Upper Tribunal
(Immigration and Asylum Chamber)

Gauswami (retained right of residence: jobseekers) India [2018] UKUT 00275 (IAC)

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**

On 2 May 2018

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Before

THE HON. MR JUSTICE LANE, PRESIDENT

UPPER TRIBUNAL JUDGE RIMINGTON

Between

SHITALBEN NAGARGIRI GAUSWAMI

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the appellant: Ms B Asanovic, instructed by Markand & Co Solicitors

For the respondent: Mr P Deller, Senior Home Office Presenting Officer

For the purposes of determining retained rights of residence, in regulation 10(6)(a) of both the Immigration (European Economic Area) Regulations 2006 and the Immigration (European Economic Area) Regulations 2016, the reference to a worker includes a jobseeker.

DECISION AND REASONS

A. The facts

1.
The appellant is a citizen of India, who was born on 21 November 1985. On 16 June 1998, Mr V , a Portuguese citizen, who was to become the appellant's husband, arrived in the United Kingdom and exercised EU Treaty rights in this country . On 6 September 2006, Mr V became a British citizen by naturalisation.

2.
On 20 July 2008, the appellant and Mr V were married in India . Later that year, the appellant came to the United Kingdom , with the requisite family permit, as the spouse of Mr V . The permit was valid until 20 May 2009.

3.
On 26 October 2009, the appellant was granted a residence card by reason of her being the spouse of an EEA national. The card was valid until 26 October 2014.

4.
According to the appellant's witness statement, t here were problems with the marriage. As we shall see, there is an issue as to whether the appellant was subjected to domestic violence at the hands of Mr V . It is, however, not disputed that on 2 October 2011, the appellant was persuaded or as she says "duped" by Mr V into travelling to India. Upon arriving in that country, the appellant was told by her mother-in-law that Mr V was going to divorce her; that what was described as her "visa" had been cancelled ; and that she could not return to the United Kingdom.

5.
Nevertheless, on 21 March 2013 the appellant returned to the United Kingdom in order to seek a reconciliation with her husband. The appellant stayed with a friend , Mrs G, between 21 March and 10 July 2013. The appellant said that she was exploited by Mrs G, who compelled the appellant to "work like a slave". In July 2013, the appellant returned to India . In March 2014, however, Mrs G telephoned the appellant in India to tell her that "she had received my divorce papers". The appellant became "very upset and worried about my marriage" and accordingly returned to the United Kingdom . Having nowhere else to go, she again stayed with Mrs G. The appellant was compelled to sign a letter saying that she was being paid £10 an hour by Mrs G and was also required to sign a tenancy agreement. In reality, the appellant was not paid anything. Mrs G also accused the appellant of stealing money from her.

6.
The appellant says that , in May 2014, she approached an organisation that assists victims of d omestic v iolence and reported her husband's behaviour to them .

7.
Mr V had, indeed, instituted divorce proceedings against the appellant. His petition for divorce was filed on 23 October 2013. The decree absolute was issued on 29 April 2014.

8.
On 25 April 2014, five days before the decree absolute, the appellant entered into a jobseeker 's agreement with an official of the Secretary of State for Work and Pensions . She began receiving jobseeker 's allowance on 2 May 2014. She remained in receipt of this allowance until she secured employment on 1 October 2014. The appellant continues in that employment.

9.
On 2 September 2015, the respondent refused the appellant's application for a residence card as confirmation of her right of residence as the ex-spouse of an EEA national exercising T reaty rights in the United Kingdom. The appellant appealed against that decision. Following a hearing at Taylor House on 27 September 2016, First-tier Tribunal Judge C M Phillips dismissed the appellant's appeal. Permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal and by the Upper Tribunal. However, the Upper Tribunal's refusal of permission was quashed following a grant of

permission by Walker J to bring judicial review proceedings to challenge that decision. Permission to appeal was subsequently granted by the Upper Tribunal.

10.
Before turning to the First-tier Tribunal Judge's decision and the submissions made regarding it, we must set out the relevant legislative provisions and refer to the relevant case law.

B. Legislation

11.
Article 45 of the Treaty on the Functioning of the European Union ("the Treaty") provides as follows:-

"Article 45

1. Freedom of movement for workers shall be secured within the Union .

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this article shall not apply to employment in the public service."

It is also necessary to mention Article 21, the relevant part of which provides as follows:

"Article 21

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

12.
The relevant provisions of Directive 2004/58/EC of the European Parliament and of the Council ("the 2004 Directive") are as follow s :-

" **Recitals**

…

(9) Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the

requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to jobseeker s as recognised by the case-law of the Court of Justice.

...

CHAPTER III

RIGHT OF RESIDENCE

Article 6

Right of residence for up to three months

1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State , accompanying or joining the Union citizen.

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-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 l(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 jobseeker 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 jobseeker 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.

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.

…

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.

…”

13.
The following provisions of the Immigration (European Economic Area) Regulation s 2006 (S.I. 2003/26) fall for consideration:-

“4. “Worker”, “self-employed person”, “self-sufficient person” and “student”

(1) In these Regulations —

(a) “worker” means a worker within the meaning of Article 45 of the treaty on the Functioning of the European Union;

…

6. “Qualified person”

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

(a) a jobseeker;

(b) a worker;

(c) a self-employed person;

(d) a self-sufficient person; or

(e) a student.

(2) Subject to regulations 7A(4) and 7B(4), a person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if—

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

(b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom for at least one year, provided that he –

(i) has registered as a jobseeker with the relevant employment office; and

(ii) satisfies conditions A and B;

(ba) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom for less than one year, provided that he –

(i) has registered as a jobseeker with the relevant employment office; and

(ii) satisfied conditions A and B.

(c) he is involuntarily unemployed and has embarked on vocational training; or

(d) he has voluntarily ceased working and embarked on vocational training that is related to his previous employment.

(2A) A person to whom paragraph (2)(ba) applies may only retain worker status for a maximum of six months.

(3) A person who is no longer in self-employment shall not cease to be treated as a self-employed person for the purpose of paragraph (1)(c) if he is temporarily unable to pursue his activity as a self-employed person as the result of an illness or accident.

(4) For the purpose of paragraph (1)(a), “jobseeker” means a person who satisfies conditions A, B and, where relevant, C.

(5) Condition A is that the person –

(a) entered the United Kingdom in order to seek employment; or

(b) is present in the United Kingdom seeking employment, immediately after enjoying a right to reside pursuant to paragraph (1)(b) to (e) (disregarding any period during which worker status was retained pursuant to paragraph (2)(b) or (ba).

(6) Condition B is that the person can provide evidence that he is seeking employment and has a genuine chance of being engaged.

(7) A person may not retain the status of a worker pursuant to paragraph (2)(b), or jobseeker pursuant to paragraph (1)(a), for longer than the relevant period unless she can provide compelling evidence that he is continuing to seek employment and has a genuine chan c e of being engaged.

(8) In paragraph (7), “the relevant period” means –

(a) in the case of a person retaining worker status pursuant to paragraph (2)(b), a continuous period of six months;

(b) in the case of a jobseeker, 91 days, minus the cumulative total of any days during which the person concerned previously enjoyed a right to reside as a jobseeker, not including any days prior to a continuous absence from the United Kingdom of at least 12 months.

(9) Condition C applies where the person concerned has previously, enjoyed a right to reside under this regulation as a result of satisfying conditions A and B –

(a) in the case of a person to whom paragraph (2)(b) or (ba) applied, for at least six months; or

(b) in the case of a jobseeker, for at least 91 days in total,

unless the person concerned has, since enjoying the above right to reside, been continuously absent from the United Kingdom for at least 12 months.

(10) Condition C is that the person has had a period of absence from the United Kingdom .

(11) Where condition C applies –

(a) paragraph (7) does not apply; and

(b) condition B has effect as if “compelling” were inserted before “evidence”.

7. Family member

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

(a) his spouse or his civil partner;

(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.

…

10. "Family member who has retained the right of residence"

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

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

(a) he was a family member of a qualified person or of an EEA national with a permanent right of residence when the qualified person died;

(b) he resided in the United Kingdom in accordance with these Regulations for at least the year immediately before the death of the qualified person or the EEA national with a permanent right of residence; and

(c) he satisfies the condition in paragraph (6).

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

(a) he is the direct descendant of—

(i) a qualified person or an EEA national with a permanent right of residence who has died;

(ii) a person who ceased to be a qualified person on ceasing to reside in the United Kingdom ; or

(iii) the person who was the spouse or civil partner of the qualified person or EEA national with a permanent right of residence mentioned in sub-paragraph (i) when he died or is the spouse or civil partner of the person mentioned in sub-paragraph (ii); and

(b) he was attending an educational course in the United Kingdom immediately before the qualified person or the EEA national with a permanent right of residence died or ceased to be a qualified person and continues to attend such a course.

(4) A person satisfies the conditions in this paragraph if the person is the parent with actual custody of a child who satisfies the condition in paragraph (3).

(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 has custody of a child of the qualified person or the EEA national with a permanent right of residence;

(iii) the former spouse or civil partner of the qualified person or the EEA national with a permanent right of residence has the right of access to a child of the qualified person or the EEA national with a permanent right of residence, where the child is 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 as 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).

(7) In this regulation, “educational course” means a course within the scope of Article 12 of Council Regulation (EEC) No. 1612/68 on freedom of movement for workers.

(8) A person with a permanent right of residence under regulation 15 shall not become a family member who has retained the right of residence on the death or departure from the United Kingdom of the qualified person or the EEA national with a permanent right of residence or the termination of

the marriage or civil partnership, as the case may be, and a family member who has retained the right of residence shall cease to have that status on acquiring a permanent right of residence under regulation 15.”

C. Case law

14.
A significant case in the interpretation of the predecessor provision of Article 4 5 of the Treaty is Antonissen (R v Immigration Appeal Tribunal ex parte Antonissen) (C-292/89). In its 1991 judgment, the European Court interpreted Article 4 8 (as it then was) so as to include within its scope not only persons who are actually working or travelling to a Member State to accept job offers but also, in certain circumstances, those looking for work (“ jobseeker s”).

15.
It is necessary to set out the following provisions of the judgment:-

“3. Mr Antonissen arrived in the United Kingdom in October 1984. He had not yet found work there when, on 30 March 1987, he was sentenced by the Liverpool Crown Court to two terms of imprisonment for unlawful possession of cocaine and possession of that drug with intent to supply. He was released on parole on 21 December 1987.

…

5. Mr Antonissen lodged an appeal against the Secretary of State's decision with the Immigration Appeal Tribunal. Before the Tribunal Mr Antonissen argued that since he was a Community national he must qualify for the protection afforded by Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (Official Journal, English Special Edition 1963-1964, p. 117). The Tribunal took the view that, since he had been seeking employment in the United Kingdom for more than six months, he could no longer be treated as a Community worker and claim that the directive should apply in his case. The Tribunal based this part of its decision on paragraph 143 of the Statement of Changes in Immigration Rules (HC169), adopted pursuant to the 1971 Act, under which a national of a Member State may be deported if, after six months from admission to the United Kingdom, he has not yet found employment or is not carrying on any other occupation.

6. His appeal being dismissed, Mr Antonissen made an application for judicial review to the High Court of Justice, Queen's Bench Division, which stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

1. For the purpose of determining whether a national of a Member State is to be treated as a "worker" within the meaning of Article 48 of the EEC Treaty when seeking employment in the territory of another Member State so as to be immune from deportation save in accordance with Council Directive 64/221 of 25 February 1964, may the legislature of the second Member State provide that such a national may be required to leave the territory of that State (subject to appeal) if after six months from admission to that territory he has failed to enter employment?

2. In answering the foregoing question what weight if any is to be attached by a court or tribunal of a Member State to the declaration contained in the minutes of the meeting of the Council when the Council adopted Directive 68/360?'

...

8. By means of the questions submitted to the Court for a preliminary ruling the national court essentially seeks to establish whether it is contrary to the provisions of Community law governing the free movement of workers for the legislation of a Member State to provide that a national of another Member State who entered the first State in order to seek employment may be required to leave the territory of that State (subject to appeal) if he has not found employment there after six months.

9. In that connection it has been argued that, according to the strict wording of Article 48 of the Treaty, Community nationals are given the right to move freely within the territory of the Member States for the purpose only of accepting offers of employment actually made (Article 48(3)(a) and (b)) whilst the right to stay in the territory of a Member State is stated to be for the purpose of employment (Article 48(3)(c)).

10. Such an interpretation would exclude the right of a national of a Member State to move freely and to stay in the territory of the other Member States in order to seek employment there, and cannot be upheld.

11. Indeed, as the Court has consistently held, freedom of movement for workers forms one of the foundations of the Community and, consequently, the provisions laying down that freedom must be given a broad interpretation (see, in particular, the judgment of 3 June 1986 in Case 139/85 Kempf v Staatssecretaris van Justitie [1986] ECR 1741, paragraph 13).

12. Moreover, a strict interpretation of Article 48(3) would jeopardize the actual chances that a national of a Member State who is seeking employment will find it in another Member State , and would, as a result, make that provision ineffective.

13. It follows that Article 48(3) must be interpreted as enumerating, in a non-exhaustive way, certain rights benefiting nationals of Member States in the context of the free movement of workers and that that freedom also entails the right for nationals of Member States to move freely within the territory of the other Member States and to stay there for the purposes of seeking employment.

14. Moreover, that interpretation of the Treaty corresponds to that of the Community legislature, as appears from the provisions adopted in order to implement the principle of free movement, in particular Articles 1 and 5 of Regulation No 1612/68/EEC of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475), which presuppose that Community nationals are entitled to move in order to look for employment, and hence to stay, in another Member State.

15. It must therefore be ascertained whether the right, under Article 48 and the provisions of Regulation No 1612/68 (cited above), to stay in a Member State for the purposes of seeking employment can be subjected to a temporal limitation.

16. In that regard, it must be pointed out in the first place that the effectiveness of Article 48 is secured in so far as Community legislation or, in its absence, the legislation of a Member State gives persons concerned a reasonable time in which to apprise themselves, in the territory of the Member State concerned, of offers of employment corresponding to their occupational qualifications and to take, where appropriate, the necessary steps in order to be engaged.

...

21. In the absence of a Community provision prescribing the period during which Community nationals seeking employment in a Member State may stay there, a period of six months, such as that laid down in the national legislation at issue in the main proceedings, does not appear in principle to be insufficient to enable the persons concerned to apprise themselves, in the host Member State, of offers of employment corresponding to their occupational qualifications and to take, where appropriate, the necessary steps in order to be engaged and, therefore, does not jeopardize the effectiveness of the principle of free movement. However, if after the expiry of that period the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host Member State .

22. It must therefore be stated in reply to the questions submitted by the national court that it is not contrary to the provisions of Community law governing the free movement of workers for the legislation of a Member State to provide that a national of another Member State who entered the first State in order to seek employment may be required to leave the territory of that State (subject to appeal) if he has not found employment there after six months, unless the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged."

16.
The CJEU has continued to reaffirm Antonissen in later cases; eg. Io annidis [20 0 5] C-258/04.

17.
In Saint Prix v Secretary of State for Work and Pensions (Aire Centre, intervening) [2015] 1 CMLR 5 (Case C-507/12), the CJEU held that, in certain circumstances, a worker who became pregnant and ceased work as a result, attained the status of a worker after a reasonable period following the birth:-

"Consideration of the questions referred

24. By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether EU law, and in particular Article 45 TFEU and Article 7 of Directive 2004/38, are to be interpreted as meaning that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth, retains the status of 'worker' within the meaning of those articles.

…

26. In that regard, it is apparent from Article 1(a) of Directive 2004/38 that that directive is intended to set out the conditions governing the exercise of that right, which include, where residence is desired for a period of longer than three months, in particular the condition laid down in Article 7(1)(a) of that directive that Union citizens must be workers or self-employed persons in the host Member State (see, to that effect, Brey , C - 140/12, EU:C:2013:565, paragraph 53 and the case-law cited).

27. Article 7(3) of Directive 2004/38 provides that, for the purposes of paragraph 7(1)(a) of that directive, a Union citizen who is no longer a worker or self-employed person shall nevertheless retain the status of worker or self-employed person in specific cases, namely where he is temporarily unable to work as the result of an illness or accident, where, in certain situations, he is in involuntary unemployment, or where, under specified conditions, he embarks on vocational training.

28. However, Article 7(3) of Directive 2004/38 does not expressly envisage the case of a woman who is in a particular situation because of the physical constraints of the late stages of her pregnancy and the aftermath of childbirth.

29 . In that regard, the Court has consistently held that pregnancy must be clearly distinguished from illness, in that pregnancy is not in any way comparable with a pathological condition (see to that effect, inter alia, Webb , C - 32/93, EU:C:1994:300, paragraph 25 and the case-law cited).

30 . It follows that a woman in the situation of Ms Saint Prix, who temporarily gives up work because of the late stages of her pregnancy and the aftermath of childbirth, cannot be regarded as a person temporarily unable to work as the result of an illness, in accordance with Article 7(3)(a) of Directive 2004/38.

31 . However, it does not follow from either Article 7 of Directive 2004/38, considered as a whole, or from the other provisions of that directive, that, in such circumstances, a citizen of the Union who does not fulfil the conditions laid down in that article is, therefore, systematically deprived of the status of ‘worker’, within the meaning of Article 45 TFEU.

32 . The codification, sought by the directive, of the instruments of EU law existing prior to that directive, which expressly seeks to facilitate the exercise of the rights of Union citizens to move and reside freely within the territory of the Member States, cannot, by itself, limit the scope of the concept of worker within the meaning of the FEU Treaty.

33 . In that regard, it must be noted that, according to the settled case-law of the Court, the concept of ‘worker’, within the meaning of Article 45 TFEU, in so far as it defines the scope of a fundamental freedom provided for by the FEU Treaty, must be interpreted broadly (see, to that effect, N. , C - 46/12, EU:C:2013:97, paragraph 39 and the case-law cited).

34 . Accordingly, the Court has held that any national of a Member State, irrespective of his place of residence and of his nationality, who has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of his residence falls within the scope of Article 45 TFEU (see, inter alia, Ritter-Coulais , C - 152/03, EU:C:2006:123, paragraph 31, and Hartmann , C - 212/05, EU:C:2007:437, paragraph 17).

…

36. Consequently, and for the purposes of the present case, it must be pointed out that freedom of movement for workers entails the right for nationals of Member States to move freely within the territory of other Member States and to stay there for the purposes of seeking employment (see, inter alia, Antonissen , C - 292/89, EU:C:1991:80, paragraph 13).

37 . It follows that classification as a worker under Article 45 TFEU, and the rights deriving from such status, do not necessarily depend on the actual or continuing existence of an employment relationship (see, to that effect, Lair , 39/86, EU:C:1988:322, paragraphs 31 and 36).

…

46. If, by virtue of that protection, an absence for an important event such as pregnancy or childbirth does not affect the continuity of the five years of residence in the host Member State required for the granting of that right of residence, the physical constraints of the late stages of pregnancy and the immediate aftermath of childbirth, which require a woman to give up work temporarily, cannot, a fortiori, result in that woman losing her status as a worker.

47 . In the light of all the foregoing considerations, the answer to the questions referred for a preliminary ruling by the referring court is that Article 45 TFEU must be interpreted as meaning that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of

pregnancy and the aftermath of childbirth retains the status of ‘worker’, within the meaning of that article, provided she returns to work or finds another job within a reasonable period after the birth of her child.”

D. The findings of the First-tier Tribunal

18.
The First-tier Tribunal Judge was not persuaded that either Antonissen or St Prix assisted the appellant:-

“25. The case of Saint Prix can be distinguished on the facts because the issue was whether a pregnant woman who has had employment in the United Kingdom and remained resident in the UK but who temporarily gave up work because of pregnancy is to be considered a ‘worker’. This appellant has not provided satisfactory supporting evidence to show that she worked in the United Kingdom prior to leaving for India on 02 October 2011 or during her stay of about four months from March to July 2013 when there is evidence that during this short stay she claimed and received Jobseekers Allowance from 05 April 2013 until 27 June 2013. The appellant has claimed that her absences from the United Kingdom were involuntary but I find that her evidence [on] that is not supported by independent evidence falls far short of that required to make out a successful claim that she has come within the definition of worker within regulation 6 of the 2006 EEA Regulations at any specific time or that she has continuously come within that definition.

26. I find that the cases of Antonissen C-292/89 which concerned the free movement of workers can also be distinguished on the fact as can the other cases relied upon in the skeleton argument (Levin, Rinner-Kuhn and Megner). The appellant seeks retained rights and therefore has to provide the evidence specified in regulation 10 of the 2006 EEA Regulations with reference to regulation 6.”

19.
This led the judge to the following finding:-

“30. I find that by arriving in the United Kingdom in March 2014 after an absence of about eight months and registering as a Jobseeker four days before her divorce became absolute, and being in receipt of Jobseekers Allowance, the appellant has not discharged the burden of proof upon her to show that if she were an EEA national as at the date of dissolution of the marriage she would be a worker, a self-employed person or a self-sufficient person within the terms of regulation 6 of the 2006 EEA Regulations.”

E. Discussion

(a) The effect of Mr V’s naturalisation

20.
Two matters can be dealt with relatively shortly. The first concerns the status of Mr V . As we have seen, he is a Portuguese national, who became naturalised as a British citizen on 6 September 2006. Until the coming into force on 16 October 2012 of the relevant provision in the Immigration (European Economic Area) (Amendment) Regulations 2012) S.I. 2012/1547, the fact that a person (P) was both an EEA national and a British citizen did not preclude his or her family member (F) from being entitled to reside in the United Kingdom, pursuant to the 2006 Regulations . On 16 October 2012, however, the position changed; but Schedule 3 to the 2012 R egulations contained important transitional provisions:-

“ **Amendments to the definition of EEA national**

2.—(1) Where the right of a family member (“F”) to be admitted to, or reside in, the United Kingdom pursuant to the 2006 Regulations depends on the fact that a person (“P”) is an EEA national, P will, notwithstanding the effect of paragraph 1(d) of Schedule 1 to these Regulations, continue to be regarded as an EEA national for the purpose of the 2006 Regulations where the criteria in subparagraphs (2), (3) or (4) are met and for as long as they remain satisfied in accordance with subparagraph (5).

(2) The criterion in this subparagraph is met where F was on 16th July 2012 a person with a permanent right to reside in the United Kingdom under the 2006 Regulations.

…

(5) Where met, the criteria in subparagraph (2), (3) and (4) remain satisfied until the occurrence of the earliest of the following events—

…

(d) the date on which F ceases to be the family member of an EEA national;

… “

21.
It is not disputed that on 16 July 2012 the appellant was a person with a right to reside in the United Kingdom under the 2006 R egulations. As we have seen, the appellant was granted a residence card as the spouse of Mr V on 26 October 2009, which was valid until she ceased to be his family member upon pronouncement of the decree absolute of divorce on 29 April 2014. Accordingly, Mr V’s acquisition of British citizenship did not adversely affect the position.

22.
As it happens, there was no need for the appellant to invoke the transitional provisions of the 2012 Regulations. Although it was not cited to us, in Lounes v Secretary of State for the Home Department (Case C-165/16) the Grand Chamber held that , although the acquisition by the EU national of British citizenship meant that the third country national d id not have a derived right of residence under the 2004 Directive, the third country national was :

“ eligible for a derived right of residence in the United Kingdom under Article 21(1) [of the Treaty] , on conditions which must not be stricter than those provided for by Directive 2004/38 for the grant of such a right to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by settling in a Member State other than the Member State of which he is a national ” (paragraph 62).

(b) The relevance of domestic violence

23.
The second matter concerns the appellant’s allegation that she suffered domestic abuse at the hands of Mr V . The First-tier Tribunal Judge, at paragraph 31 of the decision, found that the appellant had not provided “sufficient, satisfactory evidence of domestic violence”. The appellant criticises that finding. She says it was not a matter that the respondent had put in issue, when refusing her application for a residence card in September 2015. The appellant accordingly contends th at it was procedurally unfair for the First-tier Tribunal Judge to take the point against her.

24.
At the hearing on 2 May 2018, Ms Asanovic developed this ground of appeal. She submitted, however, that the issue of domestic violence would become relevant only if this Tribunal were to find against the appellant on her primary submission, which is that, at the date of the decree absolute, the appellant fell to be treated as a "worker" for the purposes of Article 4 5 of the Treaty. In those circumstances, the Tribunal would, according to Ms Asanovic, have to make findings of fact, on proper notice, regarding the allegation of domestic violence, in order to decide whether the circumstances of the appellant fell within regulation 10(5)(iv) of the 2006 R egulations, such as to warrant the continuation of her right of residence in the United Kingdom. As can be seen, para graph (iv) gives as an instance of "partic ularly difficult circumstances" which might warrant the continuation of the right, the fact that the person concerned or another family member has "been a victim of domestic violence while the marriage … was subsisting".

25.
In fact, as the respondent's r ule 24 res ponse indicates, the question whether the appellant was the subject of domestic violence is, for this purpose, immaterial. It is common ground that the appellant satisfies r egulation 10(5)(d)(i) in that , prior to the initiation of divorce proceedings in October 2013, the appellant's marriage had lasted for at least three years (in fact, over five) and the appellant had resided in the United Kingdom for at least one year during the duration of the marriage (in fact, a total of over three years).

26.
The problem for the appellant is that the respondent contends (and the First-tier Tribunal found) that she does not satisfy the condition in paragraph (6) of regulation 10. If that is right , then whether the appellant comes within paragraph (5)(d)(i) or (iv) is beside the point, since she will not satisfy the condition in paragraph (5)(c), which requires her to satisfy "the condition in paragraph (6)".

(c) The correct date for determining whether the appellant retained a right of residence

27.
Although both parties a t the hearing were agreed that the date for determining whether the appellant met the requirements of Article 1 3 was the date of the decree absolute, we need to determine whether that is correct.

28.
In Baigazieva v Secretary of State for the Home Department [2018] EWCA Civ 1088 , Singh LJ observed that, in the light of the CJEU's judgment in NA v Secretary of State for the Home Department [2017] QB 109 , the respondent now accepts that, in order to meet the condition in regulation 10(2)(a) to have been the family member of a qualified person (within the meaning of regulation 6), it was sufficient for the person asserting the retained right of residence to show that the EEA national spouse/partner was a qualified person as at the date of the initiation of divorce proceedings, rather than at the date of decree absolute. The Court of Appeal accordingly granted permission to appeal in the case before it and allowed the appeal by consent, since the Upper Tribunal had found that the date of decree absolute was the operative date for this purpose.

29.
We are entirely satisfied that this development does not in any way affect the fact that the issue is whether the appellant retained a right of residence at the date of decree absolute. That is the point at which it becomes necessary to determine whether a right has been retained for the simple reason that it is at this point that the person concerned cease s to be a family member and so ceases to be able to

rely on the EU spouse or partner for his or her right to reside under Articles 7 and 8 of the 2004 Directive. Unless the former family member retains a right of residence at that point under Article 13, he or she will have no rights under the Directive/Regulations.

30.
Indeed, in Baigazieva, the date of decree absolute was acknowledged to be the point at which it became necessary to decide the issue. Plainly, it could not be earlier. As the Court noted, there is, however, a difference between the day by reference to which it is necessary to decide whether a right has been retained and the day or days by reference to which certain requirements m ust be met, in order to make that decision (paragraph s 14 and 15 of the judgment).

31.
We are also satisfied that t here is nothing in Baigazieva or the related CJEU judgment of NA to require us to conclude that the date for determining whether the appellant complied with the requirement to be a worker must be the date on which divorce proceedings were commenced. As we shall see, it would be very unfair on the appellant and others in her position if that were the position.

32.
The tenses used in regulation 10(5) and (6) are significant . Regulation 10(5)(a) and (b) are in the past tense, whereas regulation 10(6) and regulation 10(5)(c), which introduces sub-paragraph (6) , are in the present tense.

33.
In order to understand the significance of this , one needs to refer to the text of Article 14. Article 14.2 (a), (b), (c) and (d) set out requireme nts to be met in order to retain the right of residence. These requirements are essentially backward-looking in nature. So too, as we now know, is the requirement regarding the status of the qualified person.

34.
By contrast, the paragraph that follows sub-paragraph (d) (“Before acquiring the right of permanent residence …”) is of a present or ongoing nature. This is because a person who retains the right of residence has to be a worker/self-employed/self-sufficient and insured person (or a family member of such a person) at all times up to the point that he or she acquires the right of permanent residence; that is to say, acquires a right that is no longer retained from a previous relationship with a relevant EU citizen. In short, the meaning of the words “Before acquiring …” would perhaps be better conveyed in English by saying “Until the right of permanent residence has been acquired …”.

35.
Regulation 10(6) is how the United Kingdom has decided to give domestic legislative effect to that paragraph in Article 14. As w ill be seen, we conclude that regulation 10(6) does not give proper or at least sufficiently clear effect to that Article, so far as concerns what is meant by being a “worker”. But, so far as its temporal aspect is concerned, regulation 10(6) is entirely right. So far as the appellant is concerned, the requirements of that provision must be satisfied both on and after the date of the decree absolute.

(d) Was the appellant a worker?

36.

We are now able to turn to the key question in the appeal. At the time of the decree absolute, which is the point at which the condition in regulation 10(6)(a) has to be satisfied, was the appellant “a worker”?

37.
As can be seen from Antonissen , the judgments of the CJEU on the interpretation of what became Article 45 have subsequently found expression in Directive 2004/58/EC and in the domestic legislati ve provisions giving effect to that Directive which, in the case of the United Kingdom, w ere the 2006 Regulations and are now the Immigration (European Economic Area) Regulations 2016. Antonissen held, in effect, that what is now Article 45 encompasses not only those who are currently workers or who are travelling to an EU State to take up an offer of employment but also certain categories of jobseekers.

38.
Regulation 6 of the 2006 Regulations seeks to clarify what is meant by a jobseeker, as one of the categories of “qualified person”. In so doing, the regulation introduces a distinction between workers and jobseekers. Whilst such a distinction is necessary in order to reflect the conditions that case law and , subsequently , the 2004 Directive have placed upon job - seeking EU nationals, as regards their right of free movement, it means that the appellant faces a difficulty.

39.
The case of Saint Prix makes it clear that, notwithstanding the legislative process of codification of relevant case law, situations will continue to arise which call for further interpretation of Article 45. In St Prix , a woman who had ceased employment as a result of pregnancy could not bring herself within the terms of Article 7(3) of the 2004 Directive, which sets out (in purportedly exhaustive terms) the circumstances in which a Union citizen who is no longer a worker or self-employed person shall retain that status.

40.
Crucially, at paragraph 32 of its judgment, the CJEU stated in terms that the codification of case law contained in the 2004 Directive “cannot, by itself, limit the scope of the concept of worker within the meaning of the FEU Treaty”. Accordingly, notwithstanding that Ms Saint Prix could not bring comply with Article 7(3) of the Directive, the court held that:-

“Art. 45 TFEU must be interpreted as meaning that a woman who gives up work, or seeking work, because of her physical constraints at the late stages of pregnancy and the aftermath of childbirth retains the status of “worker”, within the meaning of that Article, provided she returns to work or finds another job within a reasonable period after the birth of her child.” (paragraph 47)

41.
The fact that regulation 10(6)(a) of the 2006 R egulations excludes a jobseeker is not fatal to the appellant’s argument. The definition of “worker” in regulation 4(1)(a) is “a worker within the meaning of Article 45 of the Treaty”. Thus, if the appellant can make good her contention that Article 45 falls to be construed as including a person in her position, she will satisfy regulation 10(6)(a) and, thus, regulation 10(5)(c).

42.
It is necessary to recall the purpose behind affording derived rights of residence to the family members of EU nationals. If those nationals were unable to bring their family members with them to another EU State, when travelling there for the purposes of work, then , in many cases at least, the

national woul d be less likely to go to that S tate for that purpose. The principle of free movement of workers would, as a result, be weakened. As the Grand Chamber put it in Lounes , “the purpose and justification of a derived right of residence are therefore based on the fact that a refusal to allow such a right would be such as to interfere, in particular, with that freedom and with the exercise of the rights which Article 21(1) TFEU affords the Union citizen concerned” (paragraph 48).

43.
The retention of rights of residence for family members in the event of the death of the EU national , or in the event of divorce from that national, can be explained in part on the basis that a family member may be much less likely to go with the EU national to the third party S tate, and make a life there, if the family member knew that, following death or divorce from th e EU national, he or she would be left without status in that country.

44.
It can also be explained as an aspect of the respect to be accorded to family life and human dignity. Recital (15) to the 2004 Directive states:

“(15) F amily members should be legally safeguarded in the event of 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 circumstances 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”.

45.
Viewed in this light, there is in our view a powerful reason why Article 45 of the Treaty must be interpreted as meaning that a family member who, at the date of decree absolute, is a jobseeker falls to be treated as a ”worker”. This is so, whether one looks at the matter solely by reference to the 2004 Directive or, as the Grand Chamber did in Lounes , through the prism of Article 21(1) of the Treaty. The approach adopted in Lounes leads to the same outcome because of the requirement that any conditions must not be stricter than those provided by the 2004 Directive.

46.
A failure to interpret Article 45 in this way would produce arbitrary and unjustified results. There may be a number of reasons why a woman does not work, during the curren cy of her marriage. If , when faced with divorce, she decides to seek work, whether through economic necessity or otherwise, and happens to find a job before the decree absolute , she would, on any view, satisfy the requirements of regulation 10(6)(a) , so as to retain her right of residence . If, however , she is still seeking employment when the decr ee absolute is pronounced, then according to the respondent, she cannot retain the right of residence. Not only is such a result perverse; we agree with Ms Asanovic that it would amount to indirect discrimination against women and thus be c ontrary to Articles 21 and 23 of the Charter of Fundamental Rights of the EU.

47.
All this is a cumulatively compelling reason for construing Article 45 in the way for which the appellant contends.

48.
We also t ake account of the fact that, at paragraph 33 of its judgment, the CJEU in Saint Prix stated that the concept of “worker” within the meaning of Article 45 “insofar as it defines the scope of a

fundamental freedom provided by the EU Treaty, must be interpreted broadly". In so saying, the CJEU was reiterating what had been said in previous cases.

49.
We return to the important paragraph in Article 1 3 that we considered in paragraph 34 above, which begins:

"Before acquiring a right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show they are workers or self-employed persons or that they have sufficient resources … . "

In this paragraph, there is no attempt to separate " jobseeker s" from the general category of "workers". This contrast s with the approach taken in regulation s 6(1) and 10(6) of the 2006 R egulations , which d raw a distinction between jobseeker s and workers, with the result that the respondent is able to argue that the concept of a jobseeker cannot be found within the expression "worker" in regulation 10(6)(a). It is that distinction which is c entral to the respondent's case.

50.
However , if, as we find, Article 45 must for the purposes of our case be interpreted as including jobseekers, then th is line of argument runs up against the problem that the definition of "worker" in regulation 4(1)(a) takes us directly to Article 45 of the Treaty ; see paragraph 41 above .

51.
It is true that the wording of r egulation 10(6)(a) uses the terminology found in the relevant paragraph of Article 1 3 of wo rkers, self-employed persons etc. The cr itical difference, how ever, is that Article 1 3 , unlike the 2006 Re gulations, does not interact with anything equivalent to regulation 6, which is where the respondent draws the distinction between workers and jobseekers. Thus, if one looks solely at the 2004 Directive, the only question is : wh at does Article 45 encompass ?

52.
We are aware that our finding involves giving a meaning to Article 45 as it applies to third country nationals who assert derived rights of residence . There is nothing novel in this. On the contrary, in Ruiz Zambrano [2012] QB 265, the CJEU interpreted Article 20 of the Treaty so as to confer, in certain circumstances, a derivative right of residence on third country nationals w h o are carers of dependant EU citizen children.

53.
In any event, we can detect no rational reason why the appellant should lose a retained right of residence merely because she had not obtained employment at the date of the decree absolute. If such a result were demanded by the wording of the relevant EU legislation, or by EU caselaw, we would , of course , be required to follow that legislation. But, as we have shown, that is not the position. The 2006 Regula tions are the problem. They did not correctly t ranspose the law on this issue . The sa me is true of the 2016 Regulations .

54.
We are conscious that our conclusion on the position of those, like the appellant, who are divorced from an EEA national raises the question of whether a family member who is a jobseeker at the date of the death of the EEA national should be treated in like manner. W hat we have said at paragraphs 42 to 44 above applies to this category also. Overall, we can see no reason to distinguish between these categories. On the contrary, to do so would be problematic.

(e) The appellant as jobseeker

55.
The respondent's case is that the appellant could not retain a right of residence at the date of her decree absolute , by reason of being a jobseeker. The respondent does not contend that the appellant was not a jobseeker at that date.

56.
Regulation 6 explains who jobseekers are . It does so compatibly with the Antonissen line of case law. Since the appellant is not an EEA national, it follows that, in the light of our findings, whether she was a jobseeker at the date of decree absolute falls to be determined by reference to regul ation 6, as if she were an EEA national present in the United Kingdom and seeking employment, after enjoying a right to reside (regulation 6(5)(b)). There is no justification for treating her any differently than an EEA national in this regard. As a result , the appellant would be treated as a jobseeker for 91 days from starting to seek employment, provided she was still looking for work and had a genuine chance of being employed. After that period, she would have to provide compelling evidence that she was continuing to seek such employment and had such a genuine chance being engaged (regulation 6(4) to (8)).

57.
As at the date of decree absolute, the appellant had been a jobseeker for 5 days. There is nothing to suggest that, at that point, she did not have a genuine chance of being e ngaged .

58.
Accordingly, we find as a fact that the appellant was a jobseeker at the date of decree absolute. She therefore retained on that date her right of residence under Article 13.

59.
As we have seen, the appellant secured employment within 6 months. In order to have kept her right of residence, she would have to have remained a jobseeker up to that point, which means that , after 91 days, she would have to have provided "compelling evidence" to the respondent, had the latter called into question her status as a jobseeker. Of course, this did not happen because the respondent did not consider the appellant's status as a jobseeker could assist her.

60.
At this juncture, we do not consider that this issue affects our decision to allow the appeal. In any event, in our view, the fact tha t the appel lant secured what has proved t o be durable employment constitutes the requisite compelling evidence.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. We set that decision aside and re-make the decision in the appeal by allowing it.

No anonymity direction is made.

Signed Date 15 July 2018

The Hon. Mr Justice Lane

President of the Upper Tribunal

Immigration and Asylum Chamber