



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal no: IA 01401-13

THE IMMIGRATION ACTS

At **Field House**
on **09.08.2013**

Decision signed: **14.08.2013**
sent out: **21.08.2013**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Patrick Olaseni SOFELA

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Mahmud al-Rashid* (counsel instructed by David Grand)
For the respondent: Mr Tom Wilding

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Warren Grant), sitting at Taylor House on 1 May, to allow an EEA appeal by a citizen of Nigeria, born 3 November 1973, and formerly married to a citizen of France. The judge had accepted submissions by Mr al-Rashid to the effect that he was bound to allow the appeal, because of the way in which a previous appeal by the same appellant (IA 36369-09), from a decision of Judge Parkash Aujla, had come to an end before me in 2010. The previous appeal had involved the re-hearing of the appellant's appeal against refusal of a permanent residence card in 2009, including oral evidence from him, and a lengthy ruling by me, following a hearing on 26 July 2010, which needs to be set out in full here: Mr al-Rashid represented the appellant, as now, and the Home Office were represented by Mr Glyn Saunders.

PREVIOUS RULING

2. **Background** The family history is an unusual one, at least by the standards of these islands. The appellant entered this country on 24 May 2001. On 25 November 2002, he married Roslynn¹ Crosnier de Bellaistre, a French citizen. On 8 January 2003 he was issued with a residence permit as her husband, valid till 8 April 2008. On that same day he applied for a permanent residence card, which was refused on 17 November 2009, the decision against which he now appeals. The reason given was that the Home Office were not satisfied on the evidence provided that Roslynn had resided in this country in accordance with the Immigration (European Economic Area) Regulations 2006 [the EEA Regulations] for those five years.
3. Meanwhile Alice Toyin Azeez, who was to be the mother of the appellant's children, and is also a citizen of Nigeria, had arrived in this country, also in 2001. They met here in 2002, and the first of their children, born 6 June 2003, must in the ordinary course of nature have been conceived in about the previous September. Two more followed, on 8 November 2004, and 11 May 2008. However, in March 2003 Alice was married to Cédric Jacques, also a French citizen, and on that basis she too was issued with a residence card, and now apparently has permanent residence in this country.
4. Both the appellant and Alice gave evidence before the judge that they had led normal married lives, one with Roslynn and the other with Cédric. Alice's with Cédric still continued, to the extent that they spent three nights a week together, and he took her children by the appellant to and from school. In the appellant's case, he says in his statement that he and Roslynn "...became intimate for a short time, and then we decided it was not the best thing to do". Nevertheless they got married; but then the appellant told Roslynn he was expecting a child with Alice. That caused trouble; but when the appellant explained how normal such polygamous relationships were in his culture, Roslynn understood and agreed, so long as he didn't want to have children with her too.
5. The appellant said he and Roslynn had stayed together till July 2009, when "financial pressures" had driven them apart. He produced evidence of her employment in this country till the time of their separation, to which I shall return. They had been good friends, and enjoyed their life together, with only major disagreements over children. However he, as well as Cédric, regularly took his children to school. The judge concluded that the appellant's marriage to Roslynn, and for that matter Alice's to Cédric, had been a marriage of convenience.
6. **Law** Mr al-Rashid conceded, correctly in view of *OA* (EEA - retained right of residence) Nigeria [2010] UKAIT (see the judicial head-note paragraph (ii)), that it was not open to this appellant, whose marriage had never been ended by any legal proceedings, to rely on reg. 10 of the EEA Regulations as a former family member of a 'qualified person', who had retained the right of residence following the termination of his marriage. So he can only claim that right under reg. 15 (1), as
 - i. (b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years
 - b. The issue on this part of the case is whether the appellant did indeed live with Roslynn for the five years required. At one point Mr al-Rashid argued that five years' residence at

¹ This is how he says her name should be spelt, though most if not all the documentary evidence about her has 'Rosalynn'.

any stage was enough; but, faced with the obvious absurdity of such a period at some remote date in the past leading to a right to permanent residence now, he suggested that it should run to the date of the decision. This certainly accords with the present perfect ('has resided') of reg. 15 (1) (b).

7. In this case, the date of the decision under appeal was 17 November 2009, which might have the unfortunate effect of disqualifying this appellant, who had parted company with Roslynn that July; but the whole period between their marriage and those dates was covered in evidence. As for at least part of that time she was working away from home, I will say at once that, where one spouse was, for example, only living away during the week, for work purposes, but coming home at week-ends, then in my view each would be 'residing' with the other for the purposes of reg. 15. The regulation, in the words 'in accordance with these Regulations', requires living together as man and wife for the period in question, and neither just nor merely under the same roof. The only exceptions under the EEA Regulations themselves, at reg. 3 (2), do not help the appellant, as they only deal with absence from the UK altogether.
8. Mr al-Rashid raised various points of law in his skeleton argument about the judge's marriage of convenience finding. As he pointed out, this had not been part of the Home Office's reasons for refusal: those involved the lack of qualifying residence under reg. 15, and have in any event to be dealt with, so that was what was done at the hearing before me. Depending on the result, it may also be necessary to deal with article 8 and what may be described as the 'after-life' of policy DP 5/96.
9. **Evidence** The appellant confirmed his witness statement of 19 July: most of it has been set out in the background, but at paragraph 3 he deals with Roslynn's work record. *Cross-examined*, he said the two of them had lived for about two years after they were married at 104 Iveagh House, Loughborough Rd, London SW9. Then they had moved to no 44 in the same building, also for about two years. At this point (about the end of 2006), they had moved to the Caledonian Rd for three or four months, though he couldn't remember the number. From there, Roslynn had moved to Manchester to work for the rest of that year and the next, though she had returned to London.
10. Dealing with Roslynn's time in Manchester, the appellant said she had come and gone between there and him. He couldn't remember the address at which she had stayed while working there: she was still getting her letters at his place. He was asked about some of the documents put in on his behalf, and this is a convenient point to deal both with those, and with the ones referred to by Mr al-Rashid in closing. The documents at 13 - 16 show the appellant's address as 44 Iveagh House from 2005 till 19 September 2007. That is also the address shown on Roslynn's P60 for the years to 5 April 2004 and 2005.
11. Going on to 2006, a P45 shows Roslynn leaving the employment of a firm based in Ilford on 17 August; then her P60 to 5 April 2007 shows her earning a small amount of money (under £900) with an employment agency in Hyde, Cheshire, giving her address in Crumpsall, Manchester. A weekly wage-slip from the agency, dated 21 December 2006, shows her taking home (to an address in Openshaw, Manchester) £73.58; and another, from 6 July 2007, £81.75 to the Crumpsall address.
12. Roslynn's employment history is taken on in letters to her from
 - i. HM Revenue and Customs on 29 February 2008, to her at 456 Caledonian Rd, confirming she has paid tax for the years 2003 – 2007 inclusive.
 - ii. a business services firm in London SE16: the first, from 25 March 2008, gives her address as 456 Caledonian Rd; the other, from 13 July 2009, another not mentioned by the appellant (but this was around the time when he says they

split up). The first shows her working as an office assistant at £600 a month after tax; the second as a domestic cleaner, at £8,000 a year, also after tax.

13. When the appellant was first asked about Roslynn's 2007 P60, he confirmed that she had been living at the Crumpsall address, and nowhere else in Manchester. Then the wage-slip of 21 December 2006, showing the Openshaw address, was put to him: to this he said that there had been some kind of argument between them. Reminded that he had clearly said she had been living nowhere other than Crumpsall, he replied that he didn't remember. Asked why he hadn't said he didn't remember, when first asked, the appellant said he had been trying to.
14. Asked when difficulties between him and Roslynn had begun, the appellant said it had been in 2009: those in 2006 – 07 (see 13) had been no more than arguments. As for what had started their differences, he said it had been over children. He was reminded that his eldest child with Alice, Ezekiel, had been born on 6 June 2003², and asked when he had met her. To this he said it had been in 2002, several months before their marriage. His separation from Roslynn had been the result of difficulties over money and immigration: at one time he had been working himself, but in 2008 his residence card had been withdrawn, and so he had had to stop, after which she had been supporting him.
15. There was nothing more in the circumstances from Roslynn (the statement seen by the judge is not included in the appellant's present bundle): as for Alice, she had come to give evidence for him before, but now his real relationship was with their children, rather than her. The parties' submissions have been included in my treatment of the documents and the law.
16. **Conclusions** The real issue is whether the appellant was residing (to use the language of the EEA Regulations) with Roslynn in 2006 – 07. There is nothing in the documents relating to 2002 – 06 themselves to suggest that they were not living together, though Mr Saunders invited me to disbelieve the appellant's evidence about that, as a matter of general credibility. On the other hand, whether Mr al-Rashid's original position (that five years' residence together at any time after marriage is enough), or his second line (that it must run to the date of the decision) is right, not living together in 2006 – 07 would have broken the necessary continuity.
17. So far as the evidence about 2007 – 09 is concerned, the 2008 letters, both from the Revenue and Roslynn's employers, give an address at which the appellant says (though without being able to remember the number) they were living from the end of 2006 for three or four months.
18. Roslynn has been in regular work over the years; but at every time for which I have been referred to any record, in very modestly-paid posts, either office or domestic, at no stage earning more than the £8,000 a year after tax, given in the 2009 London letter. Whatever led her to go and seek work in Manchester, it was not apparently the prospect of large earnings: at least the most she is ever shown as taking home there is just over £80 a week in July 2007. This is not the sort of sum which leads women, otherwise inclined to live with a man as his wife, to go and work away, even, or perhaps especially, during the week only.
19. There is also the appellant's unexplained equivocation over where Roslynn was living in Manchester: he first answered very clearly that it had only been in Crumpsall, and only resorted to saying he didn't remember when confronted with the wage-slip showing Openshaw. While he might not have had any particular reason to remember an address, if

² Curiously enough, the birth certificate produced on behalf of the appellant shows the child's usual address as Flat 3, Iveagh House.

Roslynn had used it only for work purposes during the week, he certainly had no reason not to say he didn't remember it.

20. Then there is the question of what had led to the appellant's separation from Roslynn: had it been his begetting a child with Alice? Presumably not, since that child had been conceived the year before he married Roslynn. Or had it been money problems, caused by Roslynn having to support him, after his residence card expired in 2008? Even then, though, she was hardly earning enough to support two people.
21. I was also referred to telephone bills for 44 Iveagh House, dated 16 July 2006 and 15 January 2007, and in Roslynn's name. Those might tally with her and the appellant living there together till they moved to the Caledonian Rd about that time, if the 22 December 2006 wage-slip, giving the Openshaw address, only related to where she was during the week. However, these bills have nothing to say about the situation between Roslynn and the appellant for the rest of 2007; and I have not been referred to anything but the appellant's own evidence about living in the Caledonian Rd to link him with no 456, where she was living by 2008.
22. Taking together all the evidence about the position from the time Roslynn left her job with the Ilford firm in August 2006, till the appellant says they split up for good in July 2009, I am satisfied that more likely than not he was not residing with her (in the sense given at 7) at any point during that time. I am certainly satisfied, for the reasons given at 18 – 20, and bearing in mind 21, that he was not residing with her during her time in Manchester, which on the documentary evidence lasted at least from December 2006 till July 2007.
23. The result is that the appellant cannot succeed on his appeal against refusal of a permanent residence card, under reg. 15 of the EEA Regulations. While the decision under appeal did not entail his removal, if upheld, it did include a 'one-stop warning' and the appellant's notice of appeal to the judge claimed that the consequences of the decision would involve a breach of article 8, not in terms of his "private and family life" with Alice and their children, but simply because of his claim for permanent residence as a result of his marriage to Roslynn.
24. That claim has now been disposed of, and on a basis which leaves it clear that the appellant can have no article 8 right to remain in connexion with Roslynn. While it may be questionable how far it ought to be open to him to argue, on this appeal, a completely separate set of rights, in connexion with Alice or his children with her, that seems to have been taken for granted throughout the progress of this appeal so far. On general principle, it is open to the appellant to argue article 8 on an appeal not involving any present decision to remove: see *TE (Eritrea)* [2009] EWCA Civ 174. Whether that position is affected by the explanation of that decision by Moses LJ in *Mirza* [2010] EWHC (Admin) 2002 will also be open to argument.
25. It does not seem to me that the point taken in the appellant's skeleton argument on the former seven-year rule (DP 5/96: see *NF (Ghana)* [2008] EWCA Civ 906) is open to him, because his children with Alice do not face removal in any event, since she has permanent residence as a result of her marriage to Cédric.
26. So far however the appellant has put no written article 8 case before the Home Office about Alice or his children with her. A full witness statement by the appellant (and one by Alice, if any continuing relationship with her is to be relied on) must be filed and served by 1 September, setting out the history of their relationship and its current position, especially relating to the children, together with copies of any reports or letters from their schools to be put in evidence. All this material should appear in the form of a fresh numbered and indexed bundle. Following this, the appeal will be re-listed for hearing on article 8 only.

SUBSEQUENT HISTORY

2. For no reason that I have been able to discover, the previous appeal was not re-listed as I had directed, till 2012. By this time, two ‘reported’ decisions of the Upper Tribunal had come out, *PM* (EEA - spouse - ‘residing with’) Turkey [2011] UKUT 89 (IAC) and *Idezuna* (EEA -permanent residence) Nigeria [2011] UKUT 474 (IAC), and the appellant’s lawyers had made representations about their effect to the Home Office. These resulted in a number of adjournments for the Home Office to consider them, the last being on 6 November, when there was no appearance for the appellant.
3. On 6 December 2012 Miss Julie Isherwood, who had been representing the Home Office in that year’s proceedings, wrote to me, referring to the appeal having last been adjourned for that reason, and “... to allow the respondent further time to consider whether the EEA refusal stands”. Miss Isherwood asked for “... permission to withdraw the refusal decision of the 17 November 2009 in accordance with R. 17(1)(a) of the Upper Tribunal Procedure Rules. This would allow a full and more up-to-date assessment of the appellant’s position”.
4. When that letter reached me, on 28 December 2012, I consented to withdrawal of the appeal under r. 17 (2), with the proviso, under r. 17 (3), that “Failing any application by the respondent to reinstate his or her case by one month from today, the appeal will stand allowed, but no further direction will be given”. There is in my view only one plain and obvious meaning to this order: the appellant’s appeal against the decision set out in the refusal letter of 17 November 2009 was allowed; but there would be no direction to the Home Office to issue him with a permanent residence card. Equally clearly, that left the Home Office free to make a further decision, subject to a further right of appeal for the appellant, as to whether he should have a residence card or not.
5. That decision was made by way of a ‘notice of immigration decision’, dated 3 January 2013. The decision itself did not refer to any explanatory refusal letter, and refused the appellant’s application for a permanent residence card on the following grounds [*my lettering*]: the appellant
 - (a) had not provided evidence that Roslynn had resided in the UK in accordance with reg. 15(1)(a) for the necessary five-year period; and
 - (b) had not resided in the UK with Roslynn for five years.

On the same day the usual appeal bundle was compiled and sent to the First-tier Tribunal. The index of documents (on the form known as PF1) included both the refusal letter of 17 November 2009 (annex N) and the one of 3 January 2013 (not numbered). However the 3 January refusal letter was *not* included in the bundle.

6. This was the form in which the case came before Judge Grant on 1 May. He set out the history of the previous appeal, and alluded to the effect of *PM* and *Idezuna*, to which I shall now come. The judicial head-note of *PM*, a decision written by Blake J, in which two other Upper Tribunal judges took part, is as follows:

Regulation 15(1)(b) of the Immigration (European Economic Area) Regulations 2006 applies to those who entered a genuine marriage where both parties have resided in the United Kingdom

for five years since the marriage; the EEA national's spouse has resided as the family member of a qualified person or otherwise in accordance with the Regulations and the marriage has not been dissolved. The "residing with" requirement relates to presence in the UK; it does not require living in a common family home.

7. The judicial head-note in *Idezuna* is less succinct, but this is the relevant part:

1) Typically, the focus in EEA appeals involving family members is on either or both (i) the nature of the relationship with the EEA national/Union citizen; and (ii) the question of whether the EEA national/Union citizen has been exercising Treaty rights in the UK over the relevant period. What constitutes the relevant period, however, may be a matter requiring particular consideration and sometimes a family member may have acquired a right of permanent residence on the basis of historical facts. In the present case, for example, once the appellant had established that his wife was exercising Treaty rights for five continuous years since the date of marriage (and before he was divorced), then (subject to (d) below) he was from that date someone who had a right of permanent residence which could not be broken by absence from the UK unless in excess of two years.

8. Since this appellant was not divorced from Roslynn till 22 February 2013 (I saw a copy of the decree absolute), those decisions, if followed in the present case, would result in his being entitled to a permanent residence card, so long as

- (a) both of them had lived in this country for a continuous period of five years between their marriage on 25 November 2002 and that date: this is not in dispute; and
- (b) their marriage was genuine at its inception, meaning not a marriage of convenience.

It is Judge Grant's treatment of point (b) which led to the present appeal.

9. At paragraph 6 Judge Grant noted, correctly, that

- (a) the decision challenged in the previous appeal had been based on whether Roslynn was a 'qualified person'; but
- (b) Judge Aujla had found against the appellant [*at least in part*] on the basis that his marriage to Roslynn had been one of convenience, without this issue having been raised at the hearing before him; so
- (c) permission to appeal had been given on that basis; but
- (d) on 30 June 2010 directions had been given in the Upper Tribunal (by Judge Anne Murray) for a resumed hearing, on the basis of "All issues at large including the issue of whether the Appellant's marriage is a marriage of convenience"; and
- (e) that was the basis on which the previous appeal had come before me.

10. Judge Grant went on there to note, more contentiously as it turned out, that at my hearing "Mr Saunders could have raised, but did not raise the issue of marriage of convenience". After setting out what had followed, he made his own decision on the result as follows:

- 9. Instead of applying for reinstatement under rule 17 (3) the respondent has purported to issue a new decision. I agree with Mr Al-Rashid's submission that the procedural rules are meant to

facilitate fairness. Mr Saunders made no submissions on the basis of marriage of convenience. I find that the respondent has now attempted to bypass the Upper Tribunal and has issued a fresh decision which raises marriage of convenience.

10. I went through the possible steps which might have been taken had SJ [*sc. Senior Immigration Judge*] Freeman not given more time for Article 8 issues. Mr Al-Rashid stated that the appellant would have filed a fresh application. He also pointed out that the original notice of decision did not raise the issue of marriage of convenience. This was an issue raised entirely by IJ [*sc. Immigration Judge*] Aujla.

11. I find that the respondent has in failing to comply with the requirements of rule 17 issued a notice of decision which is not in accordance with the law.

11. Miss Isherwood's application for permission to appeal refers to her letter of 6 December, and the terms of my order of 28 December 2012, and goes on to refer to Judge Grant's decision in this way:

It can be seen from paragraph 6 ... that the appellant has never received an allowed decision that permits him to have permanent residency [*sic*] in the UK and that the issue of marriage of convenience was raised by both a Judge and a Presenting Officer [*sc. Mr Saunders*].

The judge materially erred in failing to address the issues raised in this appeal and to consider whether the appellant meets the EEA regulations. The respondent requested permission (which was granted) to look at the case again and having done that issued a fresh refusal. There has been no attempt by the respondent to bypass the Upper Tribunal.

PRESENT ISSUES

12. Permission to appeal was granted in the First-tier Tribunal on those grounds, and directions given in the Upper Tribunal for the present appeal to be re-listed before me, for obvious reasons. I have already made clear at 4 what I consider the equally obvious effect of my order of 28 December 2012: once the Home Office had chosen not to apply to reinstate their 2009 decision, it left them free to make a fresh one, which they did on 3 January 2013.

13. There was nothing in my 2010 ruling to provide any basis for the appellant's appeal to be allowed on its merits: if there had been, then I should have made it clear that he was to be issued with a residence card, or further directions would be given. I found against him on what at the time I considered to be the requirements of the Immigration (European Economic Area) Regulations 2006 [the EEA Regulations], and only held back from giving a final decision, dismissing his appeal, because of the obvious possibility of an article 8 claim based on Alice and his children with her.

14. There was nothing except the potential effect of *PM* and *Idezuna* to provide any basis for the appeal to be allowed on its merits under the EEA Regulations; and the Home Office, having asked a number of times during 2012 for the hearing to be further adjourned, so that they could consider that effect, appeared last December to have decided to withdraw their previous decision, for that purpose. Since the appellant, who was paying for his own representation, had not been present or represented on the last occasion when the case had come before me, rather than draw out the proceedings further, I made the order of 28 December.

15. While it would have been not only possible, but desirable for Judge Grant to take any findings of fact I had made in my 2010 ruling as his starting-point, no-one so far had given any judicial consideration to the effect on them of *PM* and *Idezuna*; and at the least he needed to do that. There is also the question of whether he needed to deal with the marriage of convenience point, to which I shall now come. If I found for the Home Office on that, then there would need to be a fresh hearing on the evidence to deal with it, which would have to take place before another judge of the First-tier Tribunal, since the point was not considered on its merits by Judge Grant at all, and would require close examination of the parties' actions, going back to 2002.
16. On the other hand, if I find for the appellant, then I can go on to re-make the decision on the EEA Regulations on the basis of my own findings of fact, in the light of *PM* and *Idezuna*: Mr al-Rashid told me he was content to take his stand on this appeal on that basis, without any re-hearing of the evidence.

MARRIAGE OF CONVENIENCE

17. I first refer to paragraph 8 of my 2010 ruling, set out above, as to what I considered to be the issues before me then. Mr Wilding referred me to a file note by his colleague Mr Saunders, made on 6 August that year (as it happened, the same day I signed my decision). The relevant parts read

The appellant adopted his statement, and gave further poor evidence, especially in respect of his wife's period of employment at Manchester, in 2006-7.

I submitted that he failed to meet the requirements of 15 (1) (b) of the 2006 Regs. I made further submissions about the marriage of convenience point, but I am less optimistic as to that issue.
18. Perhaps Mr Saunders may have thought he had drawn the marriage of convenience point to my attention; but it is quite clear that he, like me, and probably Mr al-Rashid too, were concentrating on the continuity of Roslynn's residence with the appellant, and whether it was broken by her sojourn in Manchester. While there were clearly a great many features of the case, not least the appellant's history with Alice, which were capable of casting a good deal of suspicion on his motives for marrying Roslynn, to have pursued this point effectively Mr Saunders would have needed to cross-examine him, not just on what happened when she got the job in Manchester in 2006, but on the whole history of their marriage from 2002.
19. Going on to my order of 28 December 2012, there had been nothing in Miss Isherwood's letter of the 6th (see 3) to suggest that the marriage of convenience point was to be taken in any fresh decision: if there had been, I should certainly not have allowed the Home Office to withdraw their previous one, since any judicial decision on that point would have needed to be made on the basis of the findings of fact I had already, at some length, reached; but taken as a whole together with additional ones on issues I had not considered. That could only reasonably have been done by insisting that the previous appeal proceeded to a final decision before me.

20. While I have given rather different reasons on this point from those adopted by Judge Grant, I have no doubt that he was right in the result he reached, which was that the reliance by the Home Office on marriage of convenience in the present appeal was an abuse of the appellate process.
21. That decision also avoids the obvious difficulties for the appellant in meeting whatever case the Home Office chose to make on that point (and their reasoned refusal letter, as already pointed out, was not before Judge Grant), on the basis of what he and Roslynn, with whom he is no longer in touch, might have done in 2002. That is not the basis for my decision; but it confirms my view that it is not now in the interests of justice to allow the Home Office to pursue the marriage of convenience point.

EEA REGULATIONS

22. On my previous findings of fact, which neither side sought to challenge in this appeal, both the appellant and Roslynn had lived in this country for considerably more than five years between their marriage in 2002 and their divorce in 2013. *PM* is a Presidential decision, and, though it is not 'starred', I consider that, in the interests of certainty for all concerned, I ought to follow it, unless there is some good reason for distinguishing it in the present case.
23. These were the Tribunal's conclusions in *PM*:
 34. We recognise that the fact that spouses or civil partners decide not to live together in a common household, may sometimes invite inquiry into the nature of the relationship.
 35. No such inquiry could possibly arise in this case, where there has been genuine matrimonial cohabitation for some time, a child has been born to the couple and there are continuing social relations by the parties to the marriage in the context of contact with the child.
 36. The EEA Regulations (reg 2(1)) precludes those who are party to a marriage of convenience from being a spouse and therefore a family member under reg 7. As recital 28 of the Citizens Directive makes clear, a marriage of convenience is an abuse of rights but it is a term strictly limited to relationships "contracted for the sole purpose" of enjoying free movement rights and with no effective social nexus between the parties. An inference of marriage of convenience cannot arise solely because a married couple are not living in the same household.
 37. However, for the reasons we have given above, we conclude that reg 15(1)(b) applies to those who entered a genuine marriage where both parties have resided in the United Kingdom for five years since the marriage; the EEA national's spouse has resided as the family member of a qualified person or otherwise in accordance with the Regulations and the marriage has not been dissolved.
27. Whatever the differences in the quality of this appellant's relationship with Roslynn, and that of the parties in *PM*, I do not think they provide any proper basis for distinguishing that decision. The reason is that it holds that the EEA Regulations, and the Citizens Directive on which those are based, only exclude marriages of convenience, meaning "relationships "contracted for the sole purpose" of enjoying free movement rights and with no effective social nexus between the parties"; and whether that is so or not in the present case is not a point which the Home Office have properly taken.

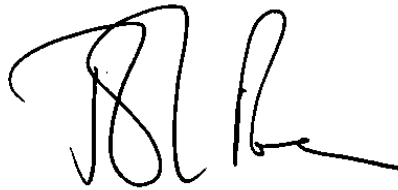
28. It follows that this appeal has now to be allowed on its merits, under the EEA Regulations. I do not suppose for one moment that the ordinary person would have any more enthusiasm for this result than I do; but it is one which I consider myself compelled by *PM* to reach. If I regarded myself as free to treat *PM* as wrongly decided, I should need to go into the basis for the conclusions set out at paragraphs 34 – 37.
29. I shall do so briefly in any event, because it is not impossible that this case may go further. The basis for the Tribunal’s decision on the terms of reg. 15 themselves was as follows:
38. Turning to reg 15 itself, we are struck with the contrast between 15(1)(a) and (b). If the IJ’s conclusion is correct then (assuming in both cases that the EEA national has resided in the United Kingdom in accordance with these Regulations) there is a very significant difference in treatment of family members depending on their nationality. A French spouse of an Italian national obtains permanent residence without any requirement to reside with the EEA national. A Turkish spouse, such as the appellant, can never obtain permanent residence if the EEA spouse never established a common matrimonial home or moves out of it before the expiry of the period of five years. Such a startling distinction in treatment would be very surprising when the basic definition of family member affords no decisive importance to the nationality of that person.
39. Moreover, it is common ground that no distinction is made on the grounds of the nationality of the family member who obtains a permanent right of residence in the circumstances set out in reg 15(1)(b) (e) or (f). Thus in the circumstances set out in those provisions a non-EEA national wife may achieve permanent residence when the EEA national ceases working, dies, or divorces her. In none of these cases is the permanent right of residence dependent on residence in a common family home, and the period of retained residence in the United Kingdom may in certain circumstances be shorter than three years. Regulation 15(1)(f) refers to the retained right of residence that is further provided for.
40. In short if the IJ’s construction of reg 15(1)(b) is correct it would result in anomalous and discriminatory treatment of the non-EEA national spouse who could not or would not get a divorce to terminate the marriage.
41. There is no reason to believe that this is what the national legislator intended to achieve and every reason to believe that it would be a result intended to be avoided.
27. If free to do so, I should have regarded it as doubtful at best, either whether Regulations intended to enact the legislation of an economic area designed to promote freedom of movement for its citizens should have necessarily been regarded as unlikely to discriminate between them and others; or whether there was anything objectionable, either under that legislation or international law, in discriminating in that way.
28. This view is strengthened by the terms of the EEA legislation itself, as set out in the Citizens Directive with which the Tribunal in *PM* go on to deal.
42. Article 16.1 provides “Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in chapter III.”
43. Article 16.2 continues “Paragraph 1 shall apply also to family members who are not nationals of a Member State and have resided with the Union citizen in the host Member State for a continuous period of five years”.
44. The French text is in the following terms:

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

29. If the Council of Ministers said “... resided *with* the Union citizen”, and used equivalent words in the French text, then to my mind they should be treated as meaning it: whatever justification is found for any other result, as a matter of construction it comes dangerously close to the well-known rule, propounded by no less an authority than Lewis Carroll³. However, for the reasons already given, I have reached the following result.

Appeal allowed

Direction for issue of permanent residence card to appellant, failing any further appeal

A handwritten signature in black ink, consisting of stylized, overlapping loops and a long horizontal stroke at the end.

(a judge of the Upper Tribunal)

³ "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."