IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002682
First-tier Tribunal No:
EA/50450/2020
IA/00900/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 17 May 20223

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

SHPRESA BERISHA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

(ANONYMITY ORDER NOT MADE)

Representation:
For the Appellant: Mr N. Leskin, Birnberg Peirce Solicitors
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

Heard at Field House on 19 April 2023

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 06 October 2020 to refuse to issue a residence card recognising a right of residence under EU law as the family member of an EEA national.

2. The appeal was brought under The Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016'). The only ground of appeal was that the decision appealed against breached the appellant's right under the EU Treaties in respect of entry into or residence in the United Kingdom.

3. First-tier Tribunal Judge J. Bartlett ('the judge') dismissed the appeal in a decision sent on 21 March 2022. The judge summarised the contents of the respondent's

decision letter. The respondent acknowledged that the appellant had applied for a residence card as a dependent family member in the ascending line of a British citizen who had previously exercised rights of free movement under EU law in Belgium. The British citizen sponsor, Granita Meta Ahmeti, had successfully sponsored her civil partner, the appellant's son, Doart Berisha, under regulation 9 of the EEA Regulations 2016 (the '*Surinder Singh*' route). The appellant and her son are Kosovan nationals. The application was refused because there was no evidence to show that the appellant had ever resided in Belgium with the British citizen sponsor and therefore did not meet the requirements of regulation 9 [3].

4. The judge then summarised the legal arguments put forward on behalf of the appellant. The skeleton argument accepted that the appellant had not resided with Ms Ahmeti when she was exercising rights of free movement in Belgium. It was argued that the appellant did not need to show that she had lived with her son and his British citizen partner in Belgium before they returned to the UK. The respondent accepted that the appellant's son met the requirements of regulation 9(2). It was argued that he was the sponsor. Ms Ahmeti should be treated as an EEA national for the purpose of regulation 9(1). As such, the appellant satisfied the requirements as a family member under regulation 7(1)(c) [4].

5. The respondent reviewed the case and asserted that the argument that the appellant's son is a sponsor under EU law was a 'new matter'. The Secretary of State did not give consent for it to be argued. The appellant could not satisfy the requirements of regulation 7 of the EEA Regulations 2016 [5].

6. In response, the appellant produced a second skeleton argument asking: 'once a British citizen and their non-EEA national partner who have together been exercising their EU Treaty rights in an EEA country and are granted a residence permit in the UK under the Surinder Singh route, are they then to be treated as if the British citizen is an EEA national under the regulations?' It was argued that, if the answer was 'yes', then the appeal should succeed [6].

7. The judge set out the requirements contained in regulations 7 and 9 of the EEA Regulations 2016, as well as the undisputed facts. The judge's key findings were as follows:

> '15. I do not accept that regulation 9 applies to the appellant's situation as she cannot satisfy all the conditions set out in regulation 9(2) and this is not disputed.
>
> 16. I consider that the issue in this case is whether because Granita Ahmeti was treated as an EEA national under regulation 9 in respect of her relationship with Doart Berisha such that she has obtained an EEA residence card, that she should be treated as an EEA national for all future applications and purposes under the EEA Regulations.
>
> 17. Mr Leskin did not refer to regulation two and its definition of EEA national. However it is clear that Granita Ahmeti is not an EEA national and receiving a residence permit does not make her an EEA national.
>
> 18. Regulations 7(1) is qualified by regulations 7(4) which states *A must be an EEA national unless regulation 9 applies (family members and extended family members of British citizens*.
>
> 19. I find that regulation 9 does not apply to the appellant as a family member or extended family member and this is therefore fatal to her claim.

> 20. I do not accept that just because Granita Ahmeti once satisfied regulation 9 in relation to Doart Berisha, this means she is to be taken as satisfying regulation 9 in respect of any other individual who does not themselves satisfy the requirements of regulation 9.'

8. The appellant applied for permission to appeal to the Upper Tribunal, repeating the same arguments put to the First-tier Tribunal, and arguing that the decision involved the making an error of law.

9. First-tier Tribunal Judge Athwal refused permission to appeal in an order dated 19 May 2022 because it was not arguable that the appellant met the requirements of regulation 9(1) when it was accepted that the appellant did not meet the requirements of regulation 9(2).

10. Following a renewed application, Upper Tribunal Judge Kamara granted permission to appeal because she considered that it was 'arguable that the judge erred in requiring the appellant to show that she met the requirements of regulation 9 directly rather than meeting the relationship requirement in Regulation 7(1)(c).

11. I heard oral submission from both parties, which are a matter of record and do not need to be set out although I will refer to any relevant argument in my findings.

Decision and reasons

12. This case considers the proper interpretation of EU law and how it was transposed into domestic law through the EEA Regulations 2016 before the UK exited the European Union on 31 December 2020.

13. The starting point is the right of free movement of Union citizens, which is enshrined in the Treaty for the Functioning of the European Union (TFEU) and other EU Treaties. Rights of free movement between European Union Member States in the European Economic Area (EEA) were outlined in the Citizens' Rights Directive (2004/EC/38). Article 3 made clear that the Directive applied to Union citizens 'who move to or reside in a Member State other than that of which they a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

14. The EEA Regulations 2016 was a statutory instrument that transposed the requirements of EU law into domestic law. If aspects of the EEA Regulations 2016 did not conform with EU law, the Directive had direct effect and was a primary source of EU law rights: see *Marleasing S.A v LA Commercial Internacional de Alimentacion S.A.* [1992] 1 CMLR 305. However, recital 29 of the Directive made clear that nothing in the Directive would affect more favourable national provisions. In other words, national provisions had to be read to conform with minimum requirements of EU law, but a Member State could make more generous provisions in domestic law if it decided to do so.

15. Until 31 December 2020 British citizens were Union citizens with rights of free movement under the EU Treaties. In *Shirley McCarthy v SSHD* [2011] EUECJ C-434/09 (05 May 2011) the Court of Justice of the European Union (CJEU) found that the Directive was not applicable to a Union citizen who had never exercised their right of free movement, who has always resided in a Member State of which

they are a national even if they were a national of another Member State. In that case, Mrs McCarthy had always resided in the United Kingdom and had never exercised her right of free movement. Mrs McCarthy's husband applied for a residence card as the family member of an EEA national on the ground that Mrs McCarthy held Irish as well as United Kingdom citizenship. The CJEU made clear that the residence rights arising from the Directive were linked to the exercise of free movement. Mrs McCarthy had not exercised rights of free movement, nor did the decision to refuse a residence card impede her right of free movement. Mrs McCarthy's case illustrates how the rights of residence of family members under EU law are dependent upon the EEA national exercising their rights as Union citizens.

16. In an old case of *R (Immigration Appeal Tribunal and Surinder Singh) ex parte SSHD* [1992] EUECJ C-370/90 (7 July 1992) the Court of Justice of the European Communities (as it then was) considered a reference for a preliminary ruling. Mr Singh's wife was a British citizen who had exercised her right of free movement to work in Germany. Mr Singh resided with her there. The couple returned to the UK. Mr Singh was granted leave to remain in the UK. Following the initiation of divorce proceedings, about two years later, the Secretary of State sought to remove Mr Singh from the UK after his limited leave to remain expired. The point made by the court was that a Union citizen might be deterred from leaving their country of origin to exercise rights of free movement in another Member State if, on returning to their Member State of which they are a national, the conditions of entry or residence were not at least equivalent to those that they would enjoy under the Treaty in the territory of another Member State. This has come to be known as the *Surinder Singh* principle.

17. The CJEU consider the principle again in *O & B v The Netherlands* (C-456/12) (12 March 2014). Mr O was a Nigerian national who was married to a Dutch citizen. They were registered at an address in Spain, but the evidence indicated that the Union citizen could not find work and returned to the Netherlands. She visited Mr O in Spain on a regular basis to spend time with him. The Dutch authorities refused to issue Mr O with a residence card recognising a right of residence in the Netherlands. Mr B was a Moroccan national who lived in the Netherlands with his Dutch partner. The Dutch authorities made a declaration that his presence was undesirable due to a criminal conviction for using a false passport. Mr B moved to Belgium where he stayed in an apartment rented by his partner, who visited him there every weekend. In 2007 Mr B returned to Morocco because he was denied residence in the Netherlands. Two years later, the Dutch authorities lifted the declaration and Mr B returned to the Netherlands to join his partner. The Dutch authorities refused to issue Mr B with a residence card.

18. The CJEU distinguished the facts of these cases from the situation in *Surinder Singh* because the EEA national sponsors did not reside in the host Member States as workers but as the recipients of services. The court made clear that the TFEU and the Directive 'do not confer any autonomous right on third-country nationals'. Any rights conferred on third-country nationals by provisions of EU law on Union citizenship are rights derived from the exercise of freedom of movement by a Union citizen [36]. The Directive did not intend to confer a derived right of residence on third-country nationals who are family members of a Union citizen residing in the Member State of which the latter is a national [43].

19. The court went on to consider whether there might be a derived right with reference to Article 21(1) TFEU. It concluded that the *Surinder Singh* principle did apply in circumstances where a Union citizen resided in another Member State

solely by virtue of their being a Union citizen i.e. not as a worker. There might be obstacles to the Union citizen leaving their Member State of origin in the same way as workers. The court emphasised that the family life must have been 'created or strengthened in the host Member State'. However, the court emphasised that there would only be an obstacle if there was 'evidence of settling there and strengthening 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.' [53][54]. It was a matter for the Dutch authorities to determine whether the sponsors genuinely resided in the host Member States and whether 'on account of living as a family during that period of genuine residence' Mr O and Mr B enjoyed a derived right of residence in conformity with Article 7(2) or Article 16(2) of the Directive [57].

20. The EEA Regulations, 2000, 2006, and 2016 all included provisions relating to family members of British citizens that sought to conform with the principles outlined in *Surinder Singh*. The wording of the EEA Regulations 2016 reflected the additional principles outlined in *O & B*. At the date of the respondent's decision, and the date when the UK exited from the EU, the relevant wording of regulation 9 of the EEA Regulations 2016, which was applicable at the hearing, was as follows:

> **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.
>
> .....
>
> (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
>
> .....
>
> (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
>
> .....
>
> (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.
>
> .....
>
> (5) Where these Regulations apply to F or EFM, BC is to be treated as holding a valid passport issued by an EEA State for the purposes of the application of these Regulations to F or EFM.
>
> .....
>
> (7) For the purposes of determining whether, when treating the BC as an EEA national under these Regulations in accordance with paragraph (1), BC would be a qualified person—
>
> (a) any requirement to have comprehensive sickness insurance cover in the United Kingdom still applies, save that it does not require the cover to extend to BC;
>
> (b) in assessing whether BC can continue to be treated as a worker under regulation 6(2)(b) or (c), BC is not required to satisfy condition A;
>
> (c) in assessing whether BC can be treated as a jobseeker as defined in regulation 6(1), BC is not required to satisfy conditions A and, where it would otherwise be relevant, condition C.

21. Regulation 9 is the only provision in the EEA regulations 2016 that applies directly to rights of residence of family members of British citizens (save for certain derivative rights of residence based on the *Zambrano* principle). All the other provisions relating to family members (regulation 7) and extended family members (regulation 8) relate to family members of EEA nationals who were exercising rights of free movement in the UK. Regulation 2 makes clear that for the purpose of the regulations the term 'EEA national' means a national of an EEA State who is not also a British citizen.

22. Once one looks at the wording of regulation 9 it becomes clear why the appellant's son, who is a third-country national, was issued with a residence card recognising a right of residence in the UK. Mrs Ahmeti, the British citizen ('BC'), met the conditions contained in regulation 9(2). She exercised her rights of free movement under the EU Treaties to work in Belgium. Her husband, the 'family member' ('F'), resided with her in another Member State where their family life was strengthened during a period of joint residence in the host Member State. According to the underlying principles of EU law recognised in *Surinder Singh*, when the couple returned to the UK, the conditions of their entry or residence needed to be equivalent to the requirements to reside in a host Member State.

23. Mr Leskin's argument appeared to hinge on the wording of regulation 9(5), which stated that where the regulations applied to the family member the British citizen sponsor should be treated as though they were an EEA national. At first blush the reference to 'these Regulations' seems quite wide, but the only part of the EEA Regulations 2016 that could 'apply' to the family member of a British citizen in such circumstances is regulation 9. This is because all other aspects of the regulations relate to EEA nationals who are not also British citizens who were exercising rights of free movement in the UK. For this reason, I find that the reference to the British citizen being treated as though they were an EEA national is confined to regulation 9 to conform with the narrow principle identified in *Surinder Singh*.

24. Mr Leskin argued that the appellant met the requirements of regulation 7 as a dependent family member in the ascending line. Regulation 2 makes clear that an EEA national is a person who is not also a British citizen. Regulation 7(4) also makes clear that the domestic scheme only treats a British citizen as an EEA national if regulation 9 applies.

> 7(4) A must be an EEA national unless regulation 9 applies (family members and extended family members of British citizens).

25. Regulation 7 only applies to the family members of an EEA national as defined who is exercising rights of free movement as a qualified person in the UK or for the sole purpose of defining a 'family member' ('F') for the purpose of regulation 9 if the sponsor ('A') is an EEA national who is also a British citizen. This means that a person who is a family member of an EEA national who is also a British citizen must also meet the substantive requirements of regulation 9.

26. Once the underlying principles of EU law have been understood, it becomes clear why the appellant's application for a residence card was refused. If she had resided in Belgium with the British citizen sponsor and had created or strengthened a family life with her there, the appellant, like her son, might have qualified under regulation 9. She did not. There is no evidence to indicate that the appellant has ever lived with the British citizen sponsor in another EU Member State.

27. The appellant entered the UK directly from a third country without having engaged any rights as the family member of a Union citizen who had exercised rights in a host Member State. By the time she entered, her son and the British citizen sponsor had been back in the UK for some time. Mr Leskin accepted that, for this reason, she did not meet the requirements of regulation 9.

28. For the reason given above, and as already explained by the First-tier Tribunal judge, regulation 9(5) did not have the effect of treating the British citizen sponsor as if she was an EEA national in relation to all aspects of the regulations, only for the purpose of regulation 9. The combined effect of regulation 2 and regulation 7(4) makes clear that regulation 7 only has free standing application for family members of EEA nationals who are not British citizens who were exercising rights of free movement in the UK. Regulation 7 is only relevant to family members of EEA nationals who are British citizens to the limited extent that it defines a 'family member' for the purpose of regulation 9.

29. Mr Leskin did not point to any case law of the CJEU that might suggest that there is any other principle of EU law that would allow a family member of a Union citizen who has not created or strengthened a family life with the Union citizen in a host member state before returning to the Member State of the Union citizen to join them after the Union citizen has returned and is no longer exercising rights of free movement. The CJEU made clear that third-country nationals have no autonomous rights of their own. The rights of family members who are not Union citizens only flow through their family life with the Union citizen. The principles outline in the above case law suggests that the appellant's circumstances do not create rights under the Directive or the TFEU more widely. The rights flowing from the Union citizen (Ms Ahmeti) who exercised her right of free movement only extended to her husband who resided with her while she was exercising rights of free movement and was entitled to return with her to the UK in circumstances that were equivalent to which he resided with her under EU law in Belgium.

30. For the reasons given above, I conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law.

Notice of Decision

The First-tier Tribunal decision did not involve the making of an error on a point of law

M.Canavan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 April 2023