Upper Tribunal
(Immigration and Asylum Chamber)

; reg 15A(3)(c) 2006 EEA

Ahmed (Amos ; Zambrano Regs) [2013] UKUT 00089 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 December 2012	.....

Before

MRS JUSTICE LANG

UPPER TRIBUNAL JUDGE STOREY

Between

MS NAZIA AHMED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Ms B Asanovich, instructed by Slough Immigration Aid Unit

For the Respondent: Mr P Deller, Home Office Presenting Officer

Interested party: Mr A Weiss, AIRE Centre

1. The spouse of an EEA national/Union citizen does not acquire a retained right of residence upon divorce unless the EEA national was in the United Kingdom and exercising Treaty rights at the date of the lawful termination of the marriage: **Amos** [2011] EWCA Civ 552 followed.

2. The principles established by the Court of Justice in **Zambrano** Case C-34-/09 [2011] ECR 1-0000 and subsequent cases dealing with Article 20 of the Treaty on the Functioning of the European Union (TFEU) have potential application even where the EEA national/Union citizen child of a third-country national is not a national of the host Member State: the test in all cases is whether the adverse decision would require the child to leave the territory of the Union.

3. Notwithstanding inability to satisfy new regulation 15A(3)(c) of the Immigration (European Economic Area) Regulations 2006 as amended with effect from 16 July 2012, the parent of a child of an EEA national who has been employed in the UK when the child was also residing here can have a

derived right of residence under Article 12 of Regulation 1612/68 (now Article 10 of Regulation No 492/2011) even though the EEA national parent is no longer a worker in the UK at the time the child commences education: see Case C-480/08 **Teixiera** [2010] EUECJ, 23 February 2010.

DETERMINATION AND REASONS

1. This case, which concerns a third-country national woman seeking rights of residence following her divorce from an EEA national by whom she had two children both also EEA nationals, raises a number of questions: (1) Did she retain an EEA right of residence given that at the date of her divorce her husband was not in the UK?; (2) Does she have a **Zambrano** -style derived right of residence based on the position of her EEA national children notwithstanding that they are not nationals of the host Member State (the UK)?; (3) Does she have a derived right of residence either under new regulation 15A of the Immigration (European Economic Areas) Regulations 2006 (the 2006 Regulations) or under Article 12, Regulation 1612/68 based on her eldest child having commenced full-time education?; and (4) Does the fact that her children are EEA nationals mean that the decision refusing to grant her a residence card violates her right to respect for family life under Article 8 ECHR? On each of these issues the law has been fast-changing and interactive and so it is necessary to go into greater detail than is normally appropriate. We express our gratitude to the representatives – Ms Asanovich, Mr Weiss and Mr Deller – for their largely helpful submissions, both written and oral.

2. The appellant is a citizen of Pakistan. In September 2003 she married Khurshid Ahmed in Karachi. He travelled to Germany and obtained German nationality. In March 2004 the couple moved to the UK and on 7 November 2005 she was issued with a residence card valid until 21 September 2009. Their relationship ran into difficulties and some time in 2006 he left the matrimonial home. He purported to divorce her by a talaq issued in Karachi on 13 March 2007. Later, in 4 April 2009, he obtained a decree absolute in the UK. She was granted custody of her two children, A, born on 14 November 2005, and I, born on 3 July 2007. Both children are German nationals. On 18 September 2009 the appellant applied for permanent residence on the basis that upon her divorce she had retained a right of residence under regulation 10(5) of the 2006 Regulations. She produced evidence to show that she had worked as a self-employed carer between 2007 and June 2011.

3. On 11 March 2010 the respondent refused to grant her permanent residence. The reason given was that the evidence she had provided failed to show that her former husband was exercising Treaty rights in the UK at the time of the divorce. The grounds of appeal submitted that to have refused the appellant on the basis that her husband was not exercising Treaty rights at the time her divorce became final was to rely on a misinterpretation of Article 13(2) of Directive 2004/38/EC: it was sufficient, it was submitted, for the Union citizen/EEA national husband to have been present in the UK and exercising Treaty rights at the time the marriage broke down as long as a divorce followed. It was also submitted that the appellant met three out of the four conditions set out in Article 13(2)/ regulation 10(5). Foremost was that she had been the victim of domestic violence (Article 13(2)(c)), regulation 10(5)(iv)), but it was also the case that her marriage had lasted at least three years prior to divorce proceedings during which she and her spouse had resided in the UK for at least one year (Article 13(2)(a), regulation 10(5)(i)) and that she has custody of children of her Union citizen /EEA national husband (Article 13(2)(b), regulation 10(5)(ii)). The decision was also said to be contrary to the appellant's Article 8 rights.

Relevant legal provisions

4. The legal provisions to which reference is made above and below are set out in an Annex to our determination. As regards provisions set out there in the 2006 Regulations, it is to be noted that these

were amended with effect from 16 July 2012 by the Immigration (European Economic Area) Amendment Regulations SI No. 1547. By virtue of the fact that we go on to set aside the decision of the First-tier Tribunal and re-make it ourselves, we are obliged to decide the appeal ex nunc under the amended Regulations: see Schedule 1.

5. Given, however, the central focus in submissions of Article 13 of the Directive it will assist to set out its text here also:

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

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

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

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

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or

(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or

(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or

(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on personal basis.”

Grounds

6. In a determination sent on 22 July 2010, First-tier Tribunal (FtT) Judge M A Khan dismissed the appeal. He concluded that the relevant date for deciding whether there was a retained right of residence was the date of divorce and (whether that date was taken as March 2007 or August 2009)

the evidence failed to establish that at that time the appellant's husband was in the country. The judge also rejected the appellant's Article 8 grounds of appeal.

7. The appellant sought permission to appeal against the FtT decision, principally on three grounds: (i) that the judge's interpretation of regulation 10(5)(b) (that she had to show her ex-husband "was residing in the United Kingdom in accordance with these Regulations at the date of the termination [of the marriage or civil partnership]") was incompatible with Article 13 of the Directive; (ii) that the judge had failed to address the issue of Article 12 of the Directive; and (iii) that the judge had also failed to deal with Article 8 of the ECHR although this was raised at the hearing. Although permission was originally granted on grounds (ii) and (iii) only, on 19 August 2010 UTJ Allen granted it on ground (i) as well. In the meantime, on 29 July 2010, the respondent sent a Rule 24 notice stating that she did not oppose the appellant's appeal. It was said that in summary the FtT judge "had applied the wrong standards in regards to the appellant's rights under Article 8 at para 31", but that at a substantive hearing the respondent would maintain her position under Article 8.

Appellant's skeleton arguments

8. Prior to the hearing the appellant's representatives submitted several skeleton arguments, the latest dated 12 December 2012. In these the appellant submitted that despite being consistent with the Court of Appeal interpretation set out in **Amos** **[2011] EWCA Civ 552** , the judge's interpretation of regulation 10(5) and Article 13(2) was erroneous because:

(i) the conditions specified under subparagraphs 13(2)(a)-(d) contain no reference whatsoever to the presence or otherwise of the EEA national in the host Member State at the point of legal termination of the relationship; had there been such a requirement it would have been simple enough to expressly state it;

(ii) such an interpretation would be contrary to the Treaty objective of abolition of obstacles to free movement, with reference to Article 2 of the Treaty on the Functioning of the European Union (TFEU) and recital 5 of the Directive. It was argued that:

"The object of Article 13 could not have been to legally safeguard only those who managed a swift and amicable divorce while in a new Member State, but to legally safeguard all those whose marriage is no longer subsisting and they belong to one of the four groups identified in Article 13";

(iii) the judge's interpretation also disregarded the context of the provisions of Article 13(2) in relation to domestic violence, which European institutions have condemned as a violation of human dignity (see EU Guidelines on violence against women and girls and combating all forms of discrimination against them, General Affairs Council 8 December 2008; Opinion of the European Economic and Social Committee on "Eradicating domestic violence against women" (2012/C351/05 at 5.1.1); European Parliament Resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women; EU project Daphne III). It was submitted that:

"To interpret Article 13(2) so as to require the EEA national who had perpetrated domestic violence to be present in the UK in order for the victims to avail themselves of the protection intended by the retained right of residence would place the perpetrator in a position of control over the victim and potentially expose [them] to recurrence of violence which would be contrary to the purpose of the provision. This would also be at odds with the stated commitment of the EU to prevent exposure to recurrence of violence by effectively permitting blackmail related to immigration status, a common feature of abuse."

(iv) the judge's interpretation would deprive Article 13(2) of real practical effect because its meaning across the Union would vary depending on national legislation on divorce/annulment: in some countries reliance on the right would be excessively difficult or impossible, e.g. in Ireland it is impossible to divorce unless there has been effective separation during at least the four years of marriage; in Malta until July 2011 divorce did not exist at all, only legal separation or annulment;

(v) if the judge's interpretation was correct, then UK provisions for protection of victims of domestic violence as set out in para 298A of the Immigration Rules would afford greater protection to third-country nationals than that provided to EEA nationals and their family members by the Directive.

9. The grounds give five examples of persons who would be denied a retained right of residence by the approach adopted by the judge:

a) those whose estranged spouse leaves the host Member State immediately after the breakdown of the marriage;

b) those unable to commence divorce proceedings for a prolonged period due to the psychological effects of domestic abuse;

c) those involved in custody proceedings pending divorce which may take different and longer periods of time "if there is an impossibility of relying on a retained right of residence while those proceedings are pending [that would] run contrary to the principle of family unity, protection of family life and the best interests of the child";

d) those whose EEA spouse has stopped working, is in receipt of benefits, but not subject to an expulsion measure which would be disproportionate;

e) a victim of domestic violence whose husband was, as a result of criminal proceedings following on from assault on his wife, sentenced to a significant prison sentence during which the decree absolute was issued and who, on present authority, would not be exercising Treaty rights whilst in prison.

10. The grounds also raised an issue regarding the judge's decision that the appellant failed because she could not prove her husband was not in the UK exercising Treaty rights: "It cannot have been the intention of the Directive to require proof of the EEA national to have been a qualified person at the time of the divorce…"

11. The grounds also contain several observations about the perceived effect of **Amos** . First, it is argued that **Amos** was wrongly decided. If, as **Amos** suggests, there were a requirement to prove that the EEA national was exercising Treaty rights immediately before the divorce, "such a requirement would follow from the first paragraph of Article 13(2) and be applicable to all the four groups of persons who would qualify. Nothing in the first paragraph suggests that". It is submitted that **Amos** needs revisiting as it did not touch on the issue of purpose, context and effect of Article 13(2) but concentrated unduly on the wording. It was also argued that the material issue in **Amos** was not whether the appellant needed to prove that the EEA national was exercising Treaty rights at the time of divorce, and the Court did not have argument on the point.

12. Second, it is contended that the UT in the instant case is not necessarily bound by **Amos** as that case did not concern a right of residence retained on the basis of domestic violence.

13. The skeleton argument goes on to request that if the Tribunal is not minded to depart from **Amos** , it should make an order for reference to the Court of Justice of the European Union (CJEU).

14. As to what decision should be re-made (if the Tribunal agreed that the judge erred in law), the grounds contend that (1) the UT should find the appellant had a right to be granted a permanent residence card on the basis of her previous retained right of residence coupled with her self-employment since 2007; (2) the appellant was entitled to succeed on Article 8 ECHR grounds on the basis that she had been in the UK since March 2004 and the eldest of her two children had been in the UK for 7 years and so would satisfy EX 1(a) of the current Immigration Rules (as amended by HC 194 etc.) as well as Article 8 on the basis of leading cases.

AIRE Centre Skeleton Argument

15. Having been involved in assisting the appellant with certain aspects of her appeal since 2010, the AIRE Centre's skeleton argument of 4 December 2012 unsurprisingly covered very similar ground to that covered in Ms Asanovich's skeleton arguments. Its submissions focused on regulation 10(5) and its perceived incompatibility with Article 13(2) of the Directive; the need for a three-part analysis of the relevant provision ("applying a literal, teleological and contextual interpretation"); and on the meaning of divorce in this context:

"In the AIRE Centre's view, the correct interpretation is that where a third-country national has been exercising residence rights as the spouse of an EU citizen under Directive 2004/38, the marriage has broken down and the third-country national expresses an intent to pursue a divorce or divorce proceedings are pending, the third-country national will retain her residence under Article 13(2), both before and after the divorce is finalised. There has to be a degree of flexibility in how this is applied, in light of the inherent trauma that victims of domestic violence frequently suffer and the difficult choices they will have to make in relation to ending their marriages".

16. It was pointed out that Article 15(3) of Directive 2003/86/EC (on the right to family reunification for third-country nationals legally residing in the Union), albeit not one to which the UK has opted in, provides for family reunification in the event not just of divorce, widowhood and death of first-degree relatives, but also of "separation". It was said that the drafters of regulation 10(5)(b) had not adhered to the EU norm of uniform interpretation: if the Union citizen/ EEA national spouse must be exercising Treaty rights on the date of the divorce, the retained right of residence will remain dependent on the vagaries of national divorce law and practice. A table was supplied which had been provided by lawyers at the firm White and Case outlining the divorce laws in the 27 Member States. This was said to demonstrate such vagaries.

17. The AIRE Centre's skeleton shared Ms Asanovich's view that recital 15 and its insistence on guarding against abuse in the context of divorce demonstrated that the purpose of Article 13(2) generally is to protect the family life and dignity of third-country national spouses in case of (inter alia) divorce, and the purpose of Article 13(2)(c) in particular is to protect third-country national victims of domestic violence from abuse at their spouse's hands. The importance of the right to human dignity highlighted in this recital was also enshrined in the Charter of Fundamental Rights and was reflected in the case law of the European Court of Human Rights: in **Bevacqua and S. v Bulgaria** App. no. 71127/01 (2008) the Court found a violation of Article 8 where the Bulgarian authorities failed to take adequate measures to protect a mother and child from domestic violence; see also **Opuz v Turkey (** Application no. 33401/02 **)** (2009).

18. As had Ms Asanovich's skeleton argument, the AIRE Centre's submitted that certain questions should be submitted to the Court of Justice regarding the issue of acquisition of retained rights of residence upon divorce.

Respondent's Skeleton Argument

19. The respondent's position was that no literal, teleological, contextual or other interpretation as suggested by the appellant and the AIRE Centre can avoid the simple, unambiguous point that a right of residence can only be "retained" if it is held at the material time. Here this must mean on legal termination of the marriage. In the alternative, even on a teleological approach, there is no reason to believe that it was the intention of the Directive to create a new right of residence for victims of domestic violence simpliciter , irrespective of the duration of the marriage or length of residence in the UK, the whereabouts of the abusive spouse, or whether the claimant's home country could offer protection and safety. If there were anomalies that arose under the Directive, they should be dealt with under other protective provisions: where relevant, the Refugee Convention or Article 8 of the ECHR.

20. As regards the proposed "contextual approach" urged jointly by the appellant's representatives and the AIRE Centre, it was wrong to suggest that the purpose of the Directive was to protect particularly vulnerable people. Whilst it is accepted that victims of domestic violence may encounter difficulty in securing a divorce in some EU states, this cannot override the fact that Article 13(2) unambiguously concerns retention of rights "on divorce, annulment of marriage or termination of a registered partnership".

21. As regards the alleged unfair difference in treatment of victims of domestic violence depending on whether they are ex-spouses of Union citizens/ EEA nationals on the one hand or third-country nationals on the other, the provision in the Immigration Rules for third-country national victims of domestic violence was not an unfettered grant of leave to victims as it was subject to other requirements.

22. Accordingly, the respondent submitted there was no need for a reference as the provisions of Article 13 were acte clair and regulation 10 of the 2006 Regulations was a correct transposition of them.

23. The respondent reserved her position on Article 8 to the hearing.

Submissions at the Hearing

24. Several matters were discussed at the outset of the hearing. Mr Deller reconfirmed at the outset of the hearing the respondent's acceptance that the FtT judge has erred in law in his treatment of Article 8.

25. We raised with the parties the issue of what date we should take as being the date of divorce in this case. Mr Deller submitted it could only be the 2009 divorce in the UK. Ms Asanovich said it was very difficult to be definite because it depended on the domicile of her ex-husband at the time when he attempted to divorce the appellant by talaq in Karachi in 2007. She accepted there were evidential difficulties in the way of asserting that the Karachi divorce in March 2007 was lawful under English law but maintained that it did not matter, as on either date the appellant met the requirements of Article 13(2).

26. We also informed the parties that notwithstanding Ms Asanovich's abandonment in her latest skeleton argument of earlier reliance on Article 12, Regulation 1612/68, we considered that article was engaged by the facts of the case and we expected the parties to address it in their oral submissions.

27. With regard to the state of the evidence as to when the appellant's ex-husband left the UK, we were referred to various items of correspondence, including a letter from UKBA to Slough CAB dated 13 December 2007. From these it is clear that her ex-husband left the UK some time in December 2006.There was no evidence to show he had returned nor has it even been suggested that he has.

28. In relation to the issue of whether the appellant had a retained right of residence, Ms Asanovich argued that the wording of Article 13 made clear that the right is acquired when an applicant meets any one of four conditions ((a)-(d)) set out in Article 13(2). There is no requirement for the EEA national spouse to be present or to be exercising Treaty rights still. Where time periods are relevant the Directive specifies them – as with the condition in Article 13(2)(a) to have been married three years. By contrast, in the first paragraph of Article 13(2) no time limit is specified. She accepted that it was not relevant that the appellant had previously had a residence card, as such a document did not prove the existence of the underlying right throughout its duration.

29. Ms Asanovich argued that the reading of Article 13(2) which she advocated was the only one consistent with the EU approach to interpretation by reference to context and purpose. Article 13(2)(a)-(d) were clearly designed to protect the interests of family life and the best interests of the child. The latter were objectives identified in recitals 5 and 15 of the Directive now reinforced by rights enshrined in the Charter of Fundamental Rights. Article 27 of the Directive, which states that "Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience", must encompass abuse of family members, e.g. by means of domestic violence. The interpretation argued for by Mr Deller would reward procrastination (in claiming a divorce) and amount to a wife beater's charter, enabling abusers to keep their victims in a situation of fear and dependency. The drafters were aware that divorce laws in Member States varied a great deal. She adverted to the general examples given in her skeleton argument of anomalies created by the respondent's approach to Article 13(2).

30. As regards the effect of **Amos** , it did not address the domestic violence clause which should be seen as sui generis . The focus of this clause was clearly domestic violence during the marriage: that was enough to trigger the retained right of residence.

31. As regards Article 12, Regulation 1612/68, Ms Asanovich said that in the light of the discussion as the outset of the hearing she wished to withdraw the position she had taken in her latest skeleton, which abandoned this ground, and resubmit the argument made in earlier pleadings that the Upper Tribunal should find that the appellant has a derived right of residence as the primary carer of her two children, both of whom are enrolled in education and who do not lose their Article 12 Regulation 1612/68 right of residence just because their father has departed from the UK.

32. As regards Article 8, Ms Asanovich urged us to take into account the appellant's recent witness statement of 11 December 2012. The appellant had been working until June 2011, she had not been able to get work since. Neither she nor the children had any links with Germany, albeit the children were German nationals. The appellant had been in the UK over eight and a half years; of that all but two years had been lawful – she had lawful stay up to 21 September 2009. Her eldest child had been in the UK for over 7 years; both her children were in education. The children had no meaningful links with Pakistan. If the appellant had made her application on or after 9 July 2012, she would have been able to benefit from the provisions of the new Immigration Rules at Appendix FM dealing with the right to private life for parents of a child in the UK over 7 years. In this respect the new Rules were essentially a codification of existing case law on Article 8: on the latter see cited as an example **EA**

(Article 8 – best interests of child) Nigeria [2011] UKUT 315 (IAC) . Even if **Zambrano (Case C-34/09) [2011] ECR 1-0000** principles could not assist the appellant directly, it was clear that in fact the children, despite being German nationals, had no links with Germany; if they had to move there they would have to learn a new language; they would be denied effective enjoyment of their rights as Union citizens. Even if the appellant's was not an Article 20 (**Zambrano**) case, Article 20 was still a relevant factor in the Article 8 assessment of the appellant's claim. The children were integrated into UK society and were doing well at school. The primary point of reference when it came to their best interests was their mother, but their mother believes she will be isolated in Pakistan.

33. Mr Weiss's submissions broadly concurred with those of Ms Asanovich. He urged the Tribunal to resist the idea that there was a dichotomy between a literal and a teleological interpretation of Article 13. On a literal approach, the meaning of Article 13 was not clear at all, especially as to the meaning of divorce, which was in reality a process by which a marriage irretrievably breaks down. He emphasised the importance, when seeking to interpret Article 13, of the fact that retained rights of residence were for those who had previously acquired rights of residence as family members under Article 3. The validity of regarding the conditions set out in Article 13 as being met by fulfilment of Article 13(2) (a)-(d) alone was reinforced by the evident fact, illustrated by the appellant's case, that the same person could meet more than one of them. The more conditions a person met, the less a literal reason was justified.

34. Mr Weiss said interesting light was shed by figures made available by UKBA in response to a Freedom of Information request regarding the number of refusals and grants made in respect of persons claiming a retained right of residence. From a position where there were more refusals than grants, the picture changed significantly in the second quarter of 2010 when only a very small number were refused. This suggested that the Secretary of State had come to recognise, at least partially, that her previous interpretation had been too restrictive. There had certainly been a change of policy by the Secretary of State in relation to dealing with applicants who were unable to produce evidence to prove their former spouse was in the UK exercising Treaty rights. Previously she had undertaken to assist with obtaining evidence only where there had been domestic violence. Now she would assist even where there had been an acrimonious divorce – as long as the applicant could show she had taken reasonable steps to obtain the information herself.

35. Mr Weiss submitted that the appellant's approach to interpretation of Article 13(2) was reinforced by the fact that the Charter of Fundamental Rights was now part of primary EU law. Article 1 stipulated that the right to human dignity was inviolable.

36. As regards the Directive, it was clear from the language of Article 13(2) that the drafters intended to vest rights to certain categories of persons independently of the Union citizen from whom they had derived them originally.

37. Mr Weiss submitted that we should find that **Zambrano** principles did apply to the appellant's case. The test in **Zambrano** and subsequent Court of Justice rulings may be whether the impugned measure requires a Union citizen to leave the territory of the EU as a whole; but that had to subject to what was practical. The two Belgian children in the **Zambrano** case could have gone to France or some other EU Member State but that did not prevent the Court of Justice finding that their parent's removal would violate their Article 20 rights.

38. As regards Article 12 of Regulation 1612/68, the application of the established jurisprudence of the Court of Justice in such cases as **Teixeira** [2010] EUECJ C-480/08 (23 February 2010) to the facts of the appellant's case should be regarded as straightforward. Even if that was not so, the recent

concession made by the Department of Work and Pensions in the case of **Czop** [2012] EUECJ C-147/11 (06 September 2012) made clear that there did not need to be a temporal overlap between the Union citizen parent being in work and his or her child being in education.

39. Mr Weiss also sought to adopt Ms Asanovich's submissions on Article 8.

40. For the respondent Mr Deller reiterated the respondent's position that the language of Article 13(2) was unambiguous. He agreed with Mr Weiss that retained rights only accrued to those who had acquired them previously, but disagreed that they could accrue to those who had lost them prior to the conditions set out in subparagraphs (a)-(d) arising. He accepted that there were criticisms that could be levelled against the social policy effects of the Directive, but if these were lacunae, they should not be filled by judicial interpretation. There would also be lacunae if the interpretation advised by the appellant and the AIRE Centre was adopted.

41. Mr Deller asked us to reject the argument that the domestic violence condition at Article 13(2)(c) had to be given a sui generis interpretation. Article 13(2) set out a complete code of those who could retain rights of residence: all four subcategories set out in subparagraphs (a)-(d) were subject to the same overarching requirements. It was regrettable, he accepted, that the Secretary of State's refusal decision failed to focus on the fact that the appellant's ex-husband had ceased to meet the requirements of Article 7 upon departure from the UK (and that the appellant in consequence had no extant right to retain) and there should also have been some explanation for why no consideration had been given to revocation of the appellant's residence card once it was known her husband had left the UK in December 2006. But these shortcomings did not impact on the underlying inability of the appellant to meet the requirements of either regulation 10 or Article 13.

42. Mr Deller said that in relation to Article 12 of Regulation 1612/68, his position was that the government had recently taken steps to implement the principles established by the CJEU in **Teixeira** by introducing a new provision into the 2006 EEA Regulations at para 15A(3). The text of the new provision made clear that it remained the case that the child had to be in the UK whilst the EEA national parent was exercising Treaty rights. Hence he did not accept that the appellant benefitted from Article 12, Regulation 1612/68.

43. Mr Deller submitted that although the decision at issue in this case – refusal of a permanent residence card – was not a removal decision, it would appear, on **JM (Liberia)** **[2006] EWCA Civ 1402** principles, that the Tribunal should consider the case on the basis that a putative consequence of the refusal decision is that the respondent would proceed to direct her removal to Pakistan. That said, the appellant's Article 8 circumstances now were stronger than they were when the refusal decision was made over two years ago. Among the factors in her favour were that she had been accepted in the past as having an EU right of residence as a family member; she would appear to meet the requirements of Appendix FM of the new Immigration Rules, had she made her application on July 9 2012 or thereafter; her children are Union citizens; it has been accepted that she has been a victim of domestic violence. Whilst he would leave the matter for the Tribunal, he accepted the appellant's Article 8 case was a strong one.

44. Mr Deller contended that the facts of the appellant's case did not engage **Zambrano** principles.

45. Both parties sought more time to make submissions on the Article 12 Regulation 1612/68 issue. We refused their application. Albeit stated in the appellant's latest skeleton argument to be abandoned, the issue had been raised by them in an earlier skeleton argument produced well before the hearing and the respondent was in receipt of that. In addition the parties had time during breaks

in the hearing to consider the issue further mindful of our indication at the outset of the hearing that we considered this issue to be live before us. We were satisfied they had been able to assist us sufficiently.

Error of Law

46. The respondent has already conceded in a Rule 24 notice that in her view the FtT erred in law in respect of Article 8 ECHR and Mr Deller confirmed that this remained the view of the respondent. All things considered we are satisfied that the FtT decision was vitiated by legal error both in respect of its treatment of Article 8 (failure to take into account key relevant factors when conducting the Article 8 balancing exercise; application of too onerous a burden of proof) and in respect of its failure to address the Article 12, Regulation 1612/68 question.

Discussion

47. The appellant relies on multiple grounds: her position under Article 13 of the Directive; under primary EU law based on **Zambrano** principles; under Article 12 of Regulation 1612/68; and under Article 8 of the ECHR.

Article 13 of the Directive

48. We deal first with Article 13 first because success under this provision would afford the appellant the highest level of protection and second because both Ms Asanovich and Mr Weiss accepted that the appellant was shut out by the plain wording of regulation 10(5)(a)-(b), which imposes a requirement that the EEA national spouse was a qualified person at the date of the termination of the marriage. If. notwithstanding adverse national law provisions, the appellant could show she had a retained rights of residence under the Directive, then she would also be entitled to permanent residence through a combination of (1) the period when it is not in dispute that she was in the UK whilst still married to her ex-husband when he was in the UK exercising Treaty rights (7 November 2005 – December 2006); and (2) the period since her divorce during which (it is not disputed) she has been in self-employment between 2007 and June 2011: see Article 18.

49. The issue of the interpretation of Article 13 was dealt with by the Court of Appeal in **Amos** . Although the central issue in that case was whether the appellant had acquired permanent residence, resolution of that issue required the Court, inter alia, to decide whether the two appellants had a retained right of residence. The Court’s legal analysis of the provisions in Article 13 and regulation 10 dealing with retention of rights on divorce was set out in emphatic terms in paras 29-31.

“29. Thus the requirements of the Directive applicable to the appellants were as follows:

(1) At all times while residing in this country until their divorce, their spouse must have been a worker or self-employed (or otherwise satisfied the requirements of Article 7.1).

(2) Their marriages had to have lasted at least three years, including one year in this country.

(3) They must be able to show that they are workers or self-employed persons or otherwise satisfy the requirements of the penultimate paragraph of Article 13.2.

30. The Regulations are consistent with these propositions. Regulation 10(5) provides that a "family member who has retained the right of residence" must in a case such as the present appeals satisfy the following conditions:

(a) His or her divorce from the EEA national.

(b) He or she was residing in the UK in accordance with the Regulations at the date of the divorce. He or she will have been so residing if regulation 14 applied, i.e. if the EEA national spouse was a "qualified person", i.e., for present purposes, a worker or self-employed person (as to which see the definitions in regulations 2 and 6).

(c) He or she is a worker or self-employed person, and therefore satisfies paragraph (6).

(d) 3 years' marriage, including at least one year's residence in the UK.

31. Provided these conditions continue to be satisfied, after 5 years' continuous residence in the UK a non-EEA national will be entitled to a permanent right of residence under regulation 15(1)(f).”

Indeed, it was precisely because the Court considered itself able to regard the above propositions as ratione decidendi that it decided to decline the appellants’ request to make an order for reference to the Court of Justice: see para 32.

50. From the above it is clear that the Court concluded in particular that in order to retain a right of residence under Article 13 it was necessary for the ex-spouse to be in the UK exercising Treaty rights at the time of the divorce . Given that that conclusion was part of the ratio of the case, it is binding on us.

51. Ms Asanovich and Mr Weiss have argued that we should disregard the authority of **Amos** because it was per incuriam or was decided without the benefit of relevant argument and submissions as to the need to apply a teleological approach to interpretation. Whilst we would accept that several arguments raised before us were not raised before the Court in **Amos** , that does not suffice to make its decision per incuriam or otherwise demonstrate that its reasoning was invalid. This is not the first time representatives have asked the Upper tribunal to disregard **Amos** , but in our view it should be the last.

52. We note further that since the judgment in **Amos** the Upper Tribunal has followed and applied it in several reported cases, **HS (EEA revocation of retained rights) Syria [2011] UKUT 165 (IAC)** and **Idezuna (EEA – permanent residence) Nigeria [2011] UKUT 00474 (IAC)** in particular. In all of these it has regarded regulation 10 as a faithful transposition of Article 13. We are not persuaded to depart from this line of cases.

53. Even if we did not consider ourselves bound by **Amos** or persuaded by recent Upper tribunal case law, we would still not have accepted the appellant’s approach.

54. In our judgment, the structure of Article 13 leaves no room for doubt as to the correct construction of Article 13(2). The second subparagraph of Article 13(1) states that: “Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).” Both Article 13(1) and (2) begin with the proviso, “Without prejudice to the second subparagraph…” The second subparagraph of Article 13(2) also makes clear that a right of residence under the Directive “remains subject to the requirement” for the Union citizen to be exercising Treaty rights:

“Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they

are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4)".

55. As Burnton LJ observed in **Amos** at para 28:

"Article 18 is also pertinent. It confers a right of permanent residence on a divorced non-national, to whom Article 12(2) or 13(2) applies, after 5 years' legal residence. It does not require the non-national to have lived "with" the EEA national during that period. (Again, this is obvious in an Article 12(2) case, since the national spouse has died.)"

Hence it is only those family members of persons who continue to meet the conditions of Article 7 who are entitled to acquire the retained right. There is nothing to suggest mere possession at some time in the past suffices. Put simply, to qualify for any kind of retained right, that right must continue to have existed up until the event giving rise to possible retention.

56. We entirely reject the notion that subparagraphs (a)-(d) of Article 13(2) set out conditions which are in themselves sufficient to give rise to a retained right of residence. It is clear that they presuppose that potential recipients continued to have a right of residence as a family member up until the issue of retention arose.

57. We also entirely reject the argument that Article 13(2)(c) – the domestic violence clause – is sui generis and can create a free-standing retained right of residence outwith the conditions set out in Article 13(1)-(2). The clauses set out in (a)-(d) are plainly intended to be subcategories subject to the same overriding conditions as are referred to in the opening words of Article 13(2) and its second subparagraph.

58. Ms Asanovich and Mr Weiss contend that such a reading would be at odds with EU principles of interpretation which require a teleological or "context and purposes" approach. Consistent with that approach they argue that the reference in Article 13(1) to "divorce" must be taken to mean de facto not de jure divorce.

59. We have no difficulty with their general description of EU principles of interpretation or of the deployment of them by the Court of Justice in such cases as **Teixeira** . We have great difficulty, however, in accepting that their proposed approach to Article 13(1) or 13(2) would be consistent either with existing Court of Justice jurisprudence or a literal, teleological or contextual approach. Our start point must be the ruling of the Court of Justice in **Diatta v Land Berlin** Case 6-267/83 [1985] (EUECJR **)** , in which the Court has continued to endorse in subsequent case law. This case establishes that a spouse continues to enjoy an EU right of residence as the family member of a Union citizen notwithstanding the fact that the couple may be living apart or their relationship be problematic.

60. One consequence of the **Diatta v Land Berlin** principle is that a spouse does not cease to have the protection of a right of residence just because her (or his) relationship breaks down or she (or he) becomes the victim of domestic violence. If the reference in Article 13(2) to termination by divorce were to be understood as meaning termination from the date of breakdown of the relationship, then it would mean granting retention of a right which was still in existence.

61. The significance of the **Diatta v Land Berlin** principle for interpretation of Article 13 and the corresponding domestic regulation was addressed several years ago by the AIT in **OA (EEA - retained right of residence**) Nigeria (Rev 1) [2010] UKAIT 00003. (**OA** was considered in **Amos** and although the Court of Appeal at para 25 found fault with one proposition in **OA** - that the former

spouses would have to show they were working for a continuous period of 5 years prior to a divorced family member's applications for the right of permanent residence - it made no adverse comment on the AIT's analysis of the issue of the meaning of divorce). The Tribunal stated:

"35. The relevant provision for deciding whether there is a retained right of residence in the first place is, of course, reg 10(5)(a) which states that a person satisfies the conditions in this paragraph if "he ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person". The IJ's opinion was that the term "terminated" meant effective breakdown of a marriage. There are several reasons why I consider this to be an erroneous construction.

36. First, it is plainly contrary to the judgment of the ECJ in Diatta v Land Berlin and it would take the most cogent reasons to seek to depart from an ECJ ruling, especially given that the Citizens Directive did not signal any departure from the approach taken in that case. Dr Onipede sought to argue that the ECJ in Diatta was only ruling on the issue of marriage law in Germany and that it did not necessarily preclude that "termination" could mean something other than lawful ending of a marriage. However, he was not able to point to any evidence to support that contention and it flies in the face of the clear fact that the ECJ was seeking to provide a Community-wide definition of Articles 10 and 11 of Regulation (EEC) No 1612/68 which accords certain rights to the spouse of a worker who is a national of a Member State and who is employed in the territory of another Member State. The Advocate General noted and agreed with the Commission's view that in relation to the argument that Article 10 and 11 required not just lawful marriage but cohabitation in a common dwelling, the Community legislature cannot have intended to make the exercise of the right to free movement subject to a requirement which is derived from family law which varies according to the Member States. The Advocate General considered that in order for a person to show that he was residing with a worker the marital relationship should not be considered to be dissolved until there had been a "judicial decision which has become final". The Court's language was to similar effect: "the marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority".

37. It is for this reason that it does not assist to examine what meaning in given in UK law in other contexts to the term "spouse". Even if it is not always defined domestically as a person in a lawful marriage (Sch 1 Pt 1 of the Rent Act 1977 as amended by the Housing Act 1988 states that "[f]or the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant: see Ghaidan v Mendoza [2004] UKHL 30), this and related terms as they arise in the 2006 EEA Regulations have to be given a Community law, not a national law, interpretation and the ECJ has already given a definitive ruling, which it has not departed from since Diatta v Land Berlin .

38. Second, there is nothing in the wording of the Citizens Directive or the 2006 EEA Regulations to suggest that termination should have the wider, more diffuse meaning canvassed by Dr Onipede. To the contrary, Art 12 (2) refers to "divorce" ("divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2"). And one of the ways in which a person can qualify under reg 10(5) of the 2006 EEA Regulations is by being someone who satisfies the condition in para 6 (which concerns family members who are themselves workers or self employed or self-sufficient persons) and:

'(d) either –

(i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at lest one year during its duration'. (Emphasis added)

39. The reference to "proceedings" can only mean legal proceedings relating to divorce and intended to result by operation of law in the "termination" of the marriage. (Here too the wording in Art 12(2)(a) of the Citizens Directive is very similar, "prior to initiation of the divorce or annulment proceedings or termination of the registered partnership…")

40. Furthermore, the only other event which is seen by reg 10 to justify a person acquiring a retained right of residence has a similar clear-cut terminus in a temporal sense: death. Likewise, on the IJ's construction the references in reg 10(5)(d) (ii)-(iii) to "former spouse" would lose any sharp definitional edges and become contingent for their interpretation on assessing the fine detail of the process of breakdown.

41. Third, Dr Onipede's approach, because it would require defining "spouse" in terms of a purely factual relationship based on cohabitation and other personal ties, would mean that it would be very difficult (and intrusive) in practice to ascertain when the break occurred.

42. Fourth, to construe termination to mean "lawful termination" also best furthers the principle of legal certainty, since persons affected will have the security of knowing that their status as family members will not be contingent on being able to show living together under the same roof or cohabitation, matters which by their nature will sometimes be very difficult to pinpoint in time.

43. Fifth, to construe "termination" as meaning lawful termination is consistent with the object and purpose of the Citizen's Directive of legally safeguarding the rights of family members, since it ensures that a family member can continue to qualify as a family member even if for whatever reason the couple do not continue to live under the same roof or who separate. On Dr Onipede's construction, a person would cease to be able to count any period of residence (for the purposes of qualifying for a retained right of residence) from the date of the breakdown of his or her marriage, which will often be some significant period of time before the date of divorce.

44. Sixth, it is clear from Art 13 of the same Directive that the Community legislature saw only a specified number of circumstances as giving rise to a retained right of residence. Recital 15 states that family members "should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. It is only in respect of "such circumstances" that measures should be taken to ensure family members already residing in the territory of the host Member State retain their right of residence exclusively on a person basis.

45. The IJ thought that construing termination to mean termination by means of legal proceedings relating to divorce would leave family members "unreasonably unprotected" because it would leave unprotected all family members who have suffered breakdown of a relationship with an EEA national in circumstances similar to this appellant. It must straightaway be acknowledged that such an approach does leave some protection gap. But as already noted, so does his approach. It is not a case where one approach seeks to ensure protection whereas the other does not; both may do. At its highest the IJ's argument based on "protection" only shows that under either interpretation there will be winners and losers. Furthermore, the lack of protection he has in mind is only in respect of the lack of the ability to acquire a retained right of residence. As the example of Diatta v Land Berlin makes clear, the breakdown of a relationship with a spouse does not as such place a family member outside

the protection of Community law; it depends on the particular circumstances. But in order to benefit from Community rights of residence of all kinds the family member must meet certain conditions. Examples of a protection gap of this kind cannot justify seeking to rewrite Community legislation or case law."

We concur.

62. Ms Asanovich and Mr Weiss have pointed to a number of anomalies which are said to flow from the approach to interpretation taken in **Amos** . As already noted, such argument can get nowhere because we are bound by **Amos** . But even if we were not we would still not accede to such argument. We accept that the approach taken in **Amos** does result in some hard cases where public policy consideration might appear to point in a different direction. However, as already pointed out, in relation to the divorce clause, some of the examples given do not factor in the **Diatta v Land Berlin** principle which entails that just because a spouse encounters domestic violence problems does not mean they cease to have an EU right of residence.

63. In any event, as highlighted in **OA** , it is clear that hard cases would also arise if the approach to interpretation advocated by Ms Asanovich and Mr Weiss were adopted such that a right of residence was retained from the date of breakdown of the relationship. This approach would preclude a range of applicants from being able to meet the precondition set out in Article 13(2(a)) of having to show the marriage has lasted 3 years. (Of course, it is technically possible to envisage that the Directive might mean one thing by divorce in Article 13(1) and another in 13(2), but if that were so the Directive would surely have made that clear.)

64. Ms Asanovich and Mr Weiss highlight that the approach to interpretation adopted in **Amos** creates wholly untenable consequences in certain countries where divorce laws are strict, e.g. Ireland and Malta. However, in our view, there are no such consequences. Persons in such countries who cannot get a divorce or cannot get one until a considerable time has elapsed do not need the protection of Article 13. They already have it under **Diatta v Land Berlin** principles and continue to have it until the point of legal divorce. For every day their marriage continues to exist formally (assuming it was not a marriage of convenience ab initio) they accrue more time towards gaining a permanent right of residence either outright or later, if they are able to meet the conditions of Article 13(2) through a continuation of residence whilst married and a retained right of residence on divorce: see Article 18. Further, Article 13 covers annulment as well as termination in any event.

65. Given that we have held that to acquire a retained right of residence under both the Directive 2004/38/EC and under the 2006 Regulations it is necessary for an ex-spouse to show that her (or his) Union citizen/EEA national spouse was exercising Treaty rights in the UK at the time of the divorce (in the form of a legal termination of the marriage), it is clear that the appellant cannot show she acquired such a right. Whether one takes the time of her divorce as being March 2007 (the Karachi divorce) or August 2009 (the UK divorce), the date was subsequent to that on which her ex-spouse left the UK (December 2006).

Zambrano

66. Any doubt as to the territorial scope of the **Zambrano** principle has been resolved by the subsequent Court of Justice cases of Case C-434/09 **McCarthy v SSHD [2011] All ER (EC) 729** , Case C-256/11 **Dereci and Others [2012] All ER (EC) 373** , Case C-40/11 **Ilida v Stadt Um KC/ C-40/11 [2012] ECR 1-0000** and Cases C-356/11 and C-357/11 **O, S and L , 6 December 2012** and by the Court of Appeal decision in **Harrison (Jamaica)** [2012] EWCA Civ 1736.

67. From these binding authorities it is clear that:

(1) a violation of Article 20 of the Treaty only arises where a refusal decision would lead to a situation where a Union citizen child would have to leave the territory of the Union;

(2) there would be no deprivation of the enjoyment of the substance of the Article 20 right simply because a departure from a Union territory might deny economic benefits or fail to keep a family together. The **Zambrano** principle only applies in exceptional circumstances;

(3) the mere fact that there has been an interference with family life does not entail that there has been a deprivation of a genuine enjoyment of the rights set out in Article 20 TFEU.

68. We accept that nothing said by the Court of Justice in any of the Article 20 TFEU cases excludes the potential application of **Zambrano** principles to third-country national parents if the practical effect of a refusal decision is that the children are obligated to leave the territory of the Union as a whole, notwithstanding that the children are not, as in **Zambrano** , citizens of the host member state. That was also the stated position of Mr Deller, Ms Asanovich and Mr Weiss. Ordinarily in such a case it would be necessary for applicants to prove that the children concerned were prevented from living in the territory of their host Member State (of nationality) together with their parent(s) and that may not be easy to do, given that for a child to have acquired citizenship of a Member State his or her third-country national parent will often have lived there lawfully in the past. In the appellant's case, however, there is no suggestion of the children being able to live with the father and Mr Deller said that he accepted that it was not realistic to expect that she could live in Germany with her children. He also accepted that for her and her children there was no alternative Union territory location other than the UK. In our view Mr Deller was right to make that concession. The appellant did not have any immigration status in Germany nor could she rely in Germany on any EU right of residence (to our understanding she would only be entitled to reside in Germany as a matter of EU law if able to show (as she clearly could not) that she was a self-sufficient parent in accordance with the principles set out by the Court of Justice in **Chen [2004] ECR 1-9925**). Accordingly, in our judgment the appellant is able to rely on her children's Article 20 right of Union citizenship under the Treaty.

69. We accept that our decision entails considering the refusal of a residence card as indicative of an intention to remove, but note that this was also how Mr Deller asked us to regard it in the context of our Article 8 ECHR consideration and it seems to us there is no principled basis for taking a different view in this respect from that taken in respect of human rights law: see **JM (Liberia)** . Mr Deller's concession that the decision adumbrated an intention to remove to Pakistan was not dependent on whether EU law or human rights law provisions were in play.

New regulation 15A of the 2006 Regulations and Article 12, Regulation 1612/68

70. It is not in dispute that (1) between March 2004 and December 2006 the appellant's ex-spouse had been employed in the UK; (2) that the appellant's eldest child, A, was born in the UK on 14 November 2005 at a time when the appellant's ex-spouse was exercising Treaty rights; (3) that her eldest child has commenced full time primary school education; and (4) that the appellant has always been the primary carer of her two children, exclusively so since some time in 2006. Prior to the amendments made to the 2006 Regulations with effect from 16 July 2012 by the Immigration (European Economic Area) Amendment Regulations 2012 the appellant's claim to a derived right of residence based on her oldest child's right of access to education would have to rely solely on the direct effect of Article 12, Regulation 1612/68 as established by Court of Justice decisions such as **Teixeira** . But as Mr Deller acknowledged, the recent amendment seeks to transpose this right into

domestic law. That is confirmed by the 13 July 2012 UKBA document entitled Changes to the Immigration (European Economic Area) Regulations 2006 which states:

“ New regulation 15A sets out the conditions which a person must satisfy in order to qualify for a derivative right of residence on the basis of the ECJ judgments in **Chen** and **Ibrahim and Teixeira** .”

71. This document goes on to identify as one of the categories provided for in regulation 15A “primary carers of children of EEA national workers or former workers where that child is in education in the UK”. Regulation 15A(4) states that a person (P) qualifies for a derivative right of residence if (a) P is the primary carer of a person meeting the criteria in (3) (“the relevant person”); and (b) the relevant person would be unable to continue to be educated in the United Kingdom if P were required to leave”. Regulation 15A(3) concerns a person who is the child of an EEA national who “resided in the United Kingdom at a time when the EEA national parent was residing in the United Kingdom as a worker” (15A(3)(b)) and “is in education in the United Kingdom and was in education there at a time when the EEA national parent was in the United Kingdom” (regulation 15A(3)c)).

72. Mr Deller submits that notwithstanding the amendments made to the 2006 Regulations the appellant cannot derive a right of residence from her eldest child under them because she cannot meet the requirement set out at regulation 15A(3)(c). On reflection we are inclined to agree. Whilst from the evidence on file as to the appellant’s former husband’s previous history of working in the UK before he left in December 2006 we are satisfied that the appellant meets regulation 15A(3) (b) – because the eldest child was born in 2005 and resided in the UK when her father was residing in the UK as a worker - we are not able to be satisfied that she meets regulation 15A(3)(c). The latter manifestly requires a temporal overlap between the child being in education and the EEA national parent being in the UK and we find it impossible to construe it otherwise. Contrary to this requirement the oldest child only began education after her EEA national father left the UK.

73. However, this is only the end of the matter if the new regulation affords at least the same scope of protection as Article 12, Regulation 1612/68. In our judgment it clearly does not. In **Teixeira** the Court of Justice made plain that it is not necessary for the child to be in education in the UK at a time when the EEA national parent is continuing to meet the condition that he is exercising Treaty rights in the host Member State. Having at paragraphs 50 and 73 reiterated previous jurisprudence that Article 12 applied as much to the primary carer of the child of a former migrant worker as to the child of a current migrant worker, at para 75 the Court stated that:

“Consequently, the answer to Question 2(c) is that the right of residence in the host Member State of the parent who is the primary carer for a child of a migrant worker, where that child is in education in that State, is not conditional on one of the child's parents having worked as a migrant worker in that Member State on the date on which the child started in education”.

74. The Court’s conclusions closely followed those of Advocate General Kokott’s Opinion in **Teixeira (European citizenship**) [2009] EUECJ C-480/08_O (20 October 2009) which had stated at para 40, with reference to the facts of the Moritz case in Joined Cases 389/87 and 390/87 **Echternach and Moritz** [1989] ECR 723:

“Contrary to the view taken by some of the parties to the proceedings, the exercise of the right of access to education cannot, therefore, in any way be predicated on the child's retention throughout the period of its education of its special right of residence under Article 10(1)(a) of Regulation No 1612/68, and thus on its continuing right to settle with a parent who is a migrant worker. (29) If that were not the case, children of former migrant workers, in particular, would for the most part lose the

right of access to education under Article 12, since the parent who 'has been employed' in the host Member State will frequently have left that State after having been employed there, and it will therefore no longer be possible for that parent simply to live there with the child in a common family home."

75. This position was confirmed by the Court in **Czop** at para 26:

"It is also apparent from the case-law that it is sufficient that the child attending educational courses in the host Member State moved there when one of his parents was exercising rights of residence there as a migrant worker. The child's right of residence in that State in order to attend educational courses there, in accordance with Article 12 of Regulation No 1612/68, and consequently the right of residence of the parent who is the child's primary carer cannot therefore be subject to the condition that one of the child's parents was working as a migrant worker in the host Member State on the date on which the child started in education (Teixeira , paragraph 74)."

76. In **MDB and Others v Secretary of State for the Home Department** [2012] EWCA Civ 1015 the Court of Appeal confirmed the principles established by **Ibrahim** and **Teixiera** . Accordingly we consider that the appellant has a derived right of residence based directly on Article 12, Regulation 1612/68. The attempt by the drafters of the amended 2006 Regulations to give a national law basis for a derivative right of residence drawn from **Ibrahim** and **Teixiera** is to be welcomed; but on our analysis it has not taken sufficiently careful note of the scope given to this right by the Court of Justice.

77. Furthermore and in any event, there is a governmental concession (to which Mr Weiss made reference) acknowledging that a child does not have to be in education at a time when the EEA national parent was working in the UK. This was made by the Department of Work and Pensions (DWP) in the context of the Case C-147/11 **Czop** litigation. In a letter dated 23 May 2012 addressed to the Upper Tribunal (Administrative Appeals Chamber) relating to the references then pending in **Czop and Punakova** , Solicitors for the DWP Legal Group stated that:

"In Ms Punakova's case, the Secretary of State accepted that Ms Punakova had a right of residence as the primary carer of a child in education, given that her partner Mr B (an EU national) had worked in the UK and their child had installed himself in the UK whilst his father was working. Paragraph 17 of the Upper Tribunal's reference noted that there was no evidence that Mr B had been working at the time their child entered education. However, having considered the position further the Secretary of State does not consider that there is any EU law requirement to that effect…"

78. Accordingly we are satisfied that the appellant has a derived right of residence on the basis of Article 12 Regulation 1612/68.

Article 8

79. Even if we are wrong in the conclusion to which we have come on the application of **Zambrano** principles and Article 12 of Regulation 1612/68, we would still allow the appeal on Article 8 ECHR grounds. As regards jurisdiction, we have already noted we are entitled to deal with Article 8 in this type of appeal: see **JM (Liberia**). As regards merits, however, we must make it clear that we do not allow it because we think she satisfies all the requirements of the new Immigration Rules. She does not quite.

80. We do accept (as Mr Deller himself at one point appeared to accept), that the appellant does meet all the relevant material requirements of the new Rules, including that relating to immigration status.

Whilst Appendix FM as the parent of a child only arises if the parent can meet the immigration status requirement, but this is made subject to an exception (EX.1).

Immigration status requirement
E-LTRPT.3.1. The applicant must not be in the UK-

(a) as a visitor;

(b) with valid leave granted for a period of 6 months or less, unless that leave was granted pending the outcome of family court or divorce proceedings;

(c) on temporary admission or temporary release (unless paragraph EX.1. applies).

E-LTRPT.3.2. The applicant must not be in the UK in breach of immigration laws, (disregarding any period of overstaying for a period of 28 days or less), unless paragraph EX.1. applies.

EX.1 states:

Section EX: Exception
EX.1. This paragraph applies if

(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application ;and

(ii) it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

81. In the appellant's case her eldest child has been in the UK since her birth in November 2005 and so meets the requirement at EX.1 (cc). For reasons given below we do not consider that it would be reasonable to expect this child to leave the UK.

82. Nonetheless, whilst meeting all the material requirements of the new Rules, the appellant cannot meet the temporal requirements of the new rules. The new Rules only apply to decisions made on or after 9 July 2012 and the appellant's application was made in 2010: see the "Implementation" section of HC194.

83. Nonetheless, we accept that in relation to whether the decision was in accordance with the law (as distinct from the Rules: see **MF (Article 8 – new rules**) **Nigeria** [2012] UKUT 393 (IAC)) it would not be proportionate for the appellant to face the threat of removal from the UK posed by the refusal decision. She has been in the UK for 8 years and has been in the UK lawfully up until her application for permanent residence. She has been in self-employment for some four years. She has been the victim of domestic violence. Her children are Union citizens in education. She has a derived EU right of residence pursuant to Article 12 Regulation 1612/68. The eldest child has been in the UK for over

seven years. If the appellant's case were considered under the new Rules now in force, she would succeed.

84. The fact that the appellant's children may also be (dual) citizens of Pakistan, have some family ties there, appear to have cultural if not also linguistic affinities with that country and also appear able to continue their education there, are not factors that we consider should outweigh the weighty factors identified in the foregoing paragraph. As Mr Deller himself acknowledged, even without reference to the new Rules, the appellant's case under Article 8 is a formidable one.

Outcome

85. On the basis of current authority, it cannot be said that the appellant's possession of an EU right of residence under Article 20 of the Treaty or Article 12 of Regulation 1612/68 entitles her to legal residence within the meaning of Directive 2004/38/EC, although we note (as did Mr Weiss) that this is one of the questions currently before the Court of Justice in the order of reference made by the Upper Tribunal in **Alarape and Another (Article 12, EC Reg 1612/68) Nigeria [2011] UKUT 413 (IAC)** . Given that on our findings the appellant succeeds in her appeal in establishing that she continues to have an EU right of residence (albeit under Article 20 of the Treaty (**Zambrano** principles) and also under Article 12, Regulation 1612/68 and not under the Directive), it would serve no purpose to adjourn the case until the ruling of the Court in **Alarape** . Even if (as now might seem likely given the opinion of Advocate General Bot in Case C-529/11 **Alarape v Secretary of State for the Home Department** 15 January 2013 [2013] EUECJ C-529/11)) the ruling of the Court in that case is that EU right of residence derived from EU instruments other than Directive 2004/38/EC do not count for the purposes of accruing a right of permanent residence under that Directive, it is clear that the respondent is duty bound to grant the appellant a right to reside for so long as her children remain in the UK and/or remain in education. The fact, therefore, that she does not qualify for a permanent residence card under the Directive or under the 2006 Regulations is not a proper reason to dismiss her appeal.

86. For the above reasons, we conclude:

The FtT materially erred in law and its decision is set aside.

The decision we remake is that the appellant's appeal is allowed on the s.84 (1)(d) Nationality, Immigration and Asylum Act 2002 ground that the decision breaches the appellant's right of residence under EU law.

The fact, therefore, that she does not qualify for a permanent residence card under the Directive or under the 2006 EEA Regulations is not a proper reason to dismiss her appeal.

The appellant's appeal is also allowed on Article 8 grounds.

Signed Date

Upper Tribunal Judge Storey

ANNEX

RELEVANT LEGAL PROVISIONS

A. Regulations 10, 14, 15 and 19(3)-(5) of the Immigration (European Economic Area) Regulations 2006 (changes/additions made by 2012 amendments shown in bold)

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

…

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

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

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

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

(d) either—

(i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

(ii) the former spouse or civil partner of the qualified person **or of an EEA national with a permanent right of residence** has custody of a child of the qualified person;

(iii) the former spouse or civil partner of the qualified person **or of an EEA national with a permanent right of residence** has the right of access to a child of the qualified person **or of an EEA national with a permanent right of residence** under the age of 18 and **where** a court has ordered that such access must take place in the United Kingdom; or

(iv) the continued right of residence in the United Kingdom of the person is warranted by particularly difficult circumstances, such as he or another family member having been a victim of domestic violence while the marriage or civil partnership was subsisting.

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

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

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

….

14 Extended right of residence

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

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

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

(4) A right to reside under this regulation is in addition to any right a person may have to reside in the United Kingdom under regulation 13 or 15.

(5) **A person who otherwise satisfies the criteria in this regulation will not be entitled to a right to reside in the United Kingdom under this regulation where the Secretary of State has made a decision under regulation 19(3)(b), 20(1) or 20A(1).**

15 Permanent right of residence

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

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

(b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

(c) a worker or self-employed person who has ceased activity;

(d) the family member of a worker or self-employed person who has ceased activity;

(e) a person who was the family member of a worker or self-employed person where—

(i) the worker or self-employed person has died;

(ii) the family member resided with him immediately before his death; and

(iii) the worker or self-employed person had resided continuously in the United Kingdom for at least the two years immediately before his death or the death was the result of an accident at work or an occupational disease;

(f) a person who—

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

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

(1A) Residence in the United Kingdom as a result of a derivative right of residence does not constitute residence for the purposes of this regulation.

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

(3) **A person who satisfies the criteria in this regulation will not be entitled to a permanent right of residence in the United Kingdom where the Secretary of State has made a decision under regulation 19(3)(b), 20(1) or 20A(1).**

“ **15A. Derivative right of residence**

(1) A person (“P”) who is not entitled to reside in the United Kingdom as a result of any other provision of these Regulations and who satisfies the criteria in paragraph (2), (3), (4) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.

(2) P satisfies the criteria in this paragraph if—

(a) P is the primary carer of an EEA national (“the relevant EEA national”); and

(b) the relevant EEA national—

(i) is under the age of 18;

(ii) is residing in the United Kingdom as a self-sufficient person; and

(iii) would be unable to remain in the United Kingdom if P were required to leave.

(3) P satisfies the criteria in this paragraph if—

(a) P is the child of an EEA national (“the EEA national parent”);

(b) P resided in the United Kingdom at a time when the EEA national parent was residing in the United Kingdom as a worker; and

(c) P is in education in the United Kingdom and was in education there at a time when the EEA national parent was in the United Kingdom.

(4) P satisfies the criteria in this paragraph if—

(a) P is the primary carer of a person meeting the criteria in paragraph (3) (“the relevant person”); and

(b) the relevant person would be unable to continue to be educated in the United Kingdom if P were required to leave.

(5) P satisfies the criteria in this paragraph if—

(a) P is under the age of 18;

(b) P’s primary carer is entitled to a derivative right to reside in the United Kingdom by virtue of paragraph (2) or (4);

(c) P does not have leave to enter, or remain in, the United Kingdom; and

(d) requiring P to leave the United Kingdom would prevent P’s primary carer from residing in the United Kingdom.

(6) For the purpose of this regulation—

(a) “education” excludes nursery education; and

(b) “worker” does not include a jobseeker or a person who falls to be regarded as a worker by virtue of regulation 6(2).

(7) P is to be regarded as a “primary carer” of another person if

(a) P is a direct relative or a legal guardian of that person; and

(b) P—

(i) is the person who has primary responsibility for that person's care; or

(ii) shares equally the responsibility for that person's care with one other person who is not entitled to reside in the United Kingdom as a result of any other provision of these Regulations and who does not have leave to enter or remain.

(8) P will not be regarded as having responsibility for a person's care for the purpose of paragraph (7) on the sole basis of a financial contribution towards that person's care.

(9) A person who otherwise satisfies the criteria in paragraph (2), (3), (4) or (5) will not be entitled to a derivative right to reside in the United Kingdom where the Secretary of State has made a decision under regulation 19(3)(b), 20(1) or 20A(1).".

12. Regulation 19(3)-(5) provide:

(3) Subject to paragraphs (4) and (5), a person who has been admitted to, or acquired a right to reside in, the United Kingdom under these Regulations may be removed from the United Kingdom if—

(a) he does not have or ceases to have a right to reside under these Regulations; or

(b) he would otherwise be entitled to reside in the United Kingdom under these Regulations but the Secretary of State has decided that his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.

(4) A person must not be removed under paragraph (3) as the automatic consequence of having recourse to the social assistance system of the United Kingdom.

(5) A person must not be removed under paragraph (3) if he has a right to remain in the United Kingdom by virtue of leave granted under the 1971 Act unless his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.

B. Articles 7, 12, 13,14, 16 17, 18 and recitals 5 and 15 of the Citizens Directive

Article 7 Right of residence for more than three months

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

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

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

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

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

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

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

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

Article 12 Retention of the right of residence by family members in the event of death or departure of the Union citizen

1. Without prejudice to the second subparagraph, the Union citizen's death or departure from the host Member State shall not affect the right of residence of his/her family members who are nationals of a Member State.

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

2. Without prejudice to the second subparagraph, the Union citizen's death shall not entail loss of the right of residence of his/her family members who are not nationals of a Member State and who have been residing in the host Member State as family members for at least one year before the Union citizen's death.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on personal basis.

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

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

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

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

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or

(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or

(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or

(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on personal basis.

Article 14 Retention of the right of residence

1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

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

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or

(b) the Union citizens entered the territory of the host Member State in order to seek employment.

In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

CHAPTER IV Right of permanent residence

Section I Eligibility

Article 16 General rule for Union citizens and their family members

1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

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

3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

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

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

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

(a) workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years.

If the law of the host Member State does not grant the right to an old age pension to certain categories of self-employed persons, the age condition shall be deemed to have been met once the person concerned has reached the age of 60;

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

If such incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by an institution in the host Member State, no condition shall be imposed as to length of residence;

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

…

Article 18 Acquisition of the right of permanent residence by certain family members who are not nationals of a Member State

Without prejudice to Article 17, the family members of a Union citizen to whom Articles 12(2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State.

Recital 5

(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. …"

Recital 15:

(15) Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.

C. Article 12, Regulation 1612/68

Article 12 of Regulation No 1612/68, now Article 10 of Regulation No 492/2011, states:

"The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions."