[2018] AACR 38

(Hrabkova v Secretary of State for Work and Pensions
[2017] EWCA Civ 794)

CA (Arden, Black, and Flaux LJJ) **CE/4571/2014**
22 June 2017

European Union law – free movement of workers – whether an EU citizen formerly in self-employment has a right of residence when caring for a dependant child

The appellant, a Slovakian national, entered the UK on 21 August 2001 with her son. She took up self-employment and her son entered school in the UK. The appellant ceased work through illness and claimed employment and support allowance (ESA) which was refused by the Secretary of State for Work and Pensions on the basis that she did not have the required right to reside in the UK. Both the First-tier Tribunal and the Upper Tribunal upheld that decision and she appealed to the Court of Appeal. It was the appellant's case that she had a derivative right of residence under Article 10 of the EU Regulation 492/2011. Article 10 provided that the child of a worker or former worker had the right to education in the state in which their parent was employed, and the parent of a child exercising that right had a right to reside in that member state as a result. The appellant claimed that, applying EU law principles of freedom of movement and/or non-discrimination, Article 10 of the EU Regulation 492/2011 had to be interpreted as applying not only to workers but also to self-employed persons. The issue before the Court of Appeal was whether it should request the Court of Justice of the European Union (CJEU) for a preliminary ruling on the interpretation of Article 10 as to whether an EU national self-employed parent of an EU national child in education had, by virtue of the provisions of the EU treaties and the right to equal treatment, the same right to reside here as an EU national employed parent of a child in education.

Held, dismissing the appeal, that:

1. a further reference was not warranted as the CJEU had previously decided that by implication Regulation 1612/68 Article 12 (the predecessor to Article 10 of the 2011 Regulation) could not apply to a self-employed person: *Secretary of State for Work and Pensions v Czop* (C-147/11) EU:C:2012:538. That conclusion was consistent with the plain wording of the 2011 Regulation, the fact that EU law drew a clear distinction between a worker and a self-employed person, and the decision in *R (on the application of Tilianu) v Social Fund Inspector* [2010] EWCA Civ 1397 (paragraphs 60 to 67);

2. the submission that CJEU jurisprudence did not distinguish between employment and self-employment was not supported by the cases on which the appellant relied. Moreover, the Treaty on Functioning of the EU (TFEU) drew a clear distinction between the status of worker and that of the self-employed and there was no relevant directly enforceable right under TFEU for a self-employed person to be treated identically with an employed person where EU legislation indicated otherwise: see Article 21 (1) TFEU (paragraphs 68 to 75).

DECISION OF THE COURT OF APPEAL

Helen Mountfield QC and Tom Royston (instructed by Child Poverty Action Group) appeared for the appellant

Julie Anderson (instructed by Government Legal Department) appeared for the respondent

Judgment

LADY JUSTICE ARDEN:

Issue on this appeal

1. The issue on this appeal is whether this Court should request the Court of Justice of the European Union ("the CJEU") to give a preliminary ruling on the interpretation of EU Regulation 492/2011 ("the 2011 EU Regulations"), Article 10. That gives the child of a

worker or former worker the right ("the education right") to education in the state in which his parent is employed. The parent of a child exercising the education right has a right to reside in that member state as a result. The question is whether an EU national self-employed parent ("the EU self-employed parent") of an EU national child in education here has, by virtue of the provisions of the EU treaties and the right to equal treatment, the same right to reside here as an EU national employed parent ("the EU worker parent") of a child in education here, who has such a right as a result of Article 10. The appellant will then be entitled to income-related Employment and Support Allowance ("ESA"), to which she is not currently entitled because she is a former self-employed person and not a worker or former worker. In these circumstances she is treated by domestic legislation as not having a right to reside.

Factual and legal context in which this question arises

2. The background can be shortly stated. The appellant is a Slovakian national. She entered the UK on 21 August 2001 with her son. She took up self-employment and her son entered school in the UK. The appellant ceased work through illness and her son continues to be in education here. The appellant claimed ESA but her claim was rejected on the basis that she did not have the required right to reside in the UK. She appealed to the First-tier Tribunal and then to the Upper Tribunal. Both tribunals dismissed her appeal. The appellant claims a derivative right of residence under EU law: she claims that her son is entitled to be educated here and that, as a result, she has a derivative right of residence as his primary carer to reside here to enable him to exercise that right. These rights are derived on her case from Article 10 of the 2011 EU Regulations.

3. ESA is an income-based benefit paid to those with limited capability for work or limited capability for work-related activity. The basic conditions of entitlement are set out in section 1 of the Welfare Reform Act 2007. The amount of the benefit is calculated by reference to section 4 of the Welfare Reform Act 2007 and to the Employment and Support Allowance Regulations 2008 ("the ESA Regulations").

4. The appellant must show that under domestic legislation she has a right to reside in the UK. This is because the overall effect of Regulations 69, 70 and Part 1 of schedule 5 to the ESA Regulations is that a "person from abroad" has a nil "applicable amount" of ESA.

5. The appellant cannot show a right to reside in the UK under these Regulations. Regulation 70 defines "person from abroad" so far as material in the following terms:

> **70**. Special cases: supplemental - persons from abroad
>
> > (1) "Person from abroad" means, subject to the following provisions of this regulation, a claimant who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.
> >
> > (2) A claimant must not be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland unless the claimant has *a right to reside* in (as the case may be) the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland other than a right to reside which falls within paragraph (3) (emphasis added)
> > . …

6. If the appellant had been a former worker, she would have a right to reside which is derived from her son because she is his primary carer. This derivative right is defined by

Regulation 15A(3)(b) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). (The 2006 Regulations have now been repealed, but subject to transitional savings). Regulation 4 of the 2006 Regulations defined "worker" and "self-employed person" as follows:

> **4.**—(1) In these Regulations —
>
> (a) "worker" means a worker within the meaning of Article 45 of the Treaty on the Functioning of the European Union;
>
> (b) "self-employed person" means a person who establishes himself in order to pursue activity as a self-employed person in accordance with Article 49 of the Treaty on the Functioning of the European Union;

7. Regulation 15A of the 2006 Regulations provided:

> **Derivative right of residence**
>
> 15A.—(1) A person ("P") who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.
>
> **…**
>
> (3) P satisfies the criteria in this paragraph if—
>
> (a) P is the child of an EEA national ("the EEA national parent");
>
> (b) P resided in the United Kingdom at a time when the EEA national parent was residing in the United Kingdom as a worker; and
>
> (c) P is in education in the United Kingdom and was in education there at a time when the EEA national parent was in the United Kingdom.
>
> **....**

8. Regulation 15A (3) implemented Article 12 of EU Regulation No 1612/68 ("the 1968 EU Regulations"). These Regulations were replaced in 2011 by the EU Regulation No 492/2011 ("the 2011 EU Regulations"). I refer to both sets of Regulations together as "the EU Regulations". Article 12 of the 1968 EU Regulations conferred a right to education on children of a worker from one member state in another member state where the worker is employed. It has been replaced by Article 10 of the 2011 EU Regulations. There is no material difference in the wording of Articles 12 and 10 of the relevant Regulations. It is sufficient in this judgment primarily to refer to Article 10.

9. Article 10 provides as follows:

> **Workers' families**

> Article 10
>
> 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…. [emphasis added]

10. The expression "employed" is not defined by the EU Regulations, but the concept of "worker" has been elucidated by the CJEU. An essential feature is that "a person performs services for and under the direction of another person in return for which he receives remuneration" (Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] 2 CMLR 454). In other cases, where a person is not a worker but provides services, freedom of establishment is available.

Secretary of State for Work and Pensions v Czop and Self-employed parents' rights

11. As drafted, Article 10 applies only to the children of employed persons. The CJEU confirmed this in Case 147/11 *Secretary of State for Work and Pensions v Czop* [2013] PTSR 334 [2013] AACR 6 (which was joined with another case, Case 148/11 *Secretary of State for Work and Pensions v Punakova*).

12. Mrs Czop was a Polish national who had come to the UK before Poland acceded to the EU. She had been self-employed and claimed income support for a period prior to resuming self-employment. She had a child in education in the UK, who had come to the UK after Poland's accession to the EU and after Mrs Czop ceased to work in the UK.

13. The questions referred were whether, in these circumstances, Mrs Czop had a right to reside in the United Kingdom:

> on the basis that (individually or cumulatively)
>
> > [1] Regulation No 1612/68 applies, together with the reasoning of the European Court of Justice in *Baumbast and R* v *Secretary of State for the Home Department* (Case C-413/99) [2003] ICR 1347 [2002] ECR I-7091; *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* (Case C-310/08) [2010] PTSR 1913 [2010] ECR I-1065; and *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* (Case C-480/08) [2010] PTSR 1913 [2010] ECR I-1107;
> > [2] there is a general principle of EU law that equates the position of workers and the self-employed;
> > [3] it would impede or deter the freedom of establishment if the claimant did not have a right to reside? [bracketed numbers added]

14. The CJEU held that a worker who was the primary carer of a child to which Article 12 applied had a derivative right of residence under its jurisprudence (see judgment, [25]).

15. However, the CJEU held that this did not assist Mrs Czop as a self-employed person does not come within Article 12:

29 On the other hand, Ms Czop cannot derive a right of residence from the sole fact that she is the primary carer of her son Lukasz Czop, who entered the educational system in the United Kingdom in 2006.

30 Neither the father of Lukasz Czop nor Ms Czop herself has been employed in the United Kingdom. It is 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.

31 Moreover, the literal interpretation of that provision, according to which it applies only to employed persons, is supported both by the general scheme of Regulation No 1612/68, the legal basis for which is Article 49 of the EEC Treaty (subsequently, after amendment, Article 49 of the EC Treaty, which became, after amendment, Article 40 EC), and by the fact that Article 12 of Regulation No 1612/68 was reproduced not in Directive 2004/38, but in Regulation No 492/11 also governing freedom of movement for workers and based on Article 46 TFEU, which corresponds to Article 40 EC.

32 Furthermore, it is settled case-law that an interpretation of a provision of European Union law cannot have the result of depriving the clear and precise wording of that provision of all effectiveness (see, to that effect, Case C-220/03 *ECB* v *Germany* [2005] ECR I-10595, [31], and Case C-199/05 *European Community v Belgian State* [2006] ECR I-10485, [42]).

33 It follows that Article 12 of Regulation No 1612/68, which concerns only employed persons, cannot be interpreted as applying also to the self-employed.

16. The CJEU then noted that the UK government conceded that Mrs Czop had a right of permanent residence under Directive 2000/38 ("the Citizenship Directive"), Article 16 (1).

17. The CJEU in conclusion held:

39 In those circumstances, there is no need to consider whether Ms Czop also has a right of residence on another basis under European Union law.

40 In the light of the foregoing, the answer to the questions referred is:

– Article 12 of Regulation No 1612/68 must be interpreted as conferring on the person who is the primary carer of a migrant worker's or former migrant worker's child who is attending educational courses in the host Member State a right of residence in that State, although that provision cannot be interpreted as conferring such a right on the person who is the primary carer of the child of a person who is self-employed;

– Article 16(1) of Directive 2004/38 must be interpreted as meaning that a European Union citizen who is a national of a Member State which recently acceded to the European Union may, pursuant to that provision, rely on a right of permanent residence where he or she has resided in the host Member State for a continuous period of more than five years, part of which was completed before the accession of the former State to the

> European Union, provided that the residence was in accordance with the conditions laid down in Article 7(1) of Directive 2004/38.

Treaty on the functioning of the EU, the Charter and the Convention

18. The appellant relies on a number of provisions of the Treaty on the Functioning of the EU ("TFEU"), the Charter of Fundamental Freedoms of the EU ("the Charter") and of the European Convention on Human Rights ("the Convention"). I have set these out in the Appendix to this judgment.

Decision of the Upper Tribunal in this case (UTJ Jacobs)

19. By the decision under appeal in this case, UTJ Jacobs dismissed an appeal from the refusal of the First-tier Tribunal to hold that the Secretary of State had made an error of law in refusing the appellant ESA. The basic issue was whether the primary carer of a child who was self-employed had the same rights to social security as one who was employed. UTJ Jacobs made his decision for the same reasons as he had given in his earlier decision in *RM v Secretary of State* [2014] UKUT 401. However, UTJ Jacobs dismissed the appeal on an interim basis only so that the appellant could challenge his decision in *RM* on this appeal. Accordingly he also gave permission to appeal.

20. In *RM*, UTJ Jacobs explained that *Czop* was one of a pair of cases that he had referred to the CJEU asking whether a primary carer who had been self-employed had a right to reside equivalent to that of a worker. He held that in *Czop* the CJEU did not decide that the self-employed primary carer cannot have a right to reside, though such a right could not arise from Article 12. However, at paragraph 37, he accepted that he could not hold that this was discrimination because the effect would be to bypass the clear and precise wording of Article 12. He added:

> I am bound by *Czop* to decide that that is not permissible.

21. In *RM*, UTJ Jacobs added:

> [38] I have reached this decision without enthusiasm. The distinction between being a worker or self-employed can be a very fine one, especially in the sort of work that Ms M undertook. *The difference in substance, as opposed to legal form, may be insignificant.* But the existence of a right to reside in this area cannot be developed by analogy from the right that is recognise[d] for the children of workers. The reasoning of the Court of Justice precludes me from deciding that Ms M has a right to reside. The logic of the Court's reasoning limits the basis on which a right to reside can arise to the need to protect the child's right to education, and that right can only arise in respect of the children of workers. It cannot be extended to the children of the self-employed. Any attempt to develop a right to reside on a different basis would have the effect of giving a child a right to education that does not exist in EU law. (Italics added)

22. In this case, when giving permission to appeal, UTJ Jacobs amplified the words I have italicised in the preceding paragraph by noting that self-employment was now more frequent than in the past, though it might be that a person who appeared to be self-employed was in fact employed.

Appellant's submissions

Overarching submission

23. Ms Helen Mountfield QC, for the appellant, submits that, applying the EU law principles of freedom of movement and/or non-discrimination, a self-employed person must have the same entitlement to ESA as a worker, and that accordingly Article 10 of the 2011 EU Regulations is to be interpreted as applying not only to workers but also to self-employed persons. She submits that, to give effect to the appellant's EU law rights the words "or a self-employed person" must be read into Regulation 15A(3)(b) of the 2006 Regulations.

24. The actual wording of the questions which Ms Mountfield submits should be referred to the CJEU for a preliminary ruling would have to be settled by the Court in the usual way. It would be on the following lines:

> In circumstances where a claimant is a citizen of the EU who established herself in self-employment within the meaning of Article 49 TFEU; is no longer in self-employment; and is the primary carer of a child who came to the United Kingdom with the claimant, entered general education while the claimant was established in self-employment, and remains in general education, does the claimant have a right to reside in the United Kingdom on the basis that (individually or cumulatively):
>
> i. there is a general principle of EU law that equates the position of workers and the self-employed;
>
> ii. it would impede or deter the freedom of establishment if the claimant did not have a right to reside;
>
> iii. it would interfere disproportionately with the claimant's or the claimant's child's rights as a citizen of the EU to reside in its member states?

Czop

25. I have referred to this case above. Ms Mountfield seeks to distinguish *Czop*. She submits that it is authority for the proposition that the rights arising directly under the EU Regulations do not include the children of self-employed persons, but that it goes no further than that. Ms Mountfield submits that the second and third questions submitted to the CJEU were not answered. The CJEU did not go on to consider whether the self-employed claimant in that case could claim a right to reside on any other basis under EU law.

26. Ms Mountfield submits that, in any event, *Czop* does not determine the issue in this case because the reasoning on non-entitlement as a self-employed person was *obiter* in the light of the right to permanent residence.

Discrimination (subparagraph (i) of the draft question)

27. Ms Mountfield contends that denial to the appellant of the right to reside accorded to workers as a result of the exercise of the education right would constitute unlawful discrimination against the appellant as a self-employed person in comparison with an employed person, or on grounds of nationality as a self-employed third country national in comparison with a self-employed UK national. Accordingly, the appellant cannot be denied the right. Ms Mountfield relies on Case 63/86 *EC Commission v Italy* [1989] 2 CMLR 601. In

this case, the CJEU held that a member state could not discriminate against a self-employed person who was the national of another member state in relation to the provision of social housing.

Denial of benefits would impede a self-employed person's right to move in the EU (subparagraph (ii) of the draft question)

28. Ms Mountfield contends that to deny the appellant the right to reside would dissuade persons from exercising their right to move within the EU (see Case 413/99 *Baumbast v Secretary of State for the Home Department* [2002] 3 CMLR 599 [50], [52]). They could be deterred from exercising their right if it could be withdrawn during the child's education because the primary carer could no longer work through ill health. The denial of the right to reside and the consequent loss of ESA would again inhibit the exercise of that right. In the case of self-employed persons, the right is part of the right to freedom of establishment conferred by Article 49 TFEU.

No justification for discrimination

29. Ms Mountfield submits that discrimination against former self-employed workers cannot be justified: see Case 363/89 *Roux v Belgium* [1993] 1 CMLR 3 at [24], where the CJEU held that a member state was bound to issue a residence card to a person who carried on economic activity for the purposes of the EEC Treaty provisions which now exist as Articles 45 and 52 of the TFEU, whether they were employed or self-employed. In this case, submits Ms Mountfield, both a former worker and a former self-employed person has made a contribution to the economy.

Right approach is to equiparate the position of employed persons and self-employed persons

30. Ms Mountfield submits that under CJEU jurisprudence no distinction is to be drawn between employment and self-employment: see Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale* [1974] I CMLR 320, where the CJEU held in the context of discrimination on the grounds of nationality that no distinction was to be drawn between self-employment and employment, and C-337/97 *C.P.M. Meeusen Hoof directie van de Informatie Beheer Groep* [2000] 2 CMLR 659, where the CJEU held that it was contrary to EU law for a Dutch educational institution to restrict grants to Dutch nationals or residents of other member states who were resident in the Netherlands. The applicant and her parents were resident in Belgium. The Netherlands could not discriminate against the applicant on the grounds of her nationality and that of her parents, which was Belgian. Moreover, no distinction could be drawn between employed and self-employed persons. Ms Mountfield also relies on Case 118/75 *Italy v Watson and Belmann* [1976] 2 CMLR 552, 558-9, to show that treaty rights can be directly enforced; Case 106/91 *Ramrath v Ministre de la Justice* [1995] 2 CMLR 187, [15 to 17] (where it was held that the treaty provisions as to entry and residence of employed and self-employed persons were based on the same principles; Case 1/05 *Jia v Migrationsverket* [2007] 2 QB 545, [38] (which held that there is no difference in status between dependent relatives of self-employed persons and workers).

31. Ms Mountfield submits that Article 49 has direct effect, which means that an individual can enforce it in domestic law.

Preamble to the 2011 EU Regulations

32. Ms Mountfield submits that the 2011 EU Regulations are intended to enable the objectives laid down in Articles 45 and 46 TFEU in the field of freedom of movement to be achieved. Paragraph 3 of the preamble to the 2011 EU Regulations states:

> (3) Provisions should be laid down to enable the objectives laid down in Articles 45 and 46 of the Treaty on the Functioning of the European Union in the field of freedom of movement to be achieved.

33. Moreover, Ms Mountfield submits, the TFEU outlines the free movement rights of employed and self-employed persons in materially similar terms.

Convention jurisprudence

34. Ms Mountfield submits that the rights to education and free movement in the Charter must be interpreted by reference to the relevant case law of the European Court of Human Rights ("the Strasbourg Court"), which is the authoritative body for interpreting the European Convention on Human Rights ("the Convention"): see Case 60/00 *Carpenter v Secretary of State of the Home Department* [2003] QB 416. Ms Mountfield emphasises the importance which the Strasbourg Court attached to the right to education conferred by Article 2 of the First Protocol to the Convention.

RM

35. Ms Mountfield submits that, contrary to what the Upper Tribunal held in *RM*, the ratio of *Patmalniece v Secretary of State for Work and Pensions* [2011] 1 WLR 783 (SC) [2010] AACR 34 is a difference of treatment between UK nationals and EEA nationals can be justified on grounds independent of nationality, but that decision does not address the question of discrimination between workers and self-employed persons.

36. UTJ Jacobs identified the central point in issue in *RM* at [38]. There is Ms Mountfield submits, no difference of substance between the position of employed and self-employed persons.

Recent cases are not binding or support the appellant

37. Ms Mountfield submits that the recent decision of this Court holding that a self-employed person is not within the Citizenship Directive provisions applying to a worker was decided per incuriam: see *R (Tilianu) v Social Fund Inspector* [2011] PTSR 781, [21]-[22], relied on by the Secretary of State, and see also to the same effect *Secretary of State for Work and Pensions v RK* [2009] UKUT 209 (AAC).

38. Ms Mountfield draws attention to the fact that the Court of Appeal of Ireland recently referred to the CJEU the question of the entitlement of self-employed: *Gusa v Minister for Social Protection* [2016] 1 IECA 237. This case concerns the question whether EU law attributes fewer rights to previously self-employed persons than to previously employed persons. The Irish Court of Appeal decided to refer that question to the CJEU.

39. In *Revenue and Customs v HD and GP* [2017] UKUT 11 (AAC), Upper Tribunal Ward noted that this reference could lead to a reconsideration of *Czop.*

40. On the basis of these cases, Ms Mountfield submits that the issue in the current case is not *acte clair*. While *Gusa* concerns the Citizenship Directive, it may also consequentially affect the 2011 EU Regulations. The issue is not identical and so a reference should be made in the present case.

Concluding submission

41. Ms Mountfield submits that Article 10 of the 2011 EU Regulations should be interpreted as including after the words "worker" the words "or self-employed person". On the other hand, she recognises that, in the light of *Czop*, a reference is required. She submits that the CJEU can properly be asked to clarify an earlier reference. She also submits that the respondent is wrong to say that there is *acte clair* in the present case.

Respondent's Submissions

No purpose in a reference

42. Ms Julie Anderson, for the Secretary of State, submits that in *Czop* the CJEU found unequivocally that the EU Regulations could not be extended past their plain words to cover former self-employed persons. That is why the appellant is forced to rely on the TFEU.

43. In summary, she submits that in *Czop*, the CJEU held that:

a) an EU national cannot derive a right to reside from the sole fact that she is a primary carer of a child who has entered the educational system of a member state (judgment, [29]);

b) Article 12 applied only to the children of employed persons (judgment, [30]);

c) the CJEU noted that the specific terms of Article 12 referred only to the employed and that was consistent with the legal basis for the 1968 EU Regulations, which referred to TFEU provisions concerning workers (judgment, [31]);

d) that an interpretation of a provision of EU law cannot have the result of depriving the clear and precise wording of that provision of all effectiveness (judgment, [32]);

e) Article 12 cannot be interpreted as applying also to the self-employed (judgment, [33]).

44. In short, Ms Anderson submits that the CJEU has effectively answered the questions now sought to be referred. She submits that it would be extraordinary if such a right was to be derived from the TFEU and yet (at paragraph 29 of its judgment set out in paragraph 15 above) the CJEU had declared that there was no derivative right for a self-employed person.

Not appropriate to draw broad generalisations about rights

45. Ms Anderson submits that it is not appropriate to equiparate the right of workers and that of self-employed persons to move and reside within the EU because Article 21(1) TFEU makes it clear that those rights are "subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect." The Supreme Court made this

point in *Mirga v Secretary of State for Work and Pensions* [2016] 1 WLR 481, [2016] AACR 26 [43]. The Supreme Court did not consider it apt to reason on the basis of broad generalised submissions about cause and effect in the way the appellant in her submissions seeks to urge on this Court. That approach illustrates the narrow limits of arguments based on general rights, such as the right to freedom of movement. It followed that specific EU legislation would be necessary in order to find a right for self-employed persons to move and reside in the EU.

46. Ms Anderson submits that the scope of the TFEU is set by Member States. Where the Member States have chosen not to provide for the derivative entitlement to reside in the relevant circumstances, this Court cannot take a step that those with a democratic mandate have consistently declined to take. Moreover, a national court cannot determine the lawfulness of EU measures or the acts of EU institutions. She submits that it is not correct to assume that the self-employed are in all respects in the same position as workers.

47. As to *Carpenter*, Ms Anderson submits that it is not in dispute that treaty articles can confer rights that individuals rely on in appropriate instances. However, this is a situation where the objectives of the EU have to be set out in further EU measures. Therefore, the appellant cannot rely on the treaty provisions and disregard the specific limitations upheld by the CJEU, in the EU Regulations.

No equiparation of the rights of workers and self-employed persons

48. Ms Anderson submits that there is no general principle in EU law that workers and self-employed persons must always be treated in the same way. The point in *Czop* was that the Court of Justice held that workers and self-employed persons were not treated in the same way.

49. Ms Anderson submits that not all children of EEA nationals have a derivative right to reside or an education right in the host state. They have to meet the criteria set out in the 2011 EU Regulations.

50. Ms Anderson submits that the established jurisprudence of the CJEU shows that the position of the self-employed and workers is not always identical in every respect in every context.

51. Ms Anderson submits that the non-discrimination principle in the TFEU cannot be elevated to a proposition that the EU legislature must treat the self-employed and workers in an identical way in every area. It is self-evident that the self-employed and workers were not treated in the same way in the EU Regulations.

52. Ms Anderson submits that the TFEU itself gives separate and discrete treatment to the position of workers and self-employed persons. She submits that there are distinctions between Article 45 and Article 49.

53. There is no general principle of equal treatment between workers and the self-employed. Even in the context of nationality, there are limits on what can be argued as discrimination: see *Mirga* at [43] to [47], and [52].

54. In any event, submits Ms Anderson, any general principles would always be subject to specific provisions in legislation.

Justification for the difference in treatment of self-employed persons and workers is available

55. If there were discrimination, Ms Anderson submits that the difference would be objectively justified by the legitimate aims of avoiding unjustified burdens on the host member state: see *Patmalniece* (see paragraph 35 above), where a distinction in benefits linked to nationality was held to be justified on similar grounds.

Right to non-discrimination under the Convention or the Charter does not assist

56. Ms Anderson submits that the reference to the Convention adds nothing. The fact that the Convention and EU law attach importance to education does not resolve the issue in this appeal. The issue is whether there can be an education right in the *host* jurisdiction. The right may perfectly well continue to exist in the home jurisdiction. Ms Anderson points out that Article 51(2) of the Charter merely codifies existing rights under the EU law, and cannot extend the scope of EU law rights.

Recent cases

57. Ms Anderson submits that her argument is supported by the decision of this Court in *Tilianu.* This Court there held that references to a former worker in Directive 2004/38 did not include references to a former self-employed person. This Court reached that conclusion by interpretation of the Citizenship Directive and in the light of jurisprudence on the meaning of "worker" in EU law.

Discussion

58. In my judgment, this appeal must be dismissed for two reasons, which I will amplify below.

Reason 1: Czop concludes the issue in this case

59. I have set out the material passages from the judgment of the CJEU in this case in paragraphs 11 to 17 above.

60. UTJ Jacobs took the view that the CJEU did not answer the second and third questions referred to it. I disagree. The CJEU by implication decided that Article 12 of the 1968 EU Regulations could not apply to Mrs Czop *because she was a self-employed person.* That precludes the appellant's argument that words can be read into that Article or its successor Article 10 of the 2011 EU Regulations so that it includes a self-employed person, i.e. a person in the same position as Mrs Czop.

61. This conclusion is confirmed by the fact that the CJEU expressly held that:

> [Article 12] cannot be interpreted as conferring such a right on the person who is the primary carer of the child of a person who is self-employed;

62. Accordingly, in my judgment the CJEU by implication excluded the very argument that the appellant now seeks to raise. I do not consider that the CJEU could have intended to leave open the possibility that the non-discrimination principle might apply. The reference by the CJEU to its being unnecessary for it to decide whether Mrs Czop had any right to reside "on another basis" is not necessarily a reference to a right to reside as a self-employed person under the 2011 EU Regulations. The CJEU might have considered that it needed to address

the possibility that she was in fact a worker rather than a self-employed person, or had some other right under the Citizenship Directive, to which it had just referred.

63. The CJEU did not need to go further because it was satisfied Mrs Czop had a right of permanent residence. But it did not simply apply a concession. It examined whether the right to permanent residence was in fact applicable.

64. My conclusion is:

> i) consistent with the plain wording of the 2011 EU Regulations. Article 10 appears in Chapter 1 of the 2011 EU Regulations which is headed "Employment, equal treatment and workers' families" and deals exclusively with workers and not, therefore, with the self-employed.
>
> ii) supported by the fact that EU law draws a clear distinction between a worker and a self-employed person (see for example the cases cited in *Tilianu*).
>
> iii) consistent with the decision of this Court in *Tilianu* (described in paragraph 57 above). That decision concerns the Citizenship Directive and so it is not binding on us on this appeal. I see no basis on which we could conclude that *Tilianu* was decided *per incuriam* if it had otherwise been binding authority on us on the interpretation of Article 10 of the 2011 EU Regulations. *Morelle Ltd v Wakeling* [1955] 2 QB 379 (cited by Ms Anderson) makes it clear that there has to be an omission to take account of some statutory provision or case law binding on the Court and not simply because this Court had not had the benefit of the argument on the provisions of the TFEU and the non-discrimination principle which Ms Mountfield lays before this Court.

65. I am not dissuaded from my conclusion on the scope of the decision of the CJEU in *Czop* by the decision of the Court of Appeal of Ireland to refer the question of the extent to which self-employed persons and workers share the same rights. *Czop* was not cited in *Gusa*. So, while the judgment of the Court of Appeal of Ireland carries great respect, it cannot assist us on this appeal.

66. There is no question of the CJEU's decision on the first question being *obiter* because the CJEU treated its reasoning on Article 12 of the 1968 EU Regulations as part of its decision.

67. Accordingly I do not consider that there is any doubt about this matter which warrants a further reference to the CJEU.

Reason 2: No basis for holding that the non-discrimination principle applies in this context

68. On the view which I take of *Czop*, it is unnecessary for me to address Ms Mountfield's well-argued and thorough submission that the rights of the self-employed worker are to be equiparated with those of the worker by applying the principle of non-discrimination. I do so because we have had substantial argument on it.

69. Ms Mountfield submits that CJEU jurisprudence does not distinguish between employment and self-employment, but the cases on which she relies do not on analysis support that submission. Either they are not decided on that basis, but on the basis of nationality (category A cases) or they demonstrate the assimilation of the rights of employed and self-employed person in specific circumstances only (category B cases).

70. *Commission v Italy* is a category A case. I have set out the facts in paragraph 27 above. This was a case of discrimination on the grounds of nationality, not a case of discrimination as between employed and self-employed persons. *Walrave* and *Meeusen* similarly concern discrimination on the grounds of nationality.

71. *Roux v Belgium* is a category B case. I have set out the facts in paragraph 29 above. The CJEU was careful to say that no distinction needed to be made *for the purposes of the issue of a residence card*. It did not lay down any general principle about employed and self-employed persons being in the same position. In paragraph 30 above, I refer to *Ramrath v Ministre de la Justice* and *Jia v Migrationsverket*. In these cases, it was held that the rights of self-employed and employed persons were the same, but it does not follow from these cases that their rights were to be the same in all respects.

72. Moreover, as Ms Anderson submits, the effect of Article 21(2) TFEU is that further legislative measures would be needed. In this connection it is of some weight that Article 50 TFEU makes no mention of measures to equiparate self-employment with employment. There may be good reason for drawing a distinction between these two statuses. For instance, if a person is able to establish a new business of providing services, he may require closer regulation by the host state than an employer employing an EU national. But it does not matter why there is a distinction – the fact is that it is clear that the TFEU draws a distinction between the status of "worker" and that of "self-employed" and it is not open to the courts to treat the two statuses as identical.

73. There is, as I see it, no relevant directly enforceable right under the TFEU for a self-employed person to be treated identically with an employed person where as here EU legislation indicates otherwise: see Article 21 (1) TFEU.

74. In the course of her submissions, Ms Mountfield submitted that the Charter may be used to interpret EU legislation. I accept this submission, though it does not take the matter any further because there is no right in the Charter for self-employed persons and workers to be treated identically where, as here, EU legislation indicates that they are to be treated differently. I disagree with the submission that the Charter cannot be used to extend existing rights (Ms Anderson's submission) unless that is a way of saying that it cannot be used to extend the powers of the EU. The result of the Charter may be to extend EU law but it cannot extend the competence of the EU: see C-400/10 PPU *McB v E* [2011] Fam 364, [48] to [53]. That does mean, however, that it cannot be used to bypass limitations and restrictions in the TFEU.

75. As, in my judgment, the doctrine of discrimination does not apply in this context, I need not consider whether any discrimination is justified.

OVERALL CONCLUSION

76. For the reasons given above, I would dismiss this appeal.

LADY JUSTICE BLACK

77. I agree.

LORD JUSTICE FLAUX

78. I also agree.

APPENDIX TO JUDGMENT OF ARDEN LJ

TREATY ON FUNCTIONING OF THE EU

1. Article 9 TFEU states that the Union is to take into account requirements linked to high level of employment in the guarantee of adequate social protection and a high level of education:

Article 9

> In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

2. Articles 20 and 21 TFEU provide as follows:

Article 20 (ex Article 17 TEC)

> 1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
>
> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia:* (a) the right to move and reside freely within the territory of the Member States; (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language. These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

Article 21 (ex Article 18 TEC)

> 1. Every citizen of the Union 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 and by the measures adopted to give them effect.

…

3. Article 45 TFEU sets out a worker's right to freedom of movement and residence:

> Article 45 (ex Article 39 TEC)
>
> 1. Freedom of movement for workers shall be secured within the Union.
>
> 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
>
> 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
>
> 4. The provisions of this Article shall not apply to employment in the public service.
>
> Article 46 (ex Article 40 TEC)
>
> The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45, in particular…
>
> Article 48 (ex Article 42 TEC)
>
> The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries; (b) payment of benefits to persons resident in the territories of Member States….

4. The TFEU also confers a right of establishment on persons who are not workers:

Article 49 (ex Article 43 TEC)

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Article 50 (ex Article 44 TEC)

1. In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.

2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular: (a) by according, as a general rule, priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade; (b) by ensuring close cooperation between the competent authorities in the Member States in order to ascertain the particular situation within the Union of the various activities concerned; (c) by abolishing those administrative procedures and practices, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to freedom of establishment; (d) by ensuring that workers of one Member State employed in the territory of another Member State may remain in that territory for the purpose of taking up activities therein as self-employed persons, where they satisfy the conditions which they would be required to satisfy if they were entering that State at the time when they intended to take up such activities; (e) by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State, in so far as this does not conflict with the principles laid down in Article 39(2); (f) by effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a

> Member State and as regards the subsidiaries in the territory of a Member State and as regards the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory posts in such agencies, branches or subsidiaries; (g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union; (h) by satisfying themselves that the conditions of establishment are not distorted by aids granted by Member States.

THE CHARTER

5. The Charter of Fundamental Rights of the European Union (the Charter") provides for a right to education (Article 14).

6. Article 21 of the Charter provides:

> Article 21
>
> Non-discrimination
>
> 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
>
> 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

7. Article 51 of the Charter provides:

> Article 51
>
> 1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
>
> 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

EUROPEAN CONVENTION ON HUMAN RIGHTS

8. Article 14 of the Convention provides:

> Article 14
>
> Prohibition of discrimination
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.