IN THE UPPER TRIBUNAL **Appeal No.** CG/2617/2019(V)
ADMINISTRATIVE APPEALS CHAMBER

On appeal from First-tier Tribunal (Social Entitlement Chamber)

Between:

Secretary of State for Work and Pensions

Appellant

\- v –

AS

Respondent

Before: Upper Tribunal Judge Ward

Hearing date: 15 December 2020

Representation:
Appellant: Ms Julie Anderson, instructed by Government Legal Service
Respondent: Mr Craig Mccrossan, Citizens Advice

DECISION

The decision of the Upper Tribunal is to allow the Secretary of State's appeal. The decision of the First-tier Tribunal made on 7 December 2018 under number SC269/18/01587 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remake it as follows:

> The claimant's appeal against the Secretary of State's decision dated 22 December 2017 refusing her carer's allowance, on the ground that entitlement was precluded by section 115(9) of the Immigration and Asylum Act 1999 because her leave to remain was on the basis of having no recourse to public funds, is dismissed.

REASONS FOR DECISION

1. This decision follows a remote hearing which was consented to by the parties. As required, I record that:

> (a) the form of remote hearing was V (Kinly). A face-to-face hearing was not held because it was not reasonably practicable in the light of Government guidance on urgent matters of public health, not least because to reach a

common physical venue would have involved substantial travel for those involved, who are based a substantial distance from each other. The case was suitable for remote hearing, with counsel on one side and a very experienced worker from Citizens Advice on the other, and involved pure matters of law;

(b) the documents that I was referred to were contained in a paper bundle with 162 pages and an emailed bundle of authorities. Additionally, I caused to be circulated extracts from the European Economic Area Act 1993 and from the 1996 Regulations (as to which see [15] below); and the representatives each provided post-hearing submissions in connection with (i) the *Szoma* case (see [32-33] below) and (ii) the significance, if any, to be attributed to a change in the wording effected by the 2000 Regulations (see [35]);

(c) the order and decision made are as set out above;

(d) after the hearing the representatives were not asked for their view on the adequacy of the process. There had been no apparent technical difficulty in the course of the hearing and they both confirmed they had made the points they wished to make. Further, as they both filed written submissions post-hearing, they would have had the opportunity to articulate concerns, if they had had any.

2. The case concerns a narrow, but important, point about the ability of the family members of EEA nationals to claim certain social security benefits. There are conflicting authorities at this level, examined further below. Neither party sought a hearing by a three-judge panel when given the opportunity to do so and, in view of the United Kingdom's changed relationship with the EEA, I did not see fit to refer the matter to the Chamber President to consider directing one.

3. The claimant is a Pakistan national. She has leave to remain, subject to a condition of no recourse to public funds. Her husband is a British citizen, as is their son, born in 2012. It is common ground that neither the husband nor the son has ever sought to exercise rights of freedom of movement under EU/EEA law, which would be a pre-condition to their enjoying relevant rights thereunder.

4. The claimant claimed carer's allowance which, by a decision dated 22 December 2017, was refused on the ground that she failed to satisfy the residence and presence conditions contained in reg.9 of the Social Security (Invalid Care Allowance) Regulations 1976/409 ("the 1976 Regulations"), specifically that she be not

> "a person subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act 1999 or section 115 of that Act does not apply to [her] for the purposes of entitlement to carer's allowance by virtue of regulation 2 of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000".

It is not in dispute that, save for this condition, she would be entitled to carer's allowance.

5. Section 115 of the 1999 Act provides:

> "(9) *"A person subject to immigration control"* means a person who is not a national of an EEA State and who—
> (a) requires leave to enter or remain in the United Kingdom but does not have it;

(b) has leave to enter or remain in the United Kingdom which is subject to a condition that he does not have recourse to public funds;
(c) has leave to enter or remain in the United Kingdom given as a result of a maintenance undertaking; or
(d) has leave to enter or remain in the United Kingdom only as a result of paragraph 17 of Schedule 4.

(10) *"Maintenance undertaking"*, in relation to any person, means a written undertaking given by another person in pursuance of the immigration rules to be responsible for that person's maintenance and accommodation."

6. Section 115 is disapplied in certain cases by regulation 2 of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000/636 ("the 2000 Regulations") which came into force on 3 April 2000 which so far as relevant provides:

"(2) For the purposes of entitlement to attendance allowance, severe disablement allowance, carer's allowance, disability living allowance, a social fund payment, health in pregnancy grant or child benefit under the Contributions and Benefits Act or personal independence payment, as the case may be, a person falling within a category or description of persons specified in Part II of the Schedule is a person to whom section 115 of the Act does not apply."

7. Part II of the Schedule lists:

"1. A member of a family of a national of a State contracting party to the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 as adjusted by the Protocol signed at Brussels on 17th March 1993 as modified or supplemented from time to time.

2. A person who is lawfully working in Great Britain and is a national of a State with which the European Union has concluded an agreement under Article 217 of the Treaty on the Functioning of the European Union providing, in the field of social security, for the equal treatment of workers who are nationals of the signatory State and their families.

3. A person who is a member of a family of, and living with, a person specified in paragraph 2.

4. A person who has been given leave to enter, or remain in, the United Kingdom by the Secretary of State upon an undertaking by another person or persons pursuant to the immigration rules within the meaning of the Immigration Act 1971, to be responsible for his maintenance and accommodation."

Other provisions of the 2000 Regulations make provision disapplying s.115(9) in relation to other benefits.

8. In the present case, the claimant asserted before the FtT that her husband and son were nationals of a state (the UK) which was a contracting party to the Oporto Agreement (as is indeed the case) and that, as their family member, she was entitled to take the benefit of para.1 of Part II of the Schedule to the 2000 Regulations, and so to be not disentitled by virtue of section 115(9). By its decision of 7 December 2018 the FtT agreed. The Secretary of State now appeals against that decision with permission given by a District Tribunal Judge.

9. The issue is whether para.1 should be read as only exempting the families of people who have exercised their right of freedom of movement under EU/EEA law. In CDLA/708/2007 Deputy Commissioner Poynter (as he then was) held that that was indeed so. However, in *JFP v Department for Social Development (DLA)* [2012] NICom 267 Chief Commissioner Mullan reached a different view on the materially identical Northern Ireland legislation. The issue also arose in *MS v SSWP (DLA)* [2016] UKUT 42 (AAC) where Upper Tribunal Judge Hemingway, after argument but *obiter*, preferred the view in CDLA/708/2007.

10. Effect was given to the Oporto Agreement in domestic law by the European Economic Area Act 1993 ("the 1993 Act"). Section 1 specified the Agreement as one of "the Treaties" and "the Community Treaties" for the purposes of s.1(2) of the European Communities Act 1972.

11. Subject to exceptions which it is not necessary to set out, s.2(1) of the 1993 Act then provides:

> "(1) Where—
> (a) the operation of any relevant enactment is limited (expressly or by implication) by reference to the European Union or by reference to some connection with the European Union, and
> (b) the enactment relates to a matter to which the Agreement (as it has effect on the date on which it comes into force) relates,
> then, unless the context otherwise requires, the enactment shall have effect on and after that date in relation to that matter with the substitution of a corresponding limitation relating to the European Economic Area (or, where appropriate, to both the European Union and the European Economic Area)."

12. Section 3(1) provides:

> "(1) Subject to section 2 above, where by virtue of the Agreement (as it has effect on the date on which it comes into force) it is necessary for a purpose mentioned in section 2(2)(a) or (b) of the 1972 Act that any relevant provision should have effect with modifications which can be ascertained from the Agreement", then on and after that date the provision shall have effect with those modifications."

13. Primary and subordinate legislation passed or made before the date on which the 1993 Act came into force each fell within the expressions "relevant enactment" and "relevant provision": ss.2(7) and 3(5).

14. In broad terms therefore, these sections had the effect, as regards matters falling within the scope of the Oporto Agreement, of extending existing domestic legislation so as to apply to the EEA as a whole what had previously applied to the European Union.

15. Before 5 February 1996 the residence and presence conditions attaching to carer's allowance did not contain any stipulation relating to a person's right to reside or remain in Great Britain: the conditions at that point related to ordinary residence, presence and past presence (reg 9(1)). That changed as a result of the Social Security (Persons from Abroad) Miscellaneous Amendments Regulations 1996/30 ("the 1996 Regulations"). Those regulations treated attendance allowance, disability living allowance, the former disability working allowance, the former family credit and invalid care allowance (now carer's allowance) substantially alike. It became an additional requirement via a new sub-paragraph that a claimant's right to reside or remain in Great Britain was not subject to any limitation or condition. Further provision was then made that for the purposes of such sub-paragraph a person's right to reside or remain was not to be treated as if it were subject to a limitation or condition if their circumstances fell within one of a number of categories: if they were recorded as a refugee, they had been granted exceptional leave outside the Immigration Rules, they were a national, or a member of the family of a national, of a State contracting party to the Oporto Agreement or were lawfully working in Great Britain and were a national (or the family member of such a national) of a member state with which the European Union has an association agreement providing for equal treatment of workers in relation to social security. The entries in paras 1, 2 and 3 of Part II of the Schedule to the 2000 Regulations clearly have their origin in these provisions.

16. It is also relevant to consider the position of EEA nationals under immigration law. Under section 7 of the Immigration Act 1988:

> "(1) A person shall not under the [Immigration Act 1971] require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable Community right or of any provision made under section 2(2) of the European Communities Act 1972."

Such provision was made, in the form of the Immigration (European Economic Area) Order 1994/1895 ("the 1994 Order"). The effect of the Order was, as its explanatory note records, to implement the EC Council Directives (i.e. the predecessors to Directive 2004/38) which had effect in relation to nationals of States which are parties to the Oporto Agreement. Art.4 provided that nationals of EEA states were entitled to reside in the UK, without leave to remain under the Immigration Act 1971, for so long as they remained a "qualified person". A "qualified person" corresponded to the well-known categories under EU law of worker, self-employed person, self-sufficient person, student, provider or recipient of services etc. A family member of an EEA national was similarly entitled for so long as they remained the family member of a qualified person. Once they respectively ceased to be a "qualified person" or the family member of a qualified person they were to be treated as a person requiring leave to enter or remain under the 1971 Act (art.20). The definition of "EEA national" was such as to exclude nationals of the United Kingdom from its scope. Who was permitted to join a British national in the UK and on what basis was therefore largely

a matter for the domestic Immigration Rules although there were limited circumstances in which EU law might be engaged, notably on the basis first articulated in C-370/90 *R v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department,* the true scope of which has been discovered to be wider in subsequent years.

17. In CDLA/708/2008, the Deputy Commissioner acknowledged that at first sight the equivalent submission to that made by the present claimant seemed "unanswerable", based on ordinary use of English (para 15). However, he set out at paras 17 to 23 the provisions and features of the Oporto Agreement which appeared to him particularly relevant and no useful purpose will be served by setting them all out afresh here. It is, however, relevant to note in particular art.4 of the Oporto Agreement, which provides that

> "Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

As the Deputy Commissioner noted, that corresponded to art.12 of the (then) EC Treaty; it now corresponds to art.18 of the Treaty on the Functioning of the European Union. His view was that the provision under consideration "is plainly intended to comply with the United Kingdom's international obligations under the EEA agreement." It followed in his judgment that the phrase "member of a family" and "national of a State contracting party to the Agreement on the European Economic Area" should be interpreted in accordance with the Agreement. At para 26, he concluded that:

> "As the claimant has no rights under EC law by virtue of being his sister's brother, and as I have concluded that the EEA agreement does not confer any greater right on him, it cannot be correct to interpret paragraph 1 of Part II of the Schedule to the 2000 regulations as bearing its ordinary English meaning. To do so would be to interpret a provision that is intended to give effect to the EEA Agreement as bestowing a right under the domestic law of the UK that the claimant is not entitled to assert under that Agreement or under EC law."

18. In *JFP*, contrary to what the title of the case suggests, the Chief Commissioner was considering an appeal by the Department against a decision by the Appeal Tribunal, based on the view that, unlike in CDLA/708/2007, the claimant's family member was "a worker in a country of the European Union" (the United Kingdom). The Chief Commissioner set the Appeal Tribunal's decision aside for inadequacy of reasons (para 34), including reasons for its conclusion in the words quoted in my previous sentence. He acknowledged (para 35) that the quoted words "suggest[..] that the status was acquired through European Union rights." There is no suggestion in *JFP* that that was in fact so. Having done so, he went on to exercise his power to give the decision which he considered the Appeal Tribunal should have given, which necessarily led him to consider the correctness of CDLA/708/2007.

19. His conclusion was that JFP could rely on the equivalent argument to that put forward by the present claimant. He observed (at para 44) that he had

"arrived at this conclusion by applying what are, in my view, the clear and unambiguous legislative provisions set out above. Those provisions are straightforward, are logical in sequence and application, and are not capable of ambiguity or uncertainty. There is no requirement, in my opinion, to look behind or further analyse the wording of those legislative provisions to attempt to identify a purpose or construction which was clearly not intended."

20. His reasons for disagreeing with the Deputy Commissioner were:

"Firstly, and as was noted above there is no requirement to adopt an interpretative approach based on purpose when the meaning of the legislative provisions is clear and unambiguous. Secondly, the Deputy Commissioner has adopted a very narrow and restrictive construction of the relevant exception based on rights arising in European Union law which, in my view, is not warranted."

21. He continued (apparently as a fall-back in case he was wrong on the first point) by suggesting that if an interpretative approach based on purpose is required, the starting point should be the purpose of the legislative provisions themselves, which he saw as being matters of domestic UK law rather than based on rights arising under EU law. He noted that the Northern Ireland equivalent of the 2000 Regulations indicated that they were made 'by virtue of, or consequential upon, provisions in the Immigration and Asylum Act 1999 … which includes provision for new arrangements for asylum seekers'. He recorded how the Explanatory Notes to the 1999 Act referred to the White Paper which had preceded it, extracts from which he set out at some length. He recorded how they explained in respect of s.115 how in consequence all existing payments of social security benefits to asylum seekers would cease (subject to savings or transitional provisions) and that henceforth they would be dependent on the new asylum support system which was to be introduced.

22. The Chief Commissioner observed (at para 52) that:

"Overall the appearance is for a scheme of law to include, inter alia, new provisions for the support of asylum seekers, with a primary purpose of removing entitlement to social security benefits for those subject to immigration control but subject to exceptions for those falling within a prescribed category or description or fulfilling prescribed conditions. The exclusion of EEA nationals in the definition in section 115(9) and the inclusion of the family members of nationals of a State contracting party to the Agreement on the European Economic Area, including the United Kingdom, in regulation 2 and paragraph 1 of Part II to the Schedule to the Social Security (Immigration and Asylum) Consequential Amendments Regulations (Northern Ireland) 2000, as amended, was intended to ensure that the rights of those individuals, because of their (then) EEC status, would not be affected in the same adverse way as other categories of asylum seekers. As was noted above, the relevant provisions are measures of United Kingdom law dealing with the benefit rights of certain persons entering the United Kingdom from abroad, taking account of the rights of certain EEA nationals and their family members as required to do so by European Union law."

23. He further observed, in summary:

> a. it could not be said that the provision in question was made for the purposes of complying with an international obligation under the EEA agreement but rather to define a category of person who under UK domestic law would not be excluded from benefit(s) under s.115 of the 1999 Act (para 54);
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> b. it was not an objection to his view that, as the Deputy Commissioner had suggested, the plain interpretation of the provision would confer greater rights under domestic law than could be claimed under EU law, as more favourable treatment was permitted, notably by art.37 of Directive 2004/38 (para 56);
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> c. had it been intended to restrict the application of the provision in the way suggested by the Deputy Commissioner, it would have been easy to have done so. As an example, he gave the definition of "EEA national" in the Immigration (European Economic Area) Regulations 2006, which is drafted so as to exclude the United Kingdom (para 58); and
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> d. the guidance in the Decision Maker's Guide was consistent with his interpretation (para 59).

24. In *MS*, Judge Hemingway's *obiter* conclusion was that the Oporto Agreement was indeed adopted for the purpose of extending European Community law on relevant matters to the EFTA states. Consequently, a purposive approach to interpretation of the domestic legislation was required, in line with C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA*. He adopted the relevant reasoning of the Deputy Commissioner in CDLA/708/2007.

25. In the present case, the FtT found for the claimant on the basis (paras 16-18) that (a) the UK was a contacting party to the Oporto Agreement; (b) the claimant was the spouse of a British citizen and the mother of another and (c) the Schedule to the 2000 Regulations contained no requirement that the claimant's spouse or child must have exercised Treaty rights in another Member State before she could rely on it. This was therefore a similar position to that which the Chief Commissioner had adopted.

26. For the correct approach to statutory interpretation Ms Anderson refers me to *R v Secretary of State for the Environment, Transport and the Regions, Ex p. Spath Holme* [2001] 2 AC 349, a helpful distillation of which appears in Rose LJ's summary of the Divisional Court's approach in *SSWP v Johnson and others* [2020] EWCA Civ 778 at [26]:

> "The task is to identify the meaning of the words used in regulation 54 in the particular context in which they are used having regard to other permissible aids to interpretation such as any relevant presumption, the legislative history of the provision and other background material, in so far as that assists in

identifying the defect that the provision is intended to cure or the purpose that the provision is intended to achieve."

27. In her submission, when such principles are followed, it is not necessary in this case to have recourse to the *Marleasing* principle. She invites me not to follow *JFP*, on the basis that it is in error in requiring ambiguity before it is permissible to go behind the plain words, and to conclude that the present FtT erred in law in adopting a similar approach to that in JFP.

28. As to where applying what she submitted to be the correct approach to statutory interpretation might lead, she submitted that the obvious rationale was to secure that if a person had an underlying right under EEA law, that trumps the exclusion which s.115 of the 1999 Act creates. The legislative intention would be to comply with the EEA Agreement but no more. At the time, the *Surinder Singh* line of cases had not emerged. There is no positive indication that the legislator wished to go further, which would be to drive a coach and horses through the system of controls on benefit entitlement by reference to immigration status. To suggest that the drafter could have formulated the test differently ignores the context. The Guidance in the Decision Makers Guide and HMRC's Guidance (which has now been amended) is just that and cannot be taken as a statement of the law.

29. Neither the 1993 Act nor the 1996 Regulations had been raised in the written submissions before the hearing. Nor are they mentioned in any of the three previous decisions. As it appeared to me when preparing the case that they might be material, they were circulated to Ms Anderson and Mr Mccrossan shortly before the hearing was due to start and a few minutes' opportunity was given for them to read them. Ms Anderson saw them as essentially supportive of her case, observing that it would be remarkable if the effect of the 1996 Regulations were to confer additional rights to those required to meet international obligations.

30. Mr Mccrossan submitted that the reason underpinning the wider reading for which he contended was that all the benefits concerned were for people who were vulnerable, whether because of illness or disability, or because of their youth. It reflected a common understanding between European nations and the international conventions on the rights of children. The legislator could easily have defined EEA national so as to exclude British citizens if that had been intended, as it had done in, for instance, reg 9(1) of the Universal Credit Regulations. A person relying on *Surinder Singh* (which had in fact been decided as early as 1992) would be relying on Treaty rights and that part of Ms Anderson's submission did not hold the key to the interpretation of the provisions. Notwithstanding the 1993 Act, the legislator had chosen to go beyond what was necessary, for the reasons previously advanced. The existence of provisions targeting different benefits in the 1996 Regulations showed that protection of the vulnerable and supporting independent living were indeed the rationale. He was however unable to point to any express reference suggesting that such was indeed the legislator's intention.

31. He submitted that CDLA/708/2007 could be distinguished from *JFP* and from the present case. The Deputy Commissioner's decision had concerned the sister of a child, whereas *JFP* and the present case each concerned the family members of people who were in fact working. In para 28 of his decision, cited at [33] of *JFP,* the

Deputy Commissioner had noted that even if the sister had EEA rights (which he doubted), her brother, the claimant, could not derive rights from her by reason of his relationship with her. As Mr Mccrossan pointed out, the brother could only be at best an "extended family member" in the terms of what is now Directive 2004/38 and there is no indication that he had the necessary residence card. As to the Guidance, he submitted that it had been in place for some 20 years and if it was now held to have been incorrect, that had the potential for adverse implications for e.g. those who had successfully claimed child benefit in reliance upon it. For the reasons in this and the preceding paragraph, the appeal should be dismissed.

32. Following the oral hearing Mr Mccrossan sought permission to file a short further submission. I allowed this and Ms Anderson was given the opportunity to comment. Mr Mccrossan referred the Upper Tribunal to *Szoma (FC) v Secretary of State for the Department of Work and Pensions* [2005] UKHL 64, in which the House of Lords considered the provision of the 2000 Regulations relating to an asylum seeker who is a national of a state which has ratified the European Convention on Social and Medical Assistance (done in Paris on 11 December 1953) ("ECSMA") or a state which has ratified the Council of Europe Social Charter ("CESC"). These, Mr Mccrossan submitted, were similarly constructed to the previsions I have to consider. He principally relied on the case for the observations by Lord Brown at [29] that "these benefits [within the 2000 Regulations] go further than is strictly required to meet the United Kingdom's international obligations under ECSMA and CESC" and that the "the court's task is to construe the legislation as it stands, not as it might more stringently have been enacted".

33. In reply, Ms Anderson suggests that *Szoma* does not take matters any further as it concerns a distinct provision applied to a very different legal and factual context (asylum seekers) which has no direct or indirect effect on the provision in issue here. Attempts to rely on Lord Brown's judgment in *Szoma* have been met with the response that they should not be taken out of their very specific context. In particular, in *R(ST) v SSHD* [2012] AC 135 at [38] the Supreme Court declined to follow the ruling of Lord Brown in *Szoma* based on a literal interpretation of his words, noting:

> "The ancient maxim verba accipienda sunt secundum subjectam materiam (words are to be understood according to the subject matter with which they deal) provides the best guide to the meaning that should be given to what Lord Brown said in this paragraph."

The same approach applies to any attempt to extract a wider principle from Lord Brown's comments in this context which concerns a different subject matter. In any event, the Upper Tribunal is not being asked to judicially legislate to create a provision that has not been enacted but is being asked positively to interpret the legislation as enacted in the ordinary way set in its legal and factual context, rather than adopt a noninterpretative 'read out' approach limited to the selected words in abstract.

34. I accept that the appropriate approach to statutory interpretation is as set out at [26]. The primary position of the Chief Commissioner was based on the meaning of the words as a matter of the ordinary use of language, which he perceived as free from ambiguity, albeit he then went on to look at the policy issues underlying the

2000 Regulations as they could be discerned from pre-legislative material. I respectfully take a different view. To the extent that his decision rests on adopting the plain meaning of the words, that is not in my view the approach which authorities such as *Spath Holme* mandate. To the extent that his decision was looking at the policy background as an aid to interpretation, I consider that the relevant policy background need to be looked at going further back than that which he considered. The context for s.115 and the 2000 Regulations may have been the exclusion of asylum-seekers from mainstream benefits and substituting the alternative route of asylum support; but in my view that is the context only for moving the provision which had previously been within the regulations governing the particular benefit (in the present case, carer's allowance and in *JFP* disability living allowance) to the newly created structure. For reasons discussed below, whilst the form of the legislation became different following the enactment of s.115(9) of the 1999 Act, I do not consider that that changed the intended connection between nationals of states covered by the Oporto Agreement and the UK's social security system and it is appropriate for the interpretation of the 2000 Regulations to be informed by the pre-2000 history.

35. The 1996 Regulations refer to a national or a member of the family of a national of a State party to the Oporto Agreement; the 2000 Regulations refer only to the family member of such a national. I invited further submissions as to the significance, if any, of that change. As can be seen from its text at [5], it is a prerequisite to being caught by s.115(9) (and so a person "subject to immigration control") that a person is not an EEA national. The 2000 Regulations did not need to exclude a category of persons who would not have been caught in the first place. Under the 1994 Order and the 1996 Regulations, the domestic structure was different, as demonstrated at [15]-[16]. However, the family members of EEA nationals might themselves not be EEA nationals, hence the continuing need for the (more limited) provision in the 2000 Regulations. The title of the 2000 Regulations records that they were "Consequential Amendments" Regulations and correctly so; the change in coverage was illusory rather than real and was consequential upon the restructuring in domestic law effected by s.115(9), rather than effecting any substantive change, which would have been inconsistent with the notion of consequential amendments. What this emphasises is that it is to the earlier legal position one must look, replicated post-2000 but in a different form. The need for provision by the 2000 Regulations, in order to address the position of third country national family members to whom the immigration rules apply, is accepted; but it does not follow from that that the provision was intended to address the position of all such people, including the third country national family members of British nationals, irrespective of whether there had been any prior exercise of free movement rights.

36. Returning to the pre-2000 history, it is clear from the provisions of the 1993 Act cited above that the intention was to extend, as a matter of course unless contrary provision was made, the then existing domestic legislation implementing EU law to the EEA in respect of matters covered by the Oporto Agreement. Quite apart from any general principle of statutory interpretation, the Act provides a significant indicator that what the UK intended to do, at any rate in general, was to comply with its obligations under the Oporto Agreement, but no more. The 1994 Order tends to reinforce this, in particular in its willingness to exempt those with rights under the Oporto Agreement from the requirement for leave to enter or remain, so long as the

relevant status persisted, but once the status was lost, to put them, once again, in the position of requiring such leave. When the 1996 Regulations were made, it was only qualified persons and their family members who by virtue of the Oporto Agreement had any right to reside at all. For those who did have it, it was indeed subject to a condition that would result in it being lost if their status changed materially. It is therefore unsurprising that, in a provision listing exemptions from when a right would be treated as subject to a limitation or condition, it was considered necessary to include an express exemption for those whose rights derived from the Oporto Agreement.

37. I reject Mr Mccrossan's submission that the exemption is a wider one to protect the vulnerable. It is in the nature of most forms of social security that it protects people who are vulnerable in some way. Certainly, a range of benefits was involved but it does not follow that an overall rationale for their inclusion of protection for the vulnerable exists. In the case of DLA, attendance allowance and carer's allowance there is an obvious synergy between them as being non-means tested, non-contributory benefits providing directly or indirectly for disability, but their inclusion needs reflect no more than a view on the part of Government that the residence and presence conditions to claiming benefits of that type needed to be tightened up. There is no positive indication that a more benevolent motive was behind the framing of the 1996 Regulations or the 2000 Regulations.

38. Nor do I accept his submission that it would have been easy to draft the legislation (including the 2000 Regulations) so as to preclude a wider cohort from claiming, as was done around that time in the Immigration (European Economic Area) Regulations 2000 by expressly excluding the UK from the definition of "EEA state". It is not a question of excluding British Citizens per se: it is possible to devise *Surinder Singh* type scenarios involving a non-EEA spouse of a British national who had met and married in (say) Norway who might have been entitled to rely on rights under the Oporto Agreement in order to enter the UK. Such scenarios are hard to define, as the post-*Surinder Singh* caselaw (including as to attempts to define them in the repeated versions of the Immigration (European Economic Area) Regulations) amply demonstrates. Such people would be adequately identified by the reference to the Oporto Agreement and I do not accept Mr Mccrossan's submission that it is irrational not to have mentioned them expressly if it was intended that they alone among the family members of British nationals were to benefit from the Schedule. Nor is what it does turn on in the Secretary of State's submission, namely whether a person has exercised their freedom of movement rights under EU/EEA law, something which is necessarily clear-cut. Far better then, in terms of avoiding a breach of an international obligation, for the drafter to do what they did - carve out rights under the Oporto Agreement in general terms and then leave it to be ascertained in individual cases whether such rights could be relied upon or not.

39. I do not consider there is a valid basis for distinguishing CDLA/708/2007. The Deputy Commissioner was very doubtful whether the claimant's sister had exercised any right of freedom of movement – the fact that he could only, at best, be an "extended family member" and in fact was not even one of those was merely a fallback. In *JFP*, *MS* and the present case, there is no suggestion that there was any exercise of freedom of movement rights at all, so the second stage in the Deputy Commissioner's analysis is never reached.

40. Ms Anderson is of course correct in saying that the Guidance does not represent the law. As my task is to interpret and declare the law, I have not dwelt on the Guidance in this already lengthy decision. In any event within Great Britain, the law has been since 2007 as stated by the Deputy Commissioner. If that has not been adequately reflected in the Guidance, the consequences of that will have to be dealt with in cases where they arise.

41. Mr Mccrossan's reliance on *Szoma* assumes that which has to be decided. If the legislation, properly construed, leads to a certain conclusion, that is not construing it how it might more stringently have been enacted.

42. It follows therefore that, albeit for additional reasons to those he gives, I am respectfully in agreement with the conclusions of the Deputy Commissioner in preference to those of the Chief Commissioner in Northern Ireland.

43. It remains for me to thank the representatives for their respective thought-provoking and constructive submissions.

C.G.Ward
Judge of the Upper Tribunal
4 February 2021