Neutral Citation Number: [2023] EWHC 31 (Admin)

Case No: CO/2349/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 20th January 2023

Before:

MR JUSTICE EYRE

- -

Between:

THE KING on the application of ANTOINE LUCAS ROEHRIG	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Jessica Simor KC, Adrian Berry and Admas Habteslasie (instructed by **Solange Valdez-Symonds, Cardinal Hume Centre**) for the **Claimant**
David Blundell KC, Julia Smyth and Nicholas Chapman (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 12th October and 13th October 2022

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Approved Judgment

Mr Justice Eyre:

1. The Claimant says that when he was born on 20th October 2000 he became a British citizen by virtue of section 1(1)(b) of the British Nationality Act 1981 ("the BNA") because on that date his mother ("M") was settled in the United Kingdom within the meaning of the BNA. The Defendant says that M was not settled in the United Kingdom on that date and so the Claimant did not become a British citizen on his birth.

2. At the date of her son's birth M was a French citizen lawfully resident in the United Kingdom by reason of her rights as a worker under EU law[1] (in the sense of EU treaties and rights arising from the acts of the institutions of the European Union or its predecessors) and the provisions giving effect to those rights. It is common ground that M was ordinarily resident in the United Kingdom at that time. The dispute between the parties turns on whether M satisfied the other relevant requirement of the BNA's definition of settlement namely of being so resident "without being subject under the immigration laws to any restriction on the period for which she may remain".

The Factual Background.

3. As already noted the Claimant was born on 20th October 2000. At that time M was resident in the United Kingdom by virtue of her status as a worker who was a citizen of an EU member state. M was born in France and had come to the United Kingdom, aged 18, in June 1995. M has remained living in the United Kingdom since then and on 21st August 2018 she became a British citizen by naturalisation.

4. On 14th December 2020 the Claimant applied for a British passport invoking the citizenship which he contends he acquired on birth. The Defendant refused that application on 8th April 2021 on the basis that at the time of the Claimant's birth M was subject under the immigration laws to a restriction as to the period for which she might remain in the United Kingdom.

5. The approach which the Defendant took to the Claimant's application accorded with the approach she had taken since 2nd October 2000 to children born on or after that date to EU citizens resident in the United Kingdom. In the period from the coming into force of the BNA on 1st January 1983 to 2nd October 2000 the Defendant's approach had been to regard children born to EU citizens resident in the United Kingdom and exercising a European law right of free movement as having acquired British citizenship on birth by reason of section 1(1)(b) of the BNA. On 2nd October 2000 the Immigration (European Economic Area) Regulations 2000 ("the 2000 Regulations") came into force. From that date until 11th October 2022 the Defendant continued, in the circumstances I will describe more fully below, to treat such children born before 2nd October 2000 as having acquired British citizenship by birth[2].

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[1] I will use the term "EU law" to include earlier provisions which are more properly described as EEC law or EC law together with obligations and rights deriving from the various European treaties. I will similarly and anachronistically refer to as the Court of Justice of the European Union ("the CJEU") both that body and its predecessors and will normally refer to as EU citizens those who were in fact EEC, EC, or EEA nationals.

[2] On 11th October 2022 the Defendant "paused" that approach intending, as I understand matters, to review the position partly in light of the conclusions I reach as to the effect of the relevant legal provisions.

6. This claim was commenced on 6th July 2021. Permission was initially refused on paper by Upper Tribunal Judge Allen sitting as a High Court Judge but granted by Richard Hermer KC upon renewal of the application for permission.

The Test of British citizenship and the Approach to be taken to the Defendant's Decision.

7. As will appear below the effect of sections 1 and 50 of the BNA is that a child who is born to a mother settled in the United Kingdom becomes a British citizen automatically on birth. A person is settled in the United Kingdom if that person is ordinarily resident in the United Kingdom "without being subject under the immigration laws to any restriction on the period for which he may remain".

8. The existence or otherwise of British citizenship is a matter of legal right with citizenship arising as a matter of law automatically in specified circumstances. Although the challenge to the Defendant's refusal to grant the Claimant a passport was brought by way of a judicial review claim the question is not one of the review of a discretionary decision. Rather it is one of the determination of the legal rights which arise in the circumstances as they exist or are found to exist (see in *Harrison v Secretary of State for the Home Department* [2003] EWCA Civ 432 per Keene LJ at [32] and [34] and per May LJ at [42]).

9. As already noted it is common ground that M was ordinarily resident in the United Kingdom at the time of the Claimant's birth. Therefore the question of whether the Claimant is or is not a British citizen will depend on the proper interpretation of the requirement that M's residence here should not be "subject under the immigration laws to any restriction on the period for which she may remain".

10. When interpreting legislation the court seeks to ascertain the objective meaning of the words used when read in context. The relevant context is primarily that of the statute or other instrument in which the words appear when that is read as a whole (see *R* (*Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2022] 2 WLR 343 per Lord Hodge at [29] – [31]). Other legislation can form part of the context in which the language of a particular instrument is to be interpreted but the primary context remains the balance of the statute or instrument in question.

11. Here Mr Blundell KC contended for the Defendant that the BNA should be seen as seeking to confine British citizenship to those with the closest connexion with the United Kingdom. He said that regard should be had to this purpose when interpreting that Act and the other legislation relevant here so as to read the provisions as extending citizenship to a narrower rather than a wider range of persons. For her part Ms Simor KC said that the context included the BNA's replacement of the previous operation of the rule of *ius soli* namely the rule that citizenship was acquired by birth in the United Kingdom. She said that because under the previous law all persons born in the United Kingdom acquired British citizenship automatically the BNA should only be interpreted as precluding those born in this country from becoming citizens when that was a necessary conclusion from the words used. In short Ms Simor said that to the extent that the BNA was to be seen as restricting existing rights then such restriction needed to be clearly expressed.

12. Elegantly though they were expressed I did not find either line of argument of assistance in interpreting the provisions applicable to the Claimant. The BNA was setting out a new regime for the acquisition of citizenship. That new regime is to be interpreted on its own merits and with regard to its own terms. Reference to the previous legal regime which was being replaced was neither helpful nor appropriate in circumstances where that regime was *ex hypothesis* being replaced by a new regime. Still less can it be said that the BNA is to be construed narrowly because it was cutting down existing rights. The position might have been different if the existing rights of persons alive at the time the BNA came into force had been reduced by the Act. However, that was not the position. Instead the BNA applied in this regard to the circumstances in which persons not yet born could acquire British citizenship and there is no scope for an interpretation premised on the approach that any restriction of an existing right is to be construed narrowly. Similarly, Mr Blundell's invocation of what he said to be the effect or purpose of the BNA was somewhat circular and begged the question in issue. The issue is whether properly interpreted the language of the BNA and the other applicable provisions had the effect of giving the Claimant British citizenship or not and reference to the debateable question of the closeness or otherwise of the connexion which those in the Claimant's position had with the United Kingdom does not assist in addressing that.

13. Ms Simor also prayed in aid the facts that until the introduction of the 2000 Regulations the Secretary of State had interpreted the law in the way which the Claimant says is correct and that between 2nd October 2000 and 11th October 2022 the Defendant had continued to treat those in the same circumstances as the Claimant but born before 2nd October 2000 as having acquired citizenship by birth. Ms Simor said that the decisions of the CJEU in *Kaba v Secretary of State for the Home Department (No 1)* and *(No 2)* [2003] 1 CMLR 38 and 39 did not call for a different approach; that the 2000 Regulations were in part *ultra vires* and did not alter the position; and that the Defendant's earlier understanding of the law remained correct. In addition Ms Simor said that the Defendant's action in continuing to treat the children born before 2nd October 2000 to EU citizens resident in the United Kingdom as acquiring citizenship by birth would, if the Defendant's current interpretation of the law were correct, have involved treating as British citizens persons who were not such citizens in law. The point was in part that this showed that the Defendant did not in truth regard the interpretation for which she now contended as correct. These points did not advance matters. The Defendant does not contend that regulation 8 of the 2000 Regulations changed the law. Rather she says that it reflected a changed understanding of what the correct position was. It follows that either the Defendant's earlier interpretation of the provisions was right and her current stance is mistaken or vice versa. However, the fact that the Defendant has necessarily been mistaken at one or other time does not assist me in assessing whether the interpretation for which she now contends is or is not correct. Similarly, the fact that the Defendant has as a matter of policy treated as British citizens persons who on one interpretation are not such cannot influence the correct interpretation of the legislation.

The Issues and the Parties' Cases in Outline.

14. There is no dispute that M's right to remain in the United Kingdom was a qualified right. The question of whether the Claimant acquired British citizenship on birth depends on whether the restriction on M's rights meant that she was not settled for the

purposes of the BNA when the Claimant was born. That depends on whether that restriction was a restriction "under the immigration laws" and whether it was a restriction "on the period for which she may remain".

15. At one point I thought that before turning to those central issues it would be necessary to consider the issue of the validity and effect of regulation 8 and more particularly regulation 8(2) of the 2000 Regulations. The Claimant says that this provision is invalid by reason of being *ultra vires* when regard is had to the scope of the powers used to make the 2000 Regulations. The Defendant says that the provision is *intra vires* and valid. Although this point was addressed at some length as matters have turned out it is of no real relevance to the outcome of the case or to the issue of whether the Claimant acquired British citizenship on his birth. That is because the Defendant does not suggest that regulation 8 was effective to cut down rights which M had pursuant to the provisions of EU law or otherwise. Nor did the Defendant contend that if M met the requirements of being settled without reference to the regulation then such reference would in some way change the position. Similarly the Claimant said that whether M was settled at the time of his birth "was a matter capable of being determined without any gloss being provided by regulation 8". In those circumstances I will address the issue of M's status at the time of the Claimant's birth without reference to regulation 8 and will return after that consideration to the question of the extent to which I need to address the validity of the regulation.

16. The first question, therefore, is whether M was at the time of the Claimant's birth subject to a restriction "under the immigration laws" on her entitlement to remain in the United Kingdom. The Claimant says that M was not so subject because when properly interpreted the term "the immigration laws" does not include provisions governing the rights of EU citizens to be in the United Kingdom. Accordingly, such restriction as there was on M's right to remain in the United Kingdom was not "a restriction under the immigration laws". The Defendant says that the Claimant was subject to such a restriction because the term "the immigration laws" includes provisions, such as those governing the rights of EU citizens to remain in the United Kingdom, which are concerned with controlling the rights of persons other than British citizens to enter or remain in the United Kingdom.

17. Determination of this issue will require an assessment of the effect of the decision of McCloskey J in *Secretary of State for the Home Department v Capparelli* [2017] UKUT 000162 (IAC) and consideration of whether it is in point and should be followed. The Claimant says that the decision is authority for the proposition that provisions giving effect to the free movement rights of EU citizens are not immigration laws for the purposes of the BNA; that the case cannot properly be distinguished from the current case; and that on this issue the decision was right and should be followed. The Defendant says that the decision is distinguishable but that even if it is not then I should decline to follow it on the basis that McCloskey J's conclusion can be seen to have been wrong.

18. If the Claimant is right on the preceding issue then that is conclusive of the dispute. If, however, I conclude that he is wrong on that issue and that M was subject to a restriction under the immigration laws it will be necessary to consider the further issue. This is whether the restriction on M was a restriction "on the period for which she may remain" in the United Kingdom. This will turn on the applicability of the decision of the Court of Appeal in *R v Immigration Appeal Tribunal (ex p Coomasaru)* [1983] 1 WLR 14.

The Claimant says that decision is to be distinguished from the circumstances with which I am concerned. He says that, as a consequence, I am free to conclude that the restriction on M was not one as to the period for which she could remain in the United Kingdom. The Defendant says that *Coomasaru* is not properly distinguishable and must be followed with the consequence that the restriction is to be seen as having been a restriction on the period for which M might remain here. Alternatively, the Defendant says that conclusion flows from a proper consideration of the nature of the restriction.

The Legislative Framework.

19. The starting point is the Immigration Act 1971 ("the 1971 Act"). This drew a distinction between those who had a right of abode in the United Kingdom and those who did not have such a right. The latter required leave to enter or to remain in the United Kingdom pursuant to the regime set out in the Act.

20. Section 1 provided that:

> "(1) All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.
>
> (2) Those not having that right may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act; and indefinite leave to enter or remain in the United Kingdom shall, by virtue of this provision, be treated as having been given under this Act to those in the United Kingdom at its coming into force, if they are then settled there (and not exempt under this Act from the provisions relating to leave to enter or remain)…"

21. Section 3 provided thus for the requirement of leave to enter or remain and for the Secretary of State to lay statements of rules before Parliament:

> (1) Except as otherwise provided by or under this Act, where a person is not a British citizen]
>
> (a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under this Act;
>
> (b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;
>
> (c) if he is given limited leave to enter or remain in the United Kingdom, it may be given
>
> subject to all or any of the following conditions, namely—
>
> (i) a condition restricting his employment or occupation in the United Kingdom;
>
> (ii) a condition requiring him to maintain and accommodate himself, and any dependants
>
> of his, without recourse to public funds; and

(iii) a condition requiring him to register with the police.

(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances; and section 1(4) above shall not be taken to require uniform provision to be made by the rules as regards admission of persons for a purpose or in a capacity specified in section 1(4) (and in particular, for this as well as other purposes of this Act, account may be taken of citizenship or nationality). If a statement laid before either House of Parliament under this subsection is disapproved by a resolution of that House passed within the period of forty days beginning with the date of laying (and exclusive of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days),then the Secretary of State shall as soon as may be make such changes or further changes in the rules as appear to him to be required in the circumstances, so that the statement of those changes be laid before Parliament at latest by the end of the period of forty days beginning with the date of the resolution (but exclusive as aforesaid)..."

22. Section 8 provided in these terms for exceptions for those exempted by order; by reason of their diplomatic status; or as being service personnel:

"...(2) The Secretary of State may by order exempt any person or class of persons, either unconditionally or subject to such conditions as may be imposed by or under the order, from all or any of the provisions of this Act relating to those who are not British citizens. An order under this subsection, if made with respect to a class of persons, shall be made by statutory instrument, which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(3) Subject to subsection (3A) below, the provisions of this Act relating to those who are not British citizens shall not apply to any person so long as he is a member of a mission (within the meaning of the Diplomatic Privileges Act 1964), a person who is a member of the family and forms part of the household of such a member, or a person otherwise entitled to the like immunity from jurisdiction as is conferred by that Act on a diplomatic agent.

(3A) For the purposes of subsection (3), a member of a mission other than a diplomatic agent (as defined by the 1964 Act) is not to count as a member of a mission unless—

(a) he was resident outside the United Kingdom, and was not in the United Kingdom, when he was offered a post as such a member; and

(b) he has not ceased to be such a member after having taken up the post.

(4) The provisions of this Act relating to those who are not [British citizens], other than the provisions relating to deportation, shall also not apply to any person so long as either—

(a) he is subject, as a member of the home forces, to service law; or

(b) being a member of a Commonwealth force or of a force raised under the law of any[...] colony, protectorate or protected state, is undergoing or about to undergo training in the United Kingdom with any body, contingent or detachment of the home forces; or

(c) he is serving or posted for service in the United Kingdom as a member of a visiting force or of any force raised as aforesaid or as a

> member of an international headquarters or defence organisation designated for the time being by an Order in Council under section 1 of the International Headquarters and Defence Organisations Act 1964..."

23. The 1971 Act defined "immigration laws" thus at section 33(1):

> *"immigration laws"* means this Act and any law for purposes similar to this Act which is for the time being or has (before or after the passing of this Act) been in force in any part of the United Kingdom and Islands;"

24. Section 33(2A) provided that:

> "(2A) Subject to section 8(5) above, references to a person being settled in the United Kingdom are references to his being ordinarily resident there without being subject under the immigration laws to any restriction on the period for which he may remain".

25. The United Kingdom joined the European Economic Community as it then was in 1972 and sections 2(1) and (2) of the European Communities Act 1972 ("the ECA") are of potential relevance here providing that:

> "(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.
>
> (2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by regulations, make provision—
>
> > (a) for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or
> >
> > (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above...;"

26. Before the BNA came into force one of the ways in which British citizenship could be acquired was by application of the principle of *ius soli* namely that any child born in the United Kingdom became by virtue of having been born in this country a British citizen on birth. That principle was replaced by the BNA.

27. Section 1(1) provided as follows that for a child (other than an abandoned child) born in the United Kingdom to acquire British citizenship on birth it was necessary for the child's father or mother to be either a British citizen or settled in the United Kingdom:

> "A person born in the United Kingdom after commencement shall be a British citizen if at the time of the birth his father or mother is—
>
> > (a) a British citizen; or

(b) settled in the United Kingdom..."

28. Section 50 defined "settled" as follows:

> "…(2) Subject to subsection (3), references in this Act to a person being settled in the United Kingdom or in a dependent territory are references to his being ordinarily resident in the United Kingdom or, as the case may be, in that territory without being subject under the immigration laws to any restriction on the period for which he may remain.
>
> (3) Subject to subsection (4), a person is not to be regarded for the purposes of this Act—
>
> (a) as having been settled in the United Kingdom at any time when he was entitled to an exemption under section 8(3) or (4)(b) or (c) of the Immigration Act 1971 or, unless the order under section 8(2) of that Act conferring the exemption in question provides otherwise, to an exemption under the said section 8(2), or to any corresponding exemption under the former immigration laws; or
>
> (b) as having been settled in a dependent territory at any time when he was under the immigration laws entitled to any exemption corresponding to any such exemption as is mentioned in paragraph (a) (that paragraph being for the purposes of this paragraph read as if the words from "unless" to "otherwise" were omitted).
>
> (4) A person to whom a child is born in the United Kingdom after commencement is to be regarded for the purposes of section 1(1) as being settled in the United Kingdom at the time of the birth if—
>
> (a) he would fall to be so regarded but for his being at that time entitled to an exemption under section 8(3) of the Immigration Act 1971; and
>
> (b) immediately before he became entitled to that exemption he was settled in the United Kingdom; and
>
> (c) he was ordinarily resident in the United Kingdom from the time when he became entitled to that exemption to the time of the birth; but this subsection shall not apply if at the time of the birth the child's father or mother is a person on whom any immunity from jurisdiction is conferred by or under the Diplomatic Privileges Act 1964…"

29. Initially following the United Kingdom's accession to the European Economic Community effect was given to freedom of movement rights derived from EU law by granting leave to enter to the nationals of other EU states. The CJEU found this to be unlawful in *R v Pieck* [1981] QB 571. This led to the situation being addressed through the Immigration Rules (see Lord Hoffmann's summary of the development of the position in *Chief Adjudication Officer v Wolke* [1997] 1 WLR 1640 at 1652 – 1653).

30. That approach changed on 20th July 1994 when section 7 of the Immigration Act 1988 ("the 1988 Act") and the Immigration (European Economic Area) Order 1994 ("the 1994 Order") came into force.

31. Section 7 provided that:

> "(1) A person shall not under the principal Act 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.

(2) The Secretary of State may by order made by statutory instrument give leave to enter the United Kingdom for a limited period to any class of persons who are nationals of member States but who are not entitled to enter the United Kingdom as mentioned in subsection (1) above; and any such order may give leave subject to such conditions as may be imposed by the order.

(3) References in the principal Act to limited leave shall include references to leave given by an order under subsection (2) above and a person having leave by virtue of such an order shall be treated as having been given that leave by a notice given to him by an immigration officer within the period specified in paragraph 6(1) of Schedule 2 to that Act."

32. The 1994 Order was intended to make provision for those who, by reason of that section, were entitled to enter and remain in the United Kingdom without leave to enter or remain. The relevant provisions of the Order are:

"3(1) Subject to article 15(1), an EEA national shall be admitted to the United Kingdom if he produces, on arrival, a valid national identity card or passport issued by another EEA state...

4(1) A qualified person shall be entitled to reside in the United Kingdom, without the requirement for leave to remain under the 1971 Act, for as long as he remains a qualified person...

6(1)(a) a worker;...

6(2)(a) "a worker" means a worker within the meaning of Article 48 of the EC Treaty;

...

10 The Secretary of State shall not be required to grant a residence permit to a person other than a qualified person nor to -

(a) a worker whose employment in the United Kingdom is limited to three months and who, unless he is a worker to whom Council Directive 68/360 EEC applies, holds a document from his employer certifying that his employment is so limited;

(b) a worker who is employed in the United Kingdom but who resides in the territory of another EEA State and who returns to his residence at least once a week;

(c) a seasonal worker whose contract of employment has been approved by the Department of Employment; nor

(d) a provider or recipient of services if the services are to be provided for no more than three months...

…

12(1) Subject to the following paragraphs, a residence permit shall be valid for at least five years.

13 (1) Subject to paragraphs (2) and (3) and article 16(1), a residence permit shall be renewed on application.

(2) On the occasion of the first renewal of a worker's residence permit the validity may be limited to one year if the worker has been involuntarily unemployed in the United Kingdom for more than one year.

(3) In the case of a student whose residence permit is limited to one year by virtue of article 12(5), renewal may be for periods limited to one year.

33. Paragraph 5 of the Immigration Rules provided that those Rules did not, save where expressly stated, apply to an EU national who was entitled to enter or remain in the United Kingdom by reason of the provisions of the 1994 Order. Express provision was made at paragraph 255 in these terms:

> "An EEA national (other than a student) and the family member of such a person, who has been issued with a residence permit or residence document valid for 5 years, and who has remained in the United Kingdom in accordance with the provisions of the 1994 EEA Order for 4 years and continues to do so may, on application, have his residence permit or residence document (as the case may be) endorsed to show permission to remain in the United Kingdom indefinitely".

34. In the period to 2nd October 2000 the Secretary of State had proceeded on the basis that EU citizens resident in the United Kingdom pursuant to their rights under EU law were present without any restriction on the period of time for which they may remain in the United Kingdom. In accord with that understanding the Secretary of State had treated such persons as settled in the United Kingdom for the purposes of the BNA at least to the extent of regarding children born to such persons when in the United Kingdom as having become British citizens on birth pursuant to section 1(1)(b) of the BNA.

35. That understanding changed in the light of reflection on the decision of the CJEU in *Kaba (No 1) (supra)* and, rather belated, reflection on the decision of the Immigration Appeal Tribunal in *Gal v Secretary of State for the Home Department* (unreported 26th January 1994). That changed understanding led to the making of the 2000 Regulations and the revocation of the 1994 Order (save in a respect not material here). Those regulations purported to be made in exercise of powers conferred on the Secretary of State by section 2(2) of the ECA. The provisions which are relevant for current purposes are as follows.

36. Regulation 3 which defined "worker" (and other of the categories of qualified person) by reference to the meaning that term had in the EC Treaty and, so, by reference to EU law.

37. Regulation 5(1)(a) which provided that:

> "In these regulations, a "qualified person" means a person who is an EEA national and in the United Kingdom as –
>
> (a) a worker..."

38. Regulation 8 in the following terms:

> "(1) For the purposes of the 1971 Act(11) and the British Nationality Act 1981(12), the following are to be regarded as persons who are in the United Kingdom without being subject under the immigration laws to any restriction on the period for which they may remain—
>
> (a) a self-employed person who has ceased activity;
>
> (b) the family member of such a person who was residing with that person in the United Kingdom immediately before that person ceased his activity in the United Kingdom;
>
> (c) a family member to whom regulation 5(4) applies;
>
> (d) a person who has rights under Regulation 1251/70;

> (e) a person who has been granted permission to remain in the United Kingdom indefinitely.
>
> (2) However, a qualified person or family member who is not mentioned in paragraph (1) is not, by virtue of his status as a qualified person or the family member of a qualified person, to be so regarded for those purposes".

39. Regulation 14(1) which gave a qualified person an entitlement to reside without leave to remain thus:

> "(1) A qualified person is entitled to reside in the United Kingdom, without the requirement for leave to remain under the 1971 Act, for as long as he remains a qualified person..."

40. By virtue of regulations 15 and 18 the Secretary of State was required to issue a residence permit valid for at least five years from the date of issue to a qualified person on application by such person and subject to production of a valid identity card or passport issued by an EEA state and proof that the applicant was a qualified person.

41. As I have noted above the Secretary of State continued until 11th October 2022 to treat children born before 2nd October 2000 to EU citizens resident in the United Kingdom pursuant to their rights under EU law as having acquired British citizenship on birth. In the Defendant's skeleton submissions it was explained that this was an approach adopted as a matter of policy and fairness. That is because such persons had been regarded and had regarded themselves as British citizens and the Secretary of State took the view "that it would be unfair to treat those individuals differently simply because of the date at which their situation became clear".

M's Status at the Date of the Claimant's Birth.

42. From her arrival in the United Kingdom in 1995 until 2nd October 2000 M's entitlement to remain here had derived from section 7 of the 1988 Act and the 1994 Order. From 2nd October 2000 and at the time of the Claimant's birth that entitlement derived from section 7 of the 1988 Act and regulation 14 of the 2000 Regulations. As a consequence of those provisions M was entitled to remain in the United Kingdom so long as she continued to be a qualified person. She was a qualified person by reason of being a worker for the purposes of EU law. However, if she had ceased to be a worker then she would have been entitled to remain in the United Kingdom if and so long as she satisfied the criteria for a different category of qualified person.

43. By October 2000 M had been in the United Kingdom for more than four years. In those circumstances the effect of regulation 15 of the 2000 Regulations and Rule 255 of the Immigration Rules was that M would have been entitled to apply for a residence permit and to apply for that to be endorsed as showing permission to remain in the United Kingdom indefinitely. On the making of such applications the permit and the endorsement would have necessarily followed provided that M had supplied the documentary confirmation required by regulation 15. M had not, however, made such an application nor received such an endorsement.

44. On behalf of the Claimant it was said that M's entitlement to obtain a residence permit and in particular to have the same endorsed as showing permission to remain indefinitely is relevant to the question of whether she was subject to a restriction under the immigration laws on the period for which she might remain. In particular this

entitlement was said to be relevant to the question of whether such restriction as existed was a restriction on the period for which M might remain.

45. The Defendant countered that contention by saying that M had not undertaken the necessary steps of applying for a residence permit; providing the documents which had to accompany such an application; and applying for the residence permit to be endorsed. Unless and until M had taken those steps and obtained the permit and endorsement her potential ability to do so was immaterial.

46. The Defendant's assessment of the effect of M's potential ability to obtain a permit so endorsed is correct. At the time of the Claimant's birth M had not taken the necessary steps to obtain such an endorsement. Her status remained that of a qualified person exercising her rights as deriving from section 7 of the 1988 Act and from regulation 14 of the 2000 Regulations. M's entitlement to remain in the United Kingdom depended on her remaining a qualified person. It is of note that regulation 15 and rule 255 both required an application to be made and the former required the application to be accompanied by an identity card or passport and proof of qualification. It would have been possible for regulation 15 to have required the Secretary of State to provide residence permits without an application. Also, and perhaps more realistically, it would have been possible for rule 255 to have provided that an EU citizen who had been lawfully in the United Kingdom for four years or who had been resident as a qualified person for four years was without more entitled to remain in the United Kingdom indefinitely. That course was not taken and instead the making of an application was laid down as a necessary precondition to the endorsement. A person who would be in a particular position or would have a certain status upon making the application stipulated for by a provision is not to be regarded as being in that position or as having that status unless and until the required application is made.

47. A further factor operating against the Claimant's argument in this regard is that if correct it means that M's status as being settled or not for the purpose of the BNA was altered automatically once she had been in the United Kingdom for four years. This would mean that the status of EU citizens who had been resident in the United Kingdom for less than four years was different from that of those who had been resident for more than four years with the latter being settled and the former not. It would have been possible for such a change to have been set out expressly in the 2000 Regulations or in the Immigration Rules or in the BNA. The fact that this was not done indicates that there was no such automatic change in status.

48. It follows that M's ability to obtain a residence permit and the endorsement provided for by rule 255 is immaterial when considering her position as at 20th October 2000.

Whether M was subject to a Restriction under the Immigration Laws.

49. In the period between her entry into the United Kingdom and the Claimant's birth M's entitlement to remain in the country had been a qualified one. Originally the qualifications on that entitlement derived from the 1994 Order and section 7 of the 1988 Act. From 2nd October 2000 it was regulation 14 of the 2000 Regulations which was relevant. As already noted this entitled M to reside in the United Kingdom without leave to remain for so long as she remained a qualified person. Was the requirement that to be entitled to reside without leave to remain M had to continue to be a qualified person a restriction "under the immigration laws"?

50. The effect of the provisions which applied before the 1994 Order and section 7 of the 1988 Act came into force was considered by the IAT in *Gal (supra)*. There the Secretary of State had, in April 1992, refused Mrs Gal's application for indefinite leave to remain. Mrs Gal's husband was a French national who had been given leave to enter and to remain under the Immigration Rules pursuant to the system then in force to give effect to rights under EU law. Mrs Gal contended that in those circumstances she was entitled to indefinite leave to remain as the wife of a person settled in the United Kingdom. The question of whether her husband was settled was to be determined in light of the definition in section 33(2A) of the 1971 Act which was in materially the same terms as that in section 50(2) of the BNA and "immigration laws" were defined in section 33(1) of the 1971 Act in terms equivalent to those in section 50(1) of the BNA.

51. The Tribunal explained its analysis of the position thus at p9:

> "Mr. Blake did not contend before us that the `laws' applicable to Mrs. Gal were not `immigration laws' for the purpose of this definition. `Immigration Laws' is defined in Section 33 (1) of the Immigration Act [1971] as being `any law for purposes similar to this Act' which has been or is in force. In our view although at present there is no direct legislative provision relating to the entry and stay in this country of those having an enforceable community right save the provisions of the immigration rules the European Laws made applicable in this country under the European Communities Act 1972 are `immigration Laws' for the purpose of the 1971 Act."

52. It is of note that the distinguished counsel acting for Mrs Gal did not seek to argue that the relevant laws were not "immigration laws" and it is apparent that the Tribunal itself took the view that this approach was correct.

53. The argument advanced for Mrs Gal was that the restriction was not one as to the period for which her husband could remain in the United Kingdom. I will consider below the approach which the Tribunal took to that argument.

54. The issue was next considered in the decision of McCloskey J sitting as President of the Upper Tribunal (Immigration and Asylum Chamber) in *Capparelli* (*supra)*. Mr Capparelli challenged a deportation order made by the Secretary of State. The First-Tier Tribunal had allowed the appeal against the deportation order. It had found that the deportation order was unsustainable on two alternative grounds. The first was that Mr Capparelli had acquired British citizenship by birth. The second was that he had been continually resident in the country for 10 years and so could only be deported on imperative grounds of public security and that such grounds had not been made out.

55. Mr Capparelli had been born in the United Kingdom in March 1986 to parents who were EC nationals exercising their rights under EU law. Thus McCloskey J was addressing the effect for the purposes of the BNA of the provisions which had preceded the 1994 Order and section 7 of the 1988 Act.

56. At [14] McCloskey J noted thus the Secretary of State's explanation of her policy in respect of the period before 2nd October 2000;

> "…The submission developed by Mr Schenk on behalf of the Appellant was that section 50(2) of the 1981 Act applies to any person exercising Treaty rights by virtue of Home Office policy. The policy in question took the form of a Home Office Nationality Instruction entitled "European Economic Area and Swiss Nationals". Paragraph 8.1 of this policy stated that as regards the period prior to 02 October 2000 –

> *"Evidence that the person concerned was exercising any description of EEA free movement right in the UK on the relevant date should be accepted as evidence that he or she was not, then, 'subject under the immigration laws to any restriction on the period for which [they] might remain in the United Kingdom'" ...*

57. McCloskey J then referred to the decision in *Gal*. At [16] he rightly said that the rationale for the decision of the IAT had been that "the period during which such a person [an EU national exercising rights as such] may remain in the United Kingdom is conditional upon remaining economically active".

58. The judgment in *Capparelli* had been reserved and it is apparent that McCloskey J had come upon *Gal* in his consideration of the textbooks. It follows that he did not benefit from argument as to the effect or correctness of the approach in that case. This appears from the passage at the end of [16] where McCloskey J noted the absence of any reference to *Gal* in the parties' written or oral submissions and from [17] where he said that "comprehensive adversarial argument" as to the correctness of that decision would have been welcome.

59. At [17] the judge said that although he was satisfied that the outcome in *Gal* had been correct he had concluded that "the underlying reasoning was flawed".

60. McCloskey J explained his analysis at [18] – [20] as follows:

> "18. Although in Gal the IAT accepted that the phrase "immigration laws" encompasses the EU rules on free movement, I would question the correctness of this. Since 1971, via Section 33(1) of the Immigration Act of that year, the definition of "immigration laws" has been:
>
> > *'Immigration laws' means this Act and any law for purposes similar to this Act which is for the time being or has (before or after the passing of this Act) been in force in any part of the United Kingdom and Islands."*
>
> I consider that the ordinary and natural meaning of these words does not encompass the EU rules on free movement. The definition makes no mention of EU laws, primary or secondary. Furthermore, the 1971 Act pre-dated the accession of the United Kingdom to the EU and this definition was not amended subsequently. Notably, this definition was repeated when the 1981 Act was introduced: see section 50(1). In my judgement "immigration laws" are confined to laws made by the United Kingdom Parliament. If this phrase were designed to extend to any provisions of EU law, one would expect clear words to this effect: there are none. To complete this discrete analysis, paragraph 5 of the Immigration Rules makes clear that they have no application to EU citizens exercising Treaty rights:
>
> > *"Safe where expressly indicated, these Rules do not apply to those persons who are entitled to enter or remain in the United Kingdom by virtue of the provisions of the 2006 EEA Regulations. But any person who is not entitled to rely on the provisions of those Regulations is covered by these Rules."*
>
> 19. I consider that the FtT fell into error in its consideration and application of the definition of "settled" in section 50(2) of the 1981 Act. This error arose from its concentration on the phrase "ordinarily resident" only, at the expense of and neglecting the second part of the definition namely "without being subject under the immigration laws to any restriction on the period for which he may remain". For the reasons explained in [18]

> I consider that the reasoning in Gal was incorrect. The IAT should have held that this second part of the definition of "settled" cannot sensibly be applied to a EU citizen exercising Treaty rights since the "immigration laws", correctly defined and understood, do not apply to such persons. In other words, in the case of EU citizens, no question of a time restriction under the immigration laws can arise. It follows that EU citizens can never satisfy the second part of the definition. Approached in this way, the FtT's error was to conclude that the Appellant's parents were, at the material time, viz when he was born, British citizens simply on account of being ordinarily resident in the United Kingdom. This finding failed to address the second limb of the definition of "settled". If addressed correctly, the FtT would in my judgement have been bound to conclude that it was not satisfied, for the reasons explained above.
>
> 20. In short, there is no merger of United Kingdom immigration laws and EU Treaty free movement rules. The view expressed in Gal that the latter are immersed within the former is, in my estimation, misconceived. These are two quite separate legal regimes in the context under scrutiny"

61. In light of that reasoning McCloskey J went on to conclude that Mr Capparelli was not a British citizen by birth and that the Secretary of State's first ground of appeal was made out. However, he ultimately dismissed the appeal and upheld the decision of the First Tier Tribunal because it was not open to the Secretary of State to challenge the finding of fact that there had been 10 years' continuous residence and that an imperative ground of public security had not been shown such as was needed to justify the deportation.

62. At [24] McCloskey J said that he regarded the Secretary of State's statement of policy as incorrect as a statement of the law. It is of note that McCloskey J did so in the context of the distinction he drew between immigration laws which were made by the United Kingdom Parliament and EU law and rights deriving from that. He does, however, appear to have had regard to parts of the Immigration Rules which gave effect to rights derived from EU law.

63. The Claimant says that McCloskey J drew two conclusions from his analysis of the position. The first was that because EU law is not within the scope of "the immigration laws" the qualifications which EU law places on the right of an EU citizen to remain in a member state other than that of which he or she is a national are not restrictions under the immigration laws for the purposes of the BNA. The second was that because they were not subject to immigration laws EU citizens could never be settled for the purposes of the BNA. The Claimant says that the first of those conclusions was correct but the second incorrect. The Defendant does not accept that the first conclusion was correct but agrees that the second does not follow from the first and does not seek to uphold that conclusion.

64. In my reading of the judgment it is somewhat artificial to say that McCloskey J reached two distinct conclusions. In reality he set out a single piece of reasoning which was that those exercising rights under EU law were outside the scope of the immigration laws and, therefore, could never be settled for the purposes of the BNA. He was not saying (as is the Claimant's case here) that a person exercising rights derived from EU law could be settled because the restrictions on such a person's right to remain were either not restrictions under the immigration laws or were not restrictions on the period for which such a person may remain. McCloskey J appears to have approached the matter on the footing that a person could only be settled for the purposes of the BNA if that

person was subject to the immigration laws and to a restriction under those laws but with that restriction being one which was not limited as to period. From that understanding he derived a single conclusion that a person exercising rights derived from EU law could never be settled for the purposes of the BNA because such a person was not subject to restrictions under the immigration laws still less to a restriction which was not limited as to period (this reading of his reasoning is supported by the reference at [24] to the Secretary of State's policy being an incorrect statement of the law). That is a conclusion which both sides before me would regard as incorrect.

65. The Claimant also referred me to the decision of the Court of Appeal in *R (Akinsanya) v Secretary of State for the Home Department* [2022] EWCA Civ 37, [2022] QB 482. The court was there concerned with the issue of the effect of *Zambrano* rights. In simplified terms such a right is a right of residence enjoyed by a third-country national by reason of being the primary carer of an EU citizen. The court had to determine whether a person exercising such a right satisfied the criteria for the grant of indefinite leave to remain under the EU Settlement Scheme. It was in that context that Underhill LJ made reference, at [20], to the scheme under the 1971 Act requiring those who do not have a right of abode in the United Kingdom to obtain leave to enter and leave to remain and said:

> "While the UK was a member of the EU this scheme had no application to EU nationals, or those with rights under EU law deriving from the rights of such nationals, since they were (broadly speaking) entitled to live and work here without any requirement for leave: see section 7 of the Immigration Act 1988".

66. At [30] Underhill LJ referred to the regulations which had given effect to the rights of *Zambrano* carers and said "since the rights recognised by them derive from EU law they do not form part of the scheme under the Immigration Act 1971: see para 20 above".

67. The Claimant says that those passages support the contention that provisions giving effect to rights deriving from EU law are not derived from immigration laws nor are themselves immigration laws. However, in my judgement that is reading far too much into those references. In *Akinsanya* the Court of Appeal was not considering the meaning of "immigration laws" for the purposes of the BNA still less whether provisions giving effect to rights derived from EU law came within that term. When his remarks are seen in context Underhill LJ was simply making the point that the regime of leave to enter and leave to remain under the 1971 Act did not apply to EU citizens because their rights to enter and remain in the United Kingdom were governed by other processes. That was, of course, correct but it does not assist with the questions I have to address.

68. Similarly reference to the decision of the Court of Appeal in *Abdirahman v Secretary of State for Work & Pensions* [2007] EWCA Civ 657, [2008] 1 WLR 254 does not advance matters. The claimants in that case were EEA nationals who were lawfully present in the United Kingdom but who did not have the right to reside here. Their claim to social security benefits had been refused because of the absence of a right to reside. At [15] and [19] Lloyd LJ noted that the claimants had not required leave to enter and so had not committed any breach of immigration law by entering and remaining in the United Kingdom without leave. At [24] in the context of considering the decision in *Ismail v Barnet LBC* [2006] 1 WLR 2271 Lloyd LJ made the point that the question of

whether a person was "subject to immigration control" for the purpose of regulations made under the Housing Act 1996 depended on whether such a person required leave to enter or to remain in the United Kingdom. That was because section 185(2) of the Housing Act provided that a person who was subject to immigration control within the meaning of the Asylum and Immigration Act 1996 was, subject to exceptions, not eligible for housing assistance. Section 13 of the Asylum and Immigration Act defined a person subject to immigration control as a person who required leave to enter or to remain in the United Kingdom. It followed that an EU citizen who was lawfully in the country without having required leave to enter or remain was not subject to immigration control for those purposes. Thus a qualified person for the purposes of regulation 14 of the 2000 Regulations was not subject to immigration control so long as he or she remained a qualified person.

69. I do not find that the meaning of "subject to immigration control" for the purposes of provisions in relation to either the Housing Act or the Asylum and Immigration Act can assist in interpreting the term "subject under the immigration laws to any restriction" in the BNA. This is because being a person subject to immigration control is a particular status with identified consequences. The terms "subject to immigration control" and "subject under the immigration laws to any restriction" are not to be seen as equivalent in circumstances where the BNA contains a definition of "immigration laws" and where it would have been possible, if the terms were intended to be equivalent, for one or other of those terms to have been used throughout the relevant legislation to the exclusion of the other. The use of two different terms indicates that their scope is different. The conclusion that a qualified person is not subject to immigration control is in reality an abbreviated explanation of the uncontentious proposition that such a person is not subject to the requirements of leave to enter and leave to remain and is lawfully entitled to enter and remain in the United Kingdom without such leave. That proposition does not assist in answering the question of whether a qualified person is "subject under the immigration laws to any restriction on the period for which he may remain".

70. Accordingly, I return to the questions of whether *Capparelli* is distinguishable from the current case and whether I should apply the proposition of law which the Claimant says constituted McCloskey J's first conclusion.

71. Initially there was some disagreement as to the respective standing of *Gal* and *Capparelli* but that was substantially resolved in the course of submissions. It is common ground that the UTIAC and the High Court are exercising a coordinate jurisdiction. Accordingly, I am not bound to follow McCloskey J's approach but unless the position in *Capparelli* is properly distinguishable from the circumstances of this case I should do so as a matter of judicial comity unless I am convinced that it is wrong (Robert Goff LJ per curiam in *R v Greater Manchester Coroner ex p Tal* [1985] 1 QB 67 at 81A-B) or unless there is a powerful reason for not doing so (Lord Neuberger in *Willers v Joyce (No2)* [2016] UKSC 44, [2018] AC 843 at [9]). Even if the IAT and the UTIAC were arguably exercising a coordinate jurisdiction the latter is a superior court in a way the former was not. It follows that contrary to an initial submission of the Defendant McCloskey J's decision was not per incuriam by reason of a failure to follow the decision in *Gal*. In any event McCloskey J explained that he regarded the reasoning in the former case as wrong and so was entitled to decline to follow it by reference to the approach in *Tal* and in *Willers v Joyce*. Although McCloskey J was not bound to

follow the decision of the IAT the Claimant did rather understate the persuasive force of decisions of the IAT. Although technically a departmental tribunal its decisions were expressed in reasoned terms and were the result of consideration involving legally qualified and experienced chairmen reflecting on submissions by counsel. Such decisions accordingly carry a real degree of persuasive weight. In the current context and by way of contrast to the position in *Capparelli* it is of note that the meaning of "immigration laws" had been addressed by counsel in *Gal* albeit by way of concession.

72. The Claimant says that *Capparelli* is not distinguishable from the material circumstances of the current case. McCloskey J had in mind the provisions of domestic law giving effect to rights derived from EU law and expressly applied his mind to the meaning of "immigration laws" for the purposes of the BNA. The Defendant says that the decision is distinguishable because McCloskey J was dealing with the position as it had been in 1986. Accordingly, he was considering the position before the 1994 Order and section 7 of the 1988 Act had come into force and before regulation 14 of the 2000 Regulations had been enacted. The Defendant says that those are laws made by or under the authority of the United Kingdom Parliament and points to their existence as a material difference between the situation which McCloskey J was addressing and that which I have to consider.

73. I find the reference to paragraph 5 of the Immigration Rules at [18] of McCloskey J's judgment a little hard to follow. It appears the judge was saying there that the reference to those rules not applying to EU citizens supported his conclusion that the immigration laws had no reference to such persons. However, that reference and the reference in rule 5 to the 2006 EEA Regulations do demonstrate that McCloskey J was aware that provision had been made for the rights of EU citizens by regulation and that there had been reference to this in the Immigration Rules. The 2006 Regulations did not apply to the situation in 1986 with which McCloskey J was concerned but I do not understand the judge to have been suggesting that their passage altered the position.

74. Accordingly, McCloskey J was aware that there had been provision by way of regulation addressing the rights of EU citizens. However, the legal regime applicable in October 2000 and which I have to consider was very different from that prevailing in 1986 with which McCloskey J was concerned. In 1986 the treatment of EU citizens was addressed by way of the grant of leave to enter or remain under the Immigration Rules. From 1994 the position had been governed by section 7 of the 1988 Act and the 1994 Order and in October 2000 the latter had been replaced by the 2000 Regulations. McCloskey J was not considering whether the 2000 Regulations were immigration laws for the purposes of the BNA. More significant is the fact that he was not considering regulations of that kind, namely made by statutory instrument under powers given by an Act of Parliament. I am satisfied that the circumstances of *Capparelli* are distinguishable from those with which I am concerned and that as a consequence the decision there is not to be seen as one which I should follow unless I am persuaded that it is wrong. McCloskey J's expression of his understanding of the law and of the meaning of "immigration laws" remains persuasive. In considering its force I will, however, have regard to the differences and similarities between the context he was considering and that relevant in this case; to the fact that McCloskey J did not have the benefit of submissions or argument upon the point; to the fact that both sides before me are agreed that in part the conclusion reached was flawed; and to the scope for differing readings of McCloskey J's reasoning.

75. In terms of persuasive authority I have regard to the reasoning adopted in *Gal* which I have summarised above.

76. Mr Blundell submitted that the decisions of the CJEU in *Kaba (No 1*) and *Kaba (No 2)* supported the Defendant's analysis.

77. In *Kaba (No 1)* the Claimant had been granted leave to remain in the United Kingdom as the spouse of an EU citizen but had been refused indefinite leave to remain. He contended that this was unlawful discrimination in that those who were settled in the United Kingdom were treated differently from those in the position of the Claimant and his wife. At [11] and [22] of the Advocate General's opinion the point was made that the rights of an EU citizen to enter and remain in a member state other than his or her own were not unconditional but lasted only so long as that EU citizen was a qualified person. At [30] the court confirmed that the right of EU citizens to reside in another member state was a conditional right and at [31] it concluded that it was open to member states to treat their own nationals and those of other member states differently when laying down conditions for the granting of indefinite leave to remain to the spouses of such persons.

78. There was a further reference in respect of the same case arising out of the question of whether a reassessment of the facts would have led to a different decision in *Kaba (No 1)*. In *Kaba (No 2)* the CJEU again confirmed (at [46] and [47]) that an EU citizen's right to reside in another member state was not unconditional but was subject to the condition that such citizen remained a worker (or met any other qualification giving a right to reside). At [48] and [49] that position was contrasted with the rights given under UK law to a person "present and settled" in the United Kingdom.

79. The court then considered the matters which the Immigration Adjudicator had pointed to as potentially indicating that the positions of an EU citizen and a person settled in the United Kingdom were comparable (with the consequence that they should not be treated differently in respect of the grant of indefinite leave to remain to their spouses). At [53] the court reaffirmed the conclusion that the positions were not comparable because in order to retain the right of residence an EU citizen, unlike a settled person, "must continue to satisfy certain conditions". At [54] the court said that it was not relevant that the conditions applying to an EU citizen "do not constitute an express limitation on the duration of the residence *ratione temporis*".

80. The decisions in the two *Kaba* cases confirm that an EU citizen's right deriving from EU law to reside in the United Kingdom is a conditional right but that proposition is not contentious before me. They do not assist beyond that in considering the meaning of "the immigration laws" or of a "restriction" under those laws "on the period of time for which she may remain". I do not read the decisions as purporting to address those questions. Moreover, as Ms Simor pointed out the interpretation of the provisions of the BNA is a matter of domestic law and was not a matter for the CJEU even while the United Kingdom was part of the EU.

81. I return then to the language of the BNA and to the question of whether the qualification on M's rights flowing from regulation 14 of the 2000 Regulations is a restriction "under the immigration laws".

82. I am satisfied that the 2000 Regulations are "immigration laws" within the meaning of section 50(1) of the BNA. The 2000 Regulations are a law for purposes similar to the 1971 Act. The relevant purpose of the 1971 Act is that of making provision for the circumstances in which a person who is not a British citizen may enter or remain in the United Kingdom. The 2000 Regulations were clearly for a similar purpose namely that of providing for the circumstances in which a particular category of persons who were not British citizens (that is those who had rights deriving from EU law to enter and remain in the United Kingdom) could remain in the United Kingdom.

83. The Claimant said that the fact that the 2000 Regulations were giving domestic effect to a right of free movement derived from EU law meant that this was to be seen as the purpose of those regulations and that this was not a purpose similar to that of the 1971 Act. I do not accept that analysis. It is important to note that the requirement is for similarity of purpose not identity. The fact that the 2000 Regulations were made pursuant to powers given by section 2 of the ECA and for the purposes of implementing the Community obligations of the United Kingdom does not prevent them having a purpose similar to that of the 1971 Act. A law can have a number of purposes and a law will fall within the scope of the definition in section 50(1) of the BNA provided one or more of its purposes is similar to those of the 1971 Act. It is immaterial that the law in question has other purposes and meets other needs. Here one purpose of the 2000 Regulations was, as I have already said, that of regulating the circumstances in which a category of persons who were not British citizens could enter and remain in the United Kingdom and that cannot be said to be anything other than a purpose similar to that of the 1971 Act.

84. It follows that the 2000 Regulations were immigration laws for the purposes of the relevant provisions of the BNA.

85. In saying that M was not a person subject to a restriction under the immigration laws Ms Simor prayed in aid the provisions of sections 50(3) and 50(4) of the BNA. As was seen above these provide that those who are exempt from the provisions of the 1971 Act by reason of sections 8(3) and (4) of that Act or by reason of an order under section 8(2) are not to be regarded as settled in the United Kingdom. Section 50(4) provides an exception to that exclusion in cases where a child is born to such an exempt person but with provision that diplomats fall outside that exception (and so remain subject to the section 50(3) exclusion).

86. Ms Simor said that the inclusion of section 50(3) in the BNA was necessary because without it those who had the benefit of exemptions under sections 8 of the 1971 Act would fall within the definition of being "settled" in section 50(2). She said that EU citizens in the position of M should be regarded as being in a comparable position to such exempt persons and so, given that there is no exclusion equivalent to section 50(3) in their regard, are to be seen as within the scope of the section 50(2) definition. Further she said that it would have been possible to have included in the BNA an express exclusion of EU citizens in the way that diplomats were excluded in section 50(4). The fact this was not done, Ms Simor contended, was an indication that EU citizens were intended to be regarded as settled for the purposes of the BNA. Ms Simor advanced an additional argument as to the relevance of sections 50(3) and (4) for the question of whether the restriction to which M was subject was a restriction on the period for which she may remain and I will address that below.

87. At one level it can readily be seen that there is a material difference between the circumstances of the two categories of persons and the considerations which apply to those categories. The first is the group of persons who are expressly exempt from the provisions of the 1971 Act, either by the terms of that Act itself or by virtue of an order made under it, and to whom no further restrictions apply other than the need to meet the qualification for the exemption. The second category consists of persons to whom the leave to enter and leave to remain regime of the 1971 Act does not apply by reason of a different express provision (in the case of M the 2000 Regulations). In abstract terms it can readily be seen that a person in the first category is not subject to any restriction under the immigration laws while the question of whether a person in the second category is so subject will depend on an analysis of the nature and source of the exclusion from the requirements of needing leave to enter and leave to remain. It can be said to be for that reason that express exclusion of those within the scope of sections 8(2) – (4) of the 1971 Act from the category of settled persons was needed in section 50(3) and that this does not throw any light on whether those subject to rights and restrictions flowing from the 2000 Regulations are settled for the purposes of the BNA.

88. I have reflected on whether it is sufficient to address Ms Simor's argument at that level of generality and I have been given pause for thought by the terms of section 8(4) of the 1971 Act. By virtue of that section the provisions of the 1971 Act shall not apply to certain service personnel "so long as" the serviceman or woman meets the qualification set out in subsections (a), (b), or (c). There is a similarity to the terms of regulation 14 where the qualified person is entitled to reside in the United Kingdom "for as long as" he or she remains a qualified person. If the only reason that service personnel are not settled for the purposes of the BNA is the express provision of section 50(3) because the effect of section 8(4) of the 1971 Act is that they are not subject to restrictions under the immigration laws does not the same reasoning apply to EU citizens who are subject to regulation 14? Even on the footing that the 2000 Regulations are immigration laws is not the position that, in the absence of an express exclusion, those in M's position satisfy the requirements of being settled? There is real force in this point but there are a number of factors operating in opposition to it. The first is that not only does section 8(4) form part of a provision creating exceptions from the 1971 Act but it states in terms that the provisions of the Act "shall … not apply" to the personnel in question. That is different language from that of regulation 14 which removes one requirement flowing from the 1971 Act. The difference is potentially significant although it is balanced by the fact that the principal provisions of the 1971 Act are those creating the leave to enter and leave to remain regime. Next, it is necessary to exercise a degree of caution in drawing conclusions from the presence of section 50(3) and as to what the position of service personnel would have been without it though the most natural interpretation is that without that provision they would satisfy the definition of being settled. Finally, it is to be noted that both section 8(4) and regulation 14 are dealing with particular and different circumstances and the analogies between them are not complete. None of those factors is conclusive by itself but taken together they mean that the argument deriving from section 8(4) of the 1971 Act and section 50(3) of the BNA does not lead to an alteration in the conclusion which otherwise follows from consideration of the language of the BNA and of the 2000 Regulations.

89. That conclusion is that the 2000 Regulations were immigration laws. I am also satisfied that the qualification to which M was subject by reason of regulation 14, namely that she was only entitled to remain so long as she was a qualified person, was a restriction

under such laws. This is necessarily the position given that the qualification derives from regulation 14. The fact that the regulation was thereby reflecting the provisions of EU law does not prevent the restriction being one under the immigration laws. Putting the matter shortly it is a restriction contained in the immigration laws and its ultimate source does not alter its nature as being a restriction under those laws.

90. It follows that the issue of whether M was settled in the United Kingdom on 20th October 2000 depends on whether the restriction was one "on the period for which she may remain".

91. I have explained above that I am satisfied that the decision in *Capparelli* is distinguishable from the current circumstances. Even if I am wrong in that view my conclusion remains unaltered. That is primarily because the 2000 Regulations can be seen as being within McCloskey J's characterisation of "laws made by the United Kingdom Parliament". Alternatively to the extent that *Capparelli* is authority for the proposition that laws relating to the rights of EU citizens cannot be immigration laws for the purposes of the BNA (a proposition which as explained above I do not regard as having been the basis for that decision) I am satisfied that it is wrong.

Was the Restriction a Restriction on the Period for which M might remain in the United Kingdom?

92. M was entitled to remain in the United Kingdom for so long as she continued to be a qualified person. Was this a restriction on the period for which she might remain?

93. The Claimant says that as matter of language and the proper interpretation of the legislation the restriction on M was not a restriction on the period for which she might remain. He says that the decision of the Court of Appeal in *Coomasaru* is distinguishable and does not require me to adopt a different view and that the approach taken to the question of interpretation by the IAT in *Gal* was wrong. The Defendant says that *Coomasaru* is not distinguishable and is binding authority to the effect that the restriction on M was one as to the period for which she might remain; alternatively she says that the same conclusion follows from interpretation of the language used.

94. The question in *Coomasaru* was whether the appellant had already been settled in the United Kingdom at the time when he left to make a trip abroad in 1978. This depended on the effect of the permission which he had been given when he entered the United Kingdom in May 1975. The court concluded that the permission which the appellant had been given at that time was to be interpreted as "permission to enter and remain in the United Kingdom only for so long as he should be employed with the Sri Lanka High Commission". It considered the effect of such permission in the light of the definition of settled which was at that time contained in section 2(3)(d) of the 1971 Act but which was in the same terms as those applicable here.

95. It is not apparent to what extent there was argument as to the meaning of a restriction on the period for which a person may remain but it is clear that the members of the court considered whether the restriction in question was a restriction as to period. It is also clear that the conclusion that it was such a restriction was crucial to the decision that the appellant was not settled.

96. At 17E Sir John Donaldson MR said:

> "…What matters is that this form of permission involved a restriction on the period for which the applicant might remain, namely so long as he was employed with the Sri Lanka High Commission, and so prevented his acquiring the status of one who is settled in the United Kingdom. …"

97. At 22B Dillon LJ said:

> "The applicant was granted permission to enter and remain in the United Kingdom only for so long as he should be employed with the Sri Lanka High Commission. That was a restriction on the period for which he might remain which prevents him from being settled in the United Kingdom within the meaning of the Act and of H.C. 79."

98. O'Connor LJ agreed with both judgments.

99. In *Gal* as already explained above the IAT was concerned with the issue of the effect of the restriction on an EU citizen's right to remain. The question of whether the restriction on the right of Mrs Gal's husband to remain was a restriction as to period was addressed directly. The IAT summarised the relevant argument and its conclusion thus at pp9 – 10:

> "**Was Mr. Zilberberg "settled" here?**
>
> This somewhat complex argument depends at its first stage on Mr. Zilberberg being "settled" in this country within the meaning of the Immigration Act (1971) and the immigration rules. Mr. Blake argued that as an employee Mr. Zilberberg had a right of residence not limited by any time restriction. If this be correct paragraph 151 is rendered otiose to the extent that once there is a right of residence the holder is entitled to indefinite leave. However that does not mean that the suggested construction of the statute is wrong.
>
> We accept that so long as Mr. Zilberberg qualified for a residence permit he had a right of residence but to be "settled" a person must have no restriction "for the period which he could remain." Mr. Zilberberg could remain under his European Law right only for a period during which he qualified under European Law for residence i.e. he met the terms of any particular European Law category on which he relied. So as an employee he had to remain a "worker" within the meaning of European Law. Even the residual residence category requires non- recourse to public funds.
>
> The period for which Mr. Zilberberg could remain was not restricted directly by time but so long as qualifications are needed the period is restricted and, more, is restricted as to its duration. The need for continued qualification is to be contrasted with indefinite leave to remain which may only be terminated by deportation. It follows that Mr. Zilberberg was never settled in this country and it was not open to Mrs. Gal to claim any right under paragraph 132."

100. It is apparent that in *Gal* it was argued that because the right of Mrs Gal's husband was not limited by time it was not a restriction on the period for which he might remain. That argument was rejected and the IAT held that even though not so limited the restriction was one on the period for which Mrs Gal's husband might remain.

101. The first question is whether *Coomasaru* is distinguishable from the current case.

102. The circumstances in *Coomasaru* were different from those here and the terms of the permission to enter and remain were different. It is also apparent that in that case the appellant was seeking to take advantage of errors made by immigration officers and there is no question that any such criticism can be levelled at M in the circumstances

here. The question remains whether there is a material difference between a permission to remain "only for so long as he should be employed with the Sri Lanka High Commission" and an entitlement to remain "for as long as she remains a qualified person" such that the former is a restriction on the period for which the permitted person may remain but the latter is not.

103. Ms Simor sought to characterise the restriction which was being considered in *Coomasaru* as having been "based on the duration of a specific job" which necessarily had a "determinative length". She contrasted that with free movement rights derived from EU law which are open-ended and not limited either to a single employment (a worker remains a worker when in successive employments) or to a single category of qualification (M would have remained a qualified person on ceasing to be a worker provided that she had then satisfied the requirements for another category of qualified person). I do not accept that it can be said that a specific job necessarily will have a determinative length. One can say at any given time whether a person is or is not in that job but cannot necessarily say when the job will come to an end. Moreover, the permission being considered in *Coomasaru* was not limited to a specific job or post but to employment by a specific employer. The appellant in that case would have satisfied the terms of the permission so long as he remained employed by the Sri Lanka High Commission even if he had held a succession of different posts in that employment.

104. I am satisfied that the issue being addressed in *Coomasaru* was not materially different from that which I have to address. Both in that case and here the same question has to be addressed. That is whether a restriction on a right to remain which was expressed as being for "so long as" the permitted person satisfied a particular condition was a restriction on the period for which the permitted person might remain in the United Kingdom for the purposes of deciding whether that person met the definition of being settled here. In *Coomasaru* the condition was that of being employed by the High Commission and here it was that of being a qualified person. In *Coomasaru* the Court of Appeal determined how that question should be answered and that determination is binding on me as to the proper interpretation of such a restriction and whether it was a restriction as to the period for which M might remain. In the light of that decision I am required to find that it was a restriction on the period for which M might remain in the United Kingdom.

105. In those circumstances I will deal only briefly with Ms Simor's contentions as to the way in which the requirement was to be analysed absent binding authority. As will be seen the effect is that even if I am wrong as to the applicability of the *Coomasaru* approach and am free to determine the question untrammelled by binding authority my conclusion remains the same.

106. The Claimant says that there is a difference between a qualifying condition of residence and a restriction as to time with the requirement that M remain a qualified person being the former rather than the latter. In his Statement of Facts and Grounds the Claimant made an analogy with a Commonwealth citizen with the right of abode in the United Kingdom. Such a person may remain in the United Kingdom without any restriction as to time but must remain a Commonwealth citizen so as to continue to enjoy the right to remain and would lose that right if he or she renounced their Commonwealth citizenship. I do not see that as an apt comparison to the circumstances of M. A person whose entitlement derives from a particular capacity (such as the relevant Commonwealth citizenship) will necessarily lose that entitlement if that person ceases

to have the required capacity. That, however, is different from the effect of regulation 14 with its express provision that the entitlement to remain will only last as long as the necessary qualification is met. It is relevant to note that as at October 2000 an EU citizen was not, without more, free from the requirements to obtain leave to enter and remain. An EU citizen who was not exercising free movement rights under EU law or who ceased to be a qualified person would be or would become subject to those requirements (a point which was made in *Abdirahman*).

107. In this context Ms Simor again made reference to sections 8(4) of the Immigration Act and 50(3) of the BNA. She said that the position of a serviceman or woman was equivalent to that of M in that both were entitled to remain so long as they met the necessary qualification. If that is to be seen as a restriction as to the period for which they may remain then there was no need for the provision in section 50(3) that such persons were not to be regarded as settled because they would not in any event have fallen within the definition of being settled. Similarly, there would have been no need to exclude the children of diplomats from the operation of section 50(4) because diplomats would not have fallen within the category of settled persons. I have already explained my reasons for concluding that although argument by reference to these provisions has force it does not alter the conclusions which would otherwise follow from my reading of the terms of the BNA.

108. The Claimant contended that as a matter of the language used and particularly when that language is seen in its context the word "period" "necessarily refers to a time period". In the Claimant's skeleton argument it is said that the expression "the period for which" "plainly relates to a time period". It is said that the statutory context makes it clear that "Parliament intended to preclude individuals from acquiring settled status only where their entitlement to remain was restricted by reference to an ascertainable period of time; a period of time that would certainly come to an end". The Claimant went so far as to say that it would be a distortion of the language of section 50(2) of the BNA to equate "an open-ended condition" with "an ascertainable restriction on the period of time for which an individual has a right to remain". I do not accept that either generally or when seen in this context the use of the word "period" necessarily refers to a period of time the duration of which can be identified at the start of the period. Such a conclusion would mean that the members of the Court of Appeal in *Coomasaru* and of the IAT in *Gal* misunderstood the clear meaning of ordinary language. It is to be noted that the CJEU in *Kaba (No 2)* did not regard it as relevant that the conditions under which an EU citizen could enter and remain in the United Kingdom did "not constitute an express limitation on the duration of residence *ratione temporis"* (see at [54]). I do not accept the Claimant's contention as to the necessary meaning of "period". In that regard the Defendant was right to characterise the Claimant's argument in this respect as artificial and I agree with the Defendant's contention that "a person will be restricted as to the period for which he may remain whenever his continuing right to remain is contingent upon his continuing to meet the qualifying criteria".

109. In her oral submissions Ms Simor said that for there to be a restriction on the period for which a person could remain it had to be possible to identify at the start of the period the facts or circumstances which would bring the period to an end. I agree. However, Ms Simor proceeded from that proposition to argue that this was not possible in the case of an EU citizen exercising rights under EU law because of the range of ways in which such a person could be a qualified person. In that context Ms Simor pointed to

the decision of the CJEU in *R v Immigration Appeal Tribunal ex p Antonissen* [1991] 2 CMLR 373 as showing the open-ended nature of free movement rights. It is true that there are multiple ways of being a qualified person but that does not mean that it is not possible to identify at the start of the period when an EU citizen becomes entitled to remain in the United Kingdom pursuant to regulation 14 the circumstances which will bring the period of entitlement to an end. It simply means that there are a range of such circumstances or rather a wide range of ways in which an EU citizen can be a qualified person and so a wide range of possible qualifications which need to be excluded before it can be said that such a citizen is not a qualified person. Those circumstances can, however, all be identified at the start of the period and so it remains possible to know with certainty at its start what will bring the period to an end.

110. Accordingly, the restriction to which M was subject was one which was a restriction as to the period for which she might remain in the United Kingdom.

The Validity and Effect of Regulation 8.

111. In refusing permission Judge Allen said that regulation 8 "does not provide a modification or gloss on the terms of the BNA but comprises an accurate transposition of the rights and obligations relating to free movement and reflects the Community law position". The Defendant says that is correct and would go further saying that regulation 8(1) "made clear beyond peradventure that Community citizens with such rights to reside were to be treated similarly to any other person settled in the United Kingdom, in particular, it removed any uncertainty as to their settled status arising from the terms of the other provisions of the 2000 Regulations". The Claimant says that regulation 8(2) was simply the corollary to that and reflected the position that the categories in regulation 8(1) were closed. The Claimant say that the effect of regulation 8(2) was to purport to cut down rights which certain EU citizens otherwise had or to provide for persons who were in the United Kingdom without restriction on the period for which they might remain to be treated as if they were subject to such a restriction. As such it was *ultra vires*.

112. I have come to the conclusion that the Defendant's interpretation of the definition of the term "settled" and its application to the circumstances of M is correct without reference to regulation 8(2). That means that I do not need to consider the validity of the regulation nor whether Judge Allen's characterisation of it is correct. If my conclusion on either of the issues of whether the restriction on M's rights to remain in the United Kingdom was a restriction under the immigration laws or of whether it was a restriction on the period for which she might remain is wrong it would follow that regulation 8(2) did indeed purport to cut down rights which would otherwise exist (or more accurately to redefine the meaning of settled). As such it would appear to be *ultra vires*. I repeat, however, that is a question I need not address in light of the conclusions I have reached on the other issues.

Conclusion.

113. The effect of the preceding analysis is that M was not settled in the United Kingdom for the purpose of the BNA at the time of the Claimant's birth and so the Claimant did not at that time acquire British citizenship through section 1(1)(b) of that Act. The claim, therefore, fails.