Upper Tribunal
(Immigration and Asylum Chamber)

MDB and others (Article 12, 1612/68) Italy [2010] UKUT 161 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

On 2 February 2010

Before

SENIOR IMMIGRATION JUDGE STOREY

SENIOR IMMIGRATION JUDGE S M WARD

Between

MDB

MADB
GRDB

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss L Appiah of Counsel instructed by Charles Annon & Co.

For the Respondent: Mr C Avery, Home Office Presenting Officer

(i) In London Borough of Harrow v Ibrahim Case C-310/08 and Maria Teixeira v London Borough of Lambeth Case C-480/08 the European Court of Justice ECJ confirmed the principle established in the Baumbast Case C-413/99 [2002] ECR I-7091, namely that in order to confer on a child a right of residence Article 12 of Regulation 1612/68 requires only that he has lived with his parents or either one of them in a Member State while at least one of them resided there as a worker.

(ii) Although simply seeking employment may be sufficient to make an individual a worker in Union law for a limited period, it is not enough to engage Article 12, since this provision requires that the parent concerned is someone who is or has been employed in the territory of another Member State.

(iii) If there is a parent who meets the requirement of employment, then his child can acquire an Article 12 right of residence. But under the Baumbast principle such a right of residence for a child can only start to run from the date he or she begins in education; it cannot commence from the child's

date of birth.(The same is true in respect of the derived right of residence of a parent carer of such a child).

(iv) On Baumbas t principles, a child in education can continue to have an Article 12 right of residence even if the said parent later ceases to be a worker.

(v) In a case concerned with an EEA decision the tribunal judge is obliged by s.84(1)(d) of the Nationality, Immigration and Asylum Act 2002 to decide whether the decision breaches any of the appellants' rights under the Community Treaties in respect of their entry to or residence in the United Kingdom (emphasis added); see also s.109(3). Where the decision is a refusal to issue a permanent residence card that may necessitate, in the event that refusal is found correct, considering whether the appellant was entitled nonetheless to an extended right of residence.

DETERMINATION AND REASONS

1. The appellants are a mother and two sons. The first appellant is a citizen of Argentina. Her two sons, however, are citizens of Italy and therefore EEA nationals. They were born on 27 November 2001 and 23 December 2004 respectively. The first appellant first came to the UK in May 2002 following her marriage to an Italian citizen, Mr LDB (the father of her children). On 26 November 2002 she applied for and was issued a residence card as the family member of an EEA national valid from 25 October 2002 until 25 April 2003. She was issued another residence card valid from 23 May 2003 until 23 November 2003. In both cases the issue was for a six month period only. This was because her husband was a job seeker, still yet to find employment. A further application for a residence card was made on 21 November 2003 but was refused as no evidence was provided that her husband had found employment or was otherwise exercising Treaty rights. On 29 January 2008 she applied again, this time for permanent residence for herself and her two children. They were all refused on 24 October 2008. In a determination notified on 6 March 2009 Immigration Judge (IJ) E.B. Grant dismissed their appeals. Their success in obtaining an order for reconsideration has brought the matter before us.

2. Although when we heard this case we sat as members of the Asylum and Immigration Tribunal (AIT), by virtue of legislative changes brought into effect on 15 February 2010 we are now required to complete hearing it as judges of the Upper Tribunal Immigration and Asylum Chamber (UTIAC).

3. Before the IJ the appellants pursued their case on three grounds. First it was claimed that all three were entitled to permanent residence under reg 15(1)(b) of the Immigration (European Economic Area) Regulations 2006 (hereinafter the "2006 EEA Regs") on the basis of having been resident for five years as the family members of an EEA national exercising Treaty rights. Second, it was contended that even if they could not qualify under reg 15(1)(b), they had a separate basis to found their claim, namely Article 12 of Regulation 1612/68 as interpreted by the European Court of Justice (ECJ) in Baumbast Case C-413/99 [2002] ECR I-7091 (the second appellant has been attending education since December 2006 and the third appellant since 25 February 2008). Third, it was submitted that the decision to refuse them a permanent residence card breached their right to respect for private and family life under Article 8 ECHR. The IJ rejected the first two grounds for the same reason: she was not satisfied that Mr LDB was in the UK exercising Treaty rights. She also rejected the Article 8 claim because she concluded that the three appellants "can and should return to Argentina together and their family life can continue there".

4. The grounds for reconsideration challenged her findings on each of these matters. It was argued that as Mr LDB was in receipt of Jobseekers Allowance, which has as a condition of its payment that the claimant shows he is looking for work and attending workshops, he should have been treated as a

jobseeker for the purposes of reg 6 of the 2006 EEA Regs. Secondly, issue was taken with the IJ's summary dismissal of the Baumbast point. Under Baumbast principles, it was said, all that had to be established was that the children of the EEA national must have installed themselves in a Member State during the exercise by their parent or parents of rights of residence as a migrant worker – it did not matter that the parent concerned had ceased to be a migrant worker subsequently. As regards Article 8, it was contended that the IJ had failed to take sufficient account of the fact that the children had been in the UK for over five years (over seven years in the case of the second appellant) and that both had had health difficulties.

5. At the hearing the parties were asked to consider the effect of two recent Advocate General (A-G) Opinions in London Borough of Harrow v Ibrahim Case C-310/08 (A-G Mazák) and Maria Teixeira v London Borough of Lambeth Case C-480/08 (A-G Kokott).

6. Mr Avery said that he was prepared to accept for the purposes of this appeal that the Opinions of the two Advocates General represented the correct legal position.

7. In submissions to us Miss Appiah pointed out that the IJ's apparent finding that Mr LDB had never worked was contrary to the evidence she herself accepted showing he had worked in August 2007. In any event he had clearly been a jobseeker during September 2002 to November 2003; that can have been the only basis on which the first (and second) appellant was granted a residence card. The IJ had also accepted in para 21 that Mr LDB was (now) "looking for work". She said that she accepted that the third appellant could not qualify for permanent residence because of his age, but it would clearly be contrary to Article 8 to allow the first two appellant's appeals but not his too. The IJ's treatment of Article 8 failed to approach matters relating to the children in line with Beoku-Betts [2008] UKHL 39.

8.
Mr Avery sought to defend the IJ's decision. Given that the IJ found Mr LDB to be a wholly unreliable witness she was quite entitled, Mr Avery maintained, to find that he had never exercised Treaty rights by working and that at best he was a jobseeker for EEA purposes only for a relatively short period. The IJ had weighed all the circumstances of the family and had reached defensible conclusions.

Legal Framework

9. The requirements of the 2006 EEA Regulations relevant to this case are as follows:

' Q ualified person'

6-(1) In these Regulations, 'qualified person' means a person who is an EEA national and in the United Kingdom as—

(a) a jobseeker;

(b) a worker;

(c) a self-employed person;

(d) a self-sufficient person; or

(e) a student.

(2) A person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if—

(a) he is temporarily unable to work as the result of an illness or accident;

(b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom, provided that he has registered as a jobseeker with the relevant employment office and—

(i) he was employed for one year or more before becoming unemployed;

(ii) he has been unemployed for no more than six months; or

(iii) he can provide evidence that he is seeking employment in the United Kingdom and has a genuine chance of being engaged;

(c) he is involuntarily unemployed and has embarked on vocational training; or

(d) he has voluntarily ceased working and embarked on vocational training that is related to his previous employment.

(3) A person who is no longer in self-employment shall not cease to be treated as a self-employed person for the purpose of paragraph (1)(c) if he is temporarily unable to pursue his activity as a self-employed person as the result of an illness or accident.

(4) For the purpose of paragraph (1)(a), “jobseeker” means a person who enters the United Kingdom in order to seek employment and can provide evidence that he is seeking employment and has a genuine chance of being engaged.

…

Initial right of residence

13.—(1) An EEA national is entitled to reside in the United Kingdom for a period not exceeding three months beginning on the date on which he is admitted to the United Kingdom provided that he holds a valid national identity card or passport issued by an EEA State.

(2) A family member of an EEA national residing in the United Kingdom under paragraph (1) who is not himself an EEA national is entitled to reside in the United Kingdom provided that he holds a valid passport.

(3) But—

(a) this regulation is subject to regulation 19(3)(b); and

(b) an EEA national or his family member who becomes an unreasonable burden on the social assistance system of the United Kingdom shall cease to have the right to reside under this regulation.

Extended right of residence

14.- (1) A qualified person is entitled to reside in the United Kingdom for so long as he remains a qualified person

(2) A family member of a qualified person residing in the United Kingdom under paragraph (1) or of an EEA national with a permanent right of residence under regulation 15 is entitled to reside in the United Kingdom for so long as he remains the family member of the qualified person or EEA national.

(3)…

(4) A right to reside under this regulation is in addition to any right a person may have to reside in the United Kingdom under regulation 13 or 15.

(5) But this regulation is subject to regulation 19(3)(b).

Permanent right of residence

15.—(1) The following persons shall acquire the right to reside in the United Kingdom permanently—

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

(c) a worker or self-employed person who has ceased activity;

(d) the family member of a worker or self-employed person who has ceased activity;

(e) a person who was the family member of a worker or self-employed person where—

(i) the worker or self-employed person has died;

(ii) the family member resided with him immediately before his death; and

(iii) the worker or self-employed person had resided continuously in the United Kingdom for at least the two years immediately before his death or the death was the result of an accident at work or an occupational disease;

(f) a person who—

(i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and

(ii) was, at the end of that period, a family member who has retained the right of residence.

(2) Once acquired, the right of permanent residence under this regulation shall be lost only through absence from the United Kingdom for a period exceeding two consecutive years.

(3)
But this regulation is subject to regulation 19(3)(b). ”

10. Relevant provisions of Directive 2004/38 (the “Citizens Directive”) are as follows:

“Article 7

Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

…

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

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

…

Article 10

Issue of residence cards

1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called 'Residence card of a family member of a Union citizen' no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

2. …

…

Article 16

General rule for Union citizens and their family members

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

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

…

Article 18

Acquisition of the right of permanent residence by certain family members who are not nationals of a Member State

Without prejudice to Article 17, the family members of a Union citizen to whom Articles 12(2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State."

11. Also to be noted here are recitals 11 and 17:

"(11) The fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures.

(17) Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members

who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure."

12. Article 12 of Regulation 1612/68 which states:

"The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions."

13. Article 12 is relevant because it is one of the provisions of Community (now Union) law on free movement of persons left unrepealed by the Citizens Directive. Being a mandatory provision of a Regulation also means it has direct effect in UK law without any need for transposition.

14. Also relevant are the ECJ judgments dealing with this type of case. In Brown v The Secretary of State for Scotland (Free Movement of Persons) [1988] EUECJ R-197/86 the Court found that a child of a national of one Member State, who resides in the territory of another Member State may not claim the benefit of Article 12 of Regulation No 1612/68, where his parent, who no longer resides in the host State, last resided there as a worker before the birth of the child (para 31). In Landesamt für Ausildungsforderung Nordrhein-Westfalen v Lubor Gaal [1995] EUECJ C-7/94 the Court reiterated that the effect of Brown was that "Article 12 of the Regulation must be interpreted as granting rights only to a child who has lived with his parents or either one of them in a Member State at a time when at least one of his parents resided there as a worker" (para 27); but went on to clarify that the Article did not exclude those still in education, even if they were already 21 years of age or older and were no longer dependants of their parents.

15. In Baumbast the ECJ stated at para 63:

"In the light of the foregoing, the answer to the first question must be that children of a citizen of the European Union who have installed themselves in a Member State during the exercise by their parent of rights of residence as a migrant worker in that Member State are entitled to reside there in order to attend general educational courses there, pursuant to Article 12 of Regulation No. 1612/68. The fact that the parents of the children concerned have meanwhile divorced, the fact that only one parent is a citizen of the Union and that parent has ceased to be a migrant worker in the host Member State and the fact that the children are not themselves citizens of the Union are irrelevant in this regard."

16. As further developed by the ECJ in Ibrahim at paras 40-42 and 50:

"40. The right derived by children from Article 12 of Regulation No 1612/68 is also not dependent on the right of residence of their parents in the host Member State. It is settled case-law that Article 12 requires only that the child has lived with his parents or either one of them in a Member State while at least one of them resided there as a worker (Case 197/86 Brown [1988] ECR 3205, paragraph 30, and Gaal , paragraph 27).

41. To accept that children of former migrant workers can continue their education in the host Member State although their parents no longer reside there is equivalent to allowing them a right of residence which is independent of that conferred on their parents, such a right being based on Article 12.

42. Article 12 of Regulation No 1612/68 must therefore be applied independently of the provisions of European Union law which govern the conditions of exercise of the right to reside in another Member State. That independence of Article 12 from Article 10 of that regulation formed the basis of the judgments of the Court referred to in paragraphs 29 to 31 above, and cannot but subsist in relation to the provisions of Directive 2004/38.

…

43.
It follows that the children of a national of a Member State who works or has worked in the host Member State and the parent who is their primary carer can claim a right of residence in the latter State on the sole basis of Article 12 of Regulation No 1612/68, without being required to satisfy the conditions laid down in Directive 2004/38."

Our Assessment

17. We should first of all note that as the second and third appellants are citizens of Italy, they are EEA nationals in their own right. However, the issue in their case is not whether they are permitted to be in the UK but whether they are entitled to EEA rights of residence, and, most immediately, whether they are entitled to permanent residence cards. The arguments before the IJ identified two separate heads under which the appellants considered they should succeed: Regulation 15(1)(b) of the 2006 Regulations and Article 12 of Regulation 1612/68. Under reg 15(1)(b), all three appellants were entitled to succeed as family members if they could show that Mr LDB has been in the UK exercising Treaty rights for at least the past 5 years continuously (both children were over 5 years old at the date of the hearing before the IJ). Under Article 12, the second and third appellants stood to succeed if they could show they had a derived right through their father's employment activities. Under Article 12, the first appellant's position was entirely dependent on that of her children. If either or both of them could derive a right of residence from their father (Mr LDB) under this Article, then she must be entitled to a right of residence in line, as their principal carer: see Ibrahim, para 43.

18. Mr Avery conceded before us that the respective Advocate General Opinions in Ibrahim and Teixeira should be taken as expressing the correct legal position. We now, of course, have to hand the subsequent judgments of the ECJ in both these cases, which are binding on us in any event. As they very much echo the Advocate General Opinions, we saw no necessity to seek further submissions on their implications for these appeals.

19. It is not in dispute that the second appellant has been attending education since December 2006 and the third appellant since 25 February 2008.

20. We consider that to some extent the IJ misunderstood the potential bearing that Baumbast principles had on the appellants' appeals. The IJ considered that in Baumbast the ECJ made eligibility under Article 12 dependent on the EEA national parent continuing to exercise Treaty rights. As our earlier citation makes clear, that is incorrect. For the Court the only requirement, so far as child is concerned is that he was living with his parents or one of them during the time one of them resided there as a worker: see the ECJ in Ibrahim at paras 40-42, cited above at para 16.

21. It remains to consider whether the IJ's error was a material one capable of affecting the outcome of the appellants' appeals. In order to decide that it is first of all necessary to consider in more depth the position of the adult EEA national on whom all three appellants depend for their contention that they possess a right of permanent residence under Community law, namely Mr LDB.

Mr LDB's position

22. The treatment by the IJ of the position of Mr LDB in relation to EEA rights is crucial to the outcome of the appellants' appeals.

23. Mr Avery sought to submit that the IJ was right to regard Mr LDB as an EEA national who had never exercised Treaty rights: in 2002/3 he had only ever been a jobseeker and in 2007 his period of work - ten weeks' work for an eight hour a week job - was, he said, not enough for EEA purposes. Nor did the evidence concerning his current position indicate he had become a worker more recently, since he had been looking for work well beyond any period that could reasonably be considered to justify continuing to treat him as a worker for EEA purposes and he was found by the IJ not to genuinely intend finding a job. Miss Appiah contended that Mr LDB should have been considered to have been exercising Treaty rights during 2002/2003, June-August 2007 and currently.

24. Clearly the parties were right to see these three periods as the only potentially relevant ones. There has been no challenge to the IJ's adverse credibility findings and there was no satisfactory evidence to show that Mr LDB was potentially exercising Treaty rights except during (or in the case of the June-August 2007 period, arising out of) these three periods of time.

25. In our opinion, the IJ erred in her assessment of Mr LDB's position in 2002/2003.

26. So far as concerns September 2002/November 2003, it is not in dispute that during this period he was issued with a residence permit (for two periods of six months each) on the basis that he was a jobseeker. That made him a qualified person within the meaning of the relevant legal provision in force at the time - reg 5(a) of the Immigration (European Economic Area) 2000 Regulations (SI 2000/2326). Since reg 3(1)(a) of the same Regulations defined "worker" as having the same meaning as in Article 39 of the EC Treaty, Mr LDB was entitled during this period to be considered as a worker (the same definition is given in reg 4(1)(a) of the 2006 EEA Regulations), notwithstanding that he was only looking for work. On principles established by the ECJ in Antonissen C-292/89 [1991] ECR I-745, his jobseeking during that time was sufficient to qualify him as a worker for Community law purposes. Indeed, as Mr Avery eventually conceded during discussions, the respondent could not lawfully have issued Mr LDB and his family with EEA residence documents in 2002/2003 unless satisfied he was a qualified person who exercised Treaty rights under the Immigration (European Economic Order) Regulations 2000. The respondent's own refusal decision of 24 October 2008 confirms such documents were issued in view of an acceptance that he was, during that earlier period, a qualified person. (Of course, under the 2006 EEA Regulations "jobseeker" is now a separate category of qualified person, but that is only relevant in this case when it comes to considering Mr LDB's post-30 April 2006 position).

27. Accordingly the IJ should have found that Mr LDB was exercising Treaty rights during this period.

28. So far as concerns June-August 2007, however (by which time Mr LDB fell under the 2006 EEA Regulations), we consider it was open to the IJ to find that his employment for that period, a period of 10 weeks during which his hours of work were only eight hours a week, was insufficient for him to qualify as a worker for the purposes of EU free movement law. Of course the term "worker" in Union law is to be given a very wide interpretation and a person might be a worker even if he works only part-time and for a limited period. In Levin 53/81 [1982] ECR 1035 a chambermaid who was employed for only 30 hours a week and earned less than the minimum wage was held to be a worker. However, the tests applied in Levin and subsequent case law include that the services performed must be genuine and effective and more than marginal and ancillary. In addition, as noted by Arden LJ in Barry

v London Borough of Southwark [2008] EWCA Civ 1440 and by the Tribunal in IP & Others (A2 national-worker authorisation-exemptions) Bulgaria [2009] UKAIT 00042 (both cases citing Nini-Orasche Case C-413/01), in deciding whether a person is a worker it is also necessary to consider all the circumstances relating to the nature of the activities in question and the employment relationship at issue, including the duration of the employment and prior employment history. The more recent judgment of the ECJ in Vatsouras Case C-2/08 and Koupatantze Case 3/08, 4 June 2009 (2009) EUECJ C-22/08 have confirmed these principles. As noted by Advocate General Colomber in his Opinion in Vatsouras at para 63: "Anyone wishing to join the workforce has better credentials if they have carried out responsibilities with a wage earning aspect of some kind in the past."

29. Bearing in mind that Mr LDB's period of employment in 2007 was only for 10 weeks, that his hours were only 8 hours a week and that previously he had been unemployed since his arrival in the UK in 2002, we do not consider that the IJ erred in evaluating the facts relating to his 2007 employment as she did.

30. As regards Mr LDB's situation at the date of hearing before the IJ, it was accepted that he was in receipt of Jobseekers Allowance and there was a letter dated 3 December 2008 (whose accuracy was not disputed by Mr Avery) from the Project Manager of Acton Training Centre stating that Mr LDB had been attending training full-time for six months. Notwithstanding this the IJ found his claim to be still actively interested in finding a job not credible. As noted earlier, the IJ's findings of fact have not been challenged and they were in any event, we consider, findings that were open to her. Whilst Antonissen established that a job seeker could qualify as a worker, the case also made clear that the period of time allowed for the job-seeker to find employment was not indefinite and that the applicant had to show that he was someone who was genuinely seeking employment. The IJ's finding that Mr LDB was not genuinely intent upon employment entitled her to conclude that Mr LDB was not a worker or a jobseeker.

31. Even though our analysis of Mr LDB's position has revealed two errors on the part of the IJ, it remains to decide whether they were material.

32. Having clarified Mr LDB's position (and also identified error in the IJ's treatment of his position) we can now turn to consider that of the three appellants.

Regulation 15(1)(b)

33. Mr Avery conceded that for the purposes of these appeals we can proceed on the basis that by virtue of Sch 1 to the 2006 EEA Regs any relevant periods of residence accrued by the appellants under Community/Union law can count towards establishing the qualifying periods of residence for the purposes of the 2006 EEA Regulations (which include of course 15(1)(b)).

34. We do not consider that the IJ materially erred in law in deciding that reg 15(1)(b) did not avail the appellants, not, at least, on the basis of Mr LDB's periods as a qualified person. As already noted, there has been no challenge raised to the IJ's adverse credibility findings in respect of Mr LDB, so at best the documentary evidence before the IJ established that he was exercising Treaty rights for a limited period - totalling around 12 months in 2002/2003 - and not thereafter. His period of relevant qualifying activity fell drastically short of the requisite five years.

Article 12 of Regulation 1612/68

35. It remains, however, to consider whether the IJ materially erred in law in rejecting the appellants' claims that they were entitled to permanent residence by another route, based directly on Article 12 of Regulation 1612/68.

36. Before venturing further, we need to acknowledge one point of difficulty we have in describing the precise foundation for a claim to a right to permanent residence based on residence accrued under Article 12. Article 16(1) of the Directive states that Union citizens who have resided legally for a continuous period of 5 years in the host Member State shall have the right of permanent residence there and Article 16(2) states that 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 5 years shall also have a right of permanent residence. On one reading, a person who is entitled to a right of residence under Community/Union law by virtue of Article 12 of Regulation 1612/68 cannot properly accrue a period of legal residence under Article 16 of the Citizens Directive because such residence depends on there having been earlier residence (under Article 7(2)) during which the Union citizen has been exercising Treaty rights under the Directive. On another view, it would be incongruous if residence that is legal under directly effective provisions of Community/Union law (Article 12 of Regulation 1612/68 is one of the directly effective provisions of this Regulation left unrepealed by the new Directive: see Article 38(1)) could not be considered legal residence within the meaning of Article 16 of the Citizens Directive.

37. There is a similar, perhaps even more acute, difficulty when one turns to the position under the 2006 EEA Regulations. The decision appealed against was one to refuse to issue a permanent residence card under these Regulations. Even applying the doctrine of indirect effect, it is difficult to see how these Regulations could be read as including Article 12-derived residence within Article 15(1)(b). Both Article 15(a) and (b) requires residence "in accordance with these Regulations" for a continuous period of 5 years. In our judgment, the 2006 EEA Regulations were not intended to cover and do not cover rights of residence derived directly from Article 12.

38. In the end we do not need to resolve these related points of difficulty because: (i) Mr Avery conceded that such residence could qualify for reg 15 purposes; and (ii) even if such residence could not qualify for reg 15 purposes, the respondent would still be bound under directly effective Union law to recognise that Article 12 beneficiaries had an established right of residence. Under either head, if the appellants were able to show they had Article 12-derived rights of residence for the requisite period, then their appeals would have to succeed since the decisions appealed against would have to be seen as not being in accordance with the law.

39. Thus all turns on Article 12 having application. Given our findings on Mr LDB's working history (confirming the IJ's finding that neither his 2007 employment nor his current activities amounted to the exercise of Treaty rights but rejecting her finding that he was not exercising Treaty rights in 2002/2003), the appellants' cases depend wholly on their being able to show that his exercise of Treaty rights in 2002/2003 had the effect of engaging their Article 12 rights. But in 2002/2003, albeit he was entitled on the basis of his status as a job-seeker to qualify as a worker for that period, he had never worked in the United Kingdom. Can a child in education (and a parent who cares for the child in turn) derive Article 12 rights from a parent who in the relevant period has exercised Treaty rights (as a jobseeker cum worker) but has never worked? Miss Appiah submitted that even a jobseeker parent was covered by Article 12; Mr Avery submitted the opposite. Although we have not found this matter entirely free of doubt, we are satisfied that Miss Appiah's interpretation cannot be right. We recognise that neither in Brown, Gaal , Baumbast, Ibrahim , Teixeira or any other case does the Court address the question whether "employed" within the meaning of Article 12 can include a jobseeker. However,

the text of Article 12 specifies that the child beneficiaries must be “children of a national of a Member State who is or has been employed in the territory of another Member State” [emphasis added]. The definition of worker is not confined to, and is not to be equated with, the latter. Further, as noted by Lord Hope in Zalewska [2008] UKHL 67 at para 27, the structure of this Regulation differentiates between “Title I” measures relating to eligibility for employment (Articles 1-6) and “Title II” measures dealing with Employment and equality of treatment (Articles 7-9). Title III deals with Workers’ Families. Jobseekers are dealt with in Title I, not Title II or III. We accept, for reason outlined earlier, that a jobseeker can qualify as a worker and that in this sense Mr LDB was a worker during the specified periods during 2002/2003. Even so, we do not think that Article 12 was intended to cover persons who have never worked (as was Mr LDB’s position at the relevant time), even applying (as we must) a purposive construction. Its rationale is that the children of someone who decides, having moved to another Member State, to establish himself there, should be able to enjoy the same rights as nationals of that state and to become integrated there if they wished without that interrupting the children’s education. But simply seeking employment, whilst it may be enough to make a person a worker in Community/Union law for a limited period, does not seem to us enough to make that person someone who has installed himself for Article 12 purposes.

40. In short, the facts of the appellants’ case fail to engage Article 12. Hence the IJ’s error in relation to Mr LDB’s 2002/2003 period as a job seeker was not material.

The appellants’ grounds for reconsideration also maintained that the IJ had materially erred in law in failing to allow the appeals under Article 8 of the ECHR. However, we do not consider that in reaching her conclusions on this matter that the IJ erred in law. There were a number of factors counting in the appellants’ favour. The first appellant was married to an EEA national and their two children were EEA nationals in their own right (being citizens of Italy). The respondent had granted Mr LDB a residence permit in 2002/2003. The first and second appellants had been in the UK for over 7 years and the third appellant had been born here in December 2004. The second and third appellants had been attending school in the UK since December 2006 and February 2008 respectively. However, there were weightier factors counting against the appellants. Since November 2003, none of the appellants has had a right of residence. The second and third appellants were of a tender and adaptable age. Of particular importance, their father, Mr LDB, has been in the UK for over 8 years yet during that period has only ever worked for a 10 week period in June-August 2007.Over a considerable period, therefore, the family had been a burden on public funds. On the IJ’s findings of fact the first appellant did not face any particular difficulties back in Argentina and it would not be unreasonable to expect the family to relocate there. More significantly, there was absolutely nothing in the evidence to suggest that it would be unreasonable to expect the family to live in Italy, a country of which Mr LDB and his two children were nationals. Although the IJ did not specifically refer to Beoku-Betts [2008] UKHL 39, her assessment of the position of the family showed proper regard to the position of the family as a whole.

41. Accordingly the IJ did not materially err in law in dismissing the appeals on both EEA and Article 8 grounds. Her decision thus stands.

42. Given our above conclusions it is not necessary to us to address other submissions made by the parties concerning the nature of Article 12-derived rights. However, given that there are likely to be other cases arising relying on Article 12, it is appropriate to give our observations on two particular matters.

The issue of when an Article 12 right commences

43. The first observation concerns the question of from what date an Article 12 right commences. Miss Appiah's submission was that in assessing qualifying periods of residence under Article 12 the relevant date should be seen as the child's date of birth. Had we found Article 12 to be engaged that submission would have helped her contention that the second and third appellants (and the first appellant, as their carer) had completed the requisite period of residence in order to qualify for a permanent residence card. However, in our view, whilst Article 12 does create directly effective free movement rights, it does so only from the time that the child concerned enters education. That, it seems to us, is the underlying premise behind the ECJ judgments in Baumbast , Teixeira and Ibrahim . Whilst we can accept that it is consistent with the language of Article 12 to consider that a child of a migrant worker born in the UK can be seen as someone who has installed himself in a Member State from the date of his birth, Article 12 amounts to "the right of access to education" (Teixeira Case C-480/08, para 45). It cannot arise from the moment of the child's arrival or birth or installation in a Member State as such, but only from the commencement of the child's education. Thus in our judgment, whilst we would have accepted (under this hypothesis) that the second and third appellants may have installed themselves from the date of their birth, each could only have begun to exercise his Article 12 rights from the date he entered education. It is that date which is decisive for Baumbast purposes. This would have meant that even had we found Article 12 to be engaged the earliest time that any of these three appellants could have begun accruing residence was December 2006, when the second appellant began in education. That would not have been long enough for any of them to qualify for permanent residence.

Rights of residence

44. Our second observation concerns the relevance of Article 12 not just for the issue of permanent residence (under reg 15) but also for extended residence (under reg 14). Where the decision is a refusal to issue a permanent residence card that may necessitate, in the event that refusal is found correct, considering whether the appellant was entitled nonetheless to an extended right of residence. If we had accepted Article 12 had been engaged in these appeals and that the second (and first appellant, as his carer) began accruing qualifying residence from December 2006, then even though that would not have been enough to qualify them for permanent residence, it would have sufficed to qualify them (and the third appellant who had also commenced education) for an extended right of residence under reg 14(2). Had we found ourselves in this situation we would then have had to allow the appeals, not because the appellants had a right of permanent residence, but because the respondent should nevertheless have recognised that they had an extended right of residence under reg 14. Section 84(1)(d) of the Nationality, Immigration and Asylum Act 2002 requires a tribunal judge to decide whether the decision breached any of the appellants' rights under the Community Treaties (which include Regulation 1612/68) in respect of their entry to or for residence in the United Kingdom (emphasis added); see also s109(3). Regulation 14 implements Article 7 of the Citizens Directive.

45. In summary, our conclusion is that even though the IJ erred in her treatment of Mr LDB's status as a worker in 2002/2003, that error was not material to the decision to dismiss the appeal. Given that the appellants' Article 8 grounds of appeal were also properly rejected, the IJ was entitled to dismiss their appeals. Her decision must therefore stand.

Signed

Senior Immigration Judge Storey

Judge of the Upper Tribunal