Upper Tribunal
(Immigration and Asylum Chamber)

Munday (EEA decision: grounds of appeal) [2019] UKUT 00091(IAC)

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 27 November 2018	
	……

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

TATSANEE SRISUWAN MUNDAY

Appellant

and

IMMIGRATION OFFICER, COQUELLES

Respondent

Representation:

For the Appellant: Ms K McCarthy instructed by direct access
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

1. *In an appeal against an EEA decision under the Immigration (EEA) Regulations 2016, the sole ground of appeal is that the decision breaches the appellant's rights under the EU Treaties in respect of entry to and residence in the UK (sched 2, para 1).*

2. *Consequently, in such an appeal an appellant may not rely on human rights grounds in the absence of a s.120 notice and statement of additional grounds in which reliance is placed upon human rights or there has been an additional decision to refuse a human rights claim.*

DECISION AND REASONS

Background

1. The appellant is a citizen of Thailand who was born on 8 August 1967.

2. The appellant met a British Citizen, Mr Ian Munday in February 2007 and they formed a relationship. In 2008, Mr Munday began work at the European Commission in Belgium and he and the appellant, thereafter, resided in Belgium – Mr Munday as an EEA national exercising treaty rights and the appellant on the basis that she was in a durable relationship with him. Both were issued residence cards by the Belgian authorities.

3. In 2012, Mr Munday's employment in Belgium ended and he returned to the United Kingdom. The appellant came with him and was granted entry clearance as a visitor. Thereafter, Mr Munday lived and worked mainly in the UK and the appellant remained here with him.

4. Thereafter, in 2012 (or it may have been in 2014 it is not clear from the papers), Mr Munday returned to Belgium to work and was joined there by the appellant.

5. In 2015, Mr Munday's work in Belgium ended and he returned to the UK in order to take care of his ill mother. The appellant returned with him.

6. On their return in March 2015, the appellant (whom the judge accepted raised Surinder Singh at the border) was, in fact admitted as a visitor. Again, it is not entirely clear what period of leave she was granted but it would appear to have been until 18 April 2017.

7. Whilst in the UK, the appellant applied for a residence card on the basis of her relationship with Mr Munday but that was refused on 17 December 2015. The basis of that application was as a returning "family member" of a British Citizen who had been exercising Treaty rights in another EEA state, namely relying upon the principle in Surinder Singh. The application was refused under reg 9 of the Immigration (EEA) Regs 2006 (SI 2006/1003 as amended) because the appellant had failed to provide Mr Munday's passport and also because reg 9 (and the Surinder Singh principle) only applied to married partners. That conclusion had subsequently been shown to be erroneous, at least in part, by the CJEU's decision in SSHD v Banger (Case C-89/17) [2018] Imm AR 1205 (12 July 2018).

8. On 29 March 2016, the appellant and Mr Munday married in the UK.

9. In April 2016, a further application was made by the appellant for a residence card now as the spouse of Mr Munday. That application was refused in December 2016, again because Mr Munday's original passport was not submitted.

10. In March 2017, the appellant left the UK travelling to Europe and then subsequently back to Thailand. Mr Munday remained in the UK looking after his mother.

11. It would appear that thereafter, Mr Munday and the appellant decided that the appellant should again join Mr Munday in the UK. To that end, Mr Munday travelled to Amsterdam where he met the appellant and they both sought to enter the UK at Coquelles.

12. Although this was disputed, the judge accepted that the appellant again sought entry on the Surinder Singh principle and now reg 9 of the Immigration (EEA) Regulations 2016 (SI 2016/1052) ("the 2016 Regulations").

13. In a decision dated 22 March 2017, the Immigration Officer refused the appellant admission under reg 11 (read with reg 9) of the 2016 Regulations. The basis of that decision was three-fold. First, the appellant and Mr Munday had not been residing in an EEA country (in particular Belgium in respect of which they both held residence cards) since March 2015. Secondly, Mr Munday was not a "qualified person" within reg 6 (or at least as deemed to apply to him as a British Citizen for the purpose of reg 9) in the UK. Although this was not made explicit, I did not understand it to be disputed before me, that is because Mr Munday no longer works in the UK but rather looks after his ill mother. Thirdly, the Immigration Officer concluded that Mr Munday had not been exercising treaty rights in another EEA country as he had been residing in the UK since March 2015.

14. For those reasons, the Immigration Officer concluded that the appellant did not have a right to be admitted to the UK as the spouse of a British Citizen applying the Surinder Singh principle and reg 9 of the 2016 Regulations.

15. The decision noted that the appellant had a right of appeal under reg 36 of the 2016 Regulations but one that could only be exercised from outside the United Kingdom.

The Appeal to the First-tier Tribunal

16. Before Judge Powell, the appellant conceded that she could not succeed under the 2016 Regulations. Not surprisingly, the judge dismissed the appeal under the 2016 Regulations. That appears to have been on the basis that the Surinder Singh principle (and reg 9 of the 2016 Regulations) only applied to British Citizens and their spouses who returned to the UK immediately after the former had been exercising Treaty rights in another EEA country. It was the respondent's position, which Judge Powell accepted, that the 2016 Regulations did not apply to those who were unmarried and in a "durable relationship" immediately prior to returning to the UK after exercising Treaty rights in another EEA country. Here, the appellant and Mr Munday had returned to the UK in March 2015 immediately after Mr Munday had been exercising Treaty rights in Belgium. At that time, they were not married: they subsequently married in the UK on 29 March 2016. By the time of the decision in March 2017 when they entered the UK as a married couple, it could no longer be said that they did so immediately after Mr Munday had been exercising Treaty rights in Belgium.

17. Of course, the respondent's position that the Surinder Singh principle did not applying to an unmarried partner, does not survive the CJEU's decision in Banger unscathed. But Banger would only be relevant to a challenge to the earlier refusal of

a residence card in December 2015 and, perhaps, to the basis of the appellant's entry to the UK in March 2015 when she was admitted as a visitor. However, neither of those decisions was (or could be) challenged in the appeal heard by Judge Powell.

18. Instead, the focus of the appellant's submission made by Ms McCarthy (who represented the appellant before Judge Powell as she did before me) was that the appellant was entitled to rely upon Art 8 of the ECHR in the appeal.

19. Judge Powell rejected that submission and concluded that the appellant could not reply upon Art 8 for two reasons. First, he applied the Court of Appeal's decision in Amirteymour v SSHD [2017] EWCA Civ 353 that, in an appeal under the EEA Regulations (in that case reg 26 of the 2006 Regulations) an appellant could not rely upon Art 8 unless raised as a consequence of an s.120 notice or because a removal decision had been made against the appellant. Neither was the case in relation to this appellant and so Judge Powell concluded that the appellant could not rely upon Art 8. He rejected an argument, made by Ms McCarthy before him, that Amirteymour was distinguishable as the appellant had made a human rights claim. He rejected that premise. His reasons, dealing with the Upper Tribunal's decision in Bahinga [2018] UKUT 90 (IAC) is at paras 35–40 as follows:

> "35. Amirteymour decides that I cannot because the appeal in this case is specifically a right of appeal against an EEA decision (Regulation 26(1)). The regulation that gives the right of appeal does not create a general arena where arguments on immigration rules and human rights can be raised. The appellant did not make a distinct human rights application when she sought admission at Coquelles. The evidence is clear that she applied for admission on the basis of her assertion of the Surinder Singh principle.
>
> 36. **The decision in Bahinga** (r.22; human rights appeal: requirements) 2018 UKUT 90 does not assist the appellant is this case. As the headnote provides:
>
> > An application for leave or entry clearance may constitute a human rights claim, even if the applicant does not, in terms, raise human rights. In cases not covered by the respondent's guidance (whereby certain applications under the immigration rules will be treated as human rights claims), the application will constitute a human rights claim if, on the totality of the information supplied, the applicant is advancing a case which requires the caseworker to consider whether a discretionary decision under the rules needs to be taken by reference to ECHR issues (eg Article 8) or requires the caseworker to look beyond the rules and decide, if they are not satisfied, whether an Article 8 case is nevertheless being advanced.
> >
> > The issue of whether a human rights claim has been refused must be judged by reference to the decision said to constitute the refusal. An entry clearance manager's decision, in response to a notice of appeal, cannot, for this purpose, be part of the decision of the entry clearance officer.
> >
> > A person who has not made an application which constitutes a human rights claim cannot re-characterise that application by raising human rights issues in her grounds of appeal to the First-tier Tribunal.
>
> 37. The **Bahinga** principle applies, in my judgment, to applications made under the Immigration Rules and not under the 2016 Regulations, where the position is established by the decision in **Amirteymour**. There is nothing in **Bahinga** that could lead me to the view that **Amirteymour** is no longer good law.

38. Ms McCarthy invited me to distinguish **Amirteymour** on the basis that the appellant there had been applied for the issue of a residence card as confirmation of an existing rights to reside in the United Kingdom. The decision did not therefore involve the exclusion of a family member or the separation of a husband and wife.

39. I considered that submission carefully but I cannot accept it. The reasoning in **Amirteymour** appears to me to be that the right of appeal under regulation 26(1) is specifically a right of appeal against an EEA decision. In my judgment, if the appellant sought to rely on her family life with her husband outside of the 2016 Regulations she could and should have made an application either under, and in accordance with, Appendix FM of the Immigration Rules, or outside off the Rules, under Article 8 in the manner prescribed for making a human rights application.

40. In terms of his appeal therefore, I find that the only decision before me is one taken under the 2016 Regulations. The only appeal before me is one mounted under the 2016 Regulations. I find that I am not entitled to consider article 8 is this appeal."

20. In addition, Judge Powell went on to conclude that, even if he were wrong, and the appellant was in principle entitled to rely upon Art 8 of the ECHR, that was a "new matter" falling within s.85(5) of the Nationality, Immigration and Asylum Act 2002 (the "NIA" Act 2002) which could only be relied upon in the appeal if the Secretary of State had given consent which he had not done.

21. Judge Powell's reasoning is at para 48 – 54 as follows:

"48. The appellant's case at the border was for admission under the 2016 Regulations. Underlying her application was her family lie with her husband. But there is no evidence before me to show that the respondent was invited to consider the appellant's case against the requirements in Appendix FM or that he was provided with any evidence that might now be raised as part of an article 8 appeal.

49. Further, the appellant's evidence in this appeal does not include the evidence either the Secretary of State or the Tribunal would need to consider in order to assess whether the appellant met or meets the requirements of Appendix FM, which is a key stage in the overall assessment of proportionality under article 8.

50. Accordingly, even if I were able to entertain an article 8 appeal in this EEA appeal. I would need to consider whether the matters raised are new matters.

51. In this regard, I must and do follow **Mahmud (S.85 NIAA 2002 – 'new matters') [2017] UKUT 00488 (IAC)**, which provides:

Whether something is or is not a 'new matter' goes to the jurisdiction of the First-tier Tribunal in the appeal and the First-tier Tribunal must therefore determine for itself the issue.

A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal.

In practice, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82)1) or a statement made by the appellant under section 120. This requires the matter to

be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive.

52. In my judgment, even if article 8 was open to the appellant as a separate ground of appeal in this EEA appeal, I must treat is as a new matter notwithstanding that the relevance of Article 8 and family life is plain and obvious.

53. I am only permitted to proceed on a new matter if the Secretary of State consents. Mr Holt took instructions and the Secretary of State does not give that consent. I cannot therefore proceed: **Quiadoo (new matter; procedure/process) 2018 UKUT 00087 (IAC) applied**.

54. In light of the decisions I have made, which were discussed at the hearing, Ms McCarthy indicated that she intended to appeal against my decision that article 8 was not before me or, if it was, that I was wrong to treat it as a new matter and seek the Secretary of State's consent before determining the appeal."

22. Finally, Judge Powell rejected the appellant's application to adjourn the appeal pending the outcome of the CJEU's determination of Banger. At the date of the hearing, the judge had a copy of the Advocate General's opinion but there was no indication when the CJEU would decide the case. In fact, as we now know, the CJEU decided Banger just over two months later on 12 July 2018.

The Appeal to the Upper Tribunal

23. The appellant sought permission to appeal to the Upper Tribunal on a number of grounds.

24. First, the judge had been wrong to follow the decision in Amirteymour because the appellant's circumstances were distinguishable from those in Amirteymour as the appellant had made a human rights claim, namely to enter the UK on the basis of her family life with Mr Munday, and therefore, unlike in Amirteymour the appellant was in the same position as a person who was subject to removal and her Art 8 rights were engaged.

25. Secondly, the judge had been wrong to conclude that the Art 8 was a "new matter" under s.85(5) of the NIA Act 2002 since the claim based upon the interference with the appellant's family life with her husband was at the "very heart" of her application to enter the UK and was not a new, factually distinct, matter.

26. Thirdly, as a result of the CJEU's decision in Banger (although the grounds rely upon the opinion of the Advocate General) the appellant, as a partner in a durable relationship, was entitled to be considered on the Surinder Singh principle.

27. Fourthly, the judge had erred by failing to give full reason for not adjourning the appeal pending the CJEU's decision in Banger.

28. On 30 July 2018, the First-tier Tribunal (Judge Alis) granted the appellant permission to appeal. On 25 September 2018, the respondent filed a rule 24 notice seeking to uphold the judge's decision.

29. At the hearing before me, I heard detailed submissions from Ms McCarthy on behalf of the appellant and Mr Howells on behalf of the Immigration Officer. I am grateful to both representatives for their helpful submission in relation to a number of complex and difficult matters relating to the jurisdiction of the First-tier Tribunal and also in relation to the application of the Surinder Singh principle.

The Legal Framework

30. The relevant legal provisions dealing with the appellant's rights, if any, to enter the UK and to appeal to the First-tier Tribunal against an adverse decision, are set out in the 2016 Regulations and Part 5 of the NIA Act 2002 (in particular ss.82 and 84 – 86).

The Substantive Provisions

31. Regulation 11 deals with the right of admission of a "family member" of an EEA national. This provides in reg 11(2) as follows:

> "A person who is not an EEA national must be admitted to the United Kingdom if that person is –
>
> > (a) a family member of an EEA national and produces on arrival a valid passport and qualifying EEA State residence card, provided the conditions in Regulation 23(4) (family member of an EEA national must accompany or join an EEA national with the right to reside) are met…"

32. Regulation 23(4) provides that:

> "a person is not entitled to be admitted to the United Kingdom as the family member of an EEA national under regulation 11(2) unless, at the time of arrival –
>
> (a) that person is accompanying the EEA national or joining the EEA national in the United Kingdom; and
>
> (b) the EEA national has a right to reside."

33. Whilst a "spouse" is defined as "family member" of an EEA national (see reg 7(1)(a)), an unmarried partner in a durable relationship is not a "family member" under the 2016 Regulations but rather is a "extended family member" by virtue of reg 8(5). However, when issued with the appropriate documentation such a person would be "treated as a family member" by virtue of reg 7(3).

34. In the present case, the appellant was a "spouse" following her marriage to Mr Munday on 29 March 2016, i.e. at the date of the challenged decision. However, prior to that (as the judge accepted) the appellant was in a "durable relationship" with Mr Munday but had not been issued with residence documentation in the UK but had been in Belgium.

35. Of course, the rights of entry under reg 11(2) is for a "family member" of an "EEA national". Mr Munday, the appellant's spouse, is not an EEA national because he is a British Citizen (see reg 2(1) defining "EEA national"). However, the Surinder Singh principle recognised by the CJEU places the "family member" of a returning British Citizen, who has been exercising treaty rights in another member state, in the same position as a "family member" of an EEA national.

36. Regulation 9 seeks to give effect to the Surinder Singh principle applying the relevant provisions of the 2016 Regulations to a family member ("F") of a British Citizen ("BC") as though BC was an EEA national. So far as relevant reg 9 of the 2016 Regulations provides as follows:

> "**Family members of British citizens**
>
> 9.
>
> (1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member ("F") of a British citizen ("BC") as though the BC were an EEA national.
>
> (2) The conditions are that—
>
> (a) BC—
> (i) is residing in an EEA State as a worker, self-employed person, self-sufficient person or a student, or so resided immediately before returning to the United Kingdom; or
>
> (ii) has acquired the right of permanent residence in an EEA State;
>
> (b) F and BC resided together in the EEA State;
>
> (c) F and BC's residence in the EEA State was genuine.
>
> (d) F was a family member of BC during all or part of their joint residence in the EEA State; and
>
> (e) genuine family life was created or strengthened during their joint residence in the EEA State.
>
> (3) Factors relevant to whether residence in the EEA State is or was genuine include—
>
> (a) whether the centre of BC's life transferred to the EEA State;
>
> (b) the length of F and BC's joint residence in the EEA State;
>
> (c) the nature and quality of the F and BC's accommodation in the EEA State, and whether it is or was BC's principal residence;
>
> (d) the degree of F and BC's integration in the EEA State;
>
> (e) whether F's first lawful residence in the EU with BC was in the EEA State.
>
> (4) This regulation does not apply—
>
> (a) where the purpose of the residence in the EEA State was as a means for circumventing any immigration laws applying to non-EEA nationals to which F would otherwise be subject (such as any applicable requirement under the 1971 Act to have leave to enter or remain in the United Kingdom); or
>
> (b) to a person who is only eligible to be treated as a family member as a result of regulation 7(3) (extended family members treated as family members).

(5) Where these Regulations apply to F, BC is to be treated as holding a valid passport issued by an EEA State for the purposes of the application of these Regulations to F.

(6) …..

(7) For the purposes of determining whether, when treating the BC as an EEA national under these Regulations in accordance with paragraph (1), BC would be a qualified person—

(a) any requirement to have comprehensive sickness insurance cover in the United Kingdom still applies, save that it does not require the cover to extend to BC;

(b) in assessing whether BC can continue to be treated as a worker under regulation 6(2)(b) or (c), BC is not required to satisfy condition A;

(c) in assessing whether BC can be treated as a jobseeker as defined in regulation 6(1), BC is not required to satisfy conditions A and, where it would otherwise be relevant, condition C."

37. As will be clear from the wording of reg 9, the British Citizen must have been residing in another EEA state as a worker "immediately before returning to the United Kingdom" where the "family member" and the British Citizen both "resided together" (see reg 9(2)(a) and (b)). Further, in order to treat the British Citizen as an EEA national under the 2016 Regulations, the British Citizen, in effect, must be a "qualified person" in the UK. This is because the British Citizen (treated as a "EEA national") must have a "right to reside" in the UK (see reg.23(4)(b) set out above). In the present case that would only because the appellant's spouse, Mr Munday was a worker and hence a "qualified person". As is apparent from both the Immigration Officer's decision and Judge Powell's decision, Mr Munday did not fulfil that latter requirement when he and the appellant sought to enter the UK on 22 March 2017.

38. Equally, given that Mr Munday had not worked in Belgium since March 2015 (when they returned to the UK together), he could not meet the requirement in reg 9(2) that on returning to the UK on 22 March 2017 he had been "residing in an EEA state as a worker…immediately before returning to the United Kingdom (reg 9(2)(a)(i)). Further, at that time it also could not be said that the appellant and Mr Munday had "resided together in the EEA state" as they had not done so since March 2015 when they returned to the UK.

39. To the extent, therefore, that the appellant relied upon an EU basis for being admitted to the UK on 22 March 2017, she could not establish the right of admission, on a Surinder Singh basis, as the spouse of a returning British Citizen.

40. The fact that those provisions applied *mutatis mutandis* to a person who is in a "durable relationship" with a British Citizen, following the CJU's decision in Banger at least to the extent of requiring "an extensive examination" of the appellant's circumstances to justify refusing her admission on that basis, had no direct relevance to the decision now challenged made on 22 March 2017. The time for challenging in any appeal the earlier decisions in March 2015 and November 2015 when the

appellant was not yet married to Mr Munday, has long passed and formed no part of the present appeal proceedings.

41. I did not understand Ms McCarthy to argue otherwise although she maintained the relevance of that misapplication of the law at the time of the earlier decisions (in hindsight in the light of Banger) was a matter relevant under Art 8. That may well be so but, of course, it would only be relevant in these proceedings if the First-tier Tribunal were required, or entitled, to consider Art 8 of the ECHR.

The Appeal Provisions

42. On its face, the decision of 22 March 2017 is one taken under the 2016 Regulations. The decision is stated to be a refusal of "admission to the United Kingdom" in accordance with the 2016 Regulations. That is a "EEA decision" as defined in reg 2(1) which includes:

> "a decision under these Regulations that concerns –
>
> (a) a person's entitlement to be admitted to the United Kingdom; …"

43. The right of appeal is set out in reg 36, in particular reg 36(1) and (6) as follows:

> "**Appeal rights**
>
> 36.—(1) The subject of an EEA decision may appeal against that decision under these Regulations.
>
> ….
>
> (6) If a person claims to be entitled to a right to reside under regulation 9 (family members of British citizens), that person may not appeal without producing a valid passport and either—
>
> (a) an EEA family permit; or
>
> (b) a qualifying EEA State residence card; and
> (i) proof that the criteria to be a family member of the British citizen are met; and
>
> (ii) proof that the British citizen is residing, or did reside, in another EEA State as a worker, self-employed person, self-sufficient person or student."

44. By virtue of reg 37(1)(a), the right of appeal against an EEA decision refusing to admit a person to the United Kingdom may not be brought whilst the individual is in the UK, in other words there is only an out-of-country appeal.

45. The 2016 Regulations incorporate (sometimes with necessary amendment) certain of the appeal provisions in Part 5 of the NIA Act 2002.

46. By virtue of reg 36(10), the provisions in the NIA Act 2002 referred to in Schedule 2 to the 2016 Regulations have effect in any appeal under the 2016 Regulations. It is helpful to set out the entirety of Schedule 2, although for the purposes of this appeal para (1) of Schedule 2 is the most central. Schedule 2 provides as follows:

"1. The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal against a decision of the Secretary of State under section 82(1) of the 2002 Act (right of appeal to the Tribunal)—

section 84 (grounds of appeal), as though the sole permitted grounds of appeal were that the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom ("an EU ground of appeal");

section 85 (matters to be considered), as though—

(a) the references to a statement under section 120 of the 2002 Act include, but are not limited to, a statement under that section as applied by paragraph 2; and

(b) a "matter" in subsection (2) and a "new matter" in subsection (6) include a ground of appeal of a kind listed in section 84 of the 2002 Act and an EU ground of appeal;

section 86 (determination of appeal);

section 105(35) and any regulations made under that section; and

section 106(36) and any rules made pursuant to that section.

2. (1) Section 92(3) of the 2002 Act has effect as though an additional basis upon which an appeal under section 82(1)(b) of that Act (human rights claim appeal) must be brought from outside the United Kingdom were that—

(a) the claim to which that appeal relates arises from an EEA decision or the consequences of an EEA decision; and

(b) the removal of that person from the United Kingdom has been certified under regulation 33 (human rights considerations and interim orders to suspend removal).

(2) Section 120 of the 2002 Act applies to a person ("P") if an EEA decision has been taken or may be taken in respect of P and, accordingly, the Secretary of State or an immigration officer may by notice require a statement from P under subsection (2) of that section, and that notice has effect for the purpose of section 96(2) of the 2002 Act.

(3) Where section 120 of the 2002 Act so applies, it has effect as though—

(a) subsection (3) also provides that a statement under subsection (2) need not repeat reasons or grounds relating to the EEA decision under challenge previously advanced by P;

(b) subsection (5) also applies where P does not have a right to reside.

(4) For the purposes of an appeal brought under section 82(1) of the 2002 Act, subsections (2) and (6)(a) of section 85 (matters to be considered) have effect as though section 84 included a ground of appeal that the decision appealed against breaches the appellant's right under the EU Treaties in respect of entry into or residence in the United Kingdom.

3. Tribunal Procedure Rules made under section 22 of the Tribunals, Courts and Enforcement Act 2007 have effect in relation to appeals under these Regulations."

47. As will be clear, by virtue of para 1 of Sched 2 an appeal under the 2016 Regulations is treated as "if it were" an appeal against a decision under s.82(1) of the NIA Act 2002. Para 1 then goes on to apply ss.84 and 85 of the appeal provisions in the NIA Act 2002 with, in effect, amendments and applies s.86 as a whole.

48. Turning to those provisions in NIA Act 2002, the present provisions came into effect on 20 October 2014, subject to certain savings, as a result of s.15 of the Immigration Act 2014. They significantly change the appeal provisions that were previously contained within Part 5 of that Act.

49. Section 82 sets out the rights of appeal against three decisions:

(1) the refusal of a protection claim (s.82(1)(a));

(2) the refusal of a human rights claim (s.82(1)(b)); and

(3) a decision to revoke a person's protection status (s.82(1)(c).

50. Sub-section (2) of s.82 goes on to define what amounts to a refusal of a "protection claim" and "protection status". A "human rights claims" is not defined in s.82. but is, instead, defined in s.113, the interpretation section. That provides that a "human rights claim":

> "means a claim made by a person that to remove him from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under Section 6 of the Human Rights Act 1998 (c.42) (public authority not to act contrary to Convention)…"

51. Section 113 then goes on to exclude from the definition of a "human rights claim" any claim which, having regard to a former claim, is stated in the Immigration Rules to be disregarded for the purposes of Part 5 of the NIA Act 2002. In effect, when in force, this would be a decision under para 353 of the Immigration Rules that the "claim" did not amount to a "fresh claim".

52. It does not appear that the definition in s.113 which was substituted by the Immigration, Asylum and Nationality Act 2006 has been brought into force. However, the substance of the provision – leaving aside the "fresh claim" issued – is not a contentious definition. It was applied (without comment) by the Upper Tribunal in Baihinga [2018] UKUT 90 (IAC).

53. Section 84 sets out the "grounds of appeal" upon which an appeal against one of the three decision in s.82(1)(a)-(c) "must be brought". It provides as follows:

> "84 **Grounds of appeal**
>
> (1) An appeal under section 82(1)(a) (refusal of protection claim) must be brought on one or more of the following grounds -
>
> (a) that removal of the appellant from the United Kingdom would breach the united Kingdom's obligations under the Refugee Convention;

(b) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection.

(c) that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

(2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

(3) An appeal under section 82(1)(c) (revocation of protection status) must be brought on one or more of the following grounds –

(a) that the decision to revoke the appellant's protection status breaches the United Kingdom's obligations under the Refugee Convention;

(b) that the decision to revoke the appellant's protection status breaches the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection."

54. It follows from these provisions that an appeal against a refusal of a protection claim must be brought on one or more of the grounds that: (a) the appellant's removal would breach the Refugee Convention; (b) that the appellant's removal would breach the UK's obligation to a person granted humanitarian protection; and (c) the appellant's removal would be unlawful under s.6 of the Human Rights Act 1998, in other words that his removal would be contrary to the ECHR.

55. A refusal of a human rights claim must be brought on the sole ground that the decision is unlawful under s.6 of the Human Rights Act 1998. That means, in effect, that the decision would breach the individual's human rights protected under the ECHR.

56. Finally, an appeal against the revocation of protection status must be brought on one of the grounds that

(a) the decision to revoke that state breaches the UK's obligations under the Refugee Convention; and

(b) the decision to revoke the individual's protection status would breach the UK's obligations in relation to a person granted humanitarian protection.

57. Relevantly, therefore, to this appeal, s.82(1)(b) creates a right of appeal against a decision to refuse a human rights claim. It is not sufficient that a human rights claim has been made; the right of appeal only arises if the claim has been refused. Any such appeal can only be brought on the single ground that the decision would breach the individual's human rights protected by the ECHR.

58. Looking, for a moment, at the 'reading across' of the provision in ss.82 and 84 when the appeal is against an "EEA decision" under the 2016 Regulations, the effect of para 1 of Schedule 2 is as follows. First, whilst the appeal is treated "as if it were" an

appeal under s.82(1) of the NIA Act 2002, the only ground of appeal – and s.84 has to be read accordingly – is that:

> "the sole permitted grounds of appeal were that the decision breaches the appellant's rights under the EU treaties in respect of entry to or residence in the United Kingdom ('an EU ground of appeal')…".

59. Consequently, but subject to the effect of s.120 of the NIA Act 2002, an appeal against an EEA decision can only be brought and maintained on the basis of the decision being contrary to EU law.

60. Importantly, therefore, Schedule 2, reading across into appeals under the 2016 Regulations provisions in s.84, limits the grounds of appeal to a breach of EU law and does not contemplate a right of appeal based upon the decision being contrary to s.6 of the Human Rights Act, namely that the decision breaches the individual rights protected by the ECHR.

61. That is an important, and significant, limitation relevant to the appellant's case in this appeal that she was entitled to rely upon Art 8 of the ECHR in an appeal under the 2016 Regulations against an "EEA decision".

62. Section 85 of the NIA Act 2002 deals with "matters to be considered" by a Tribunal hearing an appeal under s.82. It provides as follows:

> "85 **Matters to be considered**
>
> (1) An appeal under section 82(1) against a decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).
>
> (2) If an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84 against the decision appealed against.
>
> (3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.
>
> (4) On an appeal under section 82(1) ...against a decision the Tribunal may consider …any matter which it thinks relevant to the substance of the decision, including … a matter arising after the date of the decision.
>
> (5) But the Tribunal must not consider a new mater unless the Secretary of State has given the Tribunal consent to do so.
>
> (6) A matter is a 'new matter' if –
>
> (a) It constitutes a ground of appeal of a kind listed in section 84, and
>
> (b) the Secretary of State has not previously considered the matter in the context of –
>
> (i) the decision mentioned in section 82(1), or
>
> (ii) a statement made by the appellant under section 120."

63. Two matters should be noted. First, an appeal under s.82(1) against a particular decision must be treated by the Tribunal as including an appeal against any other decision in respect of which a right of appeal under s.82(1) exists. Secondly, where in response to an s.120 notice, an appellant makes a statement raising "any matter" which "constitutes a ground of appeal" under s.84, the Tribunal must consider that matter. That is the subject to the 'new matter' provision in s.85(6).

64. Section 120 provides as follows:

> "120. **Requirement to state additional grounds for application etc.**
>
> (1) Subsection (2) applies to a person ('P') if –
>
> (a) P has made a protection claim or a human rights claim,
>
> (b) P has made an application to enter or remain in the United Kingdom, or
>
> (c) a decision to deport or remove P has been or may be taken.
>
> (2) The Secretary of State or an immigration officer may serve a notice on P requiring P to provide a stamen setting out –
>
> (a) P's reasons for wishes to enter or remain in the United Kingdom,
>
> (b) any grounds on which P should be permitted to enter or remain in the United Kingdom, and
>
> (c) any grounds on which P should not be removed from or required to leave the United Kingdom.
>
> (3) A statement under subsection (2) need not repeat reasons for grounds set out in –
>
> (a) P's protection or human rights claim.
>
> (b) the application mentioned in subsection (1)(b), or
>
> (c) an application to which the decision mentioned n subsection (1)(c) relates.
>
> (4). Subsection (5) applies to a person ("P") if P has previously been served with a notice under subsection (2) and –
>
> (a) P requires leave to enter or remain in the United Kingdom but does not have it, or
>
> (b) P has leave to enter or remain in the United Kingdom only by virtue of section 3C [] of the Immigration Act 1971 (continuation of leave pending decision or appeal).
>
> (5) Where P's circumstances have changed since the Secretary of State or an immigration officer was last made aware of them (whether in the application or claim mentioned in subsection (1) or in a statement under subsection (2) or this subsection) so that P has –
>
> (a) additional reasons for wishing to enter or remain in the United Kingdom,
>
> (b) additional grounds on which P should be permitted to enter or remain in the United Kingdom, or

> (c) additional grounds on which P should not be removed from or required to leave the United Kingdom, P must, as soon as reasonably practicable, provide a supplementary statement to the Secretary of State or an immigration officer setting out the new circumstances and the additional reasons or grounds.
>
> (6) In this section –
>
> 'human rights claim' and 'protection claim' have the same meanings as in Part 5; references to 'grounds' are to grounds on which an appeal under Part 5 may be brought (see section 84)."

65. Section 120 applies where the Secretary of State serves a notice on an individual who has, for example, made a protection claim or human rights claim requiring the individual to state any other reason why he wishes to enter or remain in the UK and any ground from which he should be permitted to enter or remain in the UK or should not be removed from the UK. This is the so-called 'One-Stop Notice' which results in a 'one-stop' appeal. In response to a notice from the Secretary of State or Immigration Officer, but only in such circumstances, the effect of s.120 read with s.85(2) is that the Tribunal is required to decide not only the issues raised directly by the appealable decision under s.82(1) but also the additional basis upon which the appellant wishes to enter or remain in the UK or the basis upon which he says he cannot lawfully be removed from the UK. The effect is to expand the jurisdiction of the Tribunal beyond the issues raised directly in respect of the appealable decision within s.82(1) and the ground upon which that decision may be challenged in appeal set out in s.84 (see, AS (Afghanistan) v SSHD [2009] EWCA Civ 1076).

66. The scope of the Tribunal jurisdiction is, however, limited as a result of the amendments to s.85 effected by the Immigration Act 2014 (s.15). The Tribunal must not consider a "new matter" as defined in s.85(6) unless the Secretary of State has consent to the Tribunal doing so (see s.85(5)). Without that consent (the refusal of which is only challengeable in judicial review proceedings), the Tribunal has no jurisdiction to deal with the "new matter" (see Quiadoo (new matter; procedure/process) 2018 UKUT 00087 (IAC)).

67. The matter is a "new matter" if it constitutes a ground of appeal of a kind listed in s.84 and has not previously been considered by the Secretary of State in reaching the decision appealed against under s.82(1) or, if a s.120 notice was served and a statement made by the appellant, it has not been considered by the Secretary of State in response to that statement. In Mahmud [2017] UKUT 00488 (IAC), the Upper Tribunal stated that the "matter" is the factual substance of a claim. They went on to determine, as set out in the headnote, that:

> "in practice, a new matter is a factual matrix which has previously been considered by the Secretary of State in the context of the decision in s.82(1) or a statement made by the appellant under s.120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence from an existing matter. The assessment will always fact sensitive."

68. So, bearing in mind that the "matter" must constitute a ground of appeal listed in s.84, it may be a previously unconsidered "matter" related to a new ground of appeal – for example, asylum grounds otherwise than in the context of an international

protection claim. Alternatively, a "matter" will be a "new matter" where, although it relates to a ground already relied upon and considered by the Secretary of State, it seeks to rely upon the factual matrix not previously considered – for example, where the human rights claim and decision related exclusively to the relationship between the appellant and a partner but now the appellant wishes to rely upon the additional facts that they have a child (see [48] of Mahmud).

69. In the context of appeals under the 2016 Regulations para 1 of Schedule 2 reads across the application of s.120 (para 2) and the definitions of "matter" or "new matter" in s.85(6) and includes, for those purposes, a ground of appeal listed in s.84 as well as an EU ground of appeal (see, Oksuzoglu (EEA appeal - "new matter") [2018] UKUT 385 (IAC)).

70. Consequently, in an appeal under the 2016 Regulations, a new matter will, for example, even in a case where a s.120 notice statement has been made, include any of the grounds relied upon in s.84 and any distinct factual matrix relied upon (not previously considered) as a base upon which the appellant now claims to be entitled to enter the UK or not be removed from the UK by virtue of EU law. An example of the latter would be where, for example, the original claim and decision related to the appellant's right to reside in the UK as the spouse of an EEA national but subsequently, in response to a s.120 notice, the individual relies for the first time upon a derivative right as the primary carer of an EU national child (see, by analogy Oksuzoglu at [15]).

71. For completeness, s.86 (considerably truncated by its amendments by the Immigration Act 2014) provides as follows:

> "86. **Determination of appeal**
>
> (1) This section applies on an appeal under section 82(1)…
>
> (2) the Tribunal must determine –
>
> (a) any matter raised as a ground of appeal .. and
>
> (b) any matter which section 85 requires it to consider.
>
> …"

Discussion

72. With that legislative framework in mind, I turn now to consider the appellant's arguments in this appeal.

73. The central decision to the judge's conclusion that he could not consider Art 8 of the ECHR in this appeal is the Court of Appeal's decision in Amirteymour. That case is, on its face, opposed to the appellant's position in this appeal. Ms McCarthy sought to distinguish both before Judge Powell and in her submissions in the Upper Tribunal.

74. In Amirteymour, the claimant applied for a derivative residence card as confirmation of his right of residence in the UK under EU law as the primary carer of his daughter

who was a British Citizen. The claim relied upon the CJEU's decision in Ruiz Zambrano (Case C-34/09) [2012] QB 265 and under the 2006 EEA Regulations. Following a decision to refuse to issue the appellant with a derivative residence card, the claimant appealed to the First-tier Tribunal against the adverse "EEA decision" under the 2006 Regulations. Before the judge, however, the claimant no longer relied upon his claim under the EEA Regulations but, instead, relied solely upon Art 8 of the ECHR. He raised this issue, for the first time, in his grounds of appeal to the First-tier Tribunal. The Secretary of State had not issued a s.120 notice and so there was no relevant statement, to which s.85(2) applied, requiring the Tribunal to consider the basis of the claimant's case under Art 8 of the ECHR.

75. The Court of Appeal held that, in the absence of s.120 notice and additional statement in response or in the absence of a removal decision, the Tribunal had no jurisdiction in an appeal under the 2006 EEA Regulations to consider Art 8 of the ECHR. Beatson LJ (with whom Ryder and Sales LJJ agreed) said this at [27]:

> "In my judgment, the natural meaning of the phrase "may appeal under these Regulations against an EEA decision", as used in regulation 26(1), is that the appeal right thereby created is in respect of an EEA decision and is to proceed by reference to grounds of claim and grounds of appeal of a kind recognised as creating entitlements under the Regulations themselves (reflecting, as they do, entitlements under EU law). This interpretation means that it was not within the jurisdiction of the FTT in this case to allow the appellant to introduce in his appeal under regulation 26 a claim directed to the exercise of the Secretary of State's discretionary powers under the 1971 Act and based upon Article 8."

76. The court recognised that the position would be otherwise if there had been a s.120 notice in which the claimant relied upon his Art 8 right or there had been a removal decision (see [34] and [36]).

77. The decision of the Court of Appeal was, of course, based upon the 2006 Regulations and the provisions in Part 5 of the NIA Act 2002 which were in force prior to July 2014. There have been significant amendments both in the 2016 Regulations, and, as has been seen, to Part 5 of the NIA Act 2002. However, those amendments only strengthen the position taken by the Court of Appeal; itself following the earlier decision of the Court of Appeal in TY (Sri Lanka) v SSHD [2015] EWCA Civ 1233.

78. First, the Court of Appeal's view that the right of appeal under (then) reg 26(1) was restricted to an appeal against the "EEA decision" and did not create a right of appeal against any other kind of decision is equally applicable to reg 36(1) of the 2016 Regulations which are in essentially the same terms. At [26] Beatson LJ said this:

> "A right of appeal under regulation 26(1) is only a right to appeal "against an EEA decision". Regulation 26(1) creates no right of appeal against any other kind of decision. In particular, it does not create a right of appeal in relation to a claim for leave to enter or remain under the Immigration Rules or by exercise of the Secretary of State's discretion by reference to Article 8. Where the Secretary of State makes a relevant decision by reference to the Immigration Rules or Article 8, that is an "immigration decision" with a separate right of appeal under section 82(1)."

79. Secondly, the terms of Schedule 2 to the 2016 Regulations (reflecting the previously amended terms of Schedule 1 to the 2006 Regulations from 5 April 2015 but which

were not in force at the time of Amirteymour) restrict the individual's appeal against a decision under the 2016 Regulations to the "sole" ground of appeal, namely that the decision breaches the appellant's right under the EU treaties.

80. At the time of Amirteymour, Schedule 1 to the 2006 Regulations read across into appeals under the 2006 Regulations the more extensive grounds of appeal found in the (then) s.84(1) of the NIA Act 2002 with the exception of paras (a) and (f). These grounds included, therefore, that the decision was unlawful as it breached the individual rights under the ECHR or that his removal in consequence of the decision would breach his rights under the ECHR. Despite, therefore, the broader range of grounds then read across from s.84(1) (with the exception of paras (a) and (f) concerned with claims based upon the Immigration Rules) the Court of Appeal, nevertheless, interpreted the legislative structure when an appeal was brought against an "EEA decision" as not permitting reliance upon Art 8 of the ECHR or indeed any other human rights ground. In the light of the amended terms of Schedule 2, para 1 to the 2016 Regulations, in the absence of a s.120 notice and statement in response, it is, in my judgment, impossible to see how an individual in an appeal under those Regulations can rely upon his or her human rights. The necessary ground is simply not part of the legislative framework applicable to that individual's appeal.

81. That the "sole" ground of appeal under the 2016 Regulations against an "EEA decision" is the EU ground, appears to mean that, even when there is an EEA removal decision, an individual cannot rely upon any of the 'other' grounds in s.84 in the absence of a s.120 notice. To that extent, the more restrictive wording of para 1 to Sched 2, which was not in effect at the time of Amirteymour, may eliminate one of the two situations envisaged by Beatson LJ (under the earlier unamended provisions of the 2006 Regulations) where an individual was not restricted to the EU ground in an appeal against an "EEA decision".

82. Ms McCarthy sought to distinguish Amirteymour on two bases. First, she submitted that the claimant in that case was not subject to a decision which engages Art 8 rights. He was not subject to removal. By contrast, the decision to which the appellant is subject – namely the refusal to admit her to in the UK with her husband – directly interfered with her Art 8 right.

83. Even if that is a sustainable distinction, and I have considerable doubt as to whether it is, it cannot override legislative framework which, in the absence of a s.120 notice, denies to an individual appealing against an "EEA decision" under the 2016 Regulations any other ground of appeal apart from the "EU ground" of appeal. Schedule 2, para 1 of the 2016 Regulations is plain and unequivocal, s.84 has to be read as though the "sole permitted grounds of appeal" are that the decision breaches the individual's EU rights.

84. Secondly, Ms McCarthy submitted that, unlike in Amirteymour, the appellant had made a human rights claim when she sought entry to the UK. In that regard, she relied upon the Upper Tribunal's decision in Baihinga. It was not necessary, she submitted, for the appellant to have expressly referred to Art 8 or her human rights if the substance of her application to enter the UK constituted a human rights claim.

She relied, in particular upon para 2 of the judicial headnote of Baihinga in the following terms:

> "2. An application for leave or entry clearance may constitute a human rights claim, even if the applicant does not, in terms, raise human rights. In cases not covered by the respondent's guidance (whereby certain applications under the immigration rules will be treated as human rights claims), the application will constitute a human rights claim if, on the totality of the information supplied, the applicant is advancing a case which requires the caseworker to consider whether a discretionary decision under the rules needs to be taken by reference to ECHR issues (eg Article 8) or requires the caseworker to look beyond the rules and decide, if they are not satisfied, whether an Article 8 case is nevertheless being advanced.

85. That approach, with respect, is no doubt correct. The "human rights claim" need not explicitly refer to the relevant human right provided, seen as a whole, the individual's claim relies upon a basis which seeks to invoke and rely upon their human rights (see also, R (Alighanbari) v SSHD [2013] EWHC 1818 (Admin) at [66] – [72]).

86. Judge Powell found that the appellant had not made a human rights claim but rather had relied exclusively upon her right to enter the UK on a Surinder Singh basis (see [35]). I was not taken to any material which casts any further illumination light upon this issue. Nothing I was shown suggested that Judge Powell was wrong.

87. However, even assuming that the appellant had made a human rights claim, that did not give the First-tier Tribunal jurisdiction to consider the appellant's putative claim under Art 8. In itself, the fact that the appellant had made a human rights claim takes nothing away from the reasoning of the Court of Appeal on the limited jurisdiction of the First-tier Tribunal. The sole ground of appeal against an "EEA decision" is the EU ground of appeal. The position would otherwise if the Immigration Officer had treated it as a human rights claim and had made a decision to refuse that claim. Had he done so, then the appellant would have a right of appeal against that additional decision under s.82(1)(b) of the NIA Act 2002 on the ground that the decision not to admit her was unlawful under s.6 of the Human Rights Act 1998, namely it breached Art 8 of the ECHR. By virtue of s.85(1) of the NIA Act 2002 the Tribunal would be required to treat the appellant as appealing against both decisions.

88. However, it is clear that the Immigration Officer decision of 22 March 2017 was taken solely under the 2016 Regulations. Those are the terms of the "Notice of Immigration Decision" and nothing in the body of the notice relates to anything other than a decision under the 2016 Regulations. As the Upper Tribunal recognised in Baihinga, whether a human rights claim has been refused, and therefore gives rise to an appealable decision under s.82(1), must be judged by "reference to the decision which is said to constitute the refusal of a [human] claim" (see [35]). Such a decision cannot be discerned from an ECM's review (subsequently undertaken) or simply by being raised before the Tribunal in grounds of appeal. Unlike in Baihinga, here the Immigration Officer made no reference to the Immigration Rules or exercising discretion to admit the appellant (see [33] of Baihinga).

89. Although I was not specifically referred to s.85(4) of the NIA Act 2002, it cannot, in my judgment, be prayed in aid by the appellant to confer upon the First-tier Tribunal jurisdiction to consider Art 8 of the ECHR. That is because it only permits evidence relating to any matter relevant to the "substance" of the decision. Here, the decision is the "EEA decision" to which the Art 8 claim was irrelevant. That was recognised by Beatson LJ in Amirteymour at [48] when he said this:

> "As so adjusted, section 85(4) provides that on an appeal under regulation 26, the Tribunal 'may consider evidence about any matter which it thinks relevant to the substance of the [EEA decision] …'. In this case, the substance of the EEA decision against the appellant was that he had no entitlement to be in the UK pursuant to the principle of EU law set out in *Ruiz Zambrano* and that he had no entitlement under regulations 15A and 18A to be issued with a derivative residence card: compare *AS (Afghanistan)* at [80] (Moore-Bick LJ) and [113] (Sullivan LJ), as approved in the judgment of Lord Carnwath JSC in *Patel v Secretary of State for the Home Department* at [38]-[41]. The appellant's new Art 8 claim was irrelevant to those matters."

90. In summary, therefore, the appellant's appeal was against an EEA decision made under the 2016 Regulations, in the absence of a s.120 notice and statement of additional grounds raising a human rights claim or an addition decision refusing a human rights claim, the Tribunal was restricted to considering the legality of the EEA decision solely on EU grounds. In my judgment, for these reasons Judge Powell was correct to conclude that he had no jurisdiction to consider the appellant's claim that not to admit her to the UK was a breach of Art 8 of the ECHR.

The 'New Matter' Issue

91. Judge Powell also found that the appellant's case based upon Art 8 was, in any event a "new matter" which could only be raised before the Tribunal if the Secretary of State consented and he had not done so (see s.85(5) and (6)).

92. In her oral submissions, Ms McCarthy accepted that the Art. 8 matter was a "new matter". As I understood from Ms McCarthy, the appellant is contemplating (or has already begun) judicial review proceedings to challenge the Secretary of State's refusal to consent to the "new matter" being raised before the First-tier Tribunal.

93. As a matter of logic, however, if the First-tier Tribunal had no jurisdiction to consider Art 8 of the ECHR then it is irrelevant whether that issue is characterised as a "new matter" or not. Logically, a "new matter" must be a subset of the 'matters' which it is in principle within the Tribunal's jurisdiction to consider. Absent a s.120 notice and additional statement relying upon Art 8, this was not a "matter" within the Tribunal's jurisdiction at all. If it were, in my judgment, Judge Powell was clearly correct to conclude that by relying upon her "family life" under Art 8 the appellant was raising a "new matter" in that it fell within a ground of appeal listed in s.84 (as amended by para 1 of Schedule 1 to the 2016 Regulations) and it amounted to a different "factual matrix" in substance from her claim to be entitled to enter the UK simply as a spouse of a returning British Citizen on a Surinder Singh basis (see Mahmud). In the latter case, the appellant relied simply upon the relationship and the EU law. In the former case, she would be relying upon the substance of her relationship, the impact of the refusal to admit her upon that relationship and the proportionality of excluding her. That, in my judgment, would have amounted to a

"new matter" (see the analogous reasoning of Beatson LJ in Amirteymour at [48] set out above). But, as I have already said, the jurisdiction point makes the 'new matter' issue moot.

Other Issues

94. First, there is the appellant's case based upon EU law. I was referred, as I have already indicated, to the CJEU's decision in Banger and its conclusion that a person in a "durable relationship" was entitled to rely upon the Surinder Singh principle at least to the extent that any decision concerning their admission to the UK with a returning British Citizen required "an extensive examination of the applicant's personal circumstances and to justify any denial of entry or residence". The basis of that conclusion is that, by analogy to the position of 'other family members' under the Qualification Directive, when applied to rights derived from Art 21(1), TFEU, a person such as the appellant (in a durable relationship) with a British Citizen is entitled to have their entry (and residence) "facilitated" following an extensive examination of their circumstances.

95. The problem with that contention in this case is that by the time of the relevant decision the appellant was Mr Munday's spouse. Banger was, as a consequence, of no relevance to her circumstances. Instead, her right of entry, if any, derived from the Surinder Singh principle domestically enshrined in reg 9 of the 2016 Regulations. On that basis, as I pointed out earlier, she could not succeed. First, Mr Munday was not, at the time of the decision, a British Citizen returning from residing in an EEA state where he had been a worker. He had left Belgium (together with the appellant) in March 2015 and had not lived or worked there since. Secondly, putting him in the position as if he were an EEA national in the UK, he could not show that he was a 'qualified person' in the UK since he was not working.

96. The fact that when the appellant had previously sought admission for a residence card her circumstance more naturally fell within the Surinder Singh principle does not, in any way, demonstrate that the present EEA decision appealed against was not in accordance with EU law. It was. Of course, if the appellant now makes an Art 8 claim then all her circumstances (including, at least potentially, an argument that EU law had previously been wrongly applied to her) would be considered. However, for the reasons I have given, that issue did not fall within the jurisdiction of the First-tier Tribunal.

97. The final issue concerns the judge's decision not to adjourn the First-tier proceedings in order to await the outcome of the CJEU's ruling in Banger. Given the irrelevance of Banger to the appellant's appeal, as a spouse relying upon Surinder Singh, it is difficult, if not impossible, to contemplate why the judge should have granted an adjournment. In any event, given that it was unknown when the CJEU would reach a decision, the judge was fully entitled to continue to hear the appeal and apply the law as it was understood to be prior to Banger. His reasons at paras 55 and 56 are entirely persuasive for not granting an adjournment.

Decision

98. Consequently the decision of the First-tier Tribunal to dismiss the appellant's appeal did not involve the making of any error of law. The decision stands.

99. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

24 January 2019

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed and therefore there can be no fee award.

Signed

A Grubb
Judge of the Upper Tribunal

24 January 2019