Neutral Citation Number: [2025] EWCA Civ 1519

Case No: CA-2024-001123

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
UTJ Smith and UTJ Stephen Smith
UI-2022-003001

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 November 2025

Before :

LORD JUSTICE NEWEY
LORD JUSTICE BAKER
and
LORD JUSTICE ZACAROLI

- -

Between :

IYABODE ADEOLA AYOOLA	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Zainul Jafferji and Mr Huzefa Broachwalla (instructed by **MCR Solicitors**) for the **Appellant**
Julia Smyth KC and Ms Harriet Wakeman (instructed by **Government Legal Department**) for the **Respondent**

Hearing date : 6 November 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 28 November 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE BAKER :

1. This appeal from the Upper Tribunal concerns the interpretation of Articles 24 and 25 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01) ("the Withdrawal Agreement").

Summary of facts

2. The relevant facts, taken largely from the Upper Tribunal's reasons, can be summarised very briefly. The appellant is a citizen of Nigeria, born in 1977. In 2005, she came to this country as a visitor and overstayed. She started a relationship with a man, ("S"), also from Nigeria. On 24 April 2009, she gave birth to a daughter, ("O"), of whom S is the father.

3. Shortly afterwards, the relationship between the appellant and S came to an end. O remained in the care of the appellant. In 2010, S married a French citizen, ("C"), who was trading in this country as a self-employed hairdresser. In October 2010, the SSHD issued residence cards to O and S as the family members of an EEA national under the Immigration (European Economic Area Regulations) 2006 ("the 2006 Regulations").

4. The relationship between S and C subsequently came to an end and in 2014 they were divorced.

5. In February 2015, O was issued with a further residence card, valid until February 2020, on the basis of retained rights of residence. On 31 July 2015, O was naturalised as a British citizen. The SSHD accepts that she had acquired a right of permanent residence before she became a citizen. Now aged 16, she is still living with her mother and is in full-time education. She has no contact with her father.

6. In November 2016, the appellant was granted limited leave to remain under Appendix FM of the Immigration Rules on account of her caring responsibilities for O. In 2018, that leave was renewed and in 2021 it was renewed again until 28 December 2024. In January 2025, she applied for a further renewal of her leave to remain. At the hearing, we were told that her leave to remain has recently been extended to May 2028. In their decision and reasons in this case, the Upper Tribunal judges described her as being "on a ten-year route to settlement", adding that she "will, after the next period of leave granted, be entitled to apply for indefinite leave to remain under domestic Immigration Rules, assuming that she still qualifies (in late 2026)."

7. Meanwhile, on 29 December 2020, the appellant applied for settled status under the EU Settlement Scheme ("the EUSS"). She made her application using the form for a person applying for what is known as a *Zambrano* right to reside, that is to say, a right in accordance with the decision of the CJEU in *Ruiz Zambrano v Office National de L'Emploi* (Case C-34/09) [2012] QB 265 ("*Zambrano*"). The cover letter stated that, following S's divorce, O acquired rights under regulation 16(3) of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") to continue her education in the UK, and asserted that she, the appellant, had acquired a right to reside under regulation 16(4) of the 2016 Regulations as her primary carer. It was further asserted in the letter that the appellant also qualified as a *Zambrano* carer, but that the

main basis of the application was O's education, her regulation 16(3) right to reside, and the derivative right enjoyed by her primary carer.

8. On 10 May 2021, the SSHD refused the application under the EUSS, for two principal reasons. First, one of the requirements for settled status as a person with a *Zambrano* right to reside was that the individual did not already hold leave to remain in the UK, unless granted under the EUSS. As the applicant had leave to remain as described above, she could not qualify on that basis. Secondly, she could only be considered a person with a *Zambrano* right to reside if O would be unable to reside in the UK or the European Economic Area if the applicant were required to leave the UK for an indefinite period. As the appellant had been granted leave to remain under Appendix FM, and there was a realistic prospect that a further application under that provision would succeed, it could not be said that O would be compelled to leave if the application under the EUSS was refused.

9. The appellant appealed against the SSHD's decision. On 9 March 2022, the First-tier Tribunal allowed her appeal. On 7 December 2022, however, the Upper Tribunal allowed the SSHD's appeal against the First-tier Tribunal's decision and gave directions for the decision to be remade in the Upper Tribunal, pursuant to section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. Following various delays, the hearing before the Upper Tribunal took place in March 2024, and the decision was handed down later that month on 18 March.

10. By the time of the hearing, the appellant conceded that, following the decision of this Court in *Velaj v Secretary of State for the Home Department* [2022] EWCA Civ 767 [2023] QB 271, she could not qualify under the provisions of the EUSS relating to a *Zambrano* right to reside. Instead, she sought to argue that she was entitled to a right to reside under the EUSS on the basis of the rights established by the decisions of the CJEU in *Ibrahim v Harrow London Borough Council* (Case C-310/08) [2010] 2 CMLR 51 ("*Ibrahim*") and *Teixeira v Lambeth London Borough Council* (Case C-480/08) [2010] 2 CMLR 50 ("*Teixeira*"). It was her case at that stage that those rights, which had previously been set out in regulation 16(3) and (4) of the 2016 Regulations, were "specifically incorporated within the Withdrawal Agreement at Article 24(2)" (para 15 of the appellant's skeleton argument dated 26 October 2023 prepared for the UT hearing).

11. Article 24(2) of the Withdrawal Agreement provides:

> "Where a direct descendant of a worker who has ceased to reside in the host State is in education in that State, the primary carer for that descendant shall have the right to reside in that State until the descendant reaches the age of majority, and after the age of majority if that descendant continues to need the presence and care of the primary carer in order to pursue and complete his or education."

12. The SSHD opposed this argument, on two grounds. First, it was argued that the Article 24 issue was a "new matter" within the meaning of regulation 9 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations") and that under that regulation the tribunal was prohibited from considering a new matter without the SSHD's consent, which was withheld because the SSHD had not seen

sufficient evidence to be able to decide whether the circumstances of O and the appellant fell within Article 24(2). Secondly, it was contended that, in any event, the appellant's case failed because it should be assessed on the same practical, rather than hypothetical, basis as applied to *Zambrano* cases. Here, the appellant had leave to remain and there was no question that either she or O would have to leave the UK.

13. The Upper Tribunal dismissed the appellant's appeal. As to the first matter, the Upper Tribunal concluded, after extensive analysis, that the Article 24(2) issue was indeed a "new matter". For reasons explained below, this is no longer an issue on the present appeal, and it is unnecessary to consider the Upper Tribunal's reasons for reaching this conclusion.

14. As to the second issue, the tribunal concluded that, even if the SSHD had consented to the issue being considered, the SSHD's decision did not breach any rights the appellant enjoyed under Article 24(2). The judges gave two principal reasons for this conclusion, saying at paragraph 46 of the decision:

> "First, the appellant already holds leave. Her removal is not in issue. Not only does she hold limited leave to remain under Appendix FM until December 2024, but the Secretary of State also observed in the refusal decision that a further application under Appendix FM would have a realistic prospect of success. That is sufficient to address the mischief at which Article 24(2) is targeted."

They acknowledged that, under European case law – *Ibrahim*, *Teixeira* and the earlier case of *Baumbast and another v Secretary of State for the Home Department* (Case C-413/99), [2003] ICR 1347 ("*Baumbast*") – O was entitled to complete her education in the "best possible conditions". They held, however, (at paragraph 49) that

> "residing under "the best possible conditions" is a proxy for a right to reside. Such a right to reside was necessary to guarantee the effectiveness of the directly effective right to access education conferred upon the children of workers by Article 12 of Regulation 1612/68. It did not convey any expectation of permanence, and did not count towards the acquisition of the right of permanent residence under Directive 2004/38/EC: see *Alarape and Tijani* (Case C-529/11) [2013] 1 W.L.R. 2883. That is consistent with an Article 24(2) right to reside not being included in the class of residence rights under the WA that lead to the acquisition of permanent residence."

15. The Upper Tribunal continued (paragraph 50):

> "Secondly, we consider that the appellant's present Appendix FM leave (and the realistic prospect the Secretary of State considers that she has of a future application being successful) is capable of providing a more advantageous immigration status than Article 24(2). As we have observed above, Article 24(2) is conditional upon the child in question remaining "in education". While there is absolutely no basis to conclude on the material

> before us that O would do anything other than continue the good progress she is making at school, at a general level it remains possible that an Article 24(2) child could leave education before reaching the age of majority, thereby leading to any Article 24(2) right enjoyed by the child's carer potentially falling away. By contrast, the continued applicability of the appellant's Appendix FM leave is not conditional on the actions of a child but continues until at least the child's age of majority (assuming that the parent/child relationship subsists)."

16. The appellant was granted permission to appeal to this Court on two grounds, namely that the Upper Tribunal erred in concluding (1) that the Article 24(2) issue was a new matter within the meaning of regulation 9 and (2) that she did not have a right to reside under Article 24(2).

17. In the event, however, the appeal as presented to us for determination followed a different course. In the skeleton argument filed on behalf of the SSHD, counsel conceded that the Article 24(2) issue was not a new matter within the meaning of regulation 9. By a respondent's notice, however, the SSHD argued that the Upper Tribunal's decision should be upheld on a further ground, namely that Article 24(2) had no application in the circumstances of this case, because it only applied to the children of "workers", not to the children of people who were self-employed. It was acknowledged in the respondent's notice that Article 25(2) of the Withdrawal Agreement provided that "Article 24(2) shall apply to direct descendants of self-employed workers." It was contended, however, that Article 25(2) could not assist the appellant for two reasons. First, Article 25(2) can only apply if the child, had they been the child of a worker, would have enjoyed an *Ibrahim/Teixeira* right at the end of the transition period – and O would not have enjoyed any such right because she was a British citizen by that time. Secondly, Articles 24(2) and 25(2) of the Withdrawal Agreement are backstop provisions which were not engaged because the appellant already had a right of residence under domestic law.

18. Shortly before the hearing before this Court, the appellant through counsel accepted that Article 24(2) does not apply. She applied, however, for permission to amend the second ground of appeal in the following terms:

> "The UT erred in its interpretation of article 24(2) of the Withdrawal Agreement. This remains relevant because, although the Appellant does not fall within article 24(2) as the Union citizen sponsor was not a worker, she does fall within article 25(2) on the basis that the Union citizen sponsor was self-employed prior to leaving the UK. Article 25(2) must be read with article 24(2) due to the way that it is drafted. The UT should have allowed the Appellant's appeal on the basis that she satisfies the requirements of article 25(2)."

19. The SSHD, who had in her skeleton argument anticipated an argument based on Article 25(2), did not object to the amendment for which we duly gave leave at the outset of the hearing. The consequence was, however, that the case was argued before us on a significantly different basis from the way it had been presented at earlier hearings before the tribunals.

The legal framework

20. In *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921, [2024] 2 CMLR 8, Lewis LJ introduced a comprehensive analysis of certain rights under the Withdrawal Agreement with these observations:

> "7. Whilst the United Kingdom was a member of the European Union, it was bound to give effect to European Union law including the law governing freedom of movement for EU nationals and their family members. The United Kingdom gave effect to European Union law by means of the European Communities Act 1972 ("the 1972 Act"). The United Kingdom left the European Union on 31 January 2020 and repealed the 1972 Act with effect from that date (see section 1 of European Union (Withdrawal) Act 2018 ("the 2018 Act")).
>
> 8. Article 126 of the Withdrawal Agreement provided that there would be a transition or implementation period which would end on 31 December 2020. Article 127 provided that European Union law was applicable to, and in, the United Kingdom during the transition period. That was given effect in domestic law by the provisions of section 1A of the 2018 Act. As a result the provisions of European Union law governing free movement continued to have effect within the United Kingdom until 11 p.m. on 31 December 2020.
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> 9. It is important to identify the scope of the rights to reside of EU nationals and their family members in the period up to the end of the transition period and then to consider the provisions made for the continuation of those rights by the Withdrawal Agreement following that period."

I shall adopt the same approach here.

The EEC/EU instruments

21. The provisions of the Withdrawal Agreement under consideration on this appeal refer to the following provisions of the Treaty on the Functioning of the European Union ("TFEU"), in particular Articles 21, 45, and 49. Article 21(1) provides that every citizen shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties. Article 45 provides for the freedom of movement for workers. Article 49 provides for the freedom of establishment of nationals of one Member State in the territory of another, including "the right to take up and pursue activities as self-employed persons".

22. The origin in EU law of the species of rights under consideration on this appeal is Article 12 of Regulation (EEC) No 1612/68 on the freedom of movement for workers within the community:

> "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."

Regulation (EEC) No 1612/68 was subsequently repealed but Article 12 was re-enacted in precisely the same terms in Article 10 of Regulation (EU) 492/2011.

23. An important element of this provision is that it applied to children of a national of a Member State who is or has been *employed* in the territory of another Member State. As subsequently interpreted by the CJEU (see below), it did not extend to children of self-employed persons.

24. On 29 April 2004, the EU passed Directive 2004/38/EC ("the Directive) on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. The Preamble to the Directive included the following recitals:

> "…
>
> (2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.
>
> (3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.
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> …
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> (5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality ….
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> …
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> (15) Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be

> taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis."

25. Under Article 2 of the Directive, "family member" was defined as including "the spouse" and "the direct descendants who are under the age of 21 or are dependants and those of the spouse …"

26. Article 3 was headed "Beneficiaries" and provided, under paragraph (1):

> "This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them."

Article 6 of the Directive made provision for rights of residence for up to three months and Article 7 for rights of residence for more than three months. Article 7(1) provided inter alia:

> "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:
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> (a) are workers or self-employed persons in the host Member State; or
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> (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
>
> (c) are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence;
>
> (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c)."

27. As the passages from recital (3) and Article 7(1)(a) cited above show, unlike Article 12 of Regulation (EEC) No 1612/68 and Article 10 of Regulation (EU) No 492/2011, the

provisions of the Directive extended to self-employed persons and their family members.

28. Article 12 of the Directive was headed "Retention of the right of residence by family members in the event of death or departure of the Union citizen". Article 12(1) provided:

> "Without prejudice to the second subparagraph, the Union citizen's death or departure from the host Member State shall not affect the right of residence of his/her family members who are nationals of a Member State.
>
> Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1)."

Article 12(3) provided:

> "The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies."

29. It should also be noted that, unlike Regulation (EEC) No 1612/68 and Regulation (EU) No 492/2011, Chapter IV of the Directive established rights of permanent residence – a "general rule" under Article 16 that Union citizens and their family members shall have a right of permanent residence after legally residing in the Member State for a continuous period of five years and a specific rule under Article 18 for family members of a Union citizen who has died.

European case law

30. The provisions set out above have been considered by the CJEU in a number of cases.

31. In *Baumbast*, the CJEU addressed the extent of the rights granted by Regulation (EEC) No 1612/68. In two separate cases, the UK Immigration Appeals Tribunal referred preliminary questions as to the extent of the rights enjoyed by children of migrant workers and their primary carers where they were no longer living with the worker but the children were still in education. In each case, between the start of the proceedings and the reference to the CJEU, the claimant had been granted leave to remain under domestic law. In deciding to admit the questions referred by the Immigration Appeal Tribunal, the CJEU noted:

> "36. …. it is apparent from the observations submitted at the hearing that that leave was granted under English law and that the question of the rights conferred under Community law on the persons concerned has not been resolved definitively.

> 37. Equally, these questions were raised in the context of a real dispute and the national tribunal has provided the Court with a statement of their factual and legal context as well as of the reasons which led it to take the view that an answer to those questions was necessary for it to make its decision."

32. In its judgment, the CJEU concluded (at paragraph 63):

> "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."

33. At paragraph 71 of its judgment, the Court observed that "it is clear that if those parents were refused the right to remain in the host Member State during the period of their children's education that might deprive those children of a right which is granted to them by the Community legislature." At paragraph 73, it continued:

> "The right conferred by Article 12 of Regulation No 1612/68 on the child of a migrant worker to pursue, under the best possible conditions, his education in the host Member State necessarily implies that that child has the right to be accompanied by the person who is his primary carer and, accordingly, that that person is able to reside with him in that Member State during his studies. To refuse to grant permission to remain to a parent who is the primary carer of the child exercising his right to pursue his studies in the host Member State infringes that right."

At paragraph 75, the CJEU concluded:

> "where children have the right to reside in a host Member State in order to attend general educational courses pursuant to Article 12 of Regulation No 1612/68, that provision must be interpreted as entitling the parent who is the primary carer of those children, irrespective of his nationality, to reside with them in order to facilitate the exercise of that right notwithstanding the fact that the parents have meanwhile divorced or that the parent who has the status of citizen of the European Union has ceased to be a migrant worker in the host Member State."

34. *Ibrahim* and *Teixeira* were two unrelated cases raising substantially the same legal issues. They were decided together and reported in this country together at [2010] P.T.S.R. 1913.

35. In *Ibrahim*, the relevant questions referred by this Court to the CJEU for preliminary ruling were summarised by the CJEU at paragraph 25 as follows:

> "the referring court essentially asks whether, in circumstances such as those of the main proceedings, the children and the parent who is their primary carer can rely on a right of residence in the host Member State on the sole basis of article 12 of Regulation No 1612/68 without being required to satisfy the conditions defined in Directive 2004/38, or whether they can enjoy a right of residence only if they satisfy those conditions. If the right of residence derives from article 12 of Regulation No 1612/68 alone, the referring court further asks whether the children and the parent who is their primary carer must have sufficient resources and comprehensive sickness insurance cover in the host Member State."

36. The Court answered the first as follows:

> "42. Article 12 of Regulation No 1612/68 must … 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 [i.e. *Baumbast*], and cannot but subsist in relation to the provisions of Directive 2004/38.
>
> 43. A contrary conclusion would be liable to compromise the aim of integrating the migrant worker's family into the host Member State, as stated in the fifth recital in the preamble to Regulation No 1612/68. According to settled case-law, for such integration to come about, the children of a worker who is a national of a Member State must have the possibility of undertaking and, where appropriate, successfully completing their education in the host Member State (see, to that effect, Joined Cases 389/87 and 390/87 *Echternach and Moritz* [1989] ECR 723, paragraph 21, and *Baumbast and R*, paragraph 69).
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> 44. The London Borough of Harrow, the United Kingdom and Danish Governments and Ireland submit that Directive 2004/38, since its entry into force, constitutes the sole basis for the conditions governing the exercise of the right of residence in the Member States of citizens of the Union and members of their families, and consequently that no right of residence may now be derived from Article 12 of Regulation No 1612/68.
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> 45. On this point, there is nothing to suggest that, when adopting Directive 2004/38, the European Union legislature intended to alter the scope of Article 12 of that regulation, as interpreted by the Court, so as to limit its normative content from then on to a mere right of access to education.

> 46. Similarly, it should be noted that, in contrast to what was done in the case of Articles 10 and 11 of Regulation No 1612/68, Directive 2004/38 did not repeal Article 12 of that regulation. Such a choice necessarily reveals the intention of the European Union legislature not to introduce restrictions of the scope of that article, as interpreted by the Court.
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> 47. The interpretation in the preceding paragraph is confirmed by the fact that the *travaux préparatoires* to Directive 2004/38 show that it was designed to be consistent with the judgment in *Baumbast and R* (COM(2003) 199 final, p. 7.
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> …
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> 50. 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."

37. The Court further concluded that the spouse and children were not required to show that they had access to sufficient resources so as not to become a burden on the social assistance system of the host Member State during their proposed period of residence. It noted (at paragraph 55) that in *Baumbast* the claimant's family "had resources which allowed him and his family not to be dependent on social assistance". It continued:

> "None the less, the answers to the questions referred for a preliminary ruling concerning the right of residence of the children and their mother who cared for them were based not on their self-sufficiency but on the fact that the aim of Regulation No 1612/68, namely freedom of movement for workers, required the best possible conditions for the integration of the worker's family in the host Member State and that a refusal to allow the parents caring for the children to remain in the host Member State during the period of their children's education might deprive the children of a right granted to them by the European Union legislature…."

38. In *Teixeira*, the CJEU concluded at paragraph 86 of the judgment that the right of residence under Article 12 of Regulation (EEC) No 1612/68 of a parent who cares for a child exercising the right to education in the host Member State may extend beyond the age of majority if the child continues to need the presence and the care of that parent in order to be able to pursue and complete his or her education.

39. In argument, we were referred to the following observations in the Advocate General's opinion in *Teixeira:*

> "51. Admittedly, children of a Union citizen who are in education may enjoy a right of residence in the host Member State as family members, in accordance with the general

> provisions of the Directive. (Children of a Union citizen can, first of all, claim a right of residence as family members under article 7(1)(d) in conjunction with article 2(2)(c) of Directive 2004/38. In addition, they can acquire a right of permanent residence under article 16 of Directive 2004/38.) However, a specific right of residence for children in education comparable to that of article 12 of Regulation 1612/68 is missing from Directive 2004/38. In particular, article 12(3) of the Directive does not establish any such free-standing right of residence for the purpose of education; instead, article 12(3) presumes the existence of a right of residence and merely directs that it be retained in the event of the death or departure of a Union citizen, until such time as the child of that Union citizen has completed its studies….
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> 52. Article 12 of Regulation 1612/68 and article 12(3) of Directive 2004/38 are not identical. In terms of the scope of its application to individuals, article 12(3) of the Directive is wider than article 12 of the Regulation, because article 12(3) also covers children of economically inactive Union citizens. In terms of its substantive scope, on the other hand, article 12(3) of the Directive is much narrower than article 12 of the Regulation, because the rule it lays down applies only in the event of the death or departure of a Union citizen.
>
> 53. It is clear from the absence from Directive 2004/38 of a free-standing, comprehensive right of residence for the purpose of education that, notwithstanding the entry into force of the Directive, there is still scope to draw on article 12 of Regulation 1612/68 as a legal basis for rights of residence.
>
> …
>
> 57. Thus, notwithstanding the entry into force of Directive 2004/38, Article 12 of Regulation 1612/68 continues to provide a separate legal basis for the right of residence of individuals who live, for the purpose of education, in the Member State in which their father or mother is or has been employed as a migrant worker."

40. The Advocate General proceeded (at paragraph 58) to confirm that

> "so far as a child has a right under Article 12 of Regulation 1612/68 to pursue an education in the host Member State, according to the case law, the parent who is that child's primary carer also has a right of residence in that Member State on the basis of article 12: *Baumbast,* para 75."

41. In *Zambrano*, the CJEU responded to a referral from a Belgian employment tribunal in a case concerning a family who originated from Colombia. The parents had unsuccessfully claimed asylum in Belgium, but, because of a non-refoulement order,

could not be forcibly repatriated. Two of their children were Belgian citizens, and therefore citizens of the EU by virtue of Art 20 TFEU. The father was denied unemployment benefits on the basis that he had no work permit, and therefore no right to work in Belgium. When considering his challenge to the refusal, the tribunal sought a preliminary ruling from the CJEU on the question whether the rights of the EU citizen children under TFEU conferred a right of residence on a third country national parent upon whom they were dependent, and thus exempted him from having to obtain a work permit. The CJEU answered the question in the affirmative (at paragraph 45):

> "Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."

42. The concluding words of paragraph 45 of the judgment impose an important qualification to the so-called *Zambrano* right to reside.

43. Three further decisions of the CJEU are relevant to the issues arising in this appeal.

44. First, in *Secretary of State for Work and Pensions v Czop and Punokova* (C-147/11) [2013] P.T.S.R. 334, the CJEU held (at paragraphs 30 and 33) that it was "apparent from the clear and precise wording of article 12 of Regulation No 1612/68, which refers to 'the children of a national of a Member State who is or has been employed', that that provision applies only to the children of employed persons… [and] cannot be interpreted as applying also to the self-employed." Accordingly, the claimant could not derive a right of residence from the sole fact that she was the primary carer of her son who had entered the educational system, as neither she nor her partner had been employed in the host State.

45. Secondly, it was held in in *Alarape v SSHD* (C-529/11) [2013] 3 CMLR 3 (paragraph 40) that "the fact that the family member of a Union citizen who is not a national of a Member State has resided in a Member State solely on the basis of Article 12 of Regulation No 1612/68 cannot therefore have any effect on the acquisition of a right of permanent residence under Directive 2004/38."

46. Thirdly, in *R (Lounes) v Secretary of State for the Home Department* (C-165/16), [2018] QB 1060, the CJEU considered a claim by an Algerian man who had overstayed in the UK after the expiry of his visa and in 2013 met and married a Spanish woman living in this country. Prior to meeting the claimant, in 1996 his wife had exercised her rights as a Union citizen under Article 21 of TFEU by moving from Spain to the UK and in 2008 had acquired British citizenship. The claimant then applied for a residence card under the UK regulations implementing the Directive. The Court held (at paragraph 62):

> "that Directive 2004/38 must be interpreted as meaning that, in a situation in which a Union citizen (i) has exercised his freedom of movement by moving to and residing in a Member State other

> than that of which he is a national, under article 7(1) or article 16(1) of that Directive, (ii) has then acquired the nationality of that Member State, while also retaining his nationality of origin, and (iii) several years later, has married a third-country national with whom he continues to reside in that Member State, that third-country national does not have a derived right of residence in the Member State in question on the basis of Directive 2004/38."

In the circumstances of that case, however, the CJEU held that the third-country national was eligible for a derived right of residence under article 21(1) of TFEU.

UK regulations

47. The EU legal provisions referred to above were given effect in domestic legislation by the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). Regulation 16 of the 2016 Regulations, headed "Derivative right to reside", gave effect to various rights of that description, including the rights under Regulation (EEC) No 1612/68 as interpreted in *Ibrahim* and *Teixeira*, and the *Zambrano* right to reside. So far as relevant, regulation 16 provided:

> "16. (1) A person has a derivative right to reside during any period in which the person
>
> (a) is not an exempt person; and
>
> (b) satisfies each of the criteria in one or more of paragraphs (2) to (6).
>
> (2) …
>
> (3) The criteria in this paragraph are that
>
> (a) any of the person's parents ("PP") is an EEA national who resides or has resided in the United Kingdom;
>
> (b) both the person and PP reside or have resided in the United Kingdom at the same time, and during such a period of residence, PP has been a worker in the United Kingdom.
>
> (4) The criteria in this paragraph are that
>
> (a) the person is the primary carer of a person satisfying the criteria in paragraph (3) ("PPP"); and
>
> (b) PPP would be unable to continue to be educated in the United Kingdom if the person left the United Kingdom for an indefinite period.
>
> (5) The criteria in this paragraph are that

(a) the person is the primary carer of a British citizen ("BC");

(b) BC is residing in the United Kingdom; and

(c) BC would be unable to reside in the United Kingdom or in another EEA State if the person left the United Kingdom for an indefinite period.

(6) …"

UK case law on the EU and domestic regulations

48. We were referred to several domestic cases on the application of these EU and domestic provisions, of which the following are relevant.

49. First, the decision in *Czop* was followed by this Court in *Hrabkova v Secretary of State for Work and Pensions* [2018] 1 CMLR 5, where it was held that *Czop* precluded any argument that words could be read into Article 10 of Regulation 492/2011 so that it included a self-employed person.

50. Secondly, in *R (Akinsanya) v Secretary of State for the Home Department* [2022] EWCA Civ 37, [2022] QB 482, Underhill LJ, with whom the other members of this Court agreed, stated (citing CJEU case law to which we not referred) that it was clear that the CJEU

> "did not regard *Zambrano* rights as arising as long as domestic law accords to *Zambrano* carers the necessary right to reside (or to work or to receive social assistance). To put it another way, where those rights are accorded what I have called 'the *Zambrano* circumstances' do not obtain."

At paragraph 55, Underhill LJ continued:

> "That analysis is perfectly sustainable at the theoretical level. As the [CJEU] recognises … the right of third country nationals to reside in a Member State is normally a matter for that state. *Zambrano* rights are for that reason exceptional. They are not typical Treaty rights, since they arise only indirectly and contingently in order to prevent a situation where EU citizen dependants are compelled to leave the EU. That being so, it makes sense to treat them as arising only in circumstances where the carer has no domestic (or other EU) right to reside …."

51. Thirdly, in *Velaj v Secretary of State for the Home Department*, supra, this Court considered the interpretation and application of regulation 16(5) of the 2016 Regulations, which imported the *Zambrano* right to reside into domestic law. At paragraph 49, Andrews LJ, with whom the other members of the Court agreed, said that the question whether the dependent EU citizen would be "unable to reside in the UK" depended on "a fact-specific inquiry" which required "a nuanced analysis of inability, and not a simple analysis of a hypothetical question, and that must mean that the decision-maker is looking at what is likely to happen in reality".

The Withdrawal Agreement

52. The preamble to the Withdrawal Agreement provides inter alia that the EU and the UK recognised:

> "that it is necessary to provide reciprocal protection for Union citizens and for United Kingdom nationals, as well as their respective family members, where they have exercised free movement rights before a date set in this Agreement, and to ensure that their rights under this Agreement are enforceable and based on the principle of non-discrimination; recognising also that rights deriving from periods of social security insurance should be protected …."

53. Part One contains "Common Provisions". Article 1 states the objective, namely that the WA "sets out the arrangements for the withdrawal of the UK from the European Union …". Article 2 includes various definitions for the purposes of the Agreement, including that "Union law" means, inter alia, the various treaties, including TFEU, the "general principles of Union law" and "the acts adopted by the institutions, bodies, offices or agencies of the Union".

54. Article 4, headed "Methods and principles relating to the effect, the implementation and the application of this Agreement", provides:

> "(1) The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States. Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.
>
> …
>
> (3) The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.
>
> (4) The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period."

Article 6(1) provides:

> "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."

55. Part Two is headed "Citizens' Rights". Title 1 of Part Two is headed "General Provisions". Article 9 contains the following relevant definitions:

> "(a) "family members" means the following persons, irrespective of their nationality, who fall within the personal scope provided for in Article 10 of this Agreement:
>
> (i) family members of Union citizens or family members of United Kingdom nationals as defined in point (2) of Article 2 of Directive 2004/38/EC of the European Parliament and of the Council;
>
> (ii) persons other than those defined in Article 3(2) of Directive 2004/38/EC whose presence is required by Union citizens or United Kingdom nationals in order not to deprive those Union citizens or United Kingdom nationals of a right of residence granted by this Part;
>
> (b) "frontier workers" means Union citizens or United Kingdom nationals who pursue an economic activity in accordance with Article 45 or 49 TFEU in one or more States in which they do not reside;
>
> (c) "host State" means:
>
> (i) in respect of Union citizens and their family members, the United Kingdom, if they exercised their right of residence there in accordance with Union law before the end of the transition period and continue to reside there thereafter;
>
> (ii) in respect of United Kingdom nationals and their family members, the Member State in which they exercised their right of residence in accordance with Union law before the end of the transition period and in which they continue to reside thereafter;
>
> (d) "State of work" means:
>
> (i) in respect of Union citizens, the United Kingdom, if they pursued an economic activity as frontier workers there before the end of the transition period and continue to do so thereafter;
>
> (ii) in respect of United Kingdom nationals, a Member State in which they pursued an economic activity as frontier workers before the end of the transition period and in which they continue to do so thereafter;

…."

56. Article 10, headed "Personal scope", provides, so far as relevant to this appeal:

> "(1) ….this Part shall apply to the following persons:
>
> (a) Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter;
>
> (b) United Kingdom nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter;
>
> (c) …
>
> (d) …
>
> (e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:
>
> (i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter;
>
> …
>
> (f) family members who resided in the host State in accordance with Articles 12 and 13, Article 16(2) and Articles 17 and 18 of Directive 2004/38/EC before the end of the transition period and continue to reside there thereafter.
>
> …."

57. Title II of the Agreement is headed "Rights and Obligations". Chapter 1 of Title II is headed "Rights related to residence, residence documents". Article 13, headed "Residence rights", includes inter alia the following provisions:

> "(2) 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.
>
> (3) Family members who are neither Union citizens nor United Kingdom nationals shall have the right to reside in the host State under Article 21 TFEU and as set out in Article 6(2), Article 7(2), Article 12(2) or (3), Article 13(2), Article 14, Article 16(2), Article 17(3) or (4) or Article 18 of Directive

2004/38/EC, subject to the limitations and conditions set out in those provisions."

58. Chapter 2 of Title II is headed "Rights of workers and self-employed persons". Articles 24 and 25 are central to this appeal and provide as follows:

> "Article 24 – Rights of workers
>
> (1) Subject to the limitations set out in Article 45(3) and (4) TFEU, workers in the host State and frontier workers in the State or States of work shall enjoy the rights guaranteed by Article 45 TFEU and the rights granted by Regulation (EU) No 492/2011 of the European Parliament and of the Council. These rights include:
>
> (a) the right not to be discriminated against on grounds of nationality as regards employment, remuneration and other conditions of work and employment;
>
> (b) the right to take up and pursue an activity in accordance with the rules applicable to the nationals of the host State or the State of work;
>
> (c) the right to assistance afforded by the employment offices of the host State or the State of work as offered to own nationals;
>
> (d) the right to equal treatment in respect of conditions of employment and work, in particular as regards remuneration, dismissal and in case of unemployment, reinstatement or re-employment;
>
> (e) the right to social and tax advantages;
>
> (f) collective rights;
>
> (g) the rights and benefits accorded to national workers in matters of housing;
>
> (h) the right for their children to be admitted to the general educational, apprenticeship and vocational training courses under the same conditions as the nationals of the host State or the State of work, if such children are residing in the territory where the worker works.
>
> (2) Where a direct descendant of a worker who has ceased to reside in the host State is in education in that State, the primary carer for that descendant shall have the right to reside in that State until the descendant reaches the age of majority, and after the age of majority if that descendant continues to need the presence and care of the primary carer in order to pursue and complete his or her education.

> (3) Employed frontier workers shall enjoy the right to enter and exit the State of work in accordance with Article 14 of this Agreement and shall retain the rights they enjoyed as workers there, provided they are in one of the circumstances set out in points (a), (b), (c) and (d) of Article 7(3) of Directive 2004/38/EC, even where they do not move their residence to the State of work.
>
> Article 25 – Rights of self-employed persons
>
> (1) Subject to the limitations set out in Articles 51 and 52 TFEU, self-employed persons in the host State and self-employed frontier workers in the State or States of work shall enjoy the rights guaranteed by Articles 49 and 55 TFEU. These rights include:
>
> (a) the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down by the host State for its own nationals, as set out in Article 49 TFEU;
>
> (b) the rights as set out in points (c) to (h) of Article 24(1) of this Agreement.
>
> (2) Article 24(2) shall apply to direct descendants of self-employed workers.
>
> (3) Article 24(3) shall apply to self-employed frontier workers."

Submissions on appeal

59. On behalf of the appellant, Mr Zainul Jafferji and Mr Huzefa Broachwalla submitted that the rights provided by Articles 24(2) and 25(2) are expressed in clear terms which should not be interpreted narrowly by reference to the reasoning in previous judgments of the CJEU. It was argued that the appellant clearly satisfies the requirements of Article 25(2) (as she would have satisfied the requirements of Article 12(3) of the Directive) and that she was therefore entitled to be granted a right to reside under the EUSS.

60. Secondly, they argued that Articles 24(2) and 25(2) reflect the rights granted by Article 12(3) of the Directive, and not the derived rights recognised by the CJEU in *Baumbast*, *Ibrahim* and *Teixeira*. This amounted to a complete reversal of the argument advanced on the appellant's behalf before the Upper Tribunal – and until very recently in the grounds of appeal to this Court – that regulations 16(3) and (4) of the 2016 Regulations, which put the derived rights in *Baumbast*, *Ibrahim* and *Teixeira* into effect in domestic law, were "specifically incorporated" within the Withdrawal Agreement at Article 24(2). The appellant's ultimate position to this Court was that those derived rights were reflected in Article 24(1), which expressly referred to the rights granted under Regulation (EU) No 492/2011, the successor to Regulation 1612/68, and that the plain

terms of Articles 24(2) and 25(2) must be applied to the appellant's circumstances without any qualification.

61. Thirdly, Mr Jafferji submitted that there is no basis for asserting that EU law rights could not have co-existed with domestic law rights. He contended that, at paragraphs 36 and 37 of the judgment in *Baumbast*, the CJEU specifically envisaged EU law rights co-existing with domestic law rights. It followed that the fact that the appellant is already entitled to leave to remain under Appendix FM did not preclude her being granted a right to reside under the EUSS.

62. Fourthly, it was contended that the fact that the child O is British is irrelevant as neither Article 12(3) of the Directive nor Article 25(2) stipulate any requirement as to the child's nationality.

63. Finally, it was submitted there that is no requirement that the primary carer must establish that her absence would result in the child being deprived of the right to continue with education in the host State. That is very different to the *Zambrano* right which only arises where it is established that, but for a grant of residence to the primary carer, the child would be forced to leave the territory of the EU. In this context, it was asserted that the decision in *Velaj* was of no relevance. In that case, the Court had been considering derivative rights, not the provisions of Articles 24(2) and 25(2). In any event, there was no basis for extending to the *Ibrahim*/*Teixeira* rights the reasoning which the Court in *Velaj* adopted when considering *Zambrano* rights.

64. Responding to the appeal on behalf of the Secretary of State, Ms Julia Smyth KC leading Ms Harriet Wakeman reminded the Court that we were not being asked to give an advisory opinion on the scope of the Withdrawal Agreement but rather to determine whether on the facts this appellant was entitled to be granted leave under the EUSS on the grounds that she had a right to reside here under Article 25(2). Ms Smyth submitted that Article 25(2) granted a new right by extending the *Ibrahim*/*Teixeira* derivative rights to the primary carers of the direct descendants of self-employed workers. She maintained that Articles 24 and 25 had nothing to do with Article 12(3) of the Directive which was covered by a different provision in the Withdrawal Agreement, namely Article 13. In any event, Article 12(3) of the Directive was drafted so as to preclude the loss of existing rights in the event of the Union citizen's departure or death. It did not grant any new rights. In support of this interpretation, Ms Smyth cited the observations at paragraphs 51 of the Advocate-General's opinion in *Teixeira* (quoted at paragraph 39 above).

65. Ms Smyth argued that, in any event, any new rights granted by Article 25(2) were of no benefit to O and her primary carer, the appellant, for three reasons.

66. First, she submitted that what she characterised as the "basic underpinning" of the Withdrawal Agreement, so far as citizens' rights are concerned, was the position at the end of the transition period. Under Article 10(1)(a), Union citizens only come within the "personal scope" of Part II of the Agreement if they exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continued to reside there thereafter. The position of any person claiming a right of residence under Part II, including Article 25, must therefore be assessed as at the end of the transition period. At that point, O was not exercising any rights under Regulation (EU_ No 492/2011 – because her father's former wife C was never

employed in the UK and the rights under the regulation did not extend to the children of self-employed persons – and the appellant, her primary carer, was therefore not exercising any derivative rights under the CJEU case law. Given that it is a provision which had no equivalent in EU law, and did not come into force until the end of the transition period, Article 25(2) only had legal effect from that point.

67. Secondly, O has been a British citizen since 2015. By the time the Withdrawal Agreement came into effect, she was entitled to education in this country as a British citizen. As a result, any right she might have had under EU law had she not been a British citizen was of no relevance, and the same was true of any derivative rights that would have been enjoyed by her primary carer. On this point, Ms Smyth drew an analogy with the decision in *Lounes*.

68. Thirdly, in any event, the appellant had already been granted leave to remain here under Appendix FM. Even if she could bring herself within the category of persons covered by Article 25(2) of the Withdrawal Agreement, that would not entitle her to any particular form of leave over and above the leave she already has. Ms Smyth rejected the appellant's assertion that the decision in *Baumbast* supported the contrary interpretation. She drew attention to passages in the Advocate General's opinion and in particular paragraph 29 of the judgment which demonstrated that, at the time of the claimants' applications under the Regulation, they did not have leave to remain under domestic law. She contended that paragraphs 36 and 37 from the judgment in *Baumbast* on which the appellant relied were part of the CJEU's reasons for admitting the reference and were not an endorsement for the co-existence of EU rights alongside those granted under domestic law. The question for the CJEU was whether the claimants had a right under EU law at a time when they had no rights under domestic law.

69. In this context, Ms Smyth drew an analogy with the observations of Underhill LJ in *Akinsanya* about the restricted circumstances in which *Zambrano* rights can arise.

Discussion and conclusion

70. This appeal as now presented turns on the interpretation of Articles 24 and 25 of the Withdrawal Agreement. The interpretation of Article 24 is (relatively) straightforward. Article 25 is more problematic. But in any event I conclude that it provides no right of residence to this appellant.

71. Article 24(1) of the Withdrawal Agreement expressly preserves rights guaranteed by Article 45 of TFEU and granted by Regulation (EU) No 492/2011 (the successor to Regulation (EEC) No 1612/68), including those particularised in Article 24(1)(a) to (h). Article 24(1)(h) preserves the rights granted by Regulation 10 of Regulation (EU) No 492/2011 (previously Regulation 12 of Regulation (EEC) No 1612/68). Those rights comprise the right of a child to be educated in the UK when their parent has come here to work "under the same conditions as nationals of the host State", which, as explained in *Baumbast*, *Ibrahim*, and *Teixeira*, includes the right of the child to have their primary carer reside here in the UK with them to facilitate their education.

72. Article 12(3) of the Directive "strengthened" the rights of a child (and, following the case law, their primary carer) whose residence in the UK was parasitic on the residence in the UK of a Union citizen by preserving the right of the child and their primary carer

in circumstances where the Union citizen died or left the UK. The fact that Article 12(3) only preserved such rights as already existed, as opposed to creating new rights, is clear from its wording ("shall not entail *loss* of the right of residence") and confirmed in the Advocate-General's opinion in *Teixeira* at paragraph 51:

> "…article 12(3) of the Directive does not establish any such free-standing right of residence for the purpose of education; instead, article 12(3) presumes the existence of a right of residence and merely directs that it be retained in the event of the death or departure of a Union citizen, until such time as the child of that Union citizen has completed its studies…."

Article 12(3) preserved a wide variety of rights, including the right of a descendant who had a right of residence as a family member of a Union Citizen, under Article 7. It also preserved the right of a child under Article 12 of Regulation 1612/68 and the derivative rights of the child's carer under *Ibrahim* and *Teixeira*.

73. That subset of the rights preserved by Article 12(3) of the Directive is in turn preserved by Article 24(2) of the Withdrawal Agreement. It is found in Chapter 2 of Title II of the Withdrawal Agreement because the rights concerned are parasitic on the rights of workers. Although on one view Article 24(2) is drafted as if it is granting a right to reside ("shall have the right to reside"), it should in my view be interpreted as preserving such rights as already existed in EU law. The rationale for the rights of the child and their primary carer is that they arose out of the residence in the UK of the Union citizen. Any right provided by Article 24(2) after the Union citizen has ceased to reside in the UK must therefore be a continuation of a right that already existed.

74. Article 25(1), with which this appeal is not directly concerned, purports to preserve rights guaranteed by Articles 49 and 55 TFEU. It states that the rights so guaranteed include "(a) the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down by the host State for its own nationals, as set out in Article 49 TFEU." But it goes on to add "(b) the rights as set out in points (c) to (h) of Article 24(1) of this Agreement". We were not addressed on the rights set out in Article 24(1)(c) to (g). But so far as those set out in Article 24(1)(h) are concerned, they are not guaranteed by Articles 49 and 55 of TFEU, nor in the case law thereunder. The interpretation of Article 25(1)(b) is therefore unclear, but as it does not directly arise on this appeal it is unnecessary to reach a conclusion about it here.

75. Article 25(2) does not refer to the rights guaranteed by Articles 49 and 55 TFEU. It simply provides that Article 24(2) shall apply to direct descendants of self-employed workers. At first sight, this seems to reverse the decision in *Czop*, a decision followed by this Court in *Hrabkova*, that no *Ibrahim*/*Teixeira* derivative right to reside arose where the child's parent was self-employed.

76. In my view, however, this is not the correct interpretation. Article 25(2) states that "Article 24(2) shall apply to the direct descendants of self-employed workers." If, as proposed above, Article 24(2) is interpreted as preserving such rights as already existed in EU law rather than granting a right to reside, it follows that Article 25(2) similarly preserves pre-existing rights under EU law. Article 4(4) of the Agreement stipulates that "the provisions of this Agreement referring to Union law or to concepts or

provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period." It follows that the right preserved by Article 25(2) must be interpreted in conformity with the CJEU decision in *Czop*.

77. This interpretation is consistent with the European Commission's Guidance Note on the Withdrawal Agreement (2020/C 173/01) which states:

> "Article 25(2) protects children whose EU or UK parent was a worker, but who has ceased to reside lawfully in the host State of the child as per Article 24(2) of the Agreement, to the extent provided for by EU law as interpreted by the CJEU (Case C-147/11 *Czop & Punakova*)."

78. In any event, I conclude that Article 25(2) is of no benefit to the appellant, for the following reasons.

79. First, the appellant falls into the same category as the claimant in *Czop*. She has no pre-existing rights under *Ibrahim* and *Teixeira* preserved by Article 12(3) because C, the worker from whose spouse her daughter was directly descended, was self-employed.

80. Secondly, O (from whom any rights enjoyed by the appellant are derived) is outside the personal scope of the Withdrawal Agreement. As the direct descendant of C's spouse, O comes within the definition of a "family member" of a Union citizen in Article 2(2) of the Directive which is incorporated into the Withdrawal Agreement at Article 9(a)(i). But O only comes within the personal scope of the Agreement as defined in Article 10 as a family member if she falls within either Article 10(1)(e) or (f). She does not come within Article 10(1)(e) because C does not come within Article 10(1)(a) as she was not resident in the UK at the end of the transition period. And O does not come within Article 10(1)(f) because, although she had at one stage resided here under Article 12(3) of the Directive, by the end of the transition period she was residing here as a British citizen.

81. Thirdly, the appellant already has leave to remain here under Appendix FM. As Andrews LJ observed in *Velaj*, the court must carry out a fact-specific inquiry. Even if the appellant could bring herself within the category of persons covered by Article 25(2) of the Withdrawal Agreement, that would not entitle her to any particular form of leave over and above the leave she already has. In *R (Akinsanya) v SSHD*, this Court held (following CJEU case law) that *Zambrano* rights did not arise where "domestic law accords to *Zambrano* carers the necessary right to reside". As noted above, Underhill LJ described *Zambrano* rights as

> "not typical Treaty rights, since they arise only indirectly and contingently in order to prevent a situation where EU citizen dependants are compelled to leave the EU. That being so, it makes sense to treat them as arising only in circumstances where the carer has no domestic (or other EU) right to reside …."

Similarly, the derivative rights under *Baumbast*, *Ibrahim* and *Teixeira* only arise indirectly and contingently in order to prevent a situation where a child of a worker who has ceased to reside in the host State would be unable to complete his or her education

without the presence and care of the primary carer. It therefore makes sense to treat them as arising only in circumstances where the carer has no domestic (or other EU) right to reside here.

82. The underlying purpose of the provisions under consideration in this appeal is to protect the freedom of movement of workers under Article 45 of TFEU and the freedom of establishment under Article 49. As the CJEU observed in *Ibrahim* at paragraph 55, "the aim of Regulation No 1612/68, namely freedom of movement for workers, required the best possible conditions for the integration of the worker's family in the host Member State". The right of the primary carer established by *Baumbast*, *Ibrahim* and *Teixeira* is derived from the right of the child of a Union citizen to complete their education in the country to which the Union citizen has moved to work. The 'right' of the primary carer to reside with the child is better analysed as the right *of the child* to have the primary carer reside here with them – it is based on the child's right to be educated "under the same conditions" as a British citizen. As the CJEU stated in *Baumbast* at paragraph 73, that "necessarily implies that that child has the right to be accompanied by the person who is his primary carer and, accordingly, that that person is able to reside with him in that Member State during his studies". The rationale for the Union citizen's child's right to be educated here, and the right to have their primary carer reside here with them during the studies, is that without those rights being granted the Union citizen would not be truly free to come here to work. But where the child is a British citizen and the primary carer already has a right to reside here, the child is already being educated here "under the best possible conditions".

83. For those reasons, I would dismiss the appeal.

ZACAROLI LJ

84. I agree.

NEWEY LJ

85. I also agree.