunal, which does not assist me in the present case. More relevant was his reliance on para 63 where the Court of Appeal stated:

> "In our view, the *CICB* case points the way to a separate ground of review, based on the principle of fairness. It is true that Lord Slynn distinguished between "ignorance of fact" and "unfairness" as grounds of review. However, we doubt if there is a real distinction. The decision turned, not on issues of fault or lack of fault on either side; it was sufficient that "objectively" there was unfairness. On analysis, the "unfairness" arose from the combination of five factors:
>
> i) An erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case);
>
> ii) The fact was "established", in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence;
>
> iii) The claimant could not fairly be held responsible for the error;
>
> iv) Although there was no duty on the Board itself, or the police, to do the claimant's work of proving her case, all the participants had a shared interest in co-operating to achieve the correct result;
>
> v) The mistaken impression played a material part in the reasoning."

This case, he submitted, set a high bar before a mistake of fact constituting an error of law would be found and the present case did not clear it.

11. I perceived certain difficulties with Mr Edwards' original submission:

a. reg.10(5) plainly indicates that the person who can benefit under that provision is the person (termed "A") whose own marriage or civil partnership was terminated by divorce. That, equally plainly, is not what art.13(2) says, and to that extent at least, Mr M's submission appeared well founded;

b. nor could I accept his position that the right preserved is limited to that of being a dependent of Mr M, whether so as (through him) to have been a family member of Ms K or as a dependent of Mr M, by then a permanent resident under art.16. The wording in the "Before" paragraph of art.13(2) envisages a number of gateways, through any one of which the person seeking to rely on a retained right of residence may seek to pass. Mr M appeared, once again, correct in his submission that to the extent that it suggests that having sufficient resources could, in principle, enable a person to qualify.

12. In post-hearing submissions, Mr Edwards indicated that:

"The Secretary of State concedes that the drafting of regulation 10(5) of the EEA Regulations does not fully transpose the retained right to reside in the UK conferred by article 13(2)(a) of the Directive on a family member of a third country national following the dissolution of a marriage between the third country national and an EEA citizen who was exercising treaty rights in the UK. The terms of the EEA Regulations, as drafted, cover only the third country national who was a party to the marriage, whereas the terms of article 13(2)(a) protect the third country national family members of the Union citizen."

13. Interesting though the point may be, it ultimately fails to get off the ground, unless Mr M can show that there was an error of law in the FtT's conclusion that Ms T was not dependent on him. There was no submission, nor evidential foundation, before the FtT which could have supported a conclusion that Ms T had (or had had) sufficient resources to meet the test of self-sufficiency under art.7(1)(b) of Directive 2004/38. It is too late to raise that alternative position in these proceedings. The only basis on which Ms T could establish rights as a family member and subsequently retain such rights under art.13(2) was if she was and remained a dependent of Mr M.

<u>The FtT's findings on (lack of) dependency</u>

14. There are a number of grounds on which Mr M relies in support of his submission that the FtT's conclusion that Ms T was not dependent on him was flawed.

15. I am not persuaded that, as he submits, the issue of dependence on him was not in issue in the FtT. He submits that the local authority "implicitly accepted" the fact of such dependence, but does not indicate the reason for that view. It appears that the local authority had been proceeding on the basis that Ms T could not any longer rely on dependency on her former daughter-in-law, Ms K, but at p15 Mr M himself puts forward the submission that she relied on her dependency on him, something which, as an alternative basis for the decision relying mostly on evidence to be provided by him and/or his mother, would be for him to establish. Further, I consider that the

exchanges set out in the FtT's record of proceedings (pp273-312) indicate that dependency on Mr M, along with other matters, was in issue.

16. Mr M submits that the FtT gave no consideration to the residence card issued by the Home Office. I disagree. The covering letter dated 26 July 2018 (p276) states that:

> "You should be aware that your right of residence remains subject to the requirement that you are financially dependent on your son. Failure to adhere to the above criteria could result in your residence card being revoked."

At paras 132-138 of the FtT's Reasons, the FtT correctly directs itself that residence cards are declaratory, not constitutive; questions the extent of disclosure to the Home Office in view of the substantial amount of detail obtained by the FtT through oral questioning in its own proceedings; and notes that the residence document was on its face conditional on Ms T remaining dependent on Mr M, which the FtT concluded she was not.

17. Mr M also submits that the judge erred by failing to ask himself what the EU law test for dependency is and to apply it in the case. The EU law test is concerned with material support to meet essential needs. In C-1/05 *Jia v Migrationsverket* the Court of Justice observed:

> "According to the case-law of the Court, the status of 'dependent' family member is the result of a factual situation characterised by the fact that material support for that family member is provided by the Community national who has exercised his right of free movement or by his spouse (see, in relation to Article 10 of Regulation No 1612/68 and Article 1 of Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26), *Lebon*, paragraph 22, and Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 43, respectively)."

18. The FtT was entitled to make the findings of fact at paras 101-110 which concern matters of practical care and support and they were not such as to demonstrate dependency as understood in *Jia*.

19. At paras 111-120 the FtT rejected a submission based on financial dependency on the evidence it had before it and was entitled to do so..

20. I consider that even though the EU law authorities are not expressly referred to, this section of the FtT's decision was consistent with them. Mr M evidently disagrees with the conclusions the FtT reached on the evidence, but that does not of itself mean there was an error of law. Errors of fact will only give rise to an error of law in circumstances such as those set out in *E and R* (above). I agree with Mr Cullimore that the high bar set by that decision is not reached.

21. With regard to the ground that the judge of the FtT ought not to have conducted his own enquiries or, if he did, ought to have put them to the parties, it appears that at pp289-290, he did put Ms T's PIP claim to the parties. As regards Mr M's limited

company, it was raised by Mr M in his submission to the FtT (p.16) in the following terms:

> "The applicant son along with being a full-time student is also operating a company registration […] being a director of a functioning limited company."

22. It does appear that the judge looked independently at the Companies House records on the basis that such records are "in the public domain", discovering that the company's registered office had been relocated (see Reasons, paras 44, 46 and 61) and that Mr M had applied for it to be struck off the register, leading to its dissolution in March 2020 (para.64). I can find no discussion of the judge's research in the record of proceedings. Such an absence of discussion would have been ill-advised and, if what the research had unearthed had played a material part in the decision, highly liable to constitute an error of law. However, for the reasons below I do not consider that it did play such a part.

23. At para 107, the judge, as part of considering how likely it was that Ms T was dependent on Mr M by reasons of care delivered, referred as one of six factors to how busy Mr M was, as in addition to numerous other activities, he was running his own company. That is no more than what Mr M himself had said in his written submission; it does not draw on any additional research the judge may have undertaken. At para 113, in the context of examining whether there may have been financial dependency, the FtT noted Mr M's "own very substantial commitments", reasoning that "there would have [been] costs involved in setting up and running his company." That is not using information derived from research at Companies House; it is merely a matter of general experience of which the judge was entitled to take judicial notice. At para 117, the judge comments on the "reference to his being a company director, not mentioned anywhere other than the appeal" as part of an overall evaluation of the reliability of Mr M's evidence. Again, that was not relying on anything the judge had found out for himself.

24. For these reasons I have concluded that the research it appeared the judge carried out and did not put to the parties did not materially affect the decision and therefore did not constitute an error of law.

25. Disputes with the FtT's conclusions of fact will not, without more, amount to errors of law. Mr M challenges the FtT's finding that he claimed remission of the court fees on the ground that he had "been unemployed since Dec 15, relocating back to Pakistan." Mr M says that, as respondent in the divorce proceedings, he would not have had to pay court fees anyway. That is to miss the point. The context was a court form which asked not about court fees, but about whether he objected to paying the costs of the proceedings (not the same thing). The FtT inaccurately recorded that context by stating that it was about fees, but that mistake does not detract from the fact that that was what Mr M had said about his financial situation, in a formal context, at that time.

26. The findings that Ms T went to Pakistan were open to the FtT on the evidence before it (see e.g. pp 294-5). It would have been open to Mr M at the FtT hearing to have asked further questions of her to have obtained context for her answers. The

finding about property in Pakistan was open to the FtT on the evidence (p.305). Grounds 5 l, m and n (p.359) are an attempt to give further or better evidence than was given in the FtT proceedings and do not give rise to an error of law, whether by reference to *E and R* or otherwise.

27. Finally, Mr M has sought to rely on the fact that the Secretary of State for the Home Department is said subsequently to have conceded in tribunal proceedings and issued Ms T with a permanent residence card (p.29). However, whether the FtT erred in law depends on what it did with the material it had and thus that fact cannot be taken into account as it was not in evidence before the FtT (not having happened).

C.G.Ward
Judge of the Upper Tribunal
Authorised for issue on 28 June 2023