Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Bilal Ahmed) v Secretary of State for the Home Department (EEA/s 10 appeal rights: effect) IJR [2015] UKUT 00436 (IAC)

Field House
24th July 2015

THE QUEEN
(ON THE APPLICATION OF BILAL AHMED)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE PETER LANE

Hearing date: 8 June 2015
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Mr S Karim, instructed by Law Lane Solicitors, appeared on behalf of the applicant.

Ms J Smyth, instructed by Government Legal Department, appeared on behalf of the respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT
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(1) The fact that P (who is not an EEA national) has a right of appeal under the Immigration (European Economic Area) Regulations 2006 against an EEA decision to refuse P a residence

card does not have the effect of precluding the Secretary of State from removing P under section 10 of the Immigration and Asylum Act 1999.

(2) Section 92(4)(b) of the Nationality, Immigration and Asylum Act 2002 (as it was before the changes made by the Immigration Act 2014) does not afford P an in-country right of appeal against the section 10 decision, where the issue of whether P is a member of the family of an EEA national is a matter of dispute.

(3) The factual issue of whether P is a family member falls to be determined by the First-tier Tribunal on appeal by P against the EEA decision and/or the section 10 decision, whether or not P may by then be outside the United Kingdom. A judicial review by P of the decision to remove and/or the setting of removal directions will not succeed where P's application is based on marriage to an EEA national, if the Secretary of State reasonably suspects P of being a party to a marriage of convenience.

JUDGE PETER LANE

What follows is the judgment of the Tribunal.

A. The scenario

1. A scenario currently encountered with some frequency by the Upper Tribunal in the course of its immigration judicial review work is as follows. P, who is not an EEA national, and who is in the United Kingdom with limited leave granted by the respondent under the Immigration Acts (or whose leave has already expired) marries Q, an EEA national who is in the United Kingdom exercising Treaty rights (or purporting to do so). Relying on the marriage, P applies to the respondent for a residence card under the Immigration (European Economic Area) Regulations 2006, as confirmation of a right of residence in the United Kingdom as the family member of Q. At some point, P's limited leave has expired, with the result that, so far as the respondent is concerned, P is an overstayer. This may have happened before or after the marriage and/or P's application for a residence card.

2. Having interviewed P and Q on separate occasions, the respondent considers that the marriage is "a marriage of convenience", with the result that, so far as the respondent is concerned, P is not a family member of Q because regulation 2 of the EEA Regulations provides that a "'spouse' does not include a party to a marriage of convenience". The respondent therefore refuses P's application for a residence card.

3. Since P is an overstayer, the respondent makes a decision under section 10 of the Immigration and Asylum Act 1999 (as it was before amendment by the Immigration Act 2014) to remove P from the United Kingdom. The section 10 decision can occur

before or after the refusal of P's application. The respondent sets directions for P's removal.

4. P brings judicial review proceedings to challenge the lawfulness of removal on the basis that P has a right of appeal to the First-tier Tribunal under the EEA Regulations, which is suspensive of P's removal. P may also contend that there is a separate right of appeal to the First-tier Tribunal against the section 10 removal decision, which P says is also suspensive of removal.

5. As can be seen, there is scope in this scenario for a number of variants (including some that we have not mentioned). The central questions, however, remain the same; namely (a) whether a right of appeal against the refusal of the residence card and/or or against the section 10 decision is suspensive; and (b) whether P's contention that the marriage is not one of convenience is a "precedent fact" to be determined by the Upper Tribunal in the judicial review proceedings, particularly if the answer to (a) is in the negative and it is intended to remove P before the issue of the marriage has been decided by the First-tier Tribunal in the course of P's appeal.

B. Background

6. On 4 April 2011, the applicant, a citizen of Pakistan, arrived in the United Kingdom in possession of a Tier 4 Student visa. On 21 November 2014, the applicant married a Romanian national. On 17 December 2014, the applicant submitted an application for an EEA residence card, pursuant to the EEA Regulations. The applicant's leave to remain as a student expired on 22 December 2014.

7. On 20 February 2015, the applicant and his wife attended for interviews, conducted by a representative of the respondent. Following the interviews, the respondent concluded that the applicant's marriage was one of convenience. Since the applicant had by this point overstayed his leave, he was detained and served with a notice of a decision to remove, pursuant to section 10 of the 1999 Act. On 24 February 2015, the applicant issued his judicial review claim in the Upper Tribunal. The following day, the respondent refused the applicant's application for an EEA residence card. The applicant appealed against that decision to the First-tier Tribunal.

8. On 27 February 2015, the Upper Tribunal refused to grant permission and also refused a stay on the applicant's removal. On 5 March 2015, fresh removal directions were set, for 17 March 2015. Following an oral hearing at which both the applicant and the respondent were represented by Counsel, the Upper Tribunal granted permission to bring judicial review proceedings. The Tribunal considered it arguable that the applicant's right of appeal fell within the scope of section 92(4) of the Nationality, Immigration and Asylum Act 2002, so that it should have attracted an in-country right of appeal; and that the relevance of section 92(4) was not addressed by the High Court in R (on the application of Abdullah) v Secretary of State for the Home Department [2009] EWHC 1771 (Admin). It was also thought that there was "an apparent conflict between the Abdullah decision and the subsequent decision of the Upper Tribunal in LO [2009] UKAIT 00034".

9. Case management directions were made. Regrettably, however, the applicant failed to serve a skeleton argument until immediately before the substantive hearing on 8 June 2015. At that hearing, Mr Karim applied orally to amend the grounds of application, so as to contend that the right of appeal arising from the refusal of the residence card on 25 February 2015 was suspensive of the applicant's removal. In order to ensure fairness, both parties were given the opportunity (which they took) of making written submissions, subsequent to the hearing, on this issue, in the light of which the respondent withdrew her objection to Mr Karim's application. Permission was, accordingly, given to the applicant to amend his grounds. In deciding to withdraw her objection, the respondent referred not only to the fact that the proposed ground was, in the event, the subject of submissions at the hearing but also that it "arises in other cases".

10. In accordance with directions given following the grant of permission to bring judicial review proceedings, the present panel of the Upper Tribunal also sat as a panel of the First-tier Tribunal on 8 June, in order to hear the applicant's appeal against the refusal to grant him a residence card as the family member of an EEA national.

C. The legislation

11. The relevant legislation is to be found in:

    (a) Directive 2004/38 ("the Directive");

    (b) The Immigration (European Economic Area) Regulations 2006;

    (c) section 10 of the Immigration and Asylum Act 1999 (prior to its amendment by the Immigration Act 2014);

    (d) sections 78 and 92 of the Nationality, Immigration and Asylum Act 2002 (again, before amendment by the 2014 Act).

The relevant provisions are set out in the Appendix to this judgment.

D. Is the right of appeal against the EEA decision suspensive of removal?

(i) Submissions

12. Mr Karim submitted that the applicant's right of appeal against the decision to refuse him a residence card, which it is common ground may be brought whilst he is in the United Kingdom, means that the appeal proceedings must fully run their course before the applicant's removal can take place. Were it otherwise, the right of appeal would become "redundant and useless". In this regard, Mr Karim relied upon the determination of the Asylum and Immigration Tribunal in LO (Partner of EEA

national) Nigeria [2009] UKAIT 00034, in which it was held that there existed an in-country right of appeal against a decision to refuse a person a residence card as a partner of an EEA national within regulation 8(5) of the EEA Regulations. In the course of its determination, the AIT held:-

> "10. The appellant's claim to be an 'extended family member' and to be entitled to a residence card was met by a refusal to give him a residence card. That was an EEA decision within the meaning of regulation 2 of the 2006 Regulations. It therefore carried a right of appeal unless paragraphs (2) or (3) of reg 26 apply to it. Neither of those paragraphs do apply. The appellant is not himself an EEA national; and he does not claim to be a 'family member' or relative. Quite apart from the terms of reg 8(1), the Regulations as a whole distinguish clearly between family members and extended family members. It therefore seems clear to me that the appellant had an in-country right of appeal against the refusal of a residence card.
>
> 11. I reach that conclusion with no enthusiasm at all. The effect of it is that any person threatened with removal, who applies for a residence card, even on an entirely spurious basis, so that refusal is inevitable, is entitled to an in-country right of appeal against that refusal and cannot be removed until the appeal has run its course. That cannot be intentional, but it does not appear to me that the regulations can be read in any other way."

13. Earlier in 2009, Blair J had handed down the judgment in R (Abdullah) v Secretary of State for the Home Department and Asylum and Immigration Tribunal [2009] EWHC 1771 (Admin). In that case, a citizen of Iraq applied for a residence card as the extended family member of a Polish citizen, exercising Treaty rights in the United Kingdom. Following refusal of that application, the applicant filed notice of appeal to the Asylum and Immigration Tribunal ("AIT") against the refusal of the residence card. An application for judicial review was also made, including an application for a stay on removal. The application for a stay was unsuccessful and the applicant was removed. At that time, it was considered the AIT had acted lawfully in refusing to admit the notice of appeal. By the time the judicial review application reached Blair J, however, it had been established that a right of appeal to the AIT did, in fact, exist.

14. The issue before Blair J was thus whether the right of appeal to the AIT rendered the claimant's removal unlawful; in other words, whether that right was suspensive of removal:-

> "In her oral submissions for the claimant, Ms Chapman accepted that if his right of appeal was not suspensive, in the sense that the law precluded his removal while the appeal was pending, removal was not unlawful and there can be no question of bringing the claimant back. In my judgment she was right to adopt that position …"

15. Blair J was specifically referred to regulation 29 of the EEA Regulations. Having set out regulation 29(2) and (3), his judgment continued as follows:-

> "24. For the defendant, Mr Eicke submits that this provision is clear. While an EEA decision refusing admission or an EEA decision to remove a person ceases to have effect while appeal against such a decision is pending, the same does not apply to an appeal against a decision not to issue someone with a residence card. That was the subject of the claimant's appeal in the present case. There is, he

submits, no requirement under the Citizens Directive to provide a suspensory right of appeal in these circumstances, and none should be read in.

25. For the claimant, Ms Chapman submits that it cannot have been intended that an appeal against a decision not to issue someone with a residence card was excluded from the ambit of EEA decisions having a suspensory effect. In substance, she submits, in the present case there amounts either a refusal to admit or a decision to remove. Both of these decisions are suspended by virtue of Regulation 29 on the true construction of the Regulations. In the present case, she further submits, this also follows from the order made on 10th December 2008, the effect of which, she argues, was to quash the original removal order. The subsequent order, she submits, must have been taken as a consequence of an EEA decision.

26. Ms Chapman advances an alternative argument which, as put orally, is as follows. Although she accepts that an EEA decision is not one of those listed in section 82 of the Nationality, Immigration and Asylum Act 2002 and therefore not subject to the general section 78 prohibition on removal while an appeal is pending, she submits that it cannot have been intended that a right of appeal in respect of such a decision would not be suspensory in effect. Following the decision of 8th December 2008 by which the application for a residence card was refused, there was in effect a fresh removal decision taken on 26th January 2009 falling within section 82(1)(g). This, she submits, was subject to the section 78 prohibition.

27. I have come to the conclusion that the defendant's construction of Regulation 29 is the right one. It is to be noted that the definition of 'EEA decision' in Article 2(1) of the EEA Regulations 2006 distinguishes between EEA decisions as to (1) entitlement to admission; (2) entitlement to various documents including a residence card; and (3) removal. By its terms, Regulation 29 provides that appeals in respect of the first and third categories are to have suspensory effect. The second category is not included and nothing in the Citizens Directive has been cited to require an alternative interpretation. The EEA decision in the present case was a refusal of the claimant's application for a residence card. There was an appeal against that refusal. But both the EEA decision and the appeal, in my view, fell outside the suspensory provisions in Regulation 29.

28. I also accept the defendant's submissions that the appellate regime under the EEA Regulations 2006 and under the 2002 Act are distinct. The original removal directions of 27th November 2008 followed from the fact that the claimant was an overstayer whose appeal rights in respect of his asylum application had been exhausted. The removal directions do not themselves constitute an appealable decision. The refusal of a residence card could not change the nature of the removal directions. Consequently, there was, in my view, no appeal pending at the time of the claimant's removal on 10th February 2009, the effect of which, under either Regulation 29 or section 78, was to prevent the claimant's removal. In particular, the appeal against the decision refusing to issue him with a residence card did not have that effect. For that reason, his removal on that date was not unlawful."

16. Mr Karim's position on Abdullah was that the case was wrongly decided. Because the refusal of an EEA residence card carries an in-country right of appeal, there is no need to spell out in regulation 29 that this decision would also be suspensive.

Furthermore, the fact that a refusal of a residence card does not automatically lead to removal of the person concerned means that the safeguards in regulation 29 are unnecessary. A "sensible reading" of the EEA Regulations would, Mr Karim said, lead to the conclusion that the right of appeal was suspensive of removal.

17. Mr Karim urged us to consider the Directive. He pointed out that Article 35 (abuse of rights) requires any necessary measures to combat "abuse of rights or fraud, such as marriages of convenience" to be "proportionate and subject to the procedural safeguards provided for in Articles 30 and 31". Article 31(4) enables Member States to exclude:-

> "the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory."

18. Mr Karim submitted that the exception concerning denial of entry does not apply here and that it was not the respondent's case that the applicant's appearance at his appeal hearing could have a seriously deleterious effect on public policy or public security. Accordingly, Mr Karim said that the Directive, properly read, had the effect of precluding the respondent from removing the applicant, and persons in his position, where removal would prevent him from defending the serious allegations made against him. In the present case, where the respondent is contending that the marriage is a sham, the First-tier Tribunal would ordinarily be required to hear direct "in-person" evidence from the applicant.

19. Finally on this topic, Mr Karim contended that, even if the right of appeal was non-suspensive, the applicant clearly had a right to lodge an appeal before removal. In the present case, the removal initially planned by the respondent had been such as to give the applicant only two days within which to bring an appeal, which was procedurally unfair.

20. For the respondent, Ms Smyth drew attention to the commentary on an earlier version of what became the Directive. In this commentary (COM (2001) 0527 final) the Commission, commenting on a version of what eventually became Article 31, stated that "giving appeals automatic suspensory effect would not be a suitable solution, since it would lay the arrangements open to abuse." She also relied upon Recital (28), which specifically states that in order to guard against abuse of rights or fraud "notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying a right of free movement and residence", Member States would have the possibility of adopting "necessary measures". In giving effect to that aim, Article 35 of the Directive empowers Member States to adopt measures "to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience."

21. In the respondent's contention, regulation 29 of the EEA Regulations exhaustively lists those appeals in relation to which removal directions are to be of no effect and/or may not be made. Regulation 29(3) draws a distinction between an EEA decision to remove and other EEA decisions. As has recently been held by Jay J in

Symon Byczek v Secretary of State for the Home Department [2014] EWHC 4298 (Admin), the appellate regimes in, respectively, the EEA Regulations and the 2002 Act, are distinct. Schedule 1 to the Regulations, which applies certain provisions of the 2002 Act for the purpose of appeals against EEA decisions, does not apply section 78 of that Act, which is the general provision providing that in-country appeals under the Act are to be suspensive of removal. The issue of suspension under the EEA Regulations is therefore the exclusive preserve of regulation 29.

22. Ms Smyth submitted that Abdullah was correct to hold that there was nothing in the Directive or the EEA Regulations that requires an appeal against a refusal of a residence card to be treated as having suspensive effect. To the extent that the AIT had come to a contrary conclusion in LO, the Tribunal's comments were *obiter* and/or *per incuriam*, as it had not been referred to regulation 29.

23. The Directive, the background commentary and the Recitals made it plain, according to Ms Smyth, that it was not the intention of the framers of the Directive to require there to be a suspensive right of appeal for those third country nationals reasonably suspected by the relevant Member State to have entered into a marriage of convenience. Articles 27 to 33 apply expressly to restrictions on pre-existing EU law rights on the grounds of public policy, public security and public health. Accordingly, the references in Article 31 to "persons concerned" having access to judicial etc. redress procedures of appeal or review fall to be construed as references to persons enjoying such pre-existing rights.

24. In any event, even if Article 31 did apply to the applicant, this would not entitle him to a suspensive appeal right. The most that could be obtained by the application of Article 31 was the right (subject to exceptions) to submit a "defence in person". However, according to Ms Smyth, the commentary document (COD/2001/0111: see above) made it plain that what is now Article 31(4) of the Directive was intended to reflect the CJEU's judgment in Pecastaing v Belgium [1980] ECR 691. That case was concerned with a person excluded on public policy grounds. In the present case, the applicant was not in this position and could not sensibly be described as submitting a "defence".

(ii) Discussion

25. We are in no doubt that Abdullah was rightly decided and should be followed. The passage in paragraph 11 of LO on which Mr Karim relies is *obiter* and *per incuriam*. The AIT was not, crucially, referred to regulation 29 or to the fact that section 78 (no removal while appeal pending) of the 2002 Act is not applied by Schedule 1 to the EEA Regulations. As is plain from paragraph 5 of the determination, the AIT was constrained by the procedure rules, as then in force, under which the decision in the case had to be made without a hearing.

26. The basic flaw in the applicant's case is to conflate the absence of a statutory prohibition on the bringing of an appeal from within the United Kingdom with the existence of a right to be so present in order to bring such an appeal and to prosecute it to its conclusion. There is no principle of law, whether purely domestic or European, that confers a right on an individual to remain within a jurisdiction,

regardless of his or her status, in order to pursue an immigration appeal in that jurisdiction. Were the position otherwise then, so far as the United Kingdom is concerned, there would have been no need for Parliament to enact section 78 of the 2002 Act, which specifically provides that whilst a person's appeal under section 82(1) of that Act is pending that person may not be removed from the United Kingdom or leave it, pursuant to the Immigration Acts. The fact that section 78 is not amongst the provisions of the 2002 Act applied by Schedule 1 to the EEA Regulations is, accordingly, of key significance.

27. Nor is there anything in the Directive that can properly be said to confer a right of the kind we have described. This is not surprising, given the observations in COM (2001) 0527 that "giving appeals automatic suspensory effect would not be a suitable solution, since it would lay the arrangements open to abuse". If the framers of the Directive envisaged that the availability of an appeal against any decision taken under the Directive precludes the Member State from removing the person concerned while that appeal is pending, Article 31 would plainly not have been framed in the way it is. The protection afforded by Article 31 is expressly limited in scope to certain classes of persons.

28. Mr Karim's attempt to invoke Article 31 as in some way covering an appeal against the refusal of a residence card must fail. That Article occurs within Chapter VI of the Directive, which is headed "RESTRICTIONS ON THE RIGHT OF ENTRY AND THE RIGHT OF RESIDENCE ON GROUNDS OF PUBLIC POLICY, PUBLIC SECURITY OR PUBLIC HEALTH". Article 27 (general principles) states that, subject to the provisions of Chapter VI, "Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health." Article 27, together with Article 28 (protection against expulsion) and Article 29 (public health), accordingly informs who are the "persons concerned" referred to in Article 31(1). They are Union citizens and their family members, subject to expulsion or removal measures. As a result, Article 31 has nothing whatsoever to say about a person who is not being expelled as a Union citizen or family member but who is appealing a decision that he or she is not such a family member.

29. In view of what we have said, the respondent has no need to rely upon Ms Smyth's secondary submission, to the effect that the applicant, even if falling within the scope of Article 31, may be excluded from the United Kingdom by virtue of the opening words of Article 31(4); and that the applicant has no entitlement to return to submit his defence in person. The fundamental reason why Article 31(4) does not avail the applicant is, we find, because the entire Article is of no relevance in his case.

30. In the light of our findings regarding the Directive, it is apparent that regulation 29 of the EEA Regulations correctly transposes the relevant provisions of the Directive; in particular, Article 31 (read with regulation 29AA (temporary admission in order to submit case in person)). (We deal with regulation 24AA at paragraph 52 below).

31. Given that the applicant's right of appeal against the decision to refuse him a residence card is not suspensive of his removal from the United Kingdom, we do not find that Mr Karim is able to rely upon a secondary submission, which (if we

understand correctly) is to the effect that the appellant was not removable from the United Kingdom until the time limit for appealing the EEA decision to the First-tier Tribunal had elapsed. Such a proposition finds no express or implied expression in the Directive or the EEA Regulations. The right of appeal is in no sense rendered illusory by removing the applicant before the end of the 14 day period for providing a notice of appeal, in the case of a person who is in the United Kingdom. Not only is the appeal not abandoned, rule 19(3)(b) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 makes it plain that, in the circumstances with which we are concerned, the applicant has 28 days within which to appeal, after receiving the notice of decision, if he is outside the United Kingdom:-

> "(2) If the person is in the United Kingdom, the notice of appeal must be received not later than 14 days after they are sent the notice of the decision against which the appeal is brought.
>
> (3) If the person is outside the United Kingdom, the notice of appeal must be received -
>
> (a) not later than 28 days after their departure from the United Kingdom if the person -
>
> (i) was in the United Kingdom when the decision against which they are appealing was made, and
>
> (ii) may not appeal while they are in the United Kingdom by reason of a provision of the 2002 Act; or
>
> (b) in any other case, not later than 28 days after they receive the notice of the decision."

E. The decision to remove under section 10 of the Immigration and Asylum Act 1999

(i) Submissions

32. Although Mr Karim stated that his instructions were that the applicant had filed notice of appeal against the section 10 removal decision, no documentary material to this effect has been placed before the Upper Tribunal. Ms Smyth informed us that the respondent was likewise unaware of any such appeal.

33. The possibility nevertheless exists that, even if no such appeal is on foot, the applicant may seek to appeal to the First-tier Tribunal outside the relevant time limit. It is also relevant to observe that permission to bring these judicial review proceedings was granted, in part by reference to the possible effect of section 92(4)(b) of the 2002 Act on the respondent's ability to remove the applicant. We are also aware that this issue is arising in other, similar cases. It is therefore necessary to address it in some detail.

34. It is common ground that an appeal against a section 10 removal decision, being a decision falling within section 82(1)(g) of the 2002 Act (before amendment by the 2014 Act), may not be brought whilst the person concerned is within the United

Kingdom, unless the appeal is of a kind to which section 92 applies (section 92(1)). The only way in which section 92 can apply in the circumstances of the present case is by reason of section 92(4)(b); namely, that the appellant:-

> "(b) is an EEA national or a member of the family of an EEA national and makes a claim to the Secretary of State that the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom."

35. With effect from April 2015, the 2014 Act has substituted an entirely new version of section 92, in which there is no equivalent of former section 92(4)(b). The new section 92, however, does not apply to the applicant's case.

36. Mr Karim submitted that the use of the word "also" in section 92(4) highlights the fact that subsection (4) applies in addition to subsections (1), (2) and (3). Until a Tribunal has found the applicant's marriage to be one of convenience, with the result that the applicant is not a family member of an EEA national, Mr Karim submitted that the applicant falls within section 92(4)(b), with the result that the applicant could not be removed, since he had made a claim to the respondent that removal would breach his rights under the Treaties. The question whether the applicant is or is not the "member of the family of an EEA national" is, according to Mr Karim, a precedent fact, to be determined by a Tribunal. Accordingly, the word "is" in section 92(4)(b) should be read as, in effect, including the words "may be". That interpretation was, according to Mr Karim, strengthened by the fact that there could be no circumstances in which the respondent would make an immigration decision under section 82 in respect of an EEA national, which would require that national to assert Treaty rights.

37. Ms Smyth submitted that Mr Karim's analysis ignores the plain language of the provision, which uses the word "is" and not "may be". The suggestion that there would be no circumstances in which the respondent might make an immigration decision in respect of EEA nationals and family members was, she said, misconceived. For example, a 19 year old third country national who is a direct descendant of an EEA national "is" a family member. If he or she had not previously relied on EU law rights, they may well wish to do so when faced with the prospect of removal. Even an EEA national might be the subject of an immigration decision if the respondent did not know that he or she is such a national; for example, a dual country national who had not, for whatever reason, relied on EU citizenship in the first instance.

(ii) Discussion

38. Particularly in the light of our findings regarding the scope of the Directive, there is, we consider, no justification for adopting the approach to the construction of section 92(4)(b) for which Mr Karim contends. The word "is" does not fall to be construed as if it read (or included) "may be". We agree with Ms Smyth's submissions that there may indeed be cases where a person who is an EEA national or family member is

given an immigration decision under the 2002 Act. Thus the provision does not bite on air, unless it is given Mr Karim's construction.

39. Not only is there no reason to construe section 92(4)(b) in the way the applicant contends; there is a strong policy reason not to do so. We have already indicated at paragraph 1 above that the factual scenario of the present application (or some variant of it) is being commonly encountered by judges in this jurisdiction. A third country national who is refused a residence card on the ground that his or her marriage is considered by the respondent to be one of convenience is commonly made the subject of a decision to remove under section 10 of the 1999 Act. Parliament's decision not to make an appeal against the EEA decision suspensive of removal from the United Kingdom would be rendered effectively nugatory if section 92(4)(b) were to be interpreted in such a way as to confer such a suspensive right of appeal, which in practice will have at its heart the very issue to be determined in the EEA appeal; namely, whether the marriage is one of convenience.

40. This brings us to the scope of these judicial review proceedings. The respondent's position is that the relevant legislation entitles her to remove the applicant, so that any appeal against this type of EEA decision or the removal decision must be brought or, in the case of this type of EEA decision, brought or continued, from outside the United Kingdom. The respondent accepts that her decision to remove is, of course, susceptible to judicial review. The applicant's case at this point appears to be that, if the appellate route does not provide the means whereby the applicant can remain in the United Kingdom whilst the issue of the marriage of convenience is factually determined, then that issue needs to be so determined through the judicial review. By contrast, Ms Smyth submitted that the judicial review should be based on normal public law principles, characterising the test as being whether, on the material available to the respondent, the applicant was a person "reasonably suspected" of being party to a marriage of convenience.

41. We agree with Ms Smyth that the applicant's judicial review can succeed only if the respondent's categorisation of the marriage as one of convenience is found to be unlawful on public law principles. We can see no reason to depart from those principles in this type of judicial review. On the contrary, any greater intensity of review beyond that advocated by Ms Smyth (which is anyway somewhat more intrusive than a pure Wednesbury test) risks the very abuse which European and domestic lawmakers have been at some pains to avoid.

42. In the present case, the fact that the respondent had a reasonable basis for taking the view that the applicant's marriage was one of convenience is unarguable. The reasons for refusal letter of 25 February 2015 went into considerable detail regarding problematic aspects of the answers given at interview by the applicant and his wife respectively. The interview record has also been adduced, which provides a basis for the respondent's conclusion regarding the nature of the marriage. There is, in short, no irrationality or other public law unlawfulness in the decision to remove.

43. Although Ms Smyth did not seek to rely upon it, we observe that, where Parliament provides for a matter to be determined by appeal, albeit out-of-country, there need to be "special or exceptional factors" before a court or tribunal will permit a substantive

challenge to a removal decision pursuant to section 10 of the 1999 Act. The rationale is that the appeal affords an adequate alternative remedy. This principle has recently been trenchantly re-stated in R (Mehmood) and others v Secretary of State for the Home Department [2015] EWCA Civ 744. We cannot begin to see any such factors in the present case.

44. It follows that although, as we have already indicated, the applicant remains in the United Kingdom, where his appeal to the First-tier Tribunal has been heard, the decision-making challenged in this judicial review was not unlawful. The applicant had no legal entitlement to remain in the United Kingdom for the purpose of pursuing that appeal.

45. Mr Karim submitted that it would be unsatisfactory for the appellant to be removed and thus precluded from playing a full part in his appeal, including giving "live" evidence to a Tribunal about the issue of his marriage. An in-country appeal would, we accept, be likely to offer more to the applicant. But it is the clear effect of the relevant legislation that the applicant is not entitled to such an appeal and it is not for the Tribunal to circumvent this.

F. Post-hearing submissions

(i) Regulation 21B of the EEA Regulations

46. Both parties commented in their post-hearing submissions upon regulation 21B (abuse of rights or fraud). Mr Karim considered that 21B "appears to only concern itself with EEA nationals or their family members". In similar vein, Ms Smyth submitted that there was "no need for the Secretary of State to invoke the regulation 21B power" in the circumstances of the present case because a party to a marriage of convenience is not a spouse and an application for a residence card by such a person would fail for that reason.

47. As can be seen, regulation 21B derives from Article 35 of the Directive. We agree with Counsel that it is directed at persons (a) who are (and accepted to be) EU nationals or their family members and (b) who seek to abuse rights to reside by, *inter alia*, entering or attempting to enter into a marriage of convenience or by employing fraud to obtain a right to reside. The opening words –"The abuse of a right to reside includes"- make this plain. Thus, for example, an EEA national who enters into a marriage of convenience with a third party may find him or herself the subject of an adverse EEA decision, such as to remove the national under regulation 19. There is, however, no requirement for the respondent to take an EEA decision by reference to regulation 21B in the case of a person whom she has reasonable grounds to regard as having no relevant rights under the Directive.

(ii) Article 47 of the Charter of Fundamental Rights

48. Article 47, so far as material, provides as follows:-

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented."

49. We asked the parties to comment, in their post-hearing submissions, on the significance, if any, of Article 47 as regards the present proceedings. Mr Karim submitted that removing one or both of the parties to the alleged marriage of convenience from the United Kingdom meant that the party or parties concerned could not effectively engage in any appeal process. It was particularly important in cases such as the present for a fact-finding Tribunal to consider the mannerisms and demeanour of the applicant, in the course of giving his oral evidence. Without this there could not be a fair and effective trial. Ms Smyth submitted that the content of any Article 47 right must be context-specific.

50. We agree with that last submission. As was noted by the Court of Justice of the European Union in Case C-249/13 Khaled Boudjlida at [43]:

> "… it is… in accordance with the Court's settled case law that … fundamental rights, such as respect for the rights of the defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (the judgments in *Alassini and Others,* C-317/08 to C-320/08, EU:C2010:146, paragraph 63; *G and R,* EU:C:2013:533, paragraph 33; and *Texdata Software,* C-418/11, EU:C:2013:588, paragraph 84)".

51. In order to see where the balance is to be struck in cases of this kind, one looks to the provisions of the Directive. There, as we have noted, the relevant appeal rights are non-suspensive. However, in cases covered by Article 31 (which, we emphasise, does not include the applicant's type of EEA appeal), the persons concerned have a qualified right of re-entering in order to submit a "defence in person". The scheme of the Directive is, we find, entirely compatible with Article 47 of the Charter. Article 47 does not necessitate the wholesale conferring of suspensive rights of appeal against any EEA decision.

(iii) Macastena v Secretary of State for the Home Department and regulation 24AA

52. Regulation 24AA of the EEA Regulations applies where the Secretary of State intends to give directions for the removal of a person to whom regulation 24(3) applies; that is to say, a person to be removed under regulation 19. Regulation 24AA gives effect to Article 31. In the light of what we have found at paragraphs 28 to 30 above regarding that Article, it is plain that regulation 24AA can have no direct application to this type of EEA decision.

53. In Macastena v Secretary of State for the Home Department [2015] EWHC 1141 (Admin), a renewed permission hearing, Collins J doubted the practical utility of the Secretary of State's certifying under regulation 24AA that a person may be removed

from the United Kingdom in a family life case, given that the person has a right to return (at the Secretary of State's expense, *per* Collins J) in order to present their case in person under regulation 29AA, at the First-tier Tribunal.

54. Not only does regulation 24AA have no direct bearing on the present proceedings, we reject Mr Karim's submission that it may have some indirect effect. Mr Karim submitted that it cannot be right that persons subject to removal under regulation 19 as a result of having committed criminal offences can be in a better position that the present applicant, so far as concerns being present at his appeal hearing. But, for the reasons we have already given, that is the position; and there are sound policy reasons for it. Macastena thus has no bearing on cases of the present kind.

Decision

55. For these reasons, this application is dismissed.

APPENDIX

LEGISLATION

Directive 2004/38/EC

Recitals

(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of 'family member' should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

...

(28) To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures.

Article 3

Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

   (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

   (b) the partner with whom the Union citizen has a durable relationship, duly attested.

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

…

CHAPTER VI

RESTRICTIONS ON THE RIGHT OF ENTRY AND THE

RIGHT OF RESIDENCE ON GROUNDS OF PUBLIC POLICY,

PUBLIC SECURITY OR PUBLIC HEALTH

Article 27

General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.

4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.

Article 28

Protection against expulsion

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or

(b) are a minor, except if the expulsion is necessary for the best interests of (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

…

Article 30

Notification of decisions

1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.

2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.

3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.

Article 31

Procedural safeguards

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

   - where the expulsion decision is based on a previous judicial decision; or

   - where the persons concerned have had previous access to judicial review; or

   - where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or

public security or when the appeal or judicial review concerns a denial of entry to the territory.

…

CHAPTER VII

FINAL PROVISIONS

Article 35

Abuse of rights

Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

Immigration (European Economic Area) Regulations 2006

General interpretation

2.(1) In these Regulations –

...

'spouse' does not include -

[(a) a party to a marriage of convenience; or

…]

'Qualified person'

6.-(1) In these Regulations, 'qualified person' means a person who is an EEA national and in the United Kingdom as—

(a) a jobseeker;

(b) a worker;

(c) self-employed person;

(d) a self-sufficient person; or

(e) a student.

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

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

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

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

(ii) satisfies conditions A and B;}

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

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

(ii) satisfies conditions A and B;}

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

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

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

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

[(4) For the purpose of paragraph (1)(a), a "jobseeker" is a person who satisfies conditions A, B and, where relevant C}.]

(5) Condition A is that the person -

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

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

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

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

[(8) In paragraph (7), "the relevant period" means -

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

(b) in the case of a jobseeker, [91] days, minus the cumulative total of any days during which the person concerned previously enjoyed a right to reside as a jobseeker, not

including any days prior to a continuous absence from the United Kingdom of at least 12 months.]

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

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

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

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

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

[(11) Where condition C applies -

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

(b) condition B has effect as if "compelling" were inserted before "evidence".]

Family member

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

(a) his spouse or his civil partner;

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

(i) under 21; or

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

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

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

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

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

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

(3) Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the

conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked.

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

…

[**Abuse of rights or fraud**

21B.-**(1)** The abuse of a right to reside includes -

(a) engaging in conduct which appears to be intended to circumvent the requirement to be a qualified person;

(b) attempting to enter the United Kingdom within 12 months of being removed pursuant to regulation 19(3)(a), where the person attempting to do so is unable to provide evidence that, upon re-entry to the United Kingdom, the conditions for any right to reside, other than the initial right of residence under regulation 13, will be met;

(c) entering, attempting to enter or assisting another person to enter or attempt to enter, a marriage or civil partnership of convenience; or

(d) fraudulently obtaining or attempting to obtain, or assisting another to obtain or attempt to obtain, a right to reside.

(2) The Secretary of State may take an EEA decision on the grounds of abuse of rights where there are reasonable grounds to suspect the abuse of a right to reside and it is proportionate to do so.

(3) Where these Regulations provide that an EEA decision taken on the grounds of abuse in the preceding twelve months affects a person's right to reside, the person who is the subject of that decision may apply to the Secretary of State to have the effect of that decision set aside on grounds that there has been a material change in the circumstances which justified that decision.

(4) An application under paragraph (3) may only be made whilst the applicant is outside the United Kingdom.

(5) This regulation may not be invoked systematically.

(6) In this regulation, 'a right to reside' means a right to reside under these Regulations.]

Appeal rights

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

…

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

(a) a passport; and

(b) either –

(i) an EEA family permit;
[(ia) a qualifying EEA State residence card;]
(ii) proof that he is the family member or relative of an EEA national; or
(iii) in the case of a person claiming to be a family member who has retained the right of residence, proof that he was a family member of the relevant person.]

…

Effect of appeals to the [First-tier Tribunal or Upper Tribunal]

29.-(1) This regulation applies to appeals under these Regulations made to the [First-tier Tribunal or Upper Tribunal].

(2) If a person in the United Kingdom appeals against an EEA decision to refuse to admit him to the United Kingdom [(other than a decision under regulation 19(1), (1A) or (1B))], any directions for his removal from the United Kingdom previously given by virtue of the refusal cease to have effect, except in so far as they have already been carried out, and no directions may be so given while the appeal is pending.

(3) If a person in the United Kingdom appeals against an EEA decision to remove him from the United Kingdom [(other than a decision under regulation 19(3)(b))], any directions given under section 10 of the 1999 Act or Schedule 3 to the 1971 Act for his removal from the United Kingdom are to have no effect, except in so far as they have already been carried out, while the appeal is pending.

(4) But the provisions of Part I of Schedule 2, or as the case may be, Schedule 3 to the 1971 Act with respect to detention and persons liable to detention apply to a person appealing against a refusal to admit him, or a decision to revoke his admission, or a decision to remove him as if there were in force directions for his removal from the United Kingdom, except that he may not be detained on board a ship or aircraft so as to compel him to leave the United Kingdom while the appeal is pending.

[**(4A)** In paragraph (4), the words "except that he" to the end do not apply to an EEA decision to which regulation 24AA applies.]

(5) In calculating the period of two months limited by paragraph 8(2) of Schedule 2 to the 1971 Act for -

(a) the giving of directions under that paragraph for the removal of a person from the United Kingdom; and

(b) the giving of a notice of intention to give such directions,

any period during which there is pending an appeal by him under is to be disregarded [(except in cases where the EEA decision was taken pursuant to regulation 19(1), (1A), (1B) or (3)(b))].

(6) If a person in the United Kingdom appeals against an EEA decision to remove him from the United Kingdom, a deportation order is not to be made against him under section 5 of the 1971 Act while the appeal is pending.

(7) Paragraph 29 of Schedule 2 to the 1971 Act (grant of bail pending appeal) applies to a person who has an appeal pending under these Regulations as it applies to a person who has an appeal pending under section 82(1) of the 2002 Act.

…

Regulation 26(7)

SCHEDULE 1

APPEALS TO THE [FIRST-TIER TRIBUNAL OR UPPER TRIBUNAL]

[**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 or Upper Tribunal] Asylum and Immigration Tribunal as if it were an appeal against an immigration decision under section 82(1) of that Act:

section 84(1), except paragraphs (a) and (f);
sections 85 to 87;
…
section 105 and any regulations made under that section; and
section 106 and any rules made under that section.

Immigration and Asylum Act 1999

10. Removal of certain persons unlawfully in the United Kingdom.

(1) A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if -

(a) having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave;

[(b) he uses deception in seeking (whether successfully or not) leave to remain;

(ba) his indefinite leave to enter or remain has been revoked under section 76(3) of the Nationality, Immigration and Asylum Act 2002 (person ceasing to be refugee);] or

(c) directions […] have been given for the removal, under this section, of a person […] to whose family he belongs.

(2) Directions may not be given under subsection (1)(a) if the person concerned has made an application for leave to remain in accordance with regulations made under section 9.

[**(3)** Directions for the removal of a person may not be given under subsection (1)(c) unless the Secretary of State has given the person written notice of the intention to remove him.

(4) A notice under subsection (3) may not be given if –

(a) the person whose removal under subsection (1)(a) or (b) is the cause of the proposed directions under subsection (1)(c) has left the United Kingdom, and

(b) more than eight weeks have elapsed since that person's departure.

(5) If a notice under subsection (3) is sent by first class post to a person's last known address, that subsection shall be taken to be satisfied at the end of the second day after the day of posting.

(5A) Directions for the removal of a person under subsection (1)(c) cease to have effect if he ceases to belong to the family of the person whose removal under subsection (1)(a) or (b) is the cause of the directions under subsection (1)(c).]

(6) Directions under this section -

(a) may be given only to persons falling within a prescribed class;

(b) may impose any requirements of a prescribed kind.

(7) In relation to any such directions, paragraphs 10, 11, 16 to 18, 21 and 22 to 24 of Schedule 2 to the 1971 Act (administrative provisions as to control of entry), apply as they apply in relation to directions given under paragraph 8 of that Schedule.

[**(8)** When a person is notified that a decision has been made to remove him in accordance with this section, the notification invalidates any leave to enter or remain in the United Kingdom previously given to him.]

(9) The costs of complying with a direction given under this section (so far as reasonably incurred) must be met by the Secretary of State.

Nationality, Immigration and Asylum Act 2002

78. No removal while appeal pending

(1) While a person's appeal under section 82(1) is pending he may not be -

(a) removed from the United Kingdom in accordance with a provision of the Immigration Acts, or

(b) required to leave the United Kingdom in accordance with a provision of the Immigration Acts.

(2) In this section 'pending' has the meaning given by section 104.

(3) Nothing in this section shall prevent any of the following while an appeal is pending -

(a) the giving of a direction for the appellant's removal from the United Kingdom,

(b) the making of a deportation order in respect of the appellant (subject to section 79), or

(c) the taking of any other interim or preparatory action.

(4) This section applies only to an appeal brought while the appellant is in the United Kingdom in accordance with section 92.

…

92. Appeal from within United Kingdom: general

(1) A person may not appeal under section 82(1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies.

(2) This section applies to an appeal against an immigration decision of a kind specified in section 82(2)(c), (d), (e), (f) and (j).

(3) This section also applies to an appeal against refusal of leave to enter the United Kingdom if -

(a) at the time of the refusal the claimant is in the United Kingdom, and

(b) on his arrival in the United Kingdom the claimant had entry clearance.

…

(4) This section also applies to an appeal against an immigration decision if the applicant-

…

(b) is an EEA national or a member of the family of an EEA national and makes a claim to the Secretary of State that the decision breaches the appellant's rights under the Community Treaties in respect of entry into or residence in the United Kingdom.