AK (Citizens Directive; AP and FP applied) Sri Lanka [2007] UKAIT 00074

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House Date of Hearing: 27 June 2007

Before:

Senior Immigration Judge Storey
Senior Immigration Judge Grubb

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Rogers instructed by Wandsworth & Merton Law Centre
For the Respondent: Mr G Saunders, Senior Home Office Presenting Officer

(1) The decision of the Tribunal in AP and FP [2007] UKAIT 00048 is correct; *(2) Nothing new relied upon before the Tribunal establishes that Art 3.2 of the Citizens Directive should be read as conferring substantive rights of entry or residence upon the relatives of EU nationals not falling within the definition of "family member" in Art 2.2; (3) In UK law, their rights of admission and residence, if any, are defined by the EEA Regulations 2006.*

DETERMINATION AND REASONS

1. This is a reconsideration on the application of the appellant of a decision of Immigration Judge Froom sent on 4 August 2006 in which he dismissed the appellant's appeal against the decision of the Secretary of State to refuse to issue him with a residence card under the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) (the "EEA Regulations").

2. The factual basis of the appellant's claim is no longer a matter of dispute. He is a Sri Lankan national born on 10 December 1981. Until

2000 he lived in Sri Lanka when he came to the UK and claimed asylum. That claim failed. His cousin ("the sponsor") also lived in Sri Lanka until 1993. The appellant lived with his family including the sponsor until 1991 when due to the situation in Sri Lanka they split up. In 1993, the sponsor went to live in France where she worked and acquired French nationality in 2000. The sponsor moved to the UK in 2005 and has since that time lived with the appellant.

3. The Immigration Judge accepted that the appellant's cousin provided financial support, inter alia, to the appellant from 1993 when he lived in Sri Lanka and subsequently when he came to the UK in 2000 (at least following the withdrawal of his NASS support) including paying for his education in the UK. The appellant is, in fact, a student in the UK having completed an engineering degree at City University in London. He has subsequently undertaken accountancy courses. The Immigration Judge accepted that the appellant became partially financially dependent upon the sponsor in 1993 when in Sri Lanka and has been wholly dependent upon her whilst in the UK since his NASS support ceased in 2001.

4. The appellant claims that he is entitled under EU law to reside in the UK as the cousin of an EU national working in the UK. The Immigration Judge decided that the appellant did not fall within the EEA Regulations and consequently could not derive a right of residence from those Regulations. Ms Rogers, who represented the appellant before us, accepted that this was correct. Instead, Ms Rogers submitted that the appellant derived a right of residence directly from Art 3.2 of Council Directive 2004/38/EC and the Immigration Judge had been wrong to reach a contrary view. She accepted that the Tribunal had recently decided in AP and FP (Citizens Directive Article 3(2); discretion; dependence) India [2007] UKAIT 00048 that no such right was conferred by Art 3.2 but, she submitted, that decision was wrong and should not be followed. Ms Rogers provided us with a helpful written summary of her submissions which she supplemented orally. She also provided us with a number of decisions of the ECJ and a Communication from the EU Commission to the European Parliament dated 6 January 2004 which she relied upon as showing that at least the Commission considered that Art 3.2 conferred free movement rights greater than the Tribunal in AP and FP accepted.

5. We will return to Ms Rogers' submissions in more detail shortly. We must begin, however, with the relevant domestic legislation and provisions of Directive 2004/38/EC. These are fully set out by the Tribunal in AP and FP. However since the appellant challenges the correctness of AP and FP in this appeal it is necessary for us to set them out for ourselves.

EEA Regulations and Directive 2004/38/EC

6. Council Directive 2004/38/EC (sometimes known as the 'Citizens Directive') consolidates and, to some extent, enlarges the free movement rights (admission and residence) of EU nationals and their family members within the Member States. The EEA Regulations seek to implement that Directive in our domestic law and apply to all cases (including pending appeals) with effect from 30 April 2006 (see Sched 4, para 5 to the EEA Regulations and MG and VC [2006] UKAIT 53). Both the Regulations and the Directive deal separately with, what we will call, 'close' family members and other family members which, using the terminology of the EEA Regulations, we will call 'extended' family members. At the heart of this appeal is the scope of the free movement rights of 'extended' family members and whether they mirror or approximate to those of 'close' family members.

7. We turn now to the provisions in the EEA Regulations dealing first with "family members" and secondly with "extended family members". Although Ms Rogers accepts the appellant cannot bring himself within them, it is important to see their scope before moving on to consider the terms of the Citizens Directive.

8. Regulation 7 defines "family member" for the purposes of the EEA Regulations as follows:

> "7 (1) Subject to paragraph (2) [which is not material for the purposes of this appeal], for the purposes of these Regulations the following persons shall be treated as the family members of another person-
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> (a) his spouse or his civil partner;
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> (b) direct descendants of his, his spouse or his civil partner who are –
>
> (i) under 21; or
>
> (ii) dependants of his, his spouse or his civil partner;
>
> (c) dependent direct relatives in his ascending line or that of his spouse or his civil partner;
>
> (d) a person who is to be treated as a family member of that other person under paragraph (3)
>
> ... ."

9. By virtue of reg 12(1) a family member must be issued with an EEA family permit in certain circumstances:

> "12 (1) An entry clearance office must issue an EEA family permit to a person who applies for one if the person is a family member of an EEA national and –
>
> (a) the EEA national is –
>
> (i) is residing in the UK in accordance with these Regulations; or
>
> (ii) will be travelling to the United Kingdom within six months of the date of the application and will be an EEA national residing in the United Kingdom in accordance with these Regulations on arrival in the United Kingdom; and
>
> (b) the family member will be accompanying the EEA national to the United Kingdom or joining him there and –
>
> (i) is lawfully resident in an EEA State; or
>
> (ii) would meet the requirements in the Immigration Rules (other than those relating to entry clearance) for leave to enter the United Kingdom as the family member of the EEA national or, in the case of direct descendants or dependent direct relatives in

> the ascending line of his spouse or his civil partner, as the family member of his spouse or his civil partner, were the EEA national or the spouse or civil partner a person present and settled in the United Kingdom…. ."

10. There are two important requirements in reg 12(1) which we should note. First, the "family member" must be "accompanying" or "joining" the EEA national who is coming to or already in the UK. It does not cover the reverse situation where the "family member" is present in the UK and is joined by the EU national. Secondly, the "family member" must, before coming to the UK, either be already lawfully resident in another EEA state or satisfy the requirements of the Immigration Rules for entry. The latter situation would cover both family members who are illegally in another EEA state and those who are outside the EEA and wish to enter the UK directly from there.

11. It is not necessary for the purposes of this appeal to set out in detail the provisions dealing with the free movement rights that a "family member" has by virtue of the Regulations. They may be summarised as follows. Regulation 11(2) confers a right of admission for family members of EU nationals on production of relevant documentation including, possibly, an EEA family permit issued under reg 12(1). Regulation 13(2) provides for an initial right of residence of 3 months for such family members. Regulation 14(2) provides for an extended right of residence for a family member of, inter alia, an EU national exercising Treaty rights in the UK (a "qualified person"). Regulation 15(2) provides for a permanent right of residence, inter alia, where the "family member" has resided in the UK in accordance with the Regulations for a continuous period of 5 years. Regulation 17(1) and (2) provides for the issue of a residence card to a "family member". A 'residence card' is the document which, according to its definition in reg 2(1), is issued to a non-EEA family member as "proof of the holder's right of residence in the United Kingdom".

12. As will be clear from reg 7, the appellant, who is the sponsor's cousin, does not fall within the definition of "family member". Regulation 8 of the EEA Regulations defines the category of "extended family member" as follows:

> "8 (1) In these Regulations 'extended family member' means a person who is not a family member of an EEA national under Regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).
> (2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and –
>
> (a) the person is residing in an EEA State in which the EEA national also resides and is dependent upon the EEA national or is a member of his household;
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> (b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or
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> (c)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.

(3) A person satisfies the condition in this paragraph if the person is a relative of an EEA national or his spouse or his civil partner and, on serious health grounds, strictly requires the personal care of the EEA national his spouse or his civil partner.
(4) A person satisfies the condition in this paragraph if the person is a relative of an EEA national and would meet the requirements in the Immigration Rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national were the EEA national a person present and settled in the United Kingdom.
(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.
(6) In these Regulations 'relevant EEA national' means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purpose of paragraph (5)."

13. A relative who satisfies one of these requirements may obtain an EEA family permit in accordance with reg 12(2) which is as follows:

"12 (2) An entry clearance officer may issue an EEA family permit to an extended family member of an EEA national who applies for one if –
(a) the relevant EEA national satisfies the condition in paragraph (1)(a);
(b) the extended family member wishes to accompany the relevant EEA national to the United Kingdom or to join him there; and
(c) in all the circumstances, it appears to the entry clearance officer appropriate to issue the EEA family permit.
(3) Where an entry clearance officer receives an application under paragraph (2) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.
… ."

14. There is an important difference between the position of 'close' family members and 'extended' family members under the EEA Regulations. The Regulations do not, as such, confer a right of admission or residence upon an "extended family member". The reason for this is that the regulations only apply to "family members", i.e. the 'close' family members defined in reg 8. However, an "extended family member" who possesses an EEA family permit (or indeed a residence card) is treated as a "family member" for the purposes of the EEA Regulations by virtue of reg 7(3) which provides:

"(3) Subject to paragraph (4) [which is not material for the purposes of this appeal], a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as a family member of the relevant EEA national for so long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or revoked."

15. Thus, being in possession of a valid EEA family permit (or registration card or residence card) means that the same rights of admission and residence apply to 'extended' family members as apply to 'close' family members under regs 11(2), 13(2), 14(2) and 15(2).

16. It might be thought, therefore, that the Regulations and the rights derived from them cannot apply to a relative who falls within the definition of "extended family member" in reg 8 unless they have obtained an EEA family permit prior to arrival in the UK. That indeed is, largely, the scheme of the EEA Regulations.

17. How is this affected by reg 17(4)? Reg 17(4) allows the Secretary of State in his discretion to issue a residence card to "an extended family member" of, inter alia, an EEA national who is a qualified person.

> "17 (4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) [i.e. not in possession of a valid permit, card etc] who is not an EEA national on application if –
>
> (a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and
>
> (b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card."

18. As we saw earlier a "residence card" is a document that is proof of its holder's right of residence. Given that an "extended family member" (without an EEA family permit) does not seem to fall within any of the right-conferring regulations (namely, regs 11(2), 12(2), 13(2), 14(2) and 15(2)), how reg 17(4) is to be applied is not entirely clear. This is not a point that was taken before us but it does seem to be the appellant's situation here. Even if he satisfied the definition of an "extended family member" in reg 8(2) or (4), he has never had an EEA family permit or residence card. His right to reside based on the EEA Regulations which would be proven by the residence card issued under reg 17(4) is not readily apparent.

19. Putting that to one side, for our purposes reg 8(2) and (4) are particularly important as they bring within the definition and the EEA Regulations other "relatives" of the EEA national. Regulation 8(2) applies where the relative has been (or is) either resident with the EEA national or dependent upon them in another EEA state. Where that is not the case, for example, where the relative is coming from outside the EEA, that relative must, by virtue of reg 8(4), satisfy the requirements of the Immigration Rules. Again, it is noteworthy that reg 8(2) contemplates the family member *accompanying or joining* the EU national in the UK. It cannot apply where the family member is already in the UK and the EU national comes to the UK to live with the family member. When applying reg 8(4) that will also be the situation under the Immigration Rules since we cannot think of an example where the sponsor would not already have come to the UK and be resident here in order for the Immigration Rules to apply. For example, in this appeal the relevant provision (if any) of HC 395 is para 317 which covers claims by "dependent adult relatives". It requires in sub-para (ii) that the applicant "is joining or accompanying a person who is … in the United Kingdom". Likewise reg 12(2)(b) only allows for the issue of an

EEA family permit in circumstances where the "extended family member" wishes "to accompany" or "to join" the EEA national in the UK.

20. Ms Rogers accepts that regs 8(2) and 8(4) do not apply to the appellant. In relation to reg 8(2), he has never lived in another EEA state where he could have lived with or been dependent upon the sponsor. Prior to coming to the UK, he lived in Sri Lanka. It would have been different if he had lived in France whilst the sponsor was there but he did not. Also, the appellant cannot establish that he comes within any of the Immigration Rules. The closest relevant rule, as the Immigration Judge noted, is para 317 of HC 395 dealing with dependent adult relatives. However, a cousin of a sponsor is not one of the relatives specified in para 317. Consequently, the appellant is not an "extended family member" within the meaning of the Regulations. Thus, Ms Rogers relied directly on the Citizens Directive and, in particular, Art 3.2. We must set out the whole of Art 3. We also set out Art 2.2 which defines the term "family member" for the purposes of Art 3.1:

> "**Article 2**
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> Definitions
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> For the purposes of this Directive:
> 1) 'Union citizen' means any person having the nationality of a Member State;
> 2) 'Family member' means:
> (a) the spouse;
> (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
> (c) the direct descendants who are under the age of 21 or are the dependants and those of the spouse or partner as defined in point (b);
> (d)the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);
> 3) 'Host Member State' means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.
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> **Article 3**
>
> Beneficiaries
>
> 1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.
> 2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where

serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

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

21. As will be readily apparent, Art 3 draws the same distinction that we see in our domestic EEA Regulations. Art 3.1 applies to 'close' family members as defined in Art 2.2 and Art 3.2 applies to others – subject to its specific requirements. That the distinction was drawn at all between the two groups of family members suggests somewhat persuasively that their positions were not be treated as the same and in fact the two sub-paragraphs of Art 3 are worded quite differently. Interestingly, Art 3.1 does not create any rights of free movement itself. Those rights are set out subsequently in the Directive. They only apply to 'close' family members. All, in fact, Art 3.1 does is set out the beneficiaries of the Directive – 'close' family members who wish to accompany or join the EU national in another member state. We mention this because if, as Ms Rogers submits, rights (similar to if not exactly the same as those for 'close' family members) are created by Art 3.2 remarkably the Directive achieves this in one brief sub-paragraph for 'extended' family members whilst it takes the bulk of the remainder of the Directive to identify and spell out those rights for 'close' family members. This would, to say the least, be a curious style of legislative endeavour.

22. Art 3.2, by contrast to Art 3.1, not only states who is to benefit from its provisions but also states what benefits they are to obtain. Art 3.2 applies to "any other family members" (not those falling within Art 2.2) who are members of the EU national's household or are dependent upon that person "in the country from which they come". Ms Rogers' relies on Art 3.2 which she submits applies to the appellant. Ms Rogers' submission is not without subtlety. It is set out in her written submissions at paras 29-32. We shall return to the detail of those submissions later. Unlike, Art 3.1 and its application to 'close' family members, Mr Rogers' submits that Art 3.2 does not confer a substantive right of admission and residence *per se* upon 'extended' family members. As we understand her submission, in order to be effective the rights conferred by Art 3.2 require recognition by the Member State through the grant of a residence card. Ms Rogers' developed this argument in order to avoid the consequences of the Tribunal's decision in AP and FP which, if correct, is determinative of this appeal against the appellant.

AP and FP

23. In AP and FP the appellants were citizens of India who wished to join their father-in-law, who was a Portuguese citizen, and upon who they claimed to be dependent and their husbands in the UK. It was accepted that they could not succeed under the EEA Regulations. Instead, they

relied upon Art 3.2 of the Citizens Directive which it was said on their behalf created substantive rights of entry and residence. It was submitted that this was the effect of the Member State's obligation to "facilitate" entry and residence. The Tribunal disagreed. The Tribunal first noted, in much the same way as we have done, the obvious differences in wording between Art 3.1 and 3.2 (at [9]-[11]):

> "9. In our judgment, the starting-point must be the distinction in the Directive between the close family members defined as "family members" in Article 2(2), who clearly are given substantive rights of free movement and residence by the Directive, and those other members of the family who are comprised within the provisions of Article 3(2). It is clear that the Directive treats these two groups differently; and any proposed interpretation which does not do so must be doomed. What then are the differences? There appear to be three at least.
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> 10. First, by Article 3(1), the Directive is made simply to "apply" to "family members" as defined by Article 2(2); but Article 3(2) does not apply the Directive in any general sense to other members of the family. Secondly, whereas other provisions of the Directive (principally in Chapters II-IV) give rights of entry and residence to EU citizens and their "family members", no such rights are given by the Directive to other members of the family, because the Directive (other than Article 3(2)) does not apply to them, and because the rights are given to EU citizens and their "family members" as defined and not to others. A similar distinction, and similar wording, was to be found in Article 10 of Council Regulation 1612/68, which gave close relatives (as defined) a right to install themselves with a national of a Member State, but required Member States to "facilitate the admission" of other dependent family members. Thirdly, the treatment of other members of the family in Article 3(2) is characterised by the phrase "in accordance with its [sc the host Member State's] national legislation". This is the clearest possible indication that national legislation has a role in the attribution of rights to other members of the family: the position is not therefore entirely regulated by the substantive provisions of the Directive that have force, from the Directive, over the whole of the Union. The distinction between the two categories of family member is thus made even clearer than it was in Article 10 of reg 1612/68, which did not contain these words.
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> 11. Those differences do not mean that Article 3(2) gives nothing to those covered by it. On the contrary, it clearly gives two rights. The first is that, subject to national law, their entry and residence shall be "facilitated". The second is that there shall be "extensive examination" of their circumstances and a justification of refusal. The second of these rights is new. The first is the right previously embodied in Article 10 of reg 1612/68, extended in its scope and clarified in its relation to national law."

24. The Tribunal then turned to what is the proper meaning of "facilitate" in Art 3.2. (at [12]):

> "12. What, then, does "facilitate" mean? The apparent sense would be to make entry and residence easy, or easier: but it would evidently have to be entry and residence in accordance with national legislation that was made easy or easier. That sounds very much like a prescription about procedure, the substantive rights being given by the national legislation. We think that that is exactly what is meant. If national legislation permits a person's admission, admission is to be facilitated. If not, there is no entry or residence to be facilitated in accordance with national legislation.

25. The Tribunal drew the distinction between "substantive" and "procedural" rights and took the view that Art 3.2 is directed towards the latter which are important and a significant focus for protection under EU law (at [13]-[15]):

> "13. We bear in mind the important provisions about the procedural aspects of free movement rights in particular, which have been in the relevant legislation since the beginning. Council Directive 68/360/EEC provides in Article 3 that persons who have the substantive rights secured by that Directive shall be allowed by other Member States "to enter their territory simply on production of a valid identity card or passport"; and Article 6 of Council Directive 73/148/EEC prevents a State from requiring anything (from an applicant entitled because of a relationship to someone else) other than the identity card or passport with which the individual entered the country and proof of the relationship. Further, Article 5(1) of Council Directive 64/221/EEC limits the time allowed for making a decision on a first residence permit to six months, and requires that the applicant be allowed to remain temporarily in the country while the decision is made. These provisions are an essential part of provisions for free movement. Movement would not be free if, whatever a person's substantive rights, he could in practice be kept at the border by national requirements for particular documentation or kept out of the country during a long bureaucratic process. Similarly, the movements of the EU national would not be free if his family members might suffer such difficulties at the border: he might be hindered or dissuaded from travel if his family were not easily able to travel the whole journey with him. The considerations for obtaining a residence permit, by a person already within the borders of the state, are not identical, as explained in Chang v SSHD [2001] UKIAT 00012 at [24]-[26]: but, nevertheless, they exist, and a developing law of free movement and residence could be expected to have provisions such as these relating to the recognition of the substantive rights under it.
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> 14. There is equally reason for procedural regulations relating to those whose rights will depend on the national law of the country where the principal proposes to exercise a right of free movement or residence. For in the same way as his rights may be hindered if, at the border, there may be delay or difficulty in admitting a family member who is entitled under EU law to accompany him, so they may be hindered if there may be delay or difficulty in admitting a family member who, although without substantive rights under EU law, is entitled to admission under the law of the country he is seeking to enter. We may use an example. Suppose a person seeking to exercise an EU right of free movement has a niece, whom he would like to accompany him. If he goes to a country where nieces are (under national law) not entitled to admission, he knows in advance that there is no purpose in his niece travelling with him, and so far as EU law is concerned his right of access to the country in question is not hindered because EU law gives no right of admission to nieces. If, however, he chooses a country whose national law allows the admission of nieces, delaying the admission of his niece has the same clogging affect as delaying the admission of any member of his closer family. Similar considerations again apply to a person already in the country who seeks a residence permit: undue delay, or expulsion of the family member while the matter is considered, might well reduce the attractiveness of the country in question for the principal: and that would be a clog or hindrance on his right of free movement and residence.
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> 15. It can thus readily be seen that procedural requirements relating to persons who have no substantive rights under EU law are both explicable and indeed necessary to give full effect to free movement and residence

provisions. The new right – of extensive examination and a justification for any refusal – will no doubt serve to ensure that the procedural requirements are observed. We can, we think, be reasonably confident that the procedure for application, reasoned refusal and right of appeal provided under our own legislation meets the requirements of the last sentence of Article 3(2) of the 2004 Directive."

26. Finally, the Tribunal examined the argument that Art 3.2 creates substantive rights in the context of other provisions in the Directive and took the view that this was not the proper interpretation of Art 3.2 (at [16]-[17]):

> "16. We are aware that it has been suggested that the scope of the national legislation to which reference is made in Article 3(2) is itself limited to matters of procedure: in other words, that Article 3(2) is to be read as giving some sort of substantive right to the wider family members to whom it refers, and that the procedural aspects of those rights (only) are subject to national legislation. We do not think that that can be right. First, it would be remarkable if the substantive residence and free movement rights of the wider family members were to be found in Article 3(2) and in such general and vague terms, whereas the rights of Union citizens and their closer family members are so closely defined and circumscribed by the detailed provisions of Chapters II-VI (Articles 4-33) of the Directive. Secondly, we note that the procedural requirements for those relatives that are admitted or allowed to remain in the Member State are in fact prescribed by the Directive. Article 8(5)(e) and (f) cover the formalities for registration certificates, and permit certain documents to be demanded of those within Article 3(2), over and above the requirements to be met by others. Article 10(2)(e) and (f) cover the formalities for residence cards, and require certain documents to be demanded of those within Article 3(2), over and above the requirements to be met by others. In this context the apparent liberty to make national legislation on procedural matters would be largely illusory, and it is in any event inconceivable that there would not be in Article 3(2) a reference to the prescriptions of Articles 8 and 10, if it were really the case that the "national legislation" to which reference is there made were confined to the matters in fact dealt with later in the Directive. It seems to us that the terms of Articles 8 and 10 are a further reason for supposing that the "national legislation" to which reference is made in Article 3(2) is national legislation which may, but is not obliged to, confer substantive rights of free movement and residence on those family members covered by that paragraph.
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> 17. Article 7(4) of the Directive is a clear pointer to the conclusion that no rights of residence are conferred by Article 3(2). Article 7 as a whole is concerned with rights of residence for over three months. Paragraph (1) gives the right to certain Union citizens, including in subparagraph (c) students, and in subparagraph (d) Union citizens who are family members accompanying Union citizens. Paragraph (2) gives the right also to family members who are not themselves Union citizens, who accompany or join Union citizens. "Family member" has, of course, the meaning given by Article 2(2): that is to say, we are concerned here with close family members. Paragraph (4) is as follows:
>
> > 'By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under (c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of this/her spouse or registered partner.'

> This is very revealing. The right of residence does not accrue to all the "family members" of students. It accrues only to a narrower group. The other "family members" of a student do not have the right of residence *but Article 3(2) applies to them*. It appears to us to follow that Article 3(2) does not give a right of residence to those within it. "

27. As a consequence, the Tribunal concluded at [18]:

> "…the position is that we do not accept that Article 3(2) gives, or is intended to give, or has to be read as giving, any right of free movement or residence to those who have no such right apart from it. Any such rights will be dependent on national law, which, however, has to be administered in accordance with the requirements of facilitation, extensive examination and justification of refusal."

The challenge to AP and FP

28. Ms Rogers took issue with AP and FP and invited us not to follow it. At root her argument is that the Tribunal's reasoning in AP and FP is erroneous. As we understood her submissions she relied, in particular, on two principal grounds:

> 1. The Tribunal had confused "substantive rights of admission and stay" with "substantive requirements of admission and stay";
> 2. The Tribunal had failed to consider relevant ECJ case law and the communication from the Commission to the Parliament which would suggest a different interpretation of Art 3.2.

29. As regards Ms Rogers first submission, it is set out at paras 29-32 of her written submissions. To understand its full impact, it is necessary to set those paragraphs out in full:

> "29. The Appellant submits that it is important to differentiate between
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> a) substantive rights of admission and stay
> b) substantive requirements of admission and stay
> c) procedural rights in seeking admission and stay
> d) procedural requirements of admission and stay
>
> 30. The Appellant submits that the Tribunal has fallen into error in conflating a) and b).
>
> 31. The Appellant readily accepts that whilst those persons falling under Article 2(2) of the Directive have a substantive right – namely a directly enforceable Community law right – to be admitted and to remain in the host Member State with an EU national, those falling under Article 3(2) do not have such a right. They have a right to have their admission and stay "facilitated" only. The difference will be that whereas a Article 2(2) family member cannot be required to obtain a residence card to prove his or her right of residence for instance or at least only administrative penalties (on a non-discriminatory basis) may follow for failing to obtain a residence card, a Article 3(2) family member may be required (if such requirement is set out in national legislation) to obtain the residence card to prove that he has been granted the right to remain. Thus whereas the Article 2(2) family member needs only the Member State to recognise his rights the Article 3(2) family member needs the Member

> State to grant him the right. The procedure for obtaining such recognition may vary from one Member State to another.
>
> 32. However this does not mean that the substantive requirements imposed on family members under Article 3(2) can or will vary from one Member State to another. The mischief in Regulation 8 of the EEA Regulations is that it purports to define extended family members by reference to the Immigration Rules. Thus according to the logic of Regulation 8, if the person is not provided for at all in the Immigration Rules, then such person has no right to be considered for admission or stay in the UK. If the Immigration rules states [sic] that a person can only be admitted or remain if they meet certain criteria such as the "most exceptional compelling circumstances" test, then a person who cannot meet such a test, by definition is not an extended family member and will not be entitled to have his or her admission or stay considered."

30. With respect, we find the distinction between (a) and (b) set out in paragraph 29 to be one so fragile as not to be capable of bearing the weight Ms Rogers would have it bear. It is in truth a distinction without a difference. It is said that 'close' family members have rights that exists independently of their recognition by a Member State. That much we agree with. It is clearly supported by the jurisprudence of the ECJ (e.g Procureur de Roi v Royer (Case 48/75) [1976] ECR 497) and is recognised in our own EEA Regulations where a residence card is defined as a document which is "proof of the holder's right of residence" (reg 2(1)). That wording is replicated for 'permanent residence cards' and 'registration certificates', in the latter instance the document issued to EEA nationals. By contrast, it is said that 'extended' family members only have rights if they are granted by the Member State. Until that point the rights are only inchoate and conditional upon conferment (not merely confirmation) by the Member State. Ms Rogers' submission would seem to be that Member States have an obligation to confer those rights through "national legislation". That seems to be the import of her submissions (see in particular para 31). At worst, they can only be limited or hedged-about with procedural requirements but no more. There is an inherent problem with Ms Rogers' argument. We are not entirely clear how the appellant could benefit in this appeal if the rights have not, in fact, been conferred upon him. The UK might well, if she is correct, be in breach of its obligation to implement the Directive by enacting "national legislation". However, since Art 3.2 requires "national legislation" to be in place, he would still not have a directly enforceable right of entry and residence unless and until it has been implemented.

31. Also, in our view, the 'extended' family member's rights of entry and residence either exist automatically or they do not. If the Member State may not refuse to confer the rights, the rights are essentially indistinguishable from those granted to 'close' family members by the Directive. In other words, Ms Rogers' argument collapses in on itself and ultimately leads to an assertion of rights equal to those of 'close' family members. That position is untenable given the differential wording of Arts 3.1 and 3.2 taken together with the contextual arguments so carefully analysed by the Tribunal in AP and FP. As in

that case, the only sustainable distinction that we can see is that between “substantive rights” and “procedural requirements”.

32. Ms Rogers submits that the consequence is that the position of ‘extended’ family members may be different in each of the 27 Member States. So they may be; but Ms Rogers did not place before us any material to support her assertion that this could not have been intended. Whilst the Citizens Directive can properly be seen, at least in general, as a harmonising provision (see e.g. recital (14) dealing with documentation), it is hard to see Art 3.2 as a harmonising provision. The wording of Art 3.2 and its reference to Member States facilitating entry and residence “in accordance with national legislation” strongly suggests that the possibility of national differences is contemplated. We cannot be sure, because no relevant material was put before us, but it is not difficult to imagine that the more limited effect of Art 3.2 was all that could be agreed politically at an EU level when considering the rights of family members who do not fall into the ‘close’ family member definition. The existence and scope of any rights were to be left to the Member States themselves.

33. The distinction resonates, in our view, in the different wording found in recital (5) dealing with the “rights” of ‘close’ family members and recital (6) in relation to ‘extended’ family members. Recital (5) states that:

> “[t]he right of all Union Citizens to move and reside freely within the territory of the Member States should … be also granted to their family members, irrespective of nationality.”

34. By contrast, in recital (6) which obviously immediately follows recital (5) the position of ‘extended’ family members is not expressed in terms of their “rights” of entry and residence but rather as follows:

> “… the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.”

35. Clearly, ‘extended’ family members have no “automatic” right of entry and residence under the Directive and each Member State is entitled to consider their entry and residence “on the basis of its own national legislation” having regard to their relationship to the EU national and any other circumstance. That, it seems to us, is entirely consistent with the effect of the EEA Regulations, in particular the terms of reg 8. That some relatives do not succeed - whether because of an absence of dependency or because their relationship does not fall within those permitted under the Immigration Rules - is part and parcel of the

process under the national legislation specifically contemplated by recital (6).

36. If we turn to the case law and other material that Ms Rogers put before us, it does not in our view take her arguments any further. We were referred to the ECJ's decisions in Jia v Migrationsverket (Case C-1/05); MRAX v Belgium (Case C-459/99); Commission v Spain (Case C-157/03); R v SSHD ex p Yiadom (Case C-357/98) and Carpenter v SSHD (Case C-60/00)). We do not propose to examine these decisions in any detail. None deal directly with the Citizens Directive and, in particular, Art 3.2. None deal with the position of anyone other than 'close' family members. None provide guidance on the proper interpretation of wording similar to that found in Art 3.2. Ms Rogers did not press them before us either in her oral or written submissions. We do not find them of any real assistance in resolving the issue before us.

37. More relevant, perhaps, is the Commission's Communication with the Parliament dated 12 January 2004. Ms Rogers relies, in particular, on passages at pp. 3 and 9 of the document. They concern the free movement of partners in a durable relationship. Those partners who are in such a relationship which the host Member State recognises in its law, fall within the 'close' family members group in Art 2.2. Thus, they have the same rights of entry and residence as other 'close' family members such as spouses. We were invited to consider the situation in Member States which do not recognise those relationships. At p. 3 of its Communication, the Commission says this:

> "the concept of family: the definition in Article 2(2)(b) has been confined to registered partnership where the legislation of the host Member State regards this situation as equivalent to marriage. Unlike the amended proposal, it does not cover *de facto* durable relationships. This restriction is, however, offset by the addition of a new provision in Article 3 by which the Member States will have to facilitate the entry and residence of a partner in a durable relationship with the Union citizen having the primary right of residence;"

38. Further at p.9 the Commission says this:

> "The definition given in Article 2 (2)(b) of the amended proposal included both **registered partners** and partners having a de facto relationship, if the law of the host Member State recognises this type of situation. The Council has decided to restrict this definition to registered partners, if the law of the host Member States treats registered partnerships as equivalent to marriage.
>
> At the same time, the text of Article 3 has been amended to provide that any Member State must facilitate the entry and residence of the partner to whom the Union citizen is linked by a duly attested durable relationship. The Commission has accepted the approach proposed by the Council. While it is true that the definition of Article 2(2)(b) is more limited than the text of the amended proposal, it must be considered that the content of Article 3 has been extended to include any type of durable relationship. The Commission considers that the concept of durable relationship may cover different situations: same-sex marriage, registered partnership, legal cohabitation and

> common-law marriage. The concept of facilitation has been clarified in recital 6a.
>
> The Commission considers that the text of the common position represents a fair compromise which makes it possible to facilitate the right to free movement and residence of unmarried partners of Union citizens without imposing changes in the national laws of the Member States."

39. We have some doubts as to the value of this kind of document as a legitimate aid to construction of the Directive (see e.g. R v IAT ex p Antonissen (Case C-292/89) [1991] ECR I-745 (minutes of Council meeting)). Be that as it may, on examination it does not in fact assist Ms Rogers. She submits that the Commission's position is that partners in *de facto* relationships will be covered by Art 3.2. There is no doubt that this is correct: an 'extended' family member includes under Art 3.2 "the partner with whom the Union citizen has a durable relationship, duly attested". However, the Commission's statement goes no further than stating that their entry and residence must be "facilitate[d]". We note the Commission's reference to what that obligation entails in what is now recital (6) which we set out and referred to earlier. Ms Rogers would have us interpret the Commission's statement as accepting that Art 3.2 confers a right of entry and residence or, in her watered-down version, creates an inchoate right that Member States need to recognise for it to take effect. With respect, the Commission's publication says no such thing. It is entirely unclear on what it means will be the effect of applying Art 3.2 to such partnerships. The Commission makes no reference to the limitation upon the obligation on a Member State to facilitate, namely to do so "in accordance with its national legislation" but its reference to what is now recital (6) is, in our view, a recognition of the lesser obligation imposed upon Member States in the case of 'extended' family members.

40. Indeed, it seems to us that, if Ms Rogers is right about the Commission's understanding of Art 3.2, it exposes the unsustainability of the proposed reach of Art 3.2 which is being pressed upon us. The Commission's interpretation so understood would seem to recognise a right of entry and residence since a Member State (who by definition did not recognise such relationships) would be required to admit a partner to such a relationship despite the fact that the relationship fell outside the relevant part of the definition of 'close' family members under Art 2.2. Can it really be suggested that Art 3.2 has, in this particular context, the effect of nullifying the limitation on Member State's obligations under Art 3.1 where they do not recognise in their domestic law durable relationships of this sort? The exclusion that Member States were allowed in implementing Art 3.1 would be removed by the effect of Art 3.2. That cannot, in our view, have been intended and is a powerful argument against the interpretation of Art 3.2 pressed on us by Ms Rogers.

41. We are not persuaded by Ms Rogers' spirited challenge to AP and FP. Nothing she has said or shown us leads us to conclude it is wrongly

decided. AP and FP is correctly decided. We could repeat the reasons of the Tribunal in AP and FP but that would be pointless. We have already set them out earlier. Given the differential wording in Arts 3.1 and 3.2 and the careful articulation of the rights of 'close' (but not 'extended') family members in the Citizens Directive, Art 3.2 is not capable of being read so as to bestow the rights claimed by Ms Rogers. For the reasons we have given and those in AP and FP, with which we entirely agree, Art 3.2 does not create any substantive rights of entry or residence for 'extended' family members such as the appellant.

42. For these reasons we consider, despite Ms Rogers' invitation, the issue to be *acte clair* and not a matter which should be referred to the ECJ.

43. The Immigration Judge's decision was correct in law and the determination dismissing the appeal stands.

A GRUBB
SENIOR IMMIGRATION JUDGE

Date: