



UT Neutral citation number: [2022] UKUT 00278 (IAC)

Ali & Ors (EU Law equivalence; §276B; s3C)

Upper Tribunal
(Immigration and Asylum Chamber)

Heard at Field House

THE IMMIGRATION ACTS

Heard on 7 February 2022
Promulgated on 25 April 2022

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

(1) MD YOUSUF ALI
(2) HASINA AKHTER
(3) EASHA BINTE YOUSUF
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Rajiv Sharma, instructed by Wildan Legal Solicitors

For the Respondent: David Clarke, Senior Presenting Officer

The EU Law principle of equivalence does not require that a person who applied for a residence card as an extended family member of an EEA national before the expiry of his leave to remain should be treated as if section 3C of the 1971 Act applied to him in the same way it would if he had made an in-time application for further leave to remain.

DECISION AND REASONS

1. The appellants are Bangladeshi nationals. They are husband, wife and daughter. They appeal, with permission granted by First-tier Tribunal Judge Saffer, against the decision of First-tier Tribunal Judge Richards-Clarke (“the judge”).
2. By his decision of 26 May 2021, the judge dismissed the appellants’ appeals against the refusal of their human rights claims. The judge found that the first appellant did not meet the requirements of paragraph 276B of the Immigration Rules and dismissed the appeal of each appellant on Article 8 ECHR grounds.

A. BACKGROUND

3. The first appellant entered the United Kingdom on 3 November 2009. He held entry clearance as a Tier 4 (General) Student Migrant. The entry clearance was valid from 14 October 2009 to 31 October 2014 and conferred leave to enter until the latter date. Before the expiry of his leave, the first appellant made an application for further leave under Tier 4. Further leave was granted until 28 August 2015.
4. The second appellant entered the United Kingdom on 21 November 2012. She held entry clearance as a Tier 4 (General) Student Migrant. The entry clearance was valid from 11 November 2011 to 26 March 2014 and conferred leave to enter until the latter date. Before the expiry of her leave, the second appellant made an application for leave to remain as the dependent spouse of the first appellant. She was granted leave in line with his, expiring on 28 August 2015.
5. The third appellant (who was born on 25 September 2005) entered the United Kingdom on 3 July 2015. She held entry clearance as the dependent child of a Tier 4 (General) Student Migrant. The entry clearance was valid until 28 August 2015 and conferred leave to enter until that date.

The Appellants’ EEA Claims

6. On 27 August 2015, and therefore before the expiry of their leave to enter or remain, the appellants made applications for residence cards as the extended family members of an EEA national, under regulations 8 and 17 of the Immigration (European Economic Area) Regulations 2006 (“the 2006 Regulations”). It was submitted in that application that the appellants were the extended family members of the second appellant’s brother-in-law, Manunur Rashid. Mr Rashid was said to be the spouse of the second appellant’s cousin, Anu Lipe. Mr Rashid was said to be an Italian national who was exercising his Treaty Rights in the United Kingdom.

7. The appellants' EEA applications were refused on 8 February 2016. The respondent did not accept that the second appellant was related to Mr Rashid as claimed; that Mr Rashid was a qualified person; or that the appellants had established prior or present dependency or membership of Mr Rashid's household.
8. The appellants appealed against the EEA decisions. Their appeals were initially dismissed by First-tier Tribunal Judge R Hussain but his decision was set aside on procedural grounds, as the appellants' address had not been updated in the Tribunal's records. The appeal returned before First-tier Tribunal Judge Mitchell on 2 April 2019. The appellants did not attend. The judge refused a renewed application to adjourn based on the second appellant's ill-health. He went on to dismiss the appeal, finding that there was no evidence to address the three grounds of refusal.
9. The appellants sought permission to appeal against Judge Mitchell's decision. The application was refused by the First-tier Tribunal and then by Upper Tribunal Judge Mandalia. Judge Mandalia did not consider it arguable that Judge Mitchell's decision to refuse the adjournment request and to proceed with the appeal in the appellants' absence was unfair. His decision was sent to the parties on 17 October 2019 and the appellants' appeal rights were exhausted at that point.

The Long Residence Claim

10. On 22 October 2019, the first appellant made his application for ILR on grounds of long residence, submitting that he had accrued ten years' continuous lawful residence in the United Kingdom and that he satisfied paragraph 276B of the Immigration Rules as a result. The second and third appellants made simultaneous applications for leave to remain as the spouse and child of a settled person (it being anticipated that the first appellant would acquire that status upon his own application being granted). The success or failure of the second and third appellants' applications under the Immigration Rules were therefore contingent upon the first appellant's application under paragraph 276B.
11. The appellants' applications were detailed in two letters from their previous representatives. The first letter dealt with the first appellant's circumstances. The second letter dealt with the second and third appellants' circumstances. The first letter set out the first appellant's immigration history and the terms of paragraph 276B of the Immigration Rules before continuing as follows:

The Secretary of State may have concern about the applicant's application for EEA residence card that was made on 27 August 2015. He has spent subsequent time in the UK as a non-EEA extended family member of an EEA national. Time spent in the UK can be countered [sic] as lawful residence for an EU or EEA national exercising their Treaty rights to reside in the UK (or their family members) in accordance with The Immigration (EEA) Regulations 2006/2016.

In the EEA Residence Card application the applicant has submitted that he is a family member [sic] an EEA national (Italy) Mr Mamunur Rashid and the EEA national has been exercising treaty rights in the UK. We are now submitting relevant birth certificates, marriage certificate, DNA test reports, various proofs

of addresses and Self Employment related documents of the EEA sponsor in support of this application. It is submitted that the EEA sponsor has been exercising Treaty Rights in the UK as a Self Employed person. We are submitting the relevant documents with this application in order to demonstrate that the EEA sponsor is a Qualified Person while the applicant's EEA residence card application was under consideration. As it were, the applicant's relevant period should be counted as lawful in the UK.

12. The respondent was unpersuaded by these submissions, or by the submissions in the letters which were directed to the appellants' human rights under Article 8 ECHR. In respect of the submission that the first appellant could establish ten years' continuous lawful residence in the UK, the respondent stated that section 3C of the Immigration Act 1971 was not engaged by an application under the EEA Regulations. She therefore concluded that the first appellant's presence in the United Kingdom had only been lawful between 3 November 2009 (his date of entry) and 28 August 2015 (the date on which his leave to remain expired). The remainder of the letter concerns the first appellant's actual or implied claims outwith paragraph 276B and I need not make any further reference to those conclusions, or to the corresponding conclusions in the separate decision which was sent to the second and third appellants

B. THE APPEAL TO THE FIRST-TIER TRIBUNAL

13. The appellants appealed to the First-tier Tribunal ("the FtT"). On 26 March 2021, pursuant to directions issued by the FtT, an Appeal Skeleton Argument settled by Mr Sharma of counsel was filed and served by the appellants. It was submitted in that skeleton argument that: (i) the decisions on the EEA residence card applications were demonstrably incorrect (albeit by reference to evidence which was not before Judge Mitchell); and (ii) that the period from 28 August 2015 was lawful residence for the purposes of paragraph 276B, or that it should be treated as such.
14. The latter submission was made on two bases. Mr Sharma relied, firstly, on what was said about time spent in the UK with a right to reside under the provisions of the EEA regulations in the respondent's *Long Residence Guidance*, version 16. He relied, secondly, on the principle of equivalence in European Union Law, and submitted that the respondent was not entitled to treat the first appellant, who had made an application which relied on EU Law, less favourably than a person who had made a similar application under domestic legislation. It was for that reason that it was submitted that the first appellant was in law to be treated as a person who had leave to remain for the requisite period. Submissions were also made in reliance on other provisions of the Immigration Rules and on Article 8 ECHR grounds more generally but, again, those submissions need not be traversed here, given the scope of the issues before the Upper Tribunal.
15. On 20 May 2021 (the day before the hearing in the FtT), the respondent settled a response to the appellants' skeleton argument. Mr Sharma contended, and I have no reason to doubt, that this response was only served on the morning of the hearing. In the response, the Secretary of State maintained the stance in the refusal letter as

regards the inapplicability of section 3C. She submitted that the appellants had been unsuccessful in their appeals against the EEA decisions and that the appeal had been correctly decided. The principle of equivalence was said to be 'completely irrelevant' to the appellants' case and the first appellant should not have been treated as someone who had leave to remain from 27 August 2015 to 17 October 2019. The remainder of the response concerned residual claims which are no longer live issues before me.

16. So it was that the appeal came before the judge, sitting in Newport, on 21 May 2021. The appellant was represented by Mr Sharma of counsel, as he is before me. The respondent was represented by a Presenting Officer (not Mr Clarke). The judge heard evidence from the first and second appellants and submissions from the representatives before reserving her decision.
17. In her reserved decision, the judge found that the first appellant could not meet the requirement for ten years' continuous lawful residence in paragraph 276B. In respect of the submission that the evidence before the Tribunal established that the appellants had been the extended family members of a qualified person in April 2019, the judge summarised her conclusions in this way:

[23] This evidence demonstrates that it is likely to a high degree of probability that the Second Appellant is the cousin of Mrs Anu Lipe as she has claimed. However, I am not satisfied that the evidence now produced demonstrates that the Second Appellant satisfies the requirements of the EEA (Immigration) Regulations 2006 as is submitted by Mr Sharma. I say this because the evidence before me does not support a finding that the "Anu" named in the DNA test report is the wife of the EEA national sponsor; the Appellants have not produced evidence of the Second Appellant's dependency on her EEA national sponsor in Bangladesh prior to her arrival in the United Kingdom and the Appellants have not produced evidence of the Second Appellant's dependency on her EEA national sponsor since her arrival in the United Kingdom in 2012. Rather the evidence before me is that the Second Appellant arrived in the United Kingdom in 2012 and that it was not until 2015 that the Appellants began to live with the EEA national sponsor. I am also not satisfied that the Second Appellant joined the EEA national sponsor in the United Kingdom. Nor am I satisfied that for the periods 2012 to 2015 the Second Appellant was dependent and/or continues to be dependent on the EEA national sponsor or a member of the household.

18. It was for these reasons that the judge refused to depart from Judge Mitchell's findings and rejected the submission that the appellants ought to have been granted residence cards in 2019. The judge therefore rejected the first submission made by Mr Sharma. As to the principle of equivalence, the judge found as follows, at [28] of her decision:

I do not consider that the Appellant's claim based on EU law that is for a residence card as an extended family member of an EEA national, has been treated less favourably than a claim based on national law. The reason that Section 3C does not extend leave where an application is made for a residence card under the Immigration (EEA) Regulations 2006 is because an application for

a residence card is not an application to extend or vary leave but a confirmation of rights under the EEA Regulations 2006. Section 3C Immigration Act 1971 does not exclude claims under EU law as is demonstrated by Section 3C(2)(ca)(cb) where leave is extended during any period when an appeal could be brought under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 against the decision on the application for variation. The problem with Mr Sharma's submission before me is that the reason that the Second Appellant's application has been treated differently is not that it was made under EU law but because it is not an application to vary or extend leave that falls within 3C Immigration Act 1971.

19. The remainder of the decision concerned other paragraphs of the Immigration Rules and Article 8 ECHR rights more widely, which are no longer in issue before me.

C. THE APPEAL TO THE UPPER TRIBUNAL

20. It was accepted in terms, at [15] of the grounds of appeal, that there was no legal error in the judge's finding that the appellants were not previously entitled to a residence card as Mr Rashid's extended family members. The single ground of appeal is that the judge erred in her consideration of the principle of equivalence and its application to those in the position of the first appellant. Judge Saffer considered the point to be arguable and granted permission to appeal.
21. In directions sent to the advocates on 4 February 2022, I requested that they be in a position to address me on the decisions in Total v HMRC [2018] UKSC 44; [2018] 1 WLR 4053 and AS (Ghana) v SSHD [2016] EWCA Civ 133; [2016] Imm AR 637.
22. Also shortly before the hearing, Mr Clarke filed and served full copies of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations") and the European (Withdrawal Agreement) Act 2020. At Mr Sharma's request, he clarified in writing that these materials were to be relied upon to counter the appellants' submission, made at [22] of the grounds of appeal, that s 3C(2)(ca) and (cb) were "inserted as a post Brexit measure to bring parity (or equivalence) between domestic claims for LTR and rights stemming from EU Law".
23. At the outset of the hearing, and in view of the (open) email correspondence which had been exchanged by Mr Sharma and Mr Clarke in the days leading up to the hearing, I asked Mr Sharma whether he was disadvantaged by the service of these statutory materials. He confirmed that he was not, and that he was in a position to proceed.
24. At my request, the advocates confirmed that it was their joint position that the United Kingdom's withdrawal from the European Union was irrelevant to the arguments in the appeal because it was the legal position between 28 August 2015 and 17 October 2019 which was relevant. It was agreed, therefore, that the first appellant should succeed in his appeal, on Article 8 ECHR grounds, if he could show that the judge had erred in concluding that this period should not be treated as lawful residence for the purpose of paragraph 276B of the Immigration Rules.

Submissions

25. In his oral submissions, Mr Sharma submitted that the judge had erred in law and that her error or errors had been material to the outcome of the appeal. Mr Clarke helpfully indicated at this point that he was content to accept that the judge had fallen into procedural error, in raising the point about s3C(2)(ca)(cb) of the Immigration Act 1971, which had not been taken by either party, but he submitted that this error was immaterial, since the submissions made by the appellant were misconceived.
26. Mr Sharma submitted that the appeal hinged on the principle of equivalence. It was to be submitted by the Secretary of State that the principle of equivalence was of no effect because an application for a residence card as an extended family member was not a true comparator with an application for leave to remain as a family member. Applying the principles in Total v HMRC, however, the appellants submitted that the one was a true comparator with the other. It was for the national court to determine whether that was the case and, if so, to consider whether an applicant under the EU Law regime was treated less favourably than an applicant under the domestic legal regime. That was a context-specific assessment and it was not necessary to make the assessment at a high level of generality. What was at stake was the protection of Community Law rights, which would be rendered less effective by procedural protections which favoured applicants under the domestic regime.
27. Mr Sharma made it clear that it was not his submission that any application under the Immigration Rules would be a true comparator to any application which relied on EU Free Movement principles. An application for a residence card as an extended family member, however, was directly comparable to a human rights application which was made on the basis of a familial relationship *outside* Appendix FM or paragraph 276ADE of the Immigration Rules. It was superficially attractive to submit, as the respondent would, that an application under the domestic regime was for leave under the Immigration Act 1971, whereas the appellants' application had been in reliance on rights recognised in the Citizens Directive (Directive 2004/38/EC). That argument was fallacious, however, as the two applications resulted in what Mr Sharma described as "the right to remain in the United Kingdom on the basis of a relationship with another individual" and the only difference was the nationality of the sponsor. The respondent was also wrong in the submission she would make that residence cards were only declaratory of underlying rights; that may be so in the case of EEA nationals and their family members, whereas extended family members relied on the exercise of a discretion under the regulation 17. AS (Ghana) v SSHD concerned a family member, and was of no assistance in relation to extended family members.
28. Mr Sharma submitted that the insertion of s3C(2)(ca)(cb) into the Immigration Act 1971 underlined the correctness of his submissions. It was clear from the Explanatory Memorandum which accompanied the insertion of those provisions that they had been inserted to bring parity between applicants under the Free Movement and domestic regimes. The 2020 Regulations were intended to dovetail with

Appendix EU, which had brought into the Immigration Rules those rights which were previously recognised in the Citizens Directive and the EEA Regulations.

29. For the respondent, Mr Clarke submitted that AS (Ghana) v SSHD did not deal with the principle of equivalence directly but it did contain dicta which were relevant to the 'true comparator' question. In Mr Clarke's submission, there was not even a superficial similarity between an individual who made an application for a residence card as an extended family member of a qualified person and a person who sought leave to remain outside the Immigration Rules on the basis of a familial relationship. The judge's reasoning in [28] had been correct. Although Mr Sharma was correct to submit that there was a clear distinction to be drawn between a family member and an extended family member, since only the former had an automatic right to reside in the UK, the effect of a successful application by an extended family member was to bring them within the definition of family member, as a result of regulation 7(3).
30. Mr Clarke accepted that the judge had erred in her consideration of s3C(2)(ca) and (cb) because those provisions had nothing to do with EU law and had not been mentioned by either party before her. The 2020 Regulations proved the error in the appellants' submissions. There was no true comparison between the two situations Mr Sharma had described, as was clear from AS (Ghana) v SSHD. It was immaterial that applicants under both regimes sought a favourable consideration under the respondent's discretion. The two regimes were as similar as chalk and cheese. The first appellant in this appeal was, in truth, in a worse position than the appellant in AS (Ghana) v SSHD as he had never actually had a right to reside in the UK. Mr Sharma sought to submit that the analysis of the comparison should take place on a broad-brush analysis but the respondent submitted that a more granular analysis was necessary, pursuant to which the position became quite clear.
31. Mr Sharma responded, submitting that there was a clear distinction to be drawn between the AS (Ghana) v SSHD category of case, which concerned the rights of a family member, and extended family members such as the appellants. Those in the appellants' category relied on a discretion conferred on the Secretary of State. The distinction had been considered in cases including Macastena v SSHD [2018] EWCA Civ 1558; [2019] 1 WLR 365 and Aladeselu v SSHD [2013] EWCA Civ 144. The changes to s3C spoke for themselves. That provision did not require an applicant under the domestic regime to establish an entitlement, or even a *prima facie* case. When the two applications were stripped down to their essential components, they were evidently directly comparable. Both were applications made in reliance on a discretion and both resulted in an applicant being able to stay in the UK lawfully. It was not necessary to conduct a more granular analysis. The only difference was the nationality of the sponsor and the law required the two categories of applicant to receive, or to be treated as if they were entitled to, the protection of section 3C of the Immigration Act 1971.
32. I reserved my decision at the end of the submissions.

D. RELEVANT PROVISIONS

33. As already noted, the first appellant's application was made in reliance on paragraph 276B of the Immigration Rules. It is only the first of the five requirements in that rule which is in issue before me, which requires that a successful applicant "has had at least ten years continuous lawful residence in the United Kingdom."
34. It is not in dispute that the appellant has been continuously resident in the UK for more than ten years. What is very much in dispute is whether that residence has been lawful residence. For the definition of that term we must turn to paragraph 276A, which provides as follows:
- (b) "lawful residence" means residence which is continuous residence pursuant to:
 - (i) existing leave to enter or remain; or
 - (ii) temporary admission within section 11 of the 1971 Act (as previously in force), or immigration bail within section 11 of the 1971 Act, where leave to enter or remain is subsequently granted; or
 - (iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain.
35. Section 3C of the Immigration Act 1971 ("the 1971 Act") makes provision for the continuation of leave pending a variation decision. It has since 31 January 2020 provided materially as follows:
- 3C Continuation of leave pending variation decision
- (1) This section applies if—
 - (a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
 - (b) the application for variation is made before the leave expires, and
 - (c) the leave expires without the application for variation having been decided.
 - (2) The leave is extended by virtue of this section during any period when—
 - (a) the application for variation is neither decided nor withdrawn,
 - (b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought, while the appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission),
 - (c) an appeal under that section against that decision, brought while the appellant is in the United Kingdom, is pending (within the meaning of section 104 of that Act),
 - (ca) an appeal could be brought under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations"), while the appellant is in the

United Kingdom, against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission),

(cb) an appeal under the 2020 Regulations against that decision, brought while the appellant is in the United Kingdom, is pending (within the meaning of those Regulations), or

(d) ...

(3) - (7) ...

36. Section 7 of the Immigration Act 1988 (“the 1988 Act”) makes provision for persons exercising Community rights and nationals of member States. Between 22 April 2011 and 30 December 2020, and therefore at the material time for these appeals, it provided materially as follows. (The reference in s7(1) to ‘the principal Act’ is, by s12(2), a reference to the Immigration Act 1971).

(1) A person shall not under the principal Act require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable EU right or of any provision made under [section 2\(2\)](#) of the [European Communities Act 1972](#).

(2) - (3) ...

37. The appellants’ EEA applications were made and refused under the provisions of the Immigration (European Economic Area) Regulations 2006 (“the 2006 Regulations”), which implemented the Citizens’ Directive in domestic law. Regulation 7 defined those who would be treated as family members of an EEA national. Regulation 8 defined those who would be treated as extended family members of an EEA national. Part 2 of the Regulations defined the EEA Rights of those who satisfied the preceding provisions. Part 3 made provision for various types of Residence Documentation to be issued to EEA nationals and others. A direct family member of an EEA national was to be issued with a residence card upon production of their passport and proof of the relationship: regulation 17(1) refers. An extended family member was not so entitled, as of right, and regulation 17(4)-(5) provided that the Secretary of State may issue such a person a residence card if, following an extensive examination of the personal circumstances of the applicant, it appeared appropriate to do so.

38. The 2006 Regulations continued to apply to the appellants’ previous appeals notwithstanding their revocation by the Immigration (EEA) Regulations 2016 (“the 2016 Regulations”): [TM \(Zimbabwe\)](#) [2017] UKUT 165 (IAC). I should nevertheless note that the 2016 Regulations came generally into force on 1 February 2017. The definitions of ‘family member’ and ‘extended family member’ were still to be found in regulations 7 and 8 respectively and were materially identical. Also in common with the 2006 Regulations, EEA Rights were described in Part 2 of the 2016 Regulations. Residence Documentation was also dealt with in Part 3. The discretionary consideration pursuant to which an extended family member might be issued with a residence card was in materially identical terms to the 2006 Regulations but was now to be found in regulation 18(4)-(5).

39. I should note, finally, that the 2016 Regulations were revoked, subject to savings, upon the UK's withdrawal from the European Union.

E. THE SECRETARY OF STATE'S GUIDANCE

40. The respondent's *Long Residence* guidance is currently in version 17, published on 11 May 2021. In common with the preceding version, it has a section entitled "Time spent in the UK with a right to reside under EEA regulations". This makes clear that time spent in the UK with a right to reside under the regulations "does not count as lawful residence under paragraph 276A of the Immigration Rules". The rationale for this position is that during such a period "the individuals are not subject to immigration control, and would not be required to have leave to enter or leave to remain". Immediately after that instruction, however, there is the following paragraph:

However, you must apply discretion and count time spent in the UK as lawful residence for an EU or EEA national or their family members exercising their treaty rights to reside in the UK.

41. To similar effect is the respondent's guidance entitled *Leave extended by section 3C (and leave extended by section 3D in transitional cases)*, version 11, as published on 15 October 2021. At page 6 of that guidance, the instruction to caseworkers is that

Section 3C does not extend leave where an application is made for a residence card under the EEA Regulations Immigration (European Economic Area) Regulations 2006 . An application for a residence card is not an application to extend or vary leave, it seeks confirmation that rights under the EEA Regulations are being exercised therefore the applicant does not require leave to enter or remain.

F. ANALYSIS

42. The polices cited immediately above serve to frame the arguments I must consider. Mr Sharma does not contend that his clients actually enjoyed lawful residence as defined in the Immigration Rules between 28 August 2015 and 17 October 2019. He does not contend - in light of the FtT's findings - that the respondent was required by the express terms of her *Long Residence* policy to treat the appellants' residence between 2015 and 2019 as lawful. Nor does he contend that section 3C of the 1971 Act actually applied so as to extend the appellants' leave to remain whilst their residence card applications were under consideration by the Secretary of State and the First-tier and Upper Tribunals. Any such submission would obviously founder on the basis that the appellants did not make an application to vary their leave to remain on 27 August 2015. What they sought, instead, was a residence card, or recognition (under s7 of the 1988 Act) that they did not require leave under the 1971 Act.
43. Since the appellants cannot avail themselves of the benefit of section 3C of the 1971 Act for the period in question, Mr Sharma contends that they should be treated as if they could. Viewed through the prism of the Tribunal's limited statutory

jurisdiction, the submission must actually be that because EU Law requires the appellants to be treated as if their residence was lawful between August 2015 and October 2019, they must be treated as if they met the requirements of paragraph 276B of the Immigration Rules and it would therefore be unlawful under s6 of the Human Rights Act 1998 to remove them from the United Kingdom. The basis for that submission is the EU law principle of equivalence, to which I must now turn.

The Principle of Equivalence in the Domestic and European Authorities

44. In his skeleton argument before the FtT and his grounds of appeal before the Upper Tribunal, Mr Sharma cited what was said about the principle of equivalence in Levez v T.H. Jennings (Harlow Pools) Ltd (Case C-326/96); [1999] 2 CMLR 363:

[18] The first point to note is that, according to established case-law, in the absence of Community rules governing the matter it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness)...

45. Similar statements of the principle appeared more recently at [203] of Test Claimants in the Franked Investment Income Group Litigation v Inland Revenue (Case C-446/04); [2012] 2 AC 436, at [44] of Impact v Minister for Agriculture and Food & Ors (Case C-268/06; [2008] 2 CMLR 47, and at [58] of the Grand Chamber's judgment in Randstad Italia v Umana & Ors (Case C-497/20). The European Court having given guidance on the references made in those cases, it fell to the national courts to consider whether the measures in question offended against the principle of equivalence.

46. At [43] of Levez, the court said that the task facing a national court which is considering a submission that the principle of equivalence has been infringed is as follows:

In order to determine whether the principle of equivalence has been complied with in the present case, the national court... must consider both the purpose and the essential characteristics of allegedly similar domestic actions..." (emphasis added).

47. The only domestic authority on the principle of equivalence which was cited by Mr Sharma was SSHD v FA (Iraq) [2011] UKSC 22; [2011] CMLR 23. FA had applied for international protection under the Refugee Convention, the Qualification Directive and the ECHR. That application was refused but he was granted discretionary leave on account of his minority. He appealed to the Asylum and Immigration Tribunal under section 83(2) of the 2002 Act, as then in force, contending that the Secretary of State had been wrong to refuse his claim for asylum. He also invoked his rights under the ECHR and the Qualification Directive.

48. A panel of the AIT ultimately decided that the appellant's appeal was confined by statute to asylum grounds. Questions of statutory construction were originally raised before the Court of Appeal but the ultimate focus of that hearing, and the hearing before the Supreme Court, was the principle of equivalence. It was contended, in sum, that the principle of equivalence required that a right of appeal against the "humanitarian protection decision be recognised since the lack of an appeal would mean that this claim, based as it was on EU law, was being subjected to rules which were less favourable than those which applied to the asylum claim, such a claim being based on national law": [9] of the court's judgment refers.
49. The submission based on the principle of equivalence prevailed before the Court of Appeal (Pill, Longmore and Sullivan LJJ) and the Secretary of State appealed. The submission made on the appeal was that there was "no purely domestic measure against which a comparison of the rules applicable to claims for humanitarian protection can be made": [10] refers. At [13], Lord Kerr (who delivered the judgment of the court) noted that the resolution of the submissions required FA to demonstrate "that there is a comparable domestic right which is subject to more favourable rules than is his humanitarian protection right." At [14], Lord Kerr stated that the appellant was required to establish that "his asylum claim is a legitimate comparator with his claim for humanitarian protection." In the event that he was able to establish that, he was entitled to succeed, since the refusal of the former brought with it a 'status appeal', whereas refusal of the latter did not.
50. At [17]-[25], Lord Kerr noted that the authorities of the Court of Justice provided no satisfactory answer to the question of whether the comparator with the Community law claim was required to be a purely domestic measure. He acknowledged that there were cogent arguments on each side: [24]. At [47], he concluded that it was necessary to refer to the Court of Justice the question of whether a claim to refugee status could qualify as a valid comparator, either because it had a mixed source (based on both EU and domestic law) or because the Refugee Convention is the original source of the relevant claim to refugee status and its provisions shaped those in the Qualification Directive.
51. At [26]-[42], Lord Kerr concluded that there was also no clear answer in the authorities to the further question of what was required in order that the compared measures may be regarded as sufficiently similar. Again, both parties were able to support their competing arguments with reference to extensive domestic and European authority. Lord Kerr observed at [40] that various formulae had been employed to describe the nature of the similarity that is required and, at [41], that it was unclear whether any of the criteria he described were 'indispensable requirements'.
52. Lord Kerr thought that there was much to be said for Lord Neuberger's view, expressed at [88] of HMRC v Stringer [2009] UKHL 31; [2009] ICR 985, that "the question of the required similarity and the criteria necessary to establish it in an individual case will depend on the context in which the application of the principle

of equivalence is canvassed". Because the issue had not been considered by the Court of Justice, however, a reference was required.

53. The parties were therefore invited to formulate questions for the CJEU within 28 days of the Supreme Court's judgment. Ultimately, however, the reference was made but it did not proceed and no further guidance on these questions was provided by the CJEU: R (United Road Transport Union) v Secretary of State for Transport [2012] EWHC 1909 (Admin) refers, at [42].
54. In the most recent Supreme Court cases considering the principle of equivalence (Lloyd v Google LLC [2021] UKSC 50; [2021] 3 WLR 1268 and Anwar v Attorney General for Scotland [2021] UKSC 44; [2022] ICR 146), the Supreme Court has referred to what was said by Lord Briggs in Total v Revenue and Customs Commissioners.
55. Total was a Value Added Tax ("VAT") case. VAT is a tax which is regulated by the provisions of EU Directives. Total intended to appeal against HMRC's conclusion that it was liable to pay sums said to have been wrongly treated as inputs in its VAT returns. The relevant Act required that the company should first pay the contested amount of VAT before an appeal would be entertained. There was no such stipulation in relation to certain domestic taxes. An application to defer that payment had been refused. Before the Supreme Court, the central question was whether the Court of Appeal had been correct to conclude that none of the domestic taxes relied on by Total constituted true comparators with VAT. That conclusion was upheld, with the Supreme Court accepting the Commissioners' argument that there had not been shown to be any true comparator among domestic claims sufficient to engage the principle of equivalence in relation to the imposition of a pay-first requirement upon traders seeking to appeal assessments to VAT: [48].
56. It is not necessary for the purposes of this decision to set out the precise basis upon which that conclusion is reached. It is instructive, however, to consider what was said by Lord Briggs about the principle of equivalence at [6]-[11] of his judgment:

[6] The principle of equivalence and its qualifying Proviso are creatures of the jurisprudence of the CJEU (and its predecessors), and take effect within the general context that it is for each member state to establish its own national procedures for the vindication of rights conferred by EU law: see EDIS v Ministero delle Finanze (Case C-231/96, [1998] EUECJ C-231/96) at paras 19 and 34 of the judgment. Further, it has been repeatedly stated by the CJEU that it is for the courts of each member state to determine whether its national procedures for claims based on EU law fall foul of the principle of equivalence, both by identifying what if any procedures for domestic law claims are true comparators for that purpose, and in order to decide whether the procedure for the EU law claim is less favourable than that available in relation to a truly comparable domestic claim. This is because the national court is best placed, from its experience and supervision of those national procedures, to carry out the requisite analysis: see Palmisani v Istituto Nazionale della Previdenza Sociale (Case C-261/95) at para 38, and Levez v TH Jennings (Harlow Pools) Ltd (Case C-326/96) [1999] ICR 521, para 43.

The search for a true comparator

[7] The principle of equivalence works hand in hand with the principle of effectiveness. That principle imposes a purely qualitative test, which invalidates a national procedure if it renders the enforcement of a right conferred by EU law either virtually impossible or excessively difficult. By contrast, the principle of equivalence is essentially comparative. The identification of one or more similar procedures for the enforcement of claims arising in domestic law is an essential pre-requisite for its operation. If there is no true comparator, then the principle of equivalence can have no operation at all: see the Palmisani case, at para 39. The identification of one or more true comparators is therefore the essential first step in any examination of an assertion that the principle of equivalence has been infringed.

[8] Plainly, the question whether any, and if so which, procedures for the pursuit of domestic law claims are to be regarded as true comparators with a procedure relating to an EU law claim will depend critically upon the level of generality at which the process of comparison is conducted. Is it sufficient that both claims are tax appeals, or (as Totel submits) appeals against the assessment of tax, or that they must both be made to the same tribunal? Or is it necessary to conduct some more granular analysis of the different claims, and the economic structures in which they arise? Or is there some simple yardstick which would prevent claims from being truly comparable, such as, in the present case, the difference between claims arising out of the assessment of liability to direct and indirect taxes, (as HMRC submits)? Decisions of the CJEU provide considerable assistance in identifying the correct approach to this task, although the guidance to be gained from some of them is not always that which springs from an over-simplistic analysis of particular phraseology.

[9] First, the question whether any proposed domestic claim is a true comparator with an EU law claim is context-specific. As Lord Neuberger put it in *Revenue and Customs Comrs v Stringer* [2009] UKHL 31; [2009] ICR 985 at para 88:

“It seems to me that the question of similarity, in the context of the principle of equivalence, has to be considered by reference to the context in which the principle is being invoked.”

This proposition was not in dispute between counsel, and it is therefore unnecessary to cite decisions of the CJEU in support of it, although most of those to which reference is made below illustrate or mandate the conduct of a context-specific enquiry.

[10] The domestic court must focus on the purpose and essential characteristics of allegedly similar claims: see the *Levez* case, at para 43 of the judgment:

“In order to determine whether the principle of equivalence has been complied with in the present case the national court - which alone has direct knowledge of the procedural rules governing actions in the field of employment law - must consider both the purpose and essential characteristics of allegedly similar domestic actions.”

To the same effect is para 35 of the judgment of the Grand Chamber in *Transportes Urbanos y Servicios Generales SAL v Administración del Estado* (Case C-118/08, [\[2010\] EUECJ C-118/08](#)). In *Littlewoods Retail Ltd v Revenue and Customs Comrs* (Case C-591/10) [\[2012\] STC 1714](#), the Court at para 31 used the phrase “similar purpose and cause of action”, without in my view thereby intending to change the underlying meaning from that described in the earlier cases.

[11] Of particular importance within the relevant context is the specific procedural provision which is alleged to constitute less favourable treatment of the EU law claim. This is really a matter of common sense. Differences in the procedural rules applicable to different types of civil claim are legion, and are frequently attributable to, or at least connected with, differences in the underlying claim. A common example is to be found in different limitation periods. Thus, in England and Wales, the primary limitation period for personal injury claims is three years, whereas the primary limitation period for most other claims is six years. There is a 20 year prescription period for property claims in Scotland. To treat personal injury and, for example, property claims as true comparators for the purpose of deciding whether the shorter limitation period for personal injury claims constituted less favourable treatment would make no sense. This is because it is no part of the purpose of the principle of equivalence to prevent member states from applying different procedural requirements to different types of claim, where the differences in those procedural requirements are attributable to, or connected with, differences in the underlying claims.

(emphasis added)

57. The ultimate purpose of the principle of equivalence (and its Proviso, to which no reference was made before me) was stated by Lord Briggs at [46] to be “to prevent member states from discriminating against claims based upon EU law by affording them inferior procedural treatment from that afforded to comparable domestic claims”. That discrimination chimes with what was said by Lord Kerr at [18] of *FA (Iraq)*, that the purpose of the principle is to “ensure that there is no dilution of the adequacy of the protection of the relevant rights”.

Conclusions

58. Before turning to the ‘true comparator’ question posed by the authorities, I should note that three of the questions which have arisen in some of the case law did not arise before me. Firstly, and unlike in *FA (Iraq)*, it was not in issue between the parties that the claim advanced by the appellants between 2015 and 2019 was a claim founded purely in EU law. That must be correct, as the claims were rooted in the Free Movement principles of the EU and, specifically, in the Citizens’ Directive.
59. Secondly, it was (unsurprisingly) not in issue between the parties that an application for leave to enter or remain, whether brought inside or outside the Immigration Rules made under s3(2) of the 1971 Act, is a purely domestic claim.
60. Thirdly, it was also not in issue between the parties that the appellants received less favourable treatment as compared to an applicant for leave to remain. The less

favourable treatment in question is that the appellants did not have the benefit of s3C of the 1971 Act whilst their applications and appeals were pending and they did not accrue qualifying 'lawful residence' under paragraph 276B whilst that claim was pending (before the Secretary of State and the Tribunals). I entertain some doubt as to the correctness of the Secretary of State's silence on this point but she said nothing about it and neither shall I.

61. The focus before me, therefore, was solely on the question of whether the claims made by the appellants in 2015 were truly comparable with claims made outside the Immigration Rules on the basis of a familial relationship.
62. Applying the principles in the authorities I have cited, I conclude that Mr Sharma has failed to establish that there is any true comparison between a claim for a residence card as the extended family member of an EEA national and an application for leave to remain outside the Immigration Rules based on a familial relationship.
63. Considering the purpose and essential characteristics of the two applications, in their proper context, I accept the submission made by Mr Clarke that they seek fundamentally different outcomes. An applicant for a residence card seeks recognition that he does not require leave to enter or remain under the 1971 Act, whereas an applicant for leave to remain seeks status under that Act. The applicant in the former category wishes to take himself outside the regime of immigration control established by the 1971 Act, whereas the applicant in the latter category seeks to regularise or maintain his status under the Act.
64. Mr Sharma submitted, on the one hand, that the comparison might be performed at a greater level of generality, since what was sought by the applicants in both categories was a decision that they were not required to leave, or were permitted to remain in, the United Kingdom. To make that submission is to overlook the fundamental differences between the two forms of status and to simplify the regime of immigration control to the point that it becomes unrecognisable.
65. The distinction between the Free Movement regime and the domestic regime was considered in detail by the Court of Appeal in AS (Ghana) v SSHD, to which no reference was made in the FtT or in the grounds of appeal to the Upper Tribunal. The question in that case was whether the appellant had a right of appeal to the First-tier Tribunal, which had concluded that he did not. The appellant had previously held a residence permit as the non-EEA spouse of an EEA national and it was submitted on his behalf, at [5], that

“... the position of a person who is appealing against the refusal of an application for a claim to residence based on a right under any of the Community Treaties should be similar to that which a person applying for a variation of leave is granted by section 3C of the Immigration Act 1971, which extends his leave pending a decision on that application and any appeal against that decision.”

66. Beatson LJ, with whom Arden and Christopher Clarke LJJ agreed, did not accept that submission. He based his decision on the differences between the different regimes under the 1971 Act and the Free Movement instruments. At [21]-[22], he said this:

[21] It is common ground that there are two regimes potentially in play for those in this country who are not UK citizens. The first is that under the 1971 Act which requires a grant of leave by the Secretary of State. The second is that under the Free Movement of Citizens Directive 2004 and the 2006 Regulations. As is perhaps clear from the discussion above, the question to be asked in each category is different. Under the 1971 Act a person requires leave and if he or she does not have it, that person has no status in this country. Those who have status pursuant to a grant of leave may have that leave extended if an application to vary the leave is refused and there is an appeal against the immigration decision that is refusing the application.

[22] The position of those claiming to have EEA rights differs. Their rights result from their position and, in the case of their dependants, the position of the EEA citizen. They either have those rights or they do not have those rights. The EEA citizen only has those rights so long as he or she remains a qualified person within regulation 6 of the 2006 Regulations. Although there is provision for an appeal against the decision refusing an application under the Regulations, no provision has been made in the Regulations for a right to remain in this country pending the exercise of such an appeal.

67. Mr Sharma accepted, I think, that AS (Ghana) v SSHD was determinative of the question of whether an application made by the family member of an EEA national was truly comparable with an application for leave to remain under the 1971 Act. In the case of an extended family member, however, he submitted that the position was different, since the decision to grant or refuse a residence card turned, ultimately, on the exercise of a discretion by the Secretary of State, and not on an underlying right in EU law.
68. Mr Sharma submitted that there was a direct comparison to be drawn between an applicant for leave outside the Immigration Rules and an applicant for a residence card as the extended family member of a qualified EEA national. In the case of a person who relied on a family relationship which fell outside the Immigration Rules, what was sought was the exercise of discretion to grant Leave Outside the Rules (LOTR) under s3(1)(b) of the 1971 Act (R (Munir) v SSHD [2012] UKSC 32; [2012] 1 WLR 2192 refers, at [44]). In the case of an extended family member making an application under the 2006 Regulations (or the corresponding provisions of the 2016 Regulations), what was sought was a favourable consideration of regulation 17(4)(b): “in all the circumstances it appears to the Secretary of State appropriate to issue the residence card”.
69. I do not accept that this submission is of any assistance to Mr Sharma. Whilst he is correct to submit that a favourable decision in either category is contingent upon the exercise of a discretion, the scope of the discretion available to the respondent in each category is incomparable. The scope of the residual discretion to grant leave outside the Immigration Rules could not be wider, as Lord Dyson (with whom the other

Justices agreed) stated at [44] of R (Munir) v SSHD. The scope of the discretionary consideration required by the Regulations was not unfettered, however, and the exercise of the respondent's discretion was one which was required to take into account the advantage which the Directive intended to confer upon those who satisfy the definition of extended family members: Khan v SSHD [2017] EWCA Civ 1755; [2018] 1 WLR 1256, at [34]-[36], citing the decision of the CJEU in SSHD v Rahman & Ors (Case C-83/11); [2013] QB 249. Discretion played a part in both types of application but the way in which that discretion was to be exercised is fundamentally different. This only serves to underline the absence of a true comparison between the two types of application

70. In any event, even if I am wrong in what I have said above, and the existence of a discretion is a relevant similarity between the two categories of case, I do not accept that it is a sufficient similarity to satisfy the true comparator test when the ultimate purpose of the two applications is so fundamentally different.
71. Mr Sharma sought to support his argument with reference to s3C(2)(ca)(cb) of the 1971 Act, which had been described by the FtT as showing that s3C of the 1971 Act 'did not exclude claims under EU law'. At paragraph 22 of his grounds of appeal, he submitted that these sub-sections had been inserted "as a post Brexit measure to bring parity (or equivalence) between domestic claims for LTR and rights stemming from EU law". In my judgment, these provisions are of no assistance to him, essentially for the reason given by Mr Clarke.
72. S3C(2)(ca) and (cb) apply whilst an appeal under the 2020 Regulations could be brought or is pending. Part 2 of those Regulations provides for rights of appeal 'in respect of citizens' rights immigration decisions'. Regulations 3-6 provide for appeals against decisions 'other than those relating to frontier workers or persons with a healthcare right of entry'. Regulations 6A-6F provide for appeals by frontier workers. Regulations 6G-6J provide for appeals by persons with a healthcare right of entry.
73. The signal feature of the 2020 Regulations is that they relate exclusively to domestic law and reflect the overarching legislative intention to accommodate within the scope of domestic law those who might before the UK's withdrawal from the EU have had a right to reside under EU law. The fact that s3C now applies to various categories of people who assert rights to reside under domestic law says nothing of assistance to Mr Sharma in relation to those who previously asserted that they should be entitled to reside in the UK under EU Free Movement law. As Mr Clarke submitted, the insertion of these provisions into s3C at the time of the UK's withdrawal from the EU does nothing to establish a true comparison between the EU law and domestic applications described above.
74. Drawing these threads together, I conclude as follows. The First-tier Tribunal erred in law in concluding that s3C(2)(ca) and (cb) was of any relevance to the argument based on the principle of equivalence. No such argument was advanced in the FtT and the judge erred in any event in thinking that the claims to which those

provisions related were claims in EU law. Ultimately, however, the FtT reached the correct conclusion for the wrong reasons. Where a person makes an application for a residence card as an extended family member of an EEA national before the expiry of his leave to remain, the EU law principle of equivalence does not require that he should be treated as if section 3C of the 1971 Act applied to him in the same way it would if he had made an in-time application for further leave to remain. The judge was therefore correct to find that the first appellant could not meet the requirements of paragraph 276B of the Immigration Rules, and that he should not have been treated as if he did meet those requirements. The decision to dismiss the appeals on Article 8 ECHR grounds was not vitiated by legal error, therefore, and that decision shall stand.

Notice of Decision

The appeals to the Upper Tribunal are dismissed. The decision of the FtT shall stand.

No anonymity direction is made.

M.J. Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 April 2022