

Living in another Member State: barriers to EU citizens' full enjoyment of their rights United Kingdom 2017

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1. Table 1 – Case law

<p>CASE 1 Subject matter concerned</p>	<p><input checked="" type="checkbox"/> 1) non-discrimination on grounds of nationality</p> <p><input checked="" type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 – Articles 7 and 8</p> <p><input type="checkbox"/> 3) voting rights</p> <p><input type="checkbox"/> 4) diplomatic protection</p> <p><input type="checkbox"/> 5) the right to petition</p>
<p>Full reference</p>	<p>Court of Appeal (Civil Division), <i>Sanneh and others v. Secretary of State for Work and Pensions and others</i>, [2015] EWCA Civ 49, 10 February 2015, available at: www.bailii.org/ew/cases/EWCA/Civ/2015/49.html.</p> <p>Permission to appeal to the Supreme Court has been granted with regard to one of the parties, namely <i>R. (on the application of HC) v. Secretary of State for Work and Pensions</i>.¹ No judgement has been passed.</p>

¹ For more information, see: Supreme Court, [R \(on the application of HC\) \(Appellant\) v. Secretary of State for Work and Pensions and others \(Respondents\)](#).

Decision date	10 February 2015
Deciding body (in original language)	Court of Appeal (Civil Division)
Deciding body (in English)	/
Case number (also European Case Law Identifier (ECLI) where applicable)	[2015] EWCA Civ 49
Parties	Sanneh v. Secretary of State for Work and Pensions R. (on the application of HC) v. Secretary of State for Work and Pensions Birmingham City Council v. Merali Scott v. Croydon LBC
Web link to the decision (if available)	www.bailii.org/ew/cases/EWCA/Civ/2015/49.html
Legal basis in national law of	Social Security (Habitual Residence) (Amendment) Regulations 2012.

the rights under dispute	<p>Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2012.</p> <p>Child Benefit and Child Tax Credit (Miscellaneous Amendments) Regulations 2012.</p>
Key facts of the case (max. 500 chars)	<p>The appellants in this case were all <i>Zambrano</i> carers (third country primary carers of a minor child that has the UK nationality).² They challenged amendment Regulations introduced by the Government in 2012 to introduce the CJEU <i>Zambrano</i> principle into UK law. The Regulations added <i>Zambrano</i> carers to a list of persons not habitually resident in the UK and excluded them from social assistance (income-related benefits). Specific issues in this case were the following: 1) when the <i>Zambrano</i> carer's rights arose ; 2) whether a <i>Zambrano</i> carer had a right under EU law to claim social benefits; and 3) whether benefits could be claimed at the same level of assistance as EU citizens by virtue of the non-discrimination principle enshrined in Article 18 TFEU. The court also looked at whether the Secretary of State had paid due regard to equality considerations before making the amendment Regulations and whether a question should be referred to the CJEU.</p>
Main reasoning / argumentation (max. 500 chars)	<p>The Court of Appeal held that <i>Zambrano</i> formed part of the wider effective citizenship principle. It stated that this principle is concerned with creating rights to reside where it is necessary to make a person's EU citizenship status meaningful and effective. The right to reside stemmed from Article 20 TFEU and thus also included a right to work. In the case of a <i>Zambrano</i> carer, the right to reside was necessary so as to support the status of an EU citizen child and therefore the <i>Zambrano</i> right arises instantly (rather than only from "the last date", i.e. the date when prohibited measures are taken or are imminent). The court then considered whether, in this case, EU law extended beyond a right to reside and work to a right to claim social assistance (issue 2)). It explained that, for the EU citizenship right of the child cared for by the <i>Zambrano</i> carer to be effective,</p>

² CJEU, C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, 8 March 2011.

	<p>Member States should make social assistance available to <i>Zambrano</i> carers when it is essential to do so to enable them to support themselves in order to be the carer for the EU citizen child in their care (“the basic support test”). However, the court held that the status of <i>Zambrano</i> carers is derived from the child’s citizenship rights and not founded on any personal right of residence or right to social assistance. Therefore, the consequences of the basic support test were threefold: the amount of social assistance payable is exclusively governed by national law; it does not have to be shown that the <i>Zambrano</i> carer would in fact have to leave the EU; and the EU principle of proportionality did not apply. With regard to issue 3) the court held that only EU citizens can rely on the nationality non-discrimination principle enshrined in Article 18 TFEU. The discrimination between <i>Zambrano</i> carers and other benefits claimants, resulting from the Regulations, was not direct discrimination on the grounds of nationality but indirect discrimination on the basis of immigration status. Furthermore, the court considered that EU law had no application when a Member State treated some people within its jurisdiction less favourably than others. The only restrictions were those imposed by national law, which incorporated Article 14 of the ECHR, and was not violated as there were policy reasons for making distinctions between <i>Zambrano</i> and other carers.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The court clarified that the <i>Zambrano</i> right arises instantly and held that, while <i>Zambrano</i> carers have a right to social assistance, this right is derived from the child’s citizenship rights and, therefore, they are not entitled to the same level of social assistance as EU citizens lawfully residing in the EU. The amount of social assistance payments is exclusively governed by national law and Member States are only obliged to provide sufficient support to meet the <i>Zambrano</i> carer’s basic support needs in order to be able to care for the EU citizen child.</p>
<p>Results (e.g. sanctions) and key consequences</p>	<p>The court did not think it was necessary to refer the case for a preliminary ruling by the CJEU. With regard to the specific facts of the case, the appeals by the first and third actions (Sanneh and Birmingham City Council) were allowed and the appeals in the second and fourth (R. and Scott) actions were dismissed.</p>

<p>or implications of the case (max. 500 chars)</p>	
<p>Key quotations in original language and translated into English with reference details (max. 500 chars)</p>	<p>“In my judgment, for the reasons given below, the effective citizenship principle means that EU law confers a right to reside on a Zambrano carer from the First Date. As Elias LJ expressed the position in argument, the Zambrano carer has under EU law a positive right to work and reside in the member state in which the EU citizen child is resident, and a negative right not to have prohibited measures taken against him. I agree, though this may not be an exhaustive statement of the Zambrano carer's EU law rights”. (Para. 25)</p> <p>“As to (2) – the right to social benefits - for the reasons given below, if the EU citizenship right of the EU citizen child cared for by the Zambrano carer is to be effective, then, in my judgment, member states must make social assistance available to Zambrano carers when it is essential to do so to enable them to support themselves in order to be the carer for the EU citizen children in their care within the EU. I will call this "the basic support test". If this test is met, it cannot be said that their departure (if it occurs) was due to any prohibited national measure or to any refusal to pay social assistance which is tantamount to a prohibited national measure. In my judgment, this is the furthest that EU law goes because the status of Zambrano carers is only derivative: their rights are derived from the EU citizen child and their status is not founded on any personal right of residence, or right to be paid social assistance, conferred on them by any EU treaty provision or legislative measure”. (Para. 26)</p> <p>“In my judgment, the answer to main issue (3) is no. Only EU citizens can rely on the nationality non-discrimination principle. Furthermore, EU law has no application when a member state treats some people</p>

	<p>within its jurisdiction less favourably than others (so-called "reverse discrimination"). The only restrictions are those imposed by the national law, which, in the case of the UK, incorporates Article 14 of the Convention. Article 14 is not violated because the UK government has policy reasons for making distinctions between Zambrano carers and others, and this court cannot say that those reasons are clearly without foundation. Insofar as there is indirect discrimination, it is objectively justified for the same reasons". (Para. 29)</p>
<p>Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.</p>	<p>Yes, Articles 7, 21 and 52.</p>

<p>CASE 2 Subject matter concerned</p>	<p><input type="checkbox"/> 1) non-discrimination on grounds of nationality</p> <p><input checked="" type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 – Article 24</p> <p><input type="checkbox"/> 3) voting rights</p> <p><input type="checkbox"/> 4) diplomatic protection</p> <p><input type="checkbox"/> 5) the right to petition</p>
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Full reference	Court of Appeal (Civil Division), <i>Alhashem v. Secretary of State for Work and Pensions</i> , [2016] EWCA Civ 395, 21 April 2016, available at: www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2016/395.html .
Decision date	21 April 2016
Deciding body (in original language)	Court of Appeal (Civil Division)
Deciding body (in English)	/
Case number (also European Case Law Identifier (ECLI) where applicable)	[2016] EWCA Civ 395
Parties	Alhashem v. Secretary of State for Work and Pensions
Web link to the decision (if available)	www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2016/395.html

Legal basis in national law of the rights under dispute	Welfare Reform Act 2007.
Key facts of the case (max. 500 chars)	The appellant, Mrs Alhashem, was a Dutch citizen who appealed against a decision of the Upper Tribunal that she was not entitled to receive employment and support allowance (ESA). She had been living in the UK since 2010 and had initially received jobseeker’s allowance but this ended because she was unable to sign on for work because of ill health. She then applied for ESA but this was denied by the Secretary of State on the basis that she did not have the right to reside in the UK. She appealed to the First-Tier Tribunal and then the Upper Tribunal claiming that it was not permissible under EU law to deny access to benefits intended to facilitate access to the labour market to someone who had the right to reside as a job seeker and met the financial conditions for eligibility. Both tribunals rejected the appeal, stating that ESA was not a benefit intended to facilitate her access to the labour market but was “social assistance” and could therefore properly be withheld under EU law. The issues before the Court of Appeal were the following: (1) the test for distinguishing between social assistance and labour-market related benefits; (2) the application of that test to the facts, (3) whether it was possible to divide ESA into social assistance and labour-market related components and apply the test to the latter.
Main reasoning / argumentation (max. 500 chars)	With regard to (1) the court started that, according to the CJEU, the test was whether the benefit was paid predominantly for the purpose of facilitating access to the labour market. When applying the test to the facts (2), the court held that ESA was primarily provided for those who cannot work or who are on the borderlines due to some disability or past episode in their lives. Even though one of the aims of ESA is providing facilities to enable claimants to work in the future, this was not the predominant function. The court stated that the rationale of the EU law requirement (that nationals of other Member States should participate equally in benefits paid to facilitate access to the labour market) is to support the internal market by putting job seekers

	<p>from other Member States on an equal footing with those resident within the Member State where they seek to work. It is not to put those with limited capability to work into the same position as regards training and preparation for work as those in different Member States. With regard to (3), the court concluded that ESA was not the sort of benefit that could be separated into separate components, as it was designed to encompass both claimants who had some capability to undertake work-related activity and those who had not.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The Court of Appeal interpreted CJEU case law on the distinction between social assistance and labour market-related benefits. It decided that ESA was social assistance rather than a labour-market related benefit and, therefore, did not have to be made available to the appellant EU citizen.</p>
<p>Results (e.g. sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The appeal was dismissed.</p>
<p>Key quotations in original language and</p>	<p>“The CJEU's test looks for a close relationship with the labour market. The CJEU has taken the terminology of intention to facilitate access to the labour market as set out in <i>Vatsouras</i> but explained that test by stating that a subsistence benefit is not enough and by holding that if there is some element of facilitation of access to the</p>

translated into English with reference details (max. 500 chars)

market, the test is whether that it is the predominant function of the benefit. It does not further define what a labour market-related benefit is because that explanation was enough to decide the case before it". (Para. 26)

"I appreciate that *Alimanovic* thus read leads to the conclusion that the decision reduces the amount of benefits which an EU citizen can claim in every member state and potentially create two tiers of EU citizens in a single member state (those entitled to social assistance and those not so entitled). They are not treated equally in the circumstances in issue in *Alimanovic*. However that result is a logical consequence of the fact that social benefits are only available by virtue of EU citizenship in another member state where a claimant is a worker or job seeker exercising his right to freedom of movement (see Collins). Because of that, there are inherent limitations in any event on EU citizenship as a passport to EU-wide social benefits". (Para. 27)

"It is clear from the history of ESA that it is primarily provided for those who cannot work or who are on the borderlines due to some disability or past episode in their lives. Some of these claimants will in future be able to work, and a further aim of the benefit is to provide facilities which will enable them to do so. That is at least partly a question of social policy inspired by an aim of treating individuals affected by disability with dignity and helping them to realise their maximum potential. But facilitating an entry into work is not the predominant function of the benefit". (Para. 42)

"The rationale of the EU law requirement that nationals of other member states participate equally in benefits paid to facilitate access to the labour market is to support the internal market by putting job seekers from other member states on an equal footing with those resident within the member state where they seek to work. It is not to put those with limited capability to work into the same position as regards training and preparation for work as those in different member states. The fact that an aim of ESA is to help some people back into work where possible at some future point in time cannot therefore convert ESA into a labour market-

	<p>related benefit any more than the element of benefit in <i>Alimanovic</i> which was labour market-related could do so". (Para. 45)</p> <p>"I agree with Ms Smyth's submission. If the two-part benefit in <i>Alimanovic</i> was treated as a single benefit, it is difficult to see how EU law could have the result of severing ESA into an ESA Mark 1 for the WCA group and the Support group and an ESA Mark 2 for the Work Related Activity Group. That would be inconsistent with the aim of the benefit which is in part to make the various groups "porous" (my word) so that over time individuals in the Support Group can move to the Work Related Activity Group and vice-versa dependent on their capability at different points in time". (Para. 53)</p>
<p>Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.</p>	<p>No.</p>

<p>CASE 3</p>	<p><input checked="" type="checkbox"/> 1) non-discrimination on grounds of nationality</p> <p><input checked="" type="checkbox"/> 2) freedom of movement and residence</p>
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Subject matter concerned	<p>- linked to which article of Directive 2004/38 – Articles 27 and 28</p> <p><input type="checkbox"/> 3) voting rights</p> <p><input type="checkbox"/> 4) diplomatic protection</p> <p><input type="checkbox"/> 5) the right to petition</p>
Full reference	<p>Supreme Court, <i>R. (on the application of Nouazli) v. Secretary of State for the Home Department</i>, [2016] UKSC 16, 20 April 2016, available at: www.supremecourt.uk/cases/uksc-2014-0139.html.</p>
Decision date	<p>20 April 2016</p>
Deciding body (in original language)	<p>Supreme Court</p>
Deciding body (in English)	<p>/</p>
Case number (also European Case Law Identifier (ECLI) where applicable)	<p>[2016] UKSC 16</p>
Parties	<p>R. (on the application of Nouazli) v. Secretary of State for the Home Department</p>

Web link to the decision (if available)	www.supremecourt.uk/cases/uksc-2014-0139.html
Legal basis in national law of the rights under dispute	Regulations 21 and 24 of the Immigration (European Economic Area) Regulations 2006 (EEA Regulations).
Key facts of the case (max. 500 chars)	<p>The appellant, N., is an Algerian national who arrived in the UK in 1996. He was refused asylum. In 1997 he married a French national and was granted a right of residence as family member of an EEA national. They became estranged in 2005. N. had acquired a permanent right of residence in the UK under EU law. By the end of January 2012, the appellant had been subject to 28 criminal convictions for 48 offences. In 2012, when he was due to be released, he was served with notice of the Secretary of State's decision to make a deportation order against him under the EEA Regulations on the grounds that he would pose a threat to the interests of public policy if he were allowed to remain in the UK. On the same day, he was informed that he was to be detained under Regulation 24 (1) of the EEA Regulations and Schedule 3 of the Immigration Act 1971 pending his removal. N.'s claim for judicial review of the decision to detain him pending deportation and his appeal to the Court of Appeal were both dismissed. The main issues before the Supreme Court were: 1) whether the power detain under Regulation 24 (1) was discriminatory on the basis of nationality contrary to Article 18 TFEU, as there was no equivalent provision for pre-decision detention in relation to family members of British nationals or non-EEA nationals; and 2) whether Regulations 21 and 24 failed to accurately transpose the safeguards in Articles 27 and/or 28 of Directive 2004/38.</p>

Main reasoning / argumentation (max. 500 chars)	<p>With regard to 1) the Supreme Court explained that Article 18 TFEU is concerned only with the way in which EU citizens are treated in Member States other than those of which they are nationals and not with the way in which Member States treat nationals of other countries who reside in their territories. The court held that “discrimination” against third country nationals was simply a function of the limited scope of the EU legal order and that it was not legitimate to draw a comparison between those exercising EU rights and other third country nationals for the purposes of EU discrimination law. The appellant’s also claimed that there was discrimination between British nationals and EU nationals who have third country spouses, as the spouse of the EEA national who is liable to be detained might be hypothetically deterred from exercising their own free movement. However, the court rejected that claim on the ground that there was no basis for holding that the actual or hypothetical rights of the appellant’s spouse, who was long since estranged, would be so affected in this case. With regard to 2) the court concluded that Regulations 21 and 24 had properly transposed the safeguards of Articles 27 and/or 28 as the power to detain under Regulation 24 is not free-standing but is purely ancillary to the powers of removal in the circumstances permitted by Regulation 21, which properly transposes Articles 27 and 28. The court held that the power to detain is within the margin of appreciation given to the Member States under the directive.</p>
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<p>The court clarified that it was not legitimate to compare the situation of those exercising EU rights and other third country nationals. It also looked at whether there can be discrimination between British nationals and EU nationals with third country spouses. Finally it clarified that the power to detain pre-deportation is not in violation of the directive.</p>
Results (e.g. sanctions) and key	<p>The appeal was dismissed. The court declined to make a preliminary reference to the CJEU.</p>

<p>consequences or implications of the case (max. 500 chars)</p>	
<p>Key quotations in original language and translated into English with reference details (max. 500 chars)</p>	<p>“It was correctly conceded on behalf of the appellant that the Court of Appeal was right to hold that article 18 is concerned only with the way in which citizens of the Union are treated in member states other than those of which they are nationals. [...]”. (Para. 41)</p> <p>“Such “discrimination” is simply a function of the limited scope of the EU legal order. It is not legitimate to draw a comparison between those exercising EU rights and other third country nationals for the purposes of EU discrimination law. Thus, in R (Bhavyesh) v Secretary of State for the Home Department [2012] EWHC 2789 (Admin) Blake J held at para 27 that</p> <p style="padding-left: 40px;">“... members of such a class are the beneficiaries of a special legal regime, in a different position from either aliens or generally, or British citizens who fall altogether outside the scope of EU law. They are thus incapable of being a comparator class, or a group who are analogously situated with the claimants.”. (Para. 45)</p> <p>“ [...] It seems doubtful that it was intended to apply to a case where, as here, any practical link between the spouses came to an end eight years before the relevant actions of the Secretary of State. Any effect on the rights of Mr Nouazli’s spouse would surely be truly hypothetical because she was unlikely ever to exercise her rights and thus unlikely ever to be deterred from exercising them. It is important in any event to bear in mind</p>

that we are concerned not with the removal of the appellant, but merely with his temporary detention or Page 24 subsection to bail conditions for a few months, first pending a decision by the Secretary of State, and then pending his successful appeal. Whether in other circumstances any relevant discrimination might arise as a result of mere detention pending a decision to remove will also be a fact sensitive matter. It cannot be a reason for holding, as Mr Saini would submit, that regulation 24(1) is invalid in "each and every case". At most, such a claim could justify the disapplication of the offending measure in a particular case". (Para. 59)

"On the facts of the present case I can see no conceivable basis for holding that any actual or hypothetical rights of the appellant's former spouse have been affected by the appellant's detention for a few months in 2012, still less by the imposition of bail conditions". (Para. 60)

"In my view there is a short answer to this point. The power to detain under regulation 24 is not free-standing, but is purely ancillary to the powers of removal in the circumstances permitted by regulation 21, which properly transposes articles 27 and 28. Where the Secretary of State has reason to believe that there is a case for removal under those provisions, it is clearly appropriate that she should have power to detain while the matter is being considered, and thereafter pending deportation, if otherwise there might be a risk of the subject absconding. The creation of such a power is well within the margin of appreciation given to the national authorities under the Directive, provided it is suitable and proportionate to its purpose and reasonably exercised (see for example *R (Lumsdon) v. Legal Services Board* [2015] 3 WLR 121, para 55). It is not necessary to show that a decision under regulation 24 is itself an "EEA decision" within the meaning of article 2. It is enough that it is directly linked to regulation 19(3)(b) which in turn is made expressly subject to regulation, and hence to requirements equivalent to those in the Directive. Moreover, I can see no basis for concluding the regulations themselves are disproportionate and it is not said that the impugned decisions were arbitrary or disproportionate on the facts". (Para. 81)

Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.	Yes, Articles 6, 21 and 52

CASE 4 Subject matter concerned	<input checked="" type="checkbox"/> 1) non-discrimination on grounds of nationality <input checked="" type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 – Articles 7 and 24 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
Full reference	Court of Appeal (Civil Division), <i>Ahmad v. Secretary of State for the Home Department</i> , [2014] EWCA Civ 988, 16 July 2014, available at: www.bailii.org/ew/cases/EWCA/Civ/2014/988.html .

Decision date	16 July 2014
Deciding body (in original language)	Court of Appeal (Civil Division)
Deciding body (in English)	/
Case number (also European Case Law Identifier (ECLI) where applicable)	[2014] EWCA Civ 988
Parties	Ahmad v. Secretary of State for the Home Department
Web link to the decision (if available)	www.bailii.org/ew/cases/EWCA/Civ/2014/988.html
Legal basis in national law of the rights under dispute	Immigration (European Economic Area) Regulations 2006. NHS (Charging of Overseas Visitors) Regulations 2011.
Key facts of the case	The appellant, Mr Ahmad, a Pakistani national, appealed against a decision of the Secretary of State refusing him permanent residence. Mr. Ahmad was married to his Danish wife with whom he came to the UK in 2006. His permanent residence as a spouse of an EEA citizen was denied as Mrs Ahmad did not have comprehensive sickness insurance cover ("CSIC"). She had entered the UK as a worker but had become a student and was

(max. 500 chars)	therefore required to have CSIC but had failed to obtain it. Before the Upper Tribunal, Mr Ahmad argued that Mrs Ahmad had satisfied Article 7 (1) of Directive 2004/38/EC as she was entitled to use the National Health Service (NHS) and did not need to have private insurance cover to do so, which the tribunal rejected. The Court of Appeal therefore considered: (1) whether CSIC was restricted to private systems; (2) whether the right to equal treatment had been breached; (3) whether requiring CSIC was disproportionate; (4) whether the Secretary of State ought to have investigated whether the costs of healthcare could be recovered from Denmark; and (5) whether EEA nationals and family members had a right to free NHS treatment under the National Health Service (Charges to Overseas Visitors) Regulations 2011.
Main reasoning / argumentation (max. 500 chars)	The Court of Appeal considered that (1) CSIC cannot include the public healthcare system of the host state because that would defeat the object of the directive, namely it would not relieve that state of the cost of providing healthcare in the first five years. With regard to (2), the court held that the appellant could not rely on Article 24 of the directive or Article 18 TFEU because she had not acquired a permanent right of residence. About (3) the court stated that nothing in the appellant's case made the requirement for CSIC disproportionate – the period of time during which the CSIC must be held was short, and there was no other way in that period of protecting the host state. Finally, regarding (4), the Court of Appeal held there was no basis for imposing an obligation on the Secretary of State to investigate the position in Denmark.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Court of Appeal clarified what the EU law requirement of CSIC means in the UK context. More specifically, it explained that free access to the NHS was not sufficient to comply with the obligation.

<p>Results (e.g. sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The appeal was dismissed.</p>
<p>Key quotations in original language and translated into English with reference details (max. 500 chars)</p>	<p>“The answer to this appeal depends on the interpretation of Article 7 of the Directive. The ultimate question of interpretation is the extent to which those conditions are to be interpreted under EU law in a dynamic way, so that it is enough if they are substantially or functionally fulfilled, or whether they are to be strictly interpreted on the basis that the right to a permanent residence card is a privilege which is not conferred unless there is strict and literal compliance with the conditions”. (Para. 7)</p> <p>“But it is not enough for Mr Kadri QC to establish that CSIC can include public healthcare provision. The Secretary of State accepts that it can. However, the Secretary of State does not accept that it can include the public healthcare system of the host state because that would defeat the object of the Directive: it would not relieve that state of the cost of providing healthcare in the first five years. It would also render the Directive meaningless since the burden on the host state can only arise if there is a health service. I agree with the submissions of the Secretary of State on this point. Moreover, the CJEU in Ziolkowski held that a person does not reside lawfully for the purposes of the Directive if he does not comply with the conditions contained in the Directive”. (Para. 36)</p>

	<p>“Mr Facenna submits that the appellant cannot rely on discrimination because he has no right of permanent residence under the Directive. This court so held in <i>Abdirahman</i> at paragraphs 41 to 44. This Court held that Article 12 of the EC Treaty now Article 18 TFEU, which prohibits discrimination on the grounds of nationality within the scope of the treaty, did not apply where the relevant person has no right of residence under EU or domestic law”. (Para. 42)</p> <p>“In my judgment, there is nothing in the appellant's case which makes the requirement for CSIC disproportionate. The period of time during which the CSIC must be held is short, and there is no other way in that period of protecting the host state”. (Para. 50)</p> <p>“It would clearly be unprincipled to make that assumption. There is also no basis for imposing an obligation on the Secretary of State to investigate the position in Denmark, which is no doubt an opinion open also to the appellant”. (Para. 56)</p>
<p>Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.</p>	<p>Yes, Article 35.</p>

CASE 5 Subject matter concerned	<input type="checkbox"/> 1) non-discrimination on grounds of nationality <input checked="" type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 – Articles 7 and 16 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
Full reference	<i>R. (on the application of Benjamin) v. Secretary of State for the Home Department</i> , Queen's Bench Division (Administrative Court), 11 July 2016, [2016] EWHC 1626 (Admin), available at: www.bailii.org/ew/cases/EWHC/Admin/2016/1626.html .
Decision date	11 July 2016
Deciding body (in original language)	Queen's Bench Division (Administrative Court)
Deciding body (in English)	/
Case number (also European Case Law Identifier)	[2016] EWHC 1626 (Admin)

(ECLI) where applicable)	
Parties	R. (on the application of Mark Benjamin and Margaret Benjamin) v. Secretary of State for the Home Department
Web link to the decision (if available)	www.bailii.org/ew/cases/EWHC/Admin/2016/1626.html
Legal basis in national law of the rights under dispute	Regulation 9 of the Immigration (European Economic Area) Regulations 2006.
Key facts of the case (max. 500 chars)	The claimants, Mr and Mrs Benjamin, applied for judicial review of a decision by the Secretary of State, in 2013, refusing to grant an EEA family permit or entry clearance to enable Mrs Benjamin to enter and reside in the UK with her husband and their children. Mr Benjamin and their children are British citizens but Mrs Benjamin is a Kenyan national. The family had previously been residing together in France, where Mr Benjamin was registered as self-employed. The Secretary of State refused entry to Mrs Benjamin by decision of 15 November 2013, stating that Mr Benjamin had failed to establish that he had been exercising EU Treaty rights in France. On 15 December, Mrs Benjamin attempted to travel to the UK from France but was refused entry. On 16 December, the claimants issued a claim for judicial review. On 27 December, Mrs Benjamin was again refused entry. After reviewing the refusal decision, the Secretary of State granted Mrs Benjamin a family permit with effect from 17 July 2014. The claimants maintained their claim for judicial review, submitting further documentation in support of that claim and seeking damages for breaches of EU law in respect of the refusal decisions of 15 November and 15 and 27 December.

<p>Main reasoning / argumentation (max. 500 chars)</p>	<p>The application was refused. With regard to the first ground, the ECJ <i>Surinder Singh</i> principle and Regulation 9 of the EEA Regulations, the court held that the burden was on the claimants to establish that they were entitled to exercise a right of residence in accordance with <i>Surinder Singh</i>. Therefore, the immigration officials were entitled to conclude, based on the limited evidence provided by the claimants, that Mr Benjamin had not been engaging in genuine and effective employment or self-employment in France sufficiently recently to entitle him and his wife to a <i>Surinder Singh</i> right of residence in the UK. The fact that a subsequent application supported by further evidence was successful did not render the earlier decisions unlawful. With regard to the second ground, on the alleged unlawfulness of the requirement of a visa, the court held that that it remained lawful for the Secretary of State to determine, before granting entry, whether the family member in question in fact fulfilled the conditions for entry provided by EU law. Mr Benjamin was unable to establish that he had met the Article 7 conditions so as to become entitled to a permanent right of residence in France. Furthermore, the court stated that it was not clear from Mrs Benjamin's residence card that she had in fact obtained a permanent right of residence in France in accordance with Article 16, since it had been issued less than three years after she began living in France with Mr Benjamin.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The court clarified the need for genuine and effective (self-)employment in order to acquire a right of residence for non-EEA family members.</p>
<p>Results (e.g. sanctions) and key consequences</p>	<p>The application for judicial review was refused.</p>

<p>or implications of the case (max. 500 chars)</p>	
<p>Key quotations in original language and translated into English with reference details (max. 500 chars)</p>	<p>“The Claimants relied upon <i>Levin v Staatssecretaris van Justitie</i> Case 53/81 (endorsed as the "leading authority" on this question by the Court of Appeal in <i>Barry v London Borough of Southwark</i> [2008] EWCA Civ 1440 at [18]) in which the CJEU held that a person who pursues effective and genuine employment may be exercising Treaty rights, even though his income may be lower than subsistence level or he supplements his income from other sources. However, the CJEU made it clear, at [17], that the EU rights to freedom of movement "<i>cover only the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary</i>". Mr Benjamin produced very limited evidence of effective and genuine employment or self-employment. In my view, the Defendant's officials were entitled to conclude on the evidence before them that Mr Benjamin had not demonstrated that he was pursuing effective and genuine self-employment in France. The evidence suggested that, although registered as self-employed, in reality, he was relying on the State and his father to support him and his family, whilst he dabbled in projects which interested him but were non-remunerative". (Para. 69)</p> <p>“Such evidence of employment and self-employment as there was indicated that the work in France had been intermittent and was carried out some years before the applications were made in 2013. There was only evidence of economic activity in France prior to 2010, not thereafter. The immigration officials were informed by Mrs Benjamin that Mr Benjamin ceased work in France at the end of 2010 because he had to look after his disabled son. We also now know that from 2010 until his departure for the UK in September 2012, he was heavily involved in a property purchase and renovation project in Miami, USA. He spent a good deal of time</p>

living in the USA and his family also joined him for some of the time - his third child was born in Florida in 2011. He had been residing in the UK since September 2012". (Para. 70)

"A sufficient degree of proximity is required between the exercise of Treaty rights in another Member State and the EU national's return to his home Member State in a *Surinder Singh* case". (Para. 71)

"Regulation 9(2)(a) of the 2006 Regulations requires that the British citizen "is" residing in another Member State as a worker or self-employed person, or "was so residing before returning to the United Kingdom"". (Para. 72)

"In *OB v. Secretary of State for the Home Department* [\[2010\] UKUT 420](#), the Upper Tribunal held that, although *Surinder Singh* did not address the period of time between employment in the host country and the return to the state of origin, the case law did establish the principle that the right of entry should not be restrictively interpreted and Community law must be interpreted sufficiently broadly to promote the objective of ensuring protection for the family life of nationals of member states. There had to be some link between the exercise of the Treaty rights and the return of the spouse to the UK, but there was no requirement that employment in the host state had to be established immediately before the return to the state of origin. It would be a matter of assessment in the individual case". (Para. 73)

"In this case, the Defendant's immigration officials were entitled to conclude that the requirements of regulation 9, even when given a broad purposive interpretation, were not met. Even if he had ever engaged in genuine and effective employment or self-employment in France, the evidence indicated it ceased in 2010, a

long time before the applications in 2013 and Mr Benjamin's departure to the UK in September 2012. By December 2013, Mr Benjamin had not been residing in France for 15 months". (Para. 74)

"Accordingly, while *McCarthy* establishes that it is unlawful for the Defendant to insist on the possession of an EEA family permit by a family member of a UK citizen seeking to enter the UK, where that family member holds a valid residence card under Article 10 of the Directive, it remains lawful for the Defendant to determine, before granting entry, whether the family member in question in fact fulfils the conditions for entry provided by EU law. The legal position as clarified in *McCarthy* is reflected in regulations 11(2)(a) and 19(2)(b) of the 2006 Regulations, which together make clear that the family member of an EEA national may be admitted to the UK on presentation of a valid passport and a "*qualifying EEA State residence card*", but only provided that the EEA national has a "*right to reside in the United Kingdom under these Regulations*". The relevant regulation in this case was regulation 9". (Para. 83)

"I accept the Defendant's submission that the immigration officials at Calais were justified in investigating the validity of the Claimants' claim that they had acquired a permanent right of residence in France, not least because of the equivocal residence cards which they produced. The card in Mr Benjamin's name, dated 2009, did not indicate on its face that Mr Benjamin held a permanent right of residence pursuant to Article 16. It simply indicated that he was a beneficiary of the (repealed) Directive 73/148 i.e. as a self-employed person. Mr Benjamin told me that he had been in dispute with the French authorities over their refusal to grant him a permanent residence card but he did not disclose any correspondence about this and so I was unable to form a concluded view as to why he did not have a permanent residence card. At Calais, upon further investigation, Mr Benjamin was unable to establish to the satisfaction of the immigration officials that he had met the Article 7 conditions of employment or self-employment for a period of 5 years in France, so as to become entitled to a right of permanent residence in France". (Para. 84)

	<p>“Whilst Mrs Benjamin's card referred to a "<i>séjour permanent</i>", it was by no means clear from this that she had in fact obtained a permanent right of residence in France in accordance with Article 16 of the Directive. The card was issued on 6 July 2009, less than three years after Mrs Benjamin began living in France with Mr Benjamin. A family member's permanent right of residence under Article 16(2) arises only after five years' continuous legal residence with the Union citizen in the host Member State. This inevitably raised questions which required further investigation”. (Para. 85)</p>
<p>Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.</p>	<p>No.</p>

<p>CASE 6 Subject matter concerned</p>	<p><input type="checkbox"/> 1) non-discrimination on grounds of nationality</p> <p><input checked="" type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 – Article 35</p> <p><input type="checkbox"/> 3) voting rights</p> <p><input type="checkbox"/> 4) diplomatic protection</p>
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	□ 5) the right to petition
Full reference	<i>Rosa v. Secretary of State for the Home Department</i> , Court of Appeal (Civil Division), 15 January 2016, [2016] EWCA Civ 14, available at: www.bailii.org/ew/cases/EWCA/Civ/2016/14.html .
Decision date	15 January 2016
Deciding body (in original language)	Court of Appeal (Civil Division)
Deciding body (in English)	/
Case number (also European Case Law Identifier (ECLI) where applicable)	[2016] EWCA Civ 14
Parties	Rosa v. Secretary of State for the Home Department
Web link to the decision (if available)	www.bailii.org/ew/cases/EWCA/Civ/2016/14.html

Legal basis in national law of the rights under dispute	Regulation 17 of the Immigration (European Economic Area) Regulations 2006.
Key facts of the case (max. 500 chars)	Mrs Rosa is a Brazilian national who was removed from the United Kingdom in 2007 as an overstayer. In July 2008 she married a Portuguese national, Mr De Oliveira, in Portugal. He was living in the United Kingdom at the time. She joined him in the United Kingdom three months after the wedding. In January 2009 he was arrested at Heathrow Airport on suspicion of importing cocaine, an offence to which he subsequently pleaded guilty. He was sentenced to five years' imprisonment, from which he was released in September 2011. Prior to his release a decision was taken to deport him, but he appealed successfully to the First-tier Tribunal against that decision. Mrs Rosa gave evidence to the tribunal in support of that appeal. In April 2012 Mrs Rosa applied for a residence card under Regulation 17 of the EEA Regulations as Mr De Oliveira's spouse. Her application was refused by the Secretary of State, on the ground that her marriage to Mr De Oliveria was a "marriage of convenience". Her appeal against that decision was dismissed by the First-tier Tribunal and a further appeal was dismissed by the Upper Tribunal. Before the Court of Appeal, she claimed (mainly) that the First-tier Tribunal wrongly concluded that the appellant bore the legal burden of proof on the issue of marriage of convenience.
Main reasoning / argumentation (max. 500 chars)	The court held that the EEA Regulations had to be interpreted and applied in line with the directive which they implement. Although the directive is silent as to burden of proof, the European Commission had issued guidance which provided the key to the correct approach under it. The court referred to Article 35 of the directive and held that, as a matter of general principle, the burden of proving that an exception applied should lie on the authorities of the Member State seeking to restrict rights conferred by the directive, as confirmed by the Commission's guidance. Therefore, the court held that the Secretary of State indeed had the legal burden of proof of marriage of convenience so as to justify refusing an application for a residence card. Therefore, the

	<p>Court of Appeal stated that the First-tier Tribunal was in error in proceeding on the basis that the appellant had the burden of proof but held that the error was not material because the case did not turn on where the burden of proof lay. The findings of the tribunal had been sufficient to shift the evidential burden onto the appellant. The court concluded that the tribunal had reached an empathetic decision that the marriage was one of convenience because of inconsistencies in the evidence of the husband and wife. Its decision would not have been different if it had approached the burden of proof differently.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The court interpreted and explained who has the burden of proof in cases of marriages of convenience.</p>
<p>Results (e.g. sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The appeal was dismissed.</p>

**Key quotations
in original
language and
translated into
English with
reference
details** (max.
500 chars)

“In my judgment, the legal burden lies on the Secretary of State to prove that an otherwise valid marriage is a marriage of convenience so as to justify the refusal of an application for a residence card under the EEA Regulations. The reasoning to that effect in *Papajorgji*, as endorsed in *Agho*, is compelling”. (Para. 24)

“I do not accept Mr Kellar's submission that the burden of proof is a matter for national law alone. The EEA Regulations have to be interpreted and applied in line with the Directive which they implement. Although the Directive is silent as to burden of proof, the Commission's guidance (paragraph 20 above) provides the key to the correct approach under it. Article 35 of the Directive provides that the rights otherwise conferred by the Directive may be refused, terminated or withdrawn in the case of abuse of rights or fraud, such as marriages of convenience. As a matter of general principle, one would expect that the burden of proving that an exception applies should lie on the authorities of the Member State seeking to restrict rights conferred by the Directive – in this case, that it should lie on the Secretary of State when seeking to rely on the existence of a marriage of convenience as a reason for refusing a residence card to which the applicant is otherwise entitled. That is the approach set out clearly in the Commission's guidance, and there is no reason to doubt the correctness of the guidance on the point”. (Para. 25)

“The guidance also shows the subsidiary role that national procedural rules have in this context. As a matter of EU law, the burden of proof lies on the authorities of the Member State seeking to restrict rights under the Directive, but it is for the national court to verify the existence of the abuse relied on, evidence of which must be adduced in accordance with the rules of national law. *Emsland-Stärke GmbH* is fully consistent with that approach and provides no support to Mr Kellar”. (Para. 26)

“In any event, I do not accept that the relevant provisions of national law lead to the conclusion that Mr Kellar seeks to draw from them. Regulation 17 of the EEA Regulations provides that the Secretary of State must

issue a residence card on application and production of a valid passport and proof that the applicant is a family member of a relevant EEA national. On the face of it, production of a marriage certificate is sufficient proof that the applicant is such a family member. It is true that, by the combined effect of regulation 7 and regulation 2, "family member" does not include a party to a marriage of convenience. But Mr Kellar rightly stopped short of submitting that every applicant for a residence card on the basis of marriage has to produce proof that the marriage was not one of convenience. He said that such proof needed to be produced only where the Secretary of State raised a reasonable suspicion that the marriage was not one of convenience. When translated into the position before the tribunal, that is tantamount to saying that the legal burden of proof in relation to marriage of convenience lies on the Secretary of State but that if the Secretary of State adduces evidence capable of pointing to the conclusion that the marriage is one of convenience, the evidential burden shifts to the applicant". (Para. 27)

"Mr Kellar's reliance on rule 53 of the tribunal procedure rules is misplaced. An applicant appealing against the refusal of a residence card under regulation 17 of the EEA Regulations is asserting that regulation 17 applies; he or she is not asserting that the definition of "spouse" in regulation 2 does not apply. I do not think that rule 53 is of any help". (Para. 28)

"What I have set out above does little more than to expand upon paragraphs 33 to 37 of the decision in *Papajorgji* and to reject Mr Kellar's criticisms of the reasoning in those paragraphs. It seems to me that paragraph 14 of the decision in *IS Serbia*, which prompted the tribunal in *Papajorgji* to say what it did about the legal burden of proof, was seriously confused. It stated that the burden of proving that a marriage is not one of convenience lies on the appellant, but it also stated that if there is no evidence that could support a conclusion that the marriage is one of convenience, the appellant does not have to deal with the issue. If, however, the legal burden lies on the appellant, the appellant has to adduce some evidence in order to discharge that burden: in the absence of any evidence either way, the appellant will fail. I do not think that

	<p>that can have been the result intended by the tribunal. The result that I think the tribunal must have intended is achieved if the legal burden of proof lies on the Secretary of State throughout but the evidential burden can shift, as explained in <i>Papajorgji</i>. In my judgment, that is the correct analysis". (Para. 29)</p> <p>"I have already held that the legal burden of proof on the issue of marriage of convenience lies throughout on the Secretary of State. It follows that the First-tier Tribunal was indeed in error in proceeding on the basis that it was for the appellant to show on the balance of probabilities that the marriage was not a marriage of convenience. In my judgment, however, the error was not material. This was not one of those rare cases that turns on where the legal burden of proof lies. The answer to the question whether the appellant's marriage was a marriage of convenience was clear-cut. The findings of the previous tribunal in her husband's appeal were sufficient to shift the evidential burden in this case onto the appellant, as was effectively recognised in her counsel's concession that the issues raised by the previous determination had to be dealt with. The appellant produced a body of evidence in an attempt to deal with them. But the tribunal found that the inconsistencies in the evidence of the appellant and her husband supported the conclusion of the previous tribunal that the marriage was one of convenience and that there was no satisfactory evidence that it had ever been the appellant's intention to live with her husband as husband and wife. The emphatic finding in paragraph 26 that "I am entirely satisfied that it is a marriage of convenience and always has been" is a fair reflection of the tribunal's overall reasoning and is the clearest of indications that the outcome did not turn on the tribunal's direction as to the burden of proof. It is fanciful to suggest that the finding might have been different if the tribunal had approached the matter on the basis that the legal burden of proof lay throughout on the Secretary of State". (Para. 39)</p>
<p>Has the deciding body referred to the Charter of</p>	<p>No.</p>

Fundamental Rights? If yes, to which specific article.	
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CASE 7 Subject matter concerned	<input type="checkbox"/> 1) non-discrimination on grounds of nationality <input checked="" type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 – Article 7 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
Full reference	<i>Weldemichael v. Secretary of State for the Home Department</i> , Upper Tribunal (Immigration and Asylum Chamber), 23 September 2015, [2015] UKUT 540 (IAC), available at: www.bailii.org/uk/cases/UKUT/IAC/2015/540.html .
Decision date	23 September 2015
Deciding body (in original language)	Upper Tribunal (Immigration and Asylum Chamber)

Deciding body (in English)	/
Case number (also European Case Law Identifier (ECLI) where applicable)	[2015] UKUT 540 (IAC)
Parties	Weldemichael and Obulor v. Secretary of State for the Home Department
Web link to the decision (if available)	www.bailii.org/uk/cases/UKUT/IAC/2015/540.html
Legal basis in national law of the rights under dispute	Regulations 6 and 15 Immigration (European Economic Area) Regulations 2006.
Key facts of the case (max. 500 chars)	The appellants, Ms Weldemichael, a Dutch national, and Mr Obulor, a Nigerian citizen who was married to Lithuanian national, both appealed against decisions upholding the Secretary of State's refusal of their applications for permanent residence as they had failed to meet the requirement of Regulation 15 of the EEA Regulations due to periods of absence from working or job-seeking due to pregnancy and childbirth. The parties accepted that, in light of the CJEU's judgement in <i>Saint Prix v. Secretary of State for Work and Pensions</i> , a woman who gave up work or job-seeking because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retained the status of "worker" within the meaning of Article 45,

	<p>provided she returned to work or found another job within a reasonable period after the birth of the child. However, they disagreed on whether lawful residence accrued during the period of not working or job-seeking was to be taken into account in the acquisition of permanent residence, as well as on the requirements that had to be met at the end of the period, and the duration of the “<i>Saint Prix</i> extension period” (PSE).</p>
<p>Main reasoning / argumentation (max. 500 chars)</p>	<p>The tribunal interpreted <i>Saint Prix</i> and held the following:</p> <ol style="list-style-type: none"> 1. Period prior to birth: the tribunal stated that it was common ground that from 11 weeks before the “expected date of confinement” (EDC) a woman could not be expected to work. The period of 11 weeks was established by domestic law in order to give effect to Directive 92/85/EC. 2. Period post birth: The tribunal held that, as the purpose of the maternity leave period was to provide protection to women, it would be unreasonable to expect a woman to have returned to work before the end of the relevant maternity leave. 3. Length of <i>Saint Prix</i> extension period (PSE): The Tribunal considered that this required an individual consideration of a woman's circumstances, taking into account additional factors which may render a longer period between the date of birth and the commencement of work reasonable. It again concluded that a reasonable period could not be less than that laid down by domestic law in conformity with Directive 92/85/EC. 4. Status during SPE: The tribunal held that if a woman ceased work or ceased looking for work owing to the physical constraints of the late stage of pregnancy, being 11 weeks or less before the EDC, then there was a presumption that she had not left the employment market. That presumption could be rebutted by clear evidence of an intention not to return. If there is no return to work within the year starting 11 weeks before EDC, that is likely to be an indication that there had been no intention to return although account would need to be taken to evaluate attempts to find work in that period.

	<p>With regard to the facts of the case, the tribunal considered that Ms Weldemichael had returned to work more than a year after the birth of her child and concluded that this was not a reasonable period. The wife of Mr Obulor had stopped working more than 20 weeks before the birth of her child and the tribunal concluded that this fell outside of the scope of the ruling in <i>Saint Prix</i>.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The tribunal interpreted <i>Saint Prix</i> and set out the requirements to be met in order for an EEA national to retain continuity of residence for the purposes of Regulation 15 of the EEA Regulations during a period when she gave up working or job-seeking owing to the physical constraints of the late stages of pregnancy and the aftermath of childbirth.</p>
<p>Results (e.g. sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The appeals were dismissed.</p>
<p>Key quotations in original language and translated into</p>	<p><i>An EEA national woman will retain continuity of residence for the purposes of the Immigration (European Economic Area) Regulations 2006 (the 2006 EEA Regulations) for a period in which she was absent from working or job-seeking owing to the physical constraints of the late stages of pregnancy and the aftermath of childbirth if, in line with the decision of the CJEU in Jessy St Prix:</i></p>

**English with
reference
details** (max.
500 chars)

- (a) at the beginning of the relevant period she was either a worker or seeking employment;*
- (b) the relevant period commenced no more than 11 weeks before the expected date of confinement (absent cogent evidence to the contrary that the woman was physically constrained from working or seeking work);*
- (c) the relevant period did not extend beyond 52 weeks; and,*
- (d) she returned to work.*

So long as these requirements are met, there will be no breach of the continuity of residence for the purposes of regulation 15. Time spent in the United Kingdom during such periods counts for the purposes of acquiring permanent residence. [before Para. 1]

"It is sensible to analyse first what period of absence from employment or seeking employment prior to the expected date of confinement ("EDC") is permissible. It was not submitted that in any individual case, a woman need prove that she gave up work due to the physical constraints of the late stages of childbirth. It was common ground that from 11 weeks before "EDC a woman cannot be expected to work, that timing being fixed, in order, as a matter of policy to protect pregnant women." The period of 11 weeks is established by domestic law in order to give effect to " Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding" ("Directive 92/85/EC"). In any event it is not clear that it was part of the remit of the CJEU in **St Prix** to give guidance as to how a pre-childbirth absence from work was to be assessed". (Para. 22)

"We do not rule out that the physical constraints of pregnancy may require ceasing work or seeking employment before 11 weeks if, for example, it was a multiple pregnancy or there were particular requirements of the work in question. That would, however need to be proved by cogent evidence". (Para. 23)

“It is apparent from this that the underlying issue identified by the CJEU was whether a woman has left the employment market, an issue which would appear primarily to be evidential. They considered that if she has not, then her continuity of status as a worker has not been broken. The questions that the CJEU considers the national court concerned should consider [42] must be viewed in that context. The exercise to be undertaken is thus, as the court considered, an evaluative process, albeit one which is relatively closely circumscribed given the reference to "physical constraints of the late stages of pregnancy", the "aftermath of childbirth" and the proviso of a return to work. It is a narrower exercise than assessing job-seeking although there is, we consider, no reason in principle why the approach in assessing the reasonableness of an SPE should not be analogous to or analysed in the same way in which job-seeking is assessed; finding a job is indicative that prior to that point, an individual seeking work had a genuine chance of being engaged but it is not determinative”. (Para. 41)

“That observation is subject to this important caveat: given that the purpose of the maternity leave period is to provide protection to women, it is difficult (absent evidence of a clear intention of the part of the woman not return to work) to envisage that it would be reasonable to expect a woman to have returned to work before the end of the relevant maternity leave”. (Para. 42)

“Subject to that general observation, we consider that what is "reasonable" requires an individual consideration of a woman's circumstances, taking into account additional factors which may render a longer period between the date of birth and the commencement of work reasonable. The CJEU did not indicate that any of the factors they identified should be determinative, or of necessarily holding more weight. That said, the protection of women workers is a thread of concern running through the decision of the CJEU, and it is thus difficult to hold

that any reasonable period could be less than that laid down by domestic law in conformity with Directive 92/85/EC". (Par. 49)

"We do note, in reaching this conclusion, that Mr Berry submitted that there is no bright line identified by the CJEU. While we have some sympathy with that submission, we consider that the scope for variance in assessing what is reasonable is constrained significantly by the reference to Directive 92/85/EC and the consequent minimum length thereby indicated. There is also the express reference to finding work". (Para. 50)

"We consider that it must not be forgotten that although pregnancy is not an illness, illness during pregnancy or afterwards which prevents a woman from working, or job-seeking, may engage regulation 6 (2) of the EEA Regulations in any event". (para. 51)

"Drawing these strands together, we consider that if an evaluation of a woman's status is to be carried out at a point during a potential SPE, so long as it is shown that she ceased work or looking for work owing to the physical constraints of the late stage of pregnancy, in effect, 11 weeks or less before the EDC, then there is a presumption that she has not left the employment market. That presumption could be rebutted by clear evidence of an intention not to return. If there is no return to work within the year starting 11 weeks before EDC, that is likely to be an indication that there had been no intention to return although account would need to be taken to evaluate attempts to find work in that period. Further, a woman may well have intended to return to work, but due to a supervening event such as serious illness or an accident, have been unable to do so. While it may well be that she has left the employment market as a result, it does not mean that she did so, and her continuity of residence ceased at the moment she ceased work or looking for work; her intentions may have changed much later, and in such circumstances, a careful fact-sensitive analysis is required". (Para. 56)

"Ms Smyth submitted that only time accrued under article 7 of the Citizenship Directive could be counted when assessing whether permanent residence has been acquired and that thus time spent during an SPE could not be taken into account". (Para. 57)

"We do not consider that time spent by a woman during a SPE period can be discounted in assessing continuity of residence. We note that there is no indication that other, temporary absences from work as identified in regulations 6 to 7 (and indeed by article 7) interrupt continuity of working; such a restriction could only apply to women and would thus be inherently discriminatory. Further, it presupposes that article 7 contains a closed list which at [31]-[33] of the judgment of the Court in **St Prix** indicates it is not". (Para. 58)

"Drawing these conclusions together, we consider that the questions we posed at the outset can be answered as follows: -

A woman will retain continuity of residence for the purposes of the 2006 EEA Regulations for a period in which she was absent from working or job-seeking if, in line with the decision of the CJEU in **Jessy St Prix**:

- (a) at the beginning of the relevant period she was either a worker or seeking employment;
- (b) the relevant period commenced no more than 11 weeks before the expected date of confinement (absent cogent evidence to the contrary that the woman was physically constrained from working or seeking work);
- (c) the relevant period did not extend beyond 52 weeks; and,
- (d) she returned to work," (Para. 59)

	<p>“On the facts of Ms Weldemichael's case, as set out above, she did not return to work until well over a year after the birth of a child. Even assuming that the relevant maternity period is 12 months (including the 11 weeks before EDC), we are not satisfied that this could be seen as a reasonable period. Assuming the start of an SPE to be 11 weeks before 20 November 2009, then the appellant would require an SPE nearly 2 years to be accepted in order to show a continuity of residence. While we note the submissions made on her behalf, we are not persuaded that there are reasons of substance sufficient to explain why such long period before returning to work should be accepted”. (Para. 65)</p> <p>“As it is not in dispute that Ms Jociute had not returned to work, even on the basis of the concession made, her continuity of lawful residence ceased in November 2008, and she was not able to benefit from the decision in St Prix. Even if she were, there is still a substantial gap between her seeking work in November 2008 and the beginning of any applicable SPE. She ceased working almost 9 weeks before the date (11 weeks before the EDC) from which she would be entitled to maternity leave. Such a substantial extension to the period falls clearly outside what could be considered reasonable in the terms of the decision of the CJEU in St Prix”. (Para. 75)</p>
<p>Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.</p>	<p>No, only as part of the recitals to the directive (see Para. 3).</p>

CASE 8 Subject matter concerned	<input type="checkbox"/> 1) non-discrimination on grounds of nationality <input checked="" type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 – Article 2 (2) (d) <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
Full reference	<i>Lim v. Entry Clearance Officer, Manila, Court of Appeal (Civil Division), 28 July 2015, [2015] EWCA Civ 1383, available at: www.bailii.org/ew/cases/EWCA/Civ/2015/1383.html.</i>
Decision date	28 July 2015
Deciding body (in original language)	Court of Appeal (Civil Division)
Deciding body (in English)	/
Case number (also European Case Law)	[2015] EWCA Civ 1383

Identifier (ECLI) where applicable)	
Parties	Lim v. Entry Clearance Officer
Web link to the decision (if available)	www.bailii.org/ew/cases/EWCA/Civ/2015/1383.html
Legal basis in national law of the rights under dispute	Regulation 7 Immigration (European Economic Area) Regulations 2006.
Key facts of the case (max. 500 chars)	The Secretary of State appealed against a decision that the respondent, a Malaysian citizen, was entitled to enter the UK as a family member of an EU national. The respondent, Ms Lin, sought entry clearance as a family member of her Finnish son-in-law. The issue was whether she was a "dependent direct relative" within Regulation 7 (1) (c) of the EEA Regulations. Since 2012 Ms Lin's daughter and son-in-law had sent her around £450 a month to cover her living expenses and Ms Lin did not wish to draw upon her savings because she wanted to pass the funds on as an inheritance to her children and grandchildren. The Secretary of State submitted that Ms Lin had, as a matter of fact, no need to rely on her daughter and son-in-law's resources as she owned a property in Malaysia and had sufficient savings to meet her own needs.

<p>Main reasoning / argumentation (max. 500 chars)</p>	<p>The Court of Appeal deviated from the Upper Tribunal’s earlier decision. The Upper Tribunal, in support of its conclusion that Ms Lin was a dependent relative, had referred to the observations in <i>Pedro v. Secretary of State for Work and Pensions</i> [2009] EWCA Civ 1358. In <i>Pedro</i>, the court held that the reason why the family member was dependent did not matter; the status of dependency was characterised by the material support for that family member provided by the EU national who had exercised their free right of movement. However, the court of Appeal considered the CJEU judgement in <i>Reyes v. Migrationsverket</i> which made it unambiguously clear that receipt of support was a necessary but not sufficient condition. The court stated that the family member must need this support from his or her relatives in order to meet his or her basic needs. Therefore, the reason why he/she could not support him/herself was irrelevant; the fact that he/she could not do so was critical. In the present case, the court concluded that Ms Lin was financially independent and did not need the additional resources for the purpose of meeting her basic needs.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The Court of Appeal interpreted the notion of “dependent direct relative” in Regulation 7 (1) (c) of the EEA Regulations and Article 2 (2) (d) of the directive considering both domestic and CJEU case law.</p>
<p>Results (e.g. sanctions) and key consequences or implications of the case</p>	<p>The appeal was allowed.</p>

(max. 500 chars)	
Key quotations in original language and translated into English with reference details (max. 500 chars)	<p>“The last sentence of paragraph 27 precisely reflects the argument now being advanced by the Secretary of State. She submits that the respondent has no need to rely on the resources of her daughter as a matter of fact; she is financially independent”. (Para. 21)</p> <p>“In a judgment handed down three weeks after <u>SM</u>, namely <u>Pedro v Secretary of State for Work and Pensions</u> [2009] EWCA Civ 1358, [2010] 2 CMLR 20, Goldring LJ (with whom Mummery and Sullivan LJJ agreed) again considered the question of dependency and the true ratio of <u>Jia</u>. This was a case on the Citizens Directive. A 62-year-old Portuguese national had come to the UK in 2004 to join her son. At that point she was able to support herself in Portugal. Subsequently she relied upon her son for support. She claimed state pension credit. This depended upon whether she was a dependent family member within the meaning of the Citizens Directive. The Secretary of State said that, in accordance with <u>Jia</u>, she was not since she could support herself in her country of origin at the time when she applied to come to the UK. She contended that she had become dependent on her son since leaving Portugal and that this was enough to make her a dependent family member within the meaning of the Citizens Directive. The Court of Appeal agreed. Goldring LJ distinguished <u>Jia</u> on the grounds that it was concerned with a different directive. He held that the Citizens Directive went further than earlier Directives on freedom of movement and did not require in all cases that the question of dependency should be assessed by reference to the circumstances in the state of origin. However, Goldring LJ accepted (paragraph 61) that where the only basis of an alleged dependency was support in the state of origin, it would be appropriate to apply <u>Jia</u>, citing the decision of the Court of Appeal in <u>Bigia v Entry Clearance Officer</u> [2009] EWCA Civ 79, [2009] 2 CMLR 42”. (Para. 22)</p>

"I do not, therefore, read Pedro as affecting the appropriate principles to apply in a case of this nature; it does not address the specific question that we have to resolve. In any event, I very much doubt whether it can now stand in light of the third and most recent decision of the CJEU, namely Reyes v Migrationsverket 2014/C-423/12, [\[2014\] QB 1140](#). Reyes was concerned with the question whether an EU direct descendant aged 21 or older could be treated as a dependant within the meaning of Article 2.2(c) of the Citizens Directive. The same principles would apply equally to ascendants under paragraph (d)". (Para. 23)

"The case concerned a 25-year-old Philippine national who said that she had been unable to find work in the Philippines. She was financially supported by her mother, who had become a German citizen, and her mother's cohabiting partner, a Norwegian citizen, who both resided in Sweden. The first question in the reference by the Swedish court was, in essence, whether, in order to be regarded as dependent and so fall within the concept of family member, a direct descendant had to show that he had tried without success to find employment in his country of origin or to obtain a subsistence allowance or some other means of supporting himself. Both the Advocate General and the court held that this was not necessary, which was of course entirely in accordance with the earlier authorities. The Advocate General summarised his conclusions as follows (paragraph 69):

"On a proper construction of Article 2(2)(c) of Directive 2004/38/EC of [the Citizens Directive] ... any member of the family of a Union citizen who, for whatever reason, proves unable to support himself in his country of origin and in fact finds himself in such a situation of dependence that the material support provided by the Union citizen is necessary for his subsistence, is to be considered to be a 'dependant'. As regards members of the nuclear family deemed to be dependants, such a situation must really exist and may be proved by any means."

So the reason why the party cannot support himself or herself is irrelevant; the fact that he or she cannot do so is critical. This is inconsistent with the notion that dependency is established merely from the fact that material support is provided. The court essentially adopted the same approach, it said this:

"20. In that regard, it must be noted that, in order for a direct descendant, who is 21 years old or older, of a Union citizen to be regarded as being a 'dependant' of that citizen within the meaning of Article 2(2)(c) of Directive 2004/38, the existence of a situation of real dependence must be established (see, to that effect, Jia, paragraph 42).

21. That dependent status is the result of a factual situation characterised by the fact that material support for that family member is provided by the Union citizen who has exercised his right of free movement or by his spouse (see, to that effect, Jia, paragraph 35).

22. In order to determine the existence of such dependence, the host Member State must assess whether, having regard to his financial and social conditions, the direct descendant who is 21 years old or older, of a Union citizen, is not in a position to support himself. The need for material support must exist in the State of origin of that descendant or the State whence he came at the time when he applies to join that citizen (see, to that effect, Jia paragraph 37).

23. However, there is no need to determine the reasons for that dependence or therefore for the recourse to that support. That interpretation is dictated in particular by the principle according to which the provisions, such as Directive 2004/38, establishing the free movement of Union citizens, which constitute one of the foundations of the European Union, must be construed broadly (see, to that effect, Jia, paragraph 36 and the case-law cited).

24. The fact that, in circumstances such as those in question in the main proceedings, a Union citizen regularly, for a significant period, pays sum of money to that descendant, necessary in order for him to support himself in the State of origin, is such as to show that the descendant is in a real situation of dependence vis-à-vis that citizen.

25. In those circumstances, that descendant cannot be required, in addition, to establish that he has tried without success to find work or obtain subsistence support from the authorities of his country of origin and/or otherwise tried to support himself.

26. The requirement for such additional evidence, which is not easy to provide in practice, as the Advocate General noted in point 60 of his Opinion, is likely to make it excessively difficult for that descendant to obtain the right of residence in the host Member State, while the facts described in paragraph 24 of this judgment already show that a real dependence exists. Accordingly, that requirement is likely to deprive Articles 2(2)(c) and 7 of Directive 2004/38 of their proper effect.

27. Furthermore, it is not excluded that that requirement obliges that descendant to take more complicated steps, such as trying to obtain various certificates stating that he has not found any work or obtained any social allowance, than that of obtaining a document of the competent authority of the State of origin or the State from which the applicant came attesting to the existence of a situation of dependence. The Court has already held that such a document cannot constitute a condition for the issue of a residence permit (Jia paragraph 42)."" (Para. 24)

"In my judgment, this makes it unambiguously clear that it is not enough simply to show that financial support is in fact provided by the EU citizen to the family member. There are numerous references in these paragraphs which are only consistent with a notion that the family member must need this support from his or her relatives in order to meet his or her basic needs. For example, paragraph 20 refers to the existence of "a situation of real dependence" which must be established; paragraph 22 is even more striking and refers to the need for material support in the state of origin of the descendant "who is not in a position to support himself"; and paragraph 24 requires that financial support must be "necessary" for the putative dependant to support himself in the state of origin. It is also pertinent to note that in paragraph 22, in the context of considering the Citizens Directive, the court specifically approved the test adopted in Jia at paragraph 37, namely that:

"The need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community national."" (Para. 27)

	<p>"This, as I say, makes the analysis in <u>Pedro</u> highly problematic. I doubt whether it is compatible with <u>Reyes</u>". (Para. 26)</p>
<p>Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.</p>	<p>No.</p>

<p>CASE 9 Subject matter concerned</p>	<p><input type="checkbox"/> 1) non-discrimination on grounds of nationality</p> <p><input checked="" type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 – Article 27</p> <p><input type="checkbox"/> 3) voting rights</p> <p><input type="checkbox"/> 4) diplomatic protection</p> <p><input type="checkbox"/> 5) the right to petition</p>
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Full reference	<i>Secretary of State for the Home Department v. Dumliauskas</i> , Court of Appeal (Civil Division), 26 February 2015, [2015] EWCA Civ 145, available at: www.bailii.org/ew/cases/EWCA/Civ/2015/145.html .
Decision date	26 February 2015
Deciding body (in original language)	Court of Appeal (Civil Division)
Deciding body (in English)	/
Case number (also European Case Law Identifier (ECLI) where applicable)	[2015] EWCA Civ 145
Parties	Secretary of State for the Home Department v. Dumliauskas, Wozniak and M.E.
Web link to the decision (if available)	www.bailii.org/ew/cases/EWCA/Civ/2015/145.html

Legal basis in national law of the rights under dispute	Regulations 27 and 28 Immigration (European Economic Area) Regulations 2006.
Key facts of the case (max. 500 chars)	The Secretary of State appealed against the decisions of the Upper Tribunal refusing the deportation of three foreign criminals (AD, LW and ME). The tribunal held that the respondents had better prospects of rehabilitation in the UK so that it would be disproportionate for them to be expelled. AD was a Lithuanian national with a record of firearms and dishonesty offences who had weak family connections in the UK. He also struggled with a heroin addiction. LW was a Polish national convicted of robbery and a number of motoring offences, including causing death by careless driving with no family links in the UK. He also had a problem with alcohol abuse. ME was a Somalian national with schizophrenia. He had Dutch nationality and had lived in the UK for over five years, and had been convicted of arson and recklessness. He had a wife and children in the UK but was separated from them. AD and ME had no right of permanent residence, whereas W had such a right by concession of the secretary of state. All three were held to represent a serious threat to society justifying their deportation. The Secretary of State contended that (1) the relative prospects of rehabilitation were irrelevant in the case of someone who had no permanent right of residence in the UK; (2) the tribunal had given excessive weight to the issue of rehabilitation, and there had been insufficient evidence to justify its finding that rehabilitation of the offenders was more likely in the UK than in their respective countries of nationality.
Main reasoning / argumentation (max. 500 chars)	The Court of Appeal held, with regard to (1), that the Secretary of State's contention was wrong. The court stated that rehabilitation is frequently linked to the health of the offender and this was expressly recognised in Article 28 (1) of the directive to be taken into account in the proportionality determination. With regard to (2), the court explained that the factors to be taken into account did not vary with the qualifications of the individual concerned. However, in the case of an offender without permanent right of residence, substantial weight should not be given to his rehabilitation. The court stated that the purpose of deportation was to

	<p>remove someone whose offending rendered him a risk to the public and that the greater the risk of reoffending, the greater the right to deport. However, a deported offender would not normally have committed an offence within his own country and, therefore he would not normally have access to a probation officer or the equivalent. The court held that this fact must have been obvious to the European Parliament and Commission when they adopted the directive and that, consequently, the lack of such support did not preclude deportation.</p> <p>On the facts of the case, the court considered that:</p> <ul style="list-style-type: none"> • AD: The tribunal had been wrong to find, or assume, that there was no rehabilitative programme for a recovering drug addict available in Lithuania. • LW: It was impossible to reconcile the tribunal's finding that it was his alcohol problem that made him a serious threat to society with its finding that there was a durable solution to his alcohol problem, and thus his offending, available in the UK. It had also given excessive weight to the advantages of W remaining in the UK. • ME: The tribunal had been wrong to accept that mental health care in the Netherlands was of a high quality but find that the Secretary of State had failed to produce evidence of any difference in the level of care available between the UK and the Netherlands.
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The Court of Appeal clarified what factors should be considered when deciding on whether to deport foreign criminals and interpreted Articles 27 and 28 of the directive.</p>
<p>Results (e.g. sanctions) and key</p>	<p>Appeal allowed.</p>

<p>consequences or implications of the case (max. 500 chars)</p>	
<p>Key quotations in original language and translated into English with reference details (max. 500 chars)</p>	<p>“I am unable to accept the Secretary of State's submission that the prospects of rehabilitation are irrelevant unless the offender has a permanent right of residence. Quite apart from the authority of the judgment of the CA in <i>Daha Essa</i>, to which I have referred above, rehabilitation is not infrequently linked to the health of the offender. That is obviously the case in respect of ME and AD. ME's offending was inextricably linked to his mental health, as is the risk of his reoffending. In Article 28.1, health is expressly referred to as a factor to be taken into account in the determination of proportionality. If ME remains mentally healthy, he is unlikely to reoffend; if his mental health deteriorates, he is liable to reoffend”. (Para. 48)</p> <p>“Much the same applies to AD. If he is drug free, he is less likely to offend. Keeping him drug free will promote his rehabilitation; it will also improve his health. If he were to resume his addiction to heroin, his health would undoubtedly suffer. So drugs are relevant to both health and offending”. (Para. 49)</p> <p>“In the case of LW, it is the connection between alcohol and his offending that is involved. Excessive alcohol consumption is liable to damage health (and may lead to cirrhosis of the liver) as well as contributing to or causing offending behaviour”. (Para. 50)</p>

"It is notorious that a great deal of offending is linked to illicit drugs and/or to alcohol. Addiction to drugs leads to crimes of acquisition, including theft, burglary and robbery, aimed at financing the purchase of drugs to feed the addiction. Alcohol affects self-restraint and is particularly associated with crimes of violence". (Para. 51)

"I am bound to accept, on the authority of the judgment of this court in *Daha Essa*, that the Secretary of State, and therefore the Tribunal, must consider the relative prospects of rehabilitation, in the sense of ceasing to commit crime, when considering whether an offender should be deported. I have to say that but for that authority, I would have said that this was a factor to be considered if raised by the offender, but not otherwise, just as the effect of deportation on the health of an offender need not be considered unless it is made known to the Secretary of State that it is a relevant factor". (Para. 52)

"However, different considerations apply to questions of evidence and the weight to be given to the prospects of rehabilitation. As to evidence, as a matter of practicality, it is easier for the Secretary of State to obtain evidence as to support services in other Member States. However, in my judgment, in the absence of evidence, it is not to be assumed that medical services and support for, by way of example, reforming drug addicts, are materially different in other Member States from those available here. This is not the occasion to conduct a comparative survey, but it is appropriate to mention, by way of example, that medical services in France are said to be excellent, and that Portugal has been innovative in relation to treating drug addiction". (Para. 53)

"Lastly, in agreement with what was said by the Upper Tribunal in *Vasconcelos*, I do not consider that in the case of an offender with no permanent right of residence substantial weight should be given to rehabilitation. I appreciate that all Member States have an interest in reducing criminality, and that deportation merely exports the offender, leaving him free to offend elsewhere. However, the whole point of deportation is to remove from

	<p>this country someone whose offending renders him a risk to the public. The directive recognises that the more serious the risk of reoffending, and the offences that he may commit, the greater the right to interfere with the right of residence. Article 28.3 requires the most serious risk, i.e. "imperative grounds of public security", if a Union citizen has resided in the host Member State for the previous 10 years. Such grounds will normally indicate a greater risk of offending in the country of nationality or elsewhere in the Union. In other words, the greater the risk of reoffending, the greater the right to deport". (Para. 54)</p> <p>"Furthermore, as I mentioned above, a deported offender will not normally have committed an offence within the State of his nationality. There is a real risk of his reoffending, since otherwise the power to deport does not arise. Nonetheless, he will not normally have access to a probation officer or the equivalent. That must have been obvious to the European Parliament and to the Commission when they adopted the directive. For the lack of such support to preclude deportation is difficult to reconcile with the express power to deport. In my judgment, it should not, in general, do so". (Para. 55)</p>
<p>Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.</p>	<p>No.</p>

CASE 10 Subject matter concerned	<input type="checkbox"/> 1) non-discrimination on grounds of nationality <input checked="" type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 – Articles 2 and 3 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
Full reference	<i>Aladeselu v. Secretary of State for the Home Department</i> , Court of Appeal (Civil Division), 1 March 2013, [2013] EWCA Civ 144, available at: www.bailii.org/ew/cases/EWCA/Civ/2013/144.html .
Decision date	1 March 2013
Deciding body (in original language)	Court of Appeal (Civil Division)
Deciding body (in English)	/
Case number (also European Case Law Identifier)	[2013] EWCA Civ 144

(ECLI) where applicable)	
Parties	Aladeselu, Anthony and Ashiegbu v. Secretary of State for the Home Department
Web link to the decision (if available)	www.bailii.org/ew/cases/EWCA/Civ/2013/144.html
Legal basis in national law of the rights under dispute	Regulation 8 of the Immigration (European Economic Area) Regulations 2006.
Key facts of the case (max. 500 chars)	<p>The Secretary of State appealed against a decision of the Upper Tribunal which allowed the appeals of the respondents against a refusal to grant them a residence card. The respondents are Nigerian nationals. The third and second respondents entered the UK illegally in November 2006 and July 2007 respectively. The first respondent entered the UK on a visa in August 2007 but subsequently overstayed. They had all applied for residence as extended family members of their cousin, Ms De Brito, who had lived formerly in the Netherlands and acquired Dutch citizenship. Between 2004 and the dates when the three respondents respectively left for the UK, they lived with Ms De Brito in Nigeria, in accommodation rented by her and she also supported them financially. She continued to support them financially by way of remittances after they had come to the UK, both while she remained in Nigeria and during the period when she was in the Netherlands prior to her own move to the UK. Since April 2008, the respondents have lived with her in the United Kingdom in accommodation rented by her and she has continued to support them financially. The First-tier Tribunal held that the respondents did not meet the requirements of Regulation 8 of the EEA Regulations as extended family members had to be accompanying or joining the EU national sponsor in the UK. The Upper Tribunal held that there was no “accompanying or joining” requirement to the effect that an extended family member had to have arrived after or simultaneously with the EU national. The Secretary of State contended, relying on the</p>

	<p>subsequent CJEU decision in <i>Secretary of State for the Home Department v. Rahman</i>, that there had to be a broad element of contemporaneity, and the fact that the respondents had been in the UK for between 12 and 21 months before Ms De Brito's arrival, and before making their applications, prevented them from meeting the Regulation 8 conditions.</p>
<p>Main reasoning / argumentation (max. 500 chars)</p>	<p>The Court of Appeal considered all the elements in Regulation 8 (2) (c) ["<i>the person satisfied the condition in paragraph (a), [had] joined the EEA national in the United Kingdom and [continued] to be dependent upon him or to be a member of his household</i>"]. With regard to the first element, "satisfied", the court stated that, as this was past tense, the question was whether the condition had been satisfied at an earlier point in time. The court held that this was true for the respondents: when they lived in Nigeria they were dependent on S and were members of her household. Then, the court considered that the expression "has joined" did not of itself impose a temporal limitation. The court answered the Secretary of State's argument that a requirement of broadly contemporaneous or recent arrival should be read into the second condition on the basis of the CJEU's decision in <i>Secretary of State for the Home Department v. Rahman</i> negatively. It held that the CJEU, in <i>Rahman</i>, could not have intended to exclude from the scope of Article 3 (2) of the directive persons who had arrived in the host Member State before the EU citizen and before making their applications; that would have been contrary to the CJEU's approach in <i>Metock</i>. Even if such a requirement were to be derived from <i>Rahman</i>, it was clear that the respondents had all joined Ms De Brito in the UK even though they had arrived before her. The court furthermore held that the respondents also satisfied the third condition, namely that they continued to be dependent on her. Even if the Secretary of State's interpretation were to be accepted, the court held that it would be compatible with the directive to read Regulation 8 in a way that was more favourable than Article 3 (2), and the more restrictive reading could not be said to be necessary in order to achieve compatibility. However, the court also held that this finding did not confer any substantive right to residence in the UK and this was still a matter for the Secretary of State's discretion under Regulation 17 (4).</p>

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<p>The Court of Appeal interpreted Article 3 of the directive and clarified that, when seeking a residence card, there was no requirement under Regulation 8 of the EEA Regulations for an extended family member to have arrived in the UK after or simultaneously with the EU national sponsor.</p>
Results (e.g. sanctions) and key consequences or implications of the case (max. 500 chars)	<p>The Court of Appeal dismissed the appeal.</p>
Key quotations in original language and translated into English with reference details (max. 500 chars)	<p>"I think it best to start with the wording of regulation 8. By the end of the argument before us it was common ground that the directly relevant condition is that contained in paragraph (c) of regulation 8(2), namely that "the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household". It is necessary to examine each of those elements in turn". (Para. 42)</p> <p>"The first element is that the person "satisfied" the condition in paragraph (a). That is in the past tense: the question is whether the condition in paragraph (a) was satisfied at an earlier point in time. Paragraph (a) requires that "the person is residing in a country other than the United Kingdom ... and is dependent upon the</p>

EEA national or is a member of his household". There can be no doubt, on the findings made, that the applicants satisfied that condition: they lived in Nigeria and, at the time when they lived there, were dependent on the sponsor (and indeed were also members of her household)". (Para. 43)

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

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

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

"It is necessary to recall the questions that the court was answering in *Rahman* and the factual framework within which those questions arose. The relatives were living in Bangladesh at the time of their applications to join the EU citizen in the United Kingdom. Their applications were refused because it had not been shown that they had resided with that citizen in the same Member State before she came to the United Kingdom or that they continued to be dependent on her or were members of her household in the United Kingdom. The third and fourth questions (the answers to which are the basis for Mr Collins's argument) asked whether "it was necessary to have resided in the same State as [the EU citizen] and to have been a dependant of that citizen shortly before or at the time when the latter settled in the host Member State". The court held that the requirement of dependency in "the country from which they have come" did not refer to the country in which the EU citizen resided before settling in the host Member State, but to the country from which the family member came. When the court said that the situation of dependence must exist in that country "at the time when he applies to join the Union citizen on whom he is dependent", it was adopting a formulation appropriate to the particular circumstances of the case (where the applications were made by persons outside the host Member State) rather than laying down a principle of universal applicability. The court cannot have intended to exclude from the scope of article 3(2) persons who had arrived in the host Member State before the EU citizen and before making their applications: that would have been contrary to the approach in *Metock*". (Para. 47)

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

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

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

	<p>“Accordingly, I am satisfied that the applicants all come within regulation 8, in particular regulation 8(2)(c), on its correct interpretation and that the Upper Tribunal was correct to rule as it did, albeit some of its reasons would have been expressed differently if the judgment in <i>Rahman</i> had been available to it”. (Para. 51)</p> <p>“It should be emphasised that a finding that an applicant comes within regulation 8 does not confer on him any substantive right to residence in the United Kingdom. Whether to grant a residence card is a matter for decision by the Secretary of State in the exercise of a broad discretion under regulation 17(4), subject to the procedural requirements in regulation 17(5). All this is underlined by the observations of the court in <i>Rahman</i> as to the nature of the host Member State's obligations under article 3(2) of the Directive (see [29] above). In the present case, as the Upper Tribunal noted, the Secretary of State has yet to consider the applicants' cases pursuant to regulation 17(4) and (5). When she does so, she will have to decide whether in all the circumstances it appears appropriate to issue a residence card. Those circumstances will no doubt include the extent of the applicants' financial and emotional dependency on the sponsor (though the First-tier Tribunal's limited findings of fact in respect of financial dependency will be binding), the fact that the applicants were unlawfully in the United Kingdom for a substantial period of time before they made their applications, and any evidence as to the importance of the applicants' residence in the United Kingdom for the exercise of the sponsor's rights of free movement and residence. I have set out at [37] above the observations made by the Upper Tribunal on some of those matters”. (Para. 52)</p>
<p>Has the deciding body referred to the Charter of Fundamental Rights? If yes,</p>	<p>No.</p>

to which specific article.	
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CASE 11 Subject matter concerned	<input type="checkbox"/> 1) non-discrimination on grounds of nationality <input checked="" type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 – Article 28 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
Full reference	<i>Secretary of State for the Home Department v. FV (Italy)</i> , Court of Appeal (Civil Division), 14 September 2012, [2012] EWCA Civ 1199, available at: www.bailii.org/ew/cases/EWCA/Civ/2012/1199.html .
Decision date	14 September 2012
Deciding body (in original language)	Court of Appeal (Civil Division)
Deciding body (in English)	/

Case number (also European Case Law Identifier (ECLI) where applicable)	[2012] EWCA Civ 1199
Parties	Secretary of State for the Home Department v. FV (Italy)
Web link to the decision (if available)	www.bailii.org/ew/cases/EWCA/Civ/2012/1199.html
Legal basis in national law of the rights under dispute	Regulation 21 of the Immigration (European Economic Area) Regulations 2006.
Key facts of the case (max. 500 chars)	The Secretary of State appealed against a decision of the Asylum and Immigration Tribunal which allowed an appeal by the respondent against his deportation. The respondent (FV) was an Italian national who had arrived in the UK in 1985. He married and had five children. In 2001, he was convicted of the manslaughter of his then flatmate and sentenced to eight years' imprisonment. He remained in prison between May 2002 and July 2006. In 2007, the Secretary of State served him with notice of intention to issue a deportation order. FV appealed, complaining that the decision to deport was unlawful and inconsistent with the high threshold set under Regulation 24 (4) (a) of the EEA Regulations. He submitted that, as an EEA who had been resident in the UK for a continuous period of over 10 years, a deportation decision might not be taken except on imperative grounds of public security. The First-tier Tribunal found that Regulation 21 (4) (a) was satisfied because there

	<p>was a medium risk of FV killing again, which amounted to imperative grounds of public security justifying deportation. The Upper Tribunal allowed FV's appeal against deportation, having found that there was no risk of him randomly killing members of the public so that his circumstances did not fall within the true ambit of imperative grounds for deportation. The issues for determination included (1) whether FV had protection under Regulation 21 (4) on the basis that he had resided in the UK for a continuous period of at least 10 years prior to the decision to deport, notwithstanding his imprisonment for over four years during that period, and if so, (2) whether there were imperative grounds of public security justifying his deportation.</p>
<p>Main reasoning / argumentation (max. 500 chars)</p>	<p>(1) With regard to the correct interpretation of Regulation 21 (4) (a), the Court of Appeal stated that the fact that FV had been imprisoned did not affect his residence in the UK for a continuous 10-year period immediately prior to the deportation decision. The question whether the requirement of a continuous 10-year period of residence was established at the date of the decision to deport turned on the degree of integration established at that time, which was a question of fact for the tribunal. Periods of absence within the 10 years immediately preceding the decision did not of themselves disqualify and neither did a period of imprisonment. The period of imprisonment was, however, relevant as a factor to be considered when deciding upon integration at the date of decision. The decision would turn on an overall qualitative assessment having regard to all relevant factors, including the length of residence, family connections and any interruptions in integration. Referring to the CJEU's decision in <i>Tsakouridis</i>, the Court of Appeal held that the key questions for a tribunal to ask when considering whether there had been a period of 10 years' residence prior to the decision to deport were whether imprisonment involved either the transfer to another state of the centre of the personal, family or occupational interests of the person concerned and/or whether "integrating links" previously forged with the host Member State had been broken. FV's imprisonment for four years could not lead to a conclusion that his existing "integrating links" with the UK had thereby been broken or that his "centre of interest" had thereby become transferred to another Member State. (2) With regard to the test for deportation on imperative grounds of public security, the Court of Appeal referred again to <i>Tsakouridis</i> and stated that the test was whether the person concerned represented a "genuine and present threat to the fundamental interests of</p>

	<p>society or of the Member State concerned". Previous criminal convictions were not, in themselves, enough to satisfy the test, nor could a Member State rely on general justifications isolated from the facts of the case or on "considerations of general prevention". The facts of the particular case had to be closely examined to see if the only way that those fundamental interests could be protected was by expulsion. On the facts of the case, the court concluded that the First-tier tribunal had erred in law while the Upper Tribunal had reached a correct decision.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The Court of Appeal interpreted Regulation 21 (4) (a) of the EEA Regulations.</p>
<p>Results (e.g. sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>Appeal dismissed.</p>
<p>Key quotations in original</p>	<p>"In my judgment, some domestic authority does need reconsideration in the light of <i>Tsakouridis</i> and <i>PI</i>. There is no doubt that to establish a permanent right of residence under regulation 21(3)(a), residence must be in</p>

language and translated into English with reference details (max. 500 chars)

accordance with the Regulations. Once permanent residence has been established, the test to be applied under regulation 21(4), read with regulation 21(5) and (6), is the integration test stated in recitals 23 and 24 as explained in *Tsakouridis*. For reasons given, I do not consider that either *HR (Portugal)* or *Cesar C* requires this court to reach a different conclusion on the present facts". (Para. 83)

"A qualitative assessment must be made and integration is not necessarily defeated by time spent, whether in prison or out of the country, during which residence in accordance with the Regulations is not being exercised. That follows, in my judgment, from the integration test and from the absence of findings in those cases that periods of imprisonment, or periods of absence, during the 10 years preceding the deportation order, necessarily defeat ten year rights under the Directive. Rights of residence will, however, be defeated, under regulation 15(2) by absence from the host Member State for a period exceeding two consecutive years. It may be that ten year rights go with them". (Para. 84)

"The question whether the requirement of a continuous period of 10 years residence is established at the date of the decision to deport, turns on the degree of integration established at that time. This is a question of fact for the Tribunal. Following the test in *Tsakouridis*, periods of absence within the 10 years immediately preceding the decision do not of themselves disqualify and neither does a period of imprisonment. The period of imprisonment is, however, relevant as a factor to be considered when deciding upon integration at the date of decision. Integration will not normally be established by time spent in prison save that it may have limited relevance by contributing to the severance of links with the country of origin. If integration has been established prior to the custodial term, it will not necessarily be lost by that term". (Para. 85)

"The factors to be considered are set out by the Grand Chamber in the two cases cited. In *PI*, two years and four months in prison before the decision was made did not of itself defeat integration. The decision turns on

an overall qualitative assessment having regard to all relevant factors, including the length of residence, family connections and any interruptions in integration. The respondent's children are in the United Kingdom. Severance of links with the state of origin is also a factor. Moreover, it follows from the Tribunal's approach in *LG*, with which on this point I respectfully agree, that a state should not be allowed to defeat a claim by deferring the deportation order until the period of imprisonment has been served". (Para. 86)

"The test to be applied was stated by the Grand Chamber in *Tsakouridis*:

"48. It should be added that Article 27(2) of Directive 2004/38 emphasises that the conduct of the person concerned must represent a genuine and present threat to a fundamental interest of society or of the Member State concerned, that previous criminal convictions cannot in themselves constitute grounds for taking public policy or public security measures, and that justifications that are isolated from the particulars of the case or that rely on considerations of general prevention cannot be accepted. [...]" (Para. 88)

"Secondly, I see no real prospect of the Tribunal finding 'imperative grounds of public security' to justify deportation. The respondent has committed a serious offence of violence against the person justifying a sentence of 8 years imprisonment. He has committed other offences". (Para. 98)

"Notwithstanding those offences and the discretion permitted to a Member State in setting out its scale of values, a Tribunal applying regulation 21 and the guidance in *Tsakouridis* and *PI* could not in my judgment properly find that there are imperative grounds of public security justifying deportation. (I bear in mind the later offences of the respondent mentioned at paragraph 30 above.) The Tribunal decisions in *LG* and *J* are not inconsistent on this point with the CJEU guidance and neither is the 2008 Tribunal decision. Moreover, the

	<p>decision maker would be required to take into consideration the principles stated in regulation 21(5) and (6), which in the present case would operate heavily in the respondent's favour". (Para. 99)</p> <p>"Even if criticisms can be made of the 2008 Tribunal's analysis of the reports on the respondent, no Tribunal in 2012 could properly come to a different conclusion on the 'imperative grounds' issue. I also find applicable the approach adopted in RT and KM (Zimbabwe) [2012] UKSC 38, at paragraph 67, where it was stated, on the facts of that case, that it 'would not be just to submit him to a third tribunal hearing'". (Para. 100)</p>
<p>Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.</p>	<p>No.</p>

CASE 12 Subject matter concerned	<input checked="" type="checkbox"/> 1) non-discrimination on grounds of nationality <input type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
Full reference	<i>Patmalniece v. Secretary of State for Work and Pensions</i> , Supreme Court, 16 March 2011, [2011] UKSC 11, available at: www.supremecourt.uk/cases/uksc-2009-0177.html .
Decision date	16 March 2011
Deciding body (in original language)	Supreme Court
Deciding body (in English)	/
Case number (also European Case Law Identifier)	[2011] UKSC 11

(ECLI) where applicable)	
Parties	Patmalniece v. Secretary of State for Work and Pensions
Web link to the decision (if available)	www.supremecourt.uk/cases/uksc-2009-0177.html
Legal basis in national law of the rights under dispute	Regulation 2 of the State Pension Credit Regulations 2002.
Key facts of the case (max. 500 chars)	<p>The appellant (P) appealed against a decision of the Court of Appeal which held that Regulation 2 (2) of the State Pension Credit were indirectly, as opposed to directly, discriminatory, and that the discrimination was justified. P was a Latvian national living in the UK. She had worked in Latvia, though not in the UK, and she had no income other than a retirement pension from the Latvian social security authorities. She claimed state pension credit in the UK. The general effect of Regulation 2 (2) of the 2002 Regulations was to restrict entitlement to state pension credit to those who had a right to reside in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland (the common travel area). P had no such right and her application was therefore refused. The question was whether the conditions of entitlement in Regulation 2 (2) were compatible with Article 3 (1) of Regulation 1408/71 which provided for equality of treatment, amongst those to whom it applied, in the application of social security schemes. The Secretary of State conceded that Regulation 2 (2) was indirectly discriminatory. The issues were (1) whether Regulation 2 (2) gave rise to direct discrimination for the purposes of Article 3 (1) of Regulation 1408/71; (2) if it gave rise only to indirect discrimination, whether that discrimination was objectively justified on grounds independent of nationality; (3) if the indirect</p>

	<p>discrimination would otherwise be objectively justified, whether that conclusion was undermined by the favourable treatment given by Regulation 2 (2) to Irish nationals.</p>
<p>Main reasoning / argumentation (max. 500 chars)</p>	<p>With regard to (1), the court considered that, had a right to reside in the common travel area been the sole condition of entitlement to state pension credit, then it would undoubtedly have been directly discriminatory on grounds of nationality. However, the court stated that the effect of Regulation 2 (2) had to be viewed in the context of Section 1 (2) (a) of the State Pension Credit Act 2002 and Regulation 2 as a whole. In order to be entitled, all claimants had to be habitually resident in the common travel area, and while all UK nationals had a right to reside in the UK, not all of them would be able to meet the test of habitual residence. The test was constructed in such a way that it was more likely to be satisfied by a UK national than by a national of another Member State. In terms of EU law, that meant that although it was not directly discriminatory on grounds of nationality, it was indirectly discriminatory and had to be justified. With regard to (2), the court stated that the questions were whether the reasons for the difference in treatment provided an objective justification for that difference, and whether that justification was based on considerations that were independent of nationality. The purpose of the right-to-reside test was to safeguard the UK's social security system from exploitation by people who wished to enter in order to live off income-related benefits rather than to work. That was a legitimate reason for the imposition of the test. It was independent of nationality, arising from the principle that only those who were economically or socially integrated with the host Member State should have access to its social assistance system. There was, therefore, sufficient justification for the discrimination arising from Regulation 2 (2). With regard to (3), the court held that the position of Irish nationals was protected by Article 2 of the Protocol on the Common Travel Area and it was not discriminatory not to extend the same entitlement to the nationals of other Member States.</p>

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The court interpreted whether Regulation 2 of the State Pension Credit Regulations 2002 was compatible with Article 3 (1) of Regulation 1408/71.
Results (e.g. sanctions) and key consequences or implications of the case (max. 500 chars)	The Supreme Court dismissed the appeal.
Key quotations in original language and translated into English with reference details (max. 500 chars)	“Read in isolation, the right to reside requirement in regulation 2(2) sets out a test which no United Kingdom national could fail to meet. And it puts nationals of other Member States at a disadvantage. As already noted, a British citizen has, by virtue of his or her United Kingdom nationality, a right to reside in the United Kingdom by virtue of his right of abode under section 2(1) of the Immigration Act 1971. Those who do not have United Kingdom nationality do not have that right automatically. Nationals of other Member States of the EU who do not fall within the provisions of regulation 2(1) must do something else to acquire it. Under EU law they must be economically active or self-sufficient, or must be a member of the family of an EU citizen who meets these requirements. The disadvantage which nationals of other Member States will encounter in trying to meet the requirements of regulation 2(2) is due entirely to their nationality. Had a right to reside in the United Kingdom

or elsewhere in the Common Travel Area been the sole condition of entitlement to state pension credit, it would without doubt have been directly discriminatory on grounds of nationality". (Para. 26)

"The effect of regulation 2(2) of the 2002 Regulations must, however, be looked at in the context of section 1(2)(a) of the 2002 Act and regulation 2 as a whole. The condition which all claimants must meet, if they are to be treated as "in Great Britain" for the purposes of section 1(2)(a) of the 2002 Act, is that they must be habitually resident in the United Kingdom or elsewhere in the Common Travel Area. Everyone, including United Kingdom nationals, must meet this requirement. But while all United Kingdom nationals have a right to reside in the United Kingdom, not all of them will be able to meet the test of habitual residence. Most are, of course, habitually resident here. Others are not. They can all meet the "right to reside" requirement that regulation 2(2) sets out because of their nationality. But nationality alone does not enable them to meet the requirement in regulation 2(1). Katherine Fleay, an employee of the Department of Work and Pensions involved in formulating policy relating to access by people from abroad to income-related benefits, referred in para 17 of her witness statement to the Department's memorandum to the Social Security Advisory Committee in February 1994. In that statement it was pointed out that some UK nationals returning to the UK after a long period of absence may be held not to be habitually resident in this country. EU nationals who satisfy one of the conditions listed in regulation 2(1) do not need to meet the "right to reside" test, as they are to be treated as habitually resident here". (Para. 27)

"In *James v. Eastleigh Borough Council* [1990] 2 AC 751 a rule that those who were not of pensionable age had to pay for admission to a public swimming pool was held to directly discriminate between men and women because their pensionable ages were different. In that case there was an exact match between the difference in pensionable ages and the rule, as the right to free admission depended upon a single criterion – an exact coincidence, as Lady Hale puts it: see para 91, below. The statutory pensionable age alone determined whether the person had to pay or not. As Lord Ackner put it at p 769, if you were a male you had, vis-à-vis a

female, a five-year handicap. This was true of every male, not just some or even most of them. That is not so in the present case. There is no such exact match. The composite test is one that some UK nationals may fail to meet too because, although they have a right of residence, they are not habitually resident here. Furthermore, we are not required in this case to say whether this amounts to direct discrimination in domestic law. The question for us is whether it amounts to direct discrimination for the purposes of article 3(1) of Regulation 1408/71". (Para. 29)

"There is an obvious similarity between the provisions under consideration in Bressol and the circumstances in which a person is to be "treated" as being in Great Britain by regulation 2 of the 2002 Regulations. The tests are of the same type and they can be analysed in the same way. Just as in that case the specified courses were to be available to resident students only, here a person must be in Great Britain to be entitled to state pension credit. The European Court did not follow the Advocate General's invitation to concentrate exclusively on the second cumulative condition. Nor did it pick up the point that she made in footnote 34 to her opinion, where she drew attention to Advocate General Jacobs' opinion in Case C-79/99 Schnorbus v. Land Hessen [2000] ECR I-10997, [2001] 1 CMLR 40, para 33 which has been discussed by Lord Walker (paras 66-68, below) and by Lady Hale (paras 88-91, below). Instead it looked at the conditions cumulatively Page 17 and treated them overall as importing a residence test which was indirectly discriminatory. So it would be wrong in this case to concentrate exclusively on the regulation 2(2) "right to reside" test which is linked to nationality. Looking at the regulation as a whole, in the context of section 1(2)(a) of the 2002 Act, the test which is laid down is that the claimant must be "in Great Britain". This test is constructed in a way that is more likely to be satisfied by a United Kingdom national than by a national of another Member State. The court's reasoning in Bressol tells us that it is not directly discriminatory on grounds of nationality. But it puts nationals of other Member States at a particular disadvantage, so it is indirectly discriminatory. As such, to be lawful, it has to be justified". (Para. 35)

"The principle on which the Secretary of State's justification relies underlies the EU rules as to whether, and if so on what terms, a right of residence in the host Member State should be granted. This is the issue to which Council Directive 90/364 EEC is directed. In that context there is no prohibition on discrimination on grounds of nationality under EU law. So there is no need to be concerned with the question whether the approach that is taken there can be justified on grounds that are independent of nationality. Three questions then arise. The first is whether the Secretary of State's justification can be regarded as relevant in the present context. The second is whether it is a sufficient justification given the effect of the rules that regulation 2 of the 2002 Regulations lays down. The third is whether it is independent of the nationality of the person concerned". (Para. 50)

"The first and second questions can be taken together. The justification is relevant because the issues that arise with regard to the grant of a right of residence are so closely related to the issues that are raised by the appellant's claim to state pension credit. They are, at heart, the same because they are both concerned with a right of access to forms of social assistance in the host Member State. It is also a sufficient justification, in view of the importance that is attached to combating the risks of what the Advocate General in *Trojani v. Centre Public d'Aide Sociale de Bruxelles* [2004] 3 CMLR 820, para 18 described as "social tourism"". (Para. 51)

"As for the third question, the answer to it depends not just on what the Secretary of State himself said in his statement (see paras 37-38, above), but also on the wording of the regulation and its effect. They show that the Secretary of State's purpose was to protect the resources of the United Kingdom against resort to benefit, or social tourism by persons who are not economically or socially integrated with this country. This is not because of their nationality or because of Page 24 where they have come from. It is because of the principle that only those who are economical or socially integrated with the host Member State should have access to its social assistance system. The principle, which I take from the decision in *Trojani*, is that it is open to Member

	<p>States to say that economical or social integration is required. A person's nationality does, of course, have a bearing on whether that test can be satisfied. But the justification itself is blind to the person's nationality. The requirement that there must be a right to reside here applies to everyone, irrespective of their nationality". (Para. 52)</p>
<p>Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.</p>	<p>No.</p>

<p>CASE 13 Subject matter concerned</p>	<ul style="list-style-type: none"> <input type="checkbox"/> 1) non-discrimination on grounds of nationality <input type="checkbox"/> 2) freedom of movement and residence <ul style="list-style-type: none"> - linked to which article of Directive 2004/38 – Article 9, 10, 15, 30 and 31 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
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Full reference	<i>R. (on the application of Santos) v. Secretary of State for the Home Department</i> , Queen's Bench Division (Administrative Court), 23 March 2016, [2016] EWHC 609 (Admin), available at: www.bailii.org/ew/cases/EWHC/Admin/2016/609.html .
Decision date	23 March 2016
Deciding body (in original language)	Queen's Bench Division (Administrative Court)
Deciding body (in English)	/
Case number (also European Case Law Identifier (ECLI) where applicable)	[2016] EWHC 609 (Admin)
Parties	Gilberto Silva Santos v. Secretary of State for the Home Department
Web link to the decision (if available)	www.bailii.org/ew/cases/EWHC/Admin/2016/609.html
Legal basis in national law of	Regulations 17, 24 and 26 of the Immigration (European Economic Area) Regulations 2006 (EEA Regulations).

the rights under dispute	
Key facts of the case (max. 500 chars)	<p>The claimant, a Brazilian national who had married a Portuguese national in the UK, applied for judicial review of the Secretary of State's failure to issue him with an EEA residence card, in accordance with the EEA Regulations and Directive 2004/38/EC, and the Secretary of State's decision to detain him for six months between January and June 2012 pending his removal from the UK. He claimed damages under both domestic and EU law.</p> <p>In July 2010 he had applied for an EU residence card on the basis of his marriage to an EU citizen. The relationship broke down shortly thereafter. The Secretary of State indicated that the claimant had submitted insufficient evidence to support his application but no decision was made and so no right of appeal to the First-tier Tribunal was triggered. In January 2012 the claimant was arrested as an overstayer and detained by the Secretary of State with a view to his removal. He filed the instant application challenging the Secretary of State's failure to make a decision to grant him a residence card and the lawfulness of his proposed removal and detention. The Secretary of State granted a stay on removal and temporary admission subject to conditions and released him from detention. The claimant's further application for a residence card was refused but his appeal to the First-tier Tribunal was allowed. He was issued with a residence card in May 2014.</p>
Main reasoning / argumentation (max. 500 chars)	<p>The court decided that the Secretary of State (defendant) had acted unlawfully and in breach of the EEA Regulations and the directive. The claimant was a family member of an EEA national exercising his treaty rights in the UK between the date of his first application and the eventual issue of the residence card even though the relationship broke down. The failure of the defendant to issue a residence card was a breach of Articles 9 and 10 of the directive and Regulation 17. Moreover, the failure to determine his application for a residence card in July 2010 and on subsequent dates resulted in the claimant being denied formal notification</p>

	<p>of the reasons for the decision and a right to appeal to the FTT, which was a breach of Articles 15 and 31 and Regulation 26. The claimant was also unlawfully detained for a six-month period in 2012 for the purpose of removal, without any proper regard to his right of residence as a family member of an EEA national exercising treaty rights in the UK. (There were additional breaches in the case, see para. 133 of the decision for more information.)</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The court clarified the concept of family member of an EEA national and stressed the importance of the right to appeal against a decision of removal.</p>
<p>Results (e.g. sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The court granted the application and assessed the damages.</p>
<p>Key quotations in original language and</p>	<p>“At the FTT hearing on 27 February 2013, the Claimant submitted a witness statement setting out the history of his relationship with Ms Batista and his dealings with the Defendant, with supporting documentary evidence, and he also gave oral evidence. His evidence was not challenged in cross-examination by the Home Office</p>

translated into English with reference details (max. 500 chars)

Presenting Officer. The FTT Judge stated at paragraph 13 of the determination that he accepted the Claimant's account of events as being truthful. Although the residence card had been refused on the ground of failure to submit a valid identity card for Ms Batista, both Mr Malik and Mr Jafferji agreed that, since the issue for the FTT, under section 86(3)(a) Nationality Immigration and Asylum Act 2002, was whether the decision was "in accordance with the law", the FTT would only have allowed his appeal if it was satisfied that he met all the relevant requirements of the EEA Regulations 2006; it was an established principle that the FTT's consideration was not limited to the issue raised in the refusal letter (see *RM (Kwok On Tong: HC 395 para 320 India)* [2006] UKAIT 00039, at [9] – [11])." (Para. 52)

"Although I have not heard any oral evidence, I have seen much of the same documentary evidence as was before the FTT, and its veracity has not been challenged in these proceedings either. In particular, it has never been suggested that the documents presented by the Claimant were not genuine, or that that the marriage was a sham. I am satisfied, therefore, that the Claimant's account is true, and that from the date of his marriage at all material times he was the spouse of a Union citizen who was exercising Treaty rights, residing and working in the UK. In those circumstances, he was the beneficiary of a right of residence pursuant to the Directive and the EEA Regulations 2006, as a family member of Ms Batista, with effect from their marriage on 30 April 2010. The rights conferred by the Directive and the EEA Regulations do not depend upon the issue of residence documentation. The documentation is merely declaratory of existing rights: see *McCarthy v. Secretary of State for the Home Department* (C-202/13) [2015] 1 QB 651, at [62]". (Para. 53)

"In my judgment, the Defendant's servants or agents did treat the Claimant in an outrageously oppressive and unconstitutional way by repeatedly disregarding his EEA rights, and depriving him of his right to appeal against the decision to remove, which was the reason he was being detained. By failing to make decisions on the applications for residence cards, on 12 March and 27 April 2012, the Defendant prevented the Claimant from appealing to an independent tribunal to establish his legal right to reside in the UK. The Defendant conceded at

	<p>the hearing before me that it was unlikely he would have been detained while an appeal was pending, as the delay in removal would make the deportation unreasonable (applying <i>Hardial Singh</i> principles). In my view, failing to give full and accurate information to the court in the first judicial review claim and on the bail applications was also conduct which merits an award of exemplary damages". (Para. 154)</p>
<p>Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.</p>	<p>No.</p>

<p>CASE 14 Subject matter concerned</p>	<p><input checked="" type="checkbox"/> 1) non-discrimination on grounds of nationality</p> <p><input checked="" type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 – Article 7</p> <p><input type="checkbox"/> 3) voting rights</p> <p><input type="checkbox"/> 4) diplomatic protection</p> <p><input type="checkbox"/> 5) the right to petition</p>
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Full reference	<i>Mirga v. Secretary of State for Work and Pensions and Samin v. Westminster City Council</i> , Supreme Court, 27 January 2016, [2016] UKSC 1, available at: www.supremecourt.uk/cases/uksc-2013-0161.html .
Decision date	27 January 2016
Deciding body (in original language)	Supreme Court
Deciding body (in English)	/
Case number (also European Case Law Identifier (ECLI) where applicable)	[2016] UKSC 1
Parties	Mirga v. Secretary of State for Work and Pensions and Samin v. Westminster City Council
Web link to the decision (if available)	www.supremecourt.uk/cases/uksc-2013-0161.html

Legal basis in national law of the rights under dispute	Regulation 6 of the Immigration (European Economic Area) Regulations 2006 (EEA Regulations) (and others).
Key facts of the case (max. 500 chars)	<p>The appellants, Ms Mirga and Mr Samin, appealed against decisions upholding determinations that they were not entitled to income support and housing assistance respectively. Ms Mirga was a Polish national who had spent much of her life in England. Although she had worked at various times, she was refused income support after becoming pregnant. The Secretary of State's position was as follows: at the time she applied for income support, Ms Mirga was ineligible for income support because she was a "person from abroad"; that was on the basis that she could not claim to be a "worker" as she was a Polish national who had not completed 12 months' registered employment under the Accession (Immigration and Worker Registration) Regulations 2004 and thus could not be a "qualifying person" for the purpose of the EEA Regulations 2006; there was no question of her having been a "jobseeker", a "self-employed person" or a "student" under the 2006 Regulations, nor could she claim to be a "self-sufficient person". Mr Samin was an Austrian citizen who had come to the UK in 2005. He was in poor health and had not worked since 2006. He applied for housing under the homelessness provisions of the Housing Act 1996, but his application was refused. The local authority's position was as follows: Mr Samin was not a "worker" within the EEA Regulations, as he was now permanently incapable of work; in any event, he could not claim to be a "worker", as he had not worked for 12 months in the UK; accordingly, he was not a "qualified person" under the EEA Regulations, from which it followed that he was "ineligible" for housing assistance; further, he could not claim to be "a self-sufficient person" within the EEA Regulations, as he had no assets and no health insurance. The issues were (i) whether the EEA Regulations which had led to the impugned decisions infringed the right under TFEU Article 21 (1) to "reside freely" within the EU and/or the right under Article 18 not to be discriminated against on nationality grounds; (ii) whether there should have been an investigation as to whether it was proportionate to refuse Ms Mirga and Mr Samin income support and housing assistance.</p>

**Main reasoning
/
argumentation**
(max. 500
chars)

The court held that: (i) The appellants' TFEU rights had not been infringed. The right accorded by Article 21 (1) is qualified by the words "subject to the limitations and conditions laid down in the Treaties and in the measures adopted to give them effect". These measures include Directive 2004/38. It was a significant aim of the directive that EU nationals from one Member State should not be able to exercise their rights of residence in another Member State so as to become an unreasonable burden on the social assistance system. Article 7 (1) limits the right of residence after three months to those who are workers, self-employed, students or persons with sufficient resources and health insurance "not to become a burden on the social assistance system of the host member state". Under Article 24, EU nationals' right of equal treatment in host Member States is "subject to ... secondary law" and they can be refused social assistance "where appropriate". Having regard to the directive, Ms Mirga could not claim to be a worker because she had not done 12 months' work in the UK, and, because she was not a jobseeker, self-employed, a student or self-sufficient, she could validly be denied a right of residence and therefore could be excluded from social assistance. Therefore, Article 21 (1) could not assist her. The position was similar in relation to Article 18, on which Mr Samin had relied. The Article 18 right does not constitute a broad or general right not to be discriminated against. First, its ambit is limited to "the scope of the Treaties", which means that it only comes into play where there is discrimination in connection with a right in the TFEU or another EU Treaty. Second, the Article 18 right is "without prejudice to any special provisions contained [in the Treaties]". Further, the point raised by the appellants had to be rejected as *acte eclare* following the Grand Chamber judgments in *Dano v. Jobcenter Leipzig* and *Jobcenter Berlin Neukolln v. Alimanovic*. With regard to (ii), the court held that it would severely undermine the whole thrust and purpose of the directive if proportionality could be invoked to entitle a national of another Member State who is not a worker, self-employed or a student, and has no, or very limited, means of support and no medical insurance to have the right of residence and social assistance in another Member State. It would also place a substantial burden on a host Member State if it had to carry out a proportionality exercise in every case where the right of residence (or indeed the right against discrimination) was invoked.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<p>The Supreme Court clarified that the EEA Regulations did not breach the TFEU by denying two economically inactive EU citizens income support and housing assistance because the TFEU had to be read together with Directive 2004/38.</p>
Results (e.g. sanctions) and key consequences or implications of the case (max. 500 chars)	<p>The appeals were dismissed.</p>
Key quotations in original language and translated into English with reference details (max. 500 chars)	<p>“It seems to me that these arguments face real difficulties. The right accorded by article 21.1 of TFEU, which is relied on by Ms Mirga, although fundamental and broad, is qualified by the words “subject to the limitations and conditions laid down in the Treaties and in the measures adopted to give them effect”. In the present case, the “measures” include the 2004 Directive, and presumably include the 2003 Accession Treaty, which was adopted under article 49 of the Treaty on European Union”. (Para. 43)</p> <p>“It appears clear from the terms of paragraph 10 of the preamble that it was a significant aim of the 2004 Directive that EU nationals from one member state should not be able to exercise their rights of residence in another member state so as to become “an unreasonable burden on the social assistance system”. It also</p>

seems clear that any right of residence after three months can be “subject to conditions”. This is reflected in the terms of article 7.1, in that it limits the right of residence after three months to those who are workers, self-employed, students, or with sufficient resources and health insurance “not to become a burden on the social assistance system of the host member state”. Indeed, it is worth noting that article 14.1 even limits the right of residence in the first three months. It further appears clear from article 24, that EU nationals’ right of equal treatment in host member states is “subject to ... secondary law”, and in particular that they can be refused social assistance “where appropriate.” (Para. 44)

“Accordingly, when one turns to the 2003 Accession Treaty and the 2004 Directive, I consider that, because Ms Mirga has not done 12 months’ work in this country, she cannot claim to be a “worker”, and, because she is not a “jobseeker”, “self-employed”, a “student”, or “self-sufficient”, it would seem to follow that she can be validly denied a right of residence in the UK, and therefore can be excluded from social assistance. In those circumstances, it must follow that article 21.1 TFEU cannot assist her”. (Para. 45)

“Mr Samin’s first argument appears to me to face similar difficulties. The article 18 right which he relies on does not constitute a broad or general right not to be discriminated against. First, its ambit is limited to “the scope of the Treaties”, which means that it only comes into play where there is discrimination in connection with a right in the TFEU or another EU Treaty. Secondly, the article 18 right is “without prejudice to any special provisions contained [in the Treaties]”. That brings one back to the argument raised on behalf of Ms Mirga”. (Para. 47)

“Contrary to the appellants’ argument, I do not consider that the decision of the Third Chamber in *Pensionsversicherungsanstalt v. Brey* (Case C-140/12) [2014] 1 WLR 1080 provides the appellants with much assistance. However, it is unnecessary to consider that possibility, because it seems to me clear that the first

point raised by each appellant must be rejected as acte éclairé following the recent Grand Chamber judgments in *Dano* and another v. *Jobcenter Leipzig* (Case C- 333/13) [2015] 1 WLR 2519 (which was published after the Court of Appeal decided these cases) and in *Alimanovic* (Case C-67/14) EU:C:2015:597, which, as mentioned above, was published some time after the hearing of these appeals. It is appropriate to set out in summary terms the effect of those three decisions, not least because they have relevance to the second issue raised on behalf of each appellant, as well as the first” (Para. 48)

“Where a national of another member state is not a worker, self-employed or a student, and has no, or very limited, means of support and no medical insurance (as is sadly the position of Ms Mirga and Mr Samin), it would severely undermine the whole thrust and purpose of the 2004 Directive if proportionality could be invoked to entitle that person to have the right of residence and social assistance in another member state, save perhaps in extreme circumstances. It would also place a substantial burden on a host member state if it had to carry out a proportionality exercise in every case where the right of residence (or indeed the right against discrimination) was invoked”. (Para. 69)

“Even if there is a category of exceptional cases where proportionality could come into play, I do not consider that either Ms Mirga or Mr Samin could possibly satisfy it. They were in a wholly different position from Mr Baumbast: he was not seeking social assistance, he fell short of the self-sufficiency criteria to a very small extent indeed, and he had worked in this country for many years. By contrast Ms Mirga and Mr Samin were seeking social assistance, neither of them had any significant means of support or any medical insurance, and neither had worked for sustained periods in this country. The whole point of their appeals was to enable them to receive social assistance, and at least the main point of the self-sufficiency test is to assist applicants who would be very unlikely to need social assistance.” (Para. 70)

	<p>“Whatever sympathy one may naturally feel for Ms Mirga and Mr Samin, their respective applications for income support and housing assistance represent precisely what was said by the Grand Chamber in Dano, para 75 (supported by its later reasoning in Alimanovic) to be the aim of the 2004 Directive to stop, namely “economically inactive Union citizens using the host member state’s welfare system to fund their means of subsistence”.” (Para. 71)</p>
<p>Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.</p>	<p>No.</p>

2. Table 2 – Overview

	non-discrimination on grounds of nationality	the right to move and reside freely in another Member State	the right to vote and to stand as candidates	the right to enjoy diplomatic protection of any Member State	the right to petition
<p>Please provide the total</p>	Not available	Not available			

number of national cases decided and relevant for the objective of the research if this data is available (covering the reference period)			0	0	0
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