Neutral Citation Number: [2023] EWHC 1615 (Admin)

Case No: CO/1747/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2023

Before :

MR JUSTICE LANE

- -

Between :

The King (on the application of)	**Claimant**
FATIMA ALI	
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Mr C Buttler KC, Ms C Bayati (instructed by **Polpitiya & Co**) for the **Claimant**
Mr D Blundell KC, Ms J Smyth (instructed by **the Government Legal Department**) for the **Defendant**

Hearing dates: 25 April 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 30 June 2023by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE LANE

Mr Justice Lane :

A. INTRODUCTION

1. This claim for judicial review concerns the rights of children of European Union citizens who are not themselves citizens of the European Union or British citizens. Under EU law, such a child who is either under the age of 21 or over that age but financially dependent on the EU citizen is a "family member" within the meaning of article 2 of Directive 2004/38/EC ("the Directive"). By virtue of article 7 of the Directive, such a child has the right of residence on the territory of another Member State for a period of longer than three months if they are accompanying or joining the EU citizen concerned; provided that that citizen satisfies the conditions referred to in article 7(1)(a) to (c); for example, being a worker or self-employed person.

2. Following its decision to leave the EU, the United Kingdom entered into an 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 Withdrawal Agreement"). The transition period, during which EU law continued to apply in the United Kingdom, came to an end at 11:00 pm GMT on 31 December 2020. Thereafter, the EU law of free movement continues to apply in the United Kingdom only if and to the extent that it is specifically applied by the Withdrawal Agreement. That agreement is given effect in the law of the United Kingdom by section 7A of the European Union (Withdrawal) Act 2018.

3. The basic question posed by the judicial review is whether the defendant's immigration rules correctly reflect the Withdrawal Agreement by providing that, in order to qualify for continuing residence under the Withdrawal Agreement, the third country national child of an EU citizen in the United Kingdom must be either under the age of 21 or remain financially dependent on the EU citizen at the end of the transition period.

B. THE CLAIMANT AND HER CASE

4. The claimant is a citizen of Bangladesh, born on 25 September 1995. The claimant entered the United Kingdom in December 2014, aged 19. She did so as the family member of her EEA national mother (as a child under 21). She entered in possession of an EEA family permit issued pursuant to the Directive and the relevant domestic implementing legislation: the Immigration (European Economic Area) Regulations 2006.

5. 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.

6. The residence card, issued in connection with the claimant's entry into the United Kingdom, was valid until 21 September 2020. On 9 October 2019, the claimant made an application to the defendant for pre-settled status/limited leave to remain under the

EU Settlement Scheme ("EUSS") as the family member of her mother. On 24 September 2020, that application was refused. The defendant's reason was that the claimant was not, at the date of decision, dependent upon her mother. The defendant stated that this was a requirement since the claimant was now over 21. The claimant's application for administrative review of that decision was unsuccessful.

7. The grounds of claim contend that the defendant's decision is contrary to the Withdrawal Agreement. They further contend that the decision was, in effect, irrational in that a person granted limited leave to remain as a child under 21 who then reaches the age of 21 does not require to prove dependency on the EU citizen; whereas someone such as the claimant, who was previously granted a residence card, and who then reaches 21, is required to demonstrate such dependency.

C. THE DIRECTIVE

8. Article 2 of the Directive defines "family member" as, *inter alia*, "the direct descendants" of the Union citizen "who are under the age of 21 or are dependants". The right of such a family member to accompany or join the EU citizen in the host Member State is governed exclusively by EU law. Where the criteria under the Directive are satisfied, the right is automatic. This stands in contrast to the position of "other family members", as to whom article 3(2) provides that the host Member State must "facilitate entry and residence" in accordance with its national legislation.

9. Article 12 provides for the retention of the right of residence by family members in the event of the death or departure of the Union citizen, whose family member they are. The death of the Union citizen shall not entail the loss of the right of residence of the family member, where they have been residing as such for at least one year before that death. Before acquiring the right of permanent residence, the family member must meet one or more of the conditions laid down in article 7(1)(a) to (d).

10. Article 13 makes provision for the retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership. Amongst the ways in which the right of residence may be retained is where the marriage etc has lasted at least three years, including one year in the host Member State.

11. Article 14 (retention of the right of residence) provides, at paragraph (2), that Union citizens and their family members shall have the right of residence provided for in articles 7, 12 and 13 "as long as they meet the conditions set out therein".

12. Article 16 makes provision for the right of permanent residence in respect of EU citizens and their family members. Those who have resided legally for a continuous period of five years in the host Member State have the right of permanent residence there, without thereafter having to be a worker, self-employed etc. Article 16(2) provides that this also applies 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".

13. Article 23 (related rights) provides as follows:

> "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."

D. THE WITHDRAWAL AGREEMENT

14. Article 1 provides that the Withdrawal Agreement sets out the arrangements for the withdrawal of the United Kingdom from the European Union and from Euratom. Article 2 contains definitions, including that of "Union law".

15. Article 4(4) states that the provisions of the Withdrawal 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 ("the CJEU") handed down before the end of the transition period. Thereafter, article 4(5) provides that the United Kingdom's judicial and administrative authorities shall have due regard to relevant case law of the CJEU handed down after the end of that period.

16. Article 6(1) reads as follows:-

> "1. With the exception of Parts Four and Five, unless otherwise provided in this Agreement, all references in this Agreement to Union law shall be understood as references to Union law, including as amended or replaced, as applicable on the last day of the transition period."

17. Part Two of the Withdrawal Agreement concern citizens' rights. Article 9 contains relevant definitions.

18. Article 13 provides as follows:-

> "Article 13
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> **Residence rights**
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> 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.
>
> Family Members who are either Union citizens or United Kingdom nationals shall have the right to reside in the host State as set out in Article 21 TFEU and in Article 6(1), point (d) of Article 7(1), Article 12(1) or (3), Article 13(1), Article 14, Article 16(1) or Article 17(3) and (4) of Directive 2004/38/EC, subject to the limitations and conditions set out in those provisions.

> 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.
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> 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."

19. Article 15 states:-

> "Article 15
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> **Right of permanent residence**
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> Union citizens and United Kingdom nationals, and their respective family Members, who have resided legally in the host State in accordance with Union law for a continuous period of 5 years or for the period specified in Article 17 of Directive 2004/38/EC, shall have the right to reside permanently in the host State under the conditions set out in Articles 16, 17 and 18 of Directive 2004/38/EC. Periods of legal residence or work in accordance with Union law before and after the end of the transition period shall be included in the calculation of the qualifying period necessary for acquisition of the right of permanent residence.
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> Continuity of residence for the purposes of acquisition of the right of permanent residence shall be determined in accordance with Article 16(3) and Article 21 of Directive 2004/38/EC.
>
> Once acquired, the right of permanent residence shall be lost only through absence from the host State for a period exceeding 5 consecutive years."

20. Article 17 provides:-

> "Article 17
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> **Status and changes**
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> The right of Union citizens and United Kingdom nationals, and their respective family Members, to rely directly on this Part shall not be affected when they change status, for example between student, worker, self-employed person and economically inactive person. Persons who, at the end of the

> transition period, enjoy a right of residence in their capacity as family Members of Union citizens or United Kingdom nationals, cannot become persons referred to in points (a) to (d) of Article 10(1).
>
> 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."

21. Article 18 concerns the issuance of residence documents. Article 18(1)(l) reads as follows:-

> "(l) the host State may only require family Members who fall under point (e)(i) of Article 10(1) or Article 10(2) or (3) of this Agreement and who reside in the host State in accordance with point (d) of Article 7(1) or Article 7(2) of Directive 2004/38/EC to present, in addition to the identity documents referred to in point (i) of this paragraph, the following supporting documents as referred to in Article 8(5) or 10(2) of Directive 2004/38/EC:
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> (i) a document attesting to the existence of a family relationship or registered partnership;
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> (ii) the registration certificate or, in the absence of a registration system, any other proof that the Union citizen or the United Kingdom national with whom they reside actually resides in the host State;
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> (iii) for direct descendants who are under the age of 21 or who are dependants and dependent direct relatives in the ascending line, and for those of the spouse or registered partner, documentary evidence that the conditions set out in point (c) or (d) of Article 2(2) of Directive 2004/38/EC are fulfilled;
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> (iv) for the persons referred to in Article 10(2) or (3) of this Agreement, a document issued by the relevant authority in the host State in accordance with Article 3(2) of Directive 2004/38/EC.

22. Article 20 of the Directive requires Member States to issue family members who are not nationals of a Member State and who are entitled to permanent residence with a permanent residence card. Such a card is renewable every ten years.

23. Article 21 of the Directive explains that for the purposes of the Directive, continuity of residence may be attested by any means of proof in use in the host Member State. Continuity of residence is broken by any duly enforced expulsion decision.

24. Article 39 provides that the persons covered by Part Two shall enjoy the rights provided for in the relevant Titles of that Part "for their lifetime, unless they cease to meet the conditions set out in those Titles".

25. Article 185 (entry into force and application) states that (subject to exceptions not here relevant) Part Two "shall apply as from the end of the transition period".

26. Article 158 makes provision for references to the CJEU for a request for a preliminary ruling, in respect of the interpretation of Part Two.

E. THE CLAIMANT'S CASE IN DETAIL

27. The claimant's primary case rests upon what she submits is the proper understanding of the judgment of the CJEU in Reyes v Migrationsverket (C-423/12) [2014] QB 1140. It is therefore necessary to consider this case in detail.

28. The applicant, a national of the Philippines, received money there from a man who was the partner and later the husband of the applicant's mother. The mother had become an EU citizen and she and her husband resided in Sweden. Although the applicant had professional qualifications, she had never held a job in the Philippines. After reaching the age of 21, she moved to Sweden and applied for a residence permit as a "family member" of her mother and stepfather. The Swedish Immigration Board refused the application, on the basis that the applicant's qualifications would enable her to secure employment in Sweden and, thus, not be dependent upon the parents.

29. The Swedish appellate court referred the following questions to the CJEU:-

> "1. Can Article 2(2)(c) of Directive 2004/38 be interpreted as meaning that a Member State, on certain conditions, can require a direct descendant who is 21 years old or older – in order to be regarded as dependent and thus come within the definition of a family member under Article 2(2)(c) of Directive 2004/38 – to have tried to obtain employment or help with supporting himself from the authorities of his country of origin and/or otherwise to support himself, but that that has not been possible?
>
> 2. In interpreting the term "dependant" in Article 2(2)(c) of Directive 2004/38, does any significance attach 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 in 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. The CJEU answered the first question as follows:-

> "22. In order to determine the existence of such dependence, the host Member State must assess whether, having regard to his financial and social conditions, the direct descendant, who

is 21 years old or older, of a Union citizen, is not in a position to support himself. The need for material support must exist in the State of origin of that descendant or the State whence he came at the time when he applies to join that citizen (see, to that effect, *Jia*, paragraph 37).

23. However, there is no need to determine the reasons for that dependence or therefore for the recourse to that support. That interpretation is dictated in particular by the principle according to which the provisions, such as Directive 2004/38, establishing the free movement of Union citizens, which constitute one of the foundations of the European Union, must be construed broadly (see, to that effect, *Jia*, paragraph 36 and the case-law cited).

24. The fact that, in circumstances such as those in question in the main proceedings, a Union citizen regularly, for a significant period, pays a sum of money to that descendant, necessary in order for him to support himself in the State of origin, is such as to show that the descendant is in a real situation of dependence vis-à-vis that citizen.

25. In those circumstances, that descendant cannot be required, in addition, to establish that he has tried without success to find work or obtain subsistence support from the authorities of his country of origin and/or otherwise tried to support himself.

26. The requirement for such additional evidence, which is not easy to provide in practice, as the Advocate General noted in point 60 of his Opinion, is likely to make it excessively difficult for that descendant to obtain the right of residence in the host Member State, while the facts described in paragraph 24 of this judgment already show that a real dependence exists. Accordingly, that requirement is likely to deprive Articles 2(2)(c) and 7 of Directive 2004/38 of their proper effect.

27. Furthermore, it is not excluded that that requirement obliges that descendant to take more complicated steps, such as trying to obtain various certificates stating that he has not found any work or obtained any social allowance, than that of obtaining a document of the competent authority of the State of origin or the State from which the applicant came attesting to the existence of a situation of dependence. The Court has already held that such a document cannot constitute a condition for the issue of a residence permit (*Jia*, paragraph 42).

28. Accordingly, the answer to the first question is therefore that Article 2(2)(c) of Directive 2004/38 must be interpreted as meaning that a Member State cannot require a direct descendant who is 21 years old or older, in circumstances such as those in the main proceedings, in order to be regarded as

dependent and thus come within the definition of a family Member under Article 2(2)(c) of that provision, to have tried unsuccessfully to obtain employment or to obtain subsistence support from the authorities of his country of origin and/or otherwise to support himself."

31. The CJEU then turned to the second question:-

"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 in 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, 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'."

32. The claimant puts considerable emphasis on the opinion of the Advocate General in Reyes. On the first of the two referred questions, the Advocate General said:

> Ll"31. On reading Directive 2004/38, it is quite clear that the central element is the citizen who has exercised his freedom of movement within the Union. He is its principal and direct beneficiary. As an indirect result of that, and because separation of the family by distance should not constitute an obstacle to exercise of freedom of movement, the members of the family of a Union citizen who has exercised that freedom are also granted rights, which are not autonomous, but merely derived, that is to say, acquired through their status as members of the beneficiary's family...

33. On the second question, the Advocate General considered that:

> "64. Contrary to what the referring court seems to imply, there is no systemic inconsistency in granting a right of residence to a member of the family of a Union citizen because he is a dependant within the meaning of Directive 2004/38, even though the national authorities sense - or infer from the applicant's declared intentions, as seems to be the case in this instance - that the applicant appears to be in a position to integrate into employment in the society of the host Member State. Indeed, and as the Commission has correctly pointed out, the related rights which Directive 2004/38 grants 'irrespective of nationality' to the 'family members of a Union citizen who have the right of residence or the right of permanent residence' include the right 'to take up employment or self-employment [in the host Member State]'."
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> 65. Thus, there are no grounds for the concerns expressed by the referring court in regard to Article 14 of Directive 2004/38. Although the first subparagraph of Article 14(2) of that directive states that 'Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein', it should be pointed out, on the one hand, that Articles 12 and 13, relating to retention of the right of residence by family members in the event of death or departure of the Union citizen and in the event of divorce, annulment of marriage or termination of registered partnership respectively, are not relevant to Ms Reyes's situation. On the other hand, the right of residence for a period of longer than three months is granted to a family member who is not a national of a Member State, accompanying or joining the Union citizen only if the latter - the Union citizen, that is - satisfies or continues to satisfy the conditions referred to in Article 7(1)(a), (b) or (c) of Directive 2004/38. Article 7 of the Directive thus governs what becomes of the right of residence of the family members of the Union citizen when the latter ceases to meet the conditions necessary for the granting, for himself, of a right of residence for a period longer than three months, but is not intended to regulate the

situation in which a Union citizen's direct descendant who is over the age of 21, once recognised as a dependant of that citizen and enjoying a right of residence on that basis, ceases to be a dependant by virtue of the fact that he is now gainfully employed in the host Member State. "

66. Finally, it is necessary to deal with the concern of the referring court which sees the granting of a residence permit to a family member who is a 'dependant' of a Union citizen but is nevertheless able to work in the host Member State as the affirmation of a sort of strategy for circumventing national laws on access to employment for third-State nationals, in particular when it is their first entry into the territory of the Union.

67. Admittedly, it cannot be denied that the granting of a right of residence for the family members referred to in Article 2(2)(c) of Directive 2004/38 results, as the European Union legislature expressly envisaged, in access to the labour market of the host Member State. None the less, the circle of beneficiaries of the rights indirectly conferred by Directive 2004/38 is rather narrowly defined and, more specifically as regards Article 2(2)(c) of the directive, the direct descendants who are over the age of 21 must, in any event, be recognised as dependants by the authorities of the host Member State. The Union legislature, on the initiative of the Council, has thus provided a safeguard whilst ensuring that the very essence of family reunification was maintained for the Union citizens concerned. I reiterate that the assessment of the status of a family member who is a dependant of a Union citizen, if carried out in accordance with my suggestion in point 61 of this Opinion, should ensure that artificially created situations are identified and thus reassure the Member States as to the risks to which they believe their labour market to be exposed, *a fortiori* because the right to enter that market is granted only to the members of the nuclear family as I have described them above.

68. I therefore suggest that the Court's answer to the second question referred should be that, in order to be regarded as a family member who is a 'dependant' of a Union citizen within the meaning of Article 2(2)(c) of Directive 2004/38, the situation of dependence must exist in the applicant's State of origin and must be assessed by the authorities of the host Member State at the time when he applies to join the Union citizen on whom he claims to be dependent. I also invite the Court to make it clear that the fact that the applicant has expressed his intention of working in the host Member State or that he is regarded by the authorities of that State, at the time of submitting his application, as well placed to obtain employment cannot constitute an obstacle to recognition of his status as a family member who is a 'dependant' within the meaning of the

> abovementioned provision, if it is apparent, moreover, from consideration of his application that he finds himself, in his country of origin, in a genuine situation of dependence on the Union citizen whom he intends to join."

34. The claimant's primary case is that article 17(2) of the Withdrawal Agreement codifies what she says is the effect of the judgment in Reyes; namely, that a family member, as defined in article 10/article 2 of the Directive, does not lose the right to reside because she ceases to be dependent on the EU citizen. This necessarily means that the requirement to be dependent on the EU citizen need exist only at the point at which the person concerned is seeking to accompany the EU citizen to the third party State, or to join that citizen there.

35. Drawing on the Advocate General's opinion in Reyes, the claimant submits that the concept of dependence must be given a uniform interpretation. As the Advocate General noted, the principal and direct beneficiary of the family member provisions of the Directive is the Union citizen. The purpose of the provisions is to enable that citizen to move freely, exercising the rights they have under the EU Treaties, where separation from a family member might otherwise constitute an obstacle to the exercise of freedom of movement. The fact that the rights of the family member are, accordingly, "merely derived" (paragraph 31 of the Advocate General's opinion) means, according to the claimant, that it is irrelevant to ask whether the adult child of the EU citizen "deserves" to remain in the host Member State. As observed by Baroness Hale at paragraph 21 of SM (Algeria) v Entry Clearance Officer [2018] 1 WLR 1035, "the purpose of the Directive is to simplify and strengthen the right of free movement and residence for all Union citizens... Having to live apart from family members... may be a powerful deterrent to the exercise of that freedom".

36. The claimant submits that the provisions promoting the right of free movement must be construed broadly and that, where there is a choice between an interpretation that limits the scope of the Directive and another that, respecting the wording and context of the provision being interpreted, facilitates the free movement of a greater number of citizens, that second interpretation must be chosen: paragraph 74 of the Advocate General's opinion in Coman v Inspectoratul General Pentru Imigrari C-673/16 [2019] 1 WLR 425.

37. The claimant emphasises the observation made at paragraph 30 of the judgment in Reyes 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". One of the cases cited in support of that proposition is Secretary of State for the Home Department v Rahman (C-83/11) [2013] QB 249, paragraph 33.

38. It is a vital part of the claimant's primary case that in Reyes the CJEU held that an over-21 dependent child does not lose the right to reside if she stops being dependent on the Union citizen after arriving in the host Member State. In this regard, the claimant relies on paragraph 31 of the judgment. The effect of that judgment is that the words "the right of residence... shall extend to family members who are not nationals of the Member State" in article 7(2) of the Directive does not mean that the right of residence depends on the individual concerned continuing to satisfy the definition of "family member" in article 2(2) of the Directive. If the position were

otherwise, then taking up employment would terminate the right of residence of a child aged over 21.

39. On its facts, Reyes concerned the prospect of an adult child ceasing to be dependent by obtaining work in the host Member State. Article 23 of the Directive gives such a person a right to take up employment or self-employment.

40. At the very least, therefore, the claimant contends that the right of residence of a family member, who entered or joined at a time of financial dependence upon the EU citizen, is not ended if the family member subsequently secures employment in the Member State which means she is no longer financially dependent on the EU citizen.

41. The claimant submits that the Directive does not contain any *sui generis* "carve out" for loss of dependence through work. The provisions which govern the retention of the right to reside are articles 7(2) and 14(2). The claimant says that either these provisions make the third country national child's right of residence contingent on continuing dependence, or they do not. The conclusion in Reyes was that they do not. In this regard, it is noteworthy that the CJEU's reference to article 23 of the Directive was not an essential part of its reasoning. This can be seen from the opening word " Furthermore" in paragraph 32 of the judgment.

42. The claimant notes that at paragraph 67 of the Advocate General's opinion in Reyes, he emphasised that the circle of beneficiaries of the rights indirectly conferred by the Directive is "narrowly defined". This falls to be contrasted with the much wider class of "other family members" under article 3(2) of the Directive. In the case of such other family members, Member States are given considerably greater freedom to restrict entry and residence.

43. In this regard, the claimant points to Rahman. In that case, the Grand Chamber of the CJEU addressed six questions referred by the Upper Tribunal Immigration and Asylum Chamber.

44. The Grand Chamber addressed the sixth question as follows:-

> "41. By its sixth question, the national tribunal asks, in essence, whether issue of the residence card referred to in article 10 of Directive 2004/38 may be conditional on the requirement that the situation of dependence for the purposes of article 3(2)(a) of that Directive has endured in the host Member State."
>
> 42. With regard to issue of the residence card referred to by Directive 2004/38, the European Union legislature essentially confined itself to listing, in article 10 of that Directive, the documents to be presented in order to obtain such a card, which is then to be furnished within six months from the date on which the application was submitted.
>
> 43. So far as concerns the applicants envisaged in article 3(2)(a) of Directive 2004/38, article 10 of the Directive states that those applicants must present inter alia 'a document issued by

> the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants … of the Union citizen'.
>
> 44. The legislature did not settle, either in that provision or in other provisions of Directive 2004/38, the question whether family Members of a Union citizen who do not fall under the definition in article 2(2) of the Directive and who apply for issue of a residence card by presenting a document, issued in the country from which they have arrived, certifying their dependence on that Union citizen can be refused a residence card on the ground that, after their entry into the host Member State, they have ceased to be dependants of that citizen.
>
> 45. The answer to the sixth question therefore is that the question whether issue of the residence card referred to in article 10 of Directive 2004/38 may be conditional on the requirement that the situation of dependence for the purposes of article 3(2)(a) of that Directive has endured in the host Member State does not fall within the scope of the Directive."

45. The claimant submits that it would be very odd for the Directive not to have settled the question of whether other family members can be refused a residence card on the ground that they have ceased to be dependants; whereas, on the defendant's case, the proper interpretation of the Directive is that a family member must continue to be dependent upon the EU national.

46. The final aspect of the claimant's primary submission is that her interpretation of the judgment in Reyes is said to be supported by the fact that, whilst the adult child of an EU citizen needs to support her initial application for residence by proof of dependence (Article 10)(2)(d)), her application for a permanent residence card need only be supported by proof of continuity of residence. This is said to be the effect of articles 20 and 21 of the Directive, read with articles 10 and 16.

47. The claimant's alternative position is that article 17(2) of the Withdrawal Agreement creates a new right for family members, to the same effect as she has described in her interpretation of Reyes. Article 17(2), correctly interpreted, provides that the person who was a dependant at some point before the end of the transition period retains residence rights, even after ceasing to be dependent on the EU citizen.

48. The claimant rejects the defendant's interpretation of article 17(2), whereby the position of the family member in question falls to be assessed as at the end of the transition period. The claimant points to the use of the phrase "at the end of the transition period" in article 17(1) and in over 40 other places in the Withdrawal Agreement, in contrast to the words "before the end of the transition period", which are to be found in article 17(2) and in over 180 other places in the Withdrawal Agreement.

49. According to the claimant, if the defendant is correct to say that EU law requires continuing dependence in the case of a child over 21, article 17(2) must operate as a relieving provision. However, this cannot be correct since, in such an event, article

17(2) would be otiose. It would simply repeat what has already been stated in article 10(1)(e)(i). It cannot be assumed that the drafters of the Withdrawal Agreement produced an entirely superfluous provision, by including article 17(2).

50. The claimant submits that article 18(1)(l) is merely a procedural provision which cannot be read as cutting down substantive rights of residence conferred by the Directive or, on the claimant's alternative case, by article 17(2) of the Withdrawal Agreement.

51. The claimant's final ground of challenge concerns irrationality. The claimant posits two hypothetical individuals, A and B. Individual A was recognised as a family member of a Union citizen, as a child under 21, and granted limited leave to remain under Appendix EU on 1 April 2020. Individual A is not required to demonstrate dependence on the Union citizen, in order to obtain further leave under the immigration rules, after she reaches the age of 21.

52. Individual B was recognised as a family member of a Union citizen, as a child under 21, and granted a residence card under the Immigration (European Economic Area) Regulations 2016, as opposed to limited leave to remain under Appendix EU, on 1 April 2020. Individual B is required to demonstrate dependence on the Union citizen in order to obtain further leave under the immigration rules, after she reaches the age of 21.

53. The claimant submits that there is no rational basis for this distinction in the treatment of individuals who are in a materially identical situation: Matadeen v Pointu [1999] 1 AC 98.

F. DISCUSSION

54. It is relevant to observe that, from the factual outline given above, the claimant has never been a dependant, aged 21 or above, of an EU citizen. She entered as a family member, and was recognised as such, as a person under the age of 21. She was estranged from her EU citizen mother since no later than the claimant's marriage in 2016. In her application for pre-settled status under the EUSS contained in Appendix EU to the immigration rules, the claimant emphasised the split with her family, stating that "asking her mother to provide… documents for her application in these circumstances could put her at risk of violence…". She also pointed out that she had "her own accommodation facilities". It appears that she was working in the tax year 2017-2018, when she would have been aged 22 or more. The claimant emphasised the ECHR Article 8 private and family life she had established in her own right, including her marriage.

55. Although one must be cautious in extrapolating general conclusions about the position of family members from the facts of a particular case, it is clear that the defendant's decision to refuse the claimant's application would have had no adverse impact upon the exercise of EU rights by her mother in the United Kingdom.

56. As I have explained, the claimant's primary case depends upon a construction of the judgment of the Fourth Chamber of the CJEU in Reyes, and of elements of the Advocate General's opinion in that case, to the effect that a family member aged 21 or more needs to be dependent upon the EU citizen at the point of accompanying or

coming to join that citizen in the relevant Member State, but not at any point thereafter.

57. That is not, however, what the judgment in Reyes holds. Nor is it a conclusion that has inexorably to follow from the judgment.

58. It is important to understand the way in which the CJEU operates in this context. As Elizabeth Laing LJ held in Balogun v Secretary of State for the Home Department [2023] EWCA Civ 414:-

> " 117… it is hard to derive reliable general principles from decisions of the Court of Justice, which, necessarily, answer a question or questions which have been referred by a national court, and which have been referred on the facts of a particular case. Second, the reasoning in the decisions of the Court invites selective readings of sentences or paragraphs which make it harder, not easier, to work out what the relevant principles are …".

59. Neither of the two questions referenced in Reyes was about whether a person, who has been initially recognised as a family member, whether by reason of (a) dependency aged 21 or above, or (b) being below that age, must continue to be dependent, in the case of (a), or become/remain dependent on reaching 21, in the case of (b), in order to continue to be treated as a family member for the purposes of the Directive. Rather, the questions were directed to whether the possibility of obtaining employment or means of subsistence otherwise than from the EU citizen was relevant in determining whether such a person fell to be treated as a family member in the first place; that is to say, in order to obtain entry to the Member State in question.

60. I agree with Mr Blundell KC that the relevant paragraphs of the CJEU's judgment were (as one would expect) confined to answering those questions. They do not state in terms, or proceed from any necessary presumption, that dependency need exist only at the point at which the person concerned seeks documentation evidencing their status as a family member. It is, in this regard, noteworthy that Mr Buttler KC relied extensively on the Advocate General's opinion in Reyes. That opinion, however, has only limited weight and cannot materially affect the actual judgment.

61. Towards the end of his oral submissions, Mr Buttler KC emphasised article 23 of the Directive, which provides that the family members of a Union citizen who have the right of residence or the right of permanent residence shall be entitled to take up employment or self-employment there. As I understood him, Mr Buttler contended that, even if Reyes did not establish the proposition that dependency, as a general matter, does not need to be ongoing, the defendant's EUSS rules were still unlawful, in that continued dependency cannot be required where, as a result of exercising the right under article 23, the family member has become employed.

62. That is not, however, a proposition which emerges from Reyes or any of the other case law. As Mr Buttler KC highlighted, paragraph 32 of the CJEU's judgment in Reyes makes only a passing reference to article 23. The paragraph demonstrates that the court did not regard the existence of article 23 as in any way essential to its reasoning.

63. The claimant's skeleton argument submits, rightly in my estimation, that the Directive "does not say that there is any *sui generis* carve-out for loss of dependence through work", whether in article 23 or anywhere else. In many cases, family members with the right of residence or the right of permanent residence will be able to avail themselves of article 23, without any question arising as to whether they thereby cease to be family members. Spouses, partners and children under the age of 21 thus have an unrestricted right of employment, regardless of whether this results in them not being dependent on the relevant EU citizen, because their position as family members does not require financial dependency.

64. It is only in the case of those family members whose status as such depends upon them being dependent on an EU citizen that the question arises whether article 23 changes what would otherwise be the ordinary operation of the definition of "family member" in article 2, as applied in article 14(2) (as to which I shall have more to say below). If the drafters of the Directive had intended article 23 to affect that position, they could have been expected expressly to say so. The fact that, as the claimant herself points out, there is nothing to this effect in the Directive means that the basic position is not changed by article 23.

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. This is, however, a slender category, not least because a family member who has obtained a right of permanent residence may take up employment or self-employment, regardless of any effect that might have on dependency. This is because article 16(1) provides that the right of permanent residence "shall not be subject to the conditions provided for in Chapter III". One of those conditions is article 14(2).

66. In fact, article 14(2) drives home the defendant's case in response to the claimant's primary position. It provides that "family members" shall have the right of residence provided earlier in the Directive "as long as they meet the conditions set out therein". As is plain from that wording, a family member must continue to meet the conditions on an ongoing basis; not, as the claimant contends, merely at one point in time. This accords with the use of the present tense in the definition of "family member" in article 2(2)(c).

67. The claimant's primary position is also undermined by the fact that it would put those whose family member status rests on dependency in an anomalously better position than other kinds of family member. Article 12 of the Directive makes particular provision for the retention, in certain circumstances, of the right of residence by family members in the event of the death or departure of the Union citizen. Article 13 makes provision, in certain circumstances, for the retention of the right of residence by family members in the event of divorce, annulment of marriage or the termination of a registered partnership.

68. In Singh v Minister for Justice and Equality (C-218-14) [2016] QB 208, the CJEU held that, where the EU citizen spouse left the host State before divorce was initiated, the third country national spouse was left without a right to reside. She could not, accordingly, benefit from article 13 because she had already lost her right.

69. If the claimant is correct that a family member by reason of dependency remains subject to that status regardless of the cessation of dependency, it can therefore clearly be seen that this category of family member is being treated more favourably by the Directive than those in other categories; in particular, spouses and partners. Understandably, no appeal to the importance of the right of free movement to the EU national has been made by the claimant, in order to justify this result.

70. I do not consider that the claimant can derive any assistance from the judgment in Rahman. I remind myself that the ECJ (as it then was) was answering questions about the position of "other family members" within the terms of the Directive. In answering question 6, the court cannot be regarded as saying anything about family members by reason of dependency on an EU citizen. I see nothing odd in the fact that the Directive did not address this issue in the case of other family members, whereas it did in the definition of "family member" in Article 2, read with article 14.

71. On the contrary, because of their greater importance to the EU citizen's right of free movement, it makes perfect sense for the Directive to set out the detail of what the status of family member entails. By contrast, the relatively amorphous nature of other family members demands less precision, particularly bearing in mind the significant role of the national authorities in determining the outcome of applications by other family members.

72. Finally in connection with the claimant's primary submission, I need to address the opinion of the Advocate General in GV v Chief Appeals Officer, Social Welfare Appeals Office, Minister for Employment Affairs and Social Protection, Ireland (C-488/21). Advocate General Capeta's opinion was delivered on 16 February 2023. The CJEU has yet to issue its judgment.

73. One of the questions referred to the CJEU was whether, under the Directive, "it is sufficient that dependency existed at the moment when the direct ascendant joined the mobile EU worker in the host State or if it is an ongoing requirement for the existence of the derived right of residence in that State".

74. The Advocate General rejected the view of the applicant and the Commission that "the dependency need only exist at the moment when a parent joins a mobile worker in the host State" (paragraph 42). The Advocate General noted that in Reyes and also in Jia v Migrationsverket (C-1/05) the court was invited to consider the legality of the conditions for the acquisition of a residence permit on arrival in the host State. The conditions for retaining a right of residence were not at issue in either of those cases. Therefore, the Advocate General considered that "the court's findings in the judgments in *Jia* and *Reyes* do not resolve the situation in the present case" (paragraph 44).

75. The Advocate General found that article 14(2) of the Directive made it clear that family members retain rights under article 7 as long as they fulfil the conditions set out in that provision. Since that provision refers to family members as defined in article 2(2) of the Directive, that can be understood as implying that residence rights exist as long as dependency persists. She therefore proposed that the court replied to the first question by stating that the condition of dependency is required for as long as the family member's right of residence is derived from the right of free movement exercised by the worker.

76. Mr Buttler KC urged caution in placing any weight on the opinion of Advocate General Capeta. He noted that, as regards the second referred question, the Advocate General considered that dependency does not need to be financial. If she were correct, Mr Buttler KC said that this would represent a significant change in what has hitherto been assumed to be the law. It would mean that the provisions of the EUSS would be unlawful, since those provisions require dependency to be financial in nature.

77. I accept these *caveats*. The relevant part of the Advocate General's opinion merely echoes the defendant's position on the primary issue, which, for the reasons I have given, I consider to be correct. The fact that the Advocate General may, in addition, advocate a departure from the commonly understood legal position on the nature of dependency is not relevant to this judicial review.

78. I do not find that articles 20 and 21 of the Directive assist the claimant. These are essentially administrative provisions which, absent a clear contrary indication, are not to be seen as affecting substantive rights conferred by the Directive. Article 20 has nothing to say about the information to be supplied by the person concerned, while article 21 merely provides that continuity of residence can be demonstrated by any means of proof. It does not affect the discrete requirement to show five years' continuous legal residence.

79. For these reasons, I reject the claimant's primary position. This means that article 17(2) of the Withdrawal Agreement does not codify what the claimant says is the effect of the judgment in Reyes.

80. I turn to the claimant's alternative submission. This contends that article 17(2) of the Withdrawal Agreement is in the nature of what the claimant describes as a "relieving provision". Article 17(2) states that a person who was a dependant at some point before the end of the transition period shall have the rights conferred by the Withdrawal Agreement, even if they cease to be dependants. The claimant says this is the only proper interpretation of article 17(2).

81. As I have earlier recorded, the claimant argues that, on the defendant's approach, article 17(2) is otiose, as it simply repeats what has already been said in article 10(1)(e)(i); namely, that the family member in question resided in the host State in accordance with Union law before the end of the transition period and continued to reside there thereafter.

82. The way in which the Withdrawal Agreement falls to be interpreted is not in dispute. It is a bilateral international agreement, to which the Vienna Convention on the Law of Treaties applies. It must, therefore, be interpreted "... in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose": article 31(1) of the Convention.

83. The immediate problem for the claimant is that it is extremely difficult to see why the drafters of the Withdrawal Agreement would decide to make provision for family members, who ceased to be such before the end of the transition period, to be able to rely on the rights provided for in Title II of Part Two after they have ceased to be dependants and, thus, ceased to have rights as such under the Directive. Such a person would not satisfy article 10(1)(e)(i), in that they would not be continuing to reside in accordance with Union law after the end of the transition period. Accordingly, this

would be a strange thing for the drafters of the Withdrawal Agreement to have done. There is nothing in the recitals to the Withdrawal Agreement which might provide a rationale for this outcome.

84. The claimant places great store on the phrase "before the end of the transition period" in article 17(2). She contrasts this with the phrase "at the end of the transition period", which is to be found in article 17(1) and in many other places in the Withdrawal Agreement. Thus, the phrase in article 17(2) should, the claimant says, be given its ordinary meaning, with the result that someone, such as the claimant, who at some point before 31 December 2020 had been a dependent family member, will benefit from article 17(2).

85. Although this submission has a superficial attraction, it does not withstand scrutiny. Article 185 provides that Part Two (in which article 17 sits) applies "as from the end of the transition period". This suggests it focuses on the position of an individual immediately before and after 31 December 2020. It nevertheless begs the question as to what that position is.

86. The opening words of article 17(2) - "The rights provided for in this Title for the family members who are dependants of Unions citizens" - means the rights of family members who, in the words of article 10(1)(e)(i), "resided in the host State in accordance with Union law before the end of the transition period and continued to reside there thereafter". Despite the use in article 10(1)(e)(i) of the phrase "before the end of the transition period", the definition of "Union law" in article 6(1) makes it plain that we are concerned with Union law "as applicable on the last day of the transition period".

87. Accordingly, for our purposes it is only those family members who were residing in the United Kingdom in accordance with Union law on the last day of the transition period, and who continued to reside there thereafter, who can benefit from article 17(2).

88. This conclusion might be said to demonstrate the strength of the claimant's submission that article 17(2) is simply superfluous. Were that to be the position, there may indeed be something in the claimant's case on construction, however strange and unmerited this might be.

89. There is, however, a good reason for article 17(2), notwithstanding that article 10(1)(e)(i) has the effect I have just described. Article 17(2) makes different provision than is made under EU law for the consequences of loss of dependency. Article 17(2) ensures that a person can continue to benefit from family member rights under the Withdrawal Agreement (provided other relevant conditions are met), regardless of the circumstances in which that person ceases to be dependent on the EU citizen.

90. The point can be explained as follows. When EU law applied in the United Kingdom and a person ceased to reside here in accordance with that law, they could, at some future point, resume their lawful residence. This was because EU law continued to apply in this country. Accordingly, a person who ceased to be dependent could later resume their dependency and so resume lawful EU residence.

91. That, however, is no longer the position. As from the end of the transition period, EU law no longer applies in the United Kingdom. Importantly, this means that rights held under the Withdrawal Agreement, once lost, cannot be regained. An example can be seen in article 39 (life-long protection), which provides that persons covered by Part Two shall enjoy the rights provided in the relevant Titles for their lifetime, unless they cease to meet the conditions set out in those Titles.

92. For this reason, article 17(2) protects anyone who would lose those rights under the Withdrawal Agreement by reason of ceasing to be a dependant. It ensures that such persons continue to enjoy rights under the Withdrawal Agreement (provided they meet other relevant conditions) after the end of the transition period.

93. This means that article 17(2) is not only not superfluous; its presence demonstrates the correctness of the defendant's stance.

94. At this point, the objections to the claimant's interpretation of article 17(2) become overwhelming. If the claimant were correct, article 17(2) would not provide for a "retention" of a right of residence. Any right of residence would, necessarily, already have been lost. This means the claimant's construction of the provision would provide an amnesty, under which a certain category of family members previously residing in the United Kingdom unlawfully would, from the end of the transition period, be able to assert they were residing lawfully. That cannot possibly have been what was intended. On the contrary, the general scheme of the Withdrawal Agreement is to protect only those who were residing lawfully on 31 December 2020.

95. Furthermore, it is the claimant's case which would make article 17(2) otiose. If she were right that, under EU law, a person who was once dependent retains the right to reside despite not being dependent, then article 17(2) would be unnecessary.

96. For these reasons, I reject the claimant's alternative challenge.

97. That leaves the ground of challenge which is based upon alleged irrationality. The claimant says there is an irrational difference between the treatment of individual A and individual B in paragraphs 51 and 52 above.

98. The claimant seeks to draw support for this ground from Matadeen and another v Pointu and others [1999] 1 AC 98, which involved changes to the system of secondary school entrance examinations in Mauritius. In March 1995, the Minister gave approval to amendments to the examination regulations so as to allow an optional fifth paper in one of a number of specified oriental languages. Candidates who sat the fifth paper would be ranked on their marks in English, mathematics and the best two out of the other three papers. The plaintiffs had children who were due to take their examination in 1995 or 1996. They brought proceedings against the Minister, seeking a declaration that his decision involved discrimination, contrary to the Constitution of Mauritius in that, by giving insufficient notice of the change concerning an oriental language, the decision conferred an unfair advantage on pupils who had been following a course in such a language as a non-ranking subject.

99. The Supreme Court of Mauritius held that the Constitution conferred the general right to equality of laws and executive actions; and that there was no objective justification

for the inclusion of an oriental language in the examination at such short notice, which thereby gave certain pupils an advantage over others.

100. The Judicial Committee of the Privy Council reversed the Supreme Court's decision, holding that the Constitution entrenched the protection of the individual against discrimination only on a limited number of grounds and left the decision as to whether legitimate justification existed for other forms of discrimination or classification to the legislature or, subject to judicial review, to the minister or other public body.

101. Delivering the judgment of the Judicial Committee, Lord Hoffmann accepted that "equality before the law requires the person should be uniformly treated, unless there is some valid reason to treat them differently", describing that as a principle that "is one of the building blocks of democracy and necessarily permeates any democratic constitution" (page 109C). Lord Hoffmann said that the Judicial Committee "would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour". He continued as follows:-

> "But the very banality of the principle must suggest a doubt as to whether merely to state it can provide an answer to the kind of problem which arises in this case. Of course a person should be uniformly treated, unless there is some valid reason to treat them differently. But what counts as a valid reason for treating them differently? And, perhaps more important, who is to decide whether the reason is valid or not? Must it always be the courts? The reasons for not treating people uniformly often involve, as they do in this case, questions of social policy on which views may differ. These are questions which the elected representatives of the people have some claim to decide for themselves" (109E).

102. The defendant points out that when individual B comes to make her EUSS application, the same EUSS rules will apply to her as apply to individual A. Furthermore, individual A is under 21 at the time of her EUSS application, whereas individual B is over 21.

103. The claimant's point nevertheless remains that there is a difference in treatment, which arises from the fact that individual A sought, and was granted, limited leave to remain under the EUSS rules in Appendix EU, whereas individual B applied for, and was granted, a residence card under the 2016 Regulations (which were the successors to the 2006 Regulations, under which the claimant made her application). This difference is said to be unjustified and, thus, irrational. Mr Buttler KC submits that one cannot have rules for rules' sake.

104. My findings on the primary and secondary issues mean that the decision reached in respect of the claimant accorded with her position under EU law at the end of the transition period; and accords with the rights conferred under the Withdrawal Agreement. Her complaint is, in effect, that the defendant has not treated her more favourably than is required by virtue of the Withdrawal Agreement.

105. I agree with Mr Blundell KC's submission that the 2016 Regulations and the EUSS rules are distinct legal regimes; and it is in the nature of rules-based systems for there

to be "hard edges".

106. The United Kingdom's transition from EU law, including its domestic implementing legislation, to a system rooted in the concepts of leave to enter and remain created by the Immigration Act 1971 has been long and complex. In these circumstances, this court should be slow to categorise a difference in outcome, depending upon whether EU law or the EUSS was initially chosen, as being *Wednesbury* unreasonable.

107. In addressing Lord Hoffmann's question: "what counts as a valid reason for treating them differently?" I consider the "valid reason" in the present case is that the paths taken by individual A and individual B initially involved different legal schemes. There would need to be a compelling case to go beyond this and effectively place upon the defendant the burden of identifying a reason within the interstices of one or other such scheme. In the circumstances, I can detect no such justification. Although one must be wary of "floodgates" arguments, it is all too easy to see how a contrary conclusion would open the way to myriad claims based on alleged differences in treatment, identified only by nit-picking comparisons of the relevant schemes.

108. I have not found it necessary to consider the position under EU law of the claimant's mother. This was raised in the defendant's skeleton argument and responded to by a witness statement of the claimant dated 20 April 2023.

G. DECISION

109. The application for judicial review is dismissed.