Neutral Citation Number: [2024] EWCA Civ 1546

Case No: CA-2023-001834

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM KING'S BENCH DIVISION
Mr Justice Lane
[2023] EWHC 1615 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/12/2024

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE SINGH
and
LORD JUSTICE GREEN

- -

Between :

The King on the application of Ali	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**
- and -	
The Independent Monitoring Authority for the Citizens' Rights Agreements	**Intervener**

- -
- -

Chris Buttler KC & Charlotte Bayati (instructed by **Duncan Lewis Solicitors**) for the **Appellant**
David Blundell KC & Julia Smyth (instructed by the **Treasury Solicitor**) for the **Respondent**
Marie Demetriou KC (written submissions), Galina Ward KC & Aarushi Sahore (instructed by the **IMA**) for the **Interveners**

Hearing date: Wednesday 3rd July 2024

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Approved Judgment

This judgment was handed down remotely at 12 noon on Tuesday 10th December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Green :

A. Introduction

The issue

1. When the United Kingdom departed the EU it entered into an international law agreement with the EU to govern post-exit relations. This is embodied in a treaty concluded between the United Kingdom ("*UK*") and European Union ("*EU*") on 19th October 2019 entitled "*Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*" ("*the WA*")[1]. Provisions of the WA are capable of direct effect and thereby give rise to rights enforceable in the domestic courts and, under the terms of the WA, take precedence over any inconsistent domestic law. Those provisions include the right to free movement which includes the right to move, reside, and seek and take up employment. These rights and obligations were incorporated into domestic law by section 7A European Union (Withdrawal) Act 2018 ("*EU(W)A 2018*").

2. Part Two WA, entitled "*Citizens Rights*", concerns the rights of citizens' of the UK and the EU who exercised free movement rights prior to the expiry of the transition period for UK exit. Its purpose was to ensure continuity of those rights post-exit. As of 2019 there were, for instance, approximately 1m UK citizens who had hitherto exercised EU rights of free movement enabling them to live and work in the Member States of the EU. In many instances such persons were entitled to be accompanied by their families who acquired rights of free movement, including residence, derivative upon those of the UK or EU citizen exercising the primary right of free movement.

3. In order to create legal certainty and continuity for such persons, the WA restated certain fundamental rights otherwise contained within EU treaties and subordinate legislation but also explicitly incorporated, by reference, measures of EU law which were now to take effect as part of the WA. One such measure was Directive 2004/38/EC[2] - the Citizens' Rights Directive ("*the CRD"*) – on the right of EU citizens and their families to move and reside within the EU. Various provisions are relevant to this appeal. First, Article 2 which, in the context of the acquisition or retention of derivative rights of residence by children over the age of 21, stipulates, in substance, that they must be "*dependent*" upon the EU citizen. Secondly, Article 23 which confers upon children over the age of 21 (amongst others) an entitlement to work. Thirdly, Article 24 which requires that migrant workers be accorded equal treatment with nationals of the host state.

4. The central question arising on the appeal is whether as a condition of residence dependency must be continuous or enduring such that the requirement is breached, and residence rights lost if, by way of example, a person takes up work and is thereby no

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[1] OJ 2019/C 384 I/01

[2] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance).

longer dependent upon the family member at the point in time when the application for permanent residence is sought?

The position adopted in the administrative decision and the Judgment

5. In the administrative decision under challenge in the present case the SSHD held that the requirement of dependency had to be measured as of the date upon which the application for permanent residence was made. It was an enduring condition which had to have been satisfied for the entirety of the previous five years. This requirement was not qualified, for example, by the exercise of the right to seek or take up employment. If, as in the present case, dependency was broken, the result was that the appellant failed to meet the condition of dependency and her residence rights were forsaken.

6. The Court below agreed: See paragraphs [54ff] of the judgment ("*the Judgment*"). The judge considered the principal authorities of the Court of Justice of the European Union ("*CJEU*") but came to the conclusion that none addressed: "*The conditions for retaining a right of residence*…" once it had been granted (see paragraph [74]). The Court held that the condition of dependency was a continuing one and had to be measured as at the date of the application for permanent residence, which would have been some five years after the initial application by the child to join the EU migrant parent in the UK. In paragraph [65] the Court explained what this meant in practice. The exercise of the right to work *could* be exercised but not if it undermined continued dependency by a child over 21 upon the family member who was the EU citizen:

> "65. I acknowledge this means article 23 enables a family member over the age of 21, whose status as such depends on dependency on an EU citizen, to take up employment or self-employment, *only to the extent that doing so does not result in their no longer being dependent on that citizen*."
>
> (emphasis added)

The parties

7. The parties to the present appeal include the appellant, Mrs Fatima Ali ("*the appellant*"), details of whom are set out below, and the Secretary of State for the Home Department (the "*SSHD*") as respondent. The Independent Monitoring Authority ("*IMA*") was given permission to intervene. The IMA was created by Article 159 WA. Its remit is to act as an independent authority monitoring the implementation and application of Part Two WA. It is accorded powers equivalent to those of the European Commission under the Treaties to conduct inquiries on its own initiative concerning alleged breaches of Part Two by the administrative authorities of the United Kingdom and to receive complaints from Union citizens and their family members for the purpose of conducting such inquiries. The IMA is also accorded the right to bring legal action before competent courts or tribunals in the United Kingdom with a view to seeking adequate remedies.

The ground of appeal

8. There is a single ground of appeal, framed by the appellant as follows:

> "The Judge erred in his construction of the [WA and CRD]. Contrary to the Judge's view, the child of a Union citizen, who is aged over 21, does not lose the right to reside on account of exercising the right to work under Article 23 [CRD] and thereby ceasing to be financially dependent on the Union citizen."

B. The Facts

The appellant and her position of dependency as of the date of her application to join her mother as the relevant EU national

9. The appellant was born in Bangladesh on 22nd September 1994. She applied for an EEA family permit on 17th November 2014 as the direct family member of her mother, Jamila Akhter, an Italian national with rights of residence in the UK. As of the date of the application she was 20 years old. On 20th November 2014 an EEA family permit was issued to the appellant valid until 20th May 2015. On 13th December 2014 the appellant entered the UK. On 26th April 2015 the appellant lodged an application for a residence card as the direct family member of her EU citizen mother.

10. It is common ground that in 2014, as of the date of her application to join the EU national (her mother), she was dependent upon her family and was classified as a child under the CRD.

11. On 21st September 2015 a declaratory residence card was issued to the appellant valid until 21st September 2020 upon the condition that the necessary eligibility requirements, which included dependency from the age of 21 years, were continuously satisfied.

The appellant and her position of dependency as of the date of her application for permanent residence

12. On 9th October 2019 the appellant lodged an application under the EU Settlement Scheme as the relevant family member of an EEA national. It is common ground that as of the date of *this* application: (i) she had resided in the UK for five years; (ii) she was no longer a child within the meaning of the CRD; and (iii), she was not dependent upon her family.

13. Supporting information was sent on the appellant's behalf by JS Solicitors by letter dated 14th November 2019. The letter stated that on 11th July 2016 the appellant had married a Bangladeshi national living in the UK and they had a daughter born in the UK on 26th May 2018. The appellant had become estranged from her parents as a result of the marriage. The appellant had obtained a qualification in engineering and was in employment. Certain documentation and other evidence was not however available because it was in the possession of the appellant's parents. The letter stated: "… *our client believes asking her mother to provide those documents for her application in these circumstances could put her at risk of violence. Our client further states that she has been abused verbally by her parents on a couple of occasions because of her marriage*". The solicitors invited the SSHD, independently, to obtain any outstanding information verifying the appellant's position from existing Home Office and HMRC records.

The decision of refusal and the administrative review

14. On 24th September 2020 the appellant's application was refused upon the basis that as of the date of her application for indefinite leave to remain under Appendix EU to the Immigration Rules (in 2019) she failed to satisfy the eligibility requirements. The decision letter states: "*…you are a child over the age of 21 of a relevant EEA citizen, Jamila Akhter, but you have not provided any evidence to demonstrate that you are dependent on the relevant EEA citizen or on their spouse or civil partner*." Elsewhere it is stated: "*You have not provided any evidence to show that you are currently dependent on your EEA citizen relative*." The appellant had the right to apply for an administrative review which she did on 21st October 2020. Her application was refused and by a letter of 18th February 2021 the earlier decision was maintained. The same requirement for continued dependency was reiterated. It was stated that Annex 1 of Appendix EU to the Immigration Rules required that for indefinite leave to remain to be granted, the applicant must "*continue"* to be dependent upon the sponsor: "*However, you were not dependent on your sponsor at the end of the transition period, 31 December 2020 and so there are no rights for you [sic], retain in line with the Withdrawal Agreement*".

15. The appellant sent pre-action correspondence to the SSHD on 24th March 2021 challenging the administrative review decision. The SSHD responded on 6th May 2021. On 14th May 2021 the appellant filed an application for permission to apply for judicial review. Permission was granted on 6th October 2021.

Evidence submitted during the judicial review

16. On 20th April 2023 the appellant served a witness statement addressing various factual matters raised by the SSHD. She explained that she had started working in the UK in August/September 2015 and had been in work throughout the period from August/September 2015 until the date of her application to the SSHD for permanent residence.[3] The Judge below held that there was evidence that the appellant was in work in 2017/18, which was correct. He made this finding to support the conclusion, which was common ground before him, that when the appellant applied for indefinite leave to remain under Appendix EU to the Immigration Rules in 2019, she was not at that point in time financially dependent upon her family. He made no findings as to the point in time when the appellant first applied for the right to join her mother since that was not relevant to his analysis.

C. The legal framework

17. The relevant provisions of law can be summarised as follows.

[3] During the appeal there was the hint of a suggestion by the SSHD that when the appellant ceased to be dependent upon her family she was not in work. The appellant's evidence to the contrary is however unchallenged by the SSHD and in principle it is wrong for that evidence to be called into question at this juncture: See in the context of immigration *Ullah v SSHD* [2024] EWCA Civ 201 citing the Supreme Court in *TUI UK Ltd v Griffiths* [2023] UKSC 48.

The Withdrawal Agreement (WA)

18. The WA, and its legal effect, was considered in detail by this court in *AT v SSHD* [2023] EWCA Civ 1307 ("*AT*"). There is no dispute between the parties as to its status and effect. It suffices to summarise the main points.

19. The WA came into force on 1st February 2020 following "*exit day*", which was 31st January 2020. This marked the formal departure of the UK from the EU. It created two periods of relevance. The first was the "*transition period*" which ran from 1st February 2020 to 11pm on 31st December 2020. During the transition period, EU law applied (more or less) with full application. The second was from 11pm on 31st December 2020 onwards during which only those provisions of EU law identified in the WA applied to the extent set out therein. Under domestic law the WA is not EU law but an instrument of international law. From the perspective of the EU the WA is recognised as being an instrument governed by international law but it is also an "*integral part of the EU legal order*": *AT* (*ibid*) paragraph [46] and cases cited thereat. It binds not just the EU but also its Member States.

20. The 4th and 7th recitals record that its objective was to "*ensure an orderly withdrawal of the United Kingdom from the Union*". To achieve that aim it was necessary to "*prevent disruption and provide legal certainty to citizens and economic operators … in the Union and in the United Kingdom*". The 6th recital emphasised that the rights granted by the WA were to be enforceable by both UK and EU citizens on non-discriminatory grounds:

> "… it is necessary to provide reciprocal protection for Union citizens and for United Kingdom nationals, where they have exercised free movement rights before a date set in this Agreement, and to ensure that their rights under this Agreement are enforceable and based on the principle of non-discrimination".

21. Article 4 contains special rules on interpretation and application. These are: (i) the principle of equal legal effect of the WA in the UK and EU; (ii) the principle of direct effect; (iii) that the WA takes precedence over inconsistent domestic law; (iv) the application of the methods and general principles of Union law; and (v), the applicability of the jurisprudence of the CJEU (prior to the expiry of the transition period) to the implementation and application of the WA. Article 4 provides:

> "1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States. Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.
>
> 2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or

> incompatible domestic provisions, through domestic primary legislation.
>
> 3. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.
>
> 4. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period."

22. Part Two is entitled *"Citizens' Rights"*. Article 9, under the heading *"General Provisions*", sets out definitions. A "*family member*" is defined in the following way:

> "For the purposes of this Part, and without prejudice to Title III, the following definitions shall apply:
>
> (a) "family members" means the following persons, irrespective of their nationality, who fall within the personal scope provided for in Article 10 of this Agreement:
>
> (i) family members of Union citizens or family members of United Kingdom nationals as defined in point (2) of Article 2 of Directive 2004/38/EC of the European Parliament and of the Council…"

23. Article 9(c) contains a definition of "*host state*". For EU citizens and their family members, it is defined as "… *the United Kingdom, if they exercised their right of residence there in accordance with Union law before the end of the transition period and continue to reside there thereafter*".

24. Article 10, on personal scope, requires a person (including family members) to reside in accordance with EU law at the end of the transition period in order to come within the *ratione personae* of the WA. The purpose was to take a snapshot as at the end of the transition period (11pm on 31st December 2020) of all those residing "*in accordance with Union law*". Article 10 provides that Part Two applies to the following persons:

> "Article 10 Personal scope
>
> 1. Without prejudice to Title III, this Part shall apply to the following persons:
>
> (a) Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter;
>
> …

> (e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:
>
> > (i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter…"

25. Article 12 provides:

> "Non-discrimination
>
> Within the scope of this Part, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality within the meaning of the first subparagraph of Article 18 TFEU shall be prohibited in the host State and the State of work in respect of the persons referred to in Article 10 of this Agreement."

26. Title II of Part Two is headed "*Rights and Obligations*". Article 13, headed "*Residence rights*", cross-refers to Article 21 Treaty on the Functioning of the European Union ("*TFEU*") and the CRD. It addresses the rights of citizens of the EU or of the UK who reside in a host state and also covers the derivative rights of family members:

> "1. Union citizens and United Kingdom nationals shall have the right to reside in the host State under the limitations and conditions as set out in Articles 21, 45 or 49 TFEU and in Article 6(1), points (a), (b) or (c) of Article 7(1), Article 7(3), Article 14, Article 16(1) or Article 17(1) of Directive 2004/38/EC.
>
> …
>
> 3. Family members who are neither Union citizens nor United Kingdom nationals shall have the right to reside in the host State under Article 21 TFEU and as set out in Article 6(2), Article 7(2), Article 12(2) or (3), Article 13(2), Article 14, Article 16(2), Article 17(3) or (4) or Article 18 of Directive 2004/38/EC, subject to the limitations and conditions set out in those provisions.
>
> 4. The host State may not impose any limitations or conditions for obtaining, retaining or losing residence rights on the persons referred to in paragraphs 1, 2 and 3, other than those provided for in this Title. There shall be no discretion in applying the limitations and conditions provided for in this Title, other than in favour of the person concerned."

27. Article 17(2) WA provides that a family member who is dependent prior to the end of the transition period retains rights of residence even if they cease to be dependent afterwards. There is no analogue to this elsewhere in EU legislation:

> "The rights provided for in this Title for the family members who are dependants of Union citizens or United Kingdom nationals

> before the end of the transition period, shall be maintained even after they cease to be dependants."

28. Article 22 incorporates the entitlement for "*family members*" to work in Article 23 CRD. That right applies to those with a right to reside whether permanent or otherwise:

> "In accordance with Article 23 of Directive 2004/38/EC, irrespective of nationality, the family members of a Union citizen or United Kingdom national who have the right of residence or the right of permanent residence in the host State or the State of work shall be entitled to take up employment or self-employment there."

29. Article 23 confers on those having a right of residence a consequential right, in accordance with Article 24 CRD, to equal treatment with nationals of the host state:

> "1. In accordance with Article 24 of Directive 2004/38/EC, subject to the specific provisions provided for in this Title and Titles I and IV of this Part, all Union citizens or United Kingdom nationals residing on the basis of this Agreement in the territory of the host State shall enjoy equal treatment with the nationals of that State within the scope of this Part. The benefit of this right shall be extended to those family members of Union citizens or United Kingdom nationals who have the right of residence or permanent residence.
>
> 2. By way of derogation from paragraph 1, the host State shall not be obliged to confer entitlement to social assistance during periods of residence on the basis of Article 6 or point (b) of Article 14(4) of Directive 2004/38/EC, nor shall it be obliged, prior to a person's acquisition of the right of permanent residence in accordance with Article 15 of this Agreement, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status or to members of their families."

30. The WA provides for a dispute resolution mechanism. The CJEU was chosen by the parties to be the relevant forum in which disputes would be resolved. The adopted procedure replicates the pre-existing preliminary ruling reference procedure (under Article 267 TFEU). The recitals to the WA explained the rationale:

> "CONSIDERING that in order to guarantee the correct interpretation and application of this Agreement and compliance with the obligations under this Agreement, it is essential to establish provisions ensuring overall governance, in particular binding dispute-settlement and enforcement rules that fully respect the autonomy of the respective legal orders of the Union and of the United Kingdom as well as the United Kingdom's status as a third country…"

Article 158 sets out the detail:

> "Article 158
>
> References to the Court of Justice of the European Union concerning Part Two
>
> 1. Where, in a case which commenced at first instance within 8 years from the end of the transition period before a court or tribunal in the United Kingdom, a question is raised concerning the interpretation of Part Two of this Agreement, and where that court or tribunal considers that a decision on that question is necessary to enable it to give judgment in that case, that court or tribunal may request the Court of Justice of the European Union to give a preliminary ruling on that question. However, where the subject matter of the case before the court or tribunal in the United Kingdom is a decision on an application made pursuant to Article 18(1) or (4) or pursuant to Article 19, a request for a preliminary ruling may be made only where the case commenced at first instance within a period of 8 years from the date from which Article 19 applies.
>
> 2. The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings on requests pursuant to paragraph 1. The legal effects in the United Kingdom of such preliminary rulings shall be the same as the legal effects of preliminary rulings given pursuant to Article 267 TFEU in the Union and its Member States.
>
> 3. In the event that the Joint Committee adopts a decision under Article 132(1), the period of eight years referred to in the second subparagraph of paragraph 1 shall be automatically extended by the corresponding number of months by which the transition period is extended."

Section 7A EU(W)A 2018: Incorporation of the WA into domestic law

31. An issue arising upon the appeal is as to the alleged consistency of Appendix EU to the Immigration Rules with the WA. The relationship between inconsistent domestic law and the WA was expressly catered for in Article 4(2) WA which incorporates the well established principle of EU law that where there is a conflict between domestic law and superior treaty law then the domestic provision is not rendered null and void but is disapplied to the extent of the inconsistency. When the WA was concluded the EU(W)A 2018 was amended to retain the European Communities Act 1972 ("*ECA 1972*") until the end of the transition period. This was achieved by the introduction of a new section 1A inserted by means of the European Union Withdrawal Act 2020 ("*EU(WA)A 2020*"). A new section 7A was also added whereby Parliament brought into full force the provisions of international law in the WA. Section 7A read:

> "(1) Subsection (2) applies to— (a) all such rights, powers, liabilities, obligations and restrictions from time to time created

> or arising by or under the withdrawal agreement, and (b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement, as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.
>
> (2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be— (a) recognised and available in domestic law, and (b) enforced, allowed and followed accordingly.
>
> (3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2)."

The Explanatory Notes made the position explicit:

> "31. The approach in the Act is intended to give effect to Withdrawal Agreement law in a similar way to the manner in which EU Treaties and secondary legislation were given effect through section 2 of the ECA. Although the ECA gives effect to EU Treaties and secondary legislation, it is not the originating source of that law but merely the 'conduit pipe' by which it is introduced into UK domestic law. Further, section 2 of the ECA can only apply to those rights and remedies etc that are capable of being 'given legal effect or used' or 'enjoyed'.
>
> 32. The approach in the Act to give effect to Article 4 is to mimic this 'conduit pipe' so that the provisions of the Withdrawal Agreement will flow into domestic law through this Act, in accordance with the UK's obligations under Article 4. The approach also provides for the disapplication of inconsistent or incompatible domestic legislation where it conflicts with the Withdrawal Agreement. This ensures that all rights and remedies etc arising under the Withdrawal Agreement are available in domestic law."

The CRD (Directive 2004/38/EC)

32. The CRD was enacted to codify and bring up to date the law relating to rights of residence associated with free movement which had hitherto been set out in earlier measures: CRD recital [4].

33. Article 1 CRD lays down the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their "*family members*". It also governs the right of permanent residence in the territory of the member state for Union citizens and their family members. The definition of "*family members*" is therefore central to the scope of the rights.

34. Article 2(2) CRD defines "*family members*".

> "Article 2 Definitions

> For the purposes of this Directive:
>
> 1) "Union citizen" means any person having the nationality of a Member State;
>
> 2) "Family member" means:
>
> (a) the spouse;
>
> (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
>
> (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
>
> (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);
>
> 3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence."

The concept of *dependency* is thus referred to twice in Article 2. First, in relation to children over the age of 21 (in Article 2(2)(c)); and secondly, in relation to "… *dependent direct relatives in the ascending line and those of the spouse or partner*…" (in Article 2(2)(d)).

35. Article 3 entitled "*Beneficiaries*" incorporates the definition of "*family members*" in Article 2 and, thereby, identifies as a beneficiary a person who might be "*dependent*" within the meaning of Article 2:

> "Article 3 Beneficiaries
>
> 1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them
>
> 2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of

> residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
>
> (b) the partner with whom the Union citizen has a durable relationship, duly attested.
>
> The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

36. There is no definition of the concept of *dependence* or as to the point in time at which dependency is to be measured for the purpose of defining a family member in connection with applications for permanent residence.

37. Article 7 governs the right of residence for more than 3 months. Article 7(1)(a)-(c) posits three alternative conditions of eligibility for Union citizens: (i) they are workers or self-employed; (ii) they have sufficient resources of their own; or (iii) they are attending an educational establishment.

38. Article 7(2) provides:

> "The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c)."

39. So far as relevant, Article 14(2) provides that:

> "Union citizens and their family members shall have the right of residence provided for in Articles 7 … as long as they meet the conditions set out therein."

The only matters labelled as conditions in Article 7 are those in Article 7(1) applicable to the child's parent (the Union citizen) reflecting the fact that residence rights of family members of an EU national are derived rights contingent upon the EU national continuing to exercise Treaty rights, such rights being lost where the EU national no longer exercises those rights (see eg Case C-218/14 *Singh v Ministry for Justice and Equality* EU:C:2015:306 and 476).

40. Chapter IV CRD is entitled "*Right of permanent residence*". Section I is entitled "*Eligibility*". Article 16 lays down5 years legal residence as a requirement of permanent residence. A "*family member*" (as defined in Article 2, which incorporates the requirement of dependency) of a Union citizen must have resided for five years in the host member state:

> "1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

> 2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.
>
> 3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country."

41. Article 23 (which is cross referred to in Article 22 WA) is entitled *"Related rights*" and provides for a legal right to seek and take up employment:

> "Irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there."

42. Article 24, entitled "*Equal treatment*", provides:

> "1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.
>
> 2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families."

Appendix EU to the Immigration Rules

43. Appendix EU was intended to implement the WA. It confers a right of continuing residence on certain children of Union citizens. It specifies that a non-Union citizen child aged over 21 is only permitted to remain in the UK for as long as they *remain* dependent upon their Union citizen parent. The restrictions on the scope of that right are found in the definition of "*child*" which, so far as material, provides:

> "child
>
> …
>
> (b)(i) the direct descendant aged 21 years or over of a relevant EEA citizen…; and
>
> (ii) …dependent on (as the case may be):
>
> (aa) the relevant EEA citizen (or on their spouse or civil partner) at the date of application or, where the date of application is after the specified date, at the specified date;…
>
> 'dependent' means here that:
>
> (a) having regard to their financial and social conditions, or health, the applicant cannot, or (as the case may be) for the relevant period could not, meet their essential living needs (in whole or in part) without the financial or other material support of the relevant EEA citizen …; and
>
> (b) such support is, or (as the case may be) was, being provided to the applicant by the relevant EEA citizen …; and
>
> (c) there is no need to determine the reasons for that dependence or for the recourse to that support"

D. The parties' submissions

The appellant

44. The appellant argues that the rights conferred upon Union citizens to move and work are fundamental rights and must, according to case law, be broadly and generously construed. The rules must not be construed literally if this would undermine the purpose and intent behind them. These broadly construed rights apply equally to family members. Whilst it is true that the rights of family members are derivative upon those of the Union citizen they are nonetheless important because they serve to ensure the full and effective enjoyment of the rights of movement and work by the Union citizen in question and they are also recognised as having a free standing status under Article 24 WA. The WA applies to both EU and UK citizens and their families, and both restate these principles and incorporates pre-existing EU legislation by reference. On ordinary principles of construction a subordinate requirement such as "*dependency*", which attaches to the definition of a "*family member*", cannot be interpreted in a manner which, in practical terms, undermines the residence right of a family member of the Union citizen to exercise the right to work *even if* this results in a loss of dependency which, upon a literal and narrow interpretation of the law, might otherwise lead to a loss of status as a family member and in consequence the loss of the derivative right of residence. This approach to interpretation is reflected in the guidance provided by the European Commission and is recognised in case law of the CJEU. Case law in relation to the application of the principle of equality is to the same effect. In short the law is clear: the requirement of dependency in the CRD and WA cedes precedence to the more fundamental rights of movement, residence and work. A domestic law, such as that in

the Immigration Rules, which makes residence and the right to work subject to a requirement of *continued* dependency is hence unlawful. It is inconsistent with the settled jurisprudence of the CJEU which makes clear that dependency is to be measured as of the date of the application by the individual concerned to join the migrant EU national. Under Article 4 WA it is therefore to be disapplied. The appeal should therefore be allowed. However, if this Court is in doubt, or disagrees with the position of the European Commission, a reference should be made to the CJEU under Article 158 WA. The issue is important. It affects UK citizens and their families in the EU as well as EU citizens and their families in the UK. Rejecting the appeal necessarily involves this Court ruling that the position of the European Commission is wrong. This would result in legal uncertainty and inconsistency which is explicitly contrary to Article 4(1) WA which requires the WA to be applied in a uniform manner across the EU and the UK. A reference would, in such circumstances, be important to avoid such an undesirable, and indeed unlawful, result.

The respondent

45. The SSHD contends that for a child over 21 the principle of dependency, as part of the definition of "*family member*" in the CRD and for the purposes of Article 10 of the WA, is an unequivocal requirement that must be met upon a continuing and enduring basis as a precondition of residence. Nothing in the legislative language suggests that it is qualified. The appellant's asserted rights are derivative and less important than the primary rights of EU and UK citizens. There is no reason, as a matter of policy, that they should be treated as of equal importance. It is true that in some cases a child over the age of 21 ceasing to be dependent might lose a right of residence. In this regard the legislature distinguished between children under the age of 21 and spouses, and children over 21. Any negative consequences which flow from this differentiation are simply the inevitable and justifiable consequence of valid policy choices reflected in the WA. The contrary views of the European Commission are wrong in law; its views carry no greater weight than those of the SSHD given that the state (of which the SSHD is a representative) was an equal counterparty with the EU to the WA. The case law of the CJEU is nothing to the point. It concerns different fact situations and, in some respects, different legal regimes altogether. The High Court was correct to find that the requirement of residence could be reconciled with the requirement of dependency in the manner described in the judgement at paragraph [65] (See paragraph [6] above). For these reasons the appeal should be dismissed. The law is clear and there is no need to make a reference to the CJEU.

The IMA

46. The IMA supports the appellant. Insofar as there is uncertainty as to the law the Court should consider making a reference to the CJEU. The provisions must be purposively construed to uphold the effectiveness of the basic rights of residence and work. If correct the judgment renders the right to work under Article 22 WA (incorporating Article 23 CRD) ineffective because it traps the dependent family member into a state of dependency contrary to the aim and objective of the legislative regime which includes the encouragement of work and integration. In written submissions the IMA observed:

> "The fundamental difficulty with the conclusion reached in the Judgment is that it potentially renders the right to work under

> Article 22 WA (which incorporates Article 23 CRD) ineffective because it locks the dependent family member into a state of dependency. The consequence is that the family member has in reality a very limited and uncertain right to work. Such an outcome is difficult to justify as a matter of public policy, insofar as the family member would not be seeking to rely on state benefits and would not become a burden on the state, and is not supported by any specific EU authority.
>
> As far as the Home Office argues that dependent children should not be placed in a "privileged" or "unique" position as compared with spouses … the IMA considers that this is not necessarily a helpful analogy. Spouses do not need to demonstrate dependency so would not be impeded in exercising a right to work even if that enabled them to become financially independent. The issue is also potentially more nuanced where children are concerned. It may be justified to treat children rather differently from other categories of family members because they may have migrated with their families to the host state under the age of 21 without exercising much individual choice. They may then form connections there and have limited connections in their home state. They may well take up the right to work in the host state before or after the age of 21. They might also be in situations where they work for certain periods but then fall out of work and become dependent on their families again. Equally, they may fall in and out of close relationships with their parents or grandparents.
>
> Furthermore, if the Judgment is correct, and there is an enduring dependency requirement for children over the age of 21, they would face considerable uncertainty from time to time as to whether they had a genuine and unimpeded right to work and (more importantly) whether their residence rights were jeopardised by exercising a purported right to work. The context here is that, at least while working, those individuals would not be a burden on the host state and would (in most cases) be enabling the continued exercise of free movement rights by the primary Union citizen. Therefore, at least for certain categories of dependent family members, the Judgment appears to mandate an unattractive outcome."

It is pointed out that the jurisprudence of the CJEU, the Commission guidance, and academic commentary are consistent and support the position of the appellant.

E. Analysis

47. I address the issue in the following order: (i) jurisprudence of the CJEU; (ii) the view of the European Commission; (iii) academic commentary; and (iv), conclusions.

Jurisprudence of the CJEU

48. I turn to the case law. The first point is to consider the weight to be attached to the case law of the CJEU.

49. In this regard the WA is important. The right to free movement incorporates the right to move (to a host state) and then the right to reside and to seek and take up employment and otherwise live upon the same basis as a national. The right is based upon the TFEU and the CRD and is incorporated into the WA. It is a right available to all citizens of the EU which of course included citizens of the UK prior to the exit of the UK from the EU. Under Article 4(4) WA the right is to be construed in accordance with the jurisprudence of the CJEU as it was prior to the end of the transition period and, under Article 4(1), it must be applied in a consistent manner across the UK and the EU. The pre-end of the transition case law of the CJEU is thus important in delineating the scope of the rights open to both EU and UK citizens and their families under the WA. As to the case law of the CJEU post-dating the transition date it is not said by any party that it is inadmissible or irrelevant. Insofar as it expresses views or conclusions about provisions which are relevant under the WA this Court can, of course, take it into account though it would not strictly have the same legal effect as jurisprudence pre-dating expiry of the transition period. In attributing weight to this case law, the duty in Article 4 WA to ensure consistency as between the courts of the UK and those of the EU is important.

50. A substantial corpus of case law addresses the issues arising. I consider below, chronologically, those of most direct relevance to: (i) the concept of dependence; (ii) the point in time when it is to be assessed and the extent, if at all, that it is a continuing or enduring requirement; (iii) how the analysis is reconciled with the principle of equality in the WA and CRD; and (iv), the relevant principles of construction to apply.

Case 316/85 Centre Public d'aide Sociale de Courcelles v Marie-Christine Lebon [1987] ECR 2811 ("Lebon")

51. Here the CJEU considered how the principle of equality served to qualify a requirement of continued dependency. The judgment has been widely relied upon subsequently by the CJEU in its analysis of residence rights and was relied upon by the Court in *Reyes* (below), the principal authority relied upon by the appellant in this case.

52. Mrs. Lebon was a French national living in Belgium with her father who was in receipt of a retirement pension. Since May 1982 Mrs Lebon had been in receipt of a social security payment (the "*minimex*"). This was discontinued upon the basis of a lack of evidence that she was seeking work. Upon appeal questions were referred to the CJEU, the third of which was, in summary, in the following terms: Do dependents continue to retain a right of equality of treatment granted under EU law when they have reached the age of majority and are no longer dependent upon the EU national and do not have the status of workers? In paragraph [20] the Court held that a person did not lose the rights attributed to being dependent, which could include the right to residence, because they applied for a social security benefit which might (depending upon its extent) render the recipient non-dependent.

53. The reason for this conclusion was that otherwise it would have the practical effect of precluding the dependent from applying for the benefit in question (because it would

place residence at risk) and this would "*undermine the equal treatment accorded to the migrant worker*" (paragraph [20]). The upshot was that the status of a person as dependent had to be considered "*independently*" of the grant of the social benefit:

> "20. It must be pointed out, in the first place, that a claim for the grant of the 'minimex' submitted by a member of a migrant worker's family who is dependent on the worker cannot affect the claimant's status as a dependent member of the worker's family. To decide otherwise would amount to accepting that the grant of the 'minimex' could result in the claimant forfeiting the status of dependent member of the family and consequently either justify the withdrawal of the 'minimex' itself or even the loss of the right of residence. Such a solution would in practice preclude a dependent member of a worker's family from claiming the 'minimex' and would, for that reason, undermine the equal treatment accorded to the migrant worker. The status of dependent member of a worker's family should therefore be considered independently of the grant of the 'minimex'."

54. This conclusion was consistent with the principle that rights of free movement had to be construed broadly (paragraph [23] citing Case139/85 *Kemp* [1986] ECR1741).

***Case - C1/05 Jia v Migration Verket [2007] ECR1-1* ("*Jia*")**

55. This was a judgment of the Grand Chamber. It was the first occasion upon which the CJEU addressed the point in time at which dependency was to be measured. The judgment was subsequently followed by the CJEU in *Reyes* (see below).

56. The applicant was a retired Chinese national. Her son, also a Chinese national, resided in Sweden with his wife who was a German national who was self-employed in Sweden. The applicant sought a residence permit in Sweden having lawfully entered Sweden upon a visitor's visa. She was refused upon the basis that there was insufficient evidence of her financial dependence upon her son and daughter-in-law. An issue arose as to what was meant by "*dependency*" in Article 1(1)(d) of Directive 73/148, one of the predecessor measures to the CRD. This concerned dependent relatives:

> "The member states shall, acting as provided in this Directive, abolish restrictions on the movement and residents of...
>
> (d) the relatives in the ascending and descending lines of such nationals and of the spouse of such nationals, which relatives are dependent on them, irrespective of their nationality."

57. A dispute arose which included as to the point in time at which the condition of dependency had to be assessed. A reference was made to the CJEU. In the Opinion of Advocate General Geelhoed the issue had to be considered in the light of case law concerning the protection of family life as guaranteed under Article 8 ECHR: See Opinion paragraphs [46]-[52] and the case law cited thereat including Case C-60/00 *Carpenter v Secretary of State for the Home Department* e.g. at paragraph [38]. At paragraph [70] of the Opinion the question of the point in time at which the assessment had to be made was considered.

58. The Advocate General considered two issues: (i) the point in time for the determination; and (ii), the consequences of that determination for the period following. As to (i) the Advocate General concluded that the relevant point in time was the moment of application by the dependent to join the migrant EU worker in the host member state and as to (ii) that, thereafter, "*a new situation*" arose governed by the principle of equality:

> "In view of the primary objective of those Community instruments to eliminate any type of obstacle flowing from national entry and residence requirements which might dissuade a national of a member state from moving to another member state for economic reasons, arguably it is the family situation as it exists at the time the community national decides to go to another member state which should be taken into account. Once such a person has moved to and is settled in another member state, a new situation arises in which his legal position should be comparable to that of nationals of the host member state who have not exercised their right to free movement."

59. The CJEU agreed. It equated dependence with a factual position of "*material support*" and addressed the point in time that had to be established:

> "34. Article 1(1)(d) of Directive 73/148 applies only to 'dependent' relatives in the ascending line of the spouse of a national of a Member State established in another Member State in order to pursue activities as a self-employed person.
>
> 35. 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).
>
> 36. The Court has also held that the status of dependent family member does not presuppose the existence of a right to maintenance, otherwise that status would depend on national legislation, which varies from one State to another (*Lebon*, paragraph 21). According to the Court, there is no need to determine the reasons for recourse to that support or to raise the question whether the person concerned is able to support himself by taking up paid employment. That interpretation is dictated in particular by the principle according to which the provisions establishing the free movement of workers, which constitute one of the foundations of the Community, must be construed broadly (*Lebon*, paragraphs 22 and 23).

> 37. In order to determine whether the relatives in the ascending line of the spouse of a Community national are dependent on the latter, the host Member State must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves. The need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community national.
>
> 38. That is the conclusion that must be drawn having regard to Article 4(3) of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition, 1968(II), p. 485), according to which proof of the status of dependent relative in the ascending line of a worker or his spouse within the meaning of Article 10 of Regulation No 1612/68 is to be provided by a document issued by the competent authority of the 'State of origin or the State whence they came', testifying that the relative concerned is dependent on the worker or his spouse. Despite the lack of precision as to the means of acceptable proof by which the individual concerned can establish that he falls within one of the classes of persons referred to in Articles 1 and 4 of Directive 73/148, there is nothing to justify the status of dependent relative in the ascending line being assessed differently according to whether the relative is a member of the family of a worker or of a self-employed worker."

60. In paragraph [43] the Court held:

> "In those circumstances, the answer to Question 2(a) and (b) must be that Article 1(1)(d) of Directive 73/148 is to be interpreted to the effect that 'dependent on them' means that members of the family of a Community national established in another Member State within the meaning of Article 43 EC need the material support of that Community national or his or her spouse in order to meet their essential needs in the State of origin of those family members or the State from which they have come *at the time when they apply to join the Community national.* Article 6(b) of that directive must be interpreted as meaning that proof of the need for material support may be adduced by any appropriate means, while a mere undertaking from the Community national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family members' situation of real dependence."
>
> (Emphasis added)

61. Finally, paragraph [2] of the dispositif confirmed that in relation to members of a family the test of dependency was to be determined "… *at the time when they apply to join that Community national*":

> "2. Article 1(1)(d) of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services is to be interpreted to the effect that 'dependent on them' means that members of the family of a Community national established in another Member State within the meaning of Article 43 EC need the material support of that Community national or his or her spouse in order to meet their essential needs in the State of origin of those family members or the State from which they have come at the time when they apply to join that Community national. Article 6(b) of that directive must be interpreted as meaning that proof of the need for material support may be adduced by any appropriate means, while a mere undertaking from the Community national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family members' situation of real dependence."

62. The following points arise.

63. First, the interpretation to be applied to a concept such as dependency was "*dictated*" by the principle that provisions relating to the free movement of workers were foundations of the Community and were to be construed broadly in a manner which treated a national of the host state and a migrant EU worker equally, as was established in *Lebon* at paragraphs [22]-[23] (paragraph [36] and see also paragraph [40]).

64. Secondly, dependency was to be determined as of the date of the application by the dependent to join the EU national (paragraphs [37], [43] and dispositif paragraph [2]). The judgment necessarily confirms the observation of the Advocate General that: "*Once such a person has moved to and is settled in another member state, a new situation arises in which his legal position should be comparable to that of nationals of the host member state who have not exercised their right to free movement*.

65. Thirdly, "*proof of the status*" of dependency was to be provided by a document issued by the competent authority of the "*state of origin or the state whence they came*" (paragraph [38]). This proof could derive from any relevant source but by its nature would reflect a snapshot in time, and not at any later stage.

Case C-83/11 Secretary of State for the Home Department and Rahman and others EU:C:2012:519 (5th September 2012) ("Rahman")

66. This was also a judgment of the Grand Chamber. It was also cited with approval in *Reyes* (below). It concerns the interpretation of Article 3(2) CRD, headed '*Beneficiaries*' and its reference to "*other family members*" which, as explained above, incorporates the concepts of dependency.

67. The applicants, all Bangladeshi nationals, were related to R, a Bangladeshi national married to an Irish national working in the United Kingdom. They were not, accordingly, children of an EU citizen. They were, as the CJEU recognised (paragraph

[32]), "*family in a broader sense*" and were capable of being dependent. A reference was made to the CJEU. The fourth question focused upon the point in time at which dependency had to exist:

> "Must any dependency referred to in Article 3(2) of [Directive 2004/38] on which the other family member relies to secure entry to the host State be dependency that existed shortly before the Union citizen moved to the host State?"

The fifth question concerned anti-avoidance measures:

> "Can a Member State impose particular requirements as to the nature or duration of dependency referred to in Article 3(2) of [Directive 2004/38] by such other family member so as to prevent such dependency being contrived or unnecessary to enable a non-national to be admitted to or continue to reside in its territory?"

68. In relation to the fourth question the Advocate General (Opinion paragraphs [95]-[97]) relying upon *Jia* concluded that the relevant point in time for the assessment of dependency was the date of the application to join the migrant EU citizen in the host member state. Accordingly, the Directive precluded national legislation which, inconsistently, required a state of dependency to *pre-exist* the date of the application (paragraph [101]). The CJEU agreed (see paragraph [31]) and cited with approval this portion of the Advocate General's Opinion. The Court ruled (paragraph [33]) that: "*The situation of dependence must exist, in the country from which the family member concerned comes, at the time when he applies to join the Union citizen on whom he is dependent*". In paragraph [34] the Court focused upon the role of the competent authority in relation to dependence. It was for the national court to establish whether the applicants were dependants of the Union citizen "… *at the time when they applied to join her in the United Kingdom*" and if they were *then* there was a duty imposed upon the host member state to "*facilitate*" their entry and residence under Article 3 CRD.

69. In relation to the fifth question the Court held that member states could introduce national laws to ensure that the exercise of dependency related rights were "*genuine and stable*" and that dependency had not "… *being brought about with the sole objective obtaining entry into and residence in*" a state's territory (paragraphs [36]). Such anti-avoidance measures had to be focused upon the genuineness of the application to join the migrant EU citizen in the host member state but they could not be such as to otherwise deprive the basic right of free movement of the EU citizen and the dependant of its effectiveness (paragraph [39]).

Case C-423/12 Reyes v Migrationsverket EU:C:2014:16 ("Reyes")

70. I turn next to *Reyes*, the judgment relied upon most heavily by the appellant. It concerns the interpretation of Article 2(2)(c) CRD, the provision in issue in the present appeal. Ms Reyes (R) was born in 1987 in the Philippines. When she was three years old her mother moved to work in Germany where she acquired German citizenship. R was entrusted into the care of her grandmother in the Philippines. She trained as a nurse but lacked the funds to complete her training. Accordingly, she never entered gainful employment but nor did she receive any social assistance. Her mother, in Germany,

started a relationship with a Norwegian national and lived in Sweden with him from 2009. They married there in 2011. R's stepfather sent financial assistance to the grandmother in the Philippines which came out of his pension.

71. In early 2011 R successfully applied for a visa to enter Sweden to visit her mother and stepfather. She entered the Schengen area on 13th March 2011. On 29th March 2011 she applied to the Swedish authorities for a residence permit as a family member dependent upon a Union citizen. At this point she was over 21 (either 23 or 24) and intended to seek employment in Sweden.

72. The relevant application was that made on 29th March 2011 for a residence permit. As of that date the facts before the decision maker were that R: (i) was over 21; (ii) claimed to be dependent upon her mother and stepfather, both EU citizens; (iii) had no history of work either in the Philippines or in the EEA; and (iv), intended to seek work in the EEA in the future. It was therefore contemplated that during the period of her residency in Sweden she would *never* be dependent upon family members.

73. The authority rejected the application because she was not dependent. The financial assistance did not cover R's basic needs in the Philippines and did not, thereby, create dependency. She was dependent upon her grandmother in the Philippines, not her mother or her husband in the EEA. On appeal the Administrative Court Gothenburg upheld this conclusion given R's age (23 or 24), her qualifications which enabled her in due course to work, and the existence of local family support in the Philippines. On a further appeal the Court referred two questions to the CJEU. I deal with the two questions separately.

74. The first question concerned the meaning of "*dependency*" in Article 2(2)(c) CRD and the point in time at which it had to be assessed. The Court (paragraph [23]) emphasised that the rights contained within the CRD constituted foundations of the EU and were to be "*construed broadly"* citing *Jia (ibid)* paragraph [36] and *Lebon* (*ibid*) paragraphs [22] and [23] itself citing earlier authority to the same effect. The relevant point in time for the inquiry into dependence was at the point when the dependent applied to join the EU citizen: *ibid* paragraph [23] citing *Jia* paragraph [37]; and *Rahman* paragraph [33]. There was no need to determine the reasons for a state of dependence: paragraph [22].

75. The Court also addressed the burden of proof to be applied. In paragraphs [25]-[28] the Court cited with approval the observation of the Advocate General in paragraph [60] of his Opinion which recognised that practical and evidential difficulties often confronted those applying for residence in establishing dependency. It was said that the effectiveness of the derived rights of family members to join a nuclear family in the EU could not be made excessively difficult by evidential requirements imposed by the host state. Accordingly, an applicant could provide "*subjective*" evidence and any other evidence which was "*helpful*". The CJEU endorsed this and stated that to establish dependency an applicant could not be required to establish that they had attempted unsuccessfully to obtain employment or to attain subsistence support from the authorities of the country of origin and/or otherwise support themselves.

76. The second question focused upon the fact that R intended to work in Sweden and therefore might be dependent on her family only for a short period or possibly not at all. The Judgment addressed therefore whether the condition of dependence had to endure after first admission. If the relevant point in time for the dependency decision

was when she applied to join her mother, then the condition did not ensue and what occurred afterwards was nothing to the point.

77. In answering these questions, the court reiterated its earlier case law to the effect that the relevant point in time for determining dependency was the moment of application by the dependent to join the EU migrant worker (paragraph [30]). It followed from this that any "prospects" of obtaining work in the host member state which would enable a child over the age of 21 no longer to be dependent "*once he has the right of residence*" do not affect the condition of dependency in Article 2(2)(c) CRD (paragraph [31]). Were the position to be otherwise a child, over the age of 21, would in practice be prohibited from seeking employment in the host state which would infringe Article 23 CRD and would, as was explained in *Lebon* paragraph [20], collide with the principle of equality:

> "29. By its second question, the referring court asks, in essence, whether, in interpreting the term 'dependant' in Article 2(2)(c) of Directive 2004/38, any significance attaches to the fact that a family member – due to personal circumstances such as age, education and health – is deemed to be well placed to obtain employment and addition intends to start work in the Member State, which would mean that the conditions for him to be regarded as a relative who is a dependant under the provision are no longer met.
>
> 30. In that regard, it must be noted that the situation of dependence must exist, in the country from which the family member concerned comes, at the time when he applies to join the Union citizen on whom he is dependent (see, to that effect, *Jia*, paragraph 37, and Case C-83/11 *Rahman* [2012] ECR I-0000, paragraph 33).
>
> 31. It follows that, as, in essence, has been stated by all the parties which have submitted observations to the Court, any prospects of obtaining work in the host Member State which would enable, if necessary, a direct descendant, who is 21 years old or older, of a Union citizen no longer to be dependent on that citizen once he has the right of residence are not such as to affect the interpretation of the condition of being a 'dependant' referred to in Article 2(2)(c) of Directive 2004/38.
>
> 32. Furthermore, as the European Commission has rightly pointed out, the opposite solution would, in practice, prohibit that descendant from looking for employment in the host Member State and would accordingly infringe Article 23 of that directive, which expressly authorises such a descendant, if he has the right of residence, to take up employment or self-employment (see, by analogy, *Lebon*, paragraph 20).
>
> 33. In consequence, the answer to the second question is that Article 2(2)(c) of Directive 2004/38 must be interpreted as meaning that the fact that a relative – due to personal

> circumstances such as age, education and health – is deemed to be well placed to obtain employment and in addition intends to start work in the Member State does not affect the interpretation of the requirement in that provision that he be a 'dependant'."

78. The dispositif was in the following terms:

> "Article 2(2)(c) of Directive 2004/38 must be interpreted as meaning that the fact that a relative – due to personal circumstances such as age, education and health – is deemed to be well placed to obtain employment and in addition intends to start work in the Member State does not affect the interpretation of the requirement in that provision that he be a 'dependant'."

79. Accordingly, since dependency was measured as of the date of the application to join the EU migrant worker (paragraph [29]) it followed that the fact that, upon obtaining a right of residence, R had real prospects of obtaining work which would make her non-dependent, was "… *not such as to affect the interpretation of the condition of being a 'dependant' referred to in Article 2(2)(c) of Directive 2004/38*" (paragraph [31]).

80. Particular attention during the hearing of this appeal was attached to paragraph [32]. It is important because it explains the rationale for the judgment of the CJEU (in paragraph [30] and [31]) as to the point in time at which dependency had to be determined. It starts with the phrase "*Furthermore*" indicating that it is supplemental or additional to the reasoning in the preceding paragraphs. It is explanatory since it considers the counterfactual ("*the opposite conclusion*"). The counterfactual is the situation that would arise were the proper interpretation of "*dependency*" to be <u>other than</u> that it had to be assessed as of the date of the application by the dependent to join the EU migrant worker i.e. that it was a continuing requirement. As to this the Court set out three reasons which supported the interpretation of dependency as being measurable as of the date of the application to join the migrant EU citizen, and not on a continuing basis.

81. First, were this not to be the case Article 23 CRD on the right to work would be infringed, because taking up employment would often be accompanied by a loss of financial dependence.

82. Secondly, that conclusion was consistent with the position of the Commission (see below). That position was set out in its written observations to the Court. The appellant has obtained a copy of those submissions and they are considered below. There the Commission construed the CRD as conferring upon family members benefiting from the right of residence in a host state, the right to engage in gainful employment as employed or self-employed workers. Such a family member: "… *cannot, upon obtaining said paid employment, lose their right of residence as a result, since they are merely exercising a right expressly provided for by directive 2004/38/EC. The intention of the legislator could not have been for a family member … to be initially expressly authorised to work, only to subsequently lose their status as a dependent person within the meaning of [the CRD] and thereby the rights conferred by it*".

83. Thirdly, the conclusion was also consistent with the "*analogous*" principle laid down in *Lebon* (*ibid*) (above) to the effect that were a person in the position of R to be denied

the right to residence, because she was no longer dependent, that would place her mother in a position of inequality with a comparable national of the host state whose children (including those over the age of 21) would not lose their right of residence simply because they were no longer dependent, for instance because they took up gainful employment. It followed from this that R enjoyed all rights available to her under the CRD, including the right to seek and take up work.

Case C-224/13 Ogieriakhi v Minister for Justice and Equality EU:C:2014:2068 (10th July 2014) ("Ogieriakhi")

84. This case also concerns the definition of "*family members*" in Article 2(2) CRD but this time in relation to the position of a spouse of an EU citizen. The CJEU was required, as the Advocate General put it: "… *to explain the notion of continuous legal residence with the Union citizen for the purposes of Article 16 [CRD] ... and, more specifically, to clarify the words 'with the Union citizen*'" (Opinion paragraph [1]). The short point was whether a person who did not live continuously with the Union citizen spouse was, nonetheless, entitled to the right of permanent residence?

85. Mr Ogieriakhi ("*O*") arrived in Ireland in May 1998. In May 1999 he married G, a French national. He obtained a residence permit upon the basis that he was the family member of an EU national. Two years later, in August 2001, O and G separated and as from 2002 she provided no support to O. They divorced in 2009. An application to renew his residence right in 2004 was refused upon the basis that he could not prove that his former spouse was exercising her EU rights since she had, as from 2004, returned to France. In paragraph [28] the CJEU expressed the issue as follows:

> "By its first two questions, which should be examined together, the referring court asks, in essence, whether Article 16(2) of Directive 2004/ 38 must be interpreted as meaning that a third-country national who, during a continuous period of five years before the transposition date for that directive, has resided in a member state as the spouse of a Union citizen working in that member state, must be regarded as having acquired a right of permanent residence under that provision, even though, during that period the spouses decided to separate and commenced residing with other partners, and the home occupied by that national was no longer provided or made available by his spouse with union citizenship"

The Court held that the right to permanent residence was not lost. The CRD could not be construed as denying a person who had a prior lawful right of residence a permanent right of residence simply because he could not prove that he was no longer connected with a Union citizen. The CRD should not be construed "*narrowly*", but in a manner which secured the "*effectiveness*" of the rights conferred. This militated against a "*literal interpretation*" if this was against "*the spirit*" of the measure: paragraph [40]. The Court attached weight to the objective of the CRD which was to enable family members to exercise rights of residence in a personal capacity: see paragraph [40] citing the CRD recital [15] and see also paragraph [42] approving the Opinion of the Advocate General at paragraphs [49]-[53].

86. The CJEU considered whether the right of the non-Union citizen was conditional upon establishing that they resided permanently with the spouse. In paragraphs [43]-[46] the CJEU (adopting an approach consistent with that of the CJEU in *Jia* (*ibid*) at paragraph [38]) held that the requirement of proof that the applicant reside with the spouse was to be assessed "… *only with effect from the date on which the third-country national began living together with the spouse with union citizenship in the host member state*". This flowed, *inter alia*, from the procedural requirements for proof which addressed what sort of housing meant that the partners lived under the same roof and as to which the Court held "… *there is no implied requirement for the family to live permanently under the same roof*". On the facts of the case the CJEU held that the relevant date for assessment was therefore 1999.

87. It followed, as the Court held in paragraph [47] and in paragraph [1] of the dispositif, that a third country national who had resided in a member state as the spouse of a union citizen had to be regarded as having acquired a right of permanent residence *even if*, during that period of five years, the spouses separated and commenced residing with other partners, and the home occupied by that national was no longer provided or made available by his spouse with union citizenship.

88. The SSHD argues that the judgment concerned a different factual situation and different provisions of the CRD. I accept that the judgment is not four-square with the present case. The analysis is however consistent with the approach and thrust of the CJEU in *Jia* (*ibid*), *Reyes* (*ibid*) and earlier case law. It supports the appellant's case but offers little, if any, support to the respondent in the present appeal.

Case C-488/21 GV v Chief Appeals Officer ECLI:EU:C:2023:1013 ("GV")

89. The next case is *GV*. It concerns Article 2(2)(d) CRD and the definition of "*family members*" which brings within the definition relatives in the ascending line who are "*dependent*". The judgment post-dates the transition period under the WA and therefore does not fall within the scope of Article 4(4) thereof. Nonetheless, it was relied upon by all parties to the appeal and, in so far as it offers guidance, it can be taken into consideration. As I set out below, I conclude that it provides material support to the appellant's case. Nonetheless, my final conclusion is based upon jurisprudence of the Court which predates the end of the transition period which, under the WA, therefore has greatest weight as guiding precedent.

90. GV was a Romanian national and the mother of AC, also a Romanian national who had resided and worked in Ireland and obtained Irish nationality by naturalisation. Since 2017 GV had resided in Ireland with AC and was dependent upon her. She made an application for a disability allowance under domestic law which required, as a condition, that the applicant be habitually resident in Ireland. In February 2018 the application was refused upon the basis that GV did not have a habitual right of residence in Ireland. On appeal three questions were referred to the CJEU. The court combined and re-framed the questions placing them into the context of the CRD (paragraph [48]). In paragraph [53] the Court identified the central question as whether EU legislation read in combination with the CRD, had to be interpreted as precluding legislation of a Member State which permitted the authorities to refuse to grant a social assistance benefit to a direct relative in the ascending line who at the time when the application for that benefit was made, was dependent on a worker who was a Union citizen. An

additional question posed by the Court was whether it was open to the domestic authorities to refuse to pay social assistance:

> "… on the ground that the grant of the said benefit would have the effect that that family member would no longer be dependent on the worker who is a Union citizen and thus become an unreasonable burden on the social assistance system of the said Member State."

91. In paragraph [47] the CJEU emphasised that the rights conferred upon Union workers were to be "*effective*". In paragraph [67] it endorsed the observation of the Advocate General in paragraph [106] of her Opinion that the proper interpretation of the CRD had to avoid indirect discrimination. Paragraphs [105] and [106] of the Opinion stated:

> "105. To my mind, the same logic is applicable to dependent ascendants. GV is dependent on AC. What she does not obtain from public assistance would necessarily be provided by AC. In other words, if GV receives Disability Allowance, that payment would also ease AC's situation. If, on the contrary, Irish authorities deny such assistance to her mother, AC would be placed in a disadvantageous position in comparison with Irish workers in a similar situation.
>
> 106. To assess whether she is placed in a disadvantageous position, AC must be compared to workers who are Irish nationals. Such workers may also have parents who are Union citizens, but not Irish nationals, and who could be denied disability benefits if they resided in that State for less than five years. However, in most situations, the parents of the Irish workers will also be Irish nationals and, therefore, entitled to claim Disability Allowance. In that respect, the discrimination of AC resulting from the fact that her mother may not apply for Disability Allowance could be categorised as an indirect discrimination in relation to social advantages enjoyed by national workers."

92. In paragraph [69] the Court, having approved of the analysis of the Advocate General, also endorsed the principle laid down in *Lebon* at paragraph [20], to the following effect:

> "… the status of 'dependent' relative in the ascending line within the meaning of Article 2(2)(d) [CRD] cannot be affected by the grant of a social assistance benefit in the host Member State. To decide otherwise would amount to accepting that the grant of such a benefit could result in the person concerned forfeiting the status of dependent family member and, consequently, justify the withdrawal of that benefit or even the loss of his or her right of residence. Such a solution would, in practice, preclude that dependent family member from claiming that benefit and would, for that reason, undermine the equal treatment accorded to the migrant worker."

93. The Court rejected the submission of the Member State that the effect of such an interpretation would impose an unreasonable burden upon the finances of the state: paragraph [71]. The judgment did not explicitly address the point in time for the assessment of dependency but proceeded upon the basis that once acquired the status of dependency could not be lost by some event, such as the receipt of social assistance, which would or might otherwise result in a cessation of dependence since otherwise there would be a breach of the principle of equality.

Case C-709/20 CG v Department for Communities in Northern Ireland EU:C:2021:602 ("CG")

94. Finally, in response to the submission of the appellant that the principle of equal treatment applied to the position of the appellant, the SSHD cited *CG*. There the CJEU held that the principle of equal treatment under the CRD applied "*only*" to those who would otherwise be entitled to rights under the CRD: Paragraph [75]. The principle did not permit a person lacking rights to obtain social assistance upon the same terms as a person with residence rights who was not entitled to social assistance under the directive: Paragraph [77]. This was because it would allow the "*economically inactive*" to fund their subsistence by means of the "*host state's welfare system*". The facts are relevant. The applicant was an EU national who moved with two young children to Northern Ireland. After residing there for 18 months she was granted pre-settled status pursuant to the Immigration Rules giving her five years limited leave to remain. She moved to a women's refuge where she had no financial resources to support herself or her children. She applied for universal credit, but this was refused upon the basis that she did not have "*habitual residence*" in the United Kingdom, as required under the law. On an appeal against the refusal decision a reference was made to the CJEU asking whether that refusal was lawful in the light of Article 18 TFEU prohibiting discrimination on grounds of nationality. The CJEU held that there was no discrimination. Article 18 was implemented *via* the CRD under which the applicant would not have qualified for social benefits upon the basis that she was economically inactive and did not have sufficient resources to claim a right of residence. The provision on unequal treatment did not therefore apply. However, the Court proceeded to hold that because the Charter on Fundamental Rights ("*the Charter*") applied, even if the applicant was not entitled to universal credit, she was, nonetheless, entitled to assistance such as would enable her to subsist in accordance with the principle of dignity in Article 1 of the Charter which underpinned the CRD. I do not get a great deal of assistance from this judgment. First, the case addressed different provisions of the CRD and did not concern the meaning of dependency or how the principle of equality was relevant to the meaning of that term. Secondly, the case concerned a right to social assistance there being no question of CG's right of residence being forfeited if she was given assistance. Thirdly, the basis upon which the principle of non-discrimination was held not to be relevant was different to the rationale in the present case. Fourthly, none of the case law relevant to this appeal was addressed and certainly none of the analysis set out above was questioned.

Summary of principles arising from case law

95. I set out below a summary of the relevant principles. I cite mainly the authorities referred to above but also from additional authorities which were before the Court.

96. First, the provisions on free movement include the right to work in the host member state. The WA and the CRD reflect these principles. They constitute "*foundations of the community"* and "*must be construed broadly*": e.g. *Lebon* paragraphs [22] and [23]; *Jia* (*ibid*) paragraph [36]; *Reyes* (*ibid*) paragraph [23] endorsing *Jia* (*supra*).

97. Secondly, when national competent authorities interpret the CRD they must "*ensure*" the basic freedoms conferred by the treaties, and the "*effectiveness*" of directives which abolish obstacles to free movement and must facilitate the exercise of those rights: *Jia* (*ibid*) paragraph [40] citing Case C424/98 *Commission v Italy* [2000] ECR I-4001 paragraph [35] and case cited thereat. The CRD must also be "*exercised in the light of and in line with*" the provisions of the Charter of Fundamental Rights of the European Union: Case C-129/18 *SM (Algeria) v Entry Clearance Officer* EU:C:2019:140 and 248 at paragraph [64] in relation to the Charter and paragraph [66] in relation to the European Convention on Human Rights ("*ECHR*"). The CRD must be construed to be in line with Article 7 of the Charter on respect for private and family life (*ibid* paragraph [65]. It must also follow that the CRD must be construed to be in line with the right to marry in Article 12 ECHR and Article 9 of the Charter (both of which find expression in section 12 HRA 1998).

98. Thirdly, the concept of "*a dependent family member*" is an "*autonomous concept*" of community law. It does not turn upon national law "*otherwise that status would depend on natural legislation, which varies from one state to another"*: *Lebon* (*ibid*) paragraph [20]; *Jia* (*ibid*) paragraph [36]; see also Joined Cases C-424/10 and C-425/10 *Ziolkowski v Land Berlin* ECLI:EU:C:2011:866 paragraph [32] and cases cited thereat. It is, accordingly, not open to member states to alter the substantive meaning allocated to the term "*dependency*" by the CJEU.

99. Fourthly, under Community law the point in time for determining dependence is when the dependant applies to join the migrant EU citizen in the host state: *Jia* (*ibid*) paragraphs [37], [43] and dispositif paragraph [2]; *Rahman* (*ibid*) paragraph [33]; *Reyes* (*ibid*) paragraph [30] and dispositif paragraph [1].

100. Fifthly, the CJEU has given, variously, three reasons as to why once a right of residence has been established it is not lost, thereafter, by the exercise of some other right:

i) ***The procedural and evidential requirements for proving dependency***: The procedural basis of the requirement to establish dependency is that proof was to be provided by the competent authority in the state of *origin* i.e. it was a status determined by reference to evidence taken at a snapshot in time, viz., the point at which the dependent applied to join the EU migrant citizen in the host state: *Jia* (*ibid*) paragraph [38]; and along the same lines *Ogieriakhi* (*ibid*) paragraphs [43]-[46]. There is no scope in the definition of dependency for it to be a continuing condition governed by evidence spanning the subsequent five year period (about which the competent authorities in the state of origin would know nothing). Given that this is an autonomous concept of Community law, there is no scope for member states to adopt any other definition.

ii) ***The application of the principle of equality which applies to both the migrant EU worker and the dependant***: Were it to be otherwise it would result in: (a) a position of inequality as between the EU migrant worker and a comparable national of the host state, whose respective dependents would be treated

differently: *Lebon* (*ibid*) paragraph [20]; *Reyes (ibid)* paragraph [32]; and (b), a position of inequality as between the dependent and the relative of a host citizen because, according to the CJEU, a direct relative in the ascending line is an "*indirect beneficiary of the equal treatment"* principle which confers legal rights: WA Article 23(1); *GV* (*ibid*) paragraph [69] citing Case C-3/90 *Bernini* EU:C:1992:89 paragraph [26] and Case C-238/15 *Braganca Linares Verruga* EU:C:2016:949 paragraph [40] and see WA Article 23(1).

iii) ***The primacy of rights under the CRD including the right to work***: Were it to be otherwise it would also prevent the dependent from being able to exercise rights conferred under the CRD, such as the right to work: *Reyes* paragraph [32].

The position of the European Commission

101. I turn next to the position of the European Commission. It is consistent with the case law summary set out above. Upon this appeal two questions arise. First, as to the content of the substantive view of the Commission. Secondly, as to the weight to be attached to that view. I commence with the substantive position of the Commission as articulated in three documents which I set out below in chronological order. This is consistent with the case law referred to above. They proceed from the premise that once a person has been established to be dependent (measured as at the date of the initial application) what happens afterwards cannot lead to their losing that status[4]. An "*example*" (to use the Commission terminology) of where dependency might cease which cannot jeopardise the right of residence would be the exercise of rights under Article 23 to take up employment or self-employment in the host Member State.

102. First, in *Reyes* (*ibid*) the Commission submitted written observations to the CJEU dated 20th December 2012 which were endorsed by the Court in its judgment (*ibid* paragraph [32]). The appellant has obtained these written observations in their original French, and placed that document, together with an English translation the accuracy of which has not been challenged, before the Court. The parties to the appeal made submissions on this document. The English translation of the written observations states, in paragraph [21], as follows:

> "The question therefore is whether said family member loses their right of residence by engaging in gainful employment. Firstly, it should be noted that once a family member has been considered dependent under Article 2, point 2, subparagraph (c) of directive 2004/34/ EC, the directive applies in its entirety to the individual concerned. The Commission refers in this regard to Article 23 of the directive, according to which family members of a Union citizen, irrespective of their nationality, who benefit from the right of residence or permanent residence in a Member State, have the right to engage in gainful employment as employed or self-employed workers. Consequently, a family member falling under Article 2, point 2,

[4] I should make clear, for the avoidance of doubt, that I am not suggesting that the right of a person determined initially to be dependent must, inevitably, lead to a right of permanent residence. There are circumstances contemplated by Community law, relating largely to public policy, such as criminal law, whereby a person's right to residence may be taken from them. Such an issue does not arise in the present case.

> subparagraph (c) of directive 2004/ 38/ EC and who has obtained a right of residence or permanent residence cannot, upon obtaining said paid employment, lose their right of residence as a result, since they are merely exercising a right expressly provided for by directive 2004/38/EC. The intention of the legislator could not have been for a family member falling under Article 2, point 2, subparagraph (c) to be initially expressly authorised to work, only to subsequently lose their status as a dependent person within the meaning of directive 2004/38/ and thereby the rights conferred by it".

103. Secondly, in 2020, the European Commission published a Guidance Note upon citizens' rights under Part Two WA. Paragraph [2.5.2] is consistent with the position of the Commission in *Reyes*. It makes clear that a person whose right of residence is derived from a state of dependency on a right holder does not cease to be covered by the WA "... *when they cease to be"* dependent. The Commission gives by way of an *example* only, the exercise of rights under Article 22 to take up employment. It provides:

> "Article 17(2): A child who is no longer dependent
>
> As under Union law on free movement of EU citizens, family members of beneficiaries of the Agreement whose residence status is derived from their being dependent on the right holder do not cease to be covered by the Agreement when they cease to be dependent, for example by making use of their rights under Article 22 to take up employment or self- employment in the host State.
>
> Article 17(2) provides that such family members maintain the same rights even when they cease to be dependent, irrespective of the mode of loss of dependency.
>
> By the same token, family members of beneficiaries of the Agreement whose residence status is derived from their being under 21 years of age remain covered by the Agreement when they become 21 years."

104. Finally, in December 2023, the European Commission promulgated further Guidance on the right of free movement of EU citizens and their families which is also consistent with the Commission position in *Reyes* and with the conclusion that a person, who was initially dependent and therefore possessed a right of residence, did not lose that right of residence when they ceased to be dependent. Once again it gives, as an example, the exercise of the right to work. It provides:

> "2.2.2.4 Dependency of direct descendants and direct ascendants
>
> …..
>
> Family members whose residence right is derived from their being dependent on a mobile EU citizen do not cease to be

> covered by the Directive when they cease to be dependent, for example by making use of their rights under Article 23 to take up employment or self-employment in the host Member State. [71] By the same token, descendants whose residence right is derived from their being under 21 years of age remain covered by Directive 2004/38/EC when they reach the age of 21.
>
> Example:
>
> M. is a non-EU citizen. He had been residing and studying in a non-EU country since September 2018. His non-EU mother and his EU father reside in Member State A. They began to make monthly payments to their son to cover his study and subsistence costs in January 2020. M. moved to Member State A in October 2020, when he was 22 years of age, and applied for a residence card as a dependent direct descendant of an EU citizen (Article 2(2)(c)). He obtained his residence card in December 2020. In February 2021, he started to work in Member State A and moved away from his parents by renting a flat in Member State A. M.'s right of residence cannot be called into question by the fact that after his move to Member State A, M. is no longer dependent on his parents, due to his taking up work in accordance with Article 23 of the Directive."

105. There is a dispute between the parties as to the weight to be attached to the published guidance. The appellant submits that neither of the two public guidance documents are binding nor necessarily reflects the considered formal position of the Commission. Nonetheless, it is said that the view of the Commission should still carry some material weight with the Court. The appellant accepts the correctness of the position taken by all parties in *Siddiqa v. Entry Clearance Officer* [2024] EWCA Civ 248 paragraph [56], where the Court recorded the submissions of the parties that European Commission Guidance had no formal status in the interpretation of the Withdrawal Agreement but was instead akin to a textbook that might assist the Court in coming to its conclusions. The Court did not, however, formally express its own concluded view upon the issue. The SSHD argues that even this places too high a value upon the position of the Commission. It is argued that the Commission's view carries no especial weight and, in particular, imports no greater status than the view of the UK (of whom the SSHD is a representative) which was a counterparty to the WA.

106. It is common ground that the view of the Commission is not binding. Nonetheless, it must, in my judgment, be accorded some, persuasive, value for reasons which are both general in nature and particular to this case. First, generally, under EU law the Commission is viewed as an independent and objective voice, with automatic locus before the CJEU, whose views are entitled to weight. It was, and remains, the guardian of the law under the treaties charged with the duty of ensuring compliance with the law by Member States and by individuals. Secondly, and again generally, the Commission was the proposer of the CRD in accordance with its right of initiation of legislation under the TFEU[5] and as such it can properly be said that its view on legislative intent should carry some weight. Thirdly, in the particular context of this case, the position

[5] The draft as proposed by the Commission is at OJ C 270 E, 25.9.2001, p. 150.

of the Commission as articulated in its written observations in *Reyes* was endorsed by the Court and the observations are consistent with the subsequent guidance of 2020 and 2023. As such the Commission position has received a judicial stamp of approval, which needs to be recognised.

107. The position of the Commission on the correct interpretation of the legislation is that: (i) once a child over 21 has a lawful right of residence the CRD applies in its entirety to the individual concerned which includes Article 23 on the right to work; (ii) it follows that a family member who has obtained a "*right of residence or permanent residence"* does not lose that right by exercising or seeking to exercise the right to work, even if this results in a cessation of dependency; and (iii), the legislative intention would be undermined and the right to work rendered ineffective if it was then to be defeated because the exercise of the entitlement led to a loss of a right to residence which in turn meant that the person in question could not work.

108. Ultimately, my conclusion on this appeal flows from the jurisprudence of the CJEU. The significance of the view of the Commission is only that it is consistent with the case law and to this extent supports my conclusions derived from that jurisprudence. It does though have greater relevance in considering whether a reference to the CJEU should be made (see below at paragraphs [115] – [117]).

Academic commentary

109. The IMA cites two commentaries which, it is said, support the analysis of *Reyes* advanced by the appellant:

> "… there is nothing in the Directive which expressly addresses the loss of dependence of the family member concerned, either because that person takes up employment or self-employment or because that person becomes dependent upon someone else. If the family member were an EU citizen, such a change in status should not matter in most (if not all) cases, because the EU citizen would have the right to take up economic activities, or to become dependent upon someone else, in their own name. This point has been clarified by the judgment in *Reyes*, in which the Court expressly accepts that the dependent family member could cease to be dependent by exercising the right to seek work pursuant to Article 23. However, the question of becoming dependent upon someone else is still open."[6]
>
> (emphasis added)

And in similar vein:

> "This question [in *Reyes*] exposes the innate circularity of grounding residence rights in a requirement of dependency as a *precondition*: must the relevant family member remain in the relationship of dependency to sustain their right to reside,

6 Guild, Peers & Tomkin, *The EU citizenship directive: a commentary* (2019) p. [45].

> or is dependency more like a gateway condition: necessary to enter the host State but capable of being displaced by opportunities that might then arise there? In *Reyes*, the Court opted for the latter approach. Since the factual situation of material dependency must be shown to exist in the country from which the family member comes and at the time when they seek to join the Union citizen on whom they depend,
>
> > [i]t follows that . . . any prospects of obtaining work in the host Member State which would enable, if necessary, a direct descendant, who is 21 years old or older, of a Union citizen no longer to be dependent on that citizen once he has the right of residence are not such as to affect the interpretation of the condition of being a 'dependant' referred to in Article 2(2)(c). [Quoting from *Reyes* §31]
>
> Thus, where the initially required relationship of dependency ceases, the right of residence that was built upon it is not erased in consequence. That finding was underpinned with reference to Article 23 of the Directive, which confirms the entitlement of family members of a Union citizen to become economically active in a Member State in which they have a right to reside." [7]
>
> (emphasis added)

I agree that the literature supports the interpretation of *Reyes* advanced by the appellant and the IMA. Again, my conclusion on this appeal is based upon the case law not the academic literature.

F. Conclusion

110. It follows from the above that the High Court erred.

111. First, the Court applied the wrong point in time for the determination of dependency. As to this consistent case law is to the effect that dependency must be measured as of the date of the application by the dependant to join the migrant EU worker in the host state. It follows that a consequential right of residence which flows from a decision taken at that point in time, by the competent national authority that a family member is dependent, is not lost when the family member exercises other rights (of which an example is the right to work).

112. Secondly, specifically in relation to the right to work, the Court applied the right under the WA and the CRD as permitting *only* of an exercise of the right which did not undermine dependency. The right to work in Article 23 CRD is to be construed in a manner which renders it effective. There is no support in case law (or in Commission guidance or literature) for an interpretation of Article 23 CRD whereby a person (who was dependent at the time of the relevant application) can seek and obtain employment *only* insofar as it does not result in a cessation of dependency. With respect, this approach leads, as the IMA and the appellant point out, to the emasculation of the very

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[7] Shuibhne *EU Citizenship Law* (2023) pp. [177]-[178].

right itself. It is difficult to understand how an entitlement to work can be effectively exercised if it is limited to work which does not lead to independence, i.e. a lack of dependency. What happens, for instance, to a dependent 21 year old engaged in an apprenticeship scheme which does not pay sufficient to fund an independent lifestyle but which, upon completion, results in a pay increase which enables the apprentice to leave home? On the analysis of the Court below by accepting a living wage the apprentice loses the right to residence and thereby the right to continue to be employed which (assuming the child is not removed from the UK) then renders the child dependent, once again, upon the family which, at least in principle, allows the child yet again to seek employment. No policy objective recognised in law was advanced by the SSHD which justifies such a scenario. Furthermore, the solution applied by the Judge is a serious fetter upon the right to work and reside. Had it reflected the legislative intent one would have expected it to have been explicitly set out in the legislation, but it is not.

113. Thirdly, the Court failed to consider how the result arrived at was consistent with the duty to construe the WA and CRD in a manner which meets the test of equality and facilitates and protects fundamental rights which include the right to work, have a private life and to marry.

G. Disposition

114. For all the above reasons I would allow the appeal. Even though there is disagreement between myself and Lord Justice Underhill and Lord Justice Singh as to the proper way in which to read the case law of the CJEU we are, fortunately, in agreement as to the reasoning at the heart of this appeal and as to this we agree that the SSHD erred in law in the decision under challenge and that the Court below was wrong to approve that decision. I would therefore quash the decision of the SSHD and require that it be redetermined in accordance with our judgments.

115. I consider the position upon which we are all agreed to be sufficiently clear not to warrant a reference to the CJEU.

116. The case law of the CJEU on this point is established. It is consistent with the stated position of the Commission and there is, accordingly, no real risk that in allowing the appeal this Court would countenance a position inconsistent with that of the Commission, whose view on this point is likely to carry weight and be followed in the courts of the Member States of the EU. I do not, therefore, consider there to be a material prospect that the courts of the United Kingdom would apply the WA in a manner divergent from that of the courts of the Member States and thereby in a manner colliding with our legal obligations to ensure consistency under Article 4(1) WA.

117. Had it been the case that the issue upon which we are in disagreement was central to the outcome of this case I would have been of the view that, under the WA as implemented into domestic law, we would in effect have been bound to exercise our discretion to refer by the making of a reference to the CJEU in order to obtain clarification. I would have been of the position that the fact that there was disagreement between us at least indicated a lack of clarity in the case law which required resolution and that absent clarification there was a risk that different positions might be taken between the UK and other courts in the EU, which was an outcome we are statutorily

required to endeavour to avoid. In the event we have not had to grapple with this scenario.

Lord Justice Singh:

118. I agree with the judgment of Underhill LJ.

Lord Justice Underhill:

119. I am grateful to Green LJ for his thorough exposition of the background and of the relevant legislation and the case-law, which enables me to proceed directly to a consideration of the issues.

120. The hearing before us proceeded on the basis that the issues fell into two parts, reflecting two distinct heads of relief pleaded in the Claim Form, as follows:

(A) whether the EUSS is fully compatible with the provisions of the Withdrawal Agreement (incorporating the equivalent provisions of the Citizens' Rights Directive) relating to the residence rights of third-country national[8] family members of EU citizens resident in the UK – "the general issue"; and

(B) whether on the facts of her particular case it was unlawful for the Appellant to be refused pre-settled status – labelled, for reasons which will appear, "the causation issue".

Mr David Blundell KC, for the Secretary of State, accepted that we should decide the general issue even if the Appellant failed on the causation issue. I consider the two issues in turn.

(A) THE GENERAL ISSUE

INTRODUCTION

121. As Green LJ shows, this issue turns on the effect of the provisions of the Citizens Rights Directive, given effect in UK law by the Withdrawal Agreement and section 7A of the 2018 Act. At the risk of some repetition, I will briefly summarise the essential provisions in order to establish a firm basis for what follows.

122. The Citizens Rights Directive is divided into seven Chapters. We are primarily concerned with Chapter III, which is headed "Right of Residence". Chapter I contains "general provisions", including the definitions set out in article 2. Chapter IV is concerned with the right of "permanent residence" which becomes available after EU citizens (and, subject to some qualifications, their family members) have been resident in a host country for more than five years. Chapter V contains provisions common to both the right of residence under Chapter III and the right of permanent residence under Chapter IV.

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[8] This is the term used in the CJEU jurisprudence to denote nationals of a country other than an EU member state (or, in this context, the EEA or Switzerland).

123. The provision of Chapter III which is primarily relevant for our purposes is article 7, which concerns rights of residence for more than three months. The following points should be noted:

(1) Article 7 (1) requires member states to give "rights of residence for more than three months" (for short, "residence rights") to EU citizens in the four kinds of case identified under sub-paragraphs (a)-(d). The relevant case here is (a), which covers citizens who are employed or self-employed in the host state (being the status enjoyed by the Appellant's mother). (It should also be noted that sub-paragraph (d) extends the right to EU citizens who are family members of an EU citizen falling under one of other sub-paragraphs; but that does not apply in our case because the Appellant is not an EU citizen.)

(2) Article 7 (2) provides for the same residence rights to be granted to third-country national "family members … accompanying or joining" an EU citizen exercising residence rights under article 7 (1) (a)-(c): this is the relevant provision in our case. For convenience, I will refer to the EU citizen in question (borrowing our domestic terminology) as "the sponsor".

(3) The definition of "family member" in article 2 (2) includes, at (c), "direct descendants" (to whom I will refer as "children"[9]) of the sponsor or of their spouse or partner "who are under the age of 21 or are dependants". Thus, children fall within the definition unconditionally up to the age of 21 but thereafter only if they are "dependants": I will for convenience use the term "adult" to refer to children aged 21 or over. Although the concept of dependence is only formally relevant to adult children it may be the case that the EU legislators proceeded on the basis that children under the age of 21 ought as a matter of policy to be assumed to be dependent on their parents: to that extent, dependency could be said to be the principle underlying the grant of residence rights to children of any age.

(4) The other categories of family member are spouses or civil partners (sub-paragraphs (a) and (b) – in the interest of brevity I will hereafter refer only to spouses), to whom no requirement of dependence applies; and "dependent direct relatives in the ascending line" (i.e. parents or grandparents – again I will hereafter refer only to parents) of the sponsor or their spouse (sub-paragraph (d)).

(5) The term "dependant" is undefined in the Directive, but it is common ground that the test which emerges from the CJEU jurisprudence is accurately summarised in the passage from the EUSS quoted by Green LJ at para. 43 above, namely that the person in question cannot "meet their essential living needs (in whole or in part) without the financial or other material support of [the sponsor]". I will use the term "financially independent" as a shorthand for an adult child or parent who satisfies that test.

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[9] I do so simply because the language is more natural than "direct descendant", but it is necessary to be alert to the potential ambiguity of the term "child": in this context children may be adults.

124. I make three points at this stage about the scheme established by article 7 of the Directive (read with article 2 (2)).

125. First, the family members to whom residence rights are accorded fall into two classes: (a) those who enjoy those rights unconditionally – that is, spouses and children under 21; and (b) those who enjoy them only if they are dependent on the sponsor (or their spouse) – that is, adult children and parents. I will refer to those two groups as "class (a)" and "class (b)".

126. Second, residence rights enjoyed by a third-country national by virtue of their relationship with an EU citizen are well-established in the CJEU jurisprudence as being derivative in character. At para. 50 of its judgment in *Singh v Minister for Justice and Equality*, C-218/14, [2016] QB 208, the Grand Chamber said:

> "As regards the right of residence in the host Member State of nationals of third countries who are family members of a Union citizen, attention should be drawn, as a preliminary point, to the settled case-law of the Court which states that the rights conferred on third-country nationals by Directive 2004/38 are not autonomous rights of those nationals but rights derived from the exercise of freedom of movement by a Union citizen. The purpose and justification of those derived rights are based on the fact that a refusal to allow such rights would be liable to interfere with the Union citizen's freedom of movement by discouraging him from exercising his rights of entry into and residence in the host Member State (see, to that effect, judgment in *O and B*, C-456/12, EU:C:2014:135, paragraphs 36 and 45 and the case-law cited)."

127. It is worth saying a little more about "the purpose and justification" for the derivative rights identified in that passage. Although for the reason explained by the Court the EU legislators believed that it was necessary to remove a disincentive to the exercise of free movement rights, it is important to appreciate that they did so only to the limited extent established by the definition of "family member"; that is, by according derivative rights to those classes of relative in whose cases the disincentive of separation (in the sense of having to live in a different country) would be most powerful – spouses, children under the age of 21 and dependent adult children and parents. They will plainly have appreciated that in some cases a parent might not be prepared to be separated even from a financially independent adult child (or, likewise, a child from a financially independent parent) – for example, though not only, if they had health problems or other vulnerabilities. But they decided to draw the line, in class (b) cases, on the basis of a criterion of dependency. I cannot agree with Green LJ's characterisation of that criterion (see para. 44 above) as a "subordinate requirement". On the contrary, it represents an important policy decision by the legislators setting the limits of a derivative right which would otherwise have represented an exorbitant extension of access by third-country nationals to member states' labour markets.

128. I would add that the choice of such a criterion is not in any way unreasonable or inhumane. In a perfect world many, perhaps most, parents and their adult children would like to live in the same country, but it is part of the human condition, and widely accepted, that for a variety of reasons that will not always be possible, particularly (though not only) if parent and child have different nationalities.

129. Third, in a class (b) case the question of whether the adult child or parent applying to join their sponsor is dependent on the sponsor falls to be answered at the date of the application: see para. 30 of the judgment of the CJEU in *Reyes*.

130. Finally, I should mention that article 16 (2) of the Directive, which falls under Chapter IV, gives third-country nationals who are family members rights of permanent residence once they "have legally resided with [the sponsor] in the host [Member State] for a continuous period of five years". At that point the requirements which they had to satisfy in order to qualify for the right of residence under Chapter III fall away (as noted by the CJEU at para. 60 of its judgment in *GV* – see para. 140 below).

THE ISSUES

131. On a straightforward reading of article 7 by itself the derivative rights accorded to third-country national family members will continue only so long as they satisfy the relevant definition in article 2 (2), with the result that if an adult child ceases to be dependent on the sponsor they thereupon cease to enjoy residence rights in the host state under article 7 (2). I develop this point further at paras. 137-141 below.

132. However, it is the Appellant's case that those provisions cannot be read in isolation and that, if they are read with article 23 (right to work) and/or article 24 (equal treatment), a third-country national adult child may in the circumstances covered by those articles continue to enjoy residence rights notwithstanding that they have ceased to be dependent on the sponsor. The general issue in this appeal is whether either or both of those articles does indeed qualify the apparent effect of article 7 (2).

133. I will consider separately the cases based on article 23 and on article 24.

(1) THE CASE BASED ON ARTICLE 23

134. The terms of article 23 are set out by Green LJ at para. 41 above. It falls under Chapter V of the Directive and therefore applies both to those family members of EU citizens who are entitled to residence for more than three months under Chapter III and to those who are entitled to permanent residence under Chapter IV. I will as a shorthand refer to it as conferring a "right to work" or, to use a phrase which features in the case-law, a right to engage in "gainful employment".

135. The essence of the Appellant's case, supported by the IMA, is that it would be self-contradictory, and contrary to the evident purpose of the Directive, if during their first five years of residence an adult child who had joined their sponsor under article 7 and who took advantage of the right to work under article 23 in a way which led to them ceasing to be dependent thereby lost the right of residence which they would otherwise enjoy; and she contends that that argument has been accepted by the CJEU in its decision in *Reyes*.

136. As will appear, I accept the Appellant's case that the CJEU in *Reyes* has decided that – to put it crudely – article 23 trumps the requirement of dependency in class (b) cases; and I accept that we should follow that decision. But I should say that but for it I would have rejected the Appellant's case; and in case the matter goes further I propose to explain why that is so. I will accordingly start by considering the effect of the relevant provisions of the Directive without reference to *Reyes*.

The Effect of the Directive without Reference to *Reyes*

137. I have already said that in my opinion the natural reading of article 7 (2) of the Directive, read by itself, is that the residence rights which it confers on a family member are conditional on them continuing to satisfy the definition in article 2 (2). To put it another way, dependency is a continuing requirement for the purpose of Chapter III and not a mere gateway. In the course of his oral submissions on behalf of the Appellant, Mr Chris Buttler KC expressly accepted that that was the case (subject to his arguments based on articles 23 and/or 24).

138. Although that is in my view clear from the terms and structure of article 7 itself, I believe that it is reinforced by other provisions of the Directive in two respects.

139. First, articles 12 and 13 make special provision for particular kinds of case where the conditions entitling family members to enjoy residence rights under article 7 cease to apply. Article 12 applies where the sponsor dies or leaves the host state, and article 13 where the marriage between the sponsor and the spouse comes to an end. I need not summarise the details of the special provision in each case: what matters is that the premise of both articles is necessarily that without it the family member's residence rights would lapse.

140. Second, article 14 (2) provides (so far as material):

> "Union citizens and their family members shall have the right of residence provided for in [article 7] … as long as they meet the conditions set out therein."

In my view the natural reading of that provision is that the reference to "conditions" extends to the definition of "family member"; and on that basis the language of "as long as" explicitly confirms that the requirement of dependency in class (b) cases is continuing. Green LJ reads "conditions" as referring only to the matters labelled as "conditions" in article 7 (2), namely those itemised as (a)-(c) under article 7 (1): see para. 39 above. I do not think that that reading can be reconciled with paras. 59-60 of the judgment of the CJEU in *GV*. The facts of that case, and the basis on which it was decided, are summarised at paras. 90-93 above. I will set out the entirety of paras. 55-60 of the judgment because I will have to refer to it again later:

> "55. The concept of 'family member', used in Article 7(1)(d) of Directive 2004/38, which must be applied by analogy, is defined in Article 2(2) of that directive and designates, inter alia, in point (d), the 'dependent direct relatives in the ascending line'.
>
> 56. Accordingly, it follows from a combined reading of Article 2(2)(d) and Article 7(1)(a) and (d) of Directive 2004/38 that the direct relatives in the ascending line of a worker who is a Union citizen have a derived right of residence for more than three months where they are 'dependent' on that worker.
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> 57. As far as that condition is concerned, the Court has stated that the situation of dependency must exist, in the country from which the family member concerned comes, at the time when he or she applies to

> join the Union citizen on whom he or she is dependent (judgment of 16 January 2014, *Reyes*, C-423/12, EU:C:2014:16, paragraph 30 and the case-law cited).
>
> 58. However, as the Advocate General noted, in essence, in point 44 of her Opinion, in the case which gave rise to the case-law cited in the preceding paragraph of the present judgment, the Court had been invited to consider the conditions to be satisfied at the time when the person concerned applies for a derived right of residence in the host Member State, and not on the conditions to be satisfied by that person in order to retain that right.
>
> 59. In that regard, it should be recalled that Article 14 of Directive 2004/38, entitled 'Retention of the right of residence', provides, in the first subparagraph of paragraph 2 thereof, that Union citizens and their family members are to have the right of residence provided for, inter alia, in Article 7 thereof, as long as they meet the conditions set out in the latter article.
>
> 60. It thus follows from Article 14(2), read in combination with Article 2(2)(d) and Article 7(1)(a) and (d) of Directive 2004/38, that a direct relative in the ascending line of a worker who is a Union citizen enjoys a derived right of residence *as long as he or she remains dependent on that worker* [emphasis supplied], until such time as that relative, having resided lawfully for a continuous period of five years in the host Member State, can claim a right of permanent residence under Article 16(1) of Directive 2004/38."

Para. 60 clearly treats dependency as a "condition" which requires to be continuously satisfied.

141. Green LJ describes the reading of article 7 which I would adopt as "literal" and "narrow": see para. 44 above. I accept that it is literal, but not in any pejorative sense. It is in my view the natural reading of the article, reinforced by the further provisions to which I have referred.

142. The question then is whether the natural meaning of article 7, so understood, has to be qualified in order to give effect to article 23.

143. I start with the language of article 23 itself. It requires the right to work to be granted to "family members *who have the right of residence* [my emphasis]". The right is expressed to be "irrespective of nationality", and in practice it is of significance only to family members who are third-party nationals, since a family member who was an EU citizen would have a right to work in any event. The words which I have italicised are explicit that the right to work is dependent on the right to reside: it is, in the language of the title, a "related right".

144. The Appellant contends, however, that it is necessary to disregard the literal (I would say the natural) meaning of article 23, because it would be self-contradictory if a dependent adult child or parent who exercises the right to work granted by it would thereby lose the right to reside – in other words, that the Directive would be giving with

one hand but taking away with the other. I would not (subject to the effect of *Reyes*) accept that argument. My reasons are as follows.

145. The starting point is that an application of the literal language of article 23 would not mean that it had no effect. The article is not concerned only with family members in "class (b)". On the contrary, it is equally concerned with class (a) – that is, spouses and children under the age of 21 – in respect of whom no question of having to prove dependency arises. In their case, exercising the right conferred by article 23 would have no impact on their right to reside. Further, even in class (b) cases it will not necessarily do so. Many adult children may take up work but not earn enough to be able to become financially independent: that may be particularly the case if they are undertaking a course of study or if they suffer from a disability, but those are not the only possibilities. Likewise dependent parents may undertake paid work – typically "retirement jobs" of some kind – but not earn enough to be independent of their children.

146. Thus the application of the language of the Directive in accordance with its natural meaning would only deprive article 23 of effect in the case of a particular subset of family members, namely third-country national adult children or parents who earn enough to be financially independent, and who have not been lawfully in the host country for five years so as to qualify for permanent residence under Chapter IV. I do not regard the fact that article 23 would confer no substantial benefit on that particular group as either a breach of the effectiveness principle or (which is ultimately the same thing) contrary to the policy of the Directive. For the reasons already given, the criterion of (continuing) dependence is fundamental to the policy balance struck by the EU legislators in determining the extent of derivative rights to be enjoyed by third-country national family members. It would undermine that policy balance if the criterion were disapplied in any case where a third-country national adult child obtained gainful employment in this country: if they are no longer dependent the rationale for allowing them to reside in the host country has disappeared.

147. Mr Buttler, in his submissions summarised by Green LJ at para. 44 above, analyses the present case as requiring a balance between a fundamental right (that is, an EU citizen's right to free movement) and a limitation on that right (that is, the loss of dependency, and thus the right to reside, which a third-party national adult child would suffer if they took up gainful employment). I do not accept that analysis. The EU citizen's right to free movement is indeed fundamental, but the derivative additional rights accorded to family members are not fundamental in the same sense: they are accorded only to the extent that the EU legislators have chosen to define. I do not believe that the boundaries of those derivative rights set out in the Directive can properly be characterised as limiting, or derogating from, the right of free movement. On the contrary, I believe that they need to be respected.

148. I would also note that taking up gainful employment is not the only way that a third-country national adult child (or parent) may cease to be dependent on their sponsor. They might, for example, marry a spouse who was able to provide for them, or come into an inheritance, or win the lottery. In any of those cases their financial good fortune would come at the cost of the loss of residence rights: Mr Buttler expressly accepted this in his oral submissions. I see no reason why the loss of dependence as a result of taking up work is any different. At the risk of repeating myself, the right to work accorded to third-party national family members under article 23 is not itself a

fundamental right like the right to work accorded to EU citizens. It is a derivative right – indeed, it might be said, a right ancillary to a derivative right – and one explicitly accorded by the Directive only to those adult children who are dependent.

149. That conclusion is in my view consistent with the policy underlying the requirement of dependency identified at para. 127 above. I am rather inclined to doubt whether in many cases an EU citizen with a third-country national child aged between 16 and 20[10] would be deterred from exercising their free movement rights by the possibility that the child might lose their residence rights on attaining the age of 21 because of becoming financially independent as a result of employment (or indeed marriage or any other reason): people recognise that the medium- or long-term future is unpredictable. But I may be wrong about that; and in any event I am happy to accept that in at least some cases this possibility could be a disincentive. The real point, as I have already said, is that the policy of the EU legislature is not to remove all disincentives to the exercise of free movement rights but only, so far as class (b) is concerned, to grant derivative rights where the adult child or parent in question is dependent. If a parent is unwilling to move to, or remain in, a host country because of the prospect of a third-country national adult child (I emphasise "adult") having to choose between achieving financial independence through work and being separated from their parents, that is an inevitable consequence of the adoption of a criterion of dependency.

150. The answer is essentially the same if one focuses (strictly illegitimately) on the hardship to the child of having to choose between work and separation, rather than on the disincentive to the parent, as in Green LJ's example at para. 112 above: any such hardship is the consequence of the dependency criterion. But it is also right to recall the point which I make at para. 126: there is nothing axiomatically unfair in adult children having to live and work in a different country from their parents, particularly where they are of different nationalities.

151. I mention finally a point made by Mr Blundell based on article 17 (2) of the Withdrawal Agreement, quoted by Green LJ at para. 27 above, but which I set out again for ease of reference:

> "The rights provided for in this Title for the family members who are dependants of Union citizens or United Kingdom nationals before the end of the transition period, shall be maintained even after they cease to be dependants."

Before the Judge the Appellant relied on that provision as an alternative basis for her claim. That argument was rejected by him for reasons which he set out at paras. 80-96 of his judgment (see especially paras. 94-95); and Mr Buttler made it clear that he was not now challenging the Judge's conclusion in that regard. However, Mr Blundell's point was that a provision of this character can only have been regarded as necessary on the basis that, consistently with the Secretary of State's case, the rights of family members in class (b) would otherwise cease as soon as they ceased to be dependent on

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[10] If the child were younger than 16 there would be no risk because by the time they reached 21 they would become entitled to permanent residence under Chapter IV, at least if they had lived with the parent throughout that period.

the sponsor. There may be some force in that point, but I prefer to rest my reasoning squarely on the terms of the Directive itself.

152. For those reasons I would not, subject to the effect of the decision in *Reyes*, accept that a third-country national adult child who ceases to be dependent on their parents as a result of exercising the right to work under article 23 retains the right to reside in the host country.

The Effect of *Reyes*

153. Green LJ has helpfully summarised the facts of *Reyes*, and the relevant reasoning of the Court, at paras. 70-83 above. The crucial passage for our purposes is at paras. 31-32, which I will set out again for ease of reference:

> "31. It follows that, as, in essence, has been stated by all the parties which have submitted observations to the Court, any prospects of obtaining work in the host Member State which would enable, if necessary, a direct descendant, who is 21 years old or older, of a Union citizen no longer to be dependent on that citizen once he has the right of residence are not such as to affect the interpretation of the condition of being a 'dependant' referred to in Article 2(2)(c) of Directive 2004/38.
>
> 32. Furthermore, as the European Commission has rightly pointed out, the opposite solution would, in practice, prohibit that descendant from looking for employment in the host Member State and would accordingly infringe Article 23 of that directive, which expressly authorises such a descendant, if he has the right of residence, to take up employment or self-employment (see, by analogy, *Lebon*, paragraph 20)."

154. Although the reading of the Directive adopted in that passage is contrary to my own view as expressed above, I do not think that it is possible to escape the conclusion that in it the Court holds that the right to work accorded to family members by article 23 of the Directive trumps the requirement of continuing dependency in article 7 (2). The position is all the clearer if one considers the Commission's submissions, which the Court endorses, and the analogy with *Lebon*. Green LJ sets out the submissions in question at para. 102 above and the passage from *Lebon* at para. 53. I need not repeat them here, but the following statement from the Commission's submissions is particularly explicit:

> "… [A] family member falling under Article 2, point 2, subparagraph (c) of [the Directive] and who has obtained a right of residence or permanent residence cannot, upon obtaining said paid employment, lose their right of residence as a result, since they are merely exercising a right expressly provided for by [the Directive]."

I have to say that, even having regard to those two references, the Court's reasoning is extremely summary and does not address what seem to me to be the difficulties about the position which it adopts; but that is its style.

155. Mr Blundell argued that paras. 32-33 were not concerned with the present situation because the issue in *Reyes* was whether the adult child needed only to show that she was a dependant at the time of her application to join her mother in Sweden: the Court was not being asked to decide the hypothetical question of whether, if she took up work after she had arrived, she would cease to be dependent. He pointed out that the Grand Chamber in *GV* distinguished *Reyes* on precisely that basis: see paras. 57-58 quoted at para. [140] above.

156. Mr Blundell's point is correct as far as it goes. *Reyes* was indeed not directly concerned with the question whether the child would lose her residence rights if she became financially independent as a result of taking up work after she arrived in Sweden. But the fact remains that in para. 32 it addressed that very question as an integral part of its reasoning on the question that it did have to decide; and it held that she would not. Although it is distinguished in *GV* for the purpose of the (different) issue which the Court was considering in that case, that distinction does not undermine its reasoning in para. 32. I do not see how the view expressed in that paragraph can be ignored, and I agree with Mr Buttler that we are obliged to treat it as an authoritative expression of EU law.

157. Mr Buttler sought to gain support also from some of the other CJEU authorities referred to by Green LJ, but he acknowledged that none of them dealt directly with the issue on this appeal, and I do not myself find it useful to consider them.

Conclusion on Article 23

158. I agree with Green LJ that the Judge was wrong to reject the Appellant's claim under article 23, though my reasons do not at all points correspond with his.

THE CASE BASED ON ARTICLE 24

159. Article 24 of the Directive is entitled "Equal Treatment". Paragraph (1) reads:

> "Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence."

160. Before the Judge the Appellant did not seek to rely on article 24, nor did it feature in her skeleton argument for this appeal. Mr Buttler did, however, seek to rely on it in his submissions before us. His essential point was that if an adult child of an EU citizen lost their right to reside by taking up work which would render them financially independent they were not being permitted to enjoy equal treatment with the nationals of that Member State.

161. Mr Blundell made no formal objection to the Appellant seeking to rely on article 24, and he identified some arguments in response, in particular that article 24 had no application in the context of the right to work, which constituted a *lex specialis*. He also relied on the decision of the CJEU in *CG* (see para. 94 above). However he did

express some disquiet about the introduction of a case based on article 24 at so late a stage: among other things, he made the point that the Secretary of State had had no opportunity to adduce any evidence in support of a case of justification.

162. As I understand para. 100 of his judgment, Green LJ would be prepared to find for the Appellant on the basis of article 24 (see his sub-para. (ii)) as well as on the basis of article 23 (sub-para. (iii)). In view of the fact that the article 24 case was raised for the first time in the hearing before us and was not fully explored in argument, I prefer to base my decision only on article 23. In those circumstances I would say no more about article 24 than that my present view is that Mr Blundell's points in response were at least well arguable.

(B) THE CAUSATION ISSUE

163. At para. 5 of his judgment the Judge records:

> "It is common ground that the claimant became estranged from her mother and other biological family members, as a result of which she has lived independently from them since at least July 2016, when the claimant was aged 20. It was then that the claimant married her husband, a national of Bangladesh. The claimant does not assert that, after this point, she was financially dependent upon her mother."

Both counsel confirmed before us that the facts there stated were indeed common ground. A little more detail appears in the letter from the Appellant's solicitors accompanying her application for pre-settled status. The Appellant married her husband, a Bangladeshi national living in the UK, on 11 July 2016 (some two-and-a-half months before she was due to turn 21), and it was that marriage that was the cause of the estrangement. It seems, though this is not expressly stated, that she has been living with her husband since then, and they had a daughter in May 2018.

164. It was Mr Blundell's case that it followed from those facts that, even if the Court accepted the Appellant's submissions on the general issue, her claim to be entitled to pre-settled status was bound to fail. As he put it at para. 8 of his skeleton argument:

> "… [W]ork was not the reason that [the Appellant] was not dependent on her mother. She was not dependent because she had left the family home, and became estranged from her family, in 2016, before she reached the age of 21."

This raises what was referred to as "the causation issue". The Secretary of State's case is that, even if article 23 may trump the requirement of dependency in article 7 (2), it can only do so if the child in question has ceased to be dependent on their EU citizen parent(s) *as a result of* exercising the right to work. Mr Blundell submitted that it followed from the facts as stated in para. 5 of the judgment that that was not the case here: the Appellant's dependence on her mother ceased as a result of the estrangement and not of her taking up gainful employment.

165. Mr Buttler's response was that, although it was indeed common ground that the Appellant had lived independently from her parents from the date of her marriage, the Judge had made no finding that she was dependent on her mother until that date. He

referred to a short witness statement dated 20 April 2023 (a few days before the hearing below) in which she said:

> "I started working in the UK in August/September 2015. I was in work throughout the period from Aug/Sept 2015 until the date of my application to the Secretary of State, save for short periods in which I was looking for work or on maternity leave."

He acknowledged that that did not give any detail, but he said that the likelihood was that she ceased to be dependent on her mother as a result of taking up gainful employment in 2015 (though he acknowledged that if the decision were quashed that question could be further considered by the decision-maker in taking a fresh decision). However, he submitted that it was in any event not open to the Secretary of State to advance the causation case. The Judge had rejected the Appellant's claim squarely on the basis of the general issue, and her sole ground of appeal was directed to that issue: if the Secretary of State wished to run an alternative case based on causation that needed to be raised by Respondent's Notice, which it had not been.

166. I am not sure that either party's submissions directly confront the essential question, which I believe can be analysed as follows:

(1) The Appellant was entitled to pre-settled status if her residence in the UK had at all times been in accordance with her rights under the Directive (as preserved by the Withdrawal Agreement). The residence in question falls into two periods, up to and after her 21st birthday on 25 September 2016.

(2) As regards the first period, it is immaterial whether she had in fact ceased to be dependent on her mother, whether because she had exercised her right to work or because she had left home to get married. She enjoyed residence rights under article 7 (2) simply because she was her mother's child.

(3) It is only as regards the period after she had turned 21 that she needs to rely on the principle established by *Reyes*. As identified above, that principle is that a family member who enjoys residence rights as the dependant of an EU citizen should not lose that right as a result of exercising their right to work under article 23. Although in *Reyes* the applicant was an adult child at the time that she wished to join her mother, both counsel before us proceeded on the basis that the principle would apply also (assuming the Appellant succeeded on the general issue) in a case where a child had exercised their article 23 rights while still under 21 and had continued to work after reaching that age; and that seems to me correct.

(4) Thus the dispositive question is whether the Appellant (a) had, prior to 25 September 2016, started to exercise the article 23 rights which she enjoyed as a family member and (b) had continued to do so from then on up to the date of her application for pre-settled status.

167. That is not the question addressed by the causation case formulated by Mr Blundell in his skeleton argument. No doubt the Appellant's estrangement from her mother meant that she cannot have been dependent on her immediately before she turned 21; but it does not mean that she was not as at that date exercising her article 23 rights. On the contrary, there is undisputed evidence that she was indeed in gainful employment from

August/September 2015 onwards, which on the face of it means that she was exercising her article 23 rights and falls within the ratio of *Reyes*. The causation case does not address that point.

168. As it happens, a possible answer did emerge in the course of the oral argument before us. As noted at para. 165 above, Mr Buttler's submissions proceeded on the basis that the ultimate question was not simply whether the Appellant was in gainful employment before she turned 21 but whether she had as a result become financially independent (in the sense identified at para. 123 above); and in that case it would follow that she would also have had to remain financially independent up to the date of her application. Mr Blundell did not explicitly adopt the same approach, but it was arguably implicit in his position also. If the achievement of financial independence were the correct test, there was material before the Court which at least strongly suggests that the Appellant could not satisfy it. One point is that throughout the period she never lived on her own: up to her marriage she lived with her parents, and after it she lived with her husband. No doubt that in itself is not decisive: she might have been earning enough to live alone even though she was not doing so. But there were also before the Court copies of her P60s for the years ending 5 April 2018 and 2019, together with two payslips from Tesco from later in 2019: these appear to show that she was working part-time and at low wages.[11] However, no case was advanced to us based on those figures; and it would not in any event be right for us to entertain such a case (even if it were raised below) without a Respondent's Notice.

169. That being so, I ought not to express any definitive view on whether the criterion that engages the *Reyes* principle is indeed simply whether the Appellant was in gainful employment or whether she was earning enough from that employment to be financially independent (or perhaps some half-way house, such as that the earnings should be economically significant). But I should record my provisional view that financial independence is not the correct criterion. Although in *Reyes* the exercise of article 23 rights was linked to the question of dependence, the Court's decision was only that the exercise of article 23 rights by a family member whose residence rights depend on their being dependent does not deprive them of those rights: that is not the same as saying that the exercise of article 23 rights will only preserve the right of residence if the family member achieves financial independence thereby.

170. I would therefore, like Green LJ, reject the causation case. It should be noted, however, that my reasons are narrower than his. The difference broadly reflects the differences in our approaches to the general issue, but I should briefly identify it.

171. As I understand it, Green LJ believes that the case-law shows that the Appellant need show no more than that she was dependent on her mother at the point when she first applied for, and was granted, the right to join her in the UK[12]: see para. 100 (i) above. Thus he endorses Professor Shuibhne's view, in the passage quoted at para. 109, that dependency is only a "gateway condition", and "where the initially required

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11 The gross earnings for the two years were £11,860 and £9,104 respectively, and the pay-slips showed her working for nine hours each week at £8.42 per hour (being the then minimum wage).

12 Strictly, dependency was not a condition of her qualifying as a family member; but I accept that it may be a correct description in substance for the reason canvassed in para. 123 (3) above.

relationship of dependency ceases, the right of residence that was built upon it is not erased in consequence". With respect, I do not accept that. It seems to me a wider gloss on the terms of the Directive, as I have analysed them at paras. 137-141 above, than the reasoning in *Reyes* justifies. It is one thing to say, as the Court does in *Reyes*, that a person who has acquired residence rights as a dependent child does not lose them by virtue of exercising the right to work accorded by article 23. It is quite another to say that once you have joined your EU citizen parent (whether as a child under the age of 21 or as a dependent adult child) your consequent residence rights continue even if you cease to be dependent for a reason that has nothing to do with the exercise of any right accorded by the Directive (of which I give examples in para. 148 above). I do not believe that either *Jia* or *Ogieriakhi* says anything different. Although in both cases (as indeed in *Reyes*) the Court identified the point at which the question of dependency had to be determined as the time when the application to join the EU citizen was made, that was in the context of the entitlement to acquire the initial right of residence: the position of an adult child who ceased to be dependent before they had been lawfully resident for five years did not fall for consideration.

OVERALL CONCLUSION AND DISPOSAL

172. In circumstances where we are agreed about the result, I do not believe that the differences between my reasoning and that of Green LJ are such as to justify the referral of this case to the CJEU. That being so, I agree with him that the appeal should be allowed and the Secretary of State's decision quashed. The Appellant's application should be redetermined by her in accordance with our judgments.