

CHAPTER 9 – APPEALS

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Children's Duty

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the UK Border Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. It does not impose any new functions, or override existing functions.

Officers must not apply the actions set out in this instruction either to children or to those with children without having due regard to Section 55. The UK Border Agency instruction 'Arrangements to Safeguard and Promote Children's Welfare in the United Kingdom Border Agency' sets out the key principles to take into account in all Agency activities.

Our statutory duty to children includes the need to demonstrate:

- Fair treatment which meets the same standard a British child would receive;
- The child's interests being made a primary, although not the only consideration;
- No discrimination of any kind;
- Asylum applications are dealt with in a timely fashion;
- Identification of those that might be at risk from harm.

1. EEA Legislation

The EU has issued a number of Regulations and Directives that give effect to the rights laid down in the Treaties. A Regulation is binding law, and takes precedence over contrary domestic legislation.

It is BIA's view that the EEA Regulations are completely compatible with the UK's obligations under EEA law, and that all EEA appeals should be dealt with in accordance with the Regulations. However, it is important to remember that EEA law takes precedence over domestic law. POs may therefore be faced with the argument that a particular part of the Regulations does not comply with Directive 2004/38, and should therefore not be followed. Such arguments occasionally result in referrals to the European Court of Justice and where the UK Regulations or policy are deemed to be incompatible with EU law, they are amended accordingly.

POs should discuss with their Senior Caseworkers any cases in which Representatives argue that any of the EEA Regulations are not compatible with the Directive. SCWs should ensure that the European Policy Directorate (EPD) is kept informed of these cases. Please ensure that both the SCW responsible for European matters and the Operational Policy Manager are copied into any communications with EIP.

1.1 Applications by Representatives to refer a case to The European Court of Justice

The AIT has the power to refer a case to the ECJ for a ruling on a point of European law, and Representatives will occasionally ask it to do so. The legal test that the AIT will apply when deciding whether to make a reference will be that set out by the Court of Appeal in *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex parte Else* [1993] QB 534 at 545. It will ask itself whether it can resolve the matter itself "with complete confidence". If it cannot, it will usually refer the matter.

Unless the European Policy Directorate advises otherwise, an application to refer a matter to the ECJ should always be resisted. If the AIT makes a reference, EIP should be informed immediately, through a SCW (copying in the SCW responsible for European matters and the Operational Policy Manager), as they will want to consider bringing a JR challenge to the AIT's decision. If a case is referred to the ECJ, the AIT will adjourn the matter until the ECJ has made its decision. Once the ECJ has given its judgment, the AIT will determine the appeal in accordance with the law as laid down by Luxembourg.

1.2 Opinions of the Advocate General

Although the Advocate General's opinion in a particular case is not binding on the ECJ, it is often followed. The opinion can be submitted to the AIT as persuasive, but not binding, authority until it is superseded by the relevant ECJ judgment. i.e. A Presenting Officer may refer to an Opinion of the Advocate General in submissions and ask the Immigration Judge to note its comments but it must be clear that it is not relied upon as a legal ruling.

2 Appeal rights in EEA cases

When dealing with EEA appeals it is important to note that the Right of Appeal is directly linked to the type of application made and to the decision that has been taken. It is possible for an individual to have rights of appeal under the EEA Regulations and under Section 82 of the 2002 Act either separately or at the same time.

European Community law is a distinct system from the Immigration Rules, (HC 395) and this impacts directly on the appeal right. It is therefore essential to be clear about the basis of the application and whether any decision would trigger a right to appeal under the Regulations and/or Section 82 of the 2002 Act.

2.1 “One-stop” appeals.

Part 6 of the EEA Regulations 2006 provide for the right of appeal for those claiming the right of residence in the UK under EEA law. The Regulations apply the one stop process, but the way in which they do it differs somewhat from the way it is applied under the 2002 Act.

When an EEA decision is made, a “one stop” notice can be served in accordance with s120 of the 2002 Act. This means that any future claim (including an asylum or human rights claim) that relies on a matter that could have been raised in an appeal against the EEA decision can be certified under s96 of the 2002 Act. If this happens, any refusal of that claim will not attract a 2002 Act right of appeal. So far as EEA appeals brought after an appeal under the 2002 Act (or an earlier appeal under the 2006 Regulations or their predecessors) has been disposed of are concerned, Regulation 26(4)-(5) of the 2006 Regulations provide:

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

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

This means that a ground of appeal brought under EU law that was previously considered in an appeal hearing could be certified and thus excluded from the current appeal.

2.2 Appeals under the 2002 Act.

Other than in s83 cases, an appeal only arises under the 2002 Act if an immigration decision has been taken in respect of the subject.

S82 of the 2002 Act provides:

82 (2) In this Part "immigration decision" means

- (a) refusal of leave to enter the United Kingdom,*
- (b) refusal of entry clearance,*
- (c) refusal of a certificate of entitlement under section 10 of this Act,*
- (d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain,*
- (e) variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain,*
- (f) revocation under section 76 of this Act of indefinite leave to enter or remain in the United Kingdom,*
- (g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b) or (c) of the Immigration and Asylum Act 1999 (c. 33) (removal of person unlawfully in United Kingdom),*
- (h) a decision that an illegal entrant is to be removed from the United Kingdom by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 (c. 77) (control of entry: removal),*
- (i) a decision that a person is to be removed from the United Kingdom by way of directions given by virtue of paragraph 10A of that Schedule (family),*
- (j) a decision to make a deportation order under section 5(1) of that Act, and*
- (k) refusal to revoke a deportation order under section 5(2) of that Act.*

Persons with rights of residence under EEA law do not have leave to enter or remain in the UK (they do not need it). Therefore, the revocation of, or refusal to renew a Registration Certificate, Residence Card or document signifying permanent residence would not amount to an immigration decision under s82(2)(d) or (e). It would therefore not attract a right of appeal under the 2002 Act. The right of appeal would be under the EEA Regulations. However, EEA issues are frequently raised (often for the first time) in appeals against removal or deportation decisions. If an EEA national or the family member of an EEA national raises EEA issues as a reason for an appeal against any immigration decision, then there is a right to an in country appeal (Sections 92(4)(b)).

A decision to remove an EEA national or family member taken under Regulation 19 of the 2006 EEA Regulations is not an immigration decision under the 2002 Act. The only appeal right it attracts is under the 2006 Regulations themselves (2006 Regulations, Schedule 2, para 4(1)).

2.3 EEA Decisions.

Regulation 26(1) of the 2006 Regulations provides for a right of appeal against an EEA decision.

An EEA decision is defined as (Regulation 2):

*A decision made under the 2006 Regulations, which concerns a person's:
Entitlement to be admitted to the UK including the refusal of a family permit;*

Entitlement to be issued with or to have renewed, or not to have revoked, a registration certificate, residence card, certificate certifying permanent residence or permanent residence card

2.4 Removal from the UK

In order for an applicant to rely on this right of appeal, s/he must produce:

If s/he claims to be an EEA national a valid passport or national identity card issued by an EEA state. See Regulation 26(2).

If s/he claims to be the family member or relative of an EEA national, an EEA family permit or other proof that s/he is related as claimed to the EEA national (Regulation 26(3)).

2.5 When can the right of appeal be exercised in-country?

The in-country right of appeal under Regulation 26 includes the following decisions:

A free standing refusal of a registration certificate, residence card, certificate certifying permanent residence or permanent residence card;

Decision to remove because not a qualified person or family member of a qualified person.

Decision to exclude under Regulation 19(1) (This is a decision to exclude the applicant on the grounds of public policy, public health or public security.)

2.6 Regulation 27 - out of country appeals.

Regulation 27 deals with the out of country right of appeal for EEA nationals. It states:

*27(1) Subject to paragraphs 2 and 3, a person may not appeal under Regulation 26 whilst he is in the United Kingdom against an EEA decision -
to refuse to admit him to the United Kingdom
to refuse to revoke a deportation order made against him;
to refuse to issue him with an EEA family permit.
To remove him from the United Kingdom after he has entered or sought to enter the United Kingdom in breach of a deportation order.*

(2) Paragraph (1)(a) does not apply where

The person held an EEA family permit, a registration certificate, a registration card, a document certifying permanent residence or a permanent residence card on his

arrival in the United Kingdom, or can otherwise prove that he is resident in the United Kingdom;

The person is deemed not to have been admitted to the United Kingdom under Regulation 22(3) but at the date on which notice of decision to refuse to admit him is given he has been in the United Kingdom for at least three months. [This covers people who have been given Temporary Admission (TA) at Port, but whom we later decide not to admit. The ECJ case of *Yiadam* [2001] C-357/98 provided that, where the appellant had been in the UK for several months on TA, we could not rely on the fact that, legally, he had not been admitted to the UK to deny him an in-country right of appeal]

The person is in the United Kingdom and a ground of the appeal is that, in taking the decision, the decision maker acted in breach of the appellant's rights under the Human Rights Convention or the Refugee Convention, unless the Secretary of State certifies that the ground of appeal is clearly unfounded.

(3) Paragraphs (1)(d) does not apply where a ground of the appeal is that, in taking the decision, the decision-maker acted in breach of the appellant's human rights under the Human Rights Convention or the Refugee Convention, unless the Secretary of State certifies that that ground of appeal is clearly unfounded. Thus, the appellant's right of appeal will only be able to be exercised from outside the UK in the following circumstances:

Refusal to admit an applicant to the UK (subject to *Yiadam*)

Refusal to revoke a deportation order

Refusal to issue an EEA family permit.

Appeal brought on asylum or human rights grounds but is certified by us.

If Presenting Officers think that they have an appeal that falls under Regulation 27 but the appellant is in the UK, they should seek the advice of a Senior Caseworker.

2.7 Non-EEA family members.

Confusion over appeal rights may arise when dealing with non- EEA family members. It is important that Presenting Officers understand which decision had been made.

Non-EEA family members may have a claim to remain under the Immigration Rules as a family member of a person present and settled in the UK as well as having a right to reside on the basis of being a family member of an EEA national. However, this will only be the case where the EEA national has been granted ILE/R, or has permanent residence.

2.8 Chen type cases.

One example of where confusion may arise is in a Chen type case. The decision to allow non-EEA nationals to reside in order to care for their EEA national child is made under rule

257C of the Immigration Rules. The right of appeal is therefore under Section 82 of the Nationality, Immigration and Asylum Act 2002 and not (as is often argued in court by representatives) under the EEA Regulations. It is a decision taken under the Immigration Rules, and is not an EEA decision.

2.9 Abandonment of appeals.

Paragraph 4(2) of Schedule 2 to the 2006 Regulations deals with appeals under Section 82 of the Nationality, Immigration and Asylum Act 2002. It states that an appeal under Section 82(1) (or under the equivalent parts of the 1993, 1996 or 1999 Acts) is abandoned if the applicant has been issued with a registration certificate, residence card, certificate certifying permanent residence or a permanent residence card.

It should also be noted that an appeal under the EEA Regulations is not abandoned solely because an appellant leaves the United Kingdom (Regulation 25(4) of the 2006 Regulations).

2.10 Dealing with appeals after 30 April 2006 against decisions made before that date.

Schedule 4 of the 2006 Regulations contains transitional provisions. Any application for a residence permit, EEA family permit or residence document outstanding on 30 April will be deemed to be an application for the relevant document under the 2006 Regulations (paragraph 3). However, the requirement to issue a registration certificate “immediately” will not apply.

Appeals pending under the 2000 Regulations on 30 April will continue as pending appeals under the 2006 Regulations (paragraph 5).

So far as substantive provisions and entitlements go, Directive 2004/38/EC, and the 2006 Regulations, will be fully in force from 30 April. This means that they will represent the law that the AIT needs to apply. This [(subject to the exception below)] means that all appeals heard after 30 April should be determined under the new Directive and Regulations, whether this is to the appellant’s benefit or detriment.

This also applies to appeals brought under the 1999 Act (i.e. against decisions made before 1 April 2003). The AIT’s analysis in *SGC and others (EEA – Date of Decision – 1999 Act) Ireland [2005] UKAIT 00179* is not valid under the 2006 Regulations, because the relevant 2002 Act appeal provisions, (including s85(4), which allows the AIT to consider circumstances that have changed since the original decision) will apply to all EEA appeals (see Schedule 2).

2.11 Permanent Residence.

UK law has for some time provided for permanent residence to be granted to EEA nationals and their family members who have been exercising Treaty Rights for a certain period of time in the UK. Directive 2004/38/EC brings these rights into European law, and the relevant details are set out in Chapter 4 of the Directive.

Previously, we had granted permanent residence under the Immigration Rules, not the EEA Regulations. However, from 30 April 2006 they will be dealt with under the 2006 EEA Regulations, and relevant the Immigration Rules have been revoked. One consequence of this is that people refused permanent residence will **now** have a right of appeal.

3 Caselaw

3.1 Persons considered as workers

Someone undertaking part time work providing the work is *genuine and effective* and not purely marginal and ancillary (*Case 53/81 Levin v Staatsecretaris van Justitie*). Even part time work, whilst providing less than required for subsistence, may constitute, for many, an effective means of improving their living conditions. It is not the reason for taking employment that is relevant, but whether it is genuine economic activity. Furthermore, supplementing income from the public purse does not stop a person being a worker (*Case 139/85 Kempf*).

EEA nationals who have lost their employment here and are looking for another job may also be treated as workers although they can lose this right if they fail to secure work within a reasonable time. The law was previously governed by *Case C-292/89 R v IAT ex p Antonissen [1991]*, but this has now been consolidated by Article 7 of Directive 2004/38/EC, which in turn is brought into UK law by Regulation 6(2)(b) of the 2006 EEA Regulations.

3.2 Self-employed persons

The case of *Van Roosmalen (Case 300/84)* defined self-employment as genuine and effective economic activity carried out outside of a relationship of subordination.

3.3 Prisoners

People serving prison sentences are not workers for the purposes of EEA law, even if they do prison work. The AIT confirmed this in *[2006] UKAIT 00066 OA (Prisoner- not a qualified worker) Nigeria*. The Tribunal observed that prisoners are not participating in the labour market. They are also not exercising free movement rights (quite the opposite). The effect of *OA* is that the non-EEA family members of an EEA national who is serving a prison sentence cannot obtain a right to reside from their relationship with the prisoner.

You should also note that the AIT's finding in *MG and VC (EEA Regulations 2006; "conducive" deportation) Ireland [2006] UKAIT 00053*, that time in prison counts towards the period of ten years' residence needed before someone can benefit from the higher threshold for deportation provided by Regulation 21(4), does not apply to Regulation 15. The Tribunal in *MG and VC* was not asking itself whether the appellants' residence had been in accordance with the EEA Regulations, as Regulation 21(4) does not apply that test.

3.4 Sickness Insurance

Persons must not become a burden on the public finances of the host Member State. In paragraph 93 of *Baumbast*, the ECJ found that it was disproportionate for a lack of sickness insurance that covered emergency medical treatment within the UK to be a reason for refusing to grant a right of residence on this basis. Furthermore, the law in regard to the NHS prevents us from restricting people from obtaining medical treatment after they have been here for more than 12 months.

Presenting Officers should seek to argue that an EEA national who holds no form of medical insurance is not appropriately covered. Where evidence of medical insurance is produced, it must clearly demonstrate that the EEA national and their families are covered in respect of all pre-existing medical conditions that require medication and/or treatment as well as any treatment that may be required for serious or long-term medical conditions. Any arguments should focus on whether or not the EEA national or their families could be considered an "unreasonable burden" on the UK.

Article 7 (b) of Directive 2004/38/EC states that Union citizens should have 'comprehensive sickness insurance'. The ECJ has yet to rule on the definition of this. Therefore, it is important that Presenting Officers highlight that the appellant must give details of the sickness insurance policy before the court rather than simply producing a cover note. Senior Case Workers should be consulted in complex cases.

3.5 Chen and Zhu v Secretary of State for the Home Department [2003]

The reference in Chen to the EEA child's primary carer should be taken as applying to both of his or her parents if appropriate. There must be sufficient funds to maintain and accommodate the child and his non-EEA parents(s) without access to public funds. As the ruling did not give non-EEA parents access to the labour market, only earnings from legal employment can be taken into account.

This position was confirmed by the AIT's finding in *GM and AM (EU national: establishing self sufficiency) France [2006] UKAIT 00059*. It concluded that an EU national child cannot establish a right of residence based on self-sufficiency where the resources required to make him or her self-sufficient would have to come from a parent who has no independent right to work in the UK.

GM and AM concerned the French child of a Congolese failed asylum seeker (her father). Both were living on NASS support, but the father had a job offer (which, as a failed asylum seeker, he was not allowed to take up). It was argued that the child was entitled to reside here because she *would be* self sufficient if her father were allowed to take up the job offer. The Tribunal rejected this argument as "entirely circular". It concluded that the right to work granted to the family member of an EEA national depended on the **pre existing** right of residence of the EEA national herself. Therefore, such a right could not be demanded in order to **give** the EEA national a right to reside.

Although the father in *GM and AM* was not working illegally (he was not working at all), the Tribunal concluded that, if he had been, his wages would not be an acceptable source of income for the purpose of proving that his daughter was self sufficient (see paragraph 51).

Presenting Officers should **not** automatically accept that any employment undertaken is legal and should make reasonable efforts to check the immigration status of the carer(s) on papers or CID records, to see whether they have the right to work. Ultimately the burden of proof lies upon the appellant. If non-EEA parents are unable to demonstrate that they are entitled to work, Presenting Officers should invite the AIT to disregard these claimed earnings.

Furthermore, Presenting Officers should not automatically accept evidence that relates to employment at face value due the increasing amount of forged evidence that is being submitted.

It should also be noted that non-EEA parents of a minor EEA national do not qualify as "family members" under EU law and therefore the EEA Regulations, (including the appeal provisions) do not apply to them. It is however a requirement that the UK accommodates the ruling of Chen which is why provision is made in paragraph 257C of the Immigration Rules.

In most cases, the non-EEA parents will not have existing Leave to Enter/Remain at the date of application so any refusal will not attract a right of appeal under the 2002 Act. However, claims under *Chen* are often raised at a late stage in asylum appeals, and so need to be dealt with by POs.

3.6 Definition of a family member

It should be noted that the definition in Regulation 7 directly reflects the definition of a family member in Article 2 of Directive 2004/38/EC and more distant relatives can only be considered under Regulation 8. For example, common law spouses or fiancé(e)s of EEA nationals do not come within the definition of family members. (see *Reed v Netherlands* [1986] ECR 1283). Civil partners, on the other hand, do.

3.7 Applications for EEA documents from family members of EEA nationals who are without leave to remain or who have entered the UK illegally.

Applications will be lodged by EEA family members who are currently physically present within the UK but have never been lawfully admitted into the UK, (e.g. a failed asylum seeker who has only ever been on Temporary Admission) or who have overstayed any leave granted or who have simply entered the UK illegally. In these circumstances, it would be appropriate to consider the application as reflected in the ECJ cases of *CARPENTER* and *MRAX*.

3.8 Authority for requiring non EEA family members of EEA nationals to meet requirements of Immigration Rules if physically outside the EU.

The authority for treating non EEA family members differently depending on if they are physically present inside or outside of the EU derives from a principle established in the ECJ case of *Akrich*. This case established that non EEA family members of EEA nationals can only benefit from the free movement provisions of EU law to move *within* the EU when they were lawfully present within the EU. This is because there is no provision in EU law to facilitate entry *into* the EU and therefore, a family member of an EEA national who is outside of the EU is required to meet the Immigration Rules in order to enter the UK. This principle receives further support from the AIT case of *PB and others* [2006] UKIAT 00082.

3.9 *Yunying Jia v Migrationsverket* (Case C-1/05)

This case considered the application of *Akrich* upon an application for a residence permit made by a Chinese national who was lawfully present in Sweden, (by virtue of a current Visit Visa) to remain with her son and his German wife, (exercising Treaty rights in Sweden).

The ECJ determined that *Akrich* was not relevant to this case as the applicant was lawfully present in the EU at the time that the application was made.

The ECJ state:

“Having regard to the judgment in Case C-109/01 Akrich [2003] ECR I-9607, Community law does not require Member States to make the grant of a residence permit to nationals of a non-Member State, who are members of the family of a Community national who has exercised his or her right of free movement, subject to the condition that those family members have previously been residing lawfully in another Member State.”

Presenting Officers need to be aware that representatives may use this to argue that the principle in *Akrich* is unsound. Presenting Officers should maintain the argument that *JIA* is silent on this issue. It is true that it is not strictly necessary for someone to have previously resided lawfully in **another** Member State with an EEA national in order to apply for an EEA document. However, *JIA* does not address the issue of non-EU family members of EU nationals who do not have leave or who have never had leave to enter/reside in the EU and therefore the principle of prior lawful residence within the EU is still relevant. In the case of *JIA*, Ms Jia was actually lawfully present within the EU at the time she applied for a residence document, (albeit she had only resided lawfully with the EEA national within the country from where she applied) and therefore it was appropriate to consider her application.

3.10 Direct descendants of qualified persons who have died or left the UK, where the direct descendant is attending an educational course.

Under Regulation 10(4), the parent with actual custody of a child who qualifies under Regulation 10(3) will also retain a right of residence.

These Regulations, together with Regulation 10(5) implement the ECJ's judgment in *Baumbast* (C/433.99). *LB and MB (dependants of absent Community nationals) Colombia [2006] UKAIT* the AIT confirmed that the principle in *Baumbast* does not extend to family members other than descendants. This case was decided under the European and domestic law that existed before 30 April 2006, but will be a useful guide to the meaning of *Baumbast* should the same argument be made in respect of the new Directive and Regulations.

3.11 Non-EEA family members of UK nationals, where the UK national has exercised Treaty Rights in another EEA Member State (the *Surinder Singh* principle).

In July 1992 the European Court Of Justice (ECJ) ruled in the case of *Surinder Singh* that where a national of a Member State goes with their non-EEA spouse to another Member State to exercise a Treaty right there in an economic capacity, then on return to their own Member State the non-EEA spouse is entitled under EC law to join the Member State national.

Regulation 9 of the 2006 EEA Regulations gives effect to this judgment. It provides that the EEA Regulations apply to the family member of an UK national who is returning to the UK, as if the UK national were an EEA national, provided that the following conditions are met:

The UK national is either residing as a worker or self-employed person in an EEA State or was so residing (again, only as a worker or self-employed person) before returning to the UK.

If the family member in question is the UK national's spouse or civil partner, they either:

- are now living together in an EEA State, or
- if the UK national has now returned to the UK, had married or entered into the civil partnership and were living together in the EEA State before his/her return.
- if the UK national is engaged in economic activity, (worker or self-employed) within the UK or intends to engage in economic activity upon return to the UK.

This is an important consideration as it is key to the UK national demonstrating that they are exercising free-movement rights under EU law and a person who has worked in an EEA state and then returns to the UK and does not engage in economic activity could not benefit from Regulation 9. This issue is currently under consideration in the ECJ case of *EIND*.

The principle of treating the UK national as if s/he were an EEA national means that the family member will need to meet the normal requirements imposed on a family member seeking entry to the UK. This includes the requirement to have a family permit, which will only be issued if the family member is lawfully resident in the other EEA country or satisfies the relevant requirements of the immigration rules.

3.12 Switching from being an EEA family member to a category under the Immigration Rules.

Applications are frequently received from persons admitted on an EEA Family permit to be treated under United Kingdom domestic law (the Immigration Rules) rather than EC law, as this provides a quicker route to settlement (i.e. after two years as opposed to five).

However, persons entering the United Kingdom under EC law (i.e. under an EEA residence card) are admitted without leave and are therefore unable to qualify for leave to remain/ILR under either paragraph 284 or 287 of HC 395. In the cases of *SAHOTA* and *ZEGHRABA*, it was held that the systems of EC and national law in relation to immigration control were distinct and therefore, it is not possible to 'pick and mix' between the rules and EC law in order to obtain the maximum benefits of each

3.13 Regulation 8(4) – dependant relatives of EEA nationals who would meet the requirements of the Immigration Rules if the EEA national was present and settled in the UK.

This Regulation ensures that EEA nationals are not treated less favourably than UK nationals who wish for dependant family members to remain with them in the UK.

In practice, most considerations under this provision will be with regard to paragraph 317 of the Immigration Rules with the case of *JOSEPH* being of relevance.

3.14 Allowed appeals on cases which were initially refused on the basis that the person did not qualify under Regulation 8(2)-(5).

Allowed appeals on cases which were initially refused on the basis that the person did not qualify for consideration under Regulation 8 should be referred the ECO or (for in-country cases) to European Casework. In these cases those responsible should write to the appellant acknowledging the AIT determination and that the ECO/Secretary of State will now consider the application, exercising his discretion under Regulation 12(2), 16(5) or 17(4) as appropriate.

A decision by the AIT to allow an appeal where we initially decided that the person did not qualify for a document does not mean that we are bound to grant. In such circumstances, the ECO/Secretary of State is simply required to consider granting a document. The AIT only has the power to require the ECO/Secretary of State to consider granting a document, it does not have the power to order one to be granted/issued.

This is because s86(3)(b) of NIA 2002, only allows the AIT to exercise discretion belonging to the decision maker if the decision maker has exercised it him/herself. As we decided that we had no power to issue a document (because we considered-incorrectly- that the applicant did not meet any of the conditions of Regulation 8(2)-(5)), we will not yet have exercised our discretion in this case. Therefore, the AIT cannot conclude that the discretion "should have been exercised differently". The Court of Appeal judgement in *Yau Yak Wah [1982] Imm A.R. 16* provides authority for this.

This argument was also accepted by the AIT in *SY and Others (EEA Regulation 10(1) - dependency alone insufficient Sri Lanka [2006] 00024* - see paragraphs 26-27 in particular. Although *SY* interpreted the equivalent provision of the 2000 Regulations, the AIT's reasoning applies equally to an appeal under Regulation 8 of the 2006 Regulations.