

**THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. CSPC/337/2016

Before: Upper Tribunal Judge K Markus QC

Representation:

For the Appellant: Mr Patrick Hannon (welfare rights advisor)
For the Respondent: Mr Grahan Mcivor (counsel)

DECISION

The appeal is dismissed.

REASONS FOR DECISION

Introduction

1. This appeal is about the right of residence of an EU citizen, after divorce, on the basis of their former marriage to a British citizen. This issue also raises the prior question as to whether EU law is of any application where the British spouse has only moved between Britain and another state prior to Britain joining the EEC. I answer the second question first, in the negative. In any event, even if EU law does apply, I also decide the first question against the appellant.
2. An oral hearing of the appeal took place before me on 17 January 2018 at George House in Edinburgh. The appellant was represented by Mr Hannon, welfare rights adviser, and the respondent by Mr Mcivor, counsel. As a result of the arguments changing somewhat during the hearing, I afterwards directed the parties to make further written submissions. This delayed my determination of the appeal.

Facts

3. The undisputed facts, as presented to the First-tier Tribunal (FTT), can be briefly stated. The appellant is an Italian national. He had been resident in the UK as a worker between 1970 and 2000. He left in 2000 but returned to the UK on 22 May 2013. He had not worked after his return to the UK. At the time that he returned he had been married to a UK national ("MB"), until they divorced on 18 March 2015. He was not dependent upon her, and did not know of her current circumstances.
4. The appellant now asserts other facts which were not before the First-tier Tribunal. He says that his relationship with MB started in 1968 when she was living in Italy, having come there to work. He says that MB gave birth to their first baby in Italy in 1968 and moved to the UK in December 1969 when she was pregnant. She gave birth to their second child in the UK in January 1970. At some point the couple separated and the appellant left the UK in 2000. Although the respondent does not accept these facts, he contends that, even

if true, they cannot affect the outcome of the present appeal. I return to this in due course.

5. The appellant made a claim for state pension credit on 9 November 2015. On 15 December 2015 the claim was refused on the ground that the appellant was not habitually resident in the UK because he did not have a right to reside in the UK.
6. It is common ground that at the time of the decision the appellant was not a worker, either on the basis of employment or self-employment, and was not “self-sufficient” as he did not have comprehensive sickness insurance in the UK. Nor did he have a permanent right to reside. Therefore he could only have had a right to reside on the basis of his relationship with MB.

Legislative framework

7. Section 1 of the State Pension Credit Act 2002 provides that it is a condition of entitlement to state pension credit that the claimant is “in Great Britain”.
8. Whether a person is to be treated as being in Great Britain is governed by Regulation 2 of the State Pension Credit Regulations 2002 (SI 2002/1792). In summary, for present purposes, whether the appellant was “in Great Britain” depended on whether at the date of claim he was habitually resident in the UK, which in turn depended upon whether he had a right to reside in the UK, other than a right falling within regulation 2(3) (which includes the initial three months right afforded to all EEA nationals upon arrival in the UK, but otherwise is of no relevance in this case).
9. At the time of the claim residence in the UK was governed by the Immigration (European Economic Area) Regulations 2006. The relevant provisions are:

“2.— General interpretation

(1) In these Regulations—

...

“EEA national” means a national of an EEA State who is not also a British Citizen;

“EEA State” means—

- (a) a member State, other than the United Kingdom;
- (b) Norway, Iceland or Liechtenstein; or
- (c) Switzerland;

...

6.— “Qualified person”

(1) In these Regulations, “qualified person” means a person who is an EEA national and in the United Kingdom as—

- (a) a jobseeker;
- (b) a worker;
- (c) a self-employed person;
- (d) a self-sufficient person; or
- (e) a student.

...

7.— Family member

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

(a) his spouse or his civil partner;

...

9.— Family members of British citizens

(1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member of a British citizen as if the British citizen (“P”) were an EEA national.

(2) The conditions are that—

(a) P is residing in an EEA State as a worker or self-employed person or was so residing before returning to the United Kingdom;

(b) if the family member of P is P's spouse or civil partner, the parties are living together in the EEA State or had entered into the marriage or civil partnership and were living together in the EEA State before the British citizen returned to the United Kingdom; and

(c) the centre of P's life has transferred to the EEA State where P resided as a worker or self-employed person.

(3) Factors relevant to whether the centre of P's life has transferred to another EEA State include—

(a) the period of residence in the EEA State as a worker or self-employed person;

(b) the location of P's principal residence;

(c) the degree of integration of P in the EEA State.

(4) Where these Regulations apply to the family member of P, P is to be treated as holding a valid passport issued by an EEA State for the purpose of the application of regulation 13 to that family member.

10.— “Family member who has retained the right of residence”

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

...

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

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

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

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

(d) either—

(i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had

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lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration; ...

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

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

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

....

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

13.— Initial right of residence

(1) An EEA national is entitled to reside in the United Kingdom for a period not exceeding three months beginning on the date on which he is admitted to the United Kingdom provided that he holds a valid national identity card or passport issued by an EEA State.

(2) A family member of an EEA national or a family member who has retained the right of residence who is residing in the United Kingdom under paragraph (1) who is not himself an EEA national is entitled to reside in the United Kingdom provided that he holds a valid passport.

...

14.— Extended right of residence

(1) A qualified person is entitled to reside in the United Kingdom for so long as he remains a qualified person.

(2) A family member of a qualified person residing in the United Kingdom under paragraph (1) or of an EEA national with a permanent right of residence under regulation 15 is entitled to reside in the United Kingdom for so long as he remains the family member of the qualified person or EEA national.

(3) A family member who has retained the right of residence is entitled to reside in the United Kingdom for so long as he remains a family member who has retained the right of residence.

...

15.— Permanent right of residence

(1) The following persons shall acquire the right to reside in the United Kingdom permanently—

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(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; ...

(f) a person who—

(i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and

(ii) was, at the end of that period, a family member who has retained the right of residence.

...

(2) The right of permanent residence under this regulation shall be lost only through absence from the United Kingdom for a period exceeding two consecutive years.

...”

10. The 2006 Regulations were made in order to transpose Directive 2004/38/EC into UK law. The relevant parts of that Directive for the present appeal are as follows:

“CHAPTER I

General Provisions

...

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.

...

CHAPTER III

Residence

...

Article 7 Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) 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

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

- have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, 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; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

...

Article 13 Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership

1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 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 or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or

(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 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 partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner 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.

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 personal basis.

Article 14 Retention of the right of residence

...

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

...

CHAPTER IV

Right of permanent residence

...

Article 16 General rule for Union citizens and their family members

1. 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.

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

...

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

Article 17 Exemptions for persons no longer working in the host Member State and their family members

1. By way of derogation from Article 16, the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by:

(a) workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, ...

(b) workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work...

(c) workers or self-employed persons who, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, to which they return, as a rule, each day or at least once a week

...

3. Irrespective of nationality, the family members of a worker or a self-employed person who are residing with him in the territory of the host Member State shall have the right of permanent residence in that Member State, if the worker or self-employed person has acquired himself the right of permanent residence in that Member State on the basis of paragraph 1.

..."

The First-tier Tribunal's decision

11. The appellant did not claim to have a right to reside as a qualified person within article 6 of the 2006 Regulations. As the tribunal found, he did not have

an extended or permanent right of residence. The appellant claimed a right to reside based on that of his former wife and which he claimed continued despite their divorce. The tribunal rejected this. The appellant had ceased to be a family member of MB following their divorce. The tribunal decided that the appellant did not have a retained right pursuant to regulation 10 of the 2006 regulations, because that regulation applied only to non-EEA nationals. In this regard the tribunal must have been referring to regulation 10(5) and (6)(a), which was the only route through which regulation 10 could possibly have applied.

12. The appellant had argued that, if regulation 10 did not apply to him, it was because the Regulations failed to transpose Article 13(1) of the Directive and that the tribunal should give direct effect to his rights under that provision. The tribunal rejected that submission.

Discussion

The 2006 Regulations

13. The appellant's case under the 2006 Regulations is in essence that, although MB was a British citizen and so could not be a qualified person within the Regulations, she fell to be treated as such by virtue of regulation 9 and that, on divorce, he was a family member of a qualified person with a retained right of residence under regulation 10.
14. For reasons which are explored more fully under the sub-heading below "Whether EU law applies", I do not consider that MB was residing in Italy as a worker or self-employed person before returning to the UK, nor is there sufficient evidence to show that the centre of MB's life had transferred to Italy when residing there. Therefore regulation 9 does not apply to the present case.
15. In any event, the appellant's case under regulation 10 is wholly misconceived. Regulation 10(5) applies where a person ceases to be a family member of a qualified person on termination of the marriage to that person. One of the conditions that must be satisfied under that provision is, by reason of regulation 10(5)(c), that the person claiming the retained right of residence must satisfy the conditions in regulation 10(6).
16. The appellant could not satisfy regulation 10(6)(a) because he was an EEA national. In addition he was not a worker or a self-employed or self-sufficient person. Nor could he satisfy subparagraph (b). There was no suggestion that he had any family member falling within subparagraph (a).

Article 13 of Directive 2004/38/EC

17. The Directive applies to "Union citizens who move to or reside in a Member State other than that of which they are a national" and so did not apply to MB when she returned to and resided in the UK. The Directive is nonetheless relevant by reason of EU law and the principle of freedom of movement.
18. In R v Immigration Appeal Tribunal and Surinder Singh ex parte Secretary of State for the Home Department Case C-370/90, [1992] Imm AR 565, the CJEU decided that where, in the exercise of Treaty rights, a national of a Member State moves to another Member state and then returns to the State of

which they are a national, that person may rely upon free movement rights in his or her own country including the right to bring a spouse to their country. In O and B v Netherlands, Case C-456/12, [2014] QB 1163, the CJEU held that Directive 2004/38 the right of residence of a third country national who is a family member of a Union citizen residing in the citizen's home member state, recognised in Surinder Singh, is not conferred by Directive 2004/38 but is derived from the Community Treaties (now Article 21(1) TFEU). The Court held that, in order not to interfere with the citizen's freedom of movement, the conditions for granting the derived right of residence should not be more strict than those provided for by the Directive for the grant of such a right to a family member of a Union citizen who becomes established in a Member State other than his own and so the Directive should be applied by analogy to that situation. I note in passing that regulation 9 of the 2006 Regulations was enacted in order to implement the principles established by this case law.

19. If Article 13 has any relevance in the present case, it is by the above route. The Directive did not apply to MB, as a UK citizen living in the UK, and so did not confer derived rights on her spouse. But the principles in Surinder Singh and O and B could mean that, assuming that MB's residence in the host state satisfied the necessary conditions, the appellant was entitled to rights equivalent to those provided for by the Directive.

Whether EU law applies

20. It follows that there can be no issue as to the application of the Directive by analogy unless MB had been exercising Treaty rights in Italy from which the appellant was able to derive rights pursuant to the above principles. In the First-tier Tribunal the appellant had adduced no evidence to establish the factual basis for such a right other than the brief statement that he had been married to MB when she was living and working in Italy. Mr Hannon says that, as the appellant had raised regulation 9 and Article 13, the First-tier Tribunal should have inquired further into the facts. He submits that, on the basis of the additional evidence contained in the appellant's statement produced for this appeal (see paragraph 2 above), it would have been open to the tribunal to make findings of fact which would have formed the basis for his claim to a derived right of residence.
21. Mr Mciver submits that, whether or not EU law applies, the appeal must fail and so he submits that it is not necessary to determine whether it does apply. Nonetheless, his primary submission is that EU law does not apply. He submits that the evidence is inadequate to support the contention that MB's activities in Italy were such that they were or even might have been covered by EEC law as it was at the time or by EC/EU law as it has developed.
22. Mr Hannon relies on Ziolkowski v Land Berlin [2013] 3 CMLR 37 as establishing that periods of residence completed by a national of a non-Member State before the accession of that State to the EU must be taken into account in calculating the five-year qualifying period for the purpose of acquiring a permanent right of residence, provided the residence complied with the conditions laid down by EU law.
23. Mr Ziolkowski was a Polish national who had been living lawfully in Germany on humanitarian grounds prior to Poland's accession to the EU. The CJEU

decided that he could rely on that period of residence in order to establish the permanent right of residence under Directive 2004/38, because the provisions on citizenship of the EU are applicable as soon as they enter into force and must be applied to the present effect of situations previously arising. However it was a necessary condition of doing so that the period of residence relied upon had complied with the conditions laid down in the Directive, in particular those in article 7(1).

24. Mr Hannon submits that MB acquired the right to reside in Italy under EEC law as a third country national married to an Italian citizen, and Ziolkowski means that she should be treated as having retained that right on her return to the UK in 1970. In this way, it is submitted, when the UK joined the EEC, recognition is given to the present effect of a situation which had previously arisen.
25. This case is very different from Ziolkowski. There is no evidence that MB's factual circumstances were such that her residence in Italy was in compliance with conditions of Treaty law. Even assuming the facts to be as asserted in the appellant's witness statement at page 456, it is likely that MB first entered and worked in Italy on the basis of a visa or permit granted to her for those purposes and that, following her marriage to the appellant, was able to continue living and working in Italy as his spouse. Whatever her status in Italy, it was entirely a matter of Italian law. When MB and the appellant came to the UK in 1969 or 1970, MB was not exercising rights of freedom of movement and the appellant's status would have been under UK domestic law. His residence in the UK was not connected with the exercise of rights of free movement by him or MB. There is no evidence that the factual situation called for a derivative right to reside to be conferred on the appellant in order to give effect to a situation that had previously arisen. Indeed such evidence as there is indicates to the contrary.
26. It follows that the principle in Surinder Singh is of no application in this case.
- The Appellant's rights under Article 13(1)
27. If I am wrong in this, so that the principle in Surinder Singh applies, I nonetheless reject the appellant's case as to the meaning and application of Article 13(1).
28. Mr Hannon submits that the appellant retained a right by analogy with Article 13(1). He says that the appellant was treated as a spouse with a right of residence by virtue of being a family member of a Union citizen and so, pursuant to the first subparagraph of Article 13(1), continued to enjoy that right upon divorce. He submits that the first subparagraph of Article 13(1) imposes no further conditions and the second subparagraph addresses a different situation in that it sets out the conditions of acquisition of a permanent right of residence by such a person. On his construction of the second subparagraph, the words "before acquiring the right of permanent residence" mean "as a condition of acquiring the right of permanent residence".
29. Mr Mciver submits says that both subparagraphs of Article 13(1) are to be read together and provide that, upon divorce, the right of residence which an EU spouse already enjoys (ie independent of any right derived from their status as spouse, such as a right under Article 7) is unaffected by divorce. He says that the second subparagraph makes it clear that, until the spouse

acquires a permanent right of residence, their right of residence continues only for as long as they exercise Treaty rights. Once they acquire the permanent right of residence, no further conditions are imposed. The effect of this is that the spouse who has not acquired a personal right of residence is not in any better position following divorce than if they had never been married. On the respondent's construction, "before acquiring the right of permanent residence" means "in the period before acquiring the right of permanent residence".

30. The CJEU in 218/14 Singh v Minister for Equality and Justice [2016] QB 208 has put the matter beyond doubt in relation to Article 13(2), at paragraph 63:

"... if on the date of commencement of the divorce proceedings the third-country national who is the spouse of the Union citizen enjoyed rights of residence on the basis of Article 7(2) of the Directive 2004/38, that right is retained, on the basis of Article 13(2(a)) of the Directive, both during the divorce proceedings and after the decree of divorce, provided that the conditions laid down in the second subparagraph of Article 13(2) of the Directive are satisfied ..."

31. In Ahmed v Secretary of State for the Home Department [2017] EWCA Civ 99, Arden LJ, delivering the judgment of the Court, said as follows:

"16. As I see it, the opening words of article 13(2) makes it quite clear that the first subparagraph is subject to the second subparagraph. The second subparagraph, which starts "Before acquiring the right of permanent residence", is also clearly laying down a condition to be met where a person claims a retained right to reside under Article 13(2), but has not acquired any right of permanent residence.

17. It is not a tenable construction of article 13 that the second subparagraph is dealing only with conditions for acquiring permanent residence. It would be absurd if a person has to satisfy the requirement to be a worker, self-employed, self-sufficient or a student only when he applies for that more privileged status."

32. Article 13(2) follows the same structure as that of Article 13(1). There is no material significance in the use of different phraseology in the second subparagraphs of Article 13(1) and (2). It may be that it was thought necessary to spell out in (2) exactly what conditions non-EU citizens must satisfy, because Article 7(1) cannot apply to them and so there is no available shorthand for the relevant conditions. There is no reason to interpret the phrases "Before acquiring the right of permanent residence" differently in each subparagraph. I am satisfied that the above case law applies equally to Article 13(1).

33. Were there to be any doubt about it, there are a number of factors which provide the strongest possible foundation for this approach to Article 13(1) and which show that the appellant's construction is inconsistent with the structure of the Directive and with the background materials which assist in its construction.

34. First, Article 13 is concerned with "Retention of the right of residence by family members". Permanent residence is governed by Chapter IV. It would be anomalous and incongruous for Article 13 (which is in Chapter III) to include conditions for acquisition of the permanent right of residence.

35. Second, the effect of the appellant's construction of the second subparagraph

is that, as a condition of acquiring permanent residence, the person must meet the conditions of Article 7(1). But this is inconsistent with Article 16 which states that the right of an EU citizen to permanent residence is not subject to the conditions in Chapter III (which includes Article 7), and the permanent right of residence of a non-EU family member is contingent only on their having legally resided with the Union citizen in the host state for a continuous period of five years. The second subparagraph of Article 13(1) concerns something different; it imposes conditions for the retained right of residence which, by definition, exists prior to acquisition of the permanent right.

36. Third, Article 14(2) provides that rights of residence under Article 13 last only as long as the conditions set out there are met. But this is inconsistent with the appellant's reading of Article 13(1), according to which there are no continuing conditions on the retained right of residence.
37. Fourth, if the appellant were correct, it would mean that a person in his position inherits a right to reside from his spouse on divorce. This cuts across the scheme of the Directive which envisages three types of residence: the initial period of three months (Article 6), the extended period, which applies to the EU citizen who satisfies certain conditions and their family members (Article 7), and permanent residence which is acquired by individuals in their own right (Articles 16-18). The Directive does not envisage any other right of residence. On the appellant's construction, a person who does not have a right to reside on any of the above bases could nonetheless enjoy a right of residence for an indefinite period. It would be very close to a permanent right of residence, but achieved without the necessity of complying with the conditions for acquiring that right, and regardless of the burden which the person imposes on the host state. It would place the person in a better position than they would have been prior to divorce because, prior to divorce, if their spouse ceased to satisfy any of the conditions in Article 7(1)(a) to (c), the person would lose their right to reside under Article 7(1)(d). No such advantage is given in any other article of the Directive and there is no reason for EU law to do so in Article 13.
38. Fifth, I am satisfied that this is the correct construction of the second subparagraph even though, as Mr Hannon has pointed out, it means that the provision is declaratory of rights rather than creating additional rights (because an EU citizen who satisfies the conditions of Article 7(1) has the right to remain regardless of their former position as a spouse). The Explanatory Memorandum to the proposal for the Directive ("Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States"), stated as follows regarding Article 13(1):
- "Divorce or legal separation do not affect the right of residence of members of the family who are themselves Union citizens. This paragraph aims simply to make it clear that these members of the family, in the light of a divorce or legal separation, must satisfy the conditions for the exercise of the right of residence laid down in Article 7(1) in their own right."
39. Although there is no explanation for making this declaration of rights which arise independently of Article 13(1), it seems to me that there was good reason to do so. Article 13(2) requires non-EU citizens to be able to show that

they satisfy the conditions in the second subparagraph. If Article 13(1) did not declare the necessity of meeting the equivalent conditions for EU citizens, the gap could be misleading.

40. Sixth, the Explanatory Memorandum makes it clear that the phrase “Before acquiring” in Article 13(2) is of a temporal nature:

“The right of residence for family members who are not nationals of a Member State is subject to their being engaged in gainful activity or having sufficient resources until they acquire the permanent right of residence....” (emphasis added).

41. Seventh, the second subparagraph appears in the French version of the Directive as:

“Avant l’acquisition du droit de séjour permanent, les intéressés doivent remplir les conditions prévues à l’article 7, paragraphe 1, aux points a), b), c) ou d)”.

42. The words “avant l’acquisition” give a temporal meaning to the phrase.

43. It follows that, applying the provisions of the Directive to the appellant in accordance with O and B, the appellant had no right to reside following the divorce unless he himself satisfied one of the conditions of Article 7(1) or satisfied the conditions for the acquisition of the permanent right of residence.

44. The Appellant does not contend that he satisfied any of the conditions of Article 7(1). He submits that in 2013 he acquired permanent residence as a result of MB holding (or being treated as holding) that status. I reject this submission. Whether considered under regulation 15(1) or Article 16, the right of permanent residence depends on the acquiring individual having themselves resided legally in the Member State for a continuous period of five years. Thus, even if the appellant's status from the date of his return to the UK on 22 May 2013 were an extended right of residence under regulation 14, he could not satisfy the conditions for the acquisition of permanent residence.

45. The only exception to the above is in Article 17(3) of the Directive (which is implemented by regulation 15(1)(d) and (e)). Even if MB were to be treated as an EEA national any right of permanent residence acquired by her would arise from her having been legally resident in the UK for five years and not from Article 17(1) of the Directive. Thus the appellant could not have a right under Article 17(3) (which depends on MB having established a right under Article 17(1)). There is no evidence to suggest that this provision could have applied.

46. For the above reasons I dismiss this appeal.

**Signed on the original
on 8 May 2018**

**Kate Markus QC
Judge of the Upper Tribunal**