EEA FAMILY MEMBERS

EMMA RUTHERFORD

NO 8 CHAMBERS

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Family member

7. (1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person—

(a)his spouse or his civil partner;

(b)direct descendants of his, his spouse or his civil partner who are—

(i)under 21; or

(ii)dependants of his, his spouse or his civil partner;

(c)dependent direct relatives in his ascending line or that of his spouse or his civil partner;

(d)a person who is to be treated as the family member of that other person under paragraph (3).

(2) A person shall not be treated under paragraph (1)(b) or (c) as the family member of a student residing in the United Kingdom after the period of three months beginning on the date on which the student is admitted to the United Kingdom unless—

(a)in the case of paragraph (b), the person is the dependent child of the student or of his spouse or civil partner; or

(b)the student also falls within one of the other categories of qualified persons mentioned in regulation 6(1).

(3) 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(3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked.

(4) Where the relevant EEA national is a student, the extended family member shall only be treated as the family member of that national under paragraph (3) if either the EEA family permit was issued under regulation 12(2), the registration certificate was issued under regulation 16(5) or the residence card was issued under regulation 17(4).

PM (EEA – spouse –"residing with") Turkey [2011] UKUT 89 (IAC)

9. Before us the parties were agreed that the issue of construction is whether the words "resided in the United Kingdom with the EEA national" mean:

i) The family member (in this case the spouse) and the EEA national must both reside in the United Kingdom for the requisite period, or

ii) The family member should be residing in a common family home with the EEA national in the United Kingdom for the requisite period.

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The text of the Regulation

12. As to the words used, we note first that the words "with the EEA national" come after "United Kingdom". Putting the disputed words in parenthesis, the words appear to address attention to the question of whether the non–EEA national family member has resided in the United Kingdom as opposed to elsewhere.

> "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;

13. Second, that the regulation is concerned with any family member and not just spouses, and cannot therefore be construed as meaning "living together as husband or wife" or conjugal cohabitation. The range of family members within the ambit of reg 15(1)(b) includes children under 21 and dependent relatives in the ascending and descending line (see reg 7).

14. Third, the legislator has not used words such as "resided as a member of the household in the United Kingdom" (contrast the provision for extended family members in reg 8)

15. Each of these observations is a pointer to the first of the two possible meanings being the appropriate one.

The context of the words to be construed

16. Turning to the context of the regulations, the scheme (reflecting the requirements of Community law) deals with initial residence, then extended rights of residence, next retained rights of residence and finally permanent rights of residence. Regulation 13(2) concerns the right of initial residence of a non-EEA family member of an EEA national. The position of such a family member is distinguished from that of EEA nationals by the requirement to produce a valid passport, but otherwise the initial right of residence is not expressed to be subject to a requirement to reside with the EEA national. No distinction is made between EEA and non-EEA family members for the purposes of the extended right of residence under reg 14(2). All family members are entitled to extended residence as long as the EEA national remains a qualified person (in the present context this means works in the UK) or has become entitled to a permanent right of residence. There is no requirement that the family member be residing with the EEA national in the same house or household.

17. Both sides recognise that the European Court of Justice has dealt with the extended right of residence in Community law in the case of C/267-83 Diatta v Land Berlin [1985] ECR 567. This was a decision concerned with EEC Regulations 1612/68. The Court said this:

> "17. Having regard to its context and the objectives which it pursues, that provision cannot be interpreted restrictively.

> 18. In providing that a member of a migrant worker's family has the right to install himself with the worker, article 10 of the Regulation does not require that the member of the family in question must live permanently with the worker, but, as is clear from article 10(3), only that the accommodation which the worker has available must be such as may be considered normal for the purpose of accommodating his family. A requirement that the family must live under the same roof permanently cannot be implied
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> 19. In addition such an interpretation corresponds to the spirit of article 11 of the regulation, which gives the member of the family the right to take up any activity as an employed person throughout the territory of the Member State concerned, even though that activity is exercised at a place some distance from the place where the migrant worker resides.
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> 20. It must be added that the marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority. It is not dissolved merely because the spouses live separately, even where they intend to divorce at a later date."

18. Ms Saunders informed us that her policy department had instructed her that Diatta provided a cogent indication of what the content of the permanent right of residence should consist of, although the IJ did not agree with this proposition when first advanced on behalf of the appellant. She accepted that the IJ did not have the benefit of a submission on this question from the respondent as the initial refusal was based on the proposition that the husband had not worked for five years

19. For our part we recognise that while the decision in Diatta is highly influential as to the proper construction of Regulation 1612/68 it cannot be decisive on the question since it was a decision on the meaning of different words and was not concerned with a permanent right of residence

20. Turning to reg 15 itself, we are struck with the contrast between 15(1)(a) and (b). If the IJ's conclusion is correct then (assuming in both cases that the EEA national has resided in the United Kingdom in accordance with these Regulations) there is a very significant difference in treatment of family members depending on their nationality. A French spouse of an Italian national obtains permanent residence without any requirement to reside with the EEA national. A Turkish spouse, such as the appellant, can never obtain permanent residence if the EEA spouse never established a common matrimonial home or moves out of it before the expiry of the period of five years. Such a startling distinction in treatment would be very surprising when the basic definition of family member affords no decisive importance to the nationality of that person

21. Moreover, it is common ground that no distinction is made on the grounds of the nationality of the family member who obtains a permanent right of residence in the circumstances set out in reg 15(1)(b) (e) or (f). Thus in the circumstances set out in those provisions a non-EEA national wife may achieve permanent residence when the EEA national ceases working, dies, or divorces her. In none of these cases is the permanent right of residence dependent on residence in a common family home, and the period of retained residence in the United Kingdom may in certain circumstances be shorter than three years. Regulation 15(1)(f) refers to the retained right of residence that is further provided for.

The Citizens Directive

24. Our construction of the Regulations is reinforced by examination of the Community legislation they were designed to implement

25. Chapter III of the Citizens Directive provides for an initial period of residence of three months, a residence card evidencing a right of residence for five years and retained rights of residence. Chapter IV then turns to the right of permanent residence

26. Article 16 has the heading "General rule for Union citizens and their family members"

27. Article 16.1 provides "Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in chapter III.

28. Article 16.2 continues "Paragraph 1 shall apply also to family members who are not nationals of a Member State and have resided with the Union citizen in the host Member State for a continuous period of five years"

29. The French text is in the following terms:

> "2. Le paragraphe 1 s'applique également aux membres de la famille qui n'ont pas la nationalité d'un État membre et qui ont séjourné légalement pendant une période ininterrompue de cinq ans avec le citoyen de l'Union dans l'État membre d'accueil."

30. It is clear from the English and French text and the case of C-162/09 Secretary of State for Work and Pensions v Lassal 7 October 2010 at [30] that this new right of permanent residence granted to Union citizens and their family members was an extension of rights granted under previous provisions of Community law. It would accordingly seem most unlikely that a non-national spouse would have to comply with a new restrictive requirement of residence in the household of an EEA national during the five years preceding the acquisition of the right of permanent residence that was not a requirement under the previous law as exemplified in Diatta and the provisions of Articles 8 to 14 that need not be set out here.

31. It is equally unlikely that Community law would distinguish so radically between the rights of an EEA and non-EEA family member. Indeed Article 24 as well as recitals 17 and 20 in the Preamble to the Directive are indicators to the contrary:

> "(17)…. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with conditions laid down in this Directive during a continuous period of five years…"
> (20) In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy in that Member State equal treatment with nationals…"

32. Whilst it is possible to reach an interpretation of Article 16(2) that imposes a requirement on the non-EEA family member to reside both with the EEA national and in the same host state, strict linguistic construction is not the correct way to approach the interpretation of Community legislation.

33. We have no doubt that in the light of its objects and purpose Article 16(2) is intended to afford all family members (irrespective of their nationality) the right of permanent residence after five years

residence in the host state where the EEA national has resided. With this reading the Directive adds to the residence rights identified in Diatta and applicable to all family members.

Conclusion

34. We recognise that the fact that spouses or civil partners decide not to live together in a common household, may sometimes invite inquiry into the nature of the relationship.

35. No such inquiry could possibly arise in this case, where there has been genuine matrimonial cohabitation for some time, a child has been born to the couple and there are continuing social relations by the parties to the marriage in the context of contact with the child.

36. The EEA Regulations (reg 2(1)) precludes those who are party to a marriage of convenience from being a spouse and therefore a family member under reg 7. As recital 28 of the Citizens Directive makes clear, a marriage of convenience is an abuse of rights but it is a term strictly limited to relationships "contracted for the sole purpose" of enjoying free movement rights and with no effective social nexus between the parties. An inference of marriage of convenience cannot arise solely because a married couple are not living in the same household.

37. However, for the reasons we have given above, we conclude that reg 15(1)(b) applies to those who entered a genuine marriage where both parties have resided in the United Kingdom for five years since the marriage; the EEA national's spouse has resided as the family member of a qualified person or otherwise in accordance with the Regulations and the marriage has not been dissolved.

38. The appellant accordingly qualified for permanent residence on the facts found by the IJ and is entitled to a permanent residence card.

Kareem (Proxy marriages - EU law) [2014] UKUT 24(IAC)

68. We make the following general observations.

a. A person who is the spouse of an EEA national who is a qualified person in the United Kingdom can derive rights of free movement and residence if proof of the marital relationship is provided.

b. The production of a marriage certificate issued by a competent authority (that is, issued according to the registration laws of the country where the marriage took place) will usually be sufficient. If not in English (or Welsh in relation to proceedings in Wales), a certified translation of the marriage certificate will be required.

c. A document which calls itself a marriage certificate will not raise a presumption of the marriage it purports to record unless it has been issued by an authority with legal power to create or confirm the facts it attests.

d. In appeals where there is no such marriage certificate or where there is doubt that a marriage certificate has been issued by a competent authority, then the marital relationship may be proved by other evidence. This will require the Tribunal to determine whether a marriage was contracted.

e. In such an appeal, the starting point will be to decide whether a marriage was contracted between the appellant and the qualified person according to the national law of the EEA country of the qualified person's nationality.

f. In all such situations, when resolving issues that arise because of conflicts of law, proper respect must be given to the qualified person's rights as provided by the European Treaties, including the right to marry and the rights of free movement and residence.

g. It should be assumed that, without independent and reliable evidence about the recognition of the marriage under the laws of the EEA country and/or the country where the marriage took place, the Tribunal is likely to be unable to find that sufficient evidence has been provided to discharge the burden of proof. Mere production of legal materials from the EEA country or country where the marriage took place will be insufficient evidence because they will rarely show how such law is understood or applied in those countries. Mere assertions as to the effect of such laws will, for similar reasons, carry no weight.

h. These remarks apply solely to the question of whether a person is a spouse for the purposes of EU law. It does not relate to other relationships that might be regarded as similar to marriage, such as civil partnerships or durable relationships.

TA and Others (Kareem explained) Ghana [2014] UKUT 316 (IAC)

13 Mr Akohene relies upon the terms of paragraph 68 of the decision in Kareem, but it is important to read the determination as a whole in order to properly understand what is being said in paragraph 68.

14. At paragraph 17 of Kareem the Tribunal concludes:-

"…that, in a situation where the marital relationship is disputed, the question of whether there is a marital relationship is to be examined in accordance with the laws of the member state from which the union citizens obtains nationality and from which therefore that citizen derives free movement rights."

15. When this passage is read in isolation, it would appear to provide some support for Mr Akohene's submissions; however, when it is read in the context of the surrounding paragraphs a different picture emerges.

16. In paragraph 11 of its determination the Tribunal in Kareem recognise that the question of whether a person is married is a matter governed by the national laws of the individual Member States.

17. It continues in paragraph 13 as follows:

"From this we infer that usually a marriage certificate issued by a competent authority will be sufficient evidence that a marriage has been contracted. Of course, a document which merely calls itself a marriage certificate does not have any legal status. A certificate will only have legal status if it is issued by an authority with legal power to create or confirm the facts it attests, that is, by an authority that has such competence. Where a marriage document has no legal status or where such status is unclear, other evidence may be used to establish that a marriage has been contracted. However, once again we find that these principles do not help us to determine whether a person is a

spouse because it would depend on identifying the authority with legal power to create or confirm that a marriage has been contracted."

18. Moving forward to paragraph 16, the Tribunal once again observe that :

"…where there are issues of EU law that involve the nationality laws of Member States, then the law that applies will be the law of the Member State of the nationality and not the host Member State…"

19. The reasoning continues in paragraph 18:

"Within EU law, it is essential that Member States facilitate the free movement and residence rights of Union citizens and their spouses. This would not be achieved if it were left to a host Member State to decide whether a Union citizen has contracted a marriage. Different Member States would be able to reach different conclusions about that Union citizen's marital status. This would leave Union citizens unclear as to whether their spouses could move freely with them; and might mean that the Union citizen could move with greater freedom to one Member State (where the marriage would be recognised) than to another (where it might not be). Such difficulties would be contrary to the fundamental EU law principles. Therefore, we perceive EU law as requiring the identification of the legal system of which a marriage is said to have been contracted in such a way as to ensure that the Union citizen's marital status is not at risk of being differently determined by different Member States. Given the intrinsic link between nationality of a Member State and free movement rights, we conclude that the legal system of the nationality of the Union citizen must itself govern whether a marriage has been contracted."

20. Given that which I set out above, it is difficult to see how the Upper Tribunal in Kareem could have been any clearer in its conclusion that when consideration is being given to whether an applicant has undertaken a valid marriage for the purposes of the 2006 Regulations, such consideration has to be assessed by reference to the laws of the legal system of the nationality of the relevant Union citizen. Mr Akohene's submissions to the contrary are entirely misconceived and are born out of a failure to read the determination in Kareem as a whole.

21. Turning back to the instant case, the Union citizen sponsor (EKT) is national of the Netherlands. The First-tier Tribunal failed to engage in any consideration of the applicable legal provisions in EKT's homeland and, consequently, in my conclusion its determination is flawed by an error on a point of law that requires me to set it aside.

"Extended family member"

8. (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 the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and—

(a)the person is residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of his household;

(b)the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or

(c)the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.

(3) A person satisfies the condition in this paragraph if the person is a relative of an EEA national or his spouse or his civil partner and, on serious health grounds, strictly requires the personal care of the EEA national his spouse or his civil partner.

(4) A person satisfies the condition in this paragraph if 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 were the EEA national a person present and settled in the United Kingdom.

(5) A person satisfies the condition in this paragraph if the person 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.

(6) In these Regulations "relevant EEA national" means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purpose of paragraph (5).

Aladeselu and Others (2006 Regs – reg 8) Nigeria [2011] UKUT 00253(IAC)

10. It is well-established that in order to qualify as an OFM/extended family member a person must show dependency on the EEA sponsor/Union citizen or membership of the latter's household both in the country from which she/he has come and in the host Member State: see Bigia & Others; RK (Membership of household – dependency) India [2010] UKUT 421 (IAC)

11. It is also well-established that there is no requirement that the OFM/extended family member be resident in another Member State prior to arrival in the host Member State: hence prior to 2 June 2011 the requirement to this effect in regulation 8(1)(a) and the requirement in regulation 12(1)(b) stipulating "lawful residence in an EEA State" was to be disapplied: see Bigia, para 41. As a result of The Immigration (European Economic Area) (Amendment) Regulations 2011 (SI 2011 No.1247) for the words "EEA State" there are now substituted the words "a country other than the United Kingdom". In regulation 12, for paragraph (1)(b) the provision substituted is "(b) the family member will be accompanying the EEA national to the United Kingdom or joining the EEA national there"

12. What is less clear is whether there are not two further requirements imposed either by the Directive or by the 2006 Regulations namely (1) an "accompanying or joining" requirement (construed so as to preclude an OFM/extended family member arriving before the Union citizen/EEA national); and (2) a requirement of lawful presence in the host State. The status of the former is thrown into sharp relied by the IJ's assessment of the appellants' appeals; the status of the latter has been raised by Mr Deller's contention that the provisions of the 2006 Regulations relating to OFMs have been made pursuant to Article 3.2 of the Directive which limits the obligation

on Member States to facilitate their entry and residence to those that are "in accordance with national law" or, as worded in recital 6, "on the basis of its own national legislation".

"Accompanying or Joining"

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18. We have not found this an easy issue to resolve. Even if an "accompanying or joining" requirement was imposed by Article 3.2(a), we would see no reason to construe it differently for OFMs and Article 2.2 (CFM) family members. Metock has defined what the meaning is and a stricter approach should not be imposed on OFMs. But as we have seen, under Article 3.2(a) "accompanying or joining" is not in any event a requirement imposed for OFMs by the Directive. It is purely a national law requirement and Article 3.2(a) and recital 6 permit Member States to impose national law requirements on OFMs subject only to limited constraints.

19. In favour of the construction urged by Ms Targett-Parker are a number of arguments. One is that on the reasoning applied by the ECJ in Metock – and seemingly endorsed in respect of OFMs by the Court of Appeal in Bigia - it seems possible to identify at least a sub-class of OFMs for whom a requirement of joining the Union citizen (construed again so as to prevent the OFM's prior arrival) would have a deterrent effect on the exercise of that citizen's rights of free movement. We discussed with the parties the hypothetical example of a Union citizen who would be deterred from taking up an employment contract in a host Member State starting in the winter unless he could arrange for dependent members of his household to start school in the host Member state at the beginning of the preceding Autumn term. Equally it is possible to construct hypothetical examples in which the need for prior arrival in the host Member State of an OFM would have no impact at all on the exercise by the Union citizen of free movement rights. Another point, already prefigured in our earlier comments, is that it would be very odd indeed if the word(s) "accompany or join" were to be construed to have one meaning in the Directive (as assigned by the ECJ in Metock) and another meaning in transposing national legislation in the form of the 2006 Regulations; especially when the latter contains no specific definition of its intended meaning. Added to this point is the fact that when interpreting national law transposing a Directive we must apply a teleological approach to interpretation - not the normal rules of statutory interpretation in English/UK law, which allow recourse to a linguistic "simple matter of language" approach. A possible further point to be made is that the Court of Appeal in Bigia, when dealing with the only appellant who had come to the UK before the UK sponsor, TS, appeared to consider he failed solely because of the lack of any recent dependency abroad. Prior arrival was not seen as, or at least was not specified as, a problem.

20. There is a further reason which has to do with the fact that the UK government has chosen to confer on OFMs/extended family members a guarantee that once they establish eligibility as OFMs/extended family members they have the same level of protection as Article 2.2 family matters. That appears to be the effect of regulation 7(3).

21. Ranged against, there are also strong arguments in favour of Mr Deller's position. If Article 3.2(a) permits national law regulation of OFMs (by contrast with the automatic rights conferred on Article 2.2 family matters) then surely it must permit a Member State to require a "joining or accompanying" requirement as a condition of eligibility. The provision is part of the 2006 Regulations and it would be wrong to seek to disapply it unless it is plainly contrary to EU law. Further, an accompanying or joining requirement (construed as preventing prior arrival by the OFM/extended family member) was applied by the Court of Appeal in KG (Sri Lanka) and what the Court of Appeal said in Bigia and Others about KG must be no less true for the Upper Tribunal: viz. "We are, of course, bound by that authority unless and to the extent that it is inconsistent with the

later decision of the ECJ in Metock". In Bigia the Court of Appeal was very specific in holding that the Article 2.2-related principles established by Metock only applied to OFMs in relation to the requirement of prior (lawful) residence in another Member State. A further argument is that if there is no requirement for the EEA spouse to be accompanied by the OFM or to come before the OFM then, seemingly, applicants are able to drive a coach and horses through the family permit scheme for which specific provision is made in regulation 12.

22. We consider that the respective merits of the arguments favour Ms Targett-Parker's position. We must apply a teleological approach that seeks to give effect to the purposes of the Directive which the 2006 Regulations purports to transpose. Those purposes include the elimination of obstacles to the exercise of free movement rights by Union citizens/EEA nationals. Even if it is only a sub-class of OFMs whose EEA sponsor's freedom of movement rights would be obstructed by a requirement that they arrive in the host Member State before the OFM, that is surely sufficient to show that there can be no blanket requirement to the contrary. And in the absence of any more qualified requirement, it would be otiose for us to seek to impose restrictions that do not appear in the ordinary language of the Regulations. The requirement to join says nothing about when that joining has to take place. Accordingly the requirement to "join" an EEA sponsor as set out in regulation 8(2)(b) must be read as encompassing both OFMs/extended family members who have arrived before and OFMs/extended family members who have arrived after the EEA sponsor.

Lawful presence

24. When we turn to the matter of what decision to remake the first question we must address is whether the appellants have established that they meet the requirements of regulation 8. In this context one question that has arisen in this case is "Are the appellants nevertheless excluded from qualifying as extended family members because their presence in the UK has hitherto been either illegal or unlawful? "

25. It seems to us that so far as the Directive is concerned, the range of OFMs to whom there is a duty to facilitate their entry or residence is defined by EU law rather than national law, although in the case of OFMs EU law affords national law some discretion as to whether to admit or let reside those eligible for the exercise of that discretion. We know that imposition of such a requirement in respect of Article 2.2 family matters is unlawful. On that very point Metock expressly overruled the earlier ECJ case, Akrich which had held that there was such a requirement. But whether or not the scope afforded by Article 3.2(a) for Member States to regulate the entry and residence of OFMs "in accordance with national law" would prevent recourse to such a requirement in some shape or form is less clear.

26. Happily we do not need to wrestle with that issue because, even if the Citizens Directive is construed as not preventing Member States imposing some kind of lawful presence test on OFMs in their national laws, equally it does not mandate them to do so. In the UK all depends therefore, on what is achieved by the 2006 Regulations. As Mr Deller was quick to acknowledge, the 2006 Regulations contain no such test. Article 37 of the Directive permits Member States in any event to make more generous provision than does the Directive

27. Hence the appellants cannot be excluded from qualifying as OFMs/extended family members because their presence in the UK has been illegal or unlawful

Aladeselu and Others v SSHD [2013] EWCA Civ 144

41. Despite the somewhat elaborate background to the appeal, the point of contention is a very short one.

42. I think it best to start with the wording of regulation 8. By the end of the argument before us it was common ground that the directly relevant condition is that contained in paragraph (c) of regulation 8(2), namely that "the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household". It is necessary to examine each of those elements in turn.

43. The first element is that the person "satisfied" the condition in paragraph (a). That is in the past tense: the question is whether the condition in paragraph (a) was satisfied at an earlier point in time. Paragraph (a) requires that "the person is residing in a country other than the United Kingdom … and is dependent upon the EEA national or is a member of his household". There can be no doubt, on the findings made, that the applicants satisfied that condition: they lived in Nigeria and, at the time when they lived there, were dependent on the sponsor (and indeed were also members of her household).

44. The second element is that the person "has joined" the EEA national (specifically in this case the EU citizen) in the United Kingdom. The concession made by the Secretary of State in relation to the meaning of "join" in regulation 8(2)(b) is equally applicable to "has joined" in regulation 8(2)(c). It involves an acceptance that the expression "has joined" does not of itself impose a temporal limitation: it does not matter whether it is the relative or the EU citizen who arrives first in the United Kingdom, and one cannot glean from the expression any requirement as to contemporaneity or recent arrival. The argument that such a requirement is to be derived from *Rahman* is a matter to which I will return. Subject to that argument, it is clear that each of the applicants "has joined" the sponsor in the United Kingdom, even though each of them arrived here before the sponsor.

45. The third element is that the person "continues to be dependent upon [the EEA national] or to be a member of his household". The applicants plainly meet that requirement: on the findings of fact, there was no break at any time in their dependency on the sponsor.

46. On the face of it, therefore, the applicants satisfy the condition in paragraph (c) of regulation 8(2). The only point raised against that conclusion is the argument by Mr Collins that a requirement of broadly contemporaneous or recent arrival is to be read into the condition on the basis of *Rahman*. That argument, however, is not one that I would accept.

47. It is necessary to recall the questions that the court was answering in *Rahman* and the factual framework within which those questions arose. The relatives were living in Bangladesh at the time of their applications to join the EU citizen in the United Kingdom. Their applications were refused because it had not been shown that they had resided with that citizen in the same Member State before she came to the United Kingdom or that they continued to be dependent on her or were members of her household in the United Kingdom. The third and fourth questions (the answers to which are the basis for Mr Collins's argument) asked whether "it was necessary to have resided in the same State as [the EU citizen] and to have been a dependant of that citizen shortly before or at the time when the latter settled in the host Member State". The court held that the requirement of dependency in "the country from which they have come" did not refer to the country in which the EU citizen resided before settling in the host Member State, but to the country from which the family member came. When the court said that the situation of dependence must exist in that country "at the time when he applies to join the Union citizen on whom he

is dependent", it was adopting a formulation appropriate to the particular circumstances of the case (where the applications were made by persons outside the host Member State) rather than laying down a principle of universal applicability. The court cannot have intended to exclude from the scope of article 3(2) persons who had arrived in the host Member State before the EU citizen and before making their applications: that would have been contrary to the approach in *Metock*.

48. Thus, whilst *Rahman* establishes the need for a situation of dependence in the country from which the applicant comes, and a situation of dependence at the date of the application, it is not to be read as laying down a requirement that the dependency at the date of the application must be dependency in the country from which the applicant comes, such that a relative who has been dependent throughout cannot qualify if he arrives in the host Member State many months before the EU citizen and the making of the application.

49. Nor do I accept Mr Collins's submission that the exercise of EU rights of free movement and residence is incapable of being adversely affected by the position of dependent relatives who arrive in the host Member State many months before the EU citizen. The Upper Tribunal gave an example of a case where a EU citizen might be deterred from taking up employment in another Member State unless he could arrange for dependent relatives to arrive there well in advance (see [34] above). It plainly cannot be said that there would be an adverse effect in all cases or indeed in many cases; but equally plainly it cannot be said that there would never be an adverse effect. The *possibility* of an adverse effect is sufficient when one is considering whether a particular interpretation of the threshold condition in article 3(2) accords with the underlying policy of the Directive. If the threshold condition is met, the detailed circumstances of the particular case, including the importance or otherwise, for the EU citizen, of the dependent relative's presence in the host Member State, can be taken into account in the individual assessment and decision that follow.

50. Even if the interpretation of *Rahman* and article 3(2) put forward by Mr Collins were to be accepted, I would hesitate about reading a requirement of broadly contemporaneous or recent arrival into regulation 8. Article 3(2) defines the class of other family members whose entry and residence *must be* facilitated; it does not prevent a Member State from facilitating the entry and residence of other family members outside that class. Article 37 of the Directive provides in terms that the provisions of the Directive "shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive". It would therefore be compatible with the Directive to read regulation 8 in a way that was more favourable than article 3(2) to other family members, and the more restrictive reading could not be said to be necessary in order to achieve compatibility. As it is, however, I do not need to base my decision on that alternative analysis.

51. Accordingly, I am satisfied that the applicants all come within regulation 8, in particular regulation 8(2)(c), on its correct interpretation and that the Upper Tribunal was correct to rule as it did, albeit some of its reasons would have been expressed differently if the judgment in *Rahman* had been available to it.

52. It should be emphasised that a finding that an applicant comes within regulation 8 does not confer on him any substantive right to residence in the United Kingdom. Whether to grant a residence card is a matter for decision by the Secretary of State in the exercise of a broad discretion under regulation 17(4), subject to the procedural requirements in regulation 17(5). All this is underlined by the observations of the court in *Rahman* as to the nature of

the host Member State's obligations under article 3(2) of the Directive (see [29] above). In the present case, as the Upper Tribunal noted, the Secretary of State has yet to consider the applicants' cases pursuant to regulation 17(4) and (5). When she does so, she will have to decide whether in all the circumstances it appears appropriate to issue a residence card. Those circumstances will no doubt include the extent of the applicants' financial and emotional dependency on the sponsor (though the First-tier Tribunal's limited findings of fact in respect of financial dependency will be binding), the fact that the applicants were unlawfully in the United Kingdom for a substantial period of time before they made their applications, and any evidence as to the importance of the applicants' residence in the United Kingdom for the exercise of the sponsor's rights of free movement and residence. I have set out at [37] above the observations made by the Upper Tribunal on some of those matters.

Ihemedu (OFMs – meaning) Nigeria [2011] UKUT 00340(IAC)

Meaning of other family members/extended family members

16. The first matt matter to be addressed is whether the claimant has shown he is a cousin of the sponsor. Two observations are in order. One is that the respondent did not dispute that if the claimant was the sponsor's cousin that that was a qualifying relationship for the purposes of reg 8. That must be right. Article 3(2) of the Directive treats "Other Family Members" as a residual category and, in contrast to CFMs within the meaning of Article 2(2), does not limit it to particular types of relatives (plus spouses or civil partners). There is nothing in the 2006 Regulations akin to the Immigration Appeals (Family Visitor) Regulations 2003 which in our domestic immigration law seeks to specify exhaustively the categories of family relationship that can qualify a person. Recital 5 refers to the need for the position of OFMs to be examined with a view to the maintenance of "the unity of the family in a broader sense" and for such examination to consider "their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen", so clearly only relatives are covered, albeit with focus on those relatives with whom the Union citizen has significant factual ties. In this respect these provisions closely resemble those set out in the EU legislation in place prior to the coming into force of the Citizens Directive. Article 10(1) of Regulation No. 1612/68 accorded residence rights to close family members. Article 10(2) stated that "Member States shall facilitate the admission of any member of the family not coming within the provisions of para 1 if dependent on the worker referred to above or living under his roof in the country whence he comes." Regulation 8 of the 2006 Regulations is in similar but not identical terms. Whereas Article 3(2) differentiates between OFMs and partners in a durable relationship, reg 8 includes both within the definition of "extended family members". The European Casework Instructions (as updated May 2011) state that:

> "Regulation 8 of the 2006 Regulations covers extended family members (for example, brothers, sisters, aunts and cousins). It also covers direct family members (such as parents or children over the age 21) who have failed to provide evidence for financial dependencies."

This formulation does not seek to define the class of "extended family members" exhaustively. None of the leading textbooks consider that either the OFM or extended family member category is limited to only certain kinds of relatives or family members. It is noteworthy that in the instant case the Secretary of State accepted the sponsor's half-brother as an extended family member.

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Dependency and membership of the household

18. Like Article 3(2), reg 8 requires an OFM to demonstrate what I shall call prior connection with an EEA principal, i.e. connection either in the form of prior dependency on or prior membership of the household of the EEA national/Union citizen. As stated succinctly by the Tribunal in RK at para 16, "…OFMs must show dependency or membership of the household of the Union citizen "in the country of origin or the country from which they are arriving". It is to be observed that for CFMs there is also provision in Article 2(2) for dependents in the ascending or descending line who are over 21, but, unlike OFMs, they are not required to show prior dependency abroad, only current dependency: see Pedro [2009] EWCA Civ 1358. For CFMs there is no provision for household members or indeed for persons who have serious health difficulties.

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22. In light of what has been mentioned earlier in this determination it may assist to make three further observations.

Article 10(2)(e) of the Citizens Directive

23. The first concerns the contention in the Secretary of State's grounds that in order to show prior dependency a claimant must comply with the requirements of Article 10(2)(e) of the Citizens Directive, which requires a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen. That is indeed a requirement set out in Article 10, but it is not replicated in the 2006 Regulations. The latter merely require that a person prove it without specifying how. Whether that makes much practical difference is another matter. It is of course the case that where provisions of the EEA Regulations are more generous than the Directive, it is they, rather than those of the Directive which must be applied: see Article 37; but the Secretary of State makes clear in communications with applicants that documentary evidence is required.

Accompanying or joining and lawful presence

24. The second concerns Ms Isherwood's submission that the Claimant had to lose under the Regulations because he had failed to show he was accompanying or joining the sponsor as required by reg 8(2)(b) (see also reg 12(2)(b)) or that he was lawfully present in the United Kingdom. She pointed out that the evidence left unclear whether the claimant had arrived before or after the sponsor and so the claimant had not shown it was after.

25. On both these matters it will suffice to refer to the recent Tribunal decision in Aladeselu and Others (2006 Regs – reg 8) Nigeria [2011] UKUT 00253 (IAC) whose headnote states:

> "1. For the purposes of establishing whether a person qualifies as an Other Family Member (OFM)/extended family member under regulation 8 of the Immigration (European Economic Area) Regulations 2006, the requirement that they accompany or join the Union citizen/EEA national exercising Treaty rights must be read as encompassing both those who have arrived before and those who have arrived after the Union citizen/EEA national sponsor. "
> 2. The 2006 Regulations do not impose a requirement that an OFM/extended family member must be present in the United Kingdom lawfully.
> 3. But in the context of the exercise of regulation 17(4) discretion as to whether to issue a residence card, matters relating to how and when an OFM/extended family member arrives in a host Member State are not irrelevant."

26. Finally the IJ's statement at para 16 of this determination concerning dependency - "given that the[claimant] is in the United Kingdom illegally I accept that he does not and indeed cannot work here and therefore I further accept that he is dependent on the sponsor" - is questionable. Being in the UK illegally does not establish, without more, that a person does not as a matter of fact work and thereby

avoid dependency. In EU law, dependency is a question of fact: see Case C-316/85 Lebon [1987] ECR 2811, Case C-200/02 Chen [2005] QB 325and Case C-1/05 Jia [2007] QB 545. If there is a reason to consider that earnings from illegal employment would not count for the purposes of assessing whether a person is a dependent for the purposes of the Citizens Directive they have yet to be stated by the Court. Nevertheless, even if a claimant were considered unable to show dependency because of earnings from illegal employment he might still be able to qualify as a member of the household. As noted earlier the Tribunal in RK and other cases has made clear that the two categories, dependants and members of the household, are alternative categories.

Moneke (EEA – OFMs) Nigeria [2011] UKUT 00341(IAC)

Conclusions: place of dependency

40. We therefore conclude that for the time being, subject to future clarification by the higher courts, IJs should adopt the following approach:

    i. A person claiming to be an OFM may either be a dependant or a member of the household of the EEA national: they are alternative ways of qualifying as an OFM.

    ii. In either case the dependency or membership of the household must be on a person who is an EEA national at the material time. Thus dependency or membership of a household that preceded the sponsor becoming an EEA national would not be sufficient. It is necessary for the pre entry dependency to be on the EEA national and not a person who subsequently became an EEA national. Thus if a sponsor has been financially supporting OFMs who live abroad for many years before he became an EEA national, but there was no such support after the sponsor acquired EEA nationality, there would be no evidence of dependency on an EEA national.

    iii. By contrast with Article 2(2) family members, an OFM must show qualification as such not just since arrival in the United Kingdom but before arrival here and the application to join the EEA national who is resident here. The applicant must have been a dependent in the country from which they have come, that is to say their country of origin or other country from which they have arrived in the United Kingdom.

    iv. Membership of a household has the meaning set out in KG (Sri Lanka) and Bigia (above); that is to say it imports living for some period of time under the roof of a household that can be said to be that of the EEA national for a time when he or she had such nationality. That necessarily requires that whilst in possession of such nationality the family member has lived somewhere in the world in the same country as the EEA national, but not necessarily in an EEA state.

    v. By contrast the dependency on an EEA national can be dependency as a result of the material remittances sent by the EEA national to the family member, without the pair of them having lived in the same country at that time.

Conclusions: evidence of dependency

41. Nevertheless dependency is not the same as mere receipt of some financial assistance from the sponsor. As the Court of Appeal made plain in SM (India) (above) dependency means dependency in the sense used by the Court of Justice in the case of Lebon [1987] ECR 2811. For present purposes we accept that the definition of dependency is accurately captured by the current UKBA ECIs which read as follows at ch.5.12:

    > "In determining if a family member or extended family member is dependent (i.e. financially dependent) on the relevant EEA national for the purposes of the EEA Regulations:
    > Financial dependency should be interpreted as meaning that the person needs financial support from the EEA national or his/ her spouse/civil partner in order to meet his/her **essential needs** – not in order to have a certain level of income.

Provided a person would not be able to meet his/her essential living needs without the financial support of the EEA national, s/he should be considered dependent on that national. In those circumstances, it does not matter that the applicant may in addition receive financial support / income from other sources.

There is no need to determine the reasons for recourse to the financial support provided by the EEA national or to consider whether the applicant is able to support him/herself by taking up paid employment.

The person does not need to be living or have lived in an EEA state which the EEA national sponsor also lives or has lived."

42. We of course accept (and as the ECIs reflect) that dependency does not have to be "necessary" in the sense of the Immigration Rules, that is to say an able bodied person who chooses to rely for his essential needs on material support of the sponsor may be entitled to do so even if he could meet those needs from his or her economic activity: see SM (India). Nevertheless where, as in these cases, able bodied people of mature years claim to have always been dependent upon remittances from a sponsor, that may invite particular close scrutiny as to why this should be the case. We note further that Article 10(2)(e) of the Citizens Directive contemplates documentary evidence. Whether dependency can ever be proved by oral testimony alone is not something that we have to decide in this case, but Article 10(2)(e) does suggest that the responsibility is on the applicant to satisfy Secretary of State by cogent evidence that is in part documented and can be tested as to whether the level of material support, its duration and its impact upon the applicant combined together meet the material definition of dependency.

43. Where there is a dispute as to dependency (as there was in the present case) immigration judges should therefore carefully evaluate all the material to see whether the applicant has satisfied them of these matters.

Moneke (EEA – OFMs – assessment of evidence) Nigeria [2011] UKUT 00430 (IAC)

22 We have already explained in our previous decision why it is important that in OFM applications made in country, Immigration Judges should scrutinise with some care the existence of sufficient reliable information to satisfy them that the burden of proof of demonstrating eligibility has indeed been discharged. Such scrutiny is particularly important where the inference from the immigration history is that the appellants are prepared to mislead, and misrepresent their intentions to immigration officials.

23. In summary, there were substantial gaps in the evidence produced by the appellants despite the opportunity afforded to submit further material in the light of our previous decision. They produced no documentary evidence to support their claims: (i) to have been provided with financial support by their sponsor to meet their essential living needs when the sponsor was in Germany or before that in Nigeria; (ii) that they lived in the sponsor's household in Nigeria; (iii) that they were in apprenticeships with nil earnings in Nigeria; (iv) of the amount of material support they needed to meet their essential living needs. Their oral evidence was implausible as to material parts and flawed by inconsistencies. We conclude that both appellants misrepresented their intentions when seeking to enter as visitors.

24. We reach a different conclusion from the First-tier judge, because he gave no detailed consideration to the elements the appellants needed to demonstrate in order to qualify as dependents, and did not have the benefit of seeing the account of the witnesses tested as we have had. It was unfortunate and frankly unacceptable that there was no Presenting Officer at the First-tier hearing and there had been no submission of material to challenge the

appellants' account. Whatever other call on scarce resources there may be, it is of considerable importance that disputed applications are properly tested and opposed.

Dauhoo (EEA Regulations – reg 8(2)) [2012] UKUT 79 (IAC)

8. Reg 8 also includes within the definition of extended family members relatives on serious health grounds (reg 8(3)); dependent relatives who meet the requirements of the Immigration Rules (reg 8(4)); and partners in a durable relationship (reg 8(5)). But the focus here is on reg 8(2). As the Tribunal has emphasised in a number of cases, e.g. in RK (OFM – membership of household dependency) India [2010] UKUT 421 (IAC) and Moneke (EEA – OFMs) Nigeria [2011] UKUT 00341 (IAC) (at para 11(b)), the requirements of dependency and household membership as found within reg 8(2)(a) and within reg 8(2)(c) are alternates; they are not conjunctive. That is clear from the relevant wording of each: under reg 8(2)(a) a person must show he is "dependent upon or is a member of [the EEA national's] household". Under reg 8(2)(c) a person must show he "continues to be dependent upon…or to be a member of his household". So in the present case, even though rejecting that the appellant had shown present dependency, the FTT judge should have accepted that he had satisfied this provision by virtue of having shown present membership of the EEA principal's household.

9. However, it remains that in order to qualify as an extended family member/"other family member" under reg 8(2), a person who is in the UK must show that he meets the requirements of both reg 8(2)(a) and (c). He has to show a relevant connection with the EEA principal both: (a) prior to coming to the UK (the essence of reg 8(2)(a))(the "prior" test); and (b) now he is here in the UK (the essence of reg 8(2)(c)) (the "present" test).

10. It may help to clarify these requirements in the following way. Under the reg 8(2) scheme, a person can succeed in establishing that he or she is an "extended family member" in any one of four different ways, each of which requires proving a relevant connection both prior to arrival in the UK and in the UK:
v. prior dependency and present dependency
vi. prior membership of a household and present membership of a household
vii. prior dependency and present membership of a household;
viii. prior membership of a household and present dependency.

11. It is not necessary, therefore, to show prior and present connection in the same capacity: dependency- dependency or household membership-household membership, i.e. (i) or (ii) above. A person may also qualify if able to show (iii) or (iv).

12. Although the above scheme is consistent with case law, it is fair to consider one possible semantic objection to it. It might be said that the use of the present tense verb "continues" in reg 8(2)(c) denotes that a person can only meet the requirement to show present dependency if that is a "continued dependency" and, likewise, that a person can only meet the requirement to show present membership of an EEA national's household if that is a "continued membership". If that reading were correct, then permutations (iii) and (iv) above would be impermissible. However, such an interpretation cannot be correct. Leaving aside that if the drafters had intended the meaning of reg 8(2)(c) to be restricted in this way they would have said so, reg 8(2), being an attempt to transpose Article 3(2)(a) of Directive 2004/38/EC, must be construed purposively so as to be compatible as far as is possible with that provision. 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 members 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."

13. It is immediately apparent that there is nothing in the wording of Article 3(2)(a) that requires a person who, in the country from which they have come, was a dependant or a member of the household of a Union citizen to show they continue in the host Member state to be in precisely the same category. Further, to read in such a requirement would be contrary to the stated underlying purpose of facilitating the residence of such persons. It would exclude, for example, a sibling who abroad had been, although self-sufficient, a member of the EEA principal's household but who now wished, with the financial support of the EEA principal, to undertake studies living separately. An elderly aunt who had been a dependent abroad but who had now moved in to the EEA principal's household would be excluded simply if, for example, she was recently left enough in a will to make her self-sufficient financially. My conclusion is that under reg 8(2) there are four, not two, possible ways in which a person can qualify as an extended family member.

The EEA claim based on durable relationship

19.Turning to Mr Subramanian's challenge to the FTT judge's treatment of the appellant's claim to qualify by virtue of being in a durable relationship with an EEA partner under reg 8(5) (a separate subcategory of "extended family member"), again I discern no material error of law. It is true that the judge had accepted that the appellant's partner now lives in the same household as the appellant (para 72). I would also agree with Mr Subramanian that given that finding the judge was obliged to explain more fully why he nevertheless considered they were not in a durable relationship, particularly since being in a durable relationship does not even necessarily entail cohabitation: see YB (EEA reg 17(4) – proper approach) Ivory Coast [2008] UKAIT 00062 and Rose (Automatic deportation - Exception 3) Jamaica [2011] UKUT 276 (IAC) (at para 24).....

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21. Although Mr Subramanian did not raise the point, it is accepted by the Tribunal in reported decisions that despite the reference in UKBA European Casework Instructions to proof of a durable relationship requiring evidence that the relationship has lasted two years, the concept of a durable relationship is a term of EU law and as such it does not impose a fixed time period: see YB. Having said that, on the judge's findings the relationship had only been shown to exist, if at all, very recently and on the appellant's own evidence his partner was economically self sufficient. Mr Subramanian sensibly did not seek to argue that the appellant was entitled to succeed in showing that the relationship was durable if only a very recent relationship could be established. For the avoidance of doubt I would add that on the basis of the evidence before the FTT judge a durable relationship had not been established.

Reyes (EEA Regs: dependency) [2013] UKUT 314 (IAC)

1. The mere fact that a person is in the United Kingdom without lawful permission to work does not mean that he or she is to be considered as meeting the test of dependency under the Immigration (European Economic Area) Regulations 2006.

2. Whether a person qualifies as a dependent under the Regulations is to be determined at the date of decision on the basis of evidence produced to the respondent or, on appeal, the date of hearing on the basis of evidence produced to the tribunal.

Lim (EEA -dependency) [2013] UKUT 437 (IAC)

> Subject to there being no abuse of rights, the jurisprudence of the Court of Justice allows for dependency of choice. Whilst the jurisprudence has not to date dealt with dependency of choice in the form of choosing not to live off savings, it has expressly approved dependency of choice in the form of choosing not take up employment (see Centre Publique d'Aide Social de Courcelles v Lebon [1987] ECR 2811 ("Lebon") at [22]) and it may be very difficult to discern any principled basis for differentiating between the two different forms of dependency of choice when the test is a question of fact and the reasons why there is dependency are irrelevant.

Reyes v Migrationsverket CJEU C-423/12

To be regarded as a dependant of an EU citizen, a descendant who is over 21 years old and a third-country national, does not have to establish that he has tried all possible means to support himself

The Court therefore concludes that European Union law precludes a Member State from requiring a direct descendant, who is 21 years old or older, in order to be regarded as dependent and thus come within the definition of a 'family member' of an EU citizen, to show that he has tried unsuccessfully to obtain employment or to obtain subsistence support from the authorities of his country of origin and/or otherwise to support himself.

The Court adds that the situation of dependence must exist, in the country from which the family member concerned comes, at the time when he applies to join the EU citizen on whom he is dependent. The fact that a family member – due to personal circumstances such as age, education and health – is deemed to be well placed to obtain employment and in addition intends to start work in the Member State does not affect the interpretation of the requirement in that provision that he be a 'dependant'.

Issue of residence card

17. (1) The Secretary of State must issue a residence card to a person who is not an EEA national and is the family member of a qualified person or of an EEA national with a permanent right of residence under regulation 15 on application and production of—

(a)a valid passport; and

(b)proof that the applicant is such a family member.

(2) The Secretary of State must issue a residence card to a person who is not an EEA national but who is a family member who has retained the right of residence on application and production of—

(a)a valid passport; and

(b)proof that the applicant is a family member who has retained the right of residence.

(3) On receipt of an application under paragraph (1) or (2) and the documents that are required to accompany the application the Secretary of State shall immediately issue the applicant with a certificate of application for the residence card and the residence card shall be issued no later than six months after the date on which the application and documents are received.

(4) 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.

(5) 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.

(6) A residence card issued under this regulation may take the form of a stamp in the applicant's passport and shall be valid for—

(a)five years from the date of issue; or

(b)in the case of a residence card issued to the family member or extended family member of a qualified person, the envisaged period of residence in the United Kingdom of the qualified person,

whichever is the shorter.

(6A) A residence card issued under this regulation shall be entitled "Residence card of a family member of an EEA national" or "Residence card of a family member who has retained the right of residence", as the case may be.

(7) Omitted.

(8) But this regulation is subject to regulation 20(1) and (1A).

YB (EEA reg 17(4) - proper approach) Ivory Coast [2008] UKAIT 00062

1) Neither the Citizens Directive (2004/38/EC) nor regulation 17(4) of the Immigration (European Economic Area) Regulations 2006 confers on an "other family member" or "extended family member" of an EEA national exercising Treaty rights a right to a residence card; consistent with the Directive, reg 17(4) makes it discretionary.

2. In deciding whether to issue a residence card to an extended family member of an EEA national under reg 17(4) the decision-maker should adopt a three-stage approach so as to:

(a) first determine whether the person concerned qualifies as an extended family member under reg 8 (in this case, to determine whether the appellant was "in a durable relationship").

(b) next have regard, as rules of thumb only, to the criteria set out in comparable provisions of the Immigration Rules. To do so ensures the like treatment of extended family members of EEA and British nationals and so ensures compliance with the general principle of Community law prohibiting discrimination on the grounds of nationality. The foregoing means that for reg 17(4) purposes the comparable immigration rules cannot be used to define who are extended family members, but only to furnish rules of thumb as to what requirements they should normally be expected to meet. The fact that a person meets or does not meet the requirements of the relevant immigration rules cannot be treated as determinative of the question of whether a residence card should or should not be issued.

(c) ensure there has been an extensive examination of the personal circumstances of the applicant/appellant. It may be that in many cases such an examination will have been made in the course of assessing the applicant's position vis a vis the immigration rules. But in principle the third stage is distinct, since the duty imposed by the Directive to undertake "an extensive examination of the personal circumstances…" necessitates a balancing of the relevant factors counting for and against the issuing of such a card. It would be contrary to Community law principles to base refusal solely on the fact that a person is an overstayer who falls foul, for example of para 295D(i): see by analogy Case C-459/99 MRAX v Belgian State [2002] ECR I-6591).

3. Assessment of a person's individual circumstances done by reference to Article 8 of the ECHR, can form part (even a large part) of the requisite "extensive examination", since: what matters is that there is a balanced consideration in the round. But it must be related to the exercise of reg 17(4) discretion: see MO (reg 17(4) EEA Regs) Iraq [2008] UKAIT 00061. .

4. Regulation 17 is subject to the "public policy" proviso in reg 20(1): see reg 17(8). If (but only if) the respondent invokes reg 20(1) can that constitute a proper basis for refusing to issue a residence card, irrespective of the position under reg 17(4)

"Family member who has retained the right of residence"

10. (1) In these Regulations, "family member who has retained the right of residence" means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the conditions in this paragraph if—

(a)he was a family member of a qualified person or of an EEA national with a permanent right of residence when that person died;

(b)he resided in the United Kingdom in accordance with these Regulations for at least the year immediately before the death of the qualified person or the EEA national with a permanent right of residence; and

(c)he satisfies the condition in paragraph (6).

(3) A person satisfies the conditions in this paragraph if—

(a)he is the direct descendant of—

(i)a qualified personor an EEA national with a permanent right of residence who has died;

(ii)a person who ceased to be a qualified person on ceasing to reside in the United Kingdom; or

(iii)the person who was the spouse or civil partner of the qualified person or the EEA national with a permanent right of residence mentioned in sub-paragraph (i) when he died or is the spouse or civil partner of the person mentioned in sub-paragraph (ii); and

(b)he was attending an educational course in the United Kingdom immediately before the qualified person or the EEA national with a permanent right of residence died or ceased to be a qualified person and continues to attend such a course.

(4) A person satisfies the conditions in this paragraph if the person is the parent with actual custody of a child who satisfies the condition in paragraph (3).

(5) A person satisfies the conditions in this paragraph if—

(a)he ceased to be a family member of a qualified person or of an EEA national with a permanent right of residence on the termination of the marriage or civil partnership of that person;

(b)he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;

(c)he satisfies the condition in paragraph (6); and

(d)either—

(i)prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

(ii)the former spouse or civil partner of the qualified person has custody of a child of the qualified person or the EEA national with a permanent right of residence;

(iii)the former spouse or civil partner of the qualified person or the EEA national with a permanent right of residence has the right of access to a child of the qualified person or the EEA national with a permanent right of residence, where the child is under the age of 18 and where a court has ordered that such access must take place in the United Kingdom; or

(iv)the continued right of residence in the United Kingdom of the person is warranted by particularly difficult circumstances, such as he or another family member having been a victim of domestic violence while the marriage or civil partnership was subsisting.

(6) The condition in this paragraph is that the person—

(a)is not an EEA national but would, if he were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; or

(b)is the family member of a person who falls within paragraph (a).

(7) In this regulation, "educational course" means a course within the scope of Article 12 of Council Regulation (EEC) No. 1612/68 on freedom of movement for workers(**10**).

(8) A person with a permanent right of residence under regulation 15 shall not become a family member who has retained the right of residence on the death or departure from the United Kingdom of the qualified person or the EEA national with a permanent right of residence or the termination of the marriage or civil partnership, as the case may be, and a family member who has retained the right of residence shall cease to have that status on acquiring a permanent right of residence under regulation 15.

HS (EEA: revocation and retained rights) Syria [2011] UKUT 00165 (IAC)

Retained right of residence

33. Article 13 (1) of the Directive provides for the right of retained right of residence for family members who are nationals of a Member State in the event of divorce. Article 13 (2) applies to family members who are not nationals of a Member State, such as the appellant and the primary qualification route is subject to the fulfilment of conditions in the second sub-paragraph.

34. In this case, the primary qualifying condition is that set out in Article 13(2)(a):

> "prior to the initiation of the divorce…the marriage…has lasted three years, including one year in the host Member State".
> The summary of the facts in the introduction to this judgment demonstrates that this requirement was met. The parties were married in the UK in 2001 and divorce proceedings were commenced before October 2006 in the UK. There is no information to suggest that the wife left the UK at all during this time, although only lengthy or permanent absences would have an effect on the appellant's right of residence. The reference to marriage does not mean matrimonial cohabitation: (see the decision of the Court of Justice on the legislative predecessor of the right of residence for spouses in Diatta v Land Berlin [1985] ECR 567).

35. The second sub paragraph of Article 13 of the Directive provides:

> "Before acquiring the right of permanent residence, the right of residence of the person concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or……or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements……Such family members shall retain their right of residence exclusively on personal basis". (Our emphasis)

36. This language is quite compressed. Although it refers to "permanent residence" it must be discussing the retained right of residence rather than making an advance reference to the right of permanent residence addressed in Article 16 of the Directive. It may well be that the duration of what we shall call "indefinite residence" is permanent depending on the circumstances of its acquisition. Duration of Article 13 rights is, however, specifically addressed by Article 14, and entitlement to a permanent residence document on the basis of Article 13 (2) is considered in Article 18 (see paragraph [3] below).

37. When considering whether a retained right of residence exists the person concerned must be the spouse of a former spouse who exercised the relevant Treaty right. The overall sense of this seems to be that in the case of a family member seeking to acquire a retained right of residence, such a person must show that the EU national remains a worker etc at the time that the right of

residence is claimed to accrue (here the time of the divorce) and if so the family member (and in the case of death or divorce, former family members) has a personal right of retained residence.

38. Strictly, whether the wife was a worker is not the same as whether the wife was working at that time, as exemplified by Article 7 (3) of the Directive which provides that the status of a worker is retained if any temporary inability to work was through illness, accident, involuntary employment or relevant vocational training. This is not a relevant consideration in the present case, but it demonstrates the dangers of drawing inferences from gaps in wage slips alone.

39. Regulation 10 (5) and (6) of the EEA Regulations 2006 transposes these provisions into national law. It requires an applicant who has divorced to satisfy 10 (5)(a), (b), (c) and (d). Two of these provisions require particular attention:
    a. Regulation 10(5)(b) requires the applicant to show "he was residing in the United Kingdom in accordance with these Regulations at the date of termination". In simple terms this means that at the date of the termination of the marriage he was residing in the UK as the spouse of an EU national who was working at that date. This correctly identifies the focus as being on the spouse's status as a worker at the date of the divorce.
    b. Regulation 10(5) (c) requires the applicant to satisfy regulation 10(6). Regulation 10(6) imposes two conditions either one of which should be met: the 10(6)(a) requirement is that the non EEA national would be a worker, self employed or a self sufficient person if he were an EEA national. The alternative requirement is 10(6)(b) that the person is the family member of a person within paragraph (a).

40. If construed literally regulation 10(6) may give rise to problems. On divorce, a person ceases to be a family member by reason of marriage. That does not cause the right of residence to cease however as regulation 10(5)(a) makes plain. Family member with a retained right of residence in regulation 10 and regulation 14 (3) must be a term of art and mean a person who comes within regulation 10(2) to (5). Further a non EEA family member does not have to be economically active during the marriage and nor is there any indication in Article 13 of the Directive that they have to be economically active on their own account on termination of the marriage.

41. In Article 13 second paragraph of the Directive the reference to "the person concerned" is to the EEA national whose exercise of Treaty rights gives rise to a right of residence of the former family member and not the family members themselves. It is doubtful whether regulation 10 (6) adds to regulation 10 (5)(b) as we have construed it, as it is sufficient to be the former family member of a person who was working at the time of the divorce.

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<u>Permanent residence</u>

48. Article 16 (1) affords the right of permanent residence, not subject to the conditions of Article 14, to Union citizens who legally resided in the host Member State for a continuous period of five years. Thus if the appellant's wife had resided in accordance with EU law for five years as a worker she would be entitled to permanent residence

49. A similar right is afforded under Article 16(2) to non-national family members who have legally resided with the Union citizen in the host Member State for a continuous period of five years.

50. It can be noted that the words "resided with" do not apply to spouses who are nationals of an EU state in Article 16(1). In the case of PM (EEA spouse-residing with-Turkey) [2011] UKUT 89 IAC the Tribunal concluded that the term in both the Directive and the EEA Regulations meant residing in the same country as rather than cohabitating as spouses. Thus for both the retained right of residence and the acquisition of the permanent right of residence proof of cohabitation is not strictly necessary. It may be a relevant question to ask to rebut any suggestion of marriage of convenience or that the spouse has permanently left the United Kingdom but neither issue is raised in the present case. As long as both parties remain in the UK, and remain married, and the EEA spouse is exercising Treaty rights the non EA spouse obtains a right of residence.

51. Here the parties were married in February 2001. Both were in the United Kingdom for the next five years. The Home Office were satisfied that the wife was exercising Treaty rights by economic activity in 2002 and 2007 and issued residence permits to that effect. On the documents he produced he could not show that the wife had worked continuously for five years, although it may be in a small family business no or limited wages were paid out in the early years. There would appear to be a case that before the date of the divorce the appellant had already acquired a right of permanent residence under this route

52. Article 18 of the Directive provides that:

> "Without prejudice to Article 17, the family members of a Union citizen to whom Articles 12 (2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State"

53.This provides an alternative route for the appellant to acquire permanent residence. It is accurately reflected in regulation 15(f) of the 2006 Regulations and requires the appellant to have resided for five years in accordance with these regulations and was "at the end of that period a family member who has retained the right of residence". "Family member" here must mean former family member as you cease to be a family member if your spouse dies or divorces you. Residence in accordance with these Regulations contemplates residence acquired under any of the rights recognised by the regulations and there is no need to have resided a continuous period of five years in only one category, either as a spouse or a former spouse.

54. Thus if it could not be shown that the appellant's spouse had continually worked for five years during the marriage, the appellant would appear to qualify for permanent residence in his own right if he had the retained right of residence on divorce and nothing has happened to deprive him of it.

Derivative right of residence

15A. (1) A person ("P") who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.
(2) P satisfies the criteria in this paragraph if—
(a)P is the primary carer of an EEA national ("the relevant EEA national"); and
(b)the relevant EEA national—
(i)is under the age of 18;
(ii)is residing in the United Kingdom as a self-sufficient person; and
(iii)would be unable to remain in the United Kingdom if P were required to leave.
(3) P satisfies the criteria in this paragraph if—
(a)P is the child of an EEA national ("the EEA national parent");

(b)P resided in the United Kingdom at a time when the EEA national parent was residing in the United Kingdom as a worker; and
(c)P is in education in the United Kingdom and was in education there at a time when the EEA national parent was in the United Kingdom.
(4) P satisfies the criteria in this paragraph if—
(a)P is the primary carer of a person meeting the criteria in paragraph (3) ("the relevant person"); and
(b)the relevant person would be unable to continue to be educated in the United Kingdom if P were required to leave.
(4A) P satisfies the criteria in this paragraph if—
(a)P is the primary carer of a British citizen ("the relevant British citizen");
(b)the relevant British citizen is residing in the United Kingdom; and
(c)the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave.
(5) P satisfies the criteria in this paragraph if—
(a)P is under the age of 18;
(b)P's primary carer is entitled to a derivative right to reside in the United Kingdom by virtue of paragraph (2) or (4);
(c)P does not have leave to enter, or remain in, the United Kingdom; and
(d)requiring P to leave the United Kingdom would prevent P's primary carer from residing in the United Kingdom.
(6) For the purpose of this regulation—
(a)"education" excludes nursery education;
(b)"worker" does not include a jobseeker or a person who falls to be regarded as a worker by virtue of regulation 6(2); and
(c)"an exempt person" is a person—
(i)who has a right to reside in the United Kingdom as a result of any other provision of these Regulations;
(ii)who has a right of abode in the United Kingdom by virtue of section 2 of the 1971 Act;
(iii)to whom section 8 of the 1971 Act, or any order made under subsection (2) of that provision, applies; or
(iv)who has indefinite leave to enter or remain in the United Kingdom.
(7) P is to be regarded as a "primary carer" of another person if
(a)P is a direct relative or a legal guardian of that person; and
(b)P—
(i)is the person who has primary responsibility for that person's care; or
(ii)shares equally the responsibility for that person's care with one other person who is not an exempt person.
(7A) Where P is to be regarded as a primary carer of another person by virtue of paragraph (7)(b)(ii) the criteria in paragraphs (2)(b)(iii), (4)(b) and (4A)(c) shall be considered on the basis that both P and the person with whom care responsibility is shared would be required to leave the United Kingdom.
(7B) Paragraph (7A) does not apply if the person with whom care responsibility is shared acquired a derivative right to reside in the United Kingdom as a result of this regulation prior to P assuming equal care responsibility.
(8) P will not be regarded as having responsibility for a person's care for the purpose of paragraph (7) on the sole basis of a financial contribution towards that person's care.
(9) A person who otherwise satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) will not be entitled to a derivative right to reside in the United Kingdom where the Secretary of State or an immigration officer has made a decision under regulation 19(3)(b), 20(1), 20A(1) or 23A.

Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs) [2013] UKUT 00089 (IAC)

1. The spouse of an EEA national/Union citizen does not acquire a retained right of residence upon divorce unless the EEA national was in the United Kingdom and exercising Treaty rights at the date of the lawful termination of the marriage: Amos [2011] EWCA Civ 552 followed.

2. The principles established by the Court of Justice in Zambrano Case C-34-/09 [2011] ECR 1-000 and subsequent cases dealing with Article 20 of the Treaty on the Functioning of the European Union (TFEU) have potential application even where the EEA national/Union citizen child of a third-country national is not a national of the host Member State: the test in all cases is whether the adverse decision would require the child to leave the territory of the Union.

3. Notwithstanding inability to satisfy new regulation 15A(3)(c) of the Immigration (European Economic Area) Regulations 2006 as amended with effect from 16 July 2012, the parent of child of an EEA national who has been employed in the UK when the child was also residing here can have a derived right of residence under Article 12 of Regulation 1612/68 (now Article 10 of Regulation No 492/2011) even though the EEA national parent is no longer a worker in the UK at the time the child commences education: see Case C-480/08 Teixiera [2010] EUECJ, 23 February 2010.

Bee and another (permanent/derived rights of residence) [2013] UKUT 83 (IAC)

A non-EU citizen, who is residing in the United Kingdom by reason of a derived right of residence (eg as the primary carer of an EU citizen child), cannot thereby acquire a permanent right of residence in this country.