IAC-AH-SC/KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04390/2019

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On 19 November 2020	**On 07 December 2020**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR TARIKUL ISLAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Z Bantleman, instructed by Brit Solicitors
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Plumptre, promulgated on 6 February 2020 dismissing his appeals under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") against the decisions of the respondent made on 6 August 2019 (i) to revoke his residence card and to refuse to issue him with a card certifying his permanent right of residence.

2. On 27 October 2016, the appellant applied for a residence card as the unmarried partner of an EEA national, Ms Tsaneva. That application was granted on 8 May 2017 with permission to remain until 8 May 2022. On 8 May 2017 the appellant was issued with a residence card valid until 7 May 2022.

3. On 30 April 2019 the appellant's solicitors wrote to the respondent applying for a residence card confirming that he had retained the right of residence subsequent to the breakdown of the relationship between him and Ms Tsaneva. In that letter it was explained that the couple had lived together until February 2018 but were no longer in a relationship.

4. On 6 August 2019 the respondent issued a letter giving reasons for revoking the residence card, stating that as the letter from the appellant's solicitor had explained that he was no longer in a relationship with Ms Tsaneva he was no longer a family member of an EEA national as defined within Regulation 8 of the EEA Regulations. That decision attracted a right of appeal. The appellant avers, however, that he never received that letter.

5. On the same day the respondent issued a second letter stating that in order to be considered as a person who had retained a right of residence he needed to show that he met Regulation 10(5) which required him to show that he had ceased to be a family member of a qualified person on the termination of a marriage or civil partnership. The respondent concluded as he had not entered into a marriage or civil partnership with an EEA national exercising treaty rights, his application did not fall for consideration under the EEA Regulations and no further consideration would be given to his application.

6. The respondent did not, however, engage with the argument put in the application of 30 April 2019 that he was entitled to a residence card and that in the specific circumstances of his case, a refusal to issue him with a residence card would be a breach of his rights pursuant to Article 20 TFEU combined with Article 7 of the Charter of Fundamental Rights of the EU protecting the right to respect for family and private life.

7. As a preliminary matter, the judge extended time to treat the appeal as including an appeal against the revocation of the residence card finding that the failure to produce a family permit was not fatal to the right of appeal. The judge noted that the grounds of appeal included a submission that Article 20 TFEU was raised, as was Article 7 of the charter.

8. The judge noted [14] the appellant's representative, Mr Muquit's, concession if the appellant was no longer an extended family member given the revocation. She noted also his submission that the refusal to issue a permanent residence card under Regulation 10(5) was legally correct but was discriminatory against those who chose not to marry. He submitted that once an individual such as the appellant had been issued with a residence card, then he must be treated as a family member so long as the EEA national continues to satisfy the requirements of Regulation 8. Although the

appellant can no longer meet the requirements of the Regulation because the relationship had broken down there was no reason why, having been treated as a family member, he did not get the same benefits under Regulation 10 according to a family member whose marriage to an EEA national had broken down.

9. In short, the argument as put to the judge was that following Banger [2018] EUECJ C-89/17 an EEA national should be given the same benefit accorded to family members under the same principle as Surinder Singh.

10. The judge concluded that:-

(i) reliance on Banger was misplaced given the concession that the appellant is not now an extended family member and there is no question of the UK being required to facilitate the entry and residence of a third country national because he is already in the United Kingdom and no longer in a durable relationship [22];

(ii) the facts in this case were different from those in Banger where a British national and his South African partner had moved back to the United Kingdom where she was refused a residence card since they were not a married couple and within that case, and that in the facts of this appeal were totally dissimilar given that Banger and Surinder Singh were based on the premise a new citizen might otherwise be deterred from leaving home in order to take economic activity in another member state, yet on return to the United Kingdom without surveillance would not be equivalent to those he would enjoy in the territory of another member state [23];

(iii) the EU national ex-partner continued to exercise treaty rights in the United Kingdom and thus there was no need to facilitate entry of the third country national [25];

(iv) the Secretary of State had fully considered the personal circumstances of the appellant and was entitled to revoke the residence card, given that the durable relationship had broken down [26];

(v) the requirements of Regulation 10 were not met;

(vi) Mr Muquit no longer relied on Article 20 or 21 of TFEU [29] and that there was not in this case less favourable treatment to a third country national who has had a durable relationship which it was conceded no longer exists.

11. The appellant sought permission to appeal on the grounds that the judge had erred in law in that:-

(i) having had regard to recitals 6, 15 and 31 of Directive 2004/38/EC ("the Directive") which preclude discrimination, that it was wrong and discriminatory for a member state not to accord, through its domestic law transposing the Directive to those who are not included in the Directive's definition of family members but who had been beneficiaries of a residence card, the same legal safeguards provided to family members;

(ii) Regulation 10 of the EEA Regulations, which did not extend a retained right of residence to those who had been in a durable relationship was therefore inconsistent with the Directive;

(iii) although Article 13 of the Directive refers only to retained rights being available to family members, by reference to recital 6, those not automatically entitled to advance family members should nevertheless be granted residence;

(iv) there was no reason why the benefit accorded to family members to retain the rights of residence should not be available to extended family members, albeit subject to an extensive examination of their circumstances;

(v) Regulation 10 of the EEA Regulations was inconsistent with the exceptions under Regulation 7(3), in that, once an individual was an extended family member and had been issued a residence card they must be treated as a family member so long as they continue to satisfy Regulation 8, there being no rational reason why, if the appellant was a family member, up to the point of the relationship breakdown, he did not get the same benefit under Regulation 10 accorded to a family member whose marriage to an EEA national had also broken down; nor was it rational to deny the facility of securing residence rights to those not falling within the definition of family member because such denial did not present an obstacle to the exercise of free movement rights of the Union citizen, as this was not a precondition of according retained rights to a family member of a Union citizen;

(vi) that the principle to be derived from Banger is that the absence of an express reference in a Directive to a particular benefit being available to family members and no reference being made to such benefit being available to extended family members did not preclude those being extended to extended family members on the same principles as set out in the Directive;

(vii) accordingly, the refusal of the respondent to consider the appellant as being potentially entitled to rights of residence on the simple basis he had never been married was contrary to the terms of the Directive whose terms were not given effect by the Regulations and the decision upholding that was wrong in law.

12. On 3 August 2020 Upper Tribunal Judge Gill granted permission although noting that both Regulation 10(5) and Article 13 of the Directive, both refer to divorce or annulment proceedings or termination of arranged partnership, thus appearing to preclude their application to durable relationships.

13. I heard submissions from both representatives, both of whom had produced skeleton arguments.

14. Ms Bantleman submitted that the First-tier Tribunal erred by failing to consider the duty in Article 3(2)(b) in determining whether to revoke the appellant's residence card and facilitate residence and retention rights under Regulation 10(5). As is discussed below, the difficulty with that submission is that it is not set out within the grounds of appeal.

15. Ms Bantleman submitted further that Banger was relevant in that it extend the principle that spouses of British citizens could be accorded derived right of residence on the basis of Article 21(1) should apply equally to durable partners of British citizens and accordingly, the obligation to facilitate entry and residence in Article 3(2)(b) of the Directive, Article 21 must be interpreted as requiring a member state of which the Union citizen is a national to facilitate the provision of a residence authorisation to the unregistered partner. Thus, an absence of an express reference in the Directive of a particular benefit being available to extended family members did not preclude any obligation on the Secretary of State to consider whether to facilitate residence under Article 3(2)(b) of the Directive.

16. She submitted further that, following Banger, Article 3(2)(b) must be applied by analogy as regards the conditions for which entry and residence of a third country national envisaged by that Directive must being facilitated. She submitted that although the appellant might not enjoy a retained right of residence under Article 13 of the Directive, as he was not in a marriage or a British partnership, that did not exclude the obligation to the United Kingdom to facilitate the residence of the appellant in accordance with the Directive. She submitted that the First-tier Tribunal had erred in failing to consider the facilitation of the appellant's residence.

17. Ms Bantleman submitted that the appellant came within the concept of "partner with whom the Union citizen has a durable relationship, duly attested" as shown by the residence card however this was not facilitated. She submitted that the actions of the Secretary of State in not doing so were contrary to the duty to undertake an extensive examination of personal circumstances, an obligation to be considered against the principles underlying the Directive set out in recitals 6, 15 and 31, the latter preventing discrimination on grounds of belief and that for family members who retained rights there did not need to be an obstacle to the free movement of an EU citizen, as set out in Regulation 10(5). She submitted further that the United Kingdom's own national legislation, to which recital 6 of the Directive referred, did not require any difference in treatment between married and unmarried or unregistered partners whilst they lived together, thus by analogy the appellant met Regulation 10(5)(a) and ceased to be a family member on the termination of the relationship.

18. Ms Bantleman submitted that all the requirements other than for there to be a marital relationship were met and that the 2016 Regulations were intended to transpose and implement the Council Directive which they did not do as a result. She further submitted that Regulation 10(5) ought to be read in accordance with recitals 6, 15, 31 and Article 3(2)(b) of the Directive and against proportionality, there being no reason why the appellant, who was accepted to be a family member of an EU national, should be treated differently from a family member whose marriage had broken down.

19. She submitted that in the alternative it was open to the respondent to exercise discretion to issue a residence card to an extended family member even by not following Regulation 7(3) if it appears to the Secretary of State appropriate to do so.

Accordingly, to the extent that the respondent was not entitled to revoke the residence card, given that the duty of facilitation was extended to the retention of residence.

20. Mr Deller submitted that the appellant's case was misconceived in that although there was an obligation to facilitate the entry and residence of beneficiaries under Article 3(2) that applied only to *current* beneficiaries; it did not apply to those who are no longer beneficiaries as is the case with the appellant. The question of whether Regulation 24(3) applied was dependent on an applicant being in a durable relationship. He submitted further that both the direction of the Regulations was very clear that the rights of residence are retained only in circumstances consequent to the termination of the marriage or civil partnership which provided for the non-EEA national being a beneficiary under Article 2.2. He submitted that had it been intended for the Directive to extend directly to other forms of a durable partnership this would have been specified and explicit provision made for that in Article 13(2), which had not been done.

21. Mr Deller submitted further that a right of residence under the Directive could not be derived from the general principles of free movement and that **Banger** did not apply given that unlike Ms Banger, who plainly met the definition of an extended family member, the appellant ceased to be a beneficiary at the point when this durable relationship ended and from that point he was not owed any particular treatment. Although it had been open to the United Kingdom to apply more generous measures it had not chosen to do so.

22. Elaborating, Mr Deller submitted that Article 3(2)(b) had no "afterlife" in that it did not continue to have effect after somebody ceased to meet the qualification to be a beneficiary. In response, Ms Bantleman submitted that properly understood in light of the recitals, Article 3(2)(b) could apply once someone had ceased to be a beneficiary.

Discussion

23. As a preliminary point, at no stage was it averred, prior to Ms Bantleman's skeleton argument, that there was a continuing duty under Article 3 (2) in this case to facilitate residence. Nonetheless, I have considered that submission out of an abundance of caution.

24. The recitals to the Directive provide:

> '(6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen. …

(15) Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis. …

(31) This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation.'

25. Article 3 (2) of the Directive provides as follows:

'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:

…

(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.'

26. It is the settled case law of the ECJ that where the wording of an EU law provision is clear and precise, its contextual or purposive interpretation may not call into question the literal meaning of that provision, as this would run counter to the principle of legal certainty. See Commission v United Kingdom [2010] EUECJ C-582/08 at [49] to [51]:

"49 According to settled case-law, the principle of legal certainly requires that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly (see Case C-345/06 *Heinrich* [2009] ECR I'1659, paragraph 44 and the case-law cited).

50 It is true that that case-law refers to the relationship between individuals and public authorities. However, as the Advocate General observed in point 64 of his Opinion, that case-law is also relevant in the context of the transposition of a directive in the area of taxation.

51 The Court cannot, in the face of the clear and precise wording of a provision such as Article 2(1) of the Thirteenth Directive, interpret that provision

with the intention of correcting it and thereby extending the obligations of the Member States relating to it (see, by analogy, Case C-48/07 *Les Vergers du Vieux Tauves* [2008] ECR I-10627, paragraph 44)."

27. Put simply, when interpreting European law, a court cannot ignore the clear and precise wording of an EU law provision.

28. In R (on the application of BJ & Ors) v Secretary of State for the Home Department (Article 9, Dublin III; interpretation) [2019] UKUT 66 (IAC) the Upper Tribunal held at [33] to [38]:

"33. If, however, the meaning is not clear and precise, regard must be had to the context and purpose of the legislation in question as the ECJ did in Elgafaji [2009] ECR I-92 (Case 465/07). Faced with an apparent contradiction within the terms of Article 15 (c), the ECJ interpreted it in such a way as to give it an autonomous meaning which gave it effect, illustrating the premise that the creator of the legislation is acting rationally, and that the provision was introduced to have effect in a logical and rational scheme. A provision of EU law cannot be redundant. It follows that where several interpretations of a provision are possible, that which best ensures effectiveness and consistency with primary EU law should be followed.

34. It is evident also from the case law of the ECJ that in interpreting a provision, regard may be had to the *travaux préparatoires* if they are available. This, in the context of immigration, can be seen in Teixeira [2010] ECR I-1107 at [58].

35. The method of interpretation which is generally seen as most characteristic of the ECJ is a purposive or "teleological" approach. That is most easily seen in the interpretation of TFEU provisions such as Article 21 in, for example, Zambrano and the extensive case law on the meaning of "worker" within Article 45 and its predecessors. The teleological approach to interpretation may, as the circumstances require, give rise to three closely linked questions:

    a. Which interpretation, having had regard to the context of the provision, best preserves its effectiveness?

    b. If the provision is ambiguous, which interpretation best achieves the objective it pursues?

    c. What consequences would flow from each interpretation?

36. Teleological interpretation is, however, subject to the proviso that exceptions are to be interpreted strictly (see Commission v UK [39]) although a broader interpretation may be adopted if that is required to give effect to the objectives.

37. It is to be noted also that the words which are to be construed are the operative part of the instrument in question; the preamble may be an aid to the interpretation as in Toshiba Europa GmBH v Katun Germany GmBH [2001] ECR I-7945 where at [36] -[37] recourse was had to a recital because a literal interpretation of Directive 84/450 as amended would result in a contradiction with Directive 89/104 but it is not a legal Rule - see Casa Fleischhandel v Bundesantalte fur Landwirtschaftliche Marktordnung

[1989] ECR 2789 at [31]: "Whilst a recital in the preamble to a regulation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule."

38. It follows that the approach to interpreting a provision of EU law requires a systematic approach , looking at the words in the context of the structure of EU law as a whole and asking:

(i) Is the meaning of the provision defined in EU Law?

(ii) If not, can the words be given their usual, ordinary meaning?

(iii) If not, what are the possible different interpretations?

(iv) What is the objective of the provision?

(v) Which interpretation best preserves its effectiveness?

(vi) Which interpretation best achieves the objective?

(vii) What are the consequences of the different interpretations?"

29. Contrary to Ms Bantleman's submissions, article 3(2) is quite clear. The duty to facilitate entry arises when the partner with whom the Union citizen has a durable relationship duly attested. That is manifestly a continuing requirement in order for someone to be a beneficiary; there has to be an extant nexus with the EEA national. The difficulty with Ms Bantleman's argument, that it should be read as extending to scenarios where there had been a relationship, would make it open-ended; it would not be possible for a state on whom the obligation lies, to know who does or does not come within the ambit of the duty to facilitate. Equally, were the same logic to apply to other provisions, such as article 3 (2)(a), this would be contrary to what the ECJ held in Rahman [2012]EUECJ C-83/11 at [27] to [35] where dependence in the country from which the family member comes is necessary. That is in the present tense.

30. Accordingly, a non-EEA national, whose durable relationship has ended, comes within the ambit of article 3 (2) and so there can at that point be no duty on a member state to facilitate that individual's entry to or residence.

31. Further, and in the alternative, even were article 3 (2)(b) not clear and precise, the recitals in the Directive do not assist the appellant. Nor can it be argued that the Directive can be read such that article 13 should apply to those in durable partnerships, an argument Ms Bantleman chose not to pursue with any vigour.

32. Recital 6 starts "In order to maintain the unity of the family" yet what occurred here is that the family has ceased to exist. The durable relationship has ceased. Further, recital 6 and recital 15 clearly maintain a distinction between "family members" and others. Recital 15 proceeds on the basis of that distinction. It would have been open to the European Union when enacting the Directive to have included within that recital the position of individuals in durable relationships or whose entry and residence had been facilitated, but it did not. As Rahman and subsequent cases make clear, those whose entry is facilitated do not acquire rights under the Directive.

Further, in recital 15, there is a closed list of those whose rights are to be preserved, which does not include the breakdown of a relationship.

33. The discrimination, it is claimed here, is treating differently people who have chosen not to marry. But that is not to compare like with like. Not all those who have been married fall within Article 13. There are a number of additional requirements over and above marriage which are required to be met before that person's right to remain is reserved.

34. For the sake of completeness, I find no proper basis on which, applying the principles of interpretation set out above, the Directive can be read as though there was no distinction to be made in Article 13 between those who are married and those who are not. That would do violence to the structure of the Directive which clearly maintains the distinction between people who are married and those who are not. To suggest that Banger makes a difference is fundamentally to misunderstand what Banger is about. What Banger is about is the situation in which those involved were not covered by the Directive. That is because they fell out of the scope of it because the EU national in question was returning to his own member state which did not engage European law. It was thus necessary to have a derived right pursuant to Article 20 and 21, as otherwise a person travelling to work abroad might be inhibited if he were not able to return to the country of nationality having formed a relationship in another state. That is not the situation here. The appellant's former partner is clearly covered by the Directive. It is not at all possible to see how there would be in this case any discouragement and of course Ms Banger met the definition of extended family member. It is simply not possible to derive any conclusion that Article 13 must be interpreted in the way contended. The European Union has clearly decided that certain categories of family membership will be protected and others will not.

35. The reality is that the appellant ceased to be a family member by operation of the Regulations when his relationship ceased. That was well before the date of decision and it simply cannot be argued that there is any basis on which there was a duty to facilitate his continued residence.

36. Accordingly, for these reasons, I consider that the decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed Date 27 November 2020

Jeremy K H Rintoul

Upper Tribunal Judge Rintoul