IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003357

First-tier Tribunal No: EA/10636/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

15th November 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MARIA FERNANDA IBARRA LOPEZ
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Amrika Nolan, Senior Presenting Officer
For the Respondent: Zane Malik KC and Michael West, instructed by ALC Solicitors

Heard at Field House on 6 November 2023

DECISION AND REASONS

1. The Secretary of State appeals, with the permission of First-tier Tribunal Judge Lodato, against the decision of First-tier Tribunal Judge Blackwell ("the judge"). By his decision of 22 June 2022, the judge allowed Ms Lopez's appeal against the respondent's refusal of her application for leave to remain under Appendix EU of the Immigration Rules.

2. To avoid confusion, I shall refer to the parties as they were before the First-tier Tribunal: Ms Lopez as the appellant and the Secretary of State as the respondent.

Background

3. The appellant is a Mexican citizen who was born on 22 December 1985. The sponsor is her husband, David Fernando Morgan Hernandez[1].

4. The judge made the following findings of fact, none of which have been challenged by the Secretary of State and may therefore be taken as the relevant chronology in this case.

> [19] The sponsor was born on 17 January 1985 in Madrid, Spain.
>
> [20] The sponsor's father was born in Torquay, England on 1 March 1945 and was a British citizen. His mother was born in Madrid, Spain on 1 October 1950, and was a Spanish citizen. Both are now dead.
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> [21] The sponsor attended school in Spain between 1989 and 2003. He attended university in the UK between 2003 and 2006, returning to Spain during the vacations.
>
> [22] In Spain the sponsor was professionally engaged in Spain's theatre industry,
> undertaking roles such as assistant producer and stage manager.
>
> [23] The sponsor and appellant met in 2006. Their relationship began in 2008.
>
> [24] The sponsor and appellant were married in Spain on 4 May 2012. They have two children. The first was born on 5 April 2014 in Spain, and is a Spanish citizen. The second child was born on 20 May 2016 in Watford UK, she is a dual national of Spain and the UK.
>
> [25] The sponsor and the appellant entered the UK in August 2014. They continue to live together. Their relationship is genuine and subsisting.
>
> [26] The appellant works in the UK.
>
> [27] On the 22 October 2015 the appellant was issued with a residence card under
> Regulation 9 of the Immigration (EEA) regulations 2006 on the basis that the
> Secretary of State then understood them to be a family member of a qualifying British citizen who was exercising free movement rights in Spain. The Secretary of State now says that this was incorrectly issued.
>
> [28] The foregoing facts are not in dispute. The sponsor says that he was a British national from birth and acquired Spanish nationality in 2005. This was questioned at the hearing by the Secretary of State, on the basis both that it was said Spain does not allow its nationals to hold dual nationality and lack of evidence.

[1] There are various versions of the sponsor's name in the papers. His name is given in his British passport as David Fernando Morgan. In the Spanish documents, it is given as David Fernando Morgan Hernandez. In the letter which accompanied the application to the Secretary of State, it was given as David Fernando Hernandez Morgan.

> [29] The issue of Spanish law on dual nationality is from an evidential perspective a question of fact on which no evidence has been adduced. The appellant stated in his evidence that he had tried to get information from a Spanish qualified lawyer, but he had not succeeded. I note in Toufik Lounes v Secretary of State for the Home Department Case (Case C-165/16), which I discuss below, it was accepted that it is possible to hold dual Spanish-UK nationality. Although in Toufik Lounes the circumstances are somewhat different, since the British nationality was the second to be acquired, unlike here.
>
> [30] We have the sponsor's Spanish passports [AB 109-110] and British Passport [AB 111]. I accept these to be genuine documents and ones on which reliance can be placed. In the absence of expert evidence to the contrary I accept that the sponsor is a Spanish national and is also a British citizen, as he claims.
>
> [31] I accept that the sponsor was an honest and credible witness. His testimony was consistent with the documentary evidence. Specifically, I accept the sponsor's testimony that he acquired Spanish nationality in 2005.

The Decision of the First-tier Tribunal

5. Having made those findings of fact, the judge turned to the issue which arose under Appendix EU. It was, he recorded, whether the sponsor was a 'qualifying British citizen', as defined in Annex 1 to that Appendix. The judge had set out that definition, and the requirements of regulation 9 of the Immigration (EEA) Regulations 2016, at [12]-[13] of his decision.

6. At [33], the judge noted that the respondent had concluded in the refusal letter that the sponsor 'cannot exercise free movement rights in the EEA state they are a national of'. The respondent's submission, therefore, was that the sponsor was not exercising free movement rights as a British citizen when he was in Spain from 2005 onwards. He was, instead, a national of that country with a right of unconditional residence there.

7. At [34], the judge noted the submission made by Mr West of counsel, who then represented the appellant alone. Mr West submitted that the sponsor was a British citizen by birth who was 'exercising Treaty rights in Spain post 2005 as a dual national'.

8. At [36]-[41], the judge undertook an impressive analysis of three authorities: R v IAT & Surinder Singh *ex parte* SSHD (C-370/90); [1992] 3 CMLR 358, R (McCarthy) v SSHD (C-202/13); [2015] 2 CMLR 13 (GC), and R (Lounes) v SSHD (C-165/16); [2018] 2 CMLR 9.

9. At [42], the judge refined the scope of his enquiry still further, noting that the respondent had accepted at the hearing that the question which arose under the Immigration Rules was whether the appellant met sub-paragraph (b) of the definition of a qualifying British citizen in Annex 1 to Appendix EU of the Immigration Rules. He recorded that the definition required that the sponsor 'satisfied regulation 9(2), (3) and (4)(a) of the EEA Regulations … immediately before returning to the UK with (or ahead of) the applicant'. In turn, the only part of the EEA Regulations which was in issue between the parties was regulation

9(2)(a), which the judge correctly recorded as being in the following terms ('BC' stands for 'British citizen'):

> (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.

10. The judge noted that there was no suggestion that the second of those alternatives applied. He therefore stated at [45] that the 'ultimate question' was 'whether or not, immediately before returning to the UK, the sponsor was residing in an EEA State as a self-employed person.

11. At [46]-[50], the judge dealt with a difficulty which arose over the definition of 'self-employed person' in regulation 4 of the 2016 Regulations. That regulation defined the term with reference to a person who was 'established in the United Kingdom', whereas the material question in this case was whether the sponsor had been established as such in Spain. I need not detail the way in which the judge resolved that difficulty in favour of the appellant.

12. At [51] onwards, the judge turned to consider whether the sponsor was 'self-employed 'in accordance with Article 49' of the Treaty on the Functioning of the European Union. He concluded that the sponsor was able to meet the definition. His reasoning drew on his earlier analysis of the authorities and, from [57], he concluded as follows:

> [57] What seems to distinguish both Toufik Lounes (see [49]-[62]) and Freitag from McCarthy is that in the former two cases the EU citizen had moved from the one Member State of nationality to the other such Member state, generating the link to EU law that was found not to exist in McCarthy. Here, likewise, the appellant returned to Spain after residence in the UK as a student.
>
> [58] I therefore accept that the appellant was pursuing activity as a self-employed person in accordance with Article 49 immediately before he came to the UK.
>
> [59] With regard to the assertion in the refusal letter that "a person cannot exercise free movement rights in EEA member state of which they are a national, even if they hold dual citizenship of two EEA member states", this clearly states the principle too crudely. This is shown in Toufik Lounes and Freitag.
>
> [60] With regard to the more nuanced submissions of the Secretary of State made at the hearing, I accept that her analysis of the 2004 Directive is correct. However, that is not on point to the question I must address. In incorporating the directive the UK has chosen to make reference to a test based on the exercise of Treaty rights. From Toufik Lounes it is clear that these are broader than the directive.

> [61] It follows that the appellant meets the requirements of the immigration rules and the appeal is therefore allowed.

13. I need not set out what the judge went on to say at [62] *et seq*. It suffices to state that he allowed the appeal on the basis that the respondent's decision was disproportionate under Article 18(1)(r) of the Withdrawal Agreement because, and only because, he had found that the decision breached the Immigration Rules.

The Appeal to the Upper Tribunal

14. The Secretary of State's grounds are admirably concise. It is contended that the judge erred in finding that the definition of a qualifying British citizen was met by the sponsor's 'movements or nationality status at various times'. The sponsor was not at any material time exercising Treaty rights as a British citizen in Spain. He was simply 'a Spanish national who had returned home.' At [3], the respondent's case is summarised in this way:

> Put very simply, DFMH has no basis to be treated as a Qualifying British Citizen benefiting from the Surinder Singh principle. He may potentially have been exercising Treaty rights as a British citizen at some point between his birth and his acquisition of Spanish citizenship, but thereafter he was a Spaniard in Spain, the Lounes principle could not create any rights in the United Kingdom and the requirements of Appendix EU could not be met. As Judge Blackwell recognised, the narrow scope of the statutory appeal did not admit any possibility of complaint arising from the previous erroneous documentation. The appeal could not succeed.

15. Judge Lodato considered the grounds to be arguable.

Submissions

16. For the Secretary of State, Ms Nolan began by recalling salient aspects of the chronology. The sponsor had been born in Madrid and had attended school in Spain. He had gone to university in the UK. The sponsor and the appellant had entered the UK in 2014. The sponsor had not been residing in Spain as a British citizen; he was a Spanish national who held dual nationality and was not, therefore, exercising his free movement rights. Regulation 9(1) was not satisfied. The finding at [44] of the judge's decision was determinative. The respondent's submissions were in accordance with the decision of the CJEU in McCarthy.

17. Ms Nolan observed that the judge's finding that the sponsor had acquired Spanish citizenship in 2005 was at odds with his witness statement. In any event, he could not meet regulation 9 because it was some years after he had acquired Spanish nationality that he returned to the UK.

18. Ms Malik made two points in response. He submitted, firstly, that the Secretary of State invited the Upper Tribunal to rewrite the Regulations, whereas the proper course was to construe the Regulations in accordance with their natural meaning. He submitted, secondly, that the appellant qualified under the Regulations even on the Secretary of State's approach.

19. Developing the first of those submissions, Mr Malik noted that the sponsor was a British citizen by birth who had acquired Spanish citizenship in 2005. It was submitted at [2] of the Secretary of State's grounds that the sponsor had not been exercising Treaty rights as a British citizen in Spain but there was no such requirement in the Regulations. What she sought to do was to insert words into the Regulations impermissibly. The judge's concern over the definition of a self-employed person in regulation 4 was of no relevance.

20. Developing the second of his submissions, Mr Malik observed that the sponsor, and therefore the appellant, might have had no right of residence under the Directive but what mattered was that a derivative right still arose under the Treaty itself. It was not a purely domestic situation of the type considered in McCarthy. The sponsor was exercising Treaty rights up to the point that he became a Spanish national and the Lounes principle applied thereafter.

21. In reply, Ms Nolan submitted that it was not possible to read regulation 9(2) without reference to regulation 9(1). The fact was that the sponsor was a Spanish national at the relevant time, and not merely a British citizen. The sponsor had been born in Spain and had been to school there. His evidence was that he was a Spanish citizen from birth.

22. I asked the advocates for assistance with the latter point, as it was quite clear from the witness statement to which Ms Nolan referred that the sponsor had thought himself to be a Spanish national from birth. I was referred by Mr Malik to the sponsor's second witness statement, in which he asserted that he had acquired Spanish citizenship in 2005. He submitted that it was too late for the respondent to attempt to challenge that finding.

23. Ms Nolan continued. She submitted that the sponsor had been a Spanish national living in Spain from 2005 onwards. It was clear on that basis, she submitted, that this was 'just not a Surinder Singh case'. The Regulations showed that the sponsor must have been exercising Treaty Rights immediately before returning to the UK. That was not so; he had been a Spanish national living in Spain from 2005 to 2014.

24. I reserved my decision at the conclusion of the submissions.

Analysis

25. The respondent's grounds of appeal contain no challenge to the judge's finding of fact that the sponsor acquired Spanish citizenship in 2005. Ms Nolan expressed some concern that the finding was flatly at odds with what was said by the sponsor in his witness statement. That is evidently the case but, as Mr Malik helpfully observed, there were *two* witness statements from the sponsor. The point was clearly ventilated before the judge in the FtT and he was entitled to accept what was said in the second statement. I accept Mr Malik's submission that it is now too late for the Secretary of State to invite me to depart from that finding. The judge's findings of fact, as reproduced at [4] above, must stand. The real question is whether, on those facts, the appellant was entitled to succeed under the Immigration Rules.

26. In my judgment, the appellant was not able to succeed under the Immigration Rules and the judge erred in concluding otherwise. I reach that conclusion for the following reasons.

27. As the judge observed, the relevant question in the Immigration Rules is to be found in part (b) of the definition of a qualifying British citizen, in Annex 1 to Appendix EU. That requires the sponsor to be a British citizen who satisfied regulation 9(2), (3) and (4)(a) of the EEA Regulations. Amongst those provisions, the operative question is whether the sponsor resided in an EEA state as a worker, self-employed person, self-sufficient person or a student immediately before returning to the United Kingdom.

28. The answer to that question is in my judgment more straightforward than it was thought to be by the judge. As contended by the Secretary of State before me, the sponsor was not residing in Spain as a self-employed person immediately before returning to the United Kingdom. He was certainly residing in Spain and he was certainly self-employed, as is clear from the findings of fact made by the judge. But his residence in Spain from 2005 onwards was not *as* a self-employed person; it was *as* a Spanish national.

29. From the point at which the sponsor obtained Spanish citizenship in 2005, there was a change in the legal rules applicable to him as he had from that point, an unconditional right of residence there: Lounes refers, at [37]. It is clear from Lounes, as it is from McCarthy, that the sponsor's residence in Spain was no longer governed by Directive 2004/38/EC from that point onwards.

30. It seems that the judge reached the same conclusion in relation to the Directive. At [60], he stated that he accepted that "the respondent's analysis of the 2004 Directive is correct". He allowed the appeal, however, because the exercise of Treaty rights recognised in Lounes was 'broader than the Directive'.

31. In my judgment, however, the second holding in Lounes (described in subsequent authorities and in the Secretary of State's grounds as 'the Lounes principle') was of no assistance to the appellant. In order to explain why I have reached that conclusion, it is necessary to set out the two conclusions reached by the CJEU at [62]. I have already made reference to the first. In relation to the Directive, the court concluded:

> Directive 2004/38 must be interpreted as meaning that, in a situation in which a Union citizen (i) has exercised his freedom of movement by moving to and residing in a Member State other than that of which he is a national, under Article 7(1) or Article 16(1) of that directive, (ii) has then acquired the nationality of that Member State, while also retaining his nationality of origin, and (iii) several years later, has married a third-country national with whom he continues to reside in that Member State, that third-country national does not have a derived right of residence in the Member State in question on the basis of Directive 2004/38.

32. For reasons it had given at [45]-[61], however, the court's second conclusion was as follows:

> The third-country national is however eligible for a derived right of residence under Article 21(1) TFEU, on conditions which must not be stricter than those provided for by Directive 2004/38 for the grant of such a right to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by

> settling in a Member State other than the Member State of which he is a national.

33. By reference to the latter conclusion, it seems that the appellant *would* have been eligible for a derived right of residence *in Spain* under Article 21(1) of the Treaty on the Formation of the European Union. Before the appellant and the sponsor came to the United Kingdom, the facts were indistinguishable from those in Lounes. He went to Spain as a British citizen, in exercise of his right to freedom of movement. He subsequently obtained Spanish nationality whilst retaining his British citizenship. He married the appellant and lived with her in Spain. He was no longer a beneficiary under Article 3 of the Directive but the Lounes principle entitled his wife to remain in Spain because he had previously exercised his right to free movement.

34. But the purposive approach to Article 21 TFEU which the CJEU adopted in Lounes was of no relevance here. The appellant could not succeed in her appeal by showing that the Lounes principle would have applied to her in Spain. She could only succeed if she could show that the sponsor had resided in Spain as a self-employed person immediately before returning to the UK. She could not do so, for the reasons I have set out above. Whilst some amendment was made to the EEA Regulations in an attempt to accommodate the Lounes principle, that amendment was not broad enough to accommodate the circumstances of this appellant.

35. For my part, I doubt whether the Lounes principle extends Surinder Singh in the manner contended for by the appellant. Surinder Singh applies[2] to the family member of an EEA national who relocates to exercise free movement rights under Directive 2004/38/EC and then returns to their own Member State. Lounes applies to the family member of an EEA national who has relocated to exercise free movement rights under Directive 2004/38/EC and who subsequently acquires nationality of the host state. The Lounes principle extends a derivative right of residence *in the host state* to the family member of the dual national. There is no reason in principle or in the authorities to conclude that the Lounes extension continues to apply upon the return of the dual national to the state of their original nationality.

36. If I had been required to decide the point, I would have accepted the respondent's submission that the Lounes principle could not in this case create any rights in the UK. I do not think that that question arises, however, because it is clear that the sponsor's circumstances in Spain did not meet the specific requirements of the EEA Regulations immediately before he returned to the UK.

37. I conclude therefore that the judge erred in allowing the appeal under the Immigration Rules. On the facts as found, the only proper outcome was to dismiss the appeal. Since the judge's decision to allow the appeal under the Withdrawal Agreement followed the decision under the Immigration Rules, that part of his decision must also be set aside. I substitute a decision to dismiss the appeal on both grounds for the reasons above.

38. I emphasise for the benefit of the appellant that this decision resolves only the limited questions in an appeal of this nature. She may yet make an application for leave to remain under the Immigration Rules or a claim that her removal

[2] As is clear from the judgment of the Grand Chamber of the CJEU in O&B v Minister voor Immigratie, Integratie en Asiel (Case C-456/12); [2014] 3 CMLR 17.

would be unlawful under section 6 of the Human Rights Act 1998. Whilst an attempt was made to raise the latter point before the FtT, the respondent refused to give consent for it to be considered.

Notice of Decision

The decision of the FtT involved the making of an error on a point of law. That decision is set aside. I substitute a decision dismissing the appellant's appeal.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 November 2023