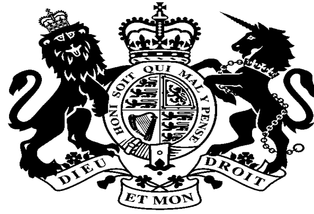

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/06990/2013

THE IMMIGRATION ACTS

Heard at Newport
On 25 October 2013 and
11 March 2014

Determination Promulgated
On 14 April 2014

…………………………………

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

ASHFAQ ALI SHAH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms F Aslam (11 March 2014) and Ms C Hulse (25 October 2013)
For the Respondent: Mr I Richards (11 March 2014) and Mr K Hibbs (25 October 2013), Home Office Presenting Officers

DETERMINATION AND REASONS

Background

1. The appellant is a citizen of Pakistan who was born on 12 April 1978. He arrived in the United Kingdom on 28 November 2000 and claimed asylum. His application was

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refused and subsequent appeal dismissed. On 29 May 2007, he applied for a residence card under the Immigration (EEA Regulations) 2006 (SI 2006/1003) (hereafter the "2006 EEA Regulations") which was granted for a period of 5 years valid until 28 June 2012. That was granted on the basis that he was an extended family member under reg 8(5) because he was in a "durable relationship" with an EEA national, namely Yoanna Ivanova Neykova a national of Bulgaria.

2. On 18 June 2012, the appellant applied for further leave to remain outside the Rules. By this time his relationship with Ms Neykova had broken down. That application was refused by the Secretary of State on 24 September 2012 and a decision to remove him under s.47 of the Immigration, Asylum and Nationality Act 2006 was made on the same date. The appellant's subsequent appeal against the decision refusing to extend his leave was dismissed in reliance upon Article 8 but the Judge allowed the appellant's appeal against the removal decision under s.47 of the 2006 Act on the basis that it was not in accordance with the law. Thereafter, on 19 February 2013, the Secretary of State made a decision to remove the appellant as an overstayer under s.10 of the Immigration and Asylum Act 1999.

<u>The First-tier Tribunal's Decision</u>

3. The appellant appealed to the First-tier Tribunal. The appeal was heard by Judge Troup on 12 June 2013. At that hearing, the appellant no longer relied upon Article 8 or the Immigration Rules. Instead, he relied upon the 2006 EEA Regulations. He claimed that he had a permanent right of residence under reg 15 of the 2006 EEA Regulations by virtue of his relationship with Ms Neykova for five years between 2005 and 2010 when it broke down.

4. Judge Troup found that the appellant could not establish that he had a permanent right of residence. The Judge did not accept that the appellant had retained a right of residence as the former family member of an EEA national following the breakdown of his relationship with Ms Neykova in 2010 because their Islamic marriage in 2005 (and Islamic divorce on 13 September 2010) was not a marriage recognised by English law falling within reg 10 of the 2006 EEA Regulations. Further, looking at their relationship on the basis that it was a "durable" one, Judge Troup concluded that the appellant could not succeed in showing that he had been a family member of an EEA national for a continuous period of 5 years within reg 15(1)(b) of the 2006 EEA Regulations because he had ceased to be a "family member" when their relationship had broken down prior to making the application for the residence card.

5. The appellant sought permission to appeal again relying upon the appellant having retained a right of residence which, applying reg 15(1)(f), resulted in him having resided in the United Kingdom in accordance with the Regulations for a continuous period of five years at the end of which he was a family member with a retained right of residence.

6. On 22 July 2013, the First-tier Tribunal (DJ Woodcraft) granted the appellant permission to appeal on that ground.

The Appeal to the Upper Tribunal

7. The appeal first came before me on 25 October 2013. At that hearing, both of the (then) representatives made a number of submissions to me. The focus of the appellant's case changed during the course of the hearing back to rely upon the five year period between February 2005 (when the appellant claims his relationship began) and June 2010 when the relationship broke down.

8. The appellant's case was that that represented a five year period of continuous residence in the UK in accordance with the 2006 EEA Regulations as a family member of an EEA national. During the course of his submissions, the (then) representative of the Secretary of State raised for the first time the issue of whether the Tribunal had jurisdiction to consider the appellant's claim under the EEA Regulations. Given that the matter was raised so late in the appeal process, I adjourned the hearing in order that the appellant's representative should have a proper opportunity to consider the issue. The date for the resumed hearing on 19 December 2013 was vacated.

9. However, the respondent's (then) representative submitted a skeleton argument to the Upper Tribunal indicating that the respondent no longer sought to argue that the Tribunal had no jurisdiction on the basis that there was no in-country right of appeal. Instead, the respondent's submission was that the appellant could not meet the requirements of reg 15(1)(b) because he could not demonstrate that he had been living in the UK for five years in accordance with the Regulations since his partner was a Bulgarian national and Bulgaria had not joined the EU until January 2007. He could, therefore, only show a period of some three years and five months between January 2007 and June 2010 which was less then the required five years' residence in accordance with the Regulations in reg 15(1)(b).

10. In response to those submissions, which were also sent to the appellant's representatives, I sent the parties notification on 15 January 2014 that, in the light of those submissions, subject to any further written representation by the parties, I proposed to determine the appeal without a hearing under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and to dismiss the appeal.

11. In response, the appellant's representatives, Qualified Immigration Services wrote to the Tribunal on 27 January 2014 arguing that the respondent's submissions were wrong. Relying on the Grand Chamber decision of the CJEC in Ziolkowski (C-424/10) and Szeja (C-425/10) (21 December 2011), it was submitted that pre-succession periods of residence could be taken into account providing that that period of residence was in accordance with the requirements of the Citizens Directive (Council Directive 2004/83/EC). Accumulating the periods of residence in the UK with the appellant's partner before and after January 2007, it was submitted that the appellant could indeed demonstrate a period of residence of five years in accordance with the Directive.

12. As a result of those further submissions, I concluded that it was not appropriate to determine the appeal without a hearing and the appeal was subsequently listed before

me on 11 March 2014. At that hearing, Mr Richards, who now represented the Secretary of State confirmed that he did not rely upon any jurisdictional point. He also acknowledged the effect of Ziolkowski and Szeja that the appellant could accumulate a period of residence with his partner from before Bulgaria's accession to the EU in January 2007 with periods of residence after that date.

13. The substance of the submissions by both representatives was whether that five year period of residence satisfied the requirements in reg 15(1)(b). Putting the issue in a nutshell, that provision applies to a "family member" of an EEA national. The appellant's basis for remaining in the UK was as a "extended family member" under reg 8(5) on the basis of his "durable relationship". Only when he was issued with a residence card in June 2007 did he become a "family member" by virtue of reg 7(3). Ms Aslam, who represented the appellant submitted that reg 15(1)(b) should be applied to residence by both a "family member" and also an "extended family member". She submitted that otherwise there would be discrimination against "extended family members" in their acquisition of a permanent right of residence. In support of her submission that a distinction should not be drawn between married and unmarried couples Ms Aslam referred me to the ECJ cases of Reed v The Netherlands (Case 59/85) [1986] ECR 1283 and Kus v Landeshauptsadt (Case C-327/91) [1992] ECR I-6781. She did not elaborate further on those cases.

14. On behalf of the respondent, Mr Richards indicated that his instructions were that the five year period of continuous residence in accordance with the 2006 EEA Regulations could only apply to residence as a "family member" falling within reg 7 and, therefore, the appellant could only establish that from June 2007 until June 2010 when the relationship broke down. However, Mr Richards tentatively submitted that it might be possible to construe reg 15(1)(b) so it applied providing that at the end of the five year period (though not necessarily throughout the period) the individual was a "family member" and that his total period of residence was "in accordance" the 2006 EEA Regulations.

15. Before turning to the relevant legislative provision, there are two matters that I should mention. First, on 17 April 2013 the appellant made a separate application for a permanent residence card under the 2006 EEA Regulations. At the time of the initial hearing before me, that application was outstanding. However, on 14 November 2013, the respondent refused the appellant's application for a permanent residence card and I was told by Ms Aslam that he has appealed against that decision which is listed before the First-tier Tribunal at Newport on 15 July 2014. That appeal will, in substance, determine the very same issues that I have to decide in this appeal. Neither party, however, indicated that they did not wish this appeal to continue. Secondly, both representatives accepted that if I found in favour of the appellant on the interpretation of reg15(1)(b), Judge Troup had not made any findings as to whether the appellant's partner was, in fact, exercising Treaty rights over the five year period relied upon. It was accepted that an evidential hearing was necessary and that, as a matter of practical sense, the appeal should be remitted to the First-tier Tribunal to be heard together with the appellant's appeal listed before the First-tier Tribunal on 15 July 2014.

Discussion

16. Article 16.1 of Directive 2004/38/EC (the "Citizens Directive") provides for the permanent right of residence of EU citizens. Article 16.2 provides for a permanent right of residence for "family members" in the following circumstances:

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

17. That provision is transposed into UK law in reg 15(1)(b) of the 2006 EEA Regulations which provides as follows:

> "15(1) The following persons shall acquire the right to reside in the United Kingdom permanently –
>
> …(b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years".

18. The definition of family member is set out in Article 2.2 of the Citizens Directive and in reg 7 of the 2006 EEA Regulations. It is not necessary to set out the general definition of "family members" as it is not suggested that the appellant falls within one of these categories, such as a spouse or civil partner.

19. Instead, the appellant rested his right to remain in the UK on the basis that he was a person who fell with Article 3.2 of the Citizens Directive and reg 8(5) of the 2006 EEA Regulations.

20. Article 3.2 of the Citizens Directive states that:

> "Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with national legislation, facilitate entry and residence for the following persons:
>
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
>
> (b) the partner with whom the Union citizen has a durable relationship, duly attested.
>
> The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

21. Reg 8(5) provides that an "extended family member" for the purposes of the 2006 Regulations includes:

> "A person [who] is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national."

22. On that basis, the appellant was not a "family member" of his partner at least until he was issued with a residence card in June 2007. The latter is because of the effect of reg 7(3) which provides that:

> "Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in Regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card does not cease to be valid or be revoked."

23. It follows that when the appellant was issued with a residence card in June 2007, the effect of reg 7(3) was that he was "treated as a family member" of his partner. Prior to that, however, he was not a "family member" but rather was only an "extended family member".

24. As I have said, it is accepted by both representatives that the decisions of the CJEC in Ziolkowski and Szeja require that periods of residence before January 2007 when Bulgaria (the country of nationality of the appellant's partner) became part of the EU should be treated in the same manner as periods of residence thereafter.

25. The issue in this appeal is, therefore, whether the appellant's residence between June 2005 and June 2007 as an "extended family member" of his partner was residence "in accordance with" the 2006 EEA Regulations?

26. The difficulty with that submission for the appellant is that the 2006 EEA Regulations do not provide for a right of residence for an extended family member. Whilst reg 8 defines what is an "extended family member", the only rights of residence are conferred upon "family members" under reg 13(2) (the initial right of residence) and reg 14(2) (the extended right of residence). The 2006 EEA Regulations do not confer upon an extended family member a right of residence. The Regulations do provide for the issue of an EEA family permit to an extended family member in certain circumstances so as to allow entry to the UK, but by virtue of reg 7(3) once that family permit is issued to that individual he is then treated as a "family member" of the EEA national in any event. All that the Regulations appear to permit in relation to extended family members is that they have an opportunity to apply for a residence card under reg 17(4) which provides as follows:

> "The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if –
>
> (a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and
>
> (b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card."

27. Regulation 17(5) goes on to provide that:

> "Where the Secretary of State receives an application under paragraph (4) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security."

28. Consequently, the scheme of the 2006 EEA Regulations is that whilst recognising categories of individuals who are "extended family members", the Regulations give no rights of residence to such individuals unless and until they make an application for, and are granted, a family permit (if seeking to enter the UK) or a residence card (if already in the UK). Only, therefore, after an individual has established that they fall within the relevant definition of an "extended family member" and has been issued with the relevant documentation do they acquire a right of residence under the 2006 EEA Regulations because they are then treated as a "family member" of the EEA national and their rights of residence are indistinguishable from individuals who fall within the defined categories of "family members" such as spouses.

29. Ms Aslam referred me to the cases of Reed and Kus. She did so for the general proposition that the CJEC did not permit discrimination between the rights of spouses and cohabiting partners. I did not have the advantage of any submissions on the substance of these two decisions. In Reed, the ECJ rejected the argument put to it that unmarried cohabiting partners should be treated as within the scope of the term "spouse" in EU law. Likewise, the Court held that it would be discriminatory to allow a Member State's own national's residence permits for their cohabiting partners but to refuse to grant the same advantage to EU nationals exercising Treaty rights. In large measure, the position of unmarried partners has been rectified by the Citizens Directive. In the absence of any submission to the contrary, I do not see how the Directive and the 2006 EEA Regulations are inconsistent with EU law as recognised by the Court in Reed. Kus concerned the Ankara Agreement. In the absence of supporting submissions, its immediate relevance is not readily apparent.

30. Can the appellant rely upon the Citizens Directive to establish a right of residence under Art 3.2?

31. The scheme of the 2006 EEA Regulations is entirely consistent with the Citizens Directive. The Citizens Directive only confers rights of residence upon "family members" as defined in Article 2.2. As regards "other family members" (Art 3.2(a)) and those in a duly attested durable relationship (Art 3.2(b)), Article 3.2 only requires that host Member States shall "in accordance with its national legislation, facilitate entry and residence" for those individuals, for example a partner of a EU citizen in a durable relationship (my emphasis). Further, nothing in the Citizens Directive allows for anyone other than a "family member" to acquire a permanent right of residence under Article 16.2.

32. Thus, both the 2006 EEA Regulations and the Citizens Directive draw a clear distinction between "'extended family members'/'other family members' + 'durable relationships'" and "family members". Rights of entry and residence are only directly conferred upon the latter.

33. The distinction between the two categories of individual is reflected in the CJEC's case law. The CJEC considered the respective position of "family members" and "other family members" in SSHD v Rahman (Case C-83/11) [2013] QB 249. The pertinent part is contained within the CJEC's answer to the first two questions posed to it, namely:

(1) Does Article 3(2) of Directive 2004/38 require a Member State to make legislative provision to facilitate entry to and/or residence in a Member State to the class of other family members who are not nationals of the European Union who can meet the requirements of Article 10(2) of that directive?

(2) Can such other family member referred to in Question 1 rely on the direct applicability of Article 3(2) of Directive 2004/38 in the event that he cannot comply with any requirements imposed by national legislative provisions?

34. At [18]-[26], the CJEC said this:

"18 With regard to the first and second questions, which it is appropriate to examine together, it should be pointed out at the outset that Directive 2004/38 does not oblige the Member States to grant every application for entry or residence submitted by persons who show that they are family members who are 'dependants' of a Union citizen, within the meaning of Article 3(2)(a) of that directive.

19 As contended by the governments which have submitted observations to the Court and by the European Commission, it follows both from the wording of Article 3(2) of Directive 2004/38 and from the general system of the directive that the European legislature has drawn a distinction between a Union citizen's family members as defined in Article 2(2) of Directive 2004/38, who enjoy, as provided for in the directive, a right of entry into and residence in that citizen's host Member State, and the other family members envisaged in Article 3(2) of the directive, whose entry and residence has only to be facilitated by that Member State.

20 That interpretation is borne out by recital 6 in the preamble to Directive 2004/38, which states that, 'in order to maintain the unity of the family in a broader sense …, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen'.

21 Whilst it is therefore apparent that Article 3(2) of Directive 2004/38 does not oblige the Member States to accord a right of entry and residence to persons who are family members, in the broad sense, dependent on a Union citizen, the fact remains, as is clear from the use of the words 'shall facilitate' in Article 3(2), that that provision imposes an obligation on the Member States to confer a certain advantage, compared with applications for entry and residence of other nationals of third States, on applications submitted by persons who have a relationship of particular dependence with a Union citizen.

22 In order to meet that obligation, the Member States must, in accordance with the second subparagraph of Article 3(2) of Directive 2004/38, make it possible for persons envisaged in the first subparagraph of Article 3(2) to obtain a decision on their application that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons.

23 As is clear from recital 6 in the preamble to Directive 2004/38, it is incumbent upon the competent authority, when undertaking that examination of the applicant's personal circumstances, to take account of the various factors that may be relevant in the particular case, such as the extent of economic or physical dependence and the degree of relationship between the family member and the Union citizen whom he wishes to accompany or join.

24 In the light both of the absence of more specific rules in Directive 2004/38 and of the use of the words 'in accordance with its national legislation' in Article 3(2) of the directive, each Member State has a wide discretion as regards the selection of the factors to be taken into account. None the less, the host Member State must ensure that its legislation contains criteria which are consistent with the normal meaning of the term 'facilitate' and of the words relating to dependence used in Article 3(2), and which do not deprive that provision of its effectiveness.

25 Finally, even though, as the governments which have submitted observations have correctly observed, the wording used in Article 3(2) of Directive 2004/38 is not sufficiently precise to enable an applicant for entry or residence to rely directly on that provision in order to invoke criteria which should in his view be applied when assessing his application, the fact remains that such an applicant is entitled to a judicial review of whether the national legislation and its application have remained within the limits of the discretion set by that directive (see, by analogy, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 56; Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 66; and Joined Cases C-165/09 to C-167/09 *Stichting Natuur en Milieu and Others* [2011] ECR I-0000, paragraphs 100 to 103).

26 In the light of the foregoing, the answer to the first and the second question referred is that, on a proper construction of Article 3(2) of Directive 2004/38:

- the Member States are not required to grant every application for entry or residence submitted by family members of a Union citizen who do not fall under the definition in Article 2(2) of that directive, even if they show, in accordance with Article 10(2) thereof, that they are dependants of that citizen;

- it is, however, incumbent upon the Member States to ensure that their legislation contains criteria which enable those persons to obtain a decision on their application for entry and residence that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons;

- the Member States have a wide discretion when selecting those criteria, but the criteria must be consistent with the normal meaning of the term 'facilitate' and of the words relating to dependence used in Article 3(2) and must not deprive that provision of its effectiveness; and

- every applicant is entitled to a judicial review of whether the national legislation and its application satisfy those conditions.

35. Thus, the CJEC acknowledges that the Citizens Directive does not create any automatic right of entry or residence for "'other family members' + those in 'durable

relationships'" unlike the position under the Directive for "family members". The Citizens Directive does, however, place those "other" individuals in an "advantaged" position requiring the Member States to "facilitate" their entry and residence and in consider any applications for entry of residence to undertake an "extensive examination of the personal circumstances" of the individual. The Member States have wide discretion in setting criteria etc providing they do so consistent with the obligation to "facilitate" entry and residence.

36. Much the same approach was taken by the Court of Appeal in Oboh v SSHD [2013] EWCA Civ 1525. The precise issue raised in that case is not relevant in this appeal. The approach of the Court to the scope and effect of Art 3.2 of the Citizens Directive is, however, instructive. In that case it was argued that under the Citizens Directive (unlike the 2006 EEA Regulations) "extended family members" only had to establish dependency in the UK and not also in the country from which they had come contrary, on the face of it, to the plain wording of Art 3.2(a) of the Directive. Rejecting that argument, the Court of Appeal applied the ordinary meaning of the Citizens Directive. The Court, citing Rahman, acknowledged the differences between the categories of "'other family members' + those in 'durable relationships'" and "family members". Beatson LJ (delivering the judgment of the Court) said this at [49]:

> "The protection conferred on other family members who qualify under Article 3 is clearly much more restricted than the rights conferred on family members under Article 2. Whereas the Directive requires that the primary and individual right enjoyed by EU citizens to move and reside freely within the territory of Member States shall also be granted to family members as defined within Article 2(2), by contrast, in the case of other family members who fall within the scope of Article 3(2), the Directive imposes an obligation on Member States to "facilitate" their "entry and residence". This obligation is then elaborated by the statement that the host Member State is required to undertake "an extensive examination of the personal circumstances" and to "justify any denial of entry or residence to these people". While falling considerably short of the automatic rights of entry and residence conferred on family members, these rights are far from negligible and confer a privileged status over other applicants for rights of entry and residence."

37. At [56] Beatson LJ returned to the scope of Art 3.2. and reiterated the "advantage" that individuals falling within Art 3.2 had over other applicants but also that the latter might have claims to reside outside the EU legislation:

> "….it is important not to lose sight of the nature of Article 3(2) which is intended to lay down a rule of general application. In our view it was not intended to make detailed provision for individual cases. Furthermore, it is significant that it confers on persons falling within the identified category certain advantages in the pursuit of rights of entry or residence. Its application does not result in the refusal of such rights to individuals who fall outside the preferred category. They are able to make their applications in the ordinary course. In the exceptional cases postulated by the appellants other legal principles will come into play, among them Article 8 of the European Convention on Human Rights. Accordingly, we consider that we would not be justified in permitting such exceptional cases to set the limits of general application of Article 3(2)."

38. The distinction between the rights of "extended family members" and "family members" was recognised by the Upper Tribunal in Rose (Automatic Deportation – Exception 3) Jamaica [2011] UKUT 00276 (IAC). That case concerned the automatic

deportation provisions of the UK Borders Act 2007 and, in particular, the application of "exception 3" in s.33(4) that:

> "The removal of a foreign criminal from the United Kingdom in pursuance of a deportation order would breach the rights of the foreign criminal under the EU treaties."

39. That case, like this appeal, concerned an individual who claimed to be a "extended family member" on the basis of a durable relationship with an EEA national. He had not been issued with a residence card. The Upper Tribunal concluded that exception 3 in s.33(5) did not apply to the appellant as he did not fall within Article 27(1) of the Citizens Directive which permitted the deportation of Union citizens and their family members only on grounds of public policy, public security or public health. The Upper Tribunal rejected the argument that Article 27(1) reference to "family members" was intended to cover "other family members" falling within Article 3.2 of the Citizens Directive. At [14]-[17] the Upper Tribunal said this:

> "14. …Does this exception apply to the appellant? By virtue of s.2(1) of the European Communities Act 1972 as amended by the European Union (Amendment) Act 2008, the expression "Community treaties" [now amended to read "EU treaties"] encompasses secondary EU legislation which of course includes 2004/38/EC (the "Citizens Directive"). In turn, Article 27(1) of the Directive, read in conjunction with recital 23 affords safeguards against expulsion to both Union citizens and their family members. Article 27(1) states that "Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health…"Recital 23 states that:
>
> > "Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin."
>
> 15. But for the appellant to be able to avail himself of such EU safeguards against expulsion he would need to show that he qualified as a "family member" for Article 27.1 purposes. In our view he cannot for two main reasons.
>
> 16. As to the first reason we would accept that there are two possible views. It is at least arguable that the Article 27(1) safeguard against expulsion is intended to cover family members of all kinds including OFMs. Whilst Article 2.2 would appear to specify that for the purposes of the Directive generally 'family member' means only those persons who come within Article 2.2 (and so not to include OFMs under Article 3.2(a)) there are other provisions which appear to apply the term 'family member' to include both Article 2.2 family members and OFMs: see in particular Article 8(5), which concerns issue of registration certificates to family members and which at 8(5)(e) deals with "cases falling

> under Article 3(2)(a)); and Article 8 (which deals with the issue of residence cards to family members and includes at Article 10(2)(e) provisions for cases falling under Article 3(2)(a)").
>
> 17. The alternative view, which is the one we take, is that the definition given of family member in Article 2.2 (which does not extend to OFMs) is intended to be Directive-wide since the definition set out in Article 2(2) is preceded by the opening words "for the purposes of this Directive". Recital 6 likewise refers to OFMs as "those persons who are not included in the definition of family members under this Directive".

40. At [19], the Upper Tribunal concluded that the 2006 EEA Regulations only provided the same level of protection for "extended family members" when they had been issued with the relevant residence documentation and continued to satisfy the conditions under which that documentation had been issued. That, of course, is the provision to which I have already referred in reg 7(3). At [25], the Upper Tribunal acknowledged that:

> "The fact that the appellant is accordingly an "extended family member" for the purposes of the 2006 Regulations does not of itself alter his status in the UK. That is because in respect of such persons the 2006 Regulations do not impose an obligation on the respondent to confirm that they are in the UK lawfully by means of issuing them with residence documentation."

41. The Upper Tribunal went on to recognise that the Secretary of State has a discretion under reg 17(4) whether to issue a residence document to an extended family member.

42. The approach of the Upper Tribunal in Rose is entirely consistent with the view I have taken that under the 2006 EEA Regulations "extended family members" only acquire rights when they are issued with the relevant documentation and then, by virtue of reg 7(3), they are treated as if they were "family members".

43. Consequently, the appellant only became a "family member" when he was issued with a residence card in June 2007 and prior to that he was as "extended family member". I see nothing inconsistent with this scheme of the 2006 EEA Regulations and the Member State's obligation under Art 3.2 to "facilitate" entry and residence. The distinction between the automatic rights of entry and residence for "family members" is highlighted by the "extensive examination" obligation for "'other family members' + those in 'durable relationships'" set out in Art 3.2. Art 3.2 invites, in effect, the scheme contemplated by the 2006 EEA Regulations, namely that "'other family members' + those in 'durable relationships'" only acquire rights if, following an "extensive examination", they establish they satisfy the qualifying criteria. Consequently, until such an individual does establish that he or she meets the criteria in Art 3.2 (and the 2006 EEA Regulations) and is issued with a residence card (or family permit prior to entry), they remain 'extended family members' with, as yet, no right of entry or residence. Consequently, they would not be residing in the UK "in accordance" with the 2006 EEA Regulations or under the Citizens Directive

44. It follows that the appellant cannot establish between June 2005 and June 2010 that he was resident in the UK "in accordance with [the 2006 EEA] Regulations for a continuous period of five years". His residence in accordance with the 2006 EEA Regulations only began in June 2007 when he became a family member of an EEA national following the issue of a residence card to him. Even if, therefore, the appellant could establish that his partner was throughout that time exercising Treaty rights (or before January 2007 was doing so in effect before Bulgaria's accession), he cannot establish a permanent right of residence under reg 15(1)(b) of the 2006 EEA Regulations.

45. That is sufficient to conclude that the appellant's claim to a permanent right of residence under EU law cannot succeed.

46. Even if the appellant had been able to establish that he had a right of residence simply on the basis of being an extended family member prior to June 2007, I do not accept that the requirement in reg 15(1)(b) would have been satisfied because, in my judgment, because that requires that he was at all times residing in the UK in accordance with the 2006 EEA Regulations as a "family member". I do not accept Mr Richards' cautious suggestion that reg 15(1)(b) should be interpreted as applying to a person who at the end of the five year period is resident in accordance with the 2006 EEA Regulations as a "family member" but has at other times during the five year period been resident in accordance with the Regulations on some other basis. Regulation 15(1)(b) transposes Article 16.2 of the Citizens Directive which only confers rights of residence on "family members". Regulation 15(1)(b) is, in my judgment, only concerned with the acquisition of a permanent right of residence by a "family member" who has resided on that basis for five continuous years in accordance with the Regulations. It is perhaps illuminating to contrast reg 15(1)(f) which appears expressly to contemplate the acquisition of a permanent right of residence based upon five years' continuous residence in accordance with the Regulations where the legal basis for that residence changed during the course of the five years because the individual ceased to be a family member of a person through death or divorce but has "retained" that right under reg 10.

The Judge's Decision

47. Turning now to the Judge's decision in this appeal. The Judge's conclusion in respect of reg 15(1)(b) is expressed at para 13 of his determination as follows:

> "On the appellant's case the relationship with Yoana ended in June 2010. I note that under Regulation 7(3) the Appellant could only be treated as a Family Member for so long as he was "in a durable relationship with Yoana but, on his evidence, he ceased to be a Family Member three years ago in June 2010. In those circumstances he is not a "Family Member" for the purposes of Regulation 15(i)(b). Indeed, even if he had been a Family Member of an EEA National as the Regulation requires, he had ceased to be so when he made his applications on 18 June 2012 and on 17 April 2013, and thus did not qualify for a permanent right of residence."

48. Whilst the Judge reached the right conclusion, his reasoning was not correct. The appellant did not fail to establish that he met the requirements of reg 15(1)(b) because he was not a "family member" when he made his application in June 2012 and April 2013. The correct question was whether the appellant had shown between February 2005 and June 2010 (when his relationship broke down) that he had been a "family member" for a continuous period of five years residing in the UK as such in accordance with the 2006 EEA Regulations. That the appellant could not do as he had only resided in the UK in that capacity between June 2007 and June 2010 – a period of only three years.

49. Consequently, the Judge erred in law in his application of reg 15(1)(b). His decision is set aside.

50. For the reasons I have given, I remake the decision dismissing the appellant's appeal. The appellant has failed to establish that he has a permanent right of residence under the 2006 EEA Regulations and is entitled to a residence card confirming that right.

Signed

A Grubb
Judge of the Upper Tribunal

Date: