



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/06365/2017

THE IMMIGRATION ACTS

Heard at Field House
On 4 October 2018

Decision & Reasons Promulgated
On 15 February 2019

Before

UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE BLUM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAJAN CHALISE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Whitwell Senior Home Office Presenting Officer
For the Respondent: Mr R Sharma, instructed by Paul John Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge B Lloyd promulgated on 21 February 2018 allowing Mr Chalise's appeal under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") against a decision made on 31 March 2017 to revoke a residence card issued to him on 31 August 2013.
2. The respondent arrived in the United Kingdom with Entry Clearance as a Tier 4 Student Migrant in September 2009. His leave in that capacity was extended until 7 October 2013.

3. In December 2010 the appellant met his former partner, Ms K, an EEA national who had been working in the United Kingdom since 5 July 2010, and they moved in together after a month or two. In 2013, the respondent applied for, and was on 31 October 2013 granted, a residence card as confirmation of his right of residence as the extended family member of an EEA national. That card was valid until 31 August 2018 and had been issued to him as the Secretary of State had been satisfied that he was in a durable partnership with Ms K and that she was exercising Treaty Rights.
4. In September 2016, the respondent's relationship with Ms K broke down, and she returned to France.
5. On 31 March 2017 the Secretary of State revoked the residence card as the respondent had on 4 October 2016 informed him that the relationship with Ms K had broken down, and she was no longer living in the United Kingdom. He concluded that, pursuant to reg 24 (3) of the EEA Regulations 2016, he entitled to revoke the residence cards as the respondent had ceased to have a right to reside under those Regulations as Ms K was no longer living in the United Kingdom. That concession by the respondent was made in context of an application for a further residence card made on 4 October 2016.
6. On appeal, the respondent accepted (as is recorded in the First-tier Tribunal's decision at [10]) that he could not meet the requirements under the EEA Regulations to obtain a retained right of residence, but argued that he is entitled to confirmation of his right of permanent residence on the basis that this was provided for under Directive 2004/38/EC ("the Directive").
7. The case as put to the First-tier Tribunal was that Ms K had exercised Treaty Rights from 5 July 2010 to 2 September 2016; and, the respondent and Ms K had been living together for five years before it broke down in September 2016. It was argued that they had been in a genuine relationship for over five years.
8. It was submitted that once someone is recognised under the Directive as falling within article 3.2 and granted residence, then as can be seen from article 8, that person is to be treated as a family member and on that basis, taking account also of recital 15, the respondent had acquired permanent residence.
9. The judge accepted those arguments and concluded that the respondent was entitled to confirmation of his right of permanent residence.
10. The Secretary of State sought permission to appeal on the grounds that the judge had erred as:
 - (a) On a proper construction of reg 7 (3) of the EEA Regulations the respondent had become a family member only from the date of issue of the residence card on 31 August 2013, and;
 - (b) On that basis, could not have acquired 5 years continuous residence in accordance with the EEA Regulations as the relationship had broken down; and,

- (c) Time spent prior to the issue of a residence card could not be taken into account.

11. On 4 June 2018 First-tier Tribunal Judge Mark Davies granted permission.

The Law

12. The EEA Regulations provide:

7. – (1) In these Regulations, “family member” means, in relation to a person (“A”) –

- (a) A’s spouse or civil partner;

- (b) A’s direct descendants, or the direct descendants of A’s spouse or civil partner who are either –

- (i) aged under 21; or

- (ii) dependants of A, or of A’s spouse or civil partner;

- (c) dependent direct relatives in A’s ascending line, or in that of A’s spouse or civil partner.

(2) Where A is a student residing in the United Kingdom otherwise than under regulation 13 (initial right of residence), a person is not a family member of A under paragraph (1)(b) or (c) unless –

- (a) in the case of paragraph (1)(b), the person is the dependent child of A or of A’s spouse or civil partner; or

- (b) A also falls within one of the other categories of qualified person mentioned in regulation 6(1).

(3) A person (“B”) who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card must be treated as a family member of A, provided –

- (a) B continues to satisfy the conditions in regulation 8(2), (3), (4) or (5); and

- (b) the EEA family permit, registration certificate or residence card remains in force.

(4) A must be an EEA national unless regulation 9 applies (family members of British citizens)

13. The Directive provides in its recitals:

(6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.

(15) Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members

already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.

14. The Directive also provides:

Article 2 definitions

For the purposes of this directive...

“Family member means

- (a) The spouse
- (b) The partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State
- (c) The direct descendants who are under the age of 21 or are dependants and those of the spouse defined in point (b);
- (d) dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)

Article 3 Beneficiaries

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

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

- (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
- (b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people

Article 8: Administrative formalities for Union citizens

1. Without prejudice to Article 5(5), for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities.

...

5. For the registration certificate to be issued to family members of Union citizens, who are themselves Union citizens, Member States may require the following documents to be presented:

...

- (e) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen

Art 10 issue of residence cards

1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen" no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

2. For the residence card to be issued, Member States shall require presentation of the following documents:

...

(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

15. The first issue which we must consider is whether, as the respondent now submits, he meets reg. 15 (b) simply as he had lived in accordance with the regulations, it not being necessary for him to have been a family member for the whole 5 year period. Two points are made: first, that as it was accepted that the respondent was a family member from 31 August 2013, he remains a family member until the issue of revocation is finally determined; and, he was in a relationship for longer than a five-year period.
16. We can dispose of the first point easily. Family member is defined in reg 7 (3) is a status which lasts only for as long as the person concerned continues to satisfy the conditions (in this case) in reg. 8(5) that he is the partner and in a durable relationship with the relevant EEA national. On the respondent's own evidence that is not the case here.
17. The second point made is, in effect, that the grant of a residence card has the effect of permitting time spent in a durable relationship prior to the grant to be considered as time spent in accordance with the regulations and so counts towards the acquisition of a permanent right of residence.
18. In Macastena v SSHD [2018] EWCA Civ 1558, Mr Macastena argued that since the Secretary of State knew of his durable relationship with his partner and has never contested that it existed for some time before his marriage, that was sufficient for that durable relationship to be added to his time as a spouse for the purpose of acquiring a permanent right of residence. The Court of Appeal held [17]:

That cannot be right. An extended family member can only be issued with a residence card on the basis of his durable relationship with an EEA national if the Secretary of State has undertaken "an extensive examination of the personal circumstances of the applicant". That has never happened and can only happen after an application for a residence card is made. Merely notifying the Secretary of State that one is in a durable relationship is nowhere near enough either to constitute such extensive examination or to require such examination to be undertaken. FTT Judge Clark was with respect wrong to think that time spent in a durable relationship with Ms L could just be added to time spent as her spouse, provided that the First Tier Tribunal itself was satisfied that there had been a durable relationship before the marriage.

19. There is an important distinction to be made between this case and Macastena: here, there had been a full examination of all the circumstances, and the Secretary of State had issued a residence card. There is merit in Mr Sharma's submission that Macastena is not authority for the Secretary of State's position that time spent in a durable relationship prior to issue of a residence card cannot be counted towards acquisition of permanent residence.
20. Mr Sharma goes further and submits that the decision endorses his submission that time spent prior to the issue of a residence card can be taken into account relying on what Longmore LJ said at [15]:

It may well be that, if Mr Macastena had applied for (and received) a residence card as an extended family member pursuant to regulations 17(4) and (5) of the 2006 regulations on the basis of his durable relationship with Ms L, the time of that durable relationship could count towards an acquisition of permanent right of residence, just as time spent with a retained right of residence after his divorce did so count. But Mr Macastena never made such an application. All that had happened before he left for Kosovo to get married to Ms L was that he had entered the United Kingdom unlawfully on 3rd July 2005 and he had unlawfully remained here. It is true that Mr Macastena's solicitors, in the light of his wish to marry Ms L in August 2008, on 29th July 2008 notified the Secretary of State of his unlawful presence in the United Kingdom and informed her that he had been living with Ms L since September 2007. They did not, however, ask for a residence card on that basis; they asked and were granted a Visa Disclaimer form so that Mr Macastena (with Ms L) could return to Kosovo and get married there. It was only after the marriage that Mr Macastena was issued first with an EEA Family Permit as Ms L's spouse (enabling him to re-enter on 5th September 2008) and in due course with a residence card as the spouse (family member as per the 2006 regulations) of an EEA national working in the United Kingdom.

21. This passage is obiter as it considers a hypothetical set of facts but in any event, we do not accept that it assists Mr Sharma's case which relies on reading the reference to the "time of that durable relationship" as including time spent prior to the issue of a residence card. The phrasing is ambiguous.
22. Paragraph [15] of Macastena must be seen in the context of the factual matrix: Mr Macastena married his durable partner after having lived with her, and (as can be seen from paragraph [6], was only 5 days short of completing 5 years continuous residence as a spouse which would have allowed him enhanced protection under the EEA Regulations. Viewed in that context, we consider that all the judge meant was that had a residence card as a durable partner been obtained, Mr Macastena would have obtained that benefit. We do not accept that Longmore LJ was indicating that a grant of a residence card which operates to grant a right of residence could operate to validate residence prior to that date.
23. There is, in addition, a practical problem to such an interpretation: how far back would it go? A marriage or the birth of a child has a readily identifiable date, but when a relationship became "durable" is entirely fact-sensitive. Merely because it is possible to say that a relationship is durable now does not mean it can be said with any degree of certainty when it became durable.

24. Accordingly, we conclude that the EEA Regulations do not permit time spent in a durable partnership prior to a grant of a residence card to be considered as residence in accordance with those regulations.
25. That is not however determinative. We accept that the EEA Regulations must be interpreted in the light of EU law; the right of appeal in this case is expressed in terms of whether the decision breaches the appellants rights under the EU Treaties. We therefore turn next to the position under EU law.
26. It is established law that the usual canons of statutory interpretation used in English Law are not applicable to the law of the European Union. Equally, a court of a member state is not assessing a question of foreign law. How then is a court to interpret European Law?
27. As can be seen from CILFIT [1982] EUECJ 283/81 the starting point is the usual meaning of the words. As the CJEU has observed in BCE v Germany [2005] ECR I-10595 (Case 220/03) at [20]:

Although an interpretation of a provision of an Agreement ‘in the light’ of its legal context is possible in principle to resolve a drafting ambiguity, such an interpretation cannot have the result of depriving the clear and precise wording of that provision of all effectiveness.

To do otherwise would be to detract from the principal of legal certainty.
28. This principle is subject to two observations about “clear and precise”:
29. EU Legislation is drafted in several languages, each of which is equally authentic (CILFIT at [18]); and, even if the different language versions are in agreement, EU law uses terminology which is particular to it, and legal concepts do not necessarily have the same meaning in EU law and in the law of the member states (CILFIT at [19]) as the law of the European Union constitutes a new legal order of international law (Van Gend end Loos [1963] ECR 3415 Case 26/62;
30. If there are differences in language, then the case law of the CJEU suggests that regard should be had to the intention of the author and in light of the objectives the measure sought to achieve - see Stauder [1969] ECR 419 (case 29/69). In the case of the latter, care must be taken to consider if the words in question have an autonomous meaning given to them in EU law.
31. If, however, the meaning is not clear and precise, regard must be had to the context and purpose of the legislation as in Elgafaji [2009] ECR I-92 (Case 465/07). Faced with an apparent contradiction within the terms of Article 15 (c), the CJEU interpreted it in such a way as to give it an autonomous meaning which gave it effect, illustrating the premise that the creator of the legislation is acting rationally, and that the provision was introduced to have effect in a logical and rational scheme. A provision of EU law cannot be redundant. It follows that where several interpretations of a provision are possible, that which best ensures effectiveness and consistency with primary EU law should be followed.

32. It is evident also from the case law of the ECJ that in interpreting a provision, regard may be had to the *travaux préparatoires* if they are available. This, in the context of immigration, can be seen in Teixeira [2010] ECR I-1107 at [58].
33. The method of interpretation which is generally seen as most characteristic of the ECJ is a purposive or “teleological” approach. That is most easily seen in the interpretation of TFEU provisions such as Article 21 in, for example, Zambrano and the extensive case law on the meaning of “worker” within Article 45 and its predecessors. The teleological approach to interpretation may, as the circumstances require, give rise to three closely linked questions:
- (a) Which interpretation, having had regard to the context of the provision, best preserves its effectiveness?
 - (b) If the provision is ambiguous, which interpretation best achieves the objective it pursues?
 - (c) What consequences would flow from each interpretation?
34. Teleological interpretation is, however, subject to the proviso that exceptions are to be interpreted strictly (see Commission v UK [2010] I-03491 at [39]) although a broader interpretation may be adopted if that is required to give effect to the objectives.
35. It is to be noted also that the words which are to be construed are the operative part of the instrument in question; the preamble may be an aid to the interpretation as in Toshiba Europa GmbH v Katun Germany GmbH [2001] ECR I-7945 where at [36] – [37] recourse was had to a recital because a literal interpretation of Directive 84/450 as amended would result in a contradiction with Directive 89/104 but it is not a legal Rule – see Casa Fleischhandel v Bundesantalte für Landwirtschaftliche Marktordnung [1989] ECR 2789 at [31]: “Whilst a recital in the preamble to a regulation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule.”
36. It follows that the approach to interpreting a provision of EU law requires a systematic approach, looking at the words in the context of the structure of EU law as a whole and asking:
- (i) Is the meaning of the provision defined in EU Law?
 - (ii) If not, can the words be given their usual, ordinary meaning?
 - (iii) If not, what are the possible different interpretations?
 - (iv) What is the objective of the provision?
 - (v) Which interpretation best preserves its effectiveness?
 - (vi) Which interpretation best achieves the objective?
 - (vii) What are the consequences of the different interpretations?
37. The Directive draws a distinction between family members as defined in Article 2 and beneficiaries identified in Article 3. This distinction between rights accruing to

workers and their spouses/children on the one hand, and other members of the family whose entry is to be facilitated dates back to regulation 15/1961.

38. It is not in doubt that the respondent is a beneficiary within article 3.2 (b), nor is it in doubt that beneficiaries are to be in a better position than other non-EEA nationals. Equally, the requirement is not just to facilitate their entry but also their residence. That much is clear from Khan v SSHD [2017] EWCA Civ 1755 at [34].
39. Mr Sharma submits that once a person's entry into and residence in a member state has been facilitated, then they ought to be treated as a family member as defined within the Directive. Mr Sharma's submissions have two strands: the inclusion of durable partners within articles 8 (f) and 10 (f) of the directive, and the recitals set out in the preamble to the Directive. He argues also that as reg 7(3) of the EEA Regulations confers family member status on the respondent, that he is entitled to be treated as a beneficiary. This adds little to his case, given that the respondent clearly does so on an ordinary reading of the Directive.
40. The first point to be made is that article 2 which defines family members is clear; it does not include beneficiaries. It could have been defined to include those within article 3 (2)(a) or (b) but it does not. Article 3 maintains the distinction, setting out at sub-article 3(1) those to whom the Directive applies which clearly excludes those falling within article 3(2). There are therefore no rights conferred on the respondent by the Directive – see Advocate-General Bobek's opinion in Banger [2018] EUECJ C-89/17 at [51]-[52]:

51. The Court has already clarified the content of the specific 'facilitation regime' of Article 3(2) of the directive applicable to extended family members, in Rahman. (26) That judgment emphasised three dimensions of that regime: the absence of an automatic right of entry and residence (i); the obligation to enact a facilitation regime according to national law for which Member States enjoy a margin of discretion (ii); and the fact that that discretion is not unlimited (iii).

52. First, Article 3(2) of Directive 2004/38 does not confer a *right* of entry or residence on extended family members. There is a distinction made between family members as defined in Article 2(2) of the directive, who have a right of entry and residence, and those mentioned in Article 3(2), whose entry and residence 'has only to be facilitated'. (27) Hence, Directive 2004/38 does not oblige Member States to grant every application for entry or residence under Article 3(2). (28) Moreover, and in contrast to the rights to which EU citizens and the members of their families are entitled, Article 3(2) is not sufficiently precise to enable an applicant for entry or residence to rely directly on that provision in order to invoke *criteria* which should in his view be applied when assessing his application'. (29)

41. We do not accept that either article 8(5)(f) or article 10(2)(f) are capable of showing that once an individual has succeeded in obtaining entry under the facilitation guaranteed by article 3(2), he or she then has the rights conferred by the Directive. That would be contrary to the clear words and definitions set out in articles 2 and 3. It would also be contrary to the jurisprudence of the CJEU noted in A-G Bobek's opinion. We consider that articles 8 and 10 are simply administrative; they address how documentation is to be issued, not with the conferral of rights.

42. Returning to the principles of interpretation set out at above, we do not consider that the recitals relied upon by the respondent assist him either.
43. To summarise, we conclude that the respondent is not conferred rights under the Directive and is unable to benefit from any rights under it. Further, the rights retained under article 13 relate to the termination of a marriage, not a durable partnership.
44. That, however, is not the end of the case. We pause to recall that the respondent's former partner was exercising Treaty Rights in this case pursuant to Article 21 TFEU. We recall also that within the category of beneficiaries, those in durable partnerships are treated separately. Since Netherlands v Reed [1986] EUECJ C-59/85 a route has existed for the partners of EEA national workers to gain entry to the United Kingdom as the partners of UK national workers were entitled to leave to enter on that basis, and hence, that was a social advantage which had to be applied to EEA workers.
45. Under domestic immigration law, the respondent would not have a right to remain in his current circumstances. Further it is difficult to envisage how an EEA national would be dissuaded from exercising her freedom of movement to work in another member state if she thought that if she entered into a durable partnership with a non-EEA national in that country and that partnership came to an end, the non-EEA national would not be able to remain. That is not, however, to say that the respondent did not obtain a derived right while the partnership was subsisting.
46. The lead cases in O. and B. [2014] EUECJ C-456/12, Coman [2018] EUECJ C-673/19 and Banger are concerned with entry and initial residence. They do not address the content of any rights, derived or otherwise, which may accrue to the non-EEA partner once that has been achieved.
47. The facts in all of these cases differ from this appeal in that the EEA national in question was returning to his home member state. That is an action which falls outside the scope of EU law; rights for family and partners of such persons could only therefore be derived rights.
48. It is argued for the respondent that the Directive should be read so that the respondent is conferred the right he seeks, that is either permanent residence or the right to a retained right of residence and that this flows from the reasoning in Banger.
49. It is to be observed that the first question put to the CJEU in Banger was this:

'(1) Do the principles contained in the [the judgment of 7 July 1992, Singh (C-370/90, EU:C:1992:296)], operate so as to require a Member State to issue or, alternatively, facilitate the provision of a residence authorisation [emphasis added] to the non-Union unmarried partner of an EU citizen who, having exercised his [FEU] Treaty right of freedom of movement to work in a second Member State, returns with such partner to the Member State of his nationality?
50. The CJEU held in Banger at [30] to [35]:

30 In that regard, it must be stated that point (b) of the first subparagraph of Article 3(2) of Directive 2004/38 relates specifically to the partner with whom the Union citizen has a durable relationship that is duly attested. That provision provides that the host Member State must, in accordance with its national legislation, facilitate entry and residence for that partner.

31 According to the Court's case-law, Article 3(2) of Directive 2004/38 does not require the Member States to accord a right of entry and residence to third-country nationals envisaged in that provision, but imposes an obligation on those Member States to confer a certain advantage on applications submitted by the third-country nationals envisaged in that article, compared with applications for entry and residence of other nationals of third countries (see, to that effect, judgment of 5 September 2012, *Rahman and Others*, C-83/11, EU:C:2012:519, paragraph 21).

32 As the Advocate General observed in points 46 and 47 of his Opinion, the case-law cited in paragraph 29 above is equally applicable as regards the partner with whom the Union citizen has a durable relationship that is duly attested, within the meaning of point (b) of the first subparagraph of Article 3(2) of Directive 2004/38. Consequently, a third-country national having such a relationship with a Union citizen who has exercised his right of freedom of movement and returns to the Member State of which he is national in order to reside there, must not, when that Union citizen returns to that Member State, be the subject of less favourable treatment than that provided for under that directive for a third-country national having a durable relationship that is duly attested with a Union citizen exercising his right of freedom of movement in Member States other than that of which he is a national.

33 In a situation such as that in question in the main proceedings, Directive 2004/38, including point (b) of the first subparagraph of Article 3(2) thereof, must be applied by analogy as regards the conditions in which the entry and residence of third-country nationals envisaged by that directive must be facilitated.

34 That conclusion cannot be called in question by the United Kingdom Government's argument according to which, in paragraph 63 of the judgment of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135), the grant of a derived right of residence in the Member State of origin was confined solely to third-country nationals who are a 'family member' as defined in Article 2(2) of Directive 2004/38. As the Advocate General observed in point 35 of his Opinion, although in that judgment the Court held that a third-country national who does not have the status of a family member may not enjoy, in the host Member State, a derived right of residence under Directive 2004/38 or Article 21(1) TFEU, that judgment does not, however, exclude the obligation for that Member State to facilitate the entry and residence of such a national in accordance with Article 3(2) of that directive.

35 In the light of the foregoing considerations, the answer to the first and second questions is that Article 21(1) TFEU must be interpreted as requiring the Member State of which a Union citizen is a national to facilitate the provision of a residence authorisation to the unregistered partner, a third-country national with whom that Union citizen has a durable relationship that is duly attested, where the Union citizen, having exercised his right of freedom of movement to work in a second Member State, in accordance with the conditions laid down in Directive 2004/38, returns with his partner to the Member State of which he is a national in order to reside there.

51. We pause to note that at [33] and [35] the CJEU held that what was conferred was facilitation, not a right.
52. The respondent was not denied a right; rather, his right to reside was facilitated whereas Ms Banger was denied a right to reside. The differential treatment was as between a returning UK citizen who had exercised Treaty rights and an EEA national entering to exercise Treaty rights. In the latter case, the entry of a durable partner would be facilitated. What the respondent seeks, in effect, is to be treated as though he were a family member. This would blur, if not eliminate, the distinction between those in durable partnerships and those who are spouses.
53. We do not consider that Coman assists the respondent either. That is because under the law of the host member state, the couple were spouses and so family members. The observation at [56] that the derived right of residence granted should be no stricter than that provided for in article 7 of the Directive is not relevant here, as there is no differential treatment between countries.
54. For these reasons, we do not accept that the respondent fell to be treated as a family member under the Directive, and so is not entitled to either a permanent right of residence or to the benefit of the provisions relating to retained rights. Equally, we are not satisfied that he is entitled to any derived rights flowing from article 21 or otherwise.
55. It follows from this that the decision of the First-tier Tribunal involved the making of an error of law and must be set aside. We remake it, in line with our findings, and dismiss the appeal.
56. We observe that the real difficulty the respondent faces is that those who are married are treated differently from those who are not. There are significant protections for those whose marriages breakdown but not for those in durable relationships of whatever length.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside
2. We remake the decision by dismissing the appeal.
3. No anonymity direction is made.

Signed

Date 11 February 2019



Upper Tribunal Judge Rintoul