Upper Tribunal
(Immigration and Asylum Chamber)

Sala (EFMs: Right of Appeal) [2016] UKUT 00411 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 July 2015 and 7 June 2016	.....

Before

MR C M G OCKELTON, VICE PRESIDENT

UPPER TRIBUNAL JUDGE GRUBB

Between

SHEMSI SALA

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr D O'Callaghan (7 June 2016) and Mr P Bonavero (7 July 2015) instructed by Kilby Jones Solicitors LLP

For the Respondent: Ms J Smyth instructed by the Government Legal Department (7 June 2016) and Mr P Deller, Senior Home Office Presenting Officer (7 July 2015)

Friend to the Court: Ms S Broadfoot instructed by the Government Legal Department

There is no statutory right of appeal against the decision of the Secretary of State not to grant a Residence Card to a person claiming to be an Extended Family Member.

DETERMINATION AND REASONS

1.
This appeal raises the issue of whether a person who is refused a residence card as an "extended family member" ("EFM") under the Immigration (EEA) Regulations 2006 (SI 2006/1003 as amended) (the "EEA Regulations 2006") has a right of appeal to the First-tier Tribunal under reg 26 of the EEA Regulations 2006.

2.
For the reasons we give below, we have reached the conclusion that no right of appeal exists.

Introduction

3.
The appellant (as we shall continue to call him) is a citizen of Albania who was born on 19 January 1987. He entered the UK illegally on 28 June 2011. On 3 May 2013, the appellant applied for a residence card as the EFM of an EEA national, Ms Livia Valasekova, a national of the Slovak Republic with whom he claimed to have a "durable relationship" and as such was an EFM under reg 8(5) of the EEA Regulations 2006.

4.
On 10 October 2013, the Secretary of State refused the appellant's application. The Secretary of State was not satisfied on the evidence that the appellant's relationship with Ms Valasekova, though genuine, was a durable one. In addition, the Secretary of State concluded that as the appellant had entered the UK illegally he had not "provided enough evidence to allow us to exercise discretion in your favour".

5.
The notice of refusal to issue a residence card dated 10 October 2013 stated that the appellant had a right of appeal against the refusal under s.82 of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002") and the EEA Regulations 2006.

The Appeal to the First-tier Tribunal

6.
The appellant appealed to the First-tier Tribunal. In a determination dated 26 June 2014, Judge Knowles dismissed the appellant's appeal under the EEA Regulations 2006 and also under Art 8.

7.
On the evidence, the judge accepted that the appellant and Ms Valasekova were in a "durable relationship" and that therefore the appellant was an EFM under reg 8(5) of the EEA Regulations 2006. As regards the exercise of discretion to issue a residence card under reg 17(4), the judge decided that the Secretary of State's consideration of her discretion was not consistent with the requirement in reg 17(5) that there be an "extensive examination of the personal circumstances" of the appellant. Judge Knowles went on to consider the appellant's circumstances and concluded that the discretion under reg 17(4) should not be exercised differently so as to issue a residence card to the appellant and consequently he dismissed the appeal under the EEA Regulations 2006.

The Appeal to the Upper Tribunal

8.
The appellant sought permission to appeal to the Upper Tribunal essentially on the basis that discretion should have been exercised in the appellant's favour under reg 17(4). Permission was initially refused by the First-tier Tribunal but on 16 October 2014 the Upper Tribunal (UTJ Perkins) granted the appellant permission to appeal on the basis that it was arguable that the judge's "approach to the exercise of discretion is flawed".

9.
The appeal was initially listed before the Upper Tribunal (VP Ockelton and UTJ Grubb) on 5 February 2015. At that hearing, the Tribunal raised with the representatives two issues which concerned the Tribunal, namely whether the appellant had a right of appeal under the EEA Regulations 2006 and whether, if he did, the judge had been entitled to exercise the discretion under reg 17(4) himself. As

the first issue went to the jurisdiction of the First-tier Tribunal, the matter could not be settled by the parties' agreement or consent. In order to allow the parties to deal with these issues, the appeal was adjourned and directions were issued by the UT on 3 March 2015, identifying these two points of law and directing that written submissions be made by the parties in respect of both issues.

10.
The appeal was then again listed before the UT as previously constituted on 7 July 2015. At that hearing, the appellant was represented by Mr Bonavero and the respondent by Mr Deller. Both representatives made submissions to the UT to the effect that an EFM (such as the appellant) did have a right of appeal under the EEA Regulations 2006 against the (discretionary) refusal to issue a residence card. At the conclusion of the hearing, the Tribunal reserved its determination.

11.
Following the hearing, we concluded that it would be of benefit to have argument seeking to put forward the contrary case to that of the parties, namely that no right of appeal existed. As a consequence, a request was made to the Attorney General for the appointment of counsel to act as a friend to the court to present those arguments. There was a delay whilst arrangements were agreed and made and, ultimately on 7 June 2016, the UT reconvened to hear argument from the parties represented by Mr O'Callaghan and Ms Smyth respectively and from Ms Broadfoot instructed as a Friend to the Court.

12.
We are grateful to all counsel for their oral submissions as well as their written skeleton arguments. In addition, at the direction of the UT, on 21 June 2016 the parties filed further submissions (agreed between Ms Smyth and Mr O'Callaghan) on a specific point raised by the Tribunal as to the scope of reg 26(2A) of the EEA Regulations 2006 which was relied upon by the parties in support of their position that there was a right of appeal.

The Legislative Scheme in Outline

1.
EFMs and 'Family Members'

13.
In this appeal, we are concerned exclusively with the right of appeal of an EFM as defined in reg 8 of the EEA Regulations 2006. We are not concerned with the right of appeal of an EEA national or of the "family member" of an EEA national as defined in reg 7 of the EEA Regulations 2006.

14.
We have set out in full the relevant parts of the EEA Regulations 2006 in the Appendix to this determination along with relevant provisions in the Immigration (EEA) Regulations 2000 (SI 2000/2326) (the "EEA Regulations 2000").

15.
So far as relevant to this appeal, reg 8(1) of the EEA Regulations 2006 defines an EFM to include someone who satisfies the condition in reg 8(5). It provides that:

"A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national."

16.
That is the provision which the appellant in this appeal claimed to satisfy and which the judge concluded he did satisfy.

17.
Regulation 17 provides for the issue of a residence card to a non-EEA national "family member" (reg 17(1)-(3)) and "extended family member" of an EEA national (reg 17(4) and (5)). Equivalent provisions exist in reg 16 for the issue of a registration certificate where the "family member" or EFM is an EEA national (see reg 16(3)-(4) and regs 16(5)-(6) respectively. In each case issue is required. Regulation 17(4), however, deals with EFMs and is in the following terms:

"The Secretary of State may issue a residence card to an extended family member not falling within Regulation 7(3) who is not an EEA national on application if –

(a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under Regulation 15; and

(b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card."

18.
The appellant's application in this case was for a residence card as an EFM based upon his durable relationship with Ms Valasekova who was an EEA national exercising treaty rights in the UK and fell to be considered under reg 17(4).

19.
As will be clear from reg 17(4)(b), the Secretary of State has a discretion to issue a residence card where a person establishes they are an EFM. Unlike the position with a family member of an EEA national, an EFM has no right to be issued with a residence card as is the case for EEA nationals and their "family members" under reg 16 and reg 17(1)-(3).

20.
In exercising that discretion, reg 17(5) provides that:

"Where the Secretary of State receives an application under paragraph (4) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security."

21.
We have set out the relevant domestic law, contained in the EEA Regulations 2006, rather than Directive 2004/38/EC (the "Citizens Directive") which is primarily concerned with the free movement and residence of EEA nationals and their "family members" as defined in Art 2.2 of that Directive. So far as "other family members" including those in a "durable relationship", are concerned Art 3.2 of the Citizens Directive provides that a Member State should "in accordance with its national legislation, facilitate entry and residence" of "the partner with whom the Union Citizen has a durable relationship, duly attested". Further, the Citizens Directive (mirrored in reg 17(5) of the EEA Regulations 2006) provides in Art 3.2 that:

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

22.

It is not necessary to make further reference to the detailed provisions of the Citizens Directive. It has been accepted by the CJEU that the rights of free movement and residence conferred upon EEA nationals and their "family members" are not directly replicated in the case of EFMs (see, SSHD v Rahman and others (Case C-83/11) [2013] Imm AR 73). A Member State's obligations are limited, only requiring it to "facilitate" entry and residence in accordance with national legislation founded on an extensive examination of an individual's personal circumstances.

23.
It was not suggested before us that our domestic law in the EEA Regulations 2006 is, in any way, inconsistent with the provisions of the Citizens Directive. Further, if no right of appeal exists, then judicial review will lie as the appropriate remedy. In Rahman the court made clear that a full merits-based appeal was not required by the Citizens Directive; only a judicial review to ensure that the decision-maker has "remained within the limits of the discretion set by [the] Directive"(see [25]).

24.
Once a residence card is issued, the EEA Regulations 2006 place EFMs in the same position as "family members" ("treated as family members") provided that they continue to satisfy the conditions in reg 8 which resulted in their being EFMs and their documentation remains valid and has not been revoked. Regulation 7 lists those who are to be treated as family members for the purposes of the Regulations, including in reg 7(3):

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

25.
Thereafter, the EFM has the same right to admission and residence under the EEA Regulations 2006 as does a "family member".

26.
It will be clear from this analysis that for EFMs recognition of their rights of admission and residence is conditional upon the relevant document, whether family permit, registration certificate or residence card, being issued under the EEA Regulations 2006 (see, Aladeselu and others v SSHD [2013] EWCA Civ 144 at [52]). This, of course, contrasts with the position of "family members" who derive their rights of admission and residence directly from EU law and the relevant documentation is merely evidence of that right. This is important. The EEA Regulations 2006 see the rights of family members and EFMs in different ways. The rights of family members derive from the Citizens Directive, those of EFMs from national law apart from the procedural right to have their applications determined following extensive examination of their personal circumstances. Family members have rights independent of being issued with a residence card. EFMs' rights, if any, derive from the exercise of the Secretary of State's discretion to issue (and allow them to keep) a residence card; their substantive rights arise only after the card is issued.

2.
Right of Appeal

27.

What then is the right of appeal, if any, in respect of the refusal of a residence card to an extended family member under reg 17(4) of the EEA Regulations 2006?

28.
The relevant provisions dealing with a right of appeal are found in reg 26. Reg 26(1) sets out a 'general' right of appeal against an "EEA decision":

"(1) Subject to the following paragraphs of this regulation, a person may appeal under these Regulations against an EEA decision.

29.
Regulation 2(1) defines an "EEA decision" as follows:

"'EEA decision' means a decision under these Regulations that concerns –

(a) a person's entitlement to be admitted to the United Kingdom;

(b) a person's entitlement to be issued with or have renewed, or not to have revoked, a registration certificate, residence card, derivative residence card, document certifying permanent residence or permanent residence card;

(c) a person's removal from the United Kingdom; or

(d) the cancellation, pursuant to regulation 20A, of a person's right to reside in the United Kingdom; but does not include decisions under regulations 24AA (human rights considerations and interim orders to suspend removal) or 29AA (temporary admission in order to submit case in person); …"

30.
Regulations 26(2)-(3A) provide for limitations on that right of appeal for certain categories of individuals. Regulation 26(2) is concerned with an appeal by an EEA national:

"If a person claims to be an EEA national, he may not appeal under these provisions unless he produces a valid national identity card or passport issued by an EEA State."

31.
We are not concerned with EEA nationals in this appeal.

32.
Regulations 26(2A) and (3) are important, particularly the former. Regulation 26(2A) deals with an appeal by a person who "claims to be in a durable relationship with an EEA national". It provides as follows:

"(2A) If a person claims to be in a durable relationship with an EEA national he may not appeal under these Regulations unless he produces –

(a) a passport; and

(b) either –

(i) an EEA permit; or

(ii) sufficient evidence to satisfy the Secretary of State that he is in a relationship with an EEA national."

33.

That provision was inserted by amendment from 8 November 2012 by the Immigration (EEA) (Amendment) (No 2) Regulations 2012 (SI 2012/2560). It is relied upon by the parties to support the submission that an EFM (based upon a 'durable relationship' with an EEA national) must have a right of appeal under reg 26(1): otherwise, there would have been no point in placing a limitation on such a person's ability to appeal.

34.
Finally, for our purposes, we must set out reg 26(3). This applies to appeals by persons who claim to be a "family member" of an EEA national (and with which we are not concerned in this appeal). Regulation 26 (3) provides:

"(3) If a person to whom paragraph (2) does not apply [i.e. a non-EEA national] claims to be a family member who has retained the right of residence or the family member or relative of an EEA national he may not appeal under these Regulations unless he produces—

(a) … a passport; and

(b) either—

(i) an EEA family permit;

(ia) a qualifying EEA State residence card;

(ii) proof that he is the family member or relative of an EEA national; or

(iii) in the case of a person claiming to be a family member who has retained the right of residence, proof that he was a family member of the relevant person."

35.
The reference to a "relative" (which has existed since the Regulations were enacted) may to be a reference to a person who claims to be a "relative" of an EEA national, his spouse or civil partner and, for example, claims to be a dependent or member of the household of the EEA national and, as such, is an EFM by virtue of reg 8(2) (see also reg 8(3) and (4) for other 'relative' EFMs).

36.
As a consequence, the appellant's right of appeal rests on there being:

(1) a decision made under the EEA Regulations 2006; and

(2) that decision "concerns … a person's entitlement to be issued with … a … residence card".

Discussion and Analysis

37.
There is, of course, no argument but that the Secretary of State made a decision under the EEA Regulations 2006 to refuse to issue the appellant with a residence card. The issue in this appeal is whether that decision "concerns" the appellant's "entitlement" to be issued with a residence card. Both Mr O'Callaghan and Ms Smyth urged upon us that the respondent's decision did concern the appellant's "entitlement" to a residence card. Their respective submissions were largely in harmony with one another.

38.

Mr O'Callaghan's submissions (also adopted by Ms Smyth) were that, properly analysed, a decision under reg 17(4) involves two steps from which an individual's entitlement to the residence card flowed. Step 1 is a factual one requiring the individual to establish that he is an EFM of a qualified person or an EEA national with a permanent right of residence. Having established that, step 2 requires the Secretary of State to exercise discretion whether to issue a residence card. If the Secretary of State decides to exercise discretion in the individual's favour then, it was argued, the individual has a right or entitlement to that residence card. Where the Secretary of State makes an adverse decision in respect of an individual at step 1 or step 2 that, it was argued, is nevertheless a decision which "concerns" an individual's eventual entitlement to a residence card. The word "concerns", it was submitted, had a broad definition meaning "is relevant or important to" or "relates to" or "is about" the entitlement to the residence card. When the respondent refuses an application for a residence card that decision under the EEA Regulations 2006 falls within the ordinary meaning of the word "concerns" and the 'potential' entitlement to the residence card.

39.
Both representatives prayed in aid the amendment to reg 26 in sub-para (2A) which, it was submitted, clearly indicated that Parliament supported the position that an EFM (at least where that is said to derive from a "durable relationship") had a right of appeal including against a refusal of a residence card. Regulation 26(2A), it was submitted, would make no sense if an EFM had no right of appeal.

40.
Those were the principal submissions made by Mr O'Callaghan and Ms Smyth on behalf of the parties. We shall return to them shortly together with a number of additional points made in their submissions.

41.
Ms Broadfoot, as a Friend of the Court, helpfully sought to put a contrary case on the proper interpretation of the EEA Regulations 2006. In particular, she referred us to the decision of the Supreme Court in R (Brown) v SSHD [2015] UKSC 8; [2015] 1 WLR 1060. In that decision, Ms Broadfoot pointed out, the Supreme Court (in particular Lord Toulson at [24] and Lord Hughes at [33]) held that a provision amending legislation could not affect the meaning of the legislation as originally passed; although, of course, it could do so if the amendment changed a definition in the original legislation. The authority for the latter caveat was found in the speech of Lord Neuberger in Boss Holdings Limited v Grosvenor West End Properties and others [2008] UKHL 5 at [23]. Thus, Ms Broadfoot submitted, reg 26(2A), as an amending provision, could not affect the meaning of the definition of an EEA decision in reg 2(1) and, in particular, whether the decision "concerns" a person's "entitlement" to a residence card.

42.
However, in respect of the submissions made by Mr O'Callaghan and Ms Smyth that the two-step decision making process under reg 17(4) led to an "entitlement" to a residence card and that a negative decision at either of those steps "concerns" that "entitlement", Ms Broadfoot in her written submissions accepted that there was a logic to that submission.

43.
We have not found this an easy issue to determine. It has, undoubtedly, long been assumed by the Secretary of State and by numerous judges hearing appeals against decisions to refuse to issue an EFM with a residence card that a right of appeal exists under the EEA Regulations 2006. There have been onward appeals to the Court of Appeal. With one exception, the issue of whether a right of

appeal exists has never been addressed. A right of appeal was accepted by the AIT in LQ (Partner of EEA National) Nigeria [2009] UKAIT 00034.

44.
The fact that the right of appeal has been long assumed or accepted is not, in itself, determinative of how we should decide this appeal which must be based upon the proper construction of the EEA Regulations 2006 taking into account, perhaps for the first time, detailed submissions on the point. 'Longstanding universal mistake' is not a canon of construction of a legislative instrument; nor, in the case of domestic legislation, is there any equivalent of art 31(3)(b) of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, Vienna, Austria) which requires subsequent practice "which establishes the agreement of the parties regarding its interpretation" to be taken into account in construing an international Treaty.

45.
At the heart of the parties' submissions is the premise that in enacting the EEA Regulations in 2006 Parliament did not intend to differentiate, in terms of appeal rights, between those cases where the Secretary of State "must" issue a registration certificate or residence card to an EEA national or family member as defined in reg 7 (see reg 16(1), (3) and (4) and reg 17(1) and (2)) and cases of EFMs who, even if they are able to establish the basis upon which they seek a registration certificate, if an EEA national, or residence card if a third country national (see reg 16(5) and reg 17(4)), there remains a discretion whether to grant a registration certificate or residence card, and hence to confer any of the rights arising from being 'treated as' a family member.

46.
We begin with the language used in reg 2(1) of the EEA Regulations 2006. In our judgment, there is a fundamental difference between the two situations contemplated for the issue of a residence card. In the former, the individual has a right to the residence card once the qualifying criteria are established: that is properly said to be an "entitlement". In the latter, the individual does not have a right to that card but is reliant upon a favourable exercise of discretion before a card will be issued. It does not seem to us that it assists, as Mr O'Callaghan urged upon us, to describe the individual's position when discretion is exercised in his favour as amounting to an "entitlement" to that card. The plain fact is that the exercise of discretion 'sits between' the basis upon which he or she qualifies as an EFM and the outcome of whether or not the residence card is to be issued. If this latter situation can properly be described as an "entitlement" to the residence card, it would merge into one category situations where choice exists (a discretion) and those where a duty or obligation arises. Only in the latter case can it be said that the individual seeking the benefit of the decision-making process has a right to that benefit or outcome. There is a clear jurisprudential distinction, well recognised in public law generally, between the exercise of discretion and the carrying out of a duty. That distinction is, in our judgment, reflected in the provisions dealing with the issue of residence cards under the EEA Regulations 2006. As the case law makes clear, the only right or entitlement that an EFM has in the decision-making process is that the discretion whether to issue a residence card is exercised lawfully and in accordance with the Citizens Directive (Rahman at [21]-[25]).

47.
It does not, in our judgment, assist to rely upon the definition in reg 2(1) that the decision "concerns" the "entitlement" of a residence card. The decision-making process leading to the ultimate outcome does not entail a "right" or an "entitlement" to the card and any decision made cannot "concern" an "entitlement" to the residence card when the decision-making process does not entail such an

entitlement. Likewise, there is no basis for interpreting the definition so as to expand its natural meaning to cover “potential entitlement”. Regulations 2(1) says what it says.

48.
In our judgment, the natural and ordinary meaning of the definition of an EEA decision in reg 2(1), point (b) with which we are concerned in this appeal does not include a decision to refuse a residence card to an EFM under reg 17(4) or, by parity, to refuse a registration certificate to an EEA national EFM under reg 16(5). The consequence of that would be that the decision in the present case was not an ‘EEA decision’ and the appellant has no right of appeal. The question then is whether there is anything in the context or other material demonstrating that the natural and ordinary meaning was not intended.

49.
During the course of argument, we raised with counsel the question whether the list of EEA decisions in reg 2(1) at points (a) to (d) would be unnecessary if the submissions of the appellant and Secretary of State were correct - because there would be no un-appealable decisions under the 2006 Regulations, and Parliament could have simply stated that an “EEA decision” means a decision under these Regulations. It would be a powerful argument against the parties’ position if, in a fact, the list in (a) to (d) was simply rendered otiose if the refusal of a residence card fell within point (b). Why would Parliament create the list if all decisions under the EEA Regulations 2006 were appealable?

50.
Counsel, however, drew to our attention (and we understand it was accepted by all three counsel) that there was at least one decision in the EEA Regulations 2006 as originally enacted which did not fall within the list (a) to (d) so that the list was not otiose since all decisions under “these Regulations” were not appealable.

51.
The decision which was identified is found in reg 28 under which the Secretary of State certifies that an EEA decision was taken, for example, in the interests of national security and so any appeal lies to the Special Immigration Appeals Commission rather than to the First-tier Tribunal. It is, in one sense, a singular example of a decision made under the EEA Regulations 2006 which would have been appealable unless the “list” (which omits the decision under reg 28) was included as part of the definition of an EEA decision. Nevertheless, its identification removes any force from the argument which would run counter the parties’ submissions. Subsequent amendment to the definition of the EEA decision has excluded from that definition decisions made under reg 24AA (certification leading to removal and an out of country appeal only) and reg 29AA (temporary admission to conduct an in-country appeal). Both of those are by way of amendment and, as we shall see shortly, therefore present considerable difficulties as an aid to interpreting the definition of an “EEA decision”. But, in any event, they also operate by way of exception to what would otherwise be an “EEA decision” falling within points (c) and (a) respectively of the definitional list in reg 2(1).

52.
Mr O’Callaghan placed some reliance upon the argument that Parliament intended in 2006 to provide for rights of appeal against decisions to refuse residence cards to the new category of individual introduced by that Directive, namely EFM. That gave effect to the requirement to provide for “judicial review” of decisions involving EFMs as recognised in [25] of Rahman . Ms Smyth did not go so far in her submissions, acknowledging that the limited requirement of review to ensure compliance with the Directive in the cases of EFMs - which was not a full ‘merits-based appeal’ – could be achieved

without an appeal to the First-tier Tribunal but rather through an application for judicial review (currently) filed with the Upper Tribunal. However, she submitted an appeal to the FtT was more ‘expedient’ as it allowed resolution of the factual issue of qualification as an EFM at the same time as a determination of the proper scope of the exercise of the discretion to issue a residence card.

53.
We do not accept these submissions. The distinction between the situation where a residence document must be issued (for example, to a qualifying ‘family member’) and one where such a document will only be issued if discretion is exercised by the Secretary of State (as is the case of a third-country national EFM) does not originate in the EEA Regulations 2006. The precursor Regulations, namely the Immigration (European Economic Area) Regulations 2000 (SI 2004/2326) (the “EEA Regulations 2000”) also contained provisions which differentiated between the situation where a residence document “must” be issued and one where such a document “may” be issued. Regulation 15 set out the circumstances where the Secretary of State “must” issue a residence permit (as it was then called) to a qualified person who was an EEA national. Regulation 15(2) stated that the Secretary of State “must” issue a residence permit to a family member of a qualified person who, in effect, proves that they were a “family member of a qualified person”. Regulation 15 of the EEA Regulations 2000 mirrors, in substance, the provisions in regs 16 and 17 of the EEA Regulations 2006. They are both, on any view, cases of “entitlement” to the relevant documentation.

54.
However, reg 10 of the EEA Regulations 2000 dealt, inter alia, with the issue of a “EEA family permit, a residence permit or residence document” to dependents and members of the household of EEA nationals. Regulation 10(1) provided that:

“If a person satisfies any of the conditions in paragraph (4), and if in all the circumstances appears to the decision-maker appropriate to do so, the decision-maker may issue to that person an EEA family permit, a residence permit or a residence (document) as the case may be”.

55.
Regulation 10(4)(c) set out the conditions referred to in reg 10(1) as follows:

“The conditions are that person –

(a) is dependent on the EEA national or his spouse;

(b) is living as part of the EEA national’s household outside the United Kingdom; or

(c) was living as part of the EEA national’s household before the EEA national came to the United Kingdom.”

56.
That reflects, albeit not precisely, the definition of an EFM in reg 8(2) of the EEA Regulations 2006. In this instance, unlike that of an EEA national who is a qualified person or their “family member”, having established the criteria, reg 10(1) of the 2000 Regulations states that the Secretary of State “may” issue the relevant document to that individual. In other words, even prior to the Citizens Directive and the EEA Regulations 2006, our domestic law allowed for the issuance of a residence document to a person who was neither an EEA national qualified person nor their family member but was, in effect, in our current language an EFM. Of course, qualifying as an EFM on the basis of a “durable relationship” did not come into our domestic law until the EEA Regulations 2006 as a result of Art 3.2 of the Citizens Directive. However, the point remains that even prior to the EEA Regulations

2006, domestic law drew a distinction between situations where the Secretary of State must issue a residence card and those where he had a discretion to do so.

57.
In terms of rights of appeal, the EEA Regulations 2000, as with the EEA Regulations 2006, provided (via regs 9 and 28) for a right of appeal against "an EEA decision" (see reg 29(1)). An "EEA decision" was defined (initially in reg 27(2) and later in reg 2) in terms identical in substance to that in reg 2(1) of the EEA Regulations 2006 at points (a) to (c). In particular, it included

"a decision under these Regulations … which concerns a person's … entitlement to be issued with or to have renewed, or not to have revoked, a residence permit or residence document".

58.
Consequently, the language of the EEA Regulations 2006 was carried across from the EEA Regulations 2000 in respect of the scope of appealable decisions and in a context where the distinction already existed between situations where the Secretary of State "must" or "may" issue a residence document. Consequently, it cannot be argued that, for the first time, in 2006 Parliament used the language of "entitlement" so as to include challenges to decisions where an individual "must" be issued with a residence document but also those where he "may" be issued with such a document in order to give effect to the Citizens Directive and its recognition of the position EFMs (including for the first time those in a 'durable relationship'). In our judgment, the issue of construction with which we are concerned in this appeal cannot be resolved by divining, on this basis, the intention by Parliament in enacting the EEA Regulations 2006. The identical point arose under the earlier EEA Regulations 2000 and was, so far as we are aware, never judicially determined.

59.
A further argument relied upon to urge us that the definition of an "EEA decision" and, in particular that the term "entitlement" included a decision which entailed a discretionary element, was that a challenge to a decision to revoke a residence document was an appealable decision falling within reg 2(1) point (b). It was urged upon us that such a decision was a discretionary one when taken under reg 20, for example, on the grounds of public policy, public security or public health. Regulation 20(1) states:

"The Secretary of State may refuse to issue, revoke or refuse to renew a registration certificate, a residence card, a document certifying permanent residence or a permanent residence card if the refusal or revocation is justified on grounds of public policy, public security or public health or on grounds of abuse of rights in accordance with Regulation 21B(2)."

60.
Thus, it was argued that an "EEA decision" against which a right of appeal lies includes a decision to revoke a resident card. That is a discretionary decision and falls within the wording of reg 2(1), point (b) of the EEA Regulations 2006 as a decision which "concerns … a person's entitlement … not to have revoked" that residence card. Hence, a decision not to issue a residence card to an EFM, albeit one entailing the exercise of discretion, is also a decision falling within the definition of an "EEA decision" under reg 2(1) as one which "concerns … a person's entitlement to be issued with" that card.

61.
In our judgment, that argument misunderstands the effect of reg 20 and the basis upon which a residence card may be revoked. Regulation 20(1) does not create a discretion to revoke a residence

card. Rather, it sets out the public policy ground upon which such a revocation can occur and then recognises the Secretary of State's ability to revoke the residence card when the qualifying criteria are satisfied. In reaching a decision whether the qualifying criteria are satisfied, the Secretary of State's decision is one that "concerns … a person's entitlement … not to have [the residence card] revoked". The Secretary of State is only entitled to revoke it on the specific grounds set out in reg 20(1). The argument based upon reg 20, therefore, adds no strength to the parties' submission in respect of a decision made under reg 17(4). There clearly is a right of appeal on the ground that the qualifying criteria are not satisfied.

62.
Thus far, therefore, we see nothing in reg 26(3) to displace the natural and ordinary meaning of the definition of an EEA decision set out in reg 2(1) point (b) that a decision under reg 17(4) to refuse to issue a residence card to an EFM does not give rise to a right of appeal.

63.
Both Mr O'Callaghan and Ms Smyth placed reliance upon reg 26(2A) which was introduced by way of amendment to reg 26 from 8 November 2012 (SI 2012/260). Both submitted that Parliament must have understood that an EFM had a right of appeal, including against a refusal to issue a residence card. Otherwise, the amendment would have been entirely irrelevant and without purpose so as to include sub-para (2A) where the "appellant" claims to be in a "durable relationship with an EEA national" as that is one of the basis upon which an individual is an EFM set out in reg 8(5). Regulation 26(2A), it was submitted, clearly sets out an exception to a recognised right of appeal. It would be futile for Parliament to establish an exception to a right of appeal that did not exist.

64.
At first blush, the parties' submissions have an attractive quality. The difficulty is that the submissions are contrary to authority which prohibits us from taking into account an amendment to the EEA Regulations 2006 in order to interpret the meaning of the Regulations as originally enacted, i.e. whether the wording of reg 2(1), point (b) includes a decision refusing to issue a residence card to an EFM.

65.
In the Boss Holdings case, Lord Neuberger at [23] summarised his view as follows:

"In my opinion, the legislature cannot have intended the meaning of a sub-section to change as a result of amendments to other provisions of the same statute, when no amendments were made to that sub-section, unless, of course, the affect of one of the amendments was, for instance, to change the definition of an expression used in the sub-section."

66.
Lords Hoffman, Scott, Roger and Walker expressly agreed with Lord Neuberger's reasoning.

67.
The present case is, of course, not a case where the amendment in reg 26(2A) has amended (and thereby changed) "the definition of an expression used" in the Regulations. It is rather prayed in aid as a tool of construction to reach the conclusion that Parliament must have understood (at least at the time of amendment in 2012) that the definition of an EEA decision included a decision not to issue a residence card to an EFM. Thus, we are required to conclude that is what reg 2(1), point (b) was intended to include in 2006 at the time the EEA Regulations were enacted. However, whatever may have been Parliament's understanding in amending the Regulations so as to insert sub-para (2A) into

reg 26, Lord Neuberger is clear that cannot affect the interpretation of the Regulations and, in particular, the definition of an “EEA decision” as originally enacted in 2006.

68.
We were also referred to the more recent decision of the Supreme Court in R (Brown) v SSHD in 2005. That case concerned the interpretation of s.94(5) of the Nationality, Immigration and Asylum Act 2002. That provision permitted the Secretary of State to designate a state for the purposes of certification of a human rights claim as “clearly unfounded” if “there is in general … no serious risk of persecution”. The issue in Brown was whether those words were applicable where the risk was to a defined minority such as persons at risk because of their sexual orientation. Section 94 had, subsequent to its enactment, been amended in s.94(5A) to (5C) to permit designation where there was “a serious risk of persecution” in a part of a state or in relation to individuals of a particular “description” such as, gender, language, race, religion, nationality, membership of a social or other group or political opinion. In Brown it was submitted by the claimant, challenging the Secretary of State’s designation under the original legislation, that the legislation should be read as a whole, including the amending provisions, such that it was clear that the power could not be exercised where there was a risk to a defined minority. Again, as in this case, why else would Parliament enact the amendment provision if the power already existed in the Act as originally enacted?

69.
Interestingly, in Brown the Secretary of State made the opposite submission to that made by Ms Smyth in this case, namely that the amending provisions could not be taken into account. The Supreme Court adopted that latter view. At [24], Lord Toulson said this:

“Since the hearing the court has received written submissions from both parties on the issue whether it is permissible to have regard to the provisions of section 94(5A) to (5C) when construing section 94(5). The Secretary of State submits that it is impermissible and relies on Boss Holdings Ltd v Grosvenor West End Properties [2008] 1 WLR 289, para 23, in which Lord Neuberger of Abbotsbury endorsed the proposition that a later amendment does not affect the construction of earlier legislation. The claimant submits that the revised statute should be construed as a whole, i.e. in its present form, and relies on R v Brown (Northern Ireland) [2013] 4 All ER 860, para 34, where Lord Kerr of Tonaghmore JSC endorsed the proposition that an amended statute is to be construed as a whole in its amended form, although in so doing he did not suggest that the legislative history is to be ignored and he examined the purpose of the relevant amendment in its context. There is no inconsistency between what was said in the two cases. In construing any legislation it is relevant to consider its purpose and that may include considering the purpose of an amendment. Parliament may sometimes amend legislation in order to correct a previous interpretation by the court. That said, and with the qualification that we have not heard full argument, I am content for present purposes to accept that generally speaking an amendment cannot affect the construction of an Act as originally enacted, and therefore that it would not be right to be influenced by the later introduction of section 94(5A) to (5C) in interpreting section 94(5). It is nevertheless of interest that Parliament has considered it appropriate to give the Home Secretary the additional power to add a state to the list in relation to a particular description of a person.”

70.
Lord Hughes agreed with Lord Toulson and at [33] he said this:

“I agree with Lord Toulson JSC that although subsections 94(5A) to (5C) cannot alter the meaning of “in general”, the presence of those subsections and the possible means of dealing with some situations in destination states which they now provide will be relevant to that decision.”

71.
It seems to us clear that both Lord Toulson (with whom the other Justices agreed) and Lord Hughes denied the legitimacy of permitting an amendment to affect, in general, the construction of legislation as originally enacted (see also MS(Uganda) v SSHD [2016] UKSC 33 at [28] per Lord Hughes with whom the other Justices agreed).

72.
The present case is not one in which Parliament amended the EEA Regulations 2006 so as to clarify or amend the definition of an “EEA decision” in reg 2(1). The purpose of the amendment is simply unclear. We were not referred to any Explanatory Memorandum relevant to the 2012 amendment. We have consulted the appended ‘Explanatory Note’ to the Regulations and it records that the new reg 26(2A) is:

“to ensure that someone who claims to be the durable partner of an EEA national may only appeal under the Regulations where he or she can provide evidence which is sufficient to satisfy the Secretary of State as to the existence of the relationship in question.”

73.
It is speculation by us but it may be that the 2012 amendment was prompted by the AIT’s decision in LO . In that case, the AIT accepted (without the benefit of any argument on the point) that an EFM had a right of appeal against the refusal to issue a residence card but noted that, unlike appeals brought by EEA nationals or “family members”, there was an unlimited right of appeal not requiring any proof, for example, of identity or relationship. The 2012 amendment may be in response to this as it provides a limit on any right of appeal under reg 26(1) requiring proof of the “relationship” but not its durability in order for an EFM relying on a ‘durable relationship’ to bring an appeal.

74.
Further, the Explanatory Memorandum, to which we were referred, in relation to the original EEA Regulations 2006 provides little assistance in determining the purpose underlying the original Regulations themselves. At para 7.9 it is stated:

“Part 6 and Schedule 1 set out the appeal rights in relation to decisions taken under the Regulations. This is broadly comparable to the existing appeal rights for EEA nationals and their family members. An in-country right of appeal is normally provided for when a decision could lead to the removal of an individual in question …”

75.
As regards the “existing appeal rights” there referred to, we have already set out the provisions in the EEA Regulations 2000 which, indeed, mirror in large measure the EEA Regulations 2006 as regard the position not only of EEA nationals and their family members but also what we now refer to as EFMs. Neither immediately prior to 2006 nor thereafter is there any statement (at least to which we were referred) which indicates that the purpose of Parliament in either set of Regulations was to confer a right of appeal against a decision to refuse to issue a residence document to a person who is now known as an EFM.

76.

At its highest, the 2012 amendment, if we were entitled to take it into account, assumes that there can be an appeal under reg 26(1) brought by an EFM relying on a ‘durable relationship’ as the basis for being an EFM. That was an assumption which would have been supported by the decision in LO . However, we must determine whether the decision in LO , reached on the papers and without submissions, correctly stated the law.

77.
At our request, we invited the parties to provide written submissions on whether reg 26(2A) could apply in cases not concerned with an EFM (claiming to be in a ‘durable relationship’) who is refused a residence card under reg 17(4). The force of the argument relying on the amendment would be diluted if it could apply to an appeal against a decision not falling within reg 2(1) point (b).

78.
Ms Smyth’s written submissions were agreed by those representing the appellant. In essence, she submitted that reg 26(2A) had no application except in an appeal by an EFM against a refusal to issue a residence card. We are not persuaded that this is correct.

79.
First, we agree that a third country national who has been issued with a residence card on the basis he is an EFM because of a ‘durable relationship’ would be “treated as a family member” by virtue of reg 7(3) – at least so long as the condition qualifying him was maintained. Any appeal against a decision made under the EEA Regulations 2006 by such a person, including a refusal to renew the card would, on the face of it, fall within reg 26(1) and (3) as an appeal by “a person…[who] claims to be a family member”. We say “appears” because we do not consider this argument to be entirely water-tight. Regulation 26(2A) is not ‘subject to’ reg 26(3) or visa versa. Contrast that with reg 26(3) which is stated not to apply if reg 26(2) applies because the individual is an EEA national. Consequently, reg 26(2A) may well apply to any appeal against a decision under the EEA Regulations 2006 where the basis of the individual’s claim is that he is in a ‘durable relationship’ with an EEA national, including a refusal to renew the card.

80.
Secondly, we agree that a third country national who now claims to be an EFM is subject to removal under the general removal provisions and not under the EEA Regulations 2006 (see Bilal Ahmed v SSHD [2016] EWCA Civ 303). Consequently reg 26(2A) can have no application in such a case.

81.
Thirdly, Ms Smyth raised the possibility of an EEA national appealing against a removal decision made under the EEA Regulations 2006 but who seeks to resist it on the basis he has a right to reside, not as an EEA national, but as an EFM based upon a 'durable relationship’ with another EEA national, in circumstances where that relationship has not previously been the subject of the grant of a residence card. (It is to be noted that neither art 3.2 of the Citizens Directive nor reg 8(5) is limited to those who are not themselves Citizens of the Union or EEA nationals.) Ms Smyth submitted that reg 26(2A) would not be applicable; the individual, as an EEA national, would only be required to satisfy the appeal limit in reg 26(2), namely that he produce a valid national identity card or passport in order to appeal. We do not agree. Whether this is a fanciful example in practice as she asserts, it is nevertheless a potential one. Regulation 26(2A) is not ‘subject to’ the application of reg 21(2) (as reg 26(3) dealing with ‘family members’ is expressly stated to be) and so both are arguably applicable. We see no reason to suppose that regulations 26(2) and (2A) are mutually exclusive: neither is said to be subject to the other and on their face both apply to the situation we have identified.

82.
There is a further example. An individual may be issued with a ‘family permit’ under reg 12(2) as an EFM who is accompanying or joining an EEA national in the UK. Suppose a family permit is issued on the basis of a ‘durable relationship’ with that EEA national. On arrival in the UK, the individual is refused admission because the Immigration Officer concludes (perhaps on receipt of further evidence) that the relationship is not ‘durable’. The individual is “treated” as a “family member” of the EEA national once he is issued with the family permit (see reg 7(3)). Provided that he produces a valid passport; is accompanying or joining the EEA national; and the EEA national has a right to reside in the UK, he “must be admitted” to the UK (see reg 11(2) read with reg 19(2)(a)). The individual may appeal against that EEA decision to refuse him admission as it “concerns…a person’s entitlement to be admitted to the United Kingdom” (see reg 2(1), point (a)). Even assuming he continues to be “treated” as a “family member” despite it being said he does not meet the required condition for being an EFM under reg 8(4), as we noted above reg 26(2A) would apply even if reg 26(3) (the limitation on appeal by a “family member”) also applies. As we noted above, the two provisions are not mutually exclusive. For the purposes of reg 26(2A), the individual is someone who “claims to be in a durable relationship”. That position is a fortiori if he is no longer “treated” as a family member because he is not considered to satisfy the EFM requirement of being in a ‘durable relationship’.

83.
We are not persuaded, therefore, that reg 26(2A) can only apply if there is an appeal by an EFM (relying on a durable relationship) against a decision to issue a residence card. It may also apply to appeals against other “EEA decisions” by such a person. It would be impossible, therefore, to read the amendment in 2012 – even if we were permitted to do so – as a tool of construction of reg 2(1), point (b) so as to make good the parties’ argument that it can only have relevance to appeals such as the present.

Conclusion

84.
Although we have found the issue raised in this appeal a difficult one, we see no sustainable argument to deflect us from the natural meaning of the definition of an “EEA decision” in reg 2(1) point (b) that we identified earlier. A decision, taken by the Secretary of State in the exercise of her discretion, not to issue an EFM with a residence card under reg 17(4) is not a decision under the EEA Regulations 2006 which “concerns… a person’s entitlement to be issued with…a residence card”.

Final Matters

85.
It is unnecessary for us to deal with the parties’ submissions on the scope of any appeal by an EFM against a refusal to issue a residence card. Given our conclusion that no right of appeal exists, we need say no more.

86.
One matter which arose at the previous hearing which we note for the record and which may be relevant to the future consideration of the appellant’s application. Mr Deller, who then represented the Secretary of State, conceded that the purported exercise of discretion against the appellant was unlawful. He accepted that it was wrong to state that the appellant had not provided enough evidence to allow an exercise of the discretion and then to exercise discretion against the appellant merely on the basis that the appellant had entered the UK illegally. That was not an adequate consideration of the appellant’s claim to meet the requirement in reg 17(5) that the Secretary of State must undertake

an “extensive examination of the personal circumstances of the applicant”. We did not understand Ms Smyth to resile from that concession before us at the most recent hearing.

Disposal

87.
The appellant has no right of appeal. The First-tier Tribunal had no jurisdiction to hear the appeal. It erred in law in doing so.

88.
We set its decision to allow the appeal and substitute a decision that there was not a valid appeal before the First-tier Tribunal.

Signed

A Grubb

Judge of the Upper Tribunal

APPENDIX

The Immigration (European Economic Area) Regulations 2006 (SI 2006/1003)

as amended and in force for this appeal

“Part 1

Interpretation etc.

….

General interpretation

2(1) In these Regulations ….

’EEA decision’ means a decision under these Regulations that concerns –

(a) a person’s entitlement to be admitted to the United Kingdom;

(b) a person’s entitlement to be issued with or have renewed, or not to have revoked, a registration certificate, residence card, derivative residence card, document certifying permanent residence or permanent residence card;

(c) a person’s removal from the United Kingdom; or

(d) the cancellation, pursuant to regulation 20A, of a person’s right to reside in the United Kingdom;

but does not include decisions under regulations 24AA (human rights considerations and interim orders to suspend removal) or 29AA (temporary admission in order to submit case in person);….

….

Family member

7(1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person –

(a) his spouse or his civil partner;

(b) direct descendants of his, his spouse or his civil partner who are –

(i) under 21; or

(ii) dependants of his, his spouse or his civil partner;

(c) dependent direct relatives in his ascending line or that of his spouse or his civil partner;

(d) a person who is to be treated as the family member of that other person under paragraph (3).

(2) A person shall not be treated under paragraph (1)(b) or (c) as the family member of a student residing in the United Kingdom after the period of three months beginning on the date on which the student is admitted to the United Kingdom unless –

(a) in the case of paragraph (b), the person is the dependent child of the student or of his spouse or civil partner; or

(b) the student also falls within one of the other categories of qualified persons mentioned in regulation 6(1).

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

(4) Where the relevant EEA national is a student, the extended family member shall only be treated as the family member of that national under paragraph (3) if either the EEA family permit was issued under regulation 12(2), the registration certificate was issued under regulation 16(5) or the residence card was issued under regulation 17(4).

….

’Extended family member’

8(1) In these Regulations ‘extended family member’ means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and –

(a) the person is residing in a country other than the United Kingdom … and is dependent upon the EEA national or is a member of his household;

(b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or

(c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of the household.

(3) A person satisfies the condition in this paragraph if the person is a relative of an EEA national or his spouse or his civil partner and, on serious health grounds, strictly requires the personal care of the EEA national, his spouse or his civil partner.

(4) A person satisfies the condition in this paragraph if the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for definite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national were the EEA national a person present and settled in the United Kingdom.

(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.

(6) In these Regulations 'relevant EEA national' means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purposes of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purpose of paragraph (5).

….

Part 3

Residence Documentation

Issue of registration certificate

16(1) The Secretary of State must issue a registration certificate to a qualified person immediately on application and production of –

(a) a valid identity card or passport issued by an EEA State;

(b) proof that he is a qualified person.

(2) In the case of a worker, confirmation of the worker's engagement from his employer or a certificate of employment is sufficient proof for the purpose of paragraph (1)(b).

(3) The Secretary of State must issue a registration certificate to an EEA national who is the family member of a qualified person or of an EEA national with a permanent right of residence under regulation 15 immediately on application and production of –

(a) a valid identity card or passport issued by an EEA State; and

(b) proof that the applicant is such a family member.

(4) The Secretary of State must issue a registration certificate to an EEA national who is a family member who has retained the right of residence on application and production of –

(a) a valid identity card or passport; and

(b) proof that the applicant is a family member who has retained the right of residence.

(5) The Secretary of State may issue a registration certificate to an extended family member not falling within regulation 7(3) who is an EEA national or application if –

(a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and

(b) in all the circumstances it appears to the Secretary of State appropriate to issue the registration certificate.

(6) Where the Secretary of State receives an application under paragraph (5) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.

(7) A registration certificate issued under this regulation shall state the name and address of the person registering and the date of registration …

(8) But this regulation is subject to regulations 7A(6) and 20(1).

Issue of residence card

17(1) The Secretary of State must issue a residence card to a person who is not an EEA national and is the family member of a qualified person or of an EEA national with a permanent right of residence under regulation 15 on application and production of –

(a) a valid passport; and

(b) proof that the applicant is such a family member.

(2) The Secretary of State must issue a residence card to a person who is not an EEA national but who is a family member who has retained the right of residence on application and production of –

(a) a valid passport; and

(b) proof that the applicant is a family member who has retained the right of residence.

(3) On receipt of an application under paragraph (1) or (2) and the documents that are required to accompany the application the Secretary of State shall immediately issue the applicant with a certificate of application for the residence card and the residence card shall be issued no later than six months after the date on which the application and documents are received.

(4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if –

(a) the relevant EEA national in relation to the extended family is a qualified person or an EEA national with a permanent right of residence under regulation 15; and

(b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.

(5) Where the Secretary of State receives an application under paragraph (4) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.

(6) A residence card issued under this regulation may take the form of a stamp in the applicant's passport and shall be … valid for –

(a) five years from the date of issue; or

(b) in the case of a residence card issued to the family member or extended family member of a qualified person, the envisaged period of residence in the United Kingdom of the qualified person, whichever is the shorter.

(6A) A residence card issued under this regulation shall be entitled 'Residence card of a family member of an EEA national' or 'Residence card of a family member who has retained the right of residence', as the case may be.

(7) …

(8) But this regulation is subject to regulation 20(1) and (1A).

….

Part 4

Refusal of Admission and Removal etc.

….

Refusal to issue or renew and revocation of residence documentation

20(1) The Secretary of State may refuse to issue, revoke or refuse to renew a registration certificate, a residence card, a document certifying permanent residence or a permanent residence card if the refusal or revocation is justified on grounds of public policy, public security or public health or on grounds of abuse of rights in accordance with regulation 21B(2). …

….

Part 6

Appeals Under These Regulations

….

Appeal rights

26(1) Subject to the following paragraphs of this regulation, a person may appeal under these Regulations against an EEA decision.

(2) If a person claims to be an EEA national, he may not appeal under these Regulations unless he produces a valid national identity card or passport issued by an EEA State.

(2A) If a person claims to be in a durable relationship with an EEA national he may not appeal under these Regulations unless he produces –

(a) a passport; and

(b) either –

(i) an EEA family permit; or

(ii) sufficient evidence to satisfy the Secretary of State that he is in a relationship with that EEA national.

(3) If a person to whom paragraph (2) does not apply claims to be a family member who has retained the right of residence or the family member or relative of an EEA national he may not appeal under these Regulations unless he produces –

(a) … a passport; and

(b) either –

(i) an EEA family permit;

(ia) a qualifying EEA State residence card;

(ii) proof that he is the family member or relative of an EEA national; or

(iii) in the case of a person claiming to be a family member who has retained the right of residence, proof that he was a family member of the relevant person.

(3A) If a person claims to be a person with a derivative right of entry or residence he may not appeal under these Regulations unless he produces a passport, and either –

(a) an EEA family permit; or

(b) proof that –

(i) where the person claims to have a derivative right of entry or residence as a result of regulation 15A(2), he is a direct relative or guardian of an EEA national who is under the age of 18;

(ii) where the person claims to have a derivative right of entry or residence as a result of regulation 15A(3), he is the child of an EEA national;

(iii) where the person claims to have a derivative right of entry or residence as a result of residence under regulation 15A(4), he is a direct relative or guardian of the child of an EEA national;

(iv) where the person claims to have a derivative right of entry or residence as a result of regulation 15A(5), he is under the age of 18 and is a dependant of a person satisfying the criteria in (i) or (iii).

(v) where the person claims to have a derivative right of entry or residence as a result of regulation 15A(4A), he is a direct relative or guardian of a British citizen.

(4) A person may not bring an appeal under these Regulations on a ground certified under paragraph (5) or rely on such a ground in an appeal brought under these Regulations.

(5) The Secretary of State or an immigration officer may certify a ground for the purposes of paragraph (4) if it has been considered in a previous appeal brought under these Regulations or under section 82(1) of the 2002 Act.

(6) Except where an appeal lies to the Commission, an appeal under these Regulations lies to the First-tier Tribunal.

(7) The provisions of or made under the 2002 Act referred to in Schedule 1 shall have effect for the purposes of an appeal under these Regulations to the First-tier Tribunal in accordance with that Schedule.”

The Immigration (European Economic Area) Regulations 2006 (SI 2006/1003)

in force at 30 April 2006

“ **Part 1**

Interpretation etc

….

2(1) In these Regulations -

’EEA decision’ means a decision under these Regulations that concerns a person’s –

(a) entitlement to be admitted to the United Kingdom;

(b) entitlement to be issued with or have renewed, or not to have revoked, a registration certificate, residence card, document certifying permanent residence or permanent residence card; or

(c) removal from the United Kingdom; …

….

Family member

7(1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person –

(a) his spouse or his civil partner;

(b) direct descendants of his, his spouse or his civil partner who are –

(i) under 21; or

(ii) dependants of his, his spouse or his civil partner;

(c) dependent direct relatives in his ascending line or that of his spouse or his civil partner;

(d) a person who is to be treated as the family member of that other person under paragraph (3).

(2) A person shall not be treated under paragraph (1)(b) or (c) as the family member of a student residing in the United Kingdom after the period of three months beginning on the date on which the student is admitted to the United Kingdom unless –

(a) in the case of paragraph (b), the person is the dependent child of the student or his spouse or civil partner; or

(b) the student also falls within one of the other categories of qualified persons mentioned in regulation 6(1).

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

(4) Where the relevant EEA national is a student, the extended family member shall only be treated as the family member of that national under paragraph (3) if either the EEA family permit was issued

under regulation 12(2), the registration certificate was issued under regulation 16(5) or the residence card was issued under regulation 17(4).

'Extended family member'

8(1) In these Regulations 'extended family member' means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and –

(a) the person is residing in an EEA State in which the EEA national also resides and is dependent upon the EEA national or is a member of his household;

(b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or

(c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.

(3) A person satisfies the condition in this paragraph if the person is a relative of an EEA national or his spouse or his civil partner and, on serious health grounds, strictly requires the personal care of the EEA national his spouse or his civil partner.

(4) A person satisfies the condition in this paragraph if the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national were the EEA national a person present and settled in the United Kingdom.

(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.

(6) In these Regulations 'relevant EEA national' means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purpose of paragraph (5).

....

Part 3

Residence Documentation

Issue of registration certificate

16(1) The Secretary of State must issue a registration certificate to a qualified person immediately on application and production of –

(a) a valid identity card or passport issued by an EEA State;

(b) proof that he is a qualified person.

(2) In the case of a worker, confirmation of the worker's engagement from his employer or a certificate of employment is sufficient proof for the purposes of paragraph (1)(b).

(3) The Secretary of State must issue a registration certificate to an EEA national who is the family member of a qualified person or of an EEA national with a permanent right of residence under regulation 15 immediately on application and production of –

(a) a valid identity card or passport issued by an EEA State; and

(b) proof that the applicant is such a family member.

(4) The Secretary of State must issue a registration certificate to an EEA national who is a family member who has retained the right of residence on application and production of –

(a) a valid identity card or passport; and

(b) proof that the applicant is a family member who has retained the right of residence.

(5) The Secretary of State may issue a registration certificate to an extended family member not falling within regulation 7(3) who is an EEA national on application if –

(a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and

(b) in all the circumstances it appears to the Secretary of State appropriate to issue the registration certificate.

(6) Where the Secretary of State receives an application under paragraph (5) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.

(7) A registration certificate issued under this regulation shall state the name and address of the person registering and the date of registration and shall be issued free of charge.

(8) But this regulation is subject to regulation 20(1).

Issue of residence card

17(1) The Secretary of State must issue a residence card to a person who is not an EEA national and is the family member of a qualified person or of an EEA national with a permanent right of residence under regulation 15 on application and production of –

(a) a valid passport; and

(b) proof that the applicant is such a family member.

(2) The Secretary of State must issue a residence card to a person who is not an EEA national but who is a family member who has retained the right of residence on application and production of –

(a) a valid passport; and

(b) proof that the applicant is a family member who has retained the right of residence.

(3) On receipt of an application under paragraph (1) or (2) and the documents that are required to accompany the application the Secretary of State shall immediately issue the applicant with a

certificate of application for the residence card and the residence card shall be issued no later than six months after the date on which the application and documents are received.

(4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if –

(a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and

(b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.

(5) Where the Secretary of State receives an application under paragraph (4) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.

(6) A residence card issued under this regulation may take the form of a stamp in the applicant's passport and shall be entitled 'Residence card of a family member of an EEA national' and be valid for –

(a) five years from the date of issue; or

(b) in the case of a residence card issued to the family member or extended family member of a qualified person, the envisaged period of residence in the United Kingdom of the qualified person, whichever is the shorter.

(7) A residence card issued under this regulation shall be issued free of charge.

(8) But this regulation is subject to regulation 20(1).

....

Part 4

Refusal of Admission and Removal etc.

....

Refusal to issue or renew and revocation of residence documentation

20(1) The Secretary of State may refuse to issue, revoke or refuse to renew a registration certificate, a residence card, a document certifying permanent residence or a permanent residence card if the refusal or revocation is justified on grounds of public policy, public security or public health.

....

Part 6

Appeals Under These Regulations

....

Appeal rights

26(1) Subject to the following paragraphs of this regulation, a person may appeal under these Regulations against an EEA decision.

(2) If a person claims to be an EEA national, he may not appeal under these Regulations unless he produces a valid national identity card or passport issued by an EEA State.

(3) If a person claims to be the family member or relative of an EEA national he may not appeal under these Regulations unless he produces –

(a) an EEA family permit; or

(b) other proof that he is related as claimed to an EEA national.

(4) A person may not bring an appeal under these Regulations on a ground certified under paragraph (5) or rely on such a ground in an appeal brought under these Regulations.

(5) The Secretary of State or an immigration officer may certify a ground for the purpose of paragraph (4) if it has been considered in a previous appeal brought under these Regulations or under section 82(1) of the 2002 Act.

(6) Except where an appeal lies to the Commission, an appeal under these Regulations lies to the Asylum and Immigration Tribunal.

(7) The provisions of or made under the 2002 Act referred to in Schedule 1 shall have effect for the purposes of an appeal under these Regulations to the Asylum and Immigration Tribunal in accordance with that Schedule."

The Immigration (European Economic Area) Regulations 2000 (SI 2000/2326)

as in force immediately prior to 30 April 2006

"Part I

Interpretation etc.

2. General

(1) ....

'EEA decision' means a decision under these Regulations, or under Regulation 1251/70, which concerns a person's –

(a) removal from the United Kingdom;

(b) entitlement to be admitted to the United Kingdom; or

(c) entitlement to be issued with or to have renewed, or not to have revoked, a residence permit or residence documentation;"

....

6. 'Family member'

(1) In these Regulations, paragraphs (2) to (4) apply in order to determine the persons who are family members of another person.

(2) If the other person is a student, the persons are –

(a) his spouse; and

(b) his dependent children.

(2A) If the other person has divorced his spouse, the person is his divorced spouse provided she is the primary carer of their dependent child who is under 19 and attending an educational course in the United Kingdom.

(2B) If the other person has ceased to be a qualified person on ceasing to reside in the United Kingdom, the persons are –

(a) his spouse or his divorced spouse, provided she is the primary carer of their dependent child who is under 19 and attending an educational course in the United Kingdom; and

(b) descendants of his or of his spouse who are under 21 or are their dependants, provided that they were attending an educational course in the United Kingdom when the qualified person was residing in the United Kingdom and are continuing to attend such a course.

(2C) For the purposes of paragraph (2A) and (2B), 'educational course' means a course within the scope of Article 12 of Regulation (EEC) No. 1612/68 of the Council of the European Communities on freedom of movement for workers within the Community.

(2D) For the purposes of these Regulations, a person to whom paragraph (2B) applies shall be treated as the family member of a qualified person, notwithstanding that the other person has ceased to be a qualified person.

(3) …

(4) In any other case, the persons are –

(a) his spouse;

(b) descendants of his or of his spouse who are under 21 or are their dependants;

(c) dependent relatives in his ascending line or that of his spouse.

….

Part II

Scope of Regulations

9. General

Subject to regulation 10 and 11 (and to regulations 24(1), 25(1), 26(1), 28 and 33) these Regulations apply solely to EEA nationals and their family members."

10. Dependants and members of the household of EEA nationals

(1) If a person satisfies any of the conditions in paragraph (4), and if in all the circumstances it appears to the decision-maker appropriate to do so, the decision-maker may issue to that person an EEA family permit, a residence permit or a residence document (as the case may be).

(2) Where a permit or document has been issued under paragraph (1), these Regulations apply to the holder of the permit or document as if he were the family member of an EEA national and the permit or document had been issued to him under regulation 13 or 15.

(3) Without prejudice to regulation 22, a decision-maker may revoke (or refuse to renew) a permit or document issued under paragraph (1) if he decides that the holder no longer satisfies any of the conditions in paragraph (4).

(4) The conditions are that the person is a relative of an EEA national or his spouse and –

(a) is dependent on the EEA national or his spouse;

(b) is living as part of the EEA national's household outside the United Kingdom; or

(c) was living as part of the EEA national's household before the EEA national came to the United Kingdom.

(5) However, for those purposes 'EEA national' does not include –

(a) an EEA national who is in the United Kingdom as a self-sufficient person, a retired person or a student;

(b) an EEA national who, when he is in the United Kingdom, will be a person referred to in sub-paragraph (a).

....

Part IV

Residence Permits and Documents

15. Issue of residence permits and residence documents

(1) Subject to regulations 16 and 22(1), the Secretary of State must issue a residence permit to a qualified person on application and production of –

(a) a valid identity card or passport issued by an EEA State; and

(b) proof that he is a qualified person.

(2) Subject to regulation 22(1), the Secretary of State must issue a residence permit to a family member of a qualified person (or, where the family member is not an EEA national, a residence document) on application and production of –

(a) a valid identity card issued by an EEA State or a valid passport;

(b) in the case of a family member who required an EEA family permit for admission to the United Kingdom, such a permit; and

(c) in the case of a person not falling within sub-paragraph (b), proof that he is a family member of a qualified person.

(3) In the case of a worker, confirmation of the worker's engagement from his employer or a certificate of employment is sufficient proof for the purposes of paragraph (1)(b).

....

Part VII

Appeals Under These Regulations

….

Scope of Part VII

28. This Part applies to persons who have, or who claim to have, rights under these Regulations or under Regulation 1251/170.

Appeal rights

29(1) Subject to paragraphs (2) to (4), a person may appeal under these Regulations against an EEA decision.

(2) If a person claims to be an EEA national, he may not appeal under these Regulations unless he produces –

(a) a valid national identity card; or

(b) a valid passport, issued by an EEA State.

(3) If a person claims to be the family member of another person, he may not appeal under these Regulations unless he produces –

(a) an EEA family permit; or

(b) other proof that he is related as claimed to that other person.

(4) For the purposes of paragraphs (2) and (3), a document –

(a) is to be regarded as being what it purports to be provided that this is reasonably apparent; and

(b) is to be regarded as relating to the person producing it unless it is reasonably apparent that it relates to another person.

(5) A person may not rely on a ground in an appeal under these Regulations if the Secretary of State or an immigration officer certifies that the ground was considered in a previous appeal brought by that person under these Regulations or under section 82(1) of the 2002 Act.

(6) Except where an appeal lies to the Commission, an appeal under these Regulations lies to the Asylum and Immigration Tribunal.

(7) The sections of the 2002 Act set out in Schedule 2 shall have effect for the purposes of appeals under these Regulations to the Asylum and Immigration Tribunal in accordance with that Schedule.”