NY-v-Department for Communities (JSA) [2021] NICom 9

Decision No: C2/20-21(JSA)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

JOBSEEKERS ALLOWANCE

Application by the claimant for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 3 April 2019

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal with file reference LD/5550/18/73/L.

2. For the reasons I give below, I grant leave to appeal. I allow the appeal and set aside the decision of the appeal tribunal under Article 15(8)(a) of the Social Security (NI) Order 1998.

3. I make the decision that the tribunal ought to have made without making further findings of fact. I decide that the appellant had a right to reside in the UK for the purposes of regulation 85A(3)(c) of the JSA Regulations at the date of claim and I allow her appeal on that point.

4. I cannot make a final decision on entitlement, as the Department will have to determine whether all other relevant conditions of entitlement to JSA were satisfied at the material date.

REASONS

Background

5. The first issue in this case is whether a tribunal (pre-Brexit) was correct to determine that it was required as a matter of law to follow UK domestic

law that conflicted with an appellant's European Union (EU) law rights. This is now of historical interest only.

6. The second issue is whether EU law arising from the Treaties and the principles deriving from *R v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department* (Case C-370/90) and subsequent related case law gave the appellant a relevant right to reside in the UK for the purposes of regulation 85A(3)(c) of the Jobseeker's Allowance (NI) Regulations 1996 (the JSA Regulations).

7. The appellant, a German national, had been resident in the United Kingdom (UK) from 5 January 2005. Following separation from her husband, a dual British-Irish national, she claimed jobseekers allowance (JSA) from the Department for Communities (the Department) from 20 February 2018. On 5 March 2018 the Department made a decision under regulation 85A of the JSA Regulations to the effect that the appellant was a jobseeker under regulation 6 of the Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations) and entitled to JSA for a period of 91 days. It further decided that upon expiry of the 91 days the appellant would no longer have a right to reside but become a "person from abroad" and therefore entitled to JSA at an applicable amount of "Nil". The Department declined to accept that the appellant had a permanent right to reside in the UK in accordance with regulation 15 of 2016 Regulations. The appellant sought a reconsideration of the decision, and she was notified that the decision had been reconsidered but not revised. She appealed.

8. The appeal was determined by an appeal tribunal consisting of a legally qualified member (LQM) sitting alone. The tribunal disallowed the appeal. The appellant requested a statement of reasons for the tribunal's decision and this was issued on 23 July 2019. The appellant requested the LQM to grant leave to appeal to the Social Security Commissioner, but the application was refused by a determination issued on 24 September 2019. On 21 October 2019 the appellant requested a Social Security Commissioner to grant leave to appeal.

Grounds

9. The appellant, represented by Mr McCloskey of Law Centre NI, submitted that the tribunal had erred in law on the basis that:

> (i) it declined to hold that it had power to dis-apply the Immigration (EEA) Regulations 2016;
>
> (ii) it declined to hold that the Immigration (EEA) Regulations 2016 were not compliant with European

Union law and jurisprudence and should be dis-applied on that basis.

10. The Department was invited to make observations on the appellant's grounds. Ms Douglas of Decision Making Services (DMS) responded on behalf of the Department. She submitted that the tribunal had not materially erred in law and indicated that the Department did not support the application.

Legislation

11. The core question in this appeal is whether the applicant satisfies the conditions in regulation 85A of the Jobseeker's Allowance Regulations (NI) 1996. At the material time, this provided:

> 85A. —(1) "Person from abroad" means, subject to the following provisions of this regulation, a claimant who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.
>
> (2) No claimant shall be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland unless—
>
> > (a) subject to the exceptions in paragraph (2A) the claimant has been living in any of those places for the past three months; and
> >
> > (b) the claimant has a right to reside in any of those places, other than a right to reside which falls within paragraph (3).
>
> (3) A right to reside falls within this paragraph if it is one which exists by virtue of, or in accordance with, one or more of the following—
>
> > (a) regulation 13 of the Immigration (European Economic Area) Regulations 2006;
> >
> > (aa) regulation 15A(1) of those Regulations, but only in a case where the right exists under that regulation because the claimant satisfies the criteria in regulation 15A(4A) of those Regulations;

(b) Article 6 of Council Directive No. 2004/38/EC; or

(c) Article 20 of the Treaty on the Functioning of the European Union (in a case where the right to reside arises because a British citizen would otherwise be deprived of the genuine enjoyment of the substance of their rights as a European Union citizen).

(4) A claimant is not a person from abroad if he is—

(za) a qualified person for the purposes of regulation 6 of the Immigration (European Economic Area) Regulations 2006 as a worker or a self-employed person;

(zb) a family member of a person referred to in sub-paragraph (za);

(zc) a person who has a right to reside permanently in the United Kingdom by virtue of regulation 15(1)(c), (d) or (e) of those Regulations;

…"

12. It can be seen from the above that, at the dates of claim and decision, regulation 85A continued to refer to specific provisions of the Immigration (EEA) Regulations 2006 (the 2006 Regulations). However, this was erroneous. The 2016 Regulations had come into effect on 1 February 2017 and had repealed the 2006 Regulations from that date. It appears that regulation 85A was first amended from 7 May 2019 to include references to the 2016 Regulations. Therefore from 1 February 2017 to 6 May 2019 – which included the relevant date of claim and decision - the version of regulation 85A that was in force referred to repealed provisions.

13. Nevertheless, such a situation may have been anticipated by regulation 45 and paragraph 1 of Schedule 7 to the 2016 Regulations. The latter provides:

1.—(1) Unless the context otherwise requires—

(a) any reference in any enactment to the 2006 Regulations, or a provision of the 2006 Regulations, has effect as though referring to these Regulations, or the corresponding provision of these Regulations, as the case may be;

(b) but—

(i) any reference to a provision of the 2006 Regulations in column 1 of the table has effect as though it were a reference to the corresponding provision of these Regulations listed in column 2; and

(ii) any reference to a provision of the 2006 Regulations with no corresponding provision in these Regulations ceases to have effect.

(2) Unless otherwise specified in the table, sub-divisions of the provisions of the 2006 Regulations listed in column 1 correspond to the equivalent sub-division in the corresponding provision of these Regulations.

14. I interpret the term "enactment" in paragraph 1(1)(a) above in a broad sense to refer also to regulations made under an enactment (see *British Medical Association v Chaudhry* [2003] EWCA Civ 645 at paras.111-112). I take the outdated references to provisions in the 2006 Regulations in regulation 85A to be a reference to the equivalent provision in the 2016 Regulations. This means that broad references to regulation 6 and 15 of the 2006 Regulations must be read as references to regulation 6 and 15 of the 2016 Regulations, and that the broad reference to regulation 15A of the 2006 Regulations must be read as a reference to regulation 16 of the 2016 Regulations. Specific equivalence in relation to various sub-paragraphs of each of the regulations is set out in a table in Schedule 7 which I further take account of. However, I will not set out the detail of these in the body of this decision.

The tribunal's decision

15. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary material before it consisting of the Department's submission and a submission from Law Centre NI, who relied on case law from the Court of Justice of the European Union (CJEU). I can see that the appellant attended the hearing and gave oral evidence, accompanied by her husband, who I will

refer to as H, and represented by Mr McCloskey. The Department was represented by Ms Ginesi.

16. The tribunal heard that H, a dual British-Irish national, moved to Germany in 1993 and worked there until 2004. He commenced a relationship with the appellant in 1998, and the couple had three children born in Germany in 2001, 2002 and 2004. H suffered a back injury, which was said by doctors to be permanent. He returned to the UK in late December 2004. The appellant, who was then on maternity leave from her own employment in Germany, came to the UK with the couple's three children to join him. H was unable to continue working and his employment in Germany was terminated in February 2005. The family remained in the UK, with their eldest child starting primary school in May 2005. The appellant did not return to her employment in Germany but was awarded carer's allowance for looking after H. The couple married in July 2010. However, in February 2018, they separated, with the appellant's subsequent claim for JSA leading to the present proceedings.

17. The Department's submission to the tribunal relied upon UK domestic regulations, submitting that H had not been economically active since his return from Germany and therefore that the appellant could not derive rights from him. The tribunal found that the domestic Immigration (EEA) Regulations 2016 would "override" rights derived from EU law and the CJEU case law relied upon by Mr McCloskey. It found that it did not have the power to "override" the 2016 Regulations on the basis that they were non-compliant with EU law. It found that the appellant had been a "deemed worker" for national insurance credits purposes, but was not an actual worker. Accordingly, it disallowed the appeal.

Submissions

18. The appellant firstly submitted that the tribunal had erred in law by holding that it must follow and apply the provisions of the domestic UK Immigration (EEA) Regulations 2016 in priority to European Union law derived from the case law of the CJEU (I will use this term to refer also to the European Court of Justice (ECJ), which preceded the CJEU).

19. The Department's observations indicated support for the first submission advanced by the appellant. It accepted that the Treaties, law and case law of the European Union had primacy over the domestic law of Member States. It accepted that the tribunal had erred in law by declining to accept that it had power to apply relevant EU law above inconsistent UK domestic regulations.

20. However, the Department placed reliance on Directive 2004/38/EC in submitting that the appellant was not exercising rights in accordance with EU law, and submitted that the tribunal decision was correct in terms of the outcome it reached. Mr McCloskey submitted that the Department's position was inconsistent with its acceptance of the primacy of EU law.

21. As each of the parties submitted that the tribunal has erred in law on the basis of its interpretation of its jurisdiction and of its approach to a potential conflict between domestic law and EU law, I granted leave to appeal.

Hearing and post-hearing submissions

22. I directed an oral hearing of the appeal and directed skeleton argument in advance of the hearing. Due to Covid-19 restrictions, the hearing was conducted over a video link. Mr McCloskey appeared for the appellant while Ms Douglas represented the Department. I am grateful to each of the representatives for their submissions.

23. In order to develop my understanding of relevant issues, I also gave a post hearing direction for submissions in response to my questions on a number of matters. Each party has provided comprehensive responses to those questions, with Mr McCloskey further obtaining the assistance of Ms Wilson of counsel. I am also grateful for those responses.

24. In the course of this decision it will be seen that the nature of the family relationship between the appellant and her husband is significant. Articles 2 and 3 of Directive 2004/38/EC provides for certain rights to be afforded to family members of EEA nationals. There is a difference between the rights given to family members as defined in Article 2.2 and those in Article 3.2. Different terminology appears in the EU and domestic legislation. For clarity, I shall subsequently refer to the Article 2.2 category as "immediate family members" and the Article 3.2 category as "extended family members".

25. The submissions of the appellant at hearing were based on regulation 9 of the 2016 Regulations, in addition to Directive 2004/38/EC and the decisions of the CJEU in *Surinder Singh* (Case C-370/90), *Eind* (Case-291/05), *O&B* (Case C-456/12) and *Banger* (Case C-89/17). Relying on *HK v SSWP* [2020] UKUT 73, a decision of Judge Ward in the Great Britain Upper Tribunal, the appellant submitted that regulation 9 of the 2016 Regulations should be construed in such a manner as not to require H to be a "qualified person", and further submitted that the appellant was entitled to a right of permanent residence under regulation 15 of the 2016 Regulations or Article 16 of Directive 2004/38/EC.

26. For the Department, Ms Douglas submitted that, as H could not fall within regulation 6 of the 2016 Regulations as a "qualified person", the appellant could not satisfy the conditions of regulation 7 or regulation 9, therefore having no right to reside. Ms Douglas submitted that the claimant in *Eind* was a jobseeker, and therefore economically active, unlike H in this case. She further submitted that the claimant in *Banger* had possessed a relevant residence card, unlike the position of the appellant. On this basis, she submitted that those cases should be distinguished from the present one.

27. In my post-hearing direction, I asked whether it mattered, for the purposes of the appellant's argument, which set of domestic regulations was in force or was referred to in regulation 85A. In particular, I asked whether the appellant relied directly on regulation 85A(3)(c), which links to the broad right of free movement in Article 20.2(a) of the Treaty on the Functioning of the European Union (TFEU), rather than on the domestic regulations. It was confirmed that she did, as it was submitted that the relevant provision giving a right to reside was (per the appellant) imperfectly implemented by regulation 9 of the 2016 Regulations, which was the UK domestic provision in force at the relevant date.

28. I noted the strand of decisions of the CJEU that stemmed from the predecessor provisions of Article 20 and 21 TFEU, namely *Surinder Singh* (Case C-370/90), *Eind* (Case-291/05) and *O&B* (Case C-456/12). I observed that these cases were all addressed to the position of a third country national who was a family member of the EEA national exercising the right of free movement, and who had accompanied the EEA national to a host Member State. However, in the present case the appellant was herself an EEA national and not a third country national. The appellant also did not accompany an EEA national to the host Member State.

29. I asked whether this strand of jurisprudence applied equally to an EEA national family member as it did to a third country national in a comparable situation. The parties agreed that it did and submitted that the Secretary of State for Work and Pensions correct to concede that it does in *HK v SSWP* [2020] UKUT 73 (see paragraph 10), a decision of Upper Tribunal Judge Ward.

30. I then asked, having particular regard to paragraph 54 of *O&B*, whether this strand of jurisprudence apply equally where family life was created in the host Member State, and thereby encompass a situation where the family member did not accompany the EEA national exercising the right of free movement to that host Member State, but in fact met her/him there for the first time. The parties agreed that this was so, relying further on *Iida v Stadt Ulm* (Case C-40/11) and on *Lounes* (C-165/16).

31. On the basis that *Surinder Singh* principles might apply where family life was created in the host Member State, and where the family member was an EEA national rather than a third country national, I asked whether the general proposition articulated at paragraphs 19-20 of *Surinder Singh* arose in the present case. By this I explained that I meant that an EEA national would be deterred from leaving her/his Member State of origin in order to pursue an activity as an employed person if, on returning to that Member State, her/his spouse and children were not also permitted to enter and reside in his Member State of origin under conditions at least equivalent to those granted by Community law in the territory of the host Member State. The appellant contended that it did and the Department submitted that it did not, on the basis that the appellant was not a spouse.

32. I then noted that, whereas the court in *Surinder Singh* envisaged, at paragraph 19, that the EEA national was returning to her/his Member State of origin in order to pursue an activity there as an employed or self-employed person, the court in *Eind* at paragraph 35 held that a national of a Member State could be deterred from leaving that Member State if s/he does not have the certainty of being able to return to his Member State of origin, irrespective of whether s/he is going to engage in economic activity in the latter State. I asked whether *Eind* therefore precluded a Member State of origin from placing the sort of conditions seen at Article 7.1(a), (b) and (c) of Directive 2004/38/EC on its own nationals who return with family members from a host Member State. The appellant submitted that paragraph 45 of *Eind* expressly stated that a family member has a right to reside in a member state of which the worker is a national even where the worker does not carry on genuine and effective economic activities. The Department concurred but distinguished *Eind* on the basis that the appellant was not an immediate family member, as she was not then H's spouse.

33. The appellant submitted that this meant that the requirement in regulation 11(2)(c) of the Immigration (EEA) Regulations 2000, which was in force at the date of the entry of the appellant to the UK in January 2005, that the returning EEA national should meet the requirement of being a "qualified person", was incompatible with the case law of the Court of Justice. The Department concurred but referred to the later version of the equivalent provision in regulation 9 of the 2006 Regulations which, it submitted, took *Eind* into account. Each of the parties accepted that, had the appellant been an immediate family member of A in January 2005, there was no basis in EU law for refusing her entry and residence in the UK.

34. Turning to the issue of family membership, I observed that *Banger* (Case C-89/17) extended *Surinder Singh* rights beyond immediate family

members to embrace the category of extended family member. I asked if there was any dispute that the appellant would meet the description of an extended family member within Article 3.2 of Directive 2004/38/EC on the basis that she was the partner in a durable relationship of an EEA national. That was not disputed.

35. I asked if it mattered that the category of extended family member (which included "the partner with whom the Union citizen has a durable relationship, duly attested") was first codified by Directive 2004/38/EC, which came into operation and required transposition into domestic law from 30 April 2006, after the appellant had already entered the UK. I asked whether an extended family member first would first acquire EU law rights after 1 April 2006 or whether there was a basis in EU law for interpreting extended family member rights retrospectively. The appellant submitted that *Banger* was based on rights under Article 21 TFEU (ex-Article 18 TEC) and not on the Directive, referring to paragraphs 27-35, and that it was effective retrospectively on that basis. The Department submitted that the Citizens Directive itself could not be applied retrospectively, but fairly pointed out that the appellant's legal position might have to be considered in terms of Article 10(2) of Regulation 1612/68, which governed dependants in a similar position before 30 April 2006.

36. The Department submitted that whilst decisions of the CJEU might be retroactively applied to aid in the interpretation of relevant enactments from the date they took effect, Directive 2004/38 itself may not be retroactively applied to a period before 30 April 2006. It submitted that the appellant's right of residence in that earlier period must be determined by reference to Regulation (EEC) 1612/68, which was the case in *Eind*. Unlike the position in *Eind*, however, Ms Douglas accepted that the appellant was not an immediate family member, but as an unmarried partner could fall within the category of other family members addressed by Article 10(2). Therefore, the UK may have been required to "facilitate" the appellant's admission in January 2005.

37. Further, Ms Douglas accepted that the appellant would have been lawfully in the UK from January 2005 to April 2006. The appellant when entering the UK would have been subject to the 2000 Regulations. Regulation 12(1) of the Immigration (EEA) Regulation 2000 would have given her the right of admission to the UK as an EEA national with a valid EEA identity card or passport.

38. I then asked about the effect of the marriage of the appellant to H in July 2010 and whether that gave her the right to reside in the UK. The appellant submitted that, as H fell to be treated as an EEA national under regulation 9 of the 2006 Regulations, and as the spouse of an EEA

national residing with him for 5 years from 2010, she had acquired a permanent right of residence under regulation 15 of the 2006 Regulations by 2015 (distinguishing *B v Secretary of State for Work and Pensions* [2017] UKUT 472). The Department submitted that marriage would give the appellant a right to reside under regulation 7 of the 2006 Regulations, and that Upper Tribunal Judge Mitchell in *B v Secretary of State for Work and Pensions* had wrongly held that a marriage must occur in a host Member State.

39. Neither party wished to make further observations on the shared responses.

Assessment

The issue of the tribunal's jurisdiction

40. The first issue that I will address is the correctness of the tribunal's understanding that it had no power to "override" UK domestic law regulations to the extent that they were incompatible with the law of the European Union.

41. The tribunal was addressing itself to the legal position applying as of 20 February 2018, when the appellant made her benefit claim. It was precluded from taking into account any factual circumstances not obtaining by 21 March 2018, which was the date of the Department's decision (by Article 13(8)(b) Social Security (NI) Order 1998). The tribunal sat to hear the appeal on 3 April 2019. The United Kingdom (UK) left the European Union on 31 January 2020. However, at all material times for the purpose of these proceedings, the UK was a member of the European Union and it is not disputed that the law applying in this case was unaffected by the European Union (Withdrawal) Act 2018.

42. A basic legal principle, derived from section 2(1) of the European Communities Act 1972, was that rights created by or arising by or under the EU Treaties are, without further enactment, to be given legal effect in the UK and enforced accordingly. This had application to directly applicable rights deriving from Treaties and Regulations, which have direct effect where they are sufficiently clear and precise and are unconditional. In the case of Directives, Member States are required to transpose EU law into domestic legislation by prescribed deadlines, failing which they may also have direct effect in set circumstances.

43. In *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (Case 106/77) the CJEU held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the

effectiveness of Community law by withholding from the national court the power to set aside national legislative provisions, which might prevent Community rules from having full force and effect, were incompatible with those requirements.

44. Lord Bridge in the House of Lords in the case *of Factortame (No.2)* [1990] UKHL 14, stated:

> Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.

45. In the present case the tribunal was faced with an argument that the appellant had a right to reside under EU law that conflicted with the provisions of UK domestic law. It had an obligation to address that argument and to give effect to any rights that were established under it. There is no conceptual difference in the obligation that falls on a tribunal or a court. It was not a case of the tribunal exercising a power to strike out domestic legislation, and thereby purporting to exercise a jurisdiction which might only rest with a court. Rather it was a case of giving EU law a higher level of authority where it conflicted with national law and applying it accordingly.

46. The issue before the tribunal was whether the appellant had a right to reside under the broad right of free movement deriving from Article 20.2(a) of the Treaty on the Functioning of the European Union (TFEU). By choosing to disregard the argument that the 2016 Regulations were not compliant with EU law and to deny that it had the power to “override same”, it failed to act in accordance with its jurisdiction and its obligations under European Union law. Plainly, it erred in law.

Regulation 85A and the appellant's right to reside in the UK

47. The second main issue in this appeal is whether the tribunal was correct as a matter of law to hold that the appellant had no right to reside in the UK under either domestic UK law or EU law, having regard to the requirements of regulation 85A(3)(c).

48. Before proceeding to address that issue, I should point out that the decision made by the Department to award the appellant JSA for 91 days was premised on her being a jobseeker under regulation 6 of the 2016 Regulations. This has no relevance to the further issues in the appeal.

49. Regulation 85A of the Jobseeker's Allowance Regulations (NI) 1996 imposes two basic conditions before entitlement can be established. The first is habitual residence. There is no dispute that the appellant in this case was habitually resident at the date of claim. The second is whether the appellant had a right to reside in the UK. Under regulation 85A(3) this requires the appellant to show that she had a right to reside under one of the following:

- regulation 13 of the Immigration (European Economic Area) Regulations 2006;

- regulation 15A(1) of those Regulations, but only in a case where the right exists under that regulation because the claimant satisfies the criteria in regulation 15A(4A) of those Regulations;

- Article 6 of Council Directive No. 2004/38/EC; or

- Article 20 of the Treaty on the Functioning of the European Union (in a case where the right to reside arises because a British citizen would otherwise be deprived of the genuine enjoyment of the substance of their rights as a European Union citizen).

50. The reference to regulation 13 of the 2006 Regulations is properly interpreted as a reference to regulation 13 of the 2016 Regulations. However, this is addressed to the initial right of residence for up to three months afforded to EEA nationals under Article 6.1 of the Citizens Directive and is not of assistance to the appellant.

51. The reference to regulation 15A of the 2006 Regulations is properly interpreted as a reference to regulation 16 of the 2016 Regulations. However, this is addressed to derivative rights of residence for carers in *Baumbast* and *Zambrano* type situations and it does not appear to assist the appellant.

52. Article 6 of the Citizens Directive does not assist the appellant for the same reason as regulation 13.

53. The only rights relied on by the appellant, and the only rights that can be relied upon in all the circumstances I believe, are those directly derived from Article 20 of the TFEU.

54. By the date of claim, the actual residence of the appellant in the UK had lasted from January 2005 to 2018, and during that time there have been three sets of relevant domestic regulations in operation, a significant consolidation of the European law relating to free movement and much case law in the domestic courts and in the CJEU. However, the parties are in agreement as to the facts of the case. These are in brief, where A is the appellant and H is her husband, that:

- A is a German national born in 1976
- H, who has dual British-Irish nationality, moved to Germany in 1993 and was employed in Germany from 1993 to 2005
- A commenced a durable relationship with H in Germany from 1998
- A and H's daughter was born in Germany in May 2001
- A and H's son was in Germany in Sept 2002
- A and H's second daughter was born in Germany in August 2004
- H returned to the UK in December 2004 having ceased to be capable of work
- A joined H in the UK with the couple's three children on 5 January 2005
- H's employment in Germany was terminated on 11 February 2005
- H was awarded incapacity benefit and then later employment and support allowance and disability living allowance in Northern Ireland
- A was awarded carers allowance in respect of H
- A and H's three children entered education in the UK

- A and H married in July 2010
- A and H separated in February 2018, but were not then divorced
- A claimed JSA from 20 Feb 2018

55. As can be seen from the above background facts, the appellant first entered the UK in January 2005. At that point in time, Article 18 of the Treaty establishing the European Community, as amended by the Nice Treaty, provided that:

> 1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

56. This was replaced in the Treaty on the Functioning of the European Union by Articles 20 and 21 from 1 December 2009. These provided:

> Article 20
>
> (ex Article 17 TEC)
>
> 1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
>
> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
>
> (a) the right to move and reside freely within the territory of the Member States;
>
> (b) …
>
> These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.
>
> Article 21
>
> (ex Article 18 TEC)
>
> 1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down

> in the Treaties and by the measures adopted to give them effect.
>
> 2. …

57. Mr McCloskey relied on a strand of jurisprudence that was derived from the right of free movement enshrined in the Treaty of Rome and relevant Directives and Regulations made for the purpose of implementing the right. This strand concerns the circumstances in which a returning worker who had exercised free movement rights can rely on Community law to bring a family member back with her or him to the Member State of origin, where this would not otherwise be permitted by national law.

58. The starting point was the case of *Surinder Singh* (Case C-370/90). Surinder Singh was a third country national spouse of a British citizen, who accompanied his wife to Germany between 1983 and 1985 to work, before they subsequently returned to the UK to set up a business. The CJEU observed at paragraphs 19 and 20 that:

> 19. A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State.
>
> 20. He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State.

59. The Court held:

> "23. … Accordingly, when a Community national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State. Nevertheless, Articles 48 and 52 of the Treaty do not prevent Member States from applying to foreign

> spouses of their own nationals rules on entry and residence more favourable than those provided for by Community law".

60. Turning to the facts of this case, the entry of the appellant to the UK occurred prior to the consolidation of various provisions dealing with freedom of movement from 30 April 2006 under Directive 2004/38/EC (the Citizens Directive). However, much of the law consolidated in the Citizens Directive was already operational. The UK domestic Immigration (European Economic Area) Regulations 2000 (the 2000 Regulations) were based upon the preceding Directives and Regulations.

61. Regulation 10 of the 2000 Regulations permitted certain individuals, who are not themselves family members within the definition of regulation 6, to be treated as extended family members of an EEA national exercising free movement rights in the UK. It provided:

> **10.**—(1) If a person satisfies any of the conditions in paragraph (4), and if in all the circumstances it appears to the decision-maker appropriate to do so, the decision-maker may issue to that person an EEA family permit, a residence permit or a residence document (as the case may be).
>
> (2) Where a permit or document has been issued under paragraph (1), these Regulations apply to the holder of the permit or document as if he were the family member of an EEA national and the permit or document had been issued to him under regulation 13 or 15.
>
> (3) Without prejudice to regulation 22, a decision-maker may revoke (or refuse to renew) a permit or document issued under paragraph (1) if he decides that the holder no longer satisfies any of the conditions in paragraph (4).
>
> (4) The conditions are that the person—
>
> > (a) is dependent on the EEA national or his spouse;
> >
> > (b) is living as part of the EEA national's household outside the United Kingdom; or
> >
> > (c) was living as part of the EEA national's household before the EEA national came to the United Kingdom.

(5) However, for those purposes "EEA national" does not include—

(a) an EEA national who is in the United Kingdom as a self-sufficient person, a retired person or a student;

(b) an EEA national who, when he is in the United Kingdom, will be a person referred to in sub-paragraph (a).

62. The rights given expression by regulation 10 were specifically derived from the rights which appear in Art.10.2 of Regulation 1612/68/EC, namely:

"1 . The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:

(a) his spouse and their descendants who are under the age of 21 years or are dependants;

(b) dependent relatives in the ascending line of the worker and his spouse.

2. Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes, …".

63. Further, regulation 11 implemented the judgment in *Surinder Singh* by extending Community rights (in certain circumstances) to family members of a United Kingdom national as follows:

11.—(1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member of a United Kingdom national returning to the United Kingdom as if that person were the family member of an EEA national.

(2) The conditions are that—

> (a) after leaving the United Kingdom, the United Kingdom national resided in an EEA State and—
> (i) was employed there (other than on a transient or casual basis); or
> (ii) established himself there as a self-employed person;
>
> (b) the United Kingdom national did not leave the United Kingdom in order to enable his family member to acquire rights under these Regulations and thereby to evade the application of United Kingdom immigration law;
>
> (c) on his return to the United Kingdom, the United Kingdom national would, if he were an EEA national, be a qualified person; and
>
> (d) if the family member of the United Kingdom national is his spouse, the marriage took place, and the parties lived together in an EEA State, before the United Kingdom national returned to the United Kingdom.

64. Two things can be seen from the domestic legislative framework in place at the date of the appellant's entry to the UK. Firstly, provision was made for facilitating the entry to the UK of persons who fell outside the scope of immediate family members, if they were dependant on the EEA national or living as part of the same household ("under the same roof" in the Regulation 1612/68) outside the UK. Secondly, express provision was made for *Surinder Singh*-type cases, where family life had been established by a returning UK national in the territory of another Member State.

65. However, I observe that the *Surinder Singh* implementation in the 2000 Regulations specified that the returning UK national should, as if he was an EEA national, be a "qualified person" for the purposes of regulation 5. It further provided only for family members as defined in regulation 6. In short, there would be two impediments to the *Surinder Singh* principle being applied to the appellant under the 2000 Regulations – firstly that H was not economically active and therefore not a qualified person, and secondly that the appellant was not an immediate family member, but what would later be called in Directive 2004/38/EC an "extended family member".

66. Directive 2004/38/EC provided for two categories of family member by the definitions in Articles 2 and 3, as follows:

> Article 2
>
> **Definitions**
>
> For the purposes of this Directive:
>
> (1) "Union citizen" means any person having the nationality of a Member State;
> 2) "Family member" means:
>
> > (a) the spouse;
> > (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
> > (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
> >
> > (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);
>
> 3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.
>
> *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.

67. It should be observed that, while Directive 2004/38/EC consolidated most of the Directives and Regulations listed above, it did not make formal provision for the *Surinder Singh* type cases. Consequently, the principles first set out in *Surinder Singh* continued to be developed through case law rather than through any EU legislation. The two obstacles in the 2000 Regulations to the appellant having a right to reside in the UK through H – the fact that H was not economically active or otherwise a "qualified person" and the fact that she was not an immediate family member – were addressed in *Eind* (C-291/05) and *Banger* (C-89/17) respectively.

68. *Eind* concerned the position of an immediate family member under Article 10(1)(a) of Regulation 1612/68. In *Eind*, the appellant was a Dutch national who moved to the UK in order to work. While he was there, he was joined by his third country national daughter from Suriname and, for the purposes of the case, it was accepted that she had been admitted to the UK under Community law. When he returned to live in the Netherlands he sought to bring his daughter, who had not previously lived in the Netherlands, with him but the authorities refused to issue a residence permit to her. Whereas Mr Singh had been self-employed in the UK, Mr Eind was in receipt of social assistance and incapable of work or self-employment due to ill health.

69. It is common case that *Eind* expanded *Surinder Singh* rights to a returning national who had been economically active in a host Member State but was not economically active on return to his Member State of origin. The ECJ said:

> "35 A national of a Member State could be deterred from leaving that Member State in order to pursue gainful employment in the territory of another Member State if he does not have the certainty of being able to return to his Member State of origin, irrespective of whether he is going to engage in economic activity in the latter State.
>
> 36 That deterrent effect would also derive simply from the prospect, for that same national, of not being able, on returning to his Member State of origin, to continue living together with close relatives, a way of life which may have come into being in the host Member State as a result of marriage or family reunification.
>
> 37 Barriers to family reunification are therefore liable to undermine the right to free movement which the nationals of the Member States have under Community law, as the right of a Community worker to return to the Member State of which he is a national cannot be considered to be a purely internal matter.
>
> 38 It follows that, in circumstances such as those in the case before the referring court, Miss Eind has the right to install herself with her father, Mr Eind, in the Netherlands, even if the latter is not economically active.
>
> 39 That right remains subject to the conditions laid down in Article 10(1)(a) of Regulation No 1612/68, which apply by analogy".

70. On this basis Mr McCloskey submitted that the circumstances where not an impediment to the present appellant's right to reside. I agree with him that the logical implication of *Eind* is that a requirement for the returning national should be a "qualified person" – such as appeared in regulation 11(2)(c) of the 2000 Regulations – is not compatible with EU law. This is accepted by both parties.

71. Mr McCloskey further relied on the decision of the Court of Justice in *Banger* (C-89/17). In *Banger*, a UK national had lived and worked in the Netherlands from 2010 to 2103. His third country national partner, who had lived with him previously outside the EU, was granted an EEA

residence card by the Netherlands as an extended family member in a durable relationship with an EEA national. The couple moved to the UK, but the partner was refused a residence card by the UK authorities, applying regulation 9 of the 2016 Regulations.

72. *Banger* was addressed to the position of an extended family member under Directive 2004/38/EC. That Directive was the first EU legislation that made reference to the concept of a partner in a durable relationship. However, as was noted above, Regulation 1612/68 gave some rights to individuals who were not immediate family members of an EEA national exercising free movement rights, including those "living under his roof in the country whence he comes".

73. The two categories of person are addressed similarly by EU law in some respects, notably in the procedural requirements that relate to them. Thus the entry of extended family members is not a right, but is subject to a discretion on the part of a host Member State to refuse admission and residence. Nevertheless by Article 10.2 of 1612/68, "Member States shall facilitate the admission" of such a person and by Article 3 of Directive 2004/38/EC "the host Member State shall, in accordance with its national legislation, facilitate entry and residence" for the person.

74. In *Banger*, the CJEU stated:

> "32 As the Advocate General observed in points 46 and 47 of his Opinion, the case-law cited in paragraph 29 above is equally applicable as regards the partner with whom the Union citizen has a durable relationship that is duly attested, within the meaning of point (b) of the first subparagraph of Article 3(2) of Directive 2004/38. Consequently, a third-country national having such a relationship with a Union citizen who has exercised his right of freedom of movement and returns to the Member State of which he is national in order to reside there, must not, when that Union citizen returns to that Member State, be the subject of less favourable treatment than that provided for under that directive for a third-country national having a durable relationship that is duly attested with a Union citizen exercising his right of freedom of movement in Member States other than that of which he is a national.
>
> 33 In a situation such as that in question in the main proceedings, Directive 2004/38, including point (b) of the first subparagraph of Article 3(2) thereof, must be applied by analogy as regards the conditions in which the entry

and residence of third-country nationals envisaged by that directive must be facilitated.

34 That conclusion cannot be called in question by the United Kingdom Government's argument according to which, in paragraph 63 of the judgment of 12 March 2014, *O. and B.* (C-456/12), the grant of a derived right of residence in the Member State of origin was confined solely to third-country nationals who are a 'family member' as defined in Article 2(2) of Directive 2004/38. As the Advocate General observed in point 35 of his Opinion, although in that judgment the Court held that a third-country national who does not have the status of a family member may not enjoy, in the host Member State, a derived right of residence under Directive 2004/38 or Article 21(1) TFEU, that judgment does not, however, exclude the obligation for that Member State to facilitate the entry and residence of such a national in accordance with Article 3(2) of that directive.

35 In the light of the foregoing considerations, the answer to the first and second questions is that Article 21(1) TFEU must be interpreted as requiring the Member State of which a Union citizen is a national to facilitate the provision of a residence authorisation to the unregistered partner, a third-country national with whom that Union citizen has a durable relationship that is duly attested, where the Union citizen, having exercised his right of freedom of movement to work in a second Member State, in accordance with the conditions laid down in Directive 2004/38, returns with his partner to the Member State of which he is a national in order to reside there".

75. Following *Banger*, as demonstrated by the Explanatory Memorandum relied upon by Mr McCloskey, the 2016 Regulations, which as originally made were restricted to immediate family members, were amended to give the right to enter and reside in the UK to extended family members who met certain conditions. This form of regulation 9 was amended from 28 March 2019.

76. The Department submits that *Banger* does not assist the appellant, since she entered the UK before Directive 2004/38/EC was in effect and, whereas it might apply retrospectively to the transposition date of 30 April 2006, it does not have retrospective effect before that date. However, the basis of the *Surinder Singh* rights, and therefore of *Banger* rights, is

not the Directive, which was not yet in force at the date of the *Surinder Singh* judgment, but the Treaty itself.

77. It seems clear that the rights of the appellant under the Treaty and Article 10 of Regulation 1612/68 would have to be viewed in the context of *Banger*, where the appellant relied on the Treaty and Article 3 of Directive 2004/38/EC. I consider that the implication, by analogy with *Banger*, would be that the UK would have been obliged to facilitate the appellant's entry to the UK in January 2005 even though she was not an immediate family member.

78. It was common case that the appellant did not make a formal application for an EEA family permit and therefore that this had not been approved by the Secretary of State for the Home Department, as might be required by the regulations. However, it was also the case that, by excluding extended family members from the rights afforded under the *Surinder Singh* principle, as was the case until regulation 9 of the 2016 Regulations was amended from 28 March 2019, there was no procedural basis in UK law for an EEA family permit to be issued. I observe that there was no doubt that the appellant lived under the same roof as H in Germany, and no doubt that – as the mother of the couple's three children and subsequently the spouse of H – that she was H's partner in a durable relationship. It seems to me that, had the proper administrative procedure been in place, any refusal of a right to reside on the basis that the appellant was not his partner was not lawfully open to the Secretary of State, as it would plainly have been irrational.

79. In conclusion, following the requirement to transpose Directive 2004/38/EC into UK law, what had been regulation 11 of the 2000 Regulations was broadly re-enacted as regulation 9 of the 2006 Regulations, and subsequently as regulation 9 of the 2016 Regulations. Regulation 9 was further amended from March 2019 to take account of the *Banger* decision and to make express reference to extended family members. However, the versions of the regulation that pre-dated March 2019 failed to reflect the requirements of EU law accurately, which was also the case for the 2006 Regulations and the 2000 Regulations. I am satisfied that the appellant had a right to reside based on *Surinder Singh*, *Eind* and *Banger* principles going back to her first entry to the UK as the family member of H in January 2005. The tribunal erred in law by failing to confirm her right to reside under regulation 85A(3)(c) of the JSA Regulations.

80. I allow the appeal. I set aside the decision of the appeal tribunal.

81. Under Article 15(8)(a) of the Social Security (NI) Order 19989, I make the decision that the tribunal ought to have made without making further findings of fact.
82. I decide that the appellant had a right to reside in the UK at the date of claim under regulation 85A(3)(c) of the JSA Regulations and I allow her appeal on that point.

83. However, I cannot make a final decision on entitlement, as the Department will have to determine whether all other relevant conditions of entitlement to JSA were satisfied at the material date.

(signed): O Stockman

Commissioner

8 March 2021