



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/06021/2018

THE IMMIGRATION ACTS

Heard at Field House
On 16 April 2019

Decision and Reasons Promulgated
On 24 May 2019

Before

UPPER TRIBUNAL JUDGE GLEESON
UPPER TRIBUNAL JUDGE CANAVAN

Between

ARSLAN SARFRAZ BUTT
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms R. Moffatt, instructed by Farani Taylor Solicitors
For the respondent: Ms J. Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This decision considers whether the phrase “a relative of an EEA national” contained in regulation 8 of The Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations 2016”), and the respondent’s policy on “Free Movement Rights: extended family members of EEA nationals” conform with European Union law.

2. The appellant appealed the respondent's decision dated 23 August 2018 to refuse to issue a residence card recognising a right of residence as an extended family member of an EEA national. The respondent was not satisfied that the appellant met the requirements of regulation 8 because he was related to the EEA national's spouse and not the EEA national. He noted that the appellant was previously issued with an EEA family permit on 24 December 2017 but asserted that it was issued in error under the EEA Regulations 2016.
3. First-tier Tribunal Judge Loughridge ("the judge") dismissed the appeal in a decision promulgated on 31 January 2019. The judge noted that the respondent "accepts that the dependency and household requirements are met" and that "the sole issue for me to determine requires an interpretation of the 2016 Regulations against an agreed factual background." The judge noted that The Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations 2006") defined an extended family member under regulation 8(2) as "a relative of an EEA national, his spouse or his civil partner".
4. In contrast, the judge found that the EEA Regulations 2016, which came into force on 01 February 2017 only refer to a "relative of an EEA national". He observed that this appeared to be a deliberate change in the regulations, which was borne out by the provision of transitional provisions in regulation 8(7) for those issued with family permits or residence cards as extended family members prior to the regulations coming into force. Regulation 8(7) allowed someone to continue to be treated as an extended family member even though they would not otherwise meet the new definition in the EEA Regulations 2016. The judge found that the appellant did not come within the transitional provision because the family permit was issued after 01 February 2017.
5. The appellant argued that the term "relative" included relatives by marriage. The judge accepted that the EEA Regulations 2016 do not define the term. He concluded that, if the term were read to include relatives through marriage it would render regulation 8(7) meaningless. For this reason, he concluded that the term "relative" must be read to mean only blood relatives. He noted that Lord Boyd rejected a similar argument in a case before the Outer House, Court of Session in *Singh* [2018] CSOH 96.
6. The judge rejected the appellant's alternative argument that he should succeed under regulation 7(3) without reference to regulation 8. He found that regulation 7(3) still required the person to meet the requirements of regulation 8(2), (3), (4) or (5). He concluded that the appellant could not satisfy the definition of 'extended family member' outlined in regulation 8(2) of the EEA Regulations 2016 because "he is not in the category of individuals covered by that statutory regime". In addressing the appellant's argument relating to the Citizens Directive (2004/38/EC) the judge made the following finding:
 16. Finally, I will comment briefly on Mrs Hodgson's submission that the 2016 Regulations do not properly implement the underlying Directive i.e. Directive 2004/38 ("the Directive"). This submission fails because the

distinction in the 2016 Regulations between relatives of an EEA national and relatives of the spouse or civil partner of an EEA national is in my view within the margin of appreciation afforded to contracting states. Recital 6 in the preamble to the Directive refers to Member States *examining* the situation of those person who are not included in the definition of family members and *deciding* whether entry and residence should be granted to such persons taking into consideration their relationship with the EEA citizen or any other circumstances such as their financial or physical dependence upon the citizen; and the reference in Article 3 to “other family members” means members of the EEA citizen’s family, rather than members of the family of an EEA citizen’s spouse or civil partner. Overall, the revised and slightly narrower scheme within the 2016 Regulations is not inconsistent/incompatible with the obligations on Member States contained within the Directive.”

7. The appellant appealed the First-tier Tribunal decision on the following grounds:
 - (i) The judge erred in his interpretation of regulation 8 of the EEA Regulations 2016.
 - (ii) The judge erred in finding that his interpretation of the EEA Regulations 2016 conformed with EU law.
 - (iii) The judge failed to apply a correct interpretation of EU law in view of the “defective transposition” contained in regulation 8 and the respondent’s policy relating to the definition of ‘other family members’ of an EEA national.

8. Prior to the hearing, the Upper Tribunal asked the parties to clarify whether it had jurisdiction. The decision letter dated 23 August 2018 refused the application with reference to regulation 8. At the date of the decision, the definition of an appealable “EEA decision” in the EEA Regulations 2016 excluded a decision to refuse a residence card to an extended family member. However, the decision letter stated that the appellant had a right of appeal. At the hearing, the parties agreed that the Upper Tribunal had jurisdiction to hear the appeal. Although the decision letter asserted that the previous family permit was “issued in error” there was no evidence to suggest that it was revoked. By operation of regulation 7(3) the appellant was treated as a family member for the purpose of the application for a residence card. Regulation 18(1) applied because regulation 17(4) specifically excluded extended family members falling within regulation 7(3). Although neither party was able to provide us with a copy of the notice of decision, we were satisfied, in any event, that the decision letter met the substantive requirements of The Immigration (Notices) Regulations 2003.

Legal framework

The Citizens Directive

9. Recitals 5 and 6 of the Directive say the following about family members.
 - (5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under

objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of 'family member' should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

- (6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, 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.

10. Article 2 sets out the following definitions.

For the purposes of this Directive:

1. 'Union citizen' means any person having the nationality of a Member State;
2. 'family member' means:
 - (a) the spouse;
 - (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
 - (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
 - (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);
3. 'host Member State' means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

11. Article 3 provides.

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

The EEA Regulations 2016

12. Although it has been subject to recent amendment by way of the Immigration (European Economic Area Nationals) (EU Exit) Regulations 2019 (28 March 2019), at the date of the First-tier Tribunal hearing, regulation 7 of the EEA Regulations 2016 contained the following provisions relating to 'family members' of EEA nationals [emphasis added].

- (1) In these Regulations, "family member" means, in relation to a person ("A")—
 - (a) A's spouse or civil partner;
 - (b) A's direct descendants, or the direct descendants of A's spouse or civil partner who are either—
 - (i) aged under 21; or
 - (ii) dependants of A, or of A's spouse or civil partner;
 - (c) dependent direct relatives in A's ascending line, or in that of A's spouse or civil partner.
- (2) Where A is a student residing in the United Kingdom otherwise than under regulation 13 (initial right of residence), a person is not a family member of A under paragraph (1)(b) or (c) unless—
 - (a) in the case of paragraph (1)(b), the person is the dependent child of A or of A's spouse or civil partner; or
 - (b) A also falls within one of the other categories of qualified person mentioned in regulation 6(1).
- (3) **A person ("B") who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card must be treated as a family member of A, provided—**

- (a) **B continues to satisfy the conditions in regulation 8(2), (3), (4) or (5); and**
 - (b) **the EEA family permit, registration certificate or residence card remains in force.**
 - (4) A must be an EEA national unless regulation 9 applies (family members of British citizens).
- 13. Regulation 8 stated the following in relation to 'extended family members' of EEA nationals [emphasis added].
 - (1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies a condition in paragraph (2), (3), (4) or (5).
 - (2) The condition in this paragraph is that the person is –
 - (a) **a relative of an EEA national;** and
 - (b) residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of the EEA national's household; and either –
 - (i) is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or
 - (ii) has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national's household.
 - (3) The condition in this paragraph is that the person is **a relative of an EEA national** and on serious health grounds, strictly requires the personal care of the EEA national.
 - (4) The condition in this paragraph is that the person is **a relative of an EEA national** and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national.
 - (5) The condition in this paragraph is that the person is the partner (other than a civil partner) of, and in a durable relationship with, an EEA national, and is able to prove this to the decision maker.
 - (6) In these Regulations, "relevant EEA national" means, in relation to an extended family member –
 - (a) referred to in paragraph (2), (3) or (4), the EEA national to whom the extended family member is related;
 - (b) referred to in paragraph (5), the EEA national who is the durable partner of the extended family member.

- (7) In paragraphs (2) and (3), “relative of an EEA national” includes a relative of the spouse or civil partner of an EEA national where on the basis of being an extended family member a person –
- (a) has prior to the 1st February 2017 been issued with –
 - (i) an EEA family permit;
 - (ii) a registration certificate; or
 - (iii) a residence card; and
 - (b) has since the most recent issue of a document satisfying sub-paragraph (a) been continuously resident in the United Kingdom.

The Home Office policy

14. The relevant policy guidance applied by the respondent at the date of the decision, which was in force at the date of the First-tier Tribunal hearing, was “Free Movement Rights: extended family members of EEA nationals (Version 6.0) published for Home Office staff on 08 June 2018. The relevant part of the guidance was as follows.

Definition of extended family member

Regulation 8 defines an extended family member as a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who is either:

- a relative of an EEA national who is residing in a country other than the UK and is dependent on the EEA national
- is a member of their household and either:
 - o is accompanying the EEA national to the UK or wishes to join them
 - o has joined them in the UK and continues to be dependent on them or to be a member of their household
- a relative of an EEA national who strictly requires the personal care of the EEA national due to serious health grounds
- a relative of an EEA national who would meet the requirements of the Immigration Rules for indefinite leave to remain (other than those relating to entry clearance) as a dependent relative of an EEA national as if the EEA national was a person present and settled in the UK
- the partner (other than a civil partner) of an EEA national who can prove they are in a durable relationship with the EEA national

There is no limit on the distance of the relationship between the EEA national and the extended family member as long as they can provide valid proof of the relationship between them.

From 1 February 2017 the rights of extended family members only applies to relatives of the EEA national and not to relatives of the EEA national’s spouse or civil partner. This means that an extended family member can no longer rely on their relationship to the EEA national’s spouse or civil partner in order to

meet the requirements of regulation 8. Instead, they must show that they are related to the EEA national.

Transitional arrangements

In order not to disadvantage applicants who have already been issued documentation on the basis that they are the relative of an EEA national's spouse or civil partner, an extended family member can continue to be regarded as the relative of an EEA national's spouse or civil partner where:

- prior to 1 February 2017, they have been issued with either:
 - o an EEA family permit
 - o a registration certificate o a residence card
- they have been continuously resident in the UK, since the most recent issue of one of the above documents

For example, an extended family member submits an application for a permanent residence card on 1 April 2017. They provide evidence they were issued a residence card in May 2012 which is valid until May 2017 on the basis they are the relative of the spouse of an EEA national. They provide evidence that they remain dependent on the spouse, and that they continue to meet all other requirements of the regulations. In these circumstances, you can issue a permanent residence card.

Definition of relative

The term 'relative' includes:

- brothers
- sisters
- aunts
- uncles
- cousins
- nieces
- nephews

This list is not complete. You can also include those related by marriage to the EEA national and further generations of the above relatives such as great-aunts, great-nephews and second cousins. Since 11 February 2016 an applicant related by marriage to the spouse of an EEA national who has not previously been issued with documentation under the regulations is not considered an extended family member.

Rights of an extended family member

Extended family members do not have automatic rights to enter and reside in the UK. Under regulation 7(3) of the 2016 regulations, an extended family member has the same rights as a direct family member. They must continue to

satisfy the conditions of regulation 8 and have been issued with one of the following documents which remains in force:

- an EEA family permit
- a registration certificate
- a residence card
- a permanent residence card
- a document certifying permanent residence

Case law

15. In *British Gas Trading Ltd v Lock and Anor* [2016] 1 CMLR 25 the Court of Appeal reviewed relevant case law relating to ‘conforming interpretation’ of EU and human rights law and considered the core principles outlined in *Marleasing S.A v LA Comercial Internacional de Alimentacion S.A.* [1992] 1 CMLR 305, *Ghaidan v Godin-Mendoza* [2004] UKHL 30, *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446 and *Swift (trading as A Swift Move) v Robertson* [2014] 1 WLF 3438.
16. In *Vodafone 2* the Court of Appeal approved the summary of the principles of conforming interpretation prepared by counsel for the HMRC.

“37. ...

“In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular: (a) it is not constrained by conventional rules of construction (per Lord Oliver of Aylmerton in the *Pickstone* case, at p. 126B); it does not require ambiguity in the legislative language (per Lord Oliver in the *Pickstone* case, at p. 126B and Lord Nicholls of Birkenhead in *Ghaidan’s* case, at para 32); (c) it is not an exercise in semantics or linguistics (per Lord Nicholls in *Ghaidan’s* case, at paras 31 and 35; per Lord Steyn, at paras 48–49; per Lord Rodger of Earlsferry, at paras 110–115); (d) it permits departure from the strict and literal application of the words which the legislature has elected to use (per Lord Oliver in the *Litster* case, at p 577A; per Lord Nicholls in *Ghaidan’s* case, at para 31); (e) it permits the implication of words necessary to comply with Community law obligations (per Lord Templeman in the *Pickstone* case, at pp 120H–121A; per Lord Oliver in the *Litster* case, at p 577A); and (f) the precise form of the words to be implied does not matter (per Lord Keith of Kinkel in the *Pickstone* case, at p 112D; per Lord Rodger in *Ghaidan’s* case, at para 122; per Arden LJ in the *IDT Card Services* case, at para 114)

...

“The only constraints on the broad and far-reaching nature of the interpretative obligation are that: (a) the meaning should ‘go with the grain of the legislation’ and be compatible with the underlying thrust of the legislation being construed’: see per Lord Nicholls in *Ghaidan v. Godin-Medoza* [2004] 2 AC 557, para 53; Dyson LJ in *Revenue and Customs v. EB Central Services Ltd* [2008] STC 2209, para 81. An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment (see per Lord Nicholls, at para 33, Lord Rodger, at

paras 110–113 in *Ghaidan's* case; per Arden LJ in *R (IDT Card Services Ireland Ltd) v. Customs and Excise Comrs* [2006] STC 1252, paras 82 and 113); and (b) the exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate: see the *Ghaidan* case, per Lord Nicholls, at para 33; per Lord Rodger, at para 115; per Arden LJ in the *IDT Card Services* case, at para 113.”

17. In *Swift* the Supreme Court considered the Court of Justice of the European Union (“CJEU”) decision in *Schulte v Seutche Bausparkasse Badenia AG* (Case C-350/03) [2003] All ER (EC) 420, which summarised the core interpretative principle as follows.

“When hearing a case between individuals, the national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a Directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Directive in order to achieve an outcome consistent with the objective pursued by the Directive.”

18. In *SSHD v Rahman* [2013] QB 249 the Grand Chamber of the CJEU considered the case of ‘other family members’ of an EEA national who were relatives of the EEA national’s spouse. The focus of the decision was to answer questions relating to the assessment of dependency of other family members. The court made the following findings:

“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 ...

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-4599, paragraphs 100 to 103)."
19. In assessing further questions relating to dependency the CJEU said the following about the objective of Article 3(2) of the Directive.
- "32. So far as concerns the time at which the applicant must be in a situation of dependence in order to be considered a 'dependant' within the meaning of Article 3(2) of Directive 2004/38, it is to be noted that, as follows from recital 6 in the directive's preamble, the objective of that provision is to 'maintain the unity of the family in a broader sense' by facilitating entry and residence for persons who are not included in the definition of family member of a Union citizen contained in Article 2(2) of Directive 2004/38 but who nevertheless maintain close and stable family ties with a Union citizen on account of specific factual circumstances, such as economic dependence, being a member of the household or serious health grounds."
20. In *SM (Algeria) v ECO, UK Visa Section* [2018] UKSC 9 the Supreme Court considered the case of an Algerian child who was placed under the guardianship of European citizens who were resident in the UK. The appellant's primary case was that the child was a 'family member' within the meaning of Article 2(2) of the Directive. The Supreme Court referred the point for a preliminary ruling from the CJEU to clarify

the meaning of 'direct descendent' in such circumstances. However, the court had little difficulty in finding that she would, in any event, come within the definition of 'other family member' within the meaning of Article 3(2). With reference to Article 3(2) the Supreme Court found:

"17. This Court has little doubt that Susana [a pseudonym] would fall within article 3.2(a) if she does not fall within article 2.2(c). The 2006 Regulations have caused confusion by introducing the word "relative" which nowhere appears in article 3.2(a). "Family member" is a wider term than "relative" as it is well capable of including people who are not related by consanguinity or affinity. All that is required is that the person (i) falls within the broad concept of "family member"; (ii) was either a dependant or a member of the household of the Union citizen; and (iii) that dependency or household membership was in the country from which the person has or would come. A child for whom the Union citizen has parental responsibility under the law of the child's country of origin is clearly capable of being regarded as a family member; Susana was both a dependant and a member of the household of Mr and Mrs M; and this was in Algeria, the country from which she would be coming to this country.

18. The obligation of the host member state is to facilitate entry and residence in accordance with its national legislation, to undertake an extensive examination of the personal circumstances, and to justify any denial of entry and residence. UK legislation relating to foreign adoptions is clearly relevant to that examination. A refusal of entry and residence would, in principle, be justified if there were reason to believe that the child was the victim of exploitation, abuse or trafficking, or that the claims of the birth family had not been respected.

...

21. In making that evaluation, the decision-makers, whether in the Home Office or in the appellate system, would also have to bear in mind that the purpose of the Directive is to simplify and strengthen the right of free movement and residence for all Union citizens, freedom of movement being one of the fundamental freedoms of the internal market. Having to live apart from family members or members of the family in the wider sense may be a powerful deterrent to the exercise of that freedom."

21. When the Grand Chamber of the CJEU heard the case in *SM v ECO, UK Visa Section* EU:C:2019:248 (26 March 2019) it found that a child that had not been formally adopted giving rise to a parent-child relationship recognised by UK law did not come within the definition under Article 2(2) but could fall within the ambit of Article 3(2).

"57. That being said, such a child does fall, as was emphasised by the referring court, under the definition of one of the 'other family members' referred to in Article 3(2)(a) of Directive 2004/38.

58. Under that provision, Member States are, in accordance with their national legislation, to facilitate entry and residence for 'any other family members ... 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’.

59. The words used in that provision are thus capable of covering the situation of a child who has been placed with citizens of the Union under a legal guardianship system such as Algerian *kafala* and in respect of whom those citizens assume responsibility for its care, education and protection, in accordance with an undertaking entered into on the basis of the law of the child’s country of origin.
60. As follows from recital 6 of Directive 2004/38, the objective of Article 3(2)(a) thereof is to ‘maintain the unity of the family in a broader sense’ by facilitating entry and residence for persons who are not included in the definition of ‘family member’ of a Union citizen contained in Article 2(2) of that directive but who nevertheless maintain close and stable family ties with a Union citizen on account of specific factual circumstances, such as economic dependence, being a member of the household or serious health grounds (judgment of 5 September 2012, *Rahman and Others*, C-83/11, EU:C:2012:519, paragraph 32).
61. According to the case-law of the Court, Article 3(2) of Directive 2004/38 imposes an obligation on the Member States to confer a certain advantage on applications submitted by the third-country nationals referred to in that article, compared with applications for entry and residence of other third-country nationals (see, to that effect, judgments of 5 September 2012, *Rahman and Others*, C-83/11, EU:C:2012:519, paragraph 21, and of 12 July 2018, *Banger*, C-89/17, EU:C:2018:570, paragraph 31).
62. Thus, the Member States must, in accordance with that provision, make it possible for the persons envisaged therein to obtain a decision on their application that is founded on an extensive examination of their personal circumstances, taking account of the various factors that may be relevant, and, in the event of refusal, is justified by reasons (see, to that effect, judgments of 5 September 2012, *Rahman and Others*, C-83/11, EU:C:2012:519, paragraphs 22 and 23, and of 12 July 2018, *Banger*, C-89/17, EU:C:2018:570, paragraphs 38 and 39).
63. It is true that each Member State has a wide discretion as regards the selection of the factors to be taken into account, provided that their legislation contains criteria which are consistent with the normal meaning of the term ‘facilitate’ used in Article 3(2) of Directive 2004/38 and which do not deprive that provision of its effectiveness (see, to that effect, judgments of 5 September 2012, *Rahman and Others*, C-83/11, EU:C:2012:519, paragraph 24, and of 12 July 2018, *Banger*, C-89/17, EU:C:2018:570, paragraph 40).
64. However, that discretion must, having regard to recital 31 of Directive 2004/38, be exercised in the light of and in line with the provisions of the Charter of Fundamental Rights of the European Union (‘the Charter’) (see, by analogy, judgment of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraphs 79 and 80 and the case-law cited).
65. In that regard, Article 7 of the Charter recognises the right to respect for private and family life. As is apparent from the Explanations relating to the

Charter of Fundamental Rights (OJ 2007 C 303, p. 17), in accordance with Article 52(3) of the Charter, the rights guaranteed by Article 7 thereof have the same meaning and the same scope as those guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (see, to that effect, judgments of 5 October 2010, *McB.*, C-400/10 PPU, EU:C:2010:582, paragraph 53, and of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paragraph 49).

...

68. Accordingly, in order to comply with those provisions when exercising their discretion, it is for the competent national authorities, when implementing the obligation to facilitate entry and residence for the other family members laid down in Article 3(2)(a) of Directive 2004/38, to make a balanced and reasonable assessment of all the current and relevant circumstances of the case, taking account of all the interests in play and, in particular, of the best interests of the child concerned (see, by analogy, judgments of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 81; of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 85; and of 13 September 2016, *CS*, C-304/14, EU:C:2016:674, paragraph 41)."

Decision and reasons

22. Having set out the legal framework at some length, the applicable principles of European law become clear.
- (i) The Directive recognises that having to live apart from close family members might act as an obstacle to European citizens exercising rights under the Treaties.
 - (ii) The Directive makes a distinction between 'family members' who have a right of entry and residence in a host Member State and 'other family members' whose entry and residence should be facilitated by the host Member State.
 - (iii) Nothing in the wording of Article 3(2) restricts the nature or type of relationship of 'other family members' to the EEA citizen. In fact, recital 6 makes clear that the purpose of the provision is to maintain the "unity of the family in the broader sense".
 - (iv) The measure of whether a person is an 'other family member' who should be facilitated entry is whether they maintain "close and stable family ties with a Union citizen on account of specific factual circumstances, such as economic dependence, being a member of the household or serious health grounds".
 - (v) The competent authority in the host Member State, when undertaking an examination of the applicant's personal circumstances, can take into account various factors that may be relevant such as the extent of the economic or physical dependence and the degree of relationship between the family member and the Union citizen who they wish to accompany or join.

- (vi) The host Member State has a wide discretion regarding the selection of factors to be taken into account “in accordance with national legislation”. Nevertheless, the host Member State must ensure that legislation is consistent with the normal meaning of the term ‘facilitate’ and must not deprive Article 3(2) of its effectiveness.
 - (vii) The exercise of discretion by the host Member State must be done in line with the provisions of the Charter of Fundamental Rights of the European Union. In particular, Article 7 of the Charter recognises the right to family life.
 - (viii) The term ‘family member’ can include people of who are not related by “consanguinity or affinity”. It becomes clear from the Supreme Court and the CJEU decisions in *SM* that it matters not whether a person is a blood relative of the European citizen. What is important is the nature and extent of the familial relationship.
23. We apply these principles to our assessment of the EEA Regulations 2016.
 24. We accept that the Secretary of State has wide discretion to introduce national legislation regarding the selection of factors to be taken into account in assessing whether to facilitate entry to ‘other family members’ (‘extended family members’ under the EEA Regulations 2016).
 25. Regulation 8 of the EEA Regulations 2006 defined an extended family member as “a relative of an EEA national, his spouse or his civil partner”. In contrast, the wording of regulation 8 of the EEA Regulations 2016 was restricted to “a relative of an EEA national”. The transitional provisions contained in regulation 8(7) were intended to provide continuity to extended family members who were issued with documentation recognising a right of residence under the EEA Regulations 2006. The wording of the Home Office policy makes clear that the intention was to exclude family members of the EEA national’s spouse from consideration under regulation 8 in applications made on or after the 01 February 2017, when the EEA Regulations 2016 came into force.
 26. When the purpose of the Directive is properly analysed it becomes clear that any provision of national legislation purporting to restrict the interpretation of ‘other family member’ to specified familial relationships does not conform with the principles of the Directive or the Charter given the broad sense in which the phrase ‘other family members’ is to be interpreted under Article 3(2).
 27. Having recognised that the important issue is the nature and extent of the familial relationship, we do not consider that relatives of the EEA national’s spouse or civil partner can lawfully be excluded from consideration in the way that the EEA Regulations 2016 and the relevant Home Office guidance currently purport to do. Although the competent authority has a wide discretion to identify various factors that might be relevant to the assessment of whether it should facilitate the entry or residence of ‘other family members’, provisions of national legislation cannot go so far as to deprive Article 3(2) of its effectiveness.

28. In assessing whether there is sufficient evidence to show the required level of familial ties or dependency to meet the requirements of regulation 8, the respondent is entitled to take into account the nature and degree of the relationship between the applicant and the EEA national. What he cannot do is to fetter his discretion by specifying that a certain type of familial relationship can never engage the broad meaning of family life encompassed by Article 3(2) of the Directive. Whether the familial relationship is sufficient to show that a person is an extended family member for the purpose of the regulations will depend on the facts and the evidence in each case.
29. We note that the decisions in *Rahman* and *SM* were both taken at a time when UK national legislation, under the EEA Regulations 2006, included a broader definition of extended family members under regulation 8. However, we find that this makes no difference to the assessment of the underlying principles of European law outlined by the CJEU. Mr Rahman was a family member of the EEA national's spouse. *SM* was not a blood relative or legally adopted for the purpose of UK law, yet was still found to be a family member for the purpose of Article 3(2). Both decisions were made with reference to general principles of European law and not by reference to the UK regulations.
30. What is the consequence of our findings? In order to conform with Article 3(2) of the Citizens Directive the phrase "relative of an EEA national" in regulation 8 of the EEA Regulations 2016 must be read to include any family member of the EEA national, including those related by marriage through the EEA national's spouse or civil partner. The key issue is whether the family member has close and stable family ties with the EEA national on account of specific factual circumstances, such as economic dependence, being a member of the household or serious health grounds.
31. The section of the Home Office policy "Free Movement Rights; extended family members of EEA nationals" (Version 6.0) (08 June 2018), and the current policy containing the same wording (Version 7.0) (27 March 2019), purporting to narrow eligible family members only to those of the EEA national does not conform with a proper interpretation of Article 3(2) of the Directive.
32. Regulation 8(7) of the EEA Regulations 2016 is a transitional provision intended to implement the change in Home Office policy. It should not be used to interpret the meaning of "relative of an EEA national" in a way that does not conform with Article 3(2) of the Directive.

Conclusion

33. In light of our findings, we conclude that the First-tier Tribunal decision involved the making of an error of law and must be set aside and remade.
34. The First-tier Tribunal judge interpreted the EEA Regulations 2016 with reference to regulation 8(7) and the policy guidance. In so far as he relied on the decision in *Singh*, that was a brief decision refusing permission to bring judicial review proceedings.

The court refused permission solely on the face of the wording of regulation 8 without any analysis of relevant European law.

35. The judge also erred in finding that his more restrictive interpretation of the wording to regulation 8 was “within the margin of appreciation afforded to contracting states”. The margin of appreciation is a doctrine of international law that has no place in the interpretation of European Union law. In so far as *Rahman* recognised that a Member State has wide discretion, such discretion cannot go so far as to render the purpose of Article 3(2) ineffective.
36. The EEA national sponsor is a Polish citizen. The appellant is her husband’s brother. The appellant was issued with a family permit as an extended family member on 24 December 2017. The assertion in the decision letter that the family permit was issued in error under the EEA Regulations 2016 relies on the respondent’s policy to exclude relatives of the EEA national’s spouse. However, there is no evidence to suggest that the permit was revoked. We have found that the policy does not conform with a proper interpretation of Article 3(2) of the Directive. The phrase “relative of an EEA national” contained in regulation 8 of the EEA Regulations 2016 should be interpreted broadly and can include a relative of the EEA national’s spouse. In light of our findings, the family permit was not issued in error simply because of the degree of the relationship.
37. The key issue is whether the appellant has close and stable family ties with the EEA national, which might be demonstrated by his dependency on the EEA national. At the First-tier Tribunal hearing the respondent accepted that the appellant was dependent within the meaning of regulation 8. Ms Isherwood accepted a concession was made and did not resile from that position. Given that the only issue for determination is whether the appellant is the ‘relative of an EEA national’ it follows that the appeal must be allowed.
38. The respondent’s decision breaches the appellant’s rights under the EU Treaties in respect of entry to or residence in the United Kingdom.

DECISION

The First-tier Tribunal decision involved the making of an error of law

The decision is remade and the appeal is ALLOWED

Signed  Date 23 May 2019
Upper Tribunal Judge Canavan