

JUST IMMIGRATION SOLICITORS

Article: 31st January 2020

Durable Partners and Permanent Residence:

By confining the qualifying period for permanent residence rights of durable partners to the duration of the EEA family permits and residence documents, is the Home Office Guidance in breach of EU law?

The Home Office Guidance's rigid confinement of durable partner's qualifying period for permanent residence rights to the duration of the family permits and residence documents may be contrary to the interpretation of Article 16 Directive 2004/38 and in breach of the obligation to facilitate under Article 3 (2). Further, it may be a breach of Article 14 of the ECHR in conjunction with Article 8.

Durable partners are classified as extended family members under Article 3 (2) of Directive 2004/38. They do not fall within the ambit of direct family members under Article 2 (2).

The Home Office Guidance *Free Movement Rights: Extended Family Members of EEA Nationals Version 6.0 8/6/2018*¹ says time spent as durable partners under Regulation 8 of the Immigration (EEA) Regulations 2016 will only be counted towards the qualifying period for acquiring permanent residence rights where the person held an EEA family permit, residence card or registration certificate issued to them in that capacity for the period.

There are no such restrictions on spouses and civil partners who are Article 2 (2) family members. For the purpose of establishing their permanent residence rights, spouses and civil partners are able to rely on periods outside their family permits and residence documents as their 5 years qualifying period, provided they are able to provide evidence of their relationships with the EEA qualified national.²

This article argues that it may be contrary to EU law for the Home Office Guidance to confine the qualifying period for permanent residence rights of

¹ Home Office, *Free Movement Rights: Extended Family Members of EEA Nationals Version 6.0 8/6/2018* P 29

² Home Office, *Free Movement Rights. Direct Family Members of EEA Nationals. Version 6.0 24/7/2018* PP 15-20

durable partners to the duration of the EEA family permits and residence documents.

The Obligation to facilitate under Article 3 (2) Directive 2004/38:

The confinement of durable partner's qualifying period for acquiring permanent residence rights to the duration of the family permits and residence documents, without taking into account any personal circumstances or other periods of cohabitation, may be a breach of the UK's obligation to facilitate entry and residence for extended family members under Article 3 (2).

In *Rahman v Other C 83/11*³, the European Court of Justice said the obligation to facilitate under Article 3 (2) Directive 2004/38 imposes on Member States a double obligation to undertake an extensive examination of the personal circumstances of extended family members and to justify any denial of entry and residence. Therefore, Member States must make it possible for extended family members to obtain a decision on their application that is founded on extensive examination of their personal circumstances and in the event of refusal, is justified by reasons. The extensive examination means according to recital 6, taking into account various other factors such as the relationship with the Union Citizen or any other circumstances, such as financial and physical dependence on the Union Citizen.⁴

Interpretation of Article 16 Directive 2004/38:

In *Rahman and others*⁵, the ECJ confirmed that that Article 3 (2) of Directive 2004/38 does not confer a right of entry and residence on extended family members. There is a distinction between family members as defined in Article 2 (2) who have a right of entry and residence, and family members in Article 3 (2), where entry and residence only have to be facilitated.⁶

Nevertheless, once extended family members such as durable partners are recognised as Article 3 (2) family members, Article 16 does not continue to make a distinction between them in the acquisition of permanent residence

³ *Rahman v Other C 83/11* Para 22

⁴ *SSHD v Rozanna Banger Case C-89/17 Opinion of Advocate General at Para 59*

⁵ *Rahman v Others Case C 83/11* Para 18

⁶ *SSHD v Rozanna Banger Case C-89/17 Opinion of Advocate General at Para 49 and 52*

rights. In the absence of such distinction, Article 16 must be interpreted broadly, having regard to its purpose and objectives⁷ of strengthening the feeling of Union Citizenship, promoting social cohesion and the integration of Union Citizens and their family members into the society of the host Member State.⁸ The continuous distinction made by the Home Office Guidance in relation to the qualifying period for permanent residence rights for spouses and civil partners under Article 2 (2) and durable partners under Article 3 (2) arguably deprives Article 16 of its effectiveness⁹ and is contrary to EU law.

Breach of Article 14 of the European Convention on Human Rights (ECHR) in conjunction with Article 8:

The ECHR underpins many of the general principles of EU law. Its provisions also provide the foundation for the EU Charter of Fundamental Rights of the European Union.¹⁰

It is true that the situations of durable or unmarried couples are not fully analogous and that there still exist differences between them, in particular in legal status and effects¹¹. However, it is accepted that family life under Article 8 exist between a couple who have lived together and have established a de facto relationship¹². Once durable partners are accepted as family members after extensive examination of their circumstances and are issued with family permits and residence documents on this basis, they are in an analogous and relatively similar position as spouses and civil partners. Any further differentiation that is made in the Home Office Guidance in determining the

⁷ *Rahman v Others* Case C 83/11 Opinion of Advocate General Para 35 and 38

⁸ Recital 17 and 18 of Directive 2004/38; Janneke de Lange and Zaneta Sedilekova, 'The right of residence of Directive 2004/38/ EC of the partner with whom the Union citizen has a durable relationship: Assessment and evidence of the starting date of the lawful residence' October 2014 Migration Law Clinic

⁹ *Rahman v Others* Case C 83/11 Opinion of Advocate General Para 38

¹⁰ *What is the Difference between European Convention of Human Rights, the European Court of Human Rights and the European Court of Justice*: ukandeu.ac.uk/fact-figures/whats-the-difference-between-the-european-convention-on-human-rights-the-european-court-of-human-rights-and-the-european-court-of-justice/ Accessed 31/12/2018; Handbook on European Non -Discrimination Law, (2010) European Union Agency for Fundamental Rights and Council of Europe

¹¹ *Petrov v Bulgaria* European Court of Human Rights 29/4/2008 Para 53

¹² *Petrov v Bulgaria* *ibid* Para 51

qualifying period for permanent residence rights for spouses and civil partners and durable partners is potentially discriminatory against durable partners on ground of their status and a violation of Article 14 of the ECHR in conjunction with Article 8. There is no objective and reasonable justification for the difference in treatment in light of the ambit of Article 16 and its purpose and objectives.

Conclusion:

In conclusion, the Home Office Guidance's rigid confinement of durable partners' qualifying period for permanent residence rights to the duration of the family permits and residence documents may be a breach of EU law.

Appendix EU does not improve the position. Under Appendix EU 11, family members of a relevant EU citizen are entitled to apply for indefinite leave to remain after a continuous period of 5 years residence in the UK¹³. Durable partners are classified as family members.¹⁴ However, in order to qualify for indefinite leave to remain, they must hold a relevant document, which include a family permit, a registration certificate and a residence card for the period of residence relied upon.¹⁵

The intention of Appendix EU is to secure the rights of EU citizens and their family members under the Draft Withdrawal Agreement.¹⁶ Under the Agreement, EU law shall be applicable to and in the UK during the transition or implementation period which ends on

31 /12/2020.¹⁷ Therefore, subject to the UK leaving the EU with a 'deal', Appendix EU may continue to be in breach of EU law after the exit date on 29/3/2019¹⁸.

¹³ Appendix EU 11 (3)

¹⁴ Appendix EU Annex 1

¹⁵ *ibid*

¹⁶ Home Office. EU Settlement Scheme. Statement of Intent 21 June 2018 P 5

¹⁷ Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 19 March 2018 Article 121 and 122

¹⁸ The writer would like to thank Richard Mc Kee for comments on this note

Agnes Lai (Principal – Solicitor)



If you would like advice or assistance on any of the issues raised in this note/article, please contact Agnes Lai by email at

agnes.lai@just-immigration.co.uk

Disclaimer:

Although correct at the time of publication, the contents of this news, article or note is intended for general information purposes only and shall not be deemed to be, or constitute, legal advice. We cannot accept responsibility for any loss as a result of acts or omissions taken in respect of this news, article or note. Please contact us for the latest legal position.