Neutral Citation Number: [2023] EWCA Civ 414

Case No: CA-2022-000321

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER
Upper Tribunal Judge Sheridan
EA/05694/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 April 2023

Before:

LORD JUSTICE STUART-SMITH
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE WARBY

- -

Between:

GAFRI QUDARI BALOGUN	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Zainul Jafferji and Huzefa Broachwalla (instructed by **Primus Solicitors**) for the **Appellant**
Julia Smyth (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date: 14 March 2023

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Approved Judgment

This judgment was handed down remotely at 11.00am on 19 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. This case concerns rights to reside in the United Kingdom which were conferred by EU law and in particular by Directive 2004/38/EC ('the Directive') before 31 December 2020. Specifically, it concerns the impact of divorce and of imprisonment on the rights conferred by EU law on the member of the family of a national of an EU member state (for convenience, 'an EU national') who is, himself, not a national of an EU member state (for convenience, 'a third country national').

2. The Appellant ('A') appeals against a determination of the Upper Tribunal (Immigration and Asylum) Chamber ('the UT') promulgated on 6 January 2022. The UT allowed an appeal by the Secretary of State from a determination of the First-tier Tribunal (Asylum and Immigration Chamber) ('the F-tT') promulgated on 6 April 2021. The F-tT had allowed A's appeal from a decision of the Secretary of State dated 19 April 2016 to revoke A's EEA residence card ('decision 1').

3. Paragraph references are to the determinations of the F-tT or of the UT, as the case may be, or if I am referring to an authority, to that authority.

4. On this appeal, A was represented by Mr Jafferji and Mr Broachwalla. The Secretary of State was represented by Ms Smyth. I thank counsel for their written and oral submissions.

5. I gave A permission to appeal on the papers. Mr Jafferji indicated in his oral submissions that, in the light of the grant of permission to appeal, A had two grounds of appeal.
    i. The UT erred in law in holding that the critical date for the purposes of A's rights in EU law was the date of the divorce decree. It should have held that the critical date was the date when the divorce proceedings were started.
    ii. The UT erred in law in holding that A lost his rights in EU law when he was imprisoned.

6. The Secretary of State applied, out of time, to rely on a Respondent's Notice ('RN'). The RN reflected arguments on which the Secretary of State had relied in the F-tT and in the UT, but which, the Secretary of State says, the UT did not consider. The Secretary of State relied on two arguments.
    i. Even if the decisive date for the purposes of A's rights in EU law was the date when divorce proceedings were initiated (which the Secretary of State does not accept), A did not satisfy the relevant conditions imposed by EU law because he was not a worker while he was in prison. The UT erred in law in holding that A could rely on *Orfanopoulos v Land Baden Württemberg* (C-482/01) [2005] CMLR 433.
    ii. Any right to reside which A might have had before he was imprisoned could not revive on his release.

7. For the reasons I give in this judgment, I have reached five conclusions.

i. A had to show that he met the conditions of article 7.2 of the Directive immediately before the divorce was finalised.
ii. A ceased to meet the conditions of article 7.2 of the Directive when he was imprisoned, before the divorce was finalised.
iii. A therefore lost the protection of article 7.2 of the Directive when he was imprisoned.
iv. By the time the divorce was finalised, A had no rights which article 13.2 of the Directive could preserve.
v. The UT's approach to the appeal was wrong in law, but the arguments in the RN enable this Court nevertheless to uphold the UT's determination on different grounds and to dismiss A's appeal.

The facts

8. A is a citizen of Nigeria. In 2009 he married a French citizen, Y, in Ghana. In the tax year 2010-2011, she began working in the United Kingdom. On 13 June 2011 A was issued an EEA residence card which was valid until June 2016. On 20 January 2014 divorce proceedings were initiated. It is not clear from the determinations who initiated the divorce, but the application for permission to appeal to this Court suggested that it was A. The marriage between A and Y ended on 6 March 2015 (the date of the decree absolute).

9. A had convictions in 2009 and 2011 for offences of dishonesty. On 7 February 2014, he was convicted of conspiracy to defraud. On 29 April 2014, A was sentenced to 27 months' imprisonment, and duly imprisoned. The F-tT found as a fact that A worked, and was also self-employed, before he was imprisoned, and that he worked up to the date of his imprisonment (paragraph 14(i)).

10. At some point between 1 August 2014 and March 2015, Y left the United Kingdom and so ceased to exercise Treaty rights here. Neither the F-tT nor the UT made a finding about the exact date when Y left. The Secretary of State nevertheless submits on this appeal that it is clear from documentary and other evidence before the F-tT that she did so after the initiation of the divorce proceedings and after A's imprisonment. The Secretary of State relies on a witness statement from HMRC, which was in A's bundle of documents for the F-tT hearing, and which the Secretary of State had served on A in accordance with the F-tT's directions. That statement showed that Y had been working for London City Cleaning between 6 May 2014 and 1 August 2014 (that is, after the commencement of the divorce proceedings and after A's imprisonment). Documents also showed that Y was self-employed during the 2013-2014 tax year. The relevant passages in Y's witness statement tallied with that information.

11. On 29 May 2014, A was served with a decision to make a deportation order under the Immigration (European Economic Area) Regulations 2006 ('the 2006 Regulations'). A responded to that decision. The Secretary of State decided to deport him. The Secretary of State made a deportation order on 13 November 2014.

12. A was released on 13 June 2015, on immigration bail. His bail conditions at all relevant times prevented him from working, as the F-tT found (paragraph 14(ii)). The

F-tT also found as a fact that A 'has not actually worked or been jobseeking, since being released from prison' (paragraph 13(iv)).

13. The Secretary of State revoked the EEA deportation decision on 20 April 2016, the day after decision 1. On 11 June 2017 the Secretary of State made a decision to deport A under section 32 of the UK Borders Act 2007. The Secretary of State refused A's human rights claim on 12 June 2017 ('decision 2'). A also appealed against decision 2. His appeal to the F-tT against decision 2 has been stayed pending the outcome of this appeal.

The determination of the F-tT

14. A was represented by counsel at the F-tT hearing.

15. Paragraph 3 records that there were five pages of reasons for decision 1. Decision 1 is in the supplementary bundle for this appeal, but the reasons for it are not. The Secretary of State accepted that Y was exercising Treaty rights in the United Kingdom from the 2010-11 tax year until the 2013-14 tax year. It appears that the Secretary of State's position in those reasons was that A was not a family member with a retained right of residence because he had not provided evidence that, at the date of the divorce, when he was in prison, he was a worker, self-employed person or self-sufficient. The Secretary of State had also decided to cancel the residence card on grounds of public policy and on the ground that A had abused his rights, in the light of his criminal convictions in 2009, 2011 and 2014 (paragraph 4). The Secretary of State had the burden of proof on the justification for revoking the residence card (paragraph 7).

16. In paragraph 5, the F-tT recorded A's case. He was a 'worker' until he went to prison, and had 'worker status' throughout his time in prison. He still had 'worker status' on his release from prison, or, if not, he was a jobseeker. He therefore had a retained right of residence.

17. The F-tT summarised the relevant parts of the EEA Regulations. The F-tT again summarised A's case. It referred (in substance) to regulation 6(2A) of the 2006 Regulations. It rejected the Secretary of State's argument that six months was the longest time during which a person could continue to be regarded as a worker when he was not, in fact, working. The F-tT held that regulation 6(2A) only limits reliance on regulation 6(2)(ba) and does not apply generally. A did not rely on regulation 6(2)(ba).

18. In paragraphs 18-22 the F-tT considered the authorities. It noted that *Orfanopoulos* (see paragraph 61, below) was decided before the Directive came into force, and that it considered article 39(3) of the EC Treaty and article 9(1) of Council Directive 64/221 EC. The F-tT quoted paragraphs 49-51. A relied on paragraph 50 to say that he was a worker throughout his imprisonment, and that the terms of his immigration bail meant that a 'reasonable time' after his release had not yet expired (paragraph 19).

19. The antiquity of *Orfanopoulos* was not a reason for ignoring or distinguishing it. It had been treated as good law, in, for example, *Carvalho v Secretary of State for the Home Department* [2010] EWCA Civ 1406. *Onuekwere* (see paragraph 70, below)

dealt specifically with the acquisition of the right of permanent residence. In paragraph 26 of his Opinion, the Advocate General had distinguished *Onuekwere* on the ground that *Orfanopoulos* dealt with a different point: that is, the retention of worker status for the purposes of maintaining a right of residence. For that reason, the F-tT held that *Onuekwere* was not decisive. The Advocate General in *Onuekwere* was answering a different question from the question in this appeal (paragraph 20).

20. Paragraph 50 of *Orfanopoulos* was 'rather opaque'. It has been interpreted in several authorities (paragraph 48(ii) of *Jarusevicius (EEA Regulation 21 - effect of imprisonment)* [2012] UKUT 00120 and paragraph 8 of *J v Secretary of State for Work and Pensions* [2019] UKUT 135 (AAC)) as meaning that a person retains worker status while he is in prison, provided that he gets another job within a reasonable time of release. The F-tT was satisfied that this was the law (paragraph 20).

21. The F-tT distinguished *Carvalho*. The issue in that case was whether time in prison could count towards the qualification period for the right of permanent residence, and *Orfanopoulos* had been distinguished by this Court precisely because Mr Orfanopoulos had not been 'in the process of acquiring further rights'. Similarly, in this case, A was not arguing that the period in prison should count towards any qualifying period for the right of permanent residence.

22. The appellant in *OA v (Prisoner - not a qualified worker) Nigeria* [2006] UKAIT 00066 had not worked right up until the point of imprisonment. As he did not have worker status before his imprisonment, it was not surprising that he did not maintain it during his imprisonment. Paragraph 32 of that decision was not an intentional departure from paragraph 50 of *Orfanopoulos*.

23. The F-tT then considered how the phrase 'reasonable time' should be understood. The F-tT was not referred to any relevant authority. A continued to be a worker when he was on conditional immigration bail, either because he should not be treated as having been released from his sentence of imprisonment, or because the 'reasonable time' cannot expire until A is again permitted lawfully to work (paragraph 23).

24. In paragraph 24, the F-tT recorded that the reasons for decision 1 stated that the Secretary of State was not satisfied that Y had been exercising Treaty rights at the relevant time, but that the Secretary of State 'confirmed that this matter was now resolved in relation to this appeal and that regulation 10(6) is the only part of regulation 10 that is still in dispute on this appeal'.

25. The F-tT concluded that A was 'a "worker", within the meaning of paragraph 50 of *Orfanopoulos*, from when he went to prison in April 2015 until, at least, 12 June 2017 (the date of the decision refusing his human rights claim)'. It found that [A] was a 'family member who has retained the right of residence' pursuant to EEA Regulation 10(5) from the date of his divorce, until, at the least, 12 June 2017 (also paragraph 24).

The Secretary of State's grounds of appeal

26. The Secretary of State appealed to the UT (with the permission of the F-tT) on three grounds. Only two are relevant now.
    i. Before his divorce, A was only a family member who happened to be working. He was not a worker under regulation 6, but derived his rights from regulation 7. He could not, therefore, benefit from *Orfanopoulos*. Orfanopoulos was an EEA national in the pre-Directive regime, and the appellants in *Carvalho* were Portuguese and Dutch. They were direct not derivative beneficiaries. A did not have worker status on his imprisonment or on the date of his divorce.
    ii. The F-tT was wrong to distinguish *Carvalho* and *OA*. *Onuekwere* concerns the acquisition of permanent residence by a family member and rules out time in prison 'as being relevant'. It applies to this appeal.

The determination of the UT

27. A was represented by (the same) counsel at the UT hearing. The UT said that Y had left the United Kingdom 'at some point between the divorce being initiated and the divorce being finalised' (paragraph 7). In paragraph 10, the UT summarised the reasons for decision 1: A did not have a retained right of residence under regulation 10(5) because (a) he had not, as required by regulation 10(5)(ii), provided evidence to show that Y was a qualified person when they divorced, and (b) he had not provided evidence that he had been a worker since the divorce, or otherwise met the requirements of regulation 10(6).

28. In paragraphs 15-19, the UT summarised the determination of the F-tT. The UT noted that the only issue in dispute had been whether A satisfied regulation 10(5), which, in turn, required him to satisfy regulation 10(6)). The UT summarised the grounds of appeal in paragraphs 20-23.

29. The UT quoted paragraphs 49-51 of *Orfanopoulos* (see paragraph 61, below) in paragraph 24, and paragraph 22 of *Dogan* (see paragraph 68, below), in paragraph 25. The UT said that those cases 'establish that an EEA national "worker" will not lose the status of being a worker upon being imprisoned, even for a lengthy period of time, as long as two conditions are met'.
    i. The EEA national must have been a worker before he was imprisoned.
    ii. He must resume work within a reasonable time after his release from prison.

30. The Secretary of State had not challenged the F-tT's conclusion that the second condition was met. It was 'plainly correct' (paragraph 27). The F-tT had not addressed the first condition 'explicitly', but it was clear that the F-tT had found that A was a worker before his imprisonment because he was working. It was 'not as straightforward as this'. It was necessary to consider A's status under the 2006 Regulations before he was imprisoned (paragraph 28).

31. A was 'not a worker under [the 2006 Regulations] because only an EEA national can have that status'. He only needed to show that, before he was imprisoned, 'he was the equivalent of a worker, as regulation 10(6) is satisfied if a non-EEA national would be a worker if he were an EEA national'. The UT used the shorthand 'reg. 10(6) worker'

to describe that status. The question, therefore, was whether A was a 'reg. 10(6) worker' before he was imprisoned (paragraph 29).

32. When A was imprisoned, the divorce proceedings had started, but had not been finalised. At that time, A was, and his entitlement to work derived from being, a family member. He was not, and could not be, a 'reg. 10(6) worker' because that status could not begin until the decree absolute in March 2015. The UT relied on paragraphs 29-35 of *Gauswami (retained right of residence: jobseekers) India* [2018] UKUT 00275 (IAC) (paragraph 30).

33. In paragraph 31, the UT recorded an argument by A's counsel which seems to have been put forward for the first time in the UT. He argued, relying on *Singh* (see paragraph 71, below), that the date for assessing whether regulation 10(6) is satisfied is the date when divorce proceedings started, not the date of the decree absolute. He was working on the first date, but not on the second. The UT said that this argument failed to recognise the distinction, explained in *Baigazieva v Secretary of State for the Home Department* [2018] EWCA Civ 1088, between the point at which status as a family member and the right under regulation 10 begins (the date of the decree absolute) and the criteria which must be met for the right of residence to be retained, which 'can be satisfied by conduct and occurrences prior to the decree absolute' (paragraph 31).

34. Before he was imprisoned A was a family member of an EEA national under regulation 7, and his entitlement to work came from that. He was not a 'reg. 10(6) worker'. The earliest date on which he could become a 'reg. 10(6) worker' was the date of the divorce. But by that time, he was in prison, and not working. As he was not a 'reg. 10(6) worker' before he was imprisoned, he could not carry that status forward into his imprisonment. The earliest he could become a 'reg. 10(6) worker' was after the decree absolute; but he was in prison by then. He did not, and could not, satisfy the requirements of regulation 10(6) (paragraph 32).

The law

Directive 2004/38/EC

35. The Directive provides, for EU nationals and members of their families, rights of movement between, and residence in, member states of which they are not nationals. Recital 1 refers to the 'primary and individual right to move and reside freely within the territory' of member states which EU nationals have, subject to limitations in the Treaty. Free movement is a 'fundamental freedom of the internal market' (recital 2). Recital 3 refers to the necessity to 'codify and review' existing EU instruments which deal with distinct categories of people in order to 'simplify and strengthen the right of free movement and residence' (and see recital 4). Free movement should be granted to the members of EU citizens' families 'irrespective of their nationality' (recital 5).

36. Recitals 9 and 10 refer to an initial right of residence for three months without any formalities, to be followed by a period during which residence is subject to conditions, 'without prejudice to a more favourable treatment applicable to job-seekers recognised by the caselaw of the Court of Justice'. 'The fundamental and personal right of residence' in another member state 'is conferred directly on' EU nationals 'by the Treaty and is not dependent on their having fulfilled administrative

procedures' (recital 11). A requirement to have a residence card should be limited to members of an EU national's family who are third country nationals (recital 13). If the EU national dies, or there is a divorce, members of families should be 'legally safeguarded'. With various qualifications, members of a family who are then living in the territory of the 'host' member state should 'retain their right of residence exclusively on a personal basis' (recital 15). Recital 17 refers to a right of permanent residence for EU nationals and members of their families who have lived in the host member state in accordance with the conditions in the Directive for a continuous period of five years.

37. Article 2.2.a defines 'family member' as including 'spouse'. Article 2.3 defines 'host member state' as the member state to which an EU national moves in order to exercise his/her right of free movement and residence. Article 3 is headed 'Beneficiaries'. The Directive applies to all EU nationals 'who move to or reside in' a member state 'other than that of which they are a national, and to their family members …who accompany or join them'.

38. Chapter III is headed 'Right of Residence'. Article 6.1 provides for an initial right of residence in the host state for EU nationals for up to three months without conditions or formalities. Family members who are third country nationals, who have a valid passport and who accompany or join such EU nationals also have that right (article 6.2).

39. Article 7.1 provides that EU nationals continue to have a right of residence for longer than three months if they are a worker or self-employed person in the host member state, or, in short, can support themselves, or are EU nationals who are family members of a person who satisfies the conditions in article 7.1. Article 7.2 provides that that right of residence extends to third country national members of the family of an EU national 'accompanying or joining' the EU national in the host member state, provided that the EU national satisfies the conditions in article 7.1.

40. Article 7.3 makes express provision for four specified circumstances in which an EU national who 'is no longer a worker or self-employed person shall retain the status of worker or self-employed person for the purposes of' article 7.1.a. They are a temporary inability to work through illness or accident, being 'in duly recorded involuntary unemployment' in the circumstances described in article 7.3.b and c, and embarking on vocational training. Article 7.3 does not apply in terms to a third country national.

41. Article 12 is headed 'Retention of the right of residence by family members in the event of death or departure' of the EU national. Article 12.1 deals with the position of EU nationals who are family members of an EU national if he dies, or leaves the host member state.

42. By contrast with article 12.1, article 12.2 provides no protection for third country nationals if the EU citizen leaves the host member state, unless the third country national has actual custody of the EU national's children (article 12.3). Article 12.2 provides that

> *'2. Without prejudice to the second subparagraph, the Union citizen's death shall not entail loss of the right of residence of his/her family members who are*

> *not nationals of a Member State and who have been residing in the host Member State as family members for at least one year before the Union citizen's death.*
>
> *Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. 'Sufficient resources' shall be as defined in Article 8(4).*
>
> *Such family members shall retain their right of residence exclusively on a personal basis'.*

43. Article 13 is headed 'Retention of the right of residence by family members in the event of divorce…' Article 13.1 deals with the effect of divorce on the rights of residence of EU nationals. Paragraph 13.2 provides:

> *'Without prejudice to the second subparagraph, divorce…shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:*
>
> > *a. prior to initiation of the divorce…proceedings, the marriage …has lasted at least three years, including one year in the host Member State; or*
> >
> > *b. by agreement between the spouses …or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or*
> >
> > *c. this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or*
> >
> > *d. by agreement between the spouses …or by court order, the spouse … who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required…*
>
> *Such family members shall retain their right of residence exclusively on personal basis.'*

44. The second sub-paragraph of article 13.2 is in the same terms as the second sub-paragraph of article 12.2 (see paragraph 42, above).

45. Article 14 is headed 'Retention of the right of residence'. Article 14.2 provides that EU nationals and their family members are to have the right of residence provided for in articles 7, 12 and 13 'as long as they meet the conditions' set out in those articles. Article 14.3 and 14.4 deal with expulsion measures and are not relevant to this appeal.

46. Chapter IV is headed 'Right of Permanent Residence'. Article 16.1 gives such a right to EU nationals who have 'resided legally' and continuously for five years in the host member state. That right is not subject to the conditions in Chapter III. By paragraph 16.2, article 16.1 also applies to family members who are third country nationals and who have 'legally resided' with the EU national in the host member state continuously for five years. Article 17.1 provides for several exemptions from the five-year requirement. Paragraph 2 also provides that 'periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness or accident shall be regarded as periods of employment'. By article 18, without prejudice to article 17, the family members of an EU citizen to whom articles 12.2 and 13.2 apply and who satisfy the conditions in those provisions, acquire the right of permanent residence after 'residing legally' for five consecutive years in the host member state.

47. Article 23 gives third country nationals who are family members of EU nationals who have the right to live or to work in a member state the right to take up employment or self-employment there.

48. Chapter VI contains restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health, including general principles (article 27), protection against expulsion (article 28), provision about restrictions on movement for public health reasons (article 29) and procedural provisions (articles 30-33). They are not relevant to this appeal.

The 2006 Regulations

49. The Directive was, at the material time, transposed by the 2006 Regulations. Regulation 2 defines an 'EEA decision' as including a decision about a person's right not to have a residence card revoked.

50. Regulation 6(1) of the 2006 Regulations defines 'qualified person' as a person who is an EEA national (which includes an EU citizen) and is in the United Kingdom as a job-seeker, a worker, a self-employed person, a self-sufficient person or a student. By regulation 6(2), a person who is no longer working shall not cease to be treated as a worker for the purposes of regulation 6(1)(b) in circumstances which largely mirror the provisions of articles 7.3 and 17.1 (see paragraphs 40 and 46, above).

51. Regulation 7 defines 'family member'. The definition includes a spouse (article 7(1)(a).

52. Regulation 10 is headed 'Family member who has retained the right of residence'. Regulation 10(1) defines such a person as a person who satisfies the conditions in any of regulation 10(2)-(5) inclusive. The condition in regulation 10(5) is that the person ceased to be a family member of a qualified person on the 'termination of the marriage of that person', and was 'residing in the United Kingdom in accordance with these Regulations at the date of that termination', and he satisfies the condition in regulation 10(6), and one of four conditions (which mirror article 13.2 a-d inclusive of the Directive: see paragraph 43, above). The condition in regulation 10(6) is that the person is not an EEA national, but 'would, if he were an EEA national, be a worker… under regulation 6'.

53. Regulation 14 is headed 'Retained right of residence'. Article 14(1) provides that a person is entitled to reside in the United Kingdom for as long as he is a qualified person. Regulation 14(3) provides that a family member who has the retained right of residence is entitled to reside in the United Kingdom for as long as he is a family member who has a retained right of residence.

54. Regulation 26(1) gives a person a right of appeal against an EEA decision, subject to the production of relevant documents and or evidence. In most cases, including this one, the appeal is to the F-tT (regulation 26(6)).

Some of the authorities

Nazli

55. *Nazli v Stadt Nürnberg* (C-340/97) was a case, not about EU nationals, but about the EU's Association Agreement with Turkey ('the AA'). Article 6.1 of the AA conferred various rights on a '…Turkish worker duly registered as belonging to the labour force of a [member state]'. By article 6.2, 'The procedures for applying paragraph…1… shall be those established under national rules'.

56. The applicant worked in Germany between 1979 and 1989. After that, he was given a permanent and unconditional work permit. He was ill or unemployed intermittently after that, but always found a new job. In 1992 he was implicated in a drug trafficking case. He was detained pending trial for just over a year. In 1994 he was convicted and sentenced to suspended term of imprisonment of 21 months. He had found work immediately on his release. He applied for an extension of his residence permit in 1994. The authorities refused that application and ordered his expulsion.

57. The national court questioned whether those decisions were compatible with article 6.1 of the AA, but was doubtful whether the applicant had continued to be 'duly registered as belonging to the labour force of the host' member state during his detention, in particular in the light of his later conviction. The national court was not clear whether Turkish nationals could be expelled on grounds of general prevention (EU nationals cannot be).

58. The Court said that the question was whether the applicant 'retroactively forfeited' the right conferred by the third indent of article 6.1 of the AA when he was detained pending trial and eventually convicted (paragraph 25). In order to be effective, the unconditional right to work conferred by the third indent carried with it a right to live in the host member state (paragraph 28). It was settled case law that article 6.1 could not be construed as permitting a member state unilaterally to modify the scope of the system for gradually integrating Turkish workers (paragraph 30). The concept of being 'duly registered' in article 6.1 'must be regarded as applying to all workers who have complied with the conditions laid down by law and regulation in' the host member state 'and are thus entitled to pursue an occupation in its territory' (paragraph 32).

59. The rights conferred by article 6.1 were subject only to 'the condition that the worker has complied with the legislation of' the host member state 'governing entry into its territory and pursuit of employment' (paragraph 32). There was no doubt that the

applicant satisfied those requirements (paragraph 33). Those rights could not be made to depend on other requirements (paragraph 34). It was also clear from the case law that 'an absence of a Turkish worker from the labour force of [a member state] does not automatically lead to the loss of the rights acquired under' article 6 (paragraph 36). It would be otherwise if the Turkish worker had left the labour force for good (paragraph 37).

60. The applicant's temporary break 'in the period of active employment' during his pre-trial detention was not 'in itself capable of causing him to forfeit the right which he derives directly from the third indent of' article 6.1 'provided he finds a new job within a reasonable period of release' (paragraph 42). The authorities of the host member state could not therefore 'deny a Turkish worker…his right of residence after he has been in uninterrupted legal employment for more than four years on the ground that, while he is detained pending trial, he no longer satisfies the condition that he must be duly registered as belonging to the labour force of' the host member state (paragraph 43). *Nazli* is concerned with the meaning of the AA. It does not decide anything about the Directive, or the predecessors of the Directive.

Orfanopoulos

61. *Orfanopoulos v Land Baden Württemberg* (C-482/01) [2005] CMLR 433 pre-dated the Directive. There were two applicants. The significant reasoning of the Court concerns the first applicant, not the second applicant, Olivieri. Orfanopoulos, the first applicant, was a Greek national who was born in 1959 and had lived in Germany since 1972, apart from two years or so when he was in Greece doing military service. He was married to a German national and had three children. He had done various jobs. His periods in work had been 'interrupted by periods of prolonged unemployment'. He had nine convictions for drugs offences and violent offences. He was imprisoned for a short period in 1999 and had been a drug addict for 15 years. He was also an alcoholic who was violent when drunk. He was in prison from 2000, serving sentences imposed in 1994 and 1998. The rest of his sentence was suspended in 2002 because he had behaved well in prison and had consented to treatment. He was made the subject of an expulsion order. He argued that EU law provided 'extensive protection against expulsion'.

62. The national court asked the Court of Justice to interpret the qualification on the right of free movement of workers contained in article 39.3EC, which permitted restrictions on that right on public policy and related grounds. It also asked the Court to interpret articles 3.1 and 3.2, and 9 of Directive 64/221. The former provisions gave two glosses on 'grounds of public policy' and the latter gave procedural protections in cases in which the authorities refused to renew a residence permit, or wished to expel a person. The national court noted in the reference that there was a risk of further offences by the applicants and that their wives and children could not reasonably be expected to live in another member state.

63. The Court summarised the first question referred as whether those provisions of EU law precluded national legislation which required the authorities to expel an EU national who had been sentenced to a sentence of immediate imprisonment for drugs offences (paragraph 58).

64. The Court's judgment begins with 'Preliminary observations' (paragraphs 40-57). These included observations on the relevant EU legislation (paragraphs 46-55). The Court said that 'As Community law stands at present' the right of EU nationals to travel to and live in another member state was conditional (paragraph 47). The limitations on the right of residence included Directive 90/364 and the secondary legislation on migrant workers (paragraph 49).

65. Paragraph 50 reads:

> *'Moreover, in respect more particularly of prisoners who were employed before their imprisonment, the fact that the person concerned was not available on the employment market during such imprisonment does not mean, as a general rule, that he did not continue to be duly registered as belonging to the labour force of the host [member state] during that period, provided he actually finds another job within a reasonable time after his release'.*

The Court referred to *Nazli* in a footnote to paragraph 49.

66. Orfanopoulos 'made use of the right of freedom of movement for workers and had pursued several activities as an employed person in Germany'. Article 39EC and Directive 64/221 therefore applied (paragraph 51).

67. The right to freedom of movement had to be construed broadly, and any derogation from that right, narrowly (paragraph 64); and in a 'particularly restrictive' way if the person was a 'citizen of the Union…that status is destined to be the fundamental status of nationals of' member states (paragraph 65). Community law precluded the applicant's automatic deportation merely on the ground that he had received a particular type of sentence (paragraphs 69-71). It was not necessary for the Court to express an opinion on whether Orfanopoulos was a 'worker' during his periods of imprisonment and it did not do so. The Court was concerned with a different question, which was whether, with his history, Orfanopoulos could be made the subject on an expulsion order. I say that despite the gloss which the Advocate General later put on *Orfanopoulos* in paragraph 26 of his Opinion in *Onuekwere* (see paragraph 70, below).

Dogan

68. *Dogan v Sicherheitsdirektion für das Bundesland Vorarlberg* (C-383/03) concerned a Turkish national who had qualified under the third indent of paragraph 6.1 of the AA before his imprisonment (for a period of three years). The applicant had lived in Austria for 27 years and had been legally employed there for many years. He challenged a permanent residence ban made by the Austrian authorities. The question referred by the national court was, in effect, whether the prison sentence caused the applicant to forfeit his accrued rights, or whether the imprisonment was to be considered as a temporary interruption of his membership of the labour force of the host member state and which did not affect the rights he had acquired as long as he found paid employment within a reasonable time of his release.

69. It is not necessary for me to consider the reasoning of the Court of Justice in any detail. It is clear from paragraphs 15 and 16 that the Court considered that article 6.2 of the AA (which deals with the effect of temporary periods of absence from work) only applied during the period when the right was being acquired. A Turkish worker

was 'entitled to a temporary interruption of his employment relationship. In spite of such interruption, he continues to be duly registered as belonging to the labour force in the' host member state 'during periods when it is reasonably necessary for him to find other paid employment…' (paragraph 19). That approach must apply 'regardless of the cause of his absence…provided that the absence is temporary' (paragraph 20). *Orfanopoulos* showed that the reasoning in *Nazli* was not confined to the facts of that case. It also applied to an absence due to imprisonment, 'even for a long period' if it 'does not preclude his subsequent return to working life' (paragraph 22). The applicant had not forfeited the employment rights conferred by article 6 by being imprisoned (paragraph 25). Like *Nazli*, *Dogan* is concerned with the meaning of the AA. It does not decide anything about the Directive, or the predecessors of the Directive.

Onuekwere

70. The applicant in *Onuekwere v Secretary of State for the Home Department* (Case C-378/12) [2014] 1 WLR 2420 was a third country national. He was given a temporary residence permit as the spouse of a citizen of an EU member state who was exercising Treaty rights in the United Kingdom. He committed various criminal offences and served two terms of imprisonment. In 2010 he applied for a permanent residence card. The Secretary of State refused that application. The UT made a reference to the Court of Justice, asking whether a period of imprisonment could constitute legal residence, and if not, whether the applicant could aggregate periods of residence before and after this imprisonment. His spouse had, in the meantime, acquired a right of permanent residence. The Court could not accept the applicant's argument that because his spouse had been exercising Treaty rights for the necessary period and he had been living with her in the host member state for that period, he also acquired a right of permanent residence (paragraph 21). It was clear from the terms and purpose of article 16.2 that the rights of the third country national spouse depended not only on the EU national's satisfying the necessary conditions, but on his living 'legally and continuously "with" that citizen for the period in question' (paragraph 23). Two further reasons (that social cohesion is promoted by integration in the host member state and that a sentence of imprisonment shows that a criminal does not accept the values of the host member state) meant that taking into account periods of imprisonment 'would clearly be contrary to the aim pursued by [the] Directive in establishing that right of residence' (paragraph 26). Unlike the Advocate General, who considered (Opinion, paragraph 26) that the question in *Orfanopoulos* was whether the applicant retained his status as a worker while he was imprisoned, it is significant that the Court did not refer to *Orfanopoulos*. The Court's conclusion was that the continuity of a person's residence (within the meaning of article 16.2) was interrupted by periods of imprisonment, so that periods of legal residence before and after imprisonment could not be aggregated (paragraph 27).

Singh

71. The three applicants in *Singh v Minister for Justice and Equality* (Case C-218/14) [2016] QB 208 were third country nationals who were married to EU nationals who lived and worked in Ireland. In each case, the EU national had left Ireland to settle elsewhere, and the marriages had ended in divorce. It is significant, in order to understand paragraph 62 of the judgment, that the divorce proceedings were not

instituted in any of the three cases until after the EU national had left Ireland (paragraphs 16, 27, 28, 36, 38, and 64).

72. The third country nationals did not leave Ireland, and applied to stay on the basis of article 13.2.b, because the marriages had lasted for at least three years, including one year in the host member state. The Minister refused their applications.

73. The Court of Justice summarised the first question in the reference as whether article 13.2 must be interpreted as meaning that 'a third country national, divorced from [an EU national], whose marriage lasted for at least three years before the commencement of divorce proceedings, including at least one year in the host member state, may retain a right of residence…where the divorce is preceded by the departure of the spouse' who is an EU national from the host member state (paragraph 48).

74. It was therefore necessary to decide whether the EU national spouse must reside in the host member state, in accordance with article 7.1 of the Directive, until 'the date on which the divorce is decreed for the third country national to be able to rely' on article 13.2 (paragraph 49). The Court recalled that rights conferred by the Directive on third country nationals 'are not autonomous rights'. They derive from the exercise of rights of freedom of movement by EU nationals (paragraph 50). Article 3.1 requires a third country national to 'accompany or join' the EU national (paragraph 52), as does article 7 (paragraph 53). That did not mean that they have to live together. They had to stay together in the host member state in which the EU national exercised his right of freedom of movement (paragraph 54).

75. It followed from the relevant provisions that if the EU national leaves the host member state and settles elsewhere, the third country national no longer meets conditions of article 7.2. It was then necessary to ask under what conditions the third country national could claim a right of residence under article 13.2.a. (paragraph 58).

76. The Court quoted article 13.2.a (paragraph 59). It then said that 'That provision' [ie, article 13.2.a] met the purpose of recital 15, which is to provide legal safeguards in the event of divorce (paragraph 60).

77. 'The reference in that provision [ie, article 13.2.a], first, to the "host member state", which is defined in [article 2.3] only by reference to the exercise of [the EU national's] right of free movement and residence, and, secondly, to the "initiation of the divorce… proceedings" necessarily implies that the right of residence of [the third country national spouse] can be retained on the basis of [article 13.2.a]… only if the member state in which that national resides is the "host member state" within the meaning of [article 2.3] on the date of the commencement of the divorce proceedings' (paragraph 61).

78. In paragraph 62, the Court said that that was not the case if, before commencement of the divorce proceedings, the EU national leaves the member state in which third country national resides to settle elsewhere. In that event, third country national's derived right of residence under article 7.2 'has come to an end with departure of [the EU national] and cannot be retained' on the basis of article 13.2.a.

79. In paragraph 63, the Court said

> *'It follows that, if on date of commencement of divorce proceedings, the third country national who is the spouse of the EU national enjoyed a right of residence on the basis of [article 7. 2], that right is retained on the basis of [article 13.2.a] both during the divorce proceedings and after the decree of divorce, provided that the conditions in the second sub-paragraph of [article 13.2] are satisfied'.*

80. The Court pointed out, however, in paragraph 64, that in fact the EU national spouses had all left the host member state and settled elsewhere 'even before the divorce proceedings had been commenced'. After their departure, the third country national spouses no longer met the conditions in article 7.2 (paragraph 65; referring to paragraph 58). It was therefore clear that the EU national had to live in the host member state, in accordance with article 7.1, up to the date of the commencement of the divorce proceedings for the third country national to be able to claim the retention of his right of residence on the basis of article 13.2 (paragraph 66). In cases like these, the departure of the EU national spouse 'has already brought about the loss of the right of residence' of the third country national spouse who stayed in the host member state. 'The later petition for divorce cannot have the effect of reviving that right, since [article 13] mentions only the "retention" of an existing right of residence' (paragraph 67). National law could, of course, confer more extensive protection (paragraph 68).

81. The Court answered the first question in the reference as follows, in paragraph 70:

> *'...[article 13.2] must be interpreted as meaning that a third country national, divorced from [an EU national] , whose marriage lasted for at least three years before the commencement of divorce proceedings, including at least one year in the member state, cannot retain a right of residence in that member state on the basis of that provision where the commencement of divorce proceedings is preceded by the departure from that member state of the [EU national] spouse'.*

NA v Secretary of State for the Home Department

82. *NA v Secretary of State for the Home Department* (Case C-115/15) [2017] QB concerned article 13.2.c. The applicant was a third country national who was married to a German citizen. They moved to the United Kingdom where her husband worked. They had two children who were born in the United Kingdom but had German nationality. She was a victim of domestic violence. She divorced her husband, but the divorce proceedings did not start until after he left the United Kingdom.

83. The Court of Justice characterised the first question which was referred by this Court as whether article 13.2.c entitled the applicant, a victim of domestic violence, to retain her right of residence when the divorce post-dated the departure of the EU national (paragraph 31). *Singh* was a case in which the departure of the EU national had already ended the right conferred by article 7.2. A later petition for divorce could not revive that right (paragraphs 34 and 35). The Court had held, in paragraph 66, that, in order to rely on article 13.2.c, the EU national must live in the host member state up until the start of divorce proceedings (paragraph 36).

84. It was clear from articles 13.2 and article 12 that the EU legislature had not provided for safeguards in the event of the departure of the EU national from the host member state (paragraphs 43 and 44). It was also clear from the explanatory memorandum to

the Directive that, before the Directive, the divorced spouse could be deprived of the right of residence in the host member state (paragraph 46). Further, it was clear that safeguards were necessary only in the event of final divorce, since in the event of de facto separation, the right of residence of the third country national spouse was not affected (paragraph 47).

85. Article 13.2, therefore, and the right conferred by article 13.2.c, depended on the divorce of the parties (paragraph 48). An interpretation of article 13.2.c which permitted a third country national to rely on it when her EU national spouse had lived in the host member state, not until the start of the divorce proceedings, but, at the latest, until the domestic violence occurred was 'contrary to the literal, systematic and teleological interpretation of' article 13.2 (paragraph 49). If an applicant was to benefit from article 13.2.c, the EU national spouse had to live in the host member state until the divorce proceedings began (paragraph 50).

Baigazieva

86. *Baigazieva v Secretary of State for the Home Department* [2018] EWCA Civ 1088 is a judgment given by Singh LJ, apparently in open court. No counsel appeared for either side. As he explained in paragraph 1, the parties had agreed a consent order. The parties agreed that it was in the public interest for the Court to give a substantive judgment. Singh LJ agreed. The Secretary of State accepted that regulation 10(5) could be relied on if the qualified person exercised Treaty rights until the date when divorce proceedings were started (paragraph 3). Singh LJ referred to *NA*. The appellant in that case was not a victim of domestic violence, but argued that the same principle should apply to her. She could establish her rights by showing that her EU national spouse had exercised Treaty rights up to that date, and did not have to show that he had exercised them until the date of the divorce (paragraph 10).

87. The Secretary of State submitted that, in *NA*, the Court of Justice was making a distinction between the point at which the right to reside is maintained under article 13.2 (that is, the divorce) and the criteria which must be met for that right to be retained (paragraphs 12, 13 and 14).

88. Singh LJ agreed with the Secretary of State's submissions.

X v Belgium

89. The applicant In *X v Belgium* (C-930/19) [2022] 1 WLR 1801, an Algerian national, joined his French wife in Belgium. He left her a few years later because she was violent. She later left Belgium and moved to France. Nearly three years after she left Belgium, he began divorce proceedings. Before the divorce was granted, the Belgian state ended the applicant's right of residence on the grounds that he had not shown that he was able to support himself, under a Belgian law which was intended to give effect to article 13.2 of the Directive.

90. The question referred by the national court was whether article 13.2.c infringed articles 20 and 21 of the Charter of Fundamental Rights ('the CFR'), because it made the right of residence which it conferred conditional, whereas the right conferred in family re-union cases by article 15.3 of Directive 2003/86 was unconditional. Articles

20 and 21 of the CFR concern the principles of equal treatment and non-discrimination.

91. The Court noted that the purpose of article 13.2 was to provide legal safeguards to people who are not citizens of an EU member state and whose right of residence depends on marriage. As long as the marriage lasts, the third country national spouse retains his status as a member of the family of such a person, and has a derived right of residence (paragraphs 38 and 39). It referred to paragraphs 46 and 47 of *NA*. The Court said that it followed that article 13 only applied if the spouses were divorced (paragraph 40).

92. The Court referred to paragraph 62 of *Singh* in paragraph 41. That decided that, if before the start of divorce proceedings, the national of the EU member state left the host member state or the EU, the derived right of residence conferred by article 7.2 ended. The Court then noted that the requirement to start the divorce proceedings before the national of the EU member state left the host member state could, in the case of a victim of domestic violence, put pressure on the non-national spouse, and make him vulnerable to blackmail and threats of divorce or departure.

93. The Court therefore decided 'contrary to what was held in *NA* [2017] QB 109, para 51, it must be held that, in order to retain the right of residence [pursuant to article 13.2(c)] divorce proceedings may be initiated after the departure of [citizen of the EU member state] from the host member state'. In order 'to ensure legal certainty' the third country national could only rely on article 13.2c if divorce proceedings were started 'within a reasonable period' of the departure of the EU national (paragraph 43).

94. The third country national should be given enough time in which to decide whether to enjoy a personal right of residence based on the divorce, or a derived right of residence base on his establishment in the host member state (paragraph 44).

The grounds of appeal

Submissions

A's submissions

95. In his skeleton argument, A summarised his argument in five steps.

i. He acquired 'the status under article 13(2) of having retained rights' when divorce proceedings were initiated.
ii. He was a worker at all relevant times. He relied on *Orfanopoulos*.
iii. Even if he was not a worker, that is irrelevant to his acquisition of a retained right of residence. It is only relevant to whether he had a temporary right of residence, which is a separate matter.
iv. Neither *Onuekwere* nor *NA* helps the Secretary of State. *Onuekwere* is not relevant to the issues in this case. *NA* must be reconsidered in the light of *X*.
v. The Secretary of State's construction of article 13 is not supported by its text, structure, context and purpose.

96. A submitted that the Directive should be given a generous interpretation, as the decisions of the Court of Justice show. The purpose of article 13.2 is to provide legal safeguards for members of a family if there is a divorce. He submits that in *Singh* and in *NA*, the Court of Justice held that article 13.2.a and 13.2.c are engaged if the EU national spouse leaves the host member state after divorce proceedings start but before the divorce is finalised. In *X*, the Court of Justice went further and held that article 13.2.c can be engaged even if the EU national left the host member state before the start of the divorce proceedings. 'Thus a right of residence is "retained" in circumstances where there is not right of residence at the point of "retention"'.

97. The cases show that a right of residence will be retained if four conditions are met.

i. The parties have divorced.
ii. The marriage had lasted for at least three years before the start of divorce proceedings.
iii. One year of the marriage was in the host member state.
iv. 'Residence in accordance with the Directive at the time of initiation of divorce proceedings or divorce proceedings are initiated within a reasonable period following the departure of the EU national spouse from the host member state'.

98. A suggests in paragraphs 18-36 of his skeleton argument that it is inconsistent with the text and purpose of the Directive if a non-EU national were to lose his retained right of residence if, at any point after the initiation of divorce proceedings, he was not a worker. A argues, for example, that that would make the right under articles 12 and 13, and the right under article 7.1 very different, and his rights far from secure. He suggests that in *X*, the Court of Justice referred to all three groups of rights in the same way. It would mean that the non-EU national was in a weaker position than when he was a family member. The 2006 Regulations are said to support this approach.

99. A then elaborated his submission that *NA* has to be reconsidered in the light of *X*. In that case, the Court of Justice held that if the citizen of an EU member state left the EU before the start of divorce proceedings, that did not stop the non-EU national from coming within article 13. That undermines the suggestion in *NA* that the non-EU national had to satisfy the requirement in the second sub-paragraph of article 13. Paragraph 63 of *Singh* does not help the Secretary of State, as the application of the second sub-paragraph of article 13 was not in issue. The position must be that the third country national's right of residence can lapse, and revive, in just the same way as that of a national of an EU member state. In his oral submissions, Mr Jafferji relied heavily on paragraph 63 as supporting A's case. The Advocate General in *X* endorsed paragraph 63 of *Singh* in paragraph 70 of his Opinion. Mr Jafferji accepted in answer to questions from the Court that paragraph 63 is difficult to interpret. There is a distinction between permanent departure and departure for the purposes of divorce. He relied extensively on other passages from the Advocate General's Opinion in *X* throughout his oral submissions.

100. The reasoning of the Court of Justice in *Onuekwere* does not rely on the proposition that the applicant did not have a right of residence during his imprisonment. The Court's finding that a period of imprisonment does not count as legal residence for the purposes of article 16 is not the same as a finding that such residence does not come

within article 7.2. It did not base its decision on a breach of the conditions in article 7.2. Even if a period of residence is not legal, that does not mean that the national of the non-EU member state loses a retained right of residence. The applicant in *Onuekwere* was found to have a right of residence despite having spent two periods in prison. Even if he had no right of residence during his imprisonment, that right revived on his release. The position is the same for a person with retained rights. The Court was considering a completely different issue. A is not relying on any period of imprisonment for the acquisition of a right of permanent residence, but contends that a period of imprisonment should not extinguish his rights under the Directive.

101. In *X*, the Court held that a person could retain a right of residence even when the citizen of a member state had left the EU before divorce proceedings were started.

102. A also relied on paragraphs 49 and 50 of *Orfanopoulos*. These show that a migrant worker who is a citizen of a member state and is in prison, if he was working immediately before his imprisonment, and provided he finds another job within a reasonable time of leaving prison, generally continues to be 'duly registered as belonging to the labour force of the host Member State', even if he is not available for employment while he is in prison. Periods of imprisonment do not count towards the acquisition of a right of permanent residence but they do not break the continuity of a period in the host member state as a worker. Retaining a status and the acquisition of a right are different.

103. A made some points about the EU Settlement Scheme at the end of his skeleton argument. These are irrelevant and I ignore them.

104. In his oral submissions, Mr Jafferji dealt first with A's appeal, and then, having heard Ms Smyth's submissions on the RN, he made submissions about the RN.

105. He submitted, first, that the only reason which the UT gave for allowing the Secretary of State's appeal was that A was not a worker under regulation 10(6) of the 2006 Regulations when he was imprisoned. There is no warrant for this gloss. The question of fact was simply whether A was a worker before his imprisonment. Nothing in paragraphs 29-35 of *Gauswami* justified this approach, and no decision of the domestic courts or of the Court of Justice supported it. On the contrary, dicta in decisions of the Court of Justice supported A's position.

106. A's second submission was that his article 13.2 rights began when the divorce proceedings started. He was a worker then. *Singh* supported that submission. Article 13.2 continued to apply until the divorce was finalised. If it were otherwise, and the EU national left the host member state before the divorce proceedings started, a third country national would have no rights, because his rights under article 7 would end with the departure of the EU national. Nothing in article 13 required the EU national to be in the territory of the host member state at the date of the divorce, or required the third country national to establish any right at the date of the divorce. He accepted that there was a tension between the scheme for retained rights and the protection of third country nationals. His essential point was that the Directive has to be interpreted in such a way as to give effective protection to the rights of third country nationals. The Court of Justice in *X* supported paragraph 63 of *Singh*. Nothing in the later cases departed from *Singh*. Even if A was not a worker when he was imprisoned, he was a

worker when the divorce proceedings started, and that was when the article 13.2 right was triggered.

The Secretary of State's submissions

107. The Secretary of State served her skeleton argument in September 2022. A served his skeleton argument about a week before the hearing of this appeal. In those circumstances this Court gave the Secretary of State permission to serve a further note commenting on A's skeleton argument. The Secretary of State served that note on the day before the hearing. In the light of that history, I would give the Secretary of State permission to rely on that note. I would also give the Secretary of State permission to rely on the RN.

108. The Secretary of State made very full and helpful submissions in her skeleton argument about the purpose and structure of article 13, and about the decisions of the Court of Justice. She submitted in her skeleton argument that A's case is built on two legal fictions.

    i. A had the article 13 right from the date when the divorce proceedings were initiated.
    ii. He satisfied the conditions in article 13 by virtue of the fact that he was working before he was imprisoned, and that after his imprisonment, the decision of the Court of Justice in *Orfanopoulos* meant that was entitled to continue to be treated as a worker even though he was in prison, and, therefore, was not working.

109. The Secretary of State did not accept that A had the article 13 right from the date divorce proceedings began. But even if an article 13 right could be acquired when divorce proceedings are initiated (as opposed to when the divorce is finalised), A did not, on that date, meet the conditions in article 13, for the reasons given in the RN. The judgment of the Court of Justice in *Onuekwere* shows that time spent in prison is not 'legal residence' for the purpose of acquiring a right of permanent residence. If that is right, it cannot count for the purposes of article 13, either. The UT was wrong to hold (paragraph 29) that A could rely on *Orfanopoulos* if his interpretation of article 13 was right.

110. That means, submitted the Secretary of State, that the issue about the meaning of article 13 is moot. The Secretary of State nevertheless submitted that A's argument about the date when he acquired the article 13 right is wrong. The Secretary of State argued that the decisions of the Court of Justice go no further than to show that the article 13 right can sometimes apply from the date when divorce proceedings are initiated, but only if the EU spouse has left the host member state.

111. In the recent note, the Secretary of State suggested that, in paragraphs 18-36 of his skeleton argument, A advanced a new argument for which he did not have permission. The argument for which he had permission was that A was a worker while he was in prison. The new argument appeared to be that A had a right of residence under article 13 despite not being a worker, and/or that the conditions in article 13 were suspended while A was in prison. Whether or not A had permission to rely on the argument, the Secretary of State submitted that it is wrong for five reasons. These include that the new argument shared an incorrect premise with the original argument (that the rights under articles 13 and 7.1 are the same, and that the Directive

confers the same protection on non-national family members as it does on EU nationals).

112. The Secretary of State also pointed out that A did not work when he came out of prison. He did not challenge his bail conditions on the basis that they were a breach of his EU rights. So even if a retained right could revive, A simply did not meet the conditions in article 13 for such a right. The Secretary of State also submitted that it would be nonsensical for a period of residence not to count as lawful residence for the purposes of acquiring a right of permanent residence but was nevertheless lawful residence for the purposes of article 7. Mr Onuekwere was able to reside lawfully after his release under article 7.2 because he was a member of the family of an EU citizen.

113. In her oral submissions, Ms Smyth emphasised that the Secretary of State's case was simple. On any view, sub-paragraph 2 of article 13.2 required A to be a worker. He could not be a worker because he was in prison. He could not, therefore, rely on article 13.2. The case was only complicated because of the elaborate submissions A was forced to make, including his reliance on *Orfanopoulos*. A's argument had two limbs. He relied on *Orfanopoulos* to say that he was a worker when he was in prison, and he also had to submit that his article 13.2 right was triggered at the start of divorce proceedings (ie at the only point in the history when he was actually a worker). The argument was 'elaborate, confusing and wrong'.

114. She submitted that, other than in exceptional cases, article 13.2 did not apply when divorce proceedings started; the usual rule is that it applies only after divorce. The simple reason why is that, until divorce, the third country national is protected by article 7.2, as a member of the family of an EU national. There was no decision of the Court of Justice in a case in which the EU national spouse had left the host member state between the initiation of proceedings and their conclusion. All the cases concerned departure before the proceedings were started. Paragraph 63 of *Singh* was not just obiter: it did not match anything else. Even if article 13.2 could apply before the divorce was finalised, that would not help A, because, by the time Y left the United Kingdom, he was in prison.

115. The fact that A would have had different rights if he had been an EU national was irrelevant. He was not an EU national. There is a fundamental difference between EU and third country nationals. The former have rights under the Treaties and the latter do not. The Court of Justice in *X* cast no doubt on the actual decision in *Singh.* The applicant in that case had no Treaty rights, and lost his derivative right when his Latvian wife left Ireland.

Discussion

116. A's ground i. depends on the proposition that he could, and in the event did, exercise rights conferred by article 13.2 from the date when the divorce proceedings began. That is the first issue. It is purely a timing issue. A's ground ii. depends on the proposition that he was a worker when he was imprisoned, and that he continued to be a worker during his imprisonment. That proposition is based on *Orfanopoulos*. It is therefore necessary to consider whether *Orfanopoulo*s has any bearing on this case,

and what, if any, bearing *Onuekwere* has. The final issue is whether or not the UT's reason for allowing the Secretary of State's appeal was wrong in law.

117. This case illustrates two difficulties. First, it is hard to derive reliable general principles from decisions of the Court of Justice, which, necessarily, answer a question or questions which have been referred by a national court, and which have been referred on the facts of a particular case. Second, the reasoning in the decisions of the Court invites selective readings of sentences or paragraphs which make it harder, not easier, to work out what the relevant principles are. Both A's grounds of appeal illustrate these difficulties.

118. First, I reject A's suggestion that his derivative rights could cease and revive in the same way as the freedom of movement rights of an EU national can. I accept the Secretary of State's submission that EU nationals have rights which are conferred by the Treaties and third country nationals do not, and that there is no support for A's argument in the Directive or in the case law of the Court of Justice, properly understood. I would hold, unless there is a clear indication in the case law to the contrary (and as I shall explain, I do not consider that there is), that A had to show that he had rights under article 7.2 which continued seamlessly until the right conferred by article 13.2 replaced the rights conferred by article 7.2. A's two grounds of appeal seek to show that he did. He must establish both if his appeal is to succeed. I consider that that approach is consistent with the structure of article 13, and with the reasoning in *NA* and *Singh* (by that, as I shall explain, I mean the essential reasoning in *Singh*).

119. That leads into the next issue, which is the point at which rights under article 7.2 end, and those conferred by article 13.2 begin. The question which was referred in *Singh* came from the facts of the three cases. All the EU national spouses had left Ireland before any divorce proceedings started. The decision in *Singh* was that, on those facts, the third country national spouses who stayed in Ireland had lost their article 7.2 rights before the divorce proceedings started, and so had no rights which article 13.2 could preserve once the divorce decree was made absolute. Paragraph 63 is difficult to understand, and A says that it does decide this question in his favour. The observation in paragraph 63, however, was not necessary to the decision, because none of the applicants left during that interim period. Further, despite its introductory words, paragraph 63 does not 'follow' from what has gone before. Nor is there any connection between the legal state of affairs on the date when divorce proceedings started, and, either, that state of affairs during the divorce proceedings, or, that state of affairs when the decree becomes absolute. Paragraph 63 is also unprincipled. It is inconsistent with the structure of article 13.2, and with the express reasoning in *NA*, which is a later decision. The key point is that the safeguard provided by article 13 is only required once the divorce is made final, as, up until then, the third country national is protected, as a family member, by article 7.2. Read in the light of that later reasoning, paragraph 63 of *Singh* cannot be interpreted as deciding that if the spouses had left between the dates when divorce proceedings started and finished, the answer would have been any different. I consider, therefore, that the suggestion that the article 7.2 right is continued during the divorce proceedings by the force of article 13 is wrong. The protection conferred by article 13 does not just depend on the satisfaction of conditions in article 13.2.a, b, or c (as the case may be), but also on the

satisfaction by the third country national spouse of the conditions in the second sub-paragraph of article 7.2 at the point when the divorce decree is made absolute.

120. There may be some doubt about the status of the judgment in *Baigazieva*, as it was delivered without oral argument and after a consent order. Whether or not that is so, it is plainly correct as a summary of the relationship between the point at which the criteria for article 13.2 may have to be met and the point at which the right which it confers can be relied on. It is consistent with the structure of article 13, and with the essential reasoning in *NA* and *Singh*. Whether or not the threshold criteria may be met at the earlier point (that is, when the divorce proceedings start), it is clear from the decisions of the Court of Justice that the protection of article 13.2 applies from the moment when the right conferred by article 7.2 is lost, that is, when the third country national ceases to be a family member of the EU national because of divorce.

121. A related point is that I consider that *X* is an outlier. The Court's wish to protect the applicant in that case led it to adopt an interpretation of article 13.2.c which is not supported by the language of article 13.2 as a whole. The reasoning in *X* is at the extreme edges of a purposive construction, and it must be confined to article 13.2.c. cases. It is remarkable for the summary way in which it overrules the conclusion in *NA*, which relies on the cogent exposition in paragraph 49 of *NA* (see paragraphs 85 and 90, above). The Court in *X* did not comment adversely on paragraph 47 of *NA*: indeed, in paragraphs 39 and 40 it appears to have taken the same approach.

122. The next issue is what conditions A has to meet during the period in which article 7.2 applied to him (that is, down to the date the divorce was finalised). The question in *Orfanopoulos* was whether a provision of national law which provided, on the passing of a particular sentence of imprisonment, for the automatic expulsion of an EU national, who had lived lawfully in the host member state for many years, was precluded by EU law.

123. The Court's preliminary observations are exactly that. The authority cited in support of paragraph 50 is *Nazli*. *Nazli* (and *Dogan*, which followed it), are about the interpretation of article 6 of the AA, which is the source of the otherwise 'opaque' phrase 'duly registered as belonging to the labour force of' the host member state. The procedures for applying that phrase were to be determined by provisions of national law (see paragraph 55, above). Neither *Nazli* nor *Dogan* concerned the rights of EU nationals. They concerned, rather, rights which Turkish nationals had accrued under article 6 of the AA before their sentences of imprisonment. The materiality of paragraph 50 to the conclusions of the Court of Justice in *Orfanopoulos* is not, therefore, at all obvious.

124. In any event, the Directive codified, and made more elaborate provision for, rights of freedom of movement of EU nationals and the members of their families than had been made in the instruments which the Directive repealed. It was assumed by the F-tT and the UT in this case, and it is assumed by A, that paragraph 50 of *Orfanopoulos* decides that a third country national is, or can be, a 'worker' for the purpose of the conditions of article 7.1 (as applied to his case by article 7.2), or the second sub-paragraph of article 13 (if that applies) when he is in prison. Article 7.3 of the Directive (see paragraph 40, above), and the second sub-paragraph of article 17.1 (see paragraph 46, above) and regulation 6(2) of the 2006 Regulations (see paragraph 51, above) now make detailed express provision for the circumstances in which

temporary cessations of work are nevertheless deemed to be periods of employment for the purposes of the relevant EU rights. They do not include periods of imprisonment. Indeed, to my mind, the express reference to 'periods not worked for reasons not of the person's own making' makes it clear that a person cannot be a worker for the relevant purposes if he is in prison. An argument that 'preliminary observations' in a case which pre-dated the Directive, and which concerned a different issue (the automatic expulsion of an EU national), are somehow relevant to, still less, can decide, the question whether a person is a 'worker' for the purposes of Directive, is untenable in the light of those provisions.

125. That conclusion is independently supported by *Onuekwere*. Mr Jaffferji urged this Court to accept that *Onuekwere* only concerns lawful residence for the purpose of accruing periods of residence in article 18, and is irrelevant to the question whether A was a 'worker' during his imprisonment. I accept Ms Smyth's submission that such an approach to the interpretation of the Directive would be incoherent. It would make no sense if, during a period which did not count for the purposes of article 18, A was, nevertheless, regarded as meeting, either, the conditions of article 7.1 (as applied to his case by article 7.2), or of the second sub-paragraph of article 13.2, as the case might be. I therefore accept her submission that *Onuekwere* provides a second reason why A did not meet the relevant conditions (those are, in this case, the conditions of article 7.2) while he was imprisoned. I note also that the Court in *Onuekwere* did not adopt the Advocate General's interpretation of *Orfanopoulos*, which is (a) wrong, as a description of what that case decided, and (b) inconsistent with the provisions I have referred to in the previous paragraph. Indeed, the Court did not refer to *Orfanopoulos*.

126. For those reasons, I have reached four conclusions.

i. A had to show that he met the conditions of article 7.2 immediately before the divorce was finalised.
ii. A ceased to meet the conditions of article 7.2 when he was imprisoned, before the divorce was finalised.
iii. A therefore lost the protection of article 7.2 when he was imprisoned.
iv. By the time the divorce was finalised, were no rights which article 13.2 could preserve.

Is the UT's reasoning wrong in law?

127. It follows that the UT erred in law in holding that A was a 'worker' when he was imprisoned. That means that the UT's use of the phrase 'reg. 10(6) worker' did not enable it to allow the Secretary of State's appeal. The UT explained what that phrase meant in paragraph 29. For the reasons I have already given in relation to the first issue, the UT was right to say that A could not become a 'reg. 10(6) worker' until the decree absolute, because, until that date, even if A happened to be working, he was not doing so in the exercise of the right conferred by article 13.2 of the Directive, but in the exercise of the right conferred by article 7.2 of the Directive, as a third country national family member of an EU national. However, if A was, as the UT held, a 'worker' at the date of decree absolute, I see no answer to the argument that there would have been a seamless transition between the protection of article 7.2 and the protection of article 13.2, because, at that date, he was a 'worker', and would have met the conditions of the second sub-paragraph of article 13.2. If the UT had been right that A was a 'worker' throughout his imprisonment, he would, on the date of the

decree absolute, have met the conditions of regulation 10(5) and 10(6) as they then stood (that is, before regulation 10(5) was amended in 2019).

An argument which is not open to the Secretary of State

128. Finally, the Secretary of State suggested that this Court could take account of an argument that A did not get work within a reasonable time of his release (see paragraph 112, above). That argument is not open to the Secretary of State at this stage. The Secretary of State did not appeal to the UT from the F-tT's decision on this point (see paragraphs 27 and 31, above).

Overall conclusion

129. I would therefore dismiss A's appeal. I would uphold the determination of the UT on the ground put forward in the RN.

Lord Justice Warby

130. I agree.

Lord Justice Stuart-Smith

131. I also agree.