Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: EA/07684/2018**
EA/07690/2018
(V)

THE IMMIGRATION ACTS

Heard remotely from Field House **Decision & Reasons Promulgated**
On 14 January 2021 **On 07 April 2021**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

ADESUWA DANIELA AJAYI (FIRST APPELLANT)
OSADEBAMWEN GEORGE AJAYI (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellants: Mr J Collins, Counsel, instructed by JDS Solicitors
For the respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. These are linked appeals against the decision of First-tier Tribunal Judge Cohen ("the judge"), promulgated on 12 July and 2019, by which he dismissed the appellants' appeals against the respondent's refusal of their applications for a residence card under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations").

2. These proceedings have not been affected by the revocation of the 2016 Regulations on 31 December 2020 as result of the expiry of the transitional period relating to the United Kingdom's exit from the European Union.

3. The two appellants are citizens of Nigeria and are sister and brother. The first appellant was born on 27 December 1996 and the second on 8 October 1994. They are both the biological children of Ms Eunice Otabor ("Ms Otabor"), a Nigerian citizen who currently has a right of residence in the United Kingdom as the spouse of British citizen, Mr Johansson Johnson ("Mr Johnson").

4. In November 2011, Mr Johnson left the United Kingdom and went to live and work in Spain. It is common ground that he exercised Treaty rights whilst in that country. During this period of residence, Mr Johnson met Ms Otabor and they married. Ms Otabor was issued with a residence card by the Spanish authorities as the family member of an EU citizen. The couple returned to the United Kingdom in December 2013. Ms Otabor was issued with a residence card in the United Kingdom pursuant to the Surinder Singh principle (R v Immigration Appeal Tribunal ex parte Surinder Singh C-370/90; [1992] Imm AR 565, hereafter "Surinder Singh").

5. The appellants did not join and reside with their mother and stepfather in Spain. They continued to reside in Nigeria.

6. On 7 November 2017 the appellants were issued with an EEA family permit and they arrived in this country 25 November of that year. On 20 September 2018 the appellants made an application for a residence card as the direct family members of Mr Johnson.

7. This application was refused by the respondent on the basis that neither of the appellants had resided with Mr Johnson in Spain and that it followed that the appellant's could not have established a genuine residence in that country, with reference to regulation 9(2)(b) and (c) of the 2016 Regulations.

The decision of the First-tier Tribunal

8. On the basis that none of the essential factual issues appeared to be in dispute, and with the agreement of the representatives, the hearing proceeded by way of submissions only.

9. The judge quoted regulation 9 of the Regulations and, having applied the undisputed facts to what he regarded as the appropriate legal framework, he concluded that the appellants failed in their appeals.

The grounds of appeal and grant of permission

10. Two grounds of appeal were put forward. First, the judge failed to address the argument put forward at the hearing that regulation 9(2)(b) of the 2016 Regulations was inconsistent with Article 21 of the Treaty on the

Functioning of the European Union ("TFEU"). Second, it was said that the TFEU did not require that dependent family members (specifically children) to have resided in another EU state ("host state") with the British citizen in order to fall within Surinder Singh. Whilst it was accepted that a residence requirement was justified in respect of a spouse/partner, this was not the case in relation to family members because:

a) it would impose stricter requirements on the appellants than those imposed on any other dependent of an EU citizen exercising Treaty rights;

b) it would render Mr Johnson's and Ms Otabor's rights less effective;

c) it would discourage the exercise of free movement.

11. Permission was granted by Upper Tribunal Judge Lane on 10 March 2020.

12. Following the grant of permission, the respondent provided a rule 24 response, dated 6 July 2020. Further written submissions, dated 8 July 2020 and 22 July 2020 were subsequently provided by the appellants.

13. Finally, a very brief skeleton argument, dated 21 October 2020, came in from the respondent.

Relevant legal framework

14. Although a number of authorities have been referred to, at this stage I confine myself to quoting from relevant passages in the Surinder Singh judgment itself:

> "11 The question submitted by the national court for a preliminary ruling concerns the issue whether Article 52 of the Treaty and Directive 73/148, properly construed, require a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who has gone with that spouse to another Member State in order to work there as an employed person as envisaged by Article 48 of the Treaty and returns to establish himself or herself as envisaged by Article 52 of the Treaty in the territory of the State of which he or she is a national.
>
> …
>
> 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.
>
> 21 It follows that a national of a Member State who has gone to another Member State in order to work there as an employed person pursuant to Article 48 of the Treaty and returns to establish himself in order to pursue an activity as a self-employed person in the territory of the Member State of which he is a national has the right, under Article 52 of the Treaty, to be accompanied in the territory of the latter State by his spouse, a national of a non-member country, under the same conditions as are laid down by Regulation No 1612/68, Directive 68/360 or Directive 73/148, cited above.
>
> …
>
> 25 The answer to the question referred for a preliminary ruling must therefore be that Article 52 of the Treaty and Directive 73/148, properly construed, require a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who has gone, with that spouse, to another Member State in order to work there as an employed person as envisaged by Article 48 of the Treaty and returns to establish himself or herself as envisaged by Article 52 of the Treaty in the territory of the State of which he or she is a national. The spouse must enjoy at least the same rights as would be granted to him or her under Community law if his or her spouse entered and resided in the territory of another Member State."
>
> (Emphasis added)

15. The Surinder Singh principle was given legislative effect in United Kingdom by way of regulation 9 of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"), which, until it was amended on 25 November 2016 and then replaced entirely by the 2016 Regulations on 1 February 2017, provided as follows:

> "9.— Family members of British citizens
>
> (1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member of a British citizen as if the British citizen ("P") were an EEA national.
>
> (2) The conditions are that—
>
> (a) P is residing in an EEA State as a worker or self-employed person or was so residing before returning to the United Kingdom;
>
> (b) if the family member of P is P's spouse or civil partner, the parties are living together in the EEA State or had entered into the marriage or civil partnership and were living together in the EEA State before the British citizen returned to the United Kingdom; and

(c) the centre of P's life has transferred to the EEA State where P resided as a worker or self-employed person."

16. Regulation 9 of the 2016 Regulations provided, as at the date of the respondent's decision in these proceedings, as follows:

"9.— Family members of British citizens

(1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member ("F") of a British citizen ("BC") as though the BC were an EEA national.

(2) The conditions are that—

(a) BC—

(i) is residing in an EEA State as a worker, self-employed person, self-sufficient person or a student, or so resided immediately before returning to the United Kingdom; or

(ii) has acquired the right of permanent residence in an EEA State;

(b) F and BC resided together in the EEA State;

(c) F and BC's residence in the EEA State was genuine;

(d) F was a family member of BC during all or part of their joint residence in the EEA State; and

(e) genuine family life was created or strengthened during their joint residence in the EEA State."

17. Regulation 9 of the 2016 Regulations provided, as at the point in time of its revocation on 31 December 2020, in so far as relevant:

"9.— Family members and extended family members of British citizens

(1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member ("F") of a British citizen ("BC") as though the BC were an EEA national.

(1A) These Regulations apply to a person who is the extended family member ("EFM") of a BC as though the BC were an EEA national if—

(a) the conditions in paragraph (2) are satisfied; and

(b) the EFM was lawfully resident in the EEA State referred to in paragraph (2)(a)(i).

(2) The conditions are that—

(a) BC—

(i) is residing in an EEA State as a worker, self-employed person, self-sufficient person or a student, or so resided immediately before returning to the United Kingdom; or

(ii) has acquired the right of permanent residence in an EEA State;

(b) F or EFM and BC resided together in the EEA State;

(c) F or EFM and BC's residence in the EEA State was genuine[;6

(d) either—

(i) F was a family member of BC during all or part of their joint residence in the EEA State;

(ii) F was an EFM of BC during all or part of their joint residence in the EEA State, during which time F was lawfully resident in the EEA State; or

(iii) EFM was an EFM of BC during all or part of their joint residence in the EEA State, during which time EFM was lawfully resident in the EEA State;

(e) genuine family life was created or strengthened during F or EFM and BC's joint residence in the EEA State ; and

(f) the conditions in sub-paragraphs (a), (b) and (c) have been met concurrently."

18. At all material times, Regulation 7 of the 2016 Regulations provided as follows:

"7.— "Family member"

(1) In these Regulations, "family member" means, in relation to a person ("A")—

(a) A's spouse or civil partner;

(b) A's direct descendants, or the direct descendants of A's spouse or civil partner who are either—

(i) aged under 21; or

(ii) dependants of A, or of A's spouse or civil partner."

19. Articles 2 and 3 of the Citizens' Directive 2004/38/EC state:

"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);

…

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.

…”

20. Article 21(1) of the TFEU provides 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 the Treaties and by the measures adopted to give them effect.”

The hearing

21. Both representatives relied on the written arguments and expanded thereon. In light of my indication that the judge appeared to have failed to address the core submissions put forward by the appellants, Mr Collins focused on the second of his grounds of appeal. Without intending any disrespect, I will only briefly summarise the oral submissions here as I will seek to deal with particular aspects of the relevant jurisprudence to which I was referred, below.

22. Mr Collins quite fairly acknowledged that there were no authorities expressly supporting his argument. However, he submitted that nothing in the case-law was fatal to the appellants' case. Specific passages of within the various authorities were referred to. The essential thrust of the argument was that these appeals, children should not be subject to a residence requirement in a host state. To do so would, in effect, inhibit and discourage the exercise of free movement rights by an EU citizen, here, Mr Johnson.

23. Mr Avery submitted that the absence of any case-law to support Mr Collins' argument was notable. The reason for the absence was that the appellants' contention was highly tenuous. He submitted that regulation 9 of the 2016 Regulations was consistent with EU law. On the facts, the appellants simply could not succeed.

24. At the end of the hearing I reserved my decision.

Discussion and conclusions

25. I have little hesitation in concluding that the judge erred in law by failing to engage with the argument put forward by the appellants as to what was said to be the correct application of the Surinder Singh principle and the contested aspects of regulation of the 2016 Regulations. It is clear that the judge simply relied on regulation 9 as constituting a correct statement of the law and did not begin to address the wider submissions that I am satisfied were properly put to him.

26. The question is then whether the judge's error is such that I should exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set his decision aside. Answering this requires an assessment of the appellants' overall submission that certain family members, in particular children, should not be subject to a residence requirement in the host state in which the EU citizen has exercised Treaty rights.

27. There is nothing in the wording of Article 21 of the TFEU itself which assists the appellants' argument. That is unsurprising, given the generality of the provision.

28. It is then appropriate to look at the terms of the Citizens' Directive to see what this might have to say. Articles 2 and 3 clearly cover the position of EU citizens who move to a host state and to their "family members". No

distinction is drawn between spouses; relevant partners; direct descendants under the age of 21 or who are dependents; and dependents in the ascending line.

29. That the position of third country family members falling within Surinder Singh should be analogous to that under the Citizens' Directive was confirmed by the Court of Justice of the European Union ("CJEU") in O and B C-456/12; [2014] 3 WLR 799 ("O and B"), which at the same time emphasised the importance of residence of an EU citizen and a family member together in the host state. At paragraphs 50-56 the Court concluded as follows:

> "50 So far as concerns the conditions for granting, when a Union citizen returns to the Member State of which he is a national, a derived right of residence, based on Article 21(1) TFEU, to a third-country national who is a family member of that Union citizen with whom that citizen has resided, solely by virtue of his being a Union citizen, in the host Member State, those conditions should not, in principle, be more strict than those provided for by Directive 2004/38 for the grant of such a right of residence to a third-country national who is a family member of a Union citizen in a case where that citizen has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national. Even though Directive 2004/38 does not cover such a return, it should be applied by analogy to the conditions for the residence of a Union citizen in a Member State other than that of which he is a national, given that in both cases it is the Union citizen who is the sponsor for the grant of a derived right of residence to a third-country national who is a member of his family.
>
> 51 An obstacle such as that referred to in paragraph 47 above will arise only where the residence of the Union citizen in the host Member State has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State. Article 21(1) TFEU does not therefore require that every residence in the host Member State by a Union citizen accompanied by a family member who is a third-country national necessarily confers a derived right of residence on that family member in the Member State of which that citizen is a national upon the citizen's return to that Member State.
>
> 52 In that regard, it should be observed that a Union citizen who exercises his rights under Article 6(1) of Directive 2004/38 does not intend to settle in the host Member State in a way which would be such as to create or strengthen family life in that Member State. Accordingly, the refusal to confer, when that citizen returns to his Member State of origin, a derived right of residence on members of his family who are third-country nationals will not deter such a citizen from exercising his rights under Article 6.
>
> 53 On the other hand, an obstacle such as that referred to in paragraph 47 above may be created where the Union citizen intends to exercise his rights under Article 7(1) of Directive 2004/38. Residence in the host Member State pursuant to and in conformity with the conditions set out in

> Article 7(1) of that directive is, in principle, evidence of settling there and therefore of the Union citizen's genuine residence in the host Member State and goes hand in hand with creating and strengthening family life in that Member State.
>
> 54 Where, during the genuine residence of the Union citizen in the host Member State, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) of Directive 2004/38, family life is created or strengthened in that Member State, the effectiveness of the rights conferred on the Union citizen by Article 21(1) TFEU requires that the citizen's family life in the host Member State may continue on returning to the Member of State of which he is a national, through the grant of a derived right of residence to the family member who is a third-country national. If no such derived right of residence were granted, that Union citizen could be discouraged from leaving the Member State of which he is a national in order to exercise his right of residence under Article 21(1) TFEU in another Member State because he is uncertain whether he will be able to continue in his Member State of origin a family life with his immediate family members which has been created or strengthened in the host Member State (see, to that effect, Eind, paragraphs 35 and 36, and Iida, paragraph 70).
>
> 55 A fortiori, the effectiveness of Article 21(1) TFEU requires that the Union citizen may continue, on returning to the Member State of which he is a national, the family life which he led in the host Member State, if he and the family member concerned who is a third-country national have been granted a permanent right of residence in the host Member State pursuant to Article 16(1) and (2) of Directive 2004/38 respectively.
>
> 56 Accordingly, it is genuine residence in the host Member State of the Union citizen and of the family member who is a third-country national, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004/38 respectively, which creates, on the Union citizen's return to his Member State of origin, a derived right of residence, on the basis of Article 21(1) TFEU, for the third-country national with whom that citizen lived as a family in the host Member State."
>
> (Emphasis added)

30. What is of note here is that the Court made a clear link not only between Article 21(1) of the TFEU and the Citizens' Directive, but also with the need for the relevant family member to have resided with the EU citizen in the host state, where family life may have been strengthened or established. The judgment in O and B does not assist the appellants' argument, but runs contrary to it.

31. The judgment in Eind C-291/05 also assists the respondent's position. The CJEU concluded that the Surinder Singh principle could be applied to children (in that case the daughter of the applicant) and that an inability to reside with such a family member in their country of nationality could act as a deterrent to free movement (see paragraph 33-36). However, and importantly, the Court proceeded from the premise that the residence in the country of nationality would be a *continuance* of the family life which

had existed in the host state (see paragraph 36). This basic premise is also apparent in paragraph 45:

> "In the light of all the above considerations, the answer to Questions 2 and 3(b) must be that, when a worker returns to the Member State of which he is a national, after being gainfully employed in another Member State, a third-country national who is a member of his family has a right under Article 10(1)(a) of Regulation No 1612/68, which applies by analogy, to reside in the Member State of which the worker is a national, even where that worker does not carry on any effective and genuine economic activities. The fact that a third-country national who is a member of a Community worker's family did not, before residing in the Member State where the worker was employed, have a right under national law to reside in the Member State of which the worker is a national has no bearing on the determination of that national's right to reside in the latter State."
>
> (Emphasis added)

32. In light of the above, I reject Mr Collins' submission that (a) EU law does not recognise any requirement for family members other than spouses/partners to have resided in the host state before the EU citizen returned to their country of nationality; and (b) that regulation 9 of the 2016 regulations is inconsistent with either the TFEU or the Citizens' Directive.

33. As to (a), it is clear enough from the jurisprudence of the CJEU (including the judgments I have already referred to) that residence by the relevant family member with the EU citizen in the host state is recognised as effectively a condition precedent to the ability to fall within Surinder Singh. It seems to me as though this has been the basic premise from which the Court has proceeded in all the relevant cases. This premise is consistent both with the need to avoid possible deterrence to EU citizens exercising Treaty rights in host states and with the concept of being able to continue or establish family life in these states during the course of exercising Treaty rights.

34. In respect of (b) and regulation 9 of the 2016 Regulations, I accept the respondent's submission (as set out in paragraph 7 of the rule 24 response) that, rather than being more generous, the 2006 Regulations were in fact too restrictive as they only took account of spouses and civil partners. I conclude that the amendments brought about by the 2016 Regulations corrected the position so as to bring the Regulations in line with CJEU case-law.

35. None of the cases cited by Mr Collins in respect of regulation 9 of the 2016 Regulations provide material assistance to the appellants. The decision of the Upper Tribunal in OB (EEA Regulations 2006-Article 9(2)-Surinder Singh spouse) Morocco [2010] UKUT 420 (IAC) addresses a separate issue (that of gaps between the exercising of Treaty rights in the host member

state and a return to the country of nationality) and has no material bearing on these appeals.

36. Rehman (EEA Regulations 2016-specified evidence) [2019] UKUT 195 (IAC) makes the uncontroversial point that relevant domestic legislation must be interpreted light of and consistently with EU law. It did not deal with any of the specific issues arising in the present appeals.

37. The judicial headnote of ZA (Reg 9. EEA Regs; abuse of rights) Afghanistan [2019] UKUT 281 (IAC) ("ZA") reads as follows:

> "The requirement to have transferred the centre of one's life to the host member state is not a requirement of EU law, nor is it endorsed by the CJEU.
>
> (ii) Where an EU national of one state ("the home member state") has exercised the right of freedom of movement to take up work or self-employment in another EU state ("the host state"), his or her family members have a derivative right to enter the member state if the exercise of Treaty rights in the host state was "genuine" in the sense that it was real, substantive, or effective. It is for an appellant to show that there had been a genuine exercise of Treaty rights.
>
> (iii) The question of whether family life was established and/or strengthened, and whether there has been a genuine exercise of Treaty rights requires a qualitative assessment which will be fact-specific and will need to bear in mind the following:
>
> > (1) Any work or self-employment must have been "genuine and effective" and not marginal or ancillary;
> >
> > (2) The assessment of whether a stay in the host state was genuine does not involve an assessment of the intentions of the parties over and above a consideration of whether what they intended to do was in fact to exercise Treaty rights;
> >
> > (3) There is no requirement for the EU national or his family to have integrated into the host member state, nor for the sole place of residence to be in the host state; there is no requirement to have severed ties with the home member state; albeit that these factors may, to a limited degree, be relevant to the qualitative assessment of whether the exercise of Treaty rights was genuine.
>
> (iv) If it is alleged that the stay in the host member state was such that reg. 9 (4) applies, the burden is on the Secretary of State to show that there was an abuse of rights."

38. ZA was concerned with regulation 9 of the 2016 Regulations and considered a number of authorities, including O and B. The specific issue with which the Upper Tribunal was concerned related to the requirement that the EU citizen's residence in the host state was "genuine" with reference to regulation 9(2)(c). As is made clear in the headnote, aspects

of regulation 9(3) were found wanting when analysed in the context of EU law.

39. Regulation 9(2)(b) was not in issue in ZA. However, it is readily apparent from what is discussed in considerable detail in that decision that the Upper Tribunal took it as read that there had to have been residence in the host state by both the EU citizen and the relevant family member prior to return to the United Kingdom (see, for example paragraph 43). There is no support in ZA for the contention that a distinction can be drawn between spouses/partners and other family members, specifically children, as regards the need to have resided with the EU citizen in the host state.

40. Banger C-89/17; [2018] Imm AR 1205 extended the scope of the Surinder Singh principle to unregistered partners in a durable relationship with an EU citizen. What is clear from the Court's ruling on the preliminary questions was the assumption that the partner would be returning to the member state of which the EU citizen was a national (see paragraphs 35 and 41).

41. The Court of Appeal's judgment in Christy [2018] EWCA Civ 2378; [2019] WLR 2017 does not advance the appellants case. The point being made in paragraph 40 was that the family member had to have resided with the EU citizen in the host state, although there did not need to have been a specific decision under the Treaty and the Citizens' Directive from the authorities of that state.

42. Having concluded that the authorities do not provide any support for Mr Collins central argument, I now turn to consider whether, as a matter of principle, a distinction can properly be drawn between spouses/partners on the one hand and dependent family members (specifically children) on the other.

43. For the reasons set out below, I conclude that there cannot.

44. First, the jurisprudence of the CJEU incorporates the underlying principles of free movement and also the ability of EU citizens who exercise that freedom to continue to enjoy, or to establish, family life in a host state. If a category of family members (in the present cases, dependent children over the age of 21) is exempt from the residence condition, it undermines or entirely circumvents an essential component of the Surinder Singh principle and the well-established case-law of the Court.

45. The facts of the present appeals are instructive. The appellants never joined their mother or Mr Johnson in Spain. As a result, no family life as between the appellant's and Mr Johnson was established. There was no question of any family life between the appellants and Ms Otabor which may have pre-existed continuing or being strengthened in that country. Indeed, if anything, the period of separation might be said to have weakened any family life.

46. Second, Mr Collins' rationale for why a distinction should be drawn, and the example given in support thereof, is unpersuasive. It may be said that dependent children residing in the United Kingdom or a third country who were in school or receiving medical treatment should not be required to go and join an EU citizen in the host state. To disrupt their lives in this way may create a deterrence to the EU citizen from exercising free movement Treaty rights in the first place.

47. In my view, however, the same considerations - or similar - could apply to a spouse/partner. They too may be receiving medical treatment or completing an educational or professional course in the United Kingdom or a third country. Requiring them to cease such an activity in order to go to a host state could potentially act as a deterrent to the EU citizen. Yet it is not suggested that they are, or should be, exempt from a residence condition. Therefore, no principled distinction can be drawn between different classes.

48. I acknowledge that the hypothetical scenario put forward by Mr Collins may have greater force if the family members concerned were minor children (although of course neither of the appellants were at any material time). Nonetheless, this does not persuade me that the Surinder Singh principle should be extended in the significant manner sought.

49. Third, the points made at paragraph 13c of the grounds of appeal are, with respect, misconceived. It is there accepted that a residence requirement for spouses/partners is justified because of the need to show a link between the exercise of Treaty rights and the formation/continuance of family life. I have addressed this in paragraphs 44 and 45, above.

50. It is said that the requirements imposed on the appellants by a residence condition in the host state are stricter than those imposed on any other dependent of an EU citizen exercising Treaty rights, this being contrary to the principle of equivalence as set out in O and B. This is not correct. The residence requirement would apply equally to any dependent family member of any other EU citizen who was relying on the Surinder Singh principle. To say that there should be no residence requirement at all for family members who are not spouses/partners is to ignore the fundamental point that third country nationals who gain a derivative right of residence only do so because of the exercise of free movement by the EU citizen concerned. The EU citizen who is resident in a host state can seek to have family members joined them from a third country *because the former is exercising Treaty rights*, pursuant to the Citizens' Directive.

51. On the facts of these appeals, Mr Johnson's exercise of Treaty rights was clearly in no way inhibited by a residence requirement for the appellants. He in fact exercised those rights in Spain. He established family life with Ms Otabor there and they continued to reside in that country for a period. There was no attempt to have the appellants join them. There is no reliable suggestion that that was anything other than a choice made by the couple.

52. That the appellants did not join their mother and stepfather in Spain meant that the only family life that Mr Johnson could have "continued" on return to the United Kingdom was that with his wife.

53. It seems to me that the ultimate consequence of the appellants' contentions in these appeals is that once a citizen of one EU state exercises Treaty rights in another and then returns to their home state, they will thereafter *always* retain some form of status as an EU citizen in that state in respect of whom all rights and benefits accruing from the original exercise of free movement will apply. In my judgment, such a position is unsupported by the TFEU, the Citizens' Directive, case-law, or any principled arguments.

54. In light of the foregoing, a residence requirement for family members other than spouses/partners does not disclose discrimination or a lack of equivalence as regards the protections afforded to those EU citizens who exercise Treaty rights in a host state.

55. I acknowledge that the appellants were issued with family permits, which they used to enter the United Kingdom in 2017. The entry clearance contained in the appellants' passport which confirmed the family permit described them as being family members of Mr Johnson. I have not been provided with any further information as to the basis on which the permits were issued. On my analysis of the correct legal position, it would appear as though the permits should not have been issued because the appellants had not resided in Spain. Whether or not the respondent proceeded in error, I am bound to apply the law as I find it to be, in the context of the facts of the appeals before me.

56. In summary, I conclude that the inclusion of a residence requirement in regulation 9(2)(b) of the 2016 Regulations is in accordance with EU law. On the facts of these appeals, the appellants clearly cannot satisfy that requirement. The appellants cannot therefore be family members of Mr Johnson. In turn, they do not enjoy derivative rights of residence in the United Kingdom and the respondent's refusal of their applications to be issued with a residence card were not in breach of any EU law rights.

57. Whilst the judge erred in law by failing to deal with the appellants' core submission, he was entitled to rely on regulation 9(2)(b) of the 2016 Regulations as providing a complete answer to their case. The error was not material to the oucome.

58. In light of this, I do not set aside the judge's decision. That decision shall stand.

Anonymity

59. There is no good reason for making an anonymity direction in these appeals and I make no such direction.

Notice of Decision

60. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

61. I do not exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and I do not set aside the decision of the First-tier Tribunal.

62. The decision of the First-tier Tribunal shall stand in respect of both appeals.

Signed: H Norton-Taylor Date: 30 March 2021

Upper Tribunal Judge Norton-Taylor