EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 4
XA18/16

Lord Menzies
Lord Bracadale
Lord Glennie

OPINION OF THE COURT

delivered by LORD MENZIES

in the Appeal under Section 13 of the Tribunals Courts and Enforcement Act 2007

by

SARA SLEZAK

Appellant

against

THE SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

Appellant: Irvine; Drummond Miller LLP
Respondent: Komorowski; Office of the Advocate General

27 January 2017

Introduction

[1] The appellant is a national of Poland. Her date of birth is 28 July 1998. She arrived in the United Kingdom on 26 August 2013. Initially she attended secondary school in Newcastle, but then moved to Glasgow and attended secondary school there. The appellant's father has never lived in the United Kingdom. Her mother joined the appellant when she was living in Glasgow in 2014 in order to seek work, but subsequently returned to Poland. The appellant remained in Glasgow and is estranged from both her mother and her father. On 19 September 2014 the appellant claimed Income Support. By decision letter dated 16 October 2014 the respondent refused this application. The appellant appealed against this decision to the First-tier Tribunal, and on 4 February 2015 that tribunal allowed her appeal. The respondent appealed against this decision to the Upper Tribunal, Administrative Appeals Chamber, and by decision dated 11 November 2015 the Upper Tribunal allowed the respondent's

appeal and confirmed the original decision of October 2014. The appellant now appeals to this court against that decision.

[2] The Upper Tribunal's decision was based on its construction of Regulation 21AA(3)(b)(ii) of the Income Support (General) Regulations 1997/1967 ("the IS Regulations"), when read with Regulations 10 and 14(3) of the Immigration (European Economic Area) Regulations 2006/1003 ("the EEA Regulations"). The reasoning of the Upper Tribunal is distilled in the last two sentences of paragraph 15 of its decision letter, in which it accepted the argument for the respondent that the plain and literal reading of the relevant provisions of the EEA Regulations has the effect that the "right to reside" on which the appellar relied is one covered by the exclusion in Regulation 21AA(3)(b)(ii). "In other words, it is one which the claimant has as a 'family member' of a European Economic Area National who had been a 'jobseeker' in the United Kingdom."

[3] Counsel for the appellant submitted that the Upper Tribunal fell into error in its construction of the relevant regulations. The question of law posed for this court was stated as follows:

> "Whether the 'right to reside' conferred by Regulation 14(3) of the Immigration (European Economic Area) Regulations 2006/1003 is an excluded right for the purposes of Regulation 21AA(3) of the Income Support (General) Regulations 1987/1967."

As appears from our discussion of the issue in paragraph [23] below, the question turns on whether in approving the EEA Regulations parliament intended to draw a relevant distinction for those purposes between family members of primary right holder where the primary right holder remained in the United Kingdom or had left.

The Relevant Statutory Provisions

[4] Counsel referred us to a significant number of interlinking provisions of statutes and regulations. It is not necessary to set all of these out in full, but the following were central to the issues between the parties:

The Social Security Contributions and Benefits Act 1992, Section 124 provides as follows:

> "(1) A person in Great Britain is entitled to Income Support if –
>
> (a) he is of or over the age of 16; ....
>
> (b) he has no income or his income does not exceed the applicable amount;...
>
> (d) except in such circumstances as may be prescribed, he is not receiving relevant education; ...
>
> (e) he falls within a prescribed category of person;..."

The Income Support (General) Regulations 1987/1967 provide inter alia as follows:

> "21AA- Special Cases: Supplemental – Persons from Abroad
>
> (1) 'Person from abroad' means, subject to the following provisions of this regulation, a claimant who is not habitually resident in the United Kingdom...
>
> (2) No claimant shall be treated as habitually resident in the United Kingdom ... unless he has a right to reside in ... the United Kingdom ... other than a right to reside which falls within

paragraph (3).

(3) A right to reside falls within this paragraph if it is one which exists by virtue of, or in accordance with, one or more of the following –

(a) Regulation 13 of the Immigration (European Economic Area) Regulations 2006;

(b) Regulation 14 of those regulations, but only in a case where the right exists under that regulation because the claimant is –

(i) a jobseeker for the purpose of the definition of 'qualified person' in Regulation 6(1) of those regulations, or

(ii) a family member (within the meaning of Regulation 7 of those regulations) of such jobseeker; ...."

The Immigration (European Economic Area) Regulations 2006/1003 provide inter alia as follows:

"6 – 'Qualified person'

(1) In these regulations, 'qualified person' means a person who is an EEA national and in the United Kingdom as –

(a) a jobseeker...

10 – 'Family member who has retained the right of residence'

(1) In these regulations, 'family member who has retained the right of residence' means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2),(3),(4) or (5) ...

(3) A person satisfies the conditions in this paragraph if

(a) he is the direct descendant of - ....

(ii) a person who ceased to be a qualified person on ceasing to reside in the United Kingdom; and

(b) he was attending an educational course in the United Kingdom immediately before the qualified person or the EEA national with a permanent right of residence died or ceased to be a qualified person and continues to attend such a course.

14 – 'Extended right of residence'

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

Submissions

Submissions for the Appellant

[5] Counsel for the appellant adopted her comprehensive and helpful Note of Argument, which we do not seek to repeat here. Section 124 of the 1992 Act is the primary legislative basis for entitlement to income support. Regulation 13 of the IS Regulations deals with the circumstances in which persons in relevant education are to be entitled to Income Support: when read together with section 142 of the 1992 Act, Regulation 3 of the Child Benefit (General) Regulations 2006/223, and Regulation 4ZA and

paragraph 15 of Schedule 1B to the IS Regulations, the appellant satisfied the habitual residence test on claimants for Income Support.

[6] Counsel emphasised the importance of the definition of "qualified person" given in Regulation 6(1) of the EEA Regulations, which makes it clear that a person's "qualification" under those regulations is predicated on that person's physical presence in the United Kingdom. Regulation 14 of the EEA Regulations confers an extended right of residence in the United Kingdom on EEA nationals and their family members beyond the initial three month period which is conferred by Regulation 13. The Regulation 14(1) right of residence is predicated on continuing physical presence in the United Kingdom. A person who comes to the United Kingdom as a jobseeker and remains after three months is, by virtue of Regulation 14(1), entitled to continue doing so for as long as they continue to look for work in the United Kingdom. Similarly, the right conferred by Regulation 14(2) is predicated on the continuing physical presence in the United Kingdom of both family member and "qualified person" – hence the use of the verb in its present continuous form "residing".

[7] By contrast, the right of residence conferred by Regulation 14(3) is not predicated on the continued presence of the "qualified person" in the United Kingdom, but on the exact opposite. This reflects the scheme of Regulation 10(3), whereby a claimant will satisfy the conditions if he or she is

> "the direct descendent of...a qualified person...who ceased to be a qualified person on ceasing to reside in the United Kingdom...and the claimant was attending an educational course in the United Kingdom immediately before the qualified person...ceased to be a qualified person and the claimant continues to attend such a course."

The appellant fits this definition.

[8] The fact that the Regulation 14(3) right of residence is predicated on the absence of the "qualified person" from the United Kingdom is of importance when construing Regulation 21AA(3)(b)(ii) of the IS Regulations. The exclusion in that subparagraph extends only to the extended right of residence conferred on the family member of an existing jobseeker by Regulation 14(2); it <u>does not</u> extend to the retained right of residence conferred on the family member of a now departed jobseeker by virtue of Regulation 14(3). The result is that the appellant, who is the abandoned EEA national child of an EEA national former jobseeker in the United Kingdom is entitled to claim Income Support in order allow her to continue in education for as long as she continues to be enrolled on the relevant course. The EEA national child is thus placed in the same position, for the same policy reasons, as the British national child who is enrolled at school but similarly estranged from his or her parents and so requiring of financial support. Despite the respondent's assertion to the contrary, there is no absurdity in this construction. The purpose of the regulations is to safeguard a family member who has effectively been abandoned in the host member state; it is understandable that parliament should intend to provide support for such persons but deny it to the family members of persons who are in the United Kingdom with their parents, who are able to support them by actively seeking work. Indeed, the construction favoured by the respondent would place a British national otherwise in the same positon as the appellant (ie a school aged child estranged from his or her parents) in a more advantageous positon to other EEA nationals. The respondent's suggested construction would therefore require the court to condone discrimination on grounds of nationality, something which it is prohibited from doing by the founding EU treaties (see Article 18 TFEU). Moreover, the purpose of the introduction of the precursor to Regulation 21AA was to avoid a breach of EU law by ensuring that the test for habitual residence was imposed equally on British nationals and on persons from elsewhere in the EU.

[9] In support of her preferred construction of Regulation 21AA, Ms Irvine also relied on the Charter of Fundamental Rights of the European Union which, she reminded us, has the status of binding, primary EU law (Article 6(1)). She relied on Article 21(2), and more specifically Article 34(1) and (2) with regard to the entitlement of EU citizens to protective social security, and Article 24(1) with regard to the right of children to such protection and care as is necessary for their wellbeing. Article 24 was based on the United Nations Convention on the Rights of the Child, and Ms Irvine drew our attention in particular to Article 26 of that Convention. Each of these provisions supported the interpretation of Regulation 21AA advanced on behalf of the appellant.

[10] The Upper Tribunal, it was submitted, had fallen into error in conflating the rights of residence in Regulation 14(2) and 14(3) of the EEA Regulations, thereby erroneously finding the appellant's right of residence to be excluded for the purposes of eligibility to income support. The Upper Tribunal then erred by failing to determine the questions of habitual residence and the appellant's satisfaction of the other conditions of entitlement under the IS Regulations, and in particular Regulation 13 thereof.

[11] The error into which the Upper Tribunal had fallen was clear from the last sentence of paragraph 15 of its decision (quoted above), in which it used the past tense – "who had been a 'jobseeker' in the United Kingdom". The Upper Tribunal appears to have misunderstood the distinction between the Regulation 14(3) retained right of residence, which is predicated on the primary right holder having left the United Kingdom, and the Regulation 14(2) extended right of residence, which grants a right to the family member of a primary right holder who is in the United Kingdom with continuing "qualified person" status. Moreover, the Upper Tribunal distinguished between the appellant's right to reside for immigration purposes and her right to reside for the purpose of entitlement to income support. There is no basis for such a distinction, and the terms of Regulation 21AA(4) make it clear that there is no such distinction.

[12] In support of her submissions on the effect of EU law on the proper interpretation of the regulations, counsel referred us to Directive 2004/38/EC ("the Citizen's Directive"), Article 6 of which provided the basis for Regulation 13 of the EEA Regulations, and Article 7 of which provided the basis for Regulation 14. Article 12 (and in particular paragraph 3 thereof) contemplated precisely the appellant's situation, and conferred an actual right on her. Were there to be any doubt about this, paragraph 2 of Article 14 made it abundantly clear that the appellant had a right of residence. The Explanatory Memorandum to the EEA Regulations, together with the Transposition Note attached to it, made it clear that the appellant's right is a right according to EU law. Moreover, if the appellant were a British national she would be entitled to Income Support as a child of an estranged parent in fulltime education; as a Polish national, she must be entitled to this in order to avoid discrimination on grounds of nationality, which is prohibited by Article 18 of TFEU. In support of these propositions Ms Irvine referred us to several authorities, including *Dano* v *Jobcentre Leipzig* [2015] 1 WLR 2519 (particularly at paragraph 73); *Mirga* v *Work and Pensions Secretary* [2016] 1 WLR 481 (particularly per Lord Neuberger PSC at paragraphs 47/48 and 54); *Rugby Football Union* v *Consolidated Information Limited* [2012] 1 WLR 3333 (particularly per Lord Kerr of Tomaghmore JSC at paragraphs 26 and 28); *R (Zagorski)* v *Secretary of State for Business, Innovation and Skills* [2010] EWHC 3110 (Admin) (per Lloyd Jones J at paragraphs 66 and 70/71); *Åklagaren* v *Åkerberg Fransson* [2013] 2 CMLR 46, 1273 (particularly at paragraph 27 of the court's judgment at page 1311); and *Kücükdeveci* v *Swedex* [2011] 2 CMLR 27 703 (particularly at paragraph 48 and 53 of the court's judgment, at page 736). The regulations in the present case were clearly implementing EU law, and the United Kingdom was acting "within the

material scope of EU law"; the regulations required to be interpreted in conformity with EU law. In particular, the court must give full effectiveness to the principle of non-discrimination.

[13] Because of its error in interpreting Regulation 21AA, the Upper Tribunal erred in failing to consider whether the habitual residence test has been satisfied in this case, and failed to make the necessary findings in fact in that regard. Moreover, the Upper Tribunal erred in failing to consider whether the appellant's circumstances fall within Regulation 13 of the IS Regulations, and whether the appellant is a "qualifying young person" for the purposes of Regulation 3 of the Child Benefit (General) Regulations 2006/223. For all these reasons the appeal should be allowed and the case remitted to the tribunal to proceed as accords.

Submissions for the Respondent

[14] Mr Komorowski invited us to refuse this appeal. If, however, the appeal were to be allowed, he agreed that the appropriate course of action would be to remit the case to the Upper Tribunal to proceed as accords. He adopted both his Note of Argument and his supplementary Note of Argument. He began by considering the language of both the IS Regulations and the EEA Regulations. Regulation 6 of the EEA Regulations broadly mirrored the structure of Article 7 of Directive 2004/38/EC, although that did not create a separate class of jobseeker. Regulation 14 extended the right of residence beyond the initial period of three months. The appellant's right of residence suffers potential interruption when her mother leaves the United Kingdom, but this is overcome by Regulations 10 and 14(3). On a proper analysis of the regulations, they are concerned with the same right running through the regulations – which is a right retained, not acquired. Turning to the IS Regulations, the construction of Regulation 21AA(3)(b)(ii) argued for on behalf of the appellant is artificial and unduly restricted; the right remains based on the right of the jobseeker. Although Mr Komorowski accepted that the regulation might have been worded differently, that does not mean to say that it is not capable of being interpreted in the way the respondent submits it should be. In any event, the court can import words to comply with the manifest intention of parliament.

[15] This involves consideration of the purposes of the legislation. The submission for the appellant was that the regulations give effect to rights under EU law, and in according a right to Income Support they are complying with the obligation not to discriminate. Neither part of this proposition is well-founded. The phrasing of Article 12(3) of the Citizens' Directive was important – "the Union Citizen's departure from the host Member State...shall not entail loss of the right of residence of his/her children...". The appellant has a right, derivative from the right of her mother, under domestic law but not under EU law. Article 12 only enables a person to retain a right which exists elsewhere. Article 7 does not confer a right on jobseekers, nor does Article 14. If the appellant has no "stand alone" right, the derogations in Article 14(4)(b) and 24.2 should apply by analogy. The appellant has no right of residence in the United Kingdom in her own particular circumstances under EU law. The provisions of Article 24 of the Citizens Directive regarding equal treatment depend on a right of residence under the Directive. The appellant has no such right of residence. Counsel referred us to *Mirga* (*supra*) and *Dano* (*supra*).

[16] For similar reasons, the Charter of Fundamental Rights of the European Union is not relevant to the present case. Its provisions only apply to member states when they are implementing EU law (Article 51(1)). As EU law neither requires the appellant to be given a right to reside nor a right to social security, the Charter has no bearing on the interpretation of domestic legislation on that matter (*Rugby Football Union*, *supra*, at paragraphs 28 and 32). However, even if the Charter is applied, it takes the

appellant's case no further – there is no requirement for the appellant to be provided with social security (Article 34), and none of the very general provisions of Article 24 regarding the rights of the child are contravened in this case.

[17] In terms of the regulations, jobseekers do have limited rights to benefits after three months residence in the United Kingdom. The argument advanced for the appellant does not explain the draftsman's intention in drafting Regulation 21AA; if the argument is correct, the draftsman shows a rather convoluted and indirect method of implementing the intention to protect an estranged child in education in the United Kingdom. This could have been achieved by child benefit. Moreover, the appellant's arguments apply not only to Income Support but to other benefits such as housing benefit – if the argument is correct, an entitlement to such benefits would only arise when the job seeking parent departed from the United Kingdom.

[18] In any event, Regulation 21AA was introduced by the Social Security (Persons from Abroad) Amendment Regulations 2006. The explanatory note to these regulations states that they are "made in consequence of Council Directive Number 2004/38/EC" ("the Free Movement Directive"). The import o the explanatory note is that the regulations are intended to discharge the United Kingdom's obligations under EU law, but not to go further. There is no suggestion that EU law, either under the Free Movement Directive or otherwise, requires Income Support to be provided to the appellant. As Regulation 21AA is intended simply to implement EU law, it should not be read in a manner that goes beyond what that law requires – *Alemo-Herron* v *Parkwood Leisure Limited* [2010] ICR 793, [2010] EWCA Civ 24 (particularly at paragraphs 53/54).

[19] Mr Komorowski adhered to the view expressed in his Note of Argument that the implications of interpreting Regulation 21AA in a different manner are absurd. It would result in a family member who "retains a right" (EEA Regulations Article 10) despite the departure of the jobseeker in fact receiving enhanced rights by reason of that departure, namely potential eligibility for receipt of Income Support. Rather than promoting the effectiveness of freedom of movement and maintaining family unity, the appellant's construction would tend to encourage job seekers to return to their country of origin whilst leaving their children behind, promoting the breakup of families. So as well as going beyond the requirements of EU law, this construction would tend to subvert some of the primary objects of EU law without advancing any conceivable alternative policy considerations.

[20] The language of Regulation 21AA is habile to cover all those whose rights of residence arise from jobseeking, whether that search for employment is ongoing or historic. If the court finds that the text of the regulation is incompatible with this meaning, the consequences of such a reading are so absurd and the policy intention so clear that the court should read the provision as if it covered all of those whose rights derive from jobseeking (ongoing or historic), even if this requires reading words into the regulation – *Inco Europe Limited* v *First Choice Distribution* [2000] 1 WLR 586, per Lord Nicholls of Birkenhead at 592).

Response for the Appellant

[21] Ms Irvine made three arguments in response to the submissions for the respondent:

(1) Every right in the Citizens' Directive finds its foundation in the Treaty Establishing the European Community and in TFEU. Article 12 of TEC was identical to Article 18 TFEU, and Article 18 TEC was identical to Article 21 TFEU; they were referred to in the heading of the Citizens' Directive, and purpose 11 of that Directive was important. The appellant's rights are rights under EU law.

(2) The respondent placed emphasis on the word "retention" in the heading of Article 12 of the Citizens' Directive (in the French version this is "maintained"), and on reference to "loss of the right of residence" in paragraph 3 thereof. However, the substantive wording of Article 12 is not concerned with "retention" or "loss" – it states that the union citizen's departure from the host member state shall not affect the right of residence of his/her family members. Article 12(1) is directed only at EU citizens; Article 12(3) is directed at both categories of right holder. Whether the right affected is under Article 12(1) or 12(3), Article 14 makes it clear that a right is conferred on family members.

(3) If, after the initial three month period, an EU national resident in the United Kingdom who is estranged from his/her child and receives Child Benefit but does not pass this on to the child, this raises issues of enforcement. The construction of Regulation 21AA argued for by the appellant avoids this practical difficulty.

Decision and Reasons

[22] We are persuaded that the submissions for the appellant are well-founded, and that this appeal must be allowed.

[23] We agree that a distinction falls to be drawn between the right conferred by Regulation 14(2) of the EEA Regulations on the one hand, and the right conferred by Regulation 14(3) of those regulations on the other hand. Regulation 14(2) provides an extended right of residence to the family member of a primary right holder who is residing in the United Kingdom with continuing "qualified person" status. Regulation 14(3) is predicated on the primary right holder having left the United Kingdom. The definition of the phrase "qualified person" in Regulation 14 is to be found in Regulation 6; it is clear from that definition that a "qualified person" must be present in the United Kingdom. A person who is an EEA national who has entered the United Kingdom in order to seek employment is (subject to the conditions set out in Regulation 6) a qualified person. On the basis of the Upper Tribunal's findings in fact the appellant's mother was a jobseeker in the United Kingdom, and was a qualified person. However, when she returned to Poland she ceased to be a qualified person.

[24] After the appellant's mother returned to Poland, the appellant remained in the United Kingdom. She was the daughter of a person who ceased to be a qualified person on ceasing to reside in the United Kingdom, and she was attending an educational course in the United Kingdom immediately before the qualified person ceased to be a qualified person, and continues to attend such a course. On this factual basis, she falls within the definition of a "family member who has retained the right of residence" provided by Regulation 10(1) and (3) of the EEA Regulations.

[25] It follows from the above that the appellant has the extended right of residence provided for by Regulation 14(3), and not the right of residence provided by Regulation 14(1) or (2).

[26] Turning to Regulation 21AA of the IS Regulations, paragraph (3)(b) is concerned only with cases where the right to reside falls under Regulation 14(1) or (2). Subparagraph (b)(i) is concerned with the situation in which the right to reside exists because the claimant is a jobseeker for the purpose of the definition of "qualified person" in Regulation 6(1) of the EEA Regulations – that is to say, someone who is present in the United Kingdom and seeking work. Subparagraph (b)(ii) relates to a family member of such a jobseeker. The appellant does not fall into either of these categories; rather, she is a family member who has retained the right of residence in terms of Regulation 10}(3) of the EEA Regulations. Her right to reside does not fall within paragraph (3) of Regulation 21AA.

[27] It does not appear from the reasoning of the Upper Tribunal that it has recognised the distinctior to be drawn between Regulation 14(1) and (2) on the one hand, and Regulation 14(3) on the other. The Upper Tribunal has, we consider, fallen into error in holding that the appellant falls within the provisions of Regulation 21AA(3)(b)(ii), because the appellant's mother is no longer a jobseeker. She ceased to be a jobseeker when she departed from the United Kingdom. Regulation 21AA(3)(b) is phrased in the present tense: "but only in a case where the right exists under that regulation because the claimant is a family member...of such a jobseeker" (emphasis added). The error of the Upper Tribunal may be seen from its use of the past tense in the last sentence of paragraph 15 of its decision letter (quoted above), in which it holds that the appellant's right to reside is one which she has as a "family member" of an EEA national who had been a "jobseeker" in the United Kingdom (emphasis again added). Properly construed, we do not consider that Regulation 21AA(3)(b) relates to such a person. It relates to a job seeker present within the United Kingdom, or a family member of a jobseeker present in the United Kingdom – it does not relate to a family member of someone who has ceased to be a jobseeker within the United Kingdom.

[28] The discussion above relates to the language of the IS Regulations and the EEA Regulations. There are other factors which support the view that a person in the appellant's situation – ie an estranged child of a parent who has ceased to be a qualified person on leaving the United Kingdom, the child continuing to reside within the United Kingdom and attend school – should not be excluded from consideration from the habitual residence test by reason of Regulation 21AA. We agree with Ms Irvine that the appellant's right is indeed a right under EU law, having regard to Council Directive 2004/38/EC ("the Citizens' Directive"), and in particular paragraphs 1 and 3 of Article 12 and paragraph 2 of Article 14. It appears from the Explanatory Memorandum and Transposition Note that Article 12(1) was the basis of Regulation 10(2) and (3) of the EEA Regulations, and Article 12(3) was the basis of Regulations 10(3) and (4) and Regulation 14(3). Moreover, the rights in the Directive can be traced back to identical rights conferred in TFEU and TEC. We are satisfied, having regard to the observations referred to above in *Zagorski*, *Fransson* and *Rugby Football Union* that we are concerned with the United Kingdom acting within the material scope of EU law. By reason of Regulations 10 and 14 of the EEA Regulations, the appellant satisfies the conditions for lawful residence in the United Kingdom. She is therefore entitled to claim equal treatment with nationals of the United Kingdom in relation to social assistance – *Mirga* at paragraph 54. This court must therefore interpret national law in conformity with EU law in order to ensure the full effectiveness of EU law, and in particular the principle of non-discrimination - *Kücükdeveci* at paragraphs 48 and 53. The principles of EU law, together with the authorities referred to, provide support for the construction of Regulation 21AA which we favour.

[29] Moreover, we are not persuaded that there is an absurdity in this construction, nor that it subverts any of the primary objects of EU law. It is, we consider, farfetched to suggest that our interpretation of Regulation 21AA will promote the breakup of families by encouraging parents who were jobseekers in the United Kingdom to return to their country of origin leaving their children behind in the United Kingdom merely so that they can receive income support. On the contrary, we consider that it is consistent with the principles of non-discrimination and equality of treatment which are fundamental to EU law that children of EEA citizens who are estranged from their parents and left in the United Kingdom should be treated in the same way as British children would be treated in the same circumstances. We find it unnecessary and inappropriate to read words into the regulation (as was discussed in *Inco Europe Limited* v *First Choice Distribution*), as urged on us by counsel for the respondent.

[30] For these reasons we consider that the retained right of residence conferred by Regulation 14(3) of the EEA Regulations is not an excluded right of residence for the purposes of Regulation 21AA(3)(b)(ii) of the IS Regulations. We therefore answer the question of law in this appeal in the negative. Provided that the appellant is able to establish habitual residence in the United Kingdom and satisfy the other eligibility criteria of the IS Regulations, we consider that she is entitled to Income Support.

[31] The habitual residence test and the other eligibility criteria remain to be considered. We shall therefore allow the appeal and remit the case to the Upper Tribunal to proceed as accords.