UT Neutral citation number: [2023] UKUT 00076 (IAC)

Kutbuddin (Reg 9; EEA Regs; lawful residence)

Upper Tribunal
(Immigration and Asylum Chamber)

Heard at: Manchester Civil Justice Centre

THE IMMIGRATION ACTS

Heard on **30 September 2021**
Promulgated on **22 March 2022**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Shabbir Kutbuddin
Fatema Arsiwala
Munira Shabbir Kutbuddin
Batul Shabbir Kutbuddin
(no anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr C. Holmes, Counsel instructed by Parkview Solicitors
For the Respondent: Mr P. Deller, Senior Home Office Presenting Officer

The requirement that an EFM must show prior lawful residence in another member state is not a requirement of EU law, nor is it endorsed by the CJEU.

DECISION AND REASONS

1. The Appellants are nationals of India who are respectively a husband, wife and their two daughters. They appeal with permission against the decision of the First-tier Tribunal (Designated Judge McClure) to dismiss their linked appeals under the Immigration (European Economic Area) Regulations 2016. It is the Appellants' case that they qualify for a residence card under the *Surinder Singh* provisions in Regulation 9 thereof.

2. The background, very shortly put, is that the Appellants lived for some time in Ireland with a British sponsor who was there exercising free movement rights. That Sponsor is the first Appellant's brother. Now the whole family have returned to live in the UK. The Respondent does not challenge the assertion that the Sponsor was working in Ireland as claimed; nor has she put in issue the claim that the Appellants are his 'extended family members'. The sole matter in issue arises under Regulation 9 (1A)(b) and is put in the refusal letter like this:

> "For extended family members to qualify under regulation 9 they must demonstrate that they resided in an EEA member state with their British Citizen sponsor and the residence had been lawful. This means you must provide evidence that you were issued with an EEA residence card during your residency in Ireland as the extended family member of your British citizen sponsor or had been granted leave in Ireland under Ireland's own domestic immigration rules"

3. Before the First-tier Tribunal the Appellants argued that there was no requirement in EU law for their residence in Ireland to have been "lawful" in the sense that it is described in that passage. In the alternative they argued that their residence was lawful, since they had entered the country in possession of valid visit visas. The First-tier Tribunal rejected both propositions and dismissed the appeal.

4. These appeals first came before the Upper Tribunal on the 6th January 2021. That hearing was adjourned so that the Secretary of State could consider her position. The difficulties caused by the pandemic meant that this position statement was not available until the 4th August 2021. The hearing could not then be listed until the 30th September 2021. I am grateful to both Mr Holmes and Mr Deller for their hard work prior to the hearing, and their helpful submissions on the day.

5. Before I address the grounds of appeal it is convenient to here record some matters that were not in issue.

6. The first is that there are valid appeals before me, the refusal letters containing express concessions to that effect. The only ground of appeal is set out in Schedule 2 to the 2016 Regulations:

> 1. The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal [against a decision of the Secretary of State under section 82(1) of the 2002 Act (right of appeal to the Tribunal)—
>
> section 84 (grounds of appeal), as though the sole permitted ground of appeal were that the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom ("an EU ground of appeal");

7. The second is that the UK's withdrawal from the European Union has no consequence to the appeals before me, since the appeal was lodged prior to withdrawal day: see Paragraph 5(1)(a) of Schedule 3 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020 1309).

8. The third is that despite the UK's withdrawal from the European Union the Appellants will achieve a substantive benefit if they succeed: although Mr Deller was not aware, at the date of the hearing, what the precise form of that benefit might be, he gave an undertaking that there would be a "work around" reflecting the outcome of the appeals.

The Matter in Issue

9. Regulation 8 defines an 'extended family member' of an EEA national:

> **"Extended family member"**
>
> **8.**—(1) In these Regulations " extended family member " means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).
>
> (2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and —
>
> (a)the person is residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of his household;

(b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or

(c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.

(3) A person satisfies the condition in this paragraph if the person is a relative of an EEA national or his spouse or his civil partner and, on serious health grounds, strictly requires the personal care of the EEA national his spouse or his civil partner.

(4) A person satisfies the condition in this paragraph if the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national were the EEA national a person present and settled in the United Kingdom.

(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.

(6) In these Regulations "relevant EEA national" means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purpose of paragraph (5).

10. At the date of decision Regulation 9 read as follows:

"Family members [and extended family members] of British citizens"

9.—(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.

(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 [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.

(3) Factors relevant to whether residence in the EEA State is or was genuine include—

(a) whether the centre of BC's life transferred to the EEA State;

(b) the length of F or EFM and BC's joint residence in the EEA State;

(c) the nature and quality of the F [or EFM] and BC's accommodation in the EEA State, and whether it is or was BC's principal residence;

(d) the degree of F or EFM and BC's integration in the EEA State;

(e) whether F's or EFM's first lawful residence in the EU with BC was in the EEA State.

(4) This regulation does not apply—

(a) where the purpose of the residence in the EEA State was as a means for circumventing any immigration laws applying to non-EEA nationals to which F or EFM would

> otherwise be subject (such as any applicable requirement under the 1971 Act to have leave to enter or remain in the United Kingdom);
>
> (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.
>
> (6) In paragraph (2)(a)(ii), BC is only to be treated as having acquired the right of permanent residence in the EEA State if such residence would have led to the acquisition of that right under regulation 15, had it taken place in the United Kingdom.
>
> (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.

(emphasis added)

11. It is apparent from the refusal letter, the relevant part of which is set out at my §2 above, that the decision maker read "lawfully resident" to mean that the Appellants held either residence cards issued pursuant to Ireland's obligations under the EEA Treaties *or* leave to remain in Ireland under domestic immigration policy. This accords with the Secretary of State's policy guidance on the subject, published under the title *Free Movement Rights: Family Members of British Citizens* (at the date of the decision, Version 4.0):

> An extended family member of a British citizen must have been lawfully resident in the EEA host country. For the purposes of this assessment, 'lawful residence' means either:
>
> • issued with documentation under EU law that has not been cancelled, revoked or otherwise invalidated
>
> • granted leave to enter or remain (or an equivalent) under the domestic law of the EEA host country that has not been curtailed, revoked or otherwise invalidated

> If an extended family member of a British citizen was not lawfully resident in the EEA host country, they are not eligible for a document confirming their right of residence and you must refuse the application.

12. Before the First-tier Tribunal the Presenting Officer also submitted that such residence required a "degree of permanence as to the status of an individual in the host EU country", a submission that the Tribunal was inclined to accept: at its §39 this is given as a key reason for dismissing the appeal. The Secretary of State (no doubt frustratingly for the First-tier Tribunal) now resiles from that submission, and in fact invites me to set the Tribunal's decision aside on the basis that this was a misdirection. The Secretary of State no longer contends that 'permanence' need be a feature of the applicant's residence in the host member state. In her position statement prepared for this appeal[1] however, she introduces a further requirement. In case either Reg 9(1A)(b) or the accompanying policy should be read to mean that *any* period of lawful residence would count, the Secretary of State now submits as follows:

> The Respondent's position in respect of her guidance and in respect of the requirements of Regulation 9 (1A) (b) of the 2016 EEA Regulations is that the Appellant must have been lawfully resident in the host member state for the **entire** period of residence. It is therefore accepted that from 12th December 2016 until the 28th February 2017 the Appellants were lawfully resident in Ireland, however for the period after 28th February 2017 there has been no evidence provided that the Appellants were lawfully resident and therefore they do not meet the requirements of Regulation 9 (1A) (b).

13. For the Appellants Mr Holmes contends that none of this has any basis in EU law. The "right" asserted by the Appellants is derived wholly from caselaw, and none of the relevant cases, set out below, make any reference at all to the matter of the claimant's status in the member state of prior residence. Mr Holmes submits that for the Respondent, and First-tier Tribunal, to have treated Reg 9(1A)(b) as determinative was therefore in error.

14. Framed in this way the parties before me therefore agreed that the central question at the heart of this appeal is whether Reg 9(1A)(b) has any basis in European Union law.

Discussion and Findings

15. It is not in dispute that nothing like Reg 9(1A)(b) appears in the Citizens Directive 2004/38/EC ('the Directive'). Two articles are however relevant. In respect of 'beneficiaries' the Directive provides as follows:

[1] Letter upon instructions from Senior Presenting Officer A. McVeety dated the 4th August 2021

Article 3: Beneficiaries

1.This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2.Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

16. Article 5 deals with the right of entry to the EU:

Article 5: Right of entry

1.Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

No entry visa or equivalent formality may be imposed on Union citizens.

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.

Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.

3.The host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present the residence card provided for in Article 10.

> 4.Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.
>
> 5.The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.

17. For the purpose of this decision it is pertinent to note that Article 3 provides that member states shall "facilitate" the entry and residence of non-EEA "other family members" who are dependents of, or members of the household of union citizens. Article 5 stipulates that when entering EU such family members shall be required to have a residence card or an "entry visa in accordance with Regulation (EC) No 539/2001". This Regulation lists the "third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement". Article 1(1) thereof provides that individuals from countries listed in Annex 1 must have a visa. I note that India appears in this list. Article 5 further provides that member states should grant "every facility" to get a visa, including making them free and accelerating their issue. Where an individual does not have a visa they should be given an opportunity to get one; failure to do so should attract no more than "proportionate and non-discriminatory sanction".

18. I shall return to these provisions in due course.

19. As Mr Holmes contends, Regulation 9 is wholly based on the caselaw of the Court of Justice, starting with the decision in Surinder Singh C-370/90 [1992] ECR I-4265. Mr Singh was an Indian national who had resided for some time in Germany with his British wife. They had thereafter come back to live in the UK and after the marriage broke down the Home Office had indicated that he should leave the country. Mr Singh asserted a "retained right of residence" under European law. The Court considered for the first time the problem of what happens to family members - of the sort referred to in Article 3(1) - *after* free movement rights have been exercised. Mr Singh undoubtedly had the right to reside in Germany as the spouse of a British national working in that country, but what about after she had returned home? The Court held that to subject spouses such as Mr Singh to the requirements of ordinary British immigration law would have a chilling effect on the willingness and ability of their British spouses to move freely within the Union. The Court held at §18:

> "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."

Accordingly such an imposition of more onerous requirements was unlawful.

20. In March 2014 the CJEU was asked to consider the ambit of the Surinder Singh principle in the linked cases of O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B C-456/12 [2014] 3 WLR 799. Both O and B were non-EU nationals who were married to Dutch women. The case had been referred to the CJEU because on the facts it was unclear whether Surinder Singh obligations were engaged. Mr O had been living in Spain for some three years but had only actually lived there with his wife for about two months. Mr B had lived in Belgium for approximately two years, with his then partner (they were not married until later) coming to stay with him at weekends. The question therefore arose as to whether the wives had been 'established' in either Spain or Belgium [see §39], and so whether the residence has been "sufficiently genuine" that the family relationship had been created or strengthened during that time [§51].

21. For the purpose of this decision the point to be derived from O and B is that the Court did not find the status of the respective husbands in the host countries to be in any way relevant. Whilst the recitation of facts tells us that the Spanish authorities had recognised Mr O's right of residence as a family member, this appeared to attract little weight in the analysis, the Court stating at §60 that the Netherlands were not required to recognise any derived rights "because of the mere fact" that he had held a residence card elsewhere. In Mr B's case, it is implicit in the facts that he did not hold any status at all in Belgium: he had moved there after the Netherlands had expelled him, and was eventually refused a right of residence by the Belgian authorities (although it is not clear whether this was under EU law or domestic immigration rules). That matter was not however deemed to be of any consequence at all in determining whether Surinder Singh obligations were engaged.

22. The next case of relevance is Banger C-89/17 [2019] 1 WLR 845. The applicant was a South African national who had lived with her British partner in the Netherlands for five years. They were unmarried: she was not therefore a 'family member' as defined at Article 2(2) of the Directive. Rather, as a durable partner, she was an 'other family member' (under Article 3(2)(b)); a fact recognised by the

Dutch authorities who had at some point issued her with a residence permit. When the couple moved to the UK she applied for a residence card here, which was refused on the grounds that the family life created or strengthened in the Netherlands did not count for the purposes of Surinder Singh application, because she and her partner were not married. It will be recalled that in both Singh and O and B the claimants were all 'family members', and that until this point the Regulations had been drafted accordingly. The Upper Tribunal referred the case to the Court of Justice, asking amongst other things whether the distinction between spouse and durable partner – between 'family member' and 'other family member' – could be justified.

23. The Court begins its analysis by underlining that Ms Banger received no benefit at all from the Directive. The rights she asserted were derived from the case-law of the Court, and the principle that EU citizens should not be discouraged from exercising treaty rights by the concern that they would in the future not be able to continue, in their own countries, any family life created or strengthened elsewhere in the EU: Article 21 TFEU applied. The conditions under which such a derived right of residence might be granted could not, in principle, be stricter than those provided for by the Directive: the Directive must therefore be applied by analogy. Since the Directive provided that member states must "facilitate" entry and residence for durable partners within host states, it followed that the Surinder Singh principle must also apply to them to this extent. For our purposes, Banger is significant because, as the parties agreed, this reasoning opened the door to the applications in the present case from Surinder Singh 'other' or 'extended' family members. It is also pertinent to note, as the Court of Appeal would do in Secretary of State v Natasha Anne Christy [2018] EWCA Civ 2378, a judgment I shall return to below, that the reasoning in Banger is in no way predicated upon the fact that the Dutch authorities had granted Ms Banger a residence card.

24. I pause here to accept Mr Holmes' submission that in none of the cases in this Surinder Singh line of Court of Justice authorities, is there to be a found a requirement of prior lawful residence in the host member state. Before I turn to address domestic caselaw, it is necessary to complete the survey of CJEU jurisprudence by referring to Metock & Ors v Minister for Justice, Equality and Reform C-127/08 [2009] 1 WLR 821.

25. In Metock the Court of Justice was asked to consider the legality of a domestic requirement of Irish law that a non-EEA family member seeking to join an EEA- national sponsor in Ireland show prior lawful residence elsewhere within the Union, recognised under the Directive. Expressly reconsidering Secretary of State v Akrich C-109/01) [2004] QB 756 the Court found such a requirement to be without foundation in the Directive or in European law more broadly. The definition of a

‘family member’ did not depend on whether he or she had ever had lawful residence, and the Directive conferred upon such family members the right to join an EEA-national citizen in a host member state whenever he had become established there. Article 5(2) of the Directive expressly required non-EEA family members to enter the Union with either a residence card *or* an entry visa: that the latter would suffice demonstrates that the non-EEA family member did not have to have held, at all times, a right of residence recognised by the member state under the Directive. Article 10(2), which lists the documents that the non-EEA family member needs to provide to get a residence card, makes no mention of a residence card issued by another member state. The Court concludes:

> 66. Consequently, the interpretation put forward by the Minister for Justice and by several of the governments that have submitted observations that the member states retain exclusive competence, subject to Title IV of Part Three of the Treaty, to regulate the first access to Community territory of family members of a Union citizen who are nationals of non-member countries, must be rejected.
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> 67. Indeed, to allow the member states exclusive competence to grant or refuse entry into and residence in their territory to nationals of non-member countries who are family members of Union citizens and have not already resided lawfully in another member state would have the effect that the freedom of movement of Union citizens in a member state whose nationality they do not possess would vary from one member state to another, according to the provisions of national law concerning immigration, with some member states permitting entry and residence of family members of a Union citizen and other member states refusing them.
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> 68. That would not be compatible with the objective set out in article 3(1)(c) EC of an internal market characterised by the abolition, as between member states, of obstacles to the free movement of persons. Establishing an internal market implies that the conditions of entry and residence of a Union citizen in a member state whose nationality he does not possess are the same in all the member states. Freedom of movement for Union citizens must therefore be interpreted as the right to leave any member state, in particular the member state whose nationality the Union citizen possesses, in order to become established under the same conditions in any member state other than the member state whose nationality the Union citizen possesses.
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> 69. Furthermore, the interpretation mentioned in para 66 above would lead to the paradoxical outcome that a member state would be obliged, under Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L251, p 12), to authorise the entry and residence of the spouse of a national of a non-member country lawfully resident in its territory where the spouse was not already lawfully resident in

another member state, but would be free to refuse the entry and residence of the spouse of a Union citizen in the same circumstances.

70. **Consequently, Directive 2004/38/EC confers on all nationals of non-member countries who are family members of a Union citizen within the meaning of article 2(2) of that Directive, and accompany or join the Union citizen in a member state other than that of which he is a national**, **rights of entry into and residence in the host member state, regardless of whether the national of a non-member country has already been lawfully resident in another member state**.

....

80 The answer to the first question must therefore be that Directive 2004/38/EC **precludes legislation of a member state which requires a national of a non-member country who is the spouse of a Union citizen residing in that member state but not possessing its nationality to have previously been lawfully resident in another member state before arriving in the host member state, in order to benefit from the provisions of that Directive.**

(emphasis added)

26. In so concluding the Court rejects the contention of EIRE – and other member states – that to do so would be to undermine the ability of member states to control the external borders of the Union. The Court points out that the provision only applies to family members of EEA nationals exercising their free movement rights; that member states are not deprived of all ability to control entry and residence in these circumstances, but they must do so in accordance with the Directive on grounds of public policy, public security or public health; member states furthermore retain the right to deny a residence card where there is an abuse of rights or fraud.

27. In response to the second question raised by the referring court – the relevance of the circumstances in which the non-EEA national entered the Union, the Court says this:

96. Compliance with article 27 is required in particular where the member state wishes to penalise the national of a non-member country for entering into and/or residing in its territory in breach of the national rules on immigration before becoming a family member of a Union citizen.

97. **However, even if the personal conduct of the person concerned does not justify the adoption of measures of public policy or public security within the meaning of article 27 of Directive 2004/38, the member state remains entitled to impose other penalties on him which do not**

> **interfere with freedom of movement and residence, such as a fine, provided that they are proportionate:** see, to that effect, *Mouvement contre le racisme, lantisemitisme et la xenophobie ASBL (MRAX) v Belgian State* (Case C-459/99) [2003] 1 WLR 1073, para 77 and the case law cited.
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> ...
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> 99 The answer to the second question must therefore be that article 3(1) of Directive 2004/38/EC must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a member state whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that Directive, irrespective of when and where their marriage took place and of **how the national of a non-member country entered the host member state**.

(emphasis added).

28. I now turn to the most relevant domestic authority that the parties were able to identify: the Court of Appeal decision in Christy. The applicant was an American woman who had established a durable relationship with a British man, first on a trip to London, then later in Slovakia. They had together moved to Poland where he had exercised his treaty rights. She had been given leave to enter that country under Polish immigration laws. They lived there for about four years before returning to London. Banger having settled the issue relating to unmarried partners, the question before the Court was whether the 'right of facilitation' applied here at all. Ms Christy had been in Poland under her own steam, with her own leave and work permit. In those circumstances, said the Secretary of State, no obligation under EU law arose: in order for the right to arise she would have had to had her residence facilitated by Poland in accordance with Article 3(2) of the Directive. The Secretary of State relied, in particular, to the judgment in O and B which at [§54] makes reference to 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" (emphasis added).

29. The Court rejected this contention. In the lead judgment Sales LJ (as he then was) notes that it is the Court's established case-law that the purpose of the Directive is to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States, which is conferred directly on citizens of the Union by Article 21(1) TFEU, and that one of the objectives of that directive is to strengthen that right. Whilst Ms Christy could derive from the Directive no direct right of residence in the UK, the CJEU has acknowledged, in certain cases, that third-country nationals in her position could be accorded such a right on the basis of Article 21(1) TFEU. The Court could find nothing in the caselaw to support the

proposition that this Banger 'right of facilitation' only arose for partners who had already asserted such a right elsewhere.

30. The Court noted that the principle underpinning all of these cases – that the EEA national might be deterred from moving – is "in no way dependent on whether the durable partner happened to exercise her right of facilitation under Article 3(2)(b) of the Directive in the relationship Member State or not". It certainly could not be said that this was a matter that would concern the EU citizen partner, whose attitude would be the same no matter how his partner came to be residing there. Furthermore, practical difficulties arose from the Secretary of State's suggested policy:

> 37. Secondly, even where the right of facilitation has been relied upon in the relationship Member State, it is by no means inevitable that this will appear from whatever immigration decision was taken or immigration document was issued in that state. That is because the right of facilitation under Article 3(2)(b) is in relation to the treatment of the durable partner against the background of the Member State's existing immigration regime; hence the right might well be satisfied simply by the issue of an entirely ordinary immigration document which makes no reference to Article 3(2) or the Directive at all. This makes it all the more improbable that the CJEU could have intended that the derived right of facilitation which it articulated in *Banger*, applicable in the home Member State, was to be taken to be predicated upon a decision by the immigration authorities in the relationship Member State in respect of the durable partner which was itself based on Article 3(2) of the Directive. The authorities in the home Member State might be unable to tell whether a decision by those other immigration authorities was based on Article 3(2) or not, even where Article 3(2) had in fact been relied on by the durable partner in the relationship Member State.

31. As to the reference in O and B to residence "pursuant to and in conformity with" the Directive, this was, in the view of the Court, a reference to the behaviour of the Union citizen, not the non-EEA partner. Even if it could be read to referring to both parties to the relationship, the judgment could not be read as requiring the partner to have been granted a residence card:

> … In my opinion, the better view is that the CJEU is there saying that the relevant EU citizen had to be in the relationship Member State in circumstances where she had a right to be there under her EU rights under the Treaty and the Directive (in particular, under Article 7(1) or Article 16(1)), even without any specific decision to that effect by the immigration authorities of that Member State, and that, having regard to the nature of the claims made by Mr O and Mr B, the residence of Mr O and Mr B in that Member State (Spain and Belgium, respectively) **had to be of a character for which they could (if necessary) have relied**

> **upon their rights under the Directive**. **On this interpretation of the judgment, what matters is whether the relevant rights of an EU citizen and his or her family member existed or not in the circumstances of the case, rather than whether they happen to have been exercised or not (in the sense of being directly and explicitly relied upon in their dealings with the immigration authorities of the relationship Member State).**

(emphasis added).

32. Sales LJ finds this interpretation to be supported by a number of considerations. First, the CJEU were well aware that Mr B had not been granted residence in Belgium, but did not say that his derived right claim must fail for that reason. Second, the formulation used by the Court rather suggests that the focus is on whether the couple had *enjoyed* the right of residence in Belgium rather than on whether they sought to exercise or rely upon it in an application to the authorities. Third, in its guidance to the referring court the CJEU again emphasised the question of whether family life had been created or strengthened in the host state was one of fact, rather than legal status. All of these points are in my view good ones, broadly supportive of the present Appellants' case.

33. Sales LJ however goes on in Christy to give a further reason for rejecting the Secretary of State's interpretation of O and B, and in doing so appears, suggests Mr Deller, to have provided the basis for the amendment to the Immigration (European Economic Area) Regulations 2016 that is the subject of this appeal:

> (iv) as explained above, the logic of the CJEU's reasoning at para. [54], of which paras. [55]-[57] represent an *a fortiori* variant, does not depend upon whether the third country national happened to rely upon Article 7(2) or Article 16(2) in any application to the immigration authorities of the relationship Member State to obtain residence in that state, **as distinct from being lawfully in that state (e.g. by virtue of a provision in the ordinary domestic immigration rules of that state)** in circumstances which would have allowed him to rely upon those provisions should it prove necessary to do so. This interpretation of the *O and B* judgment is also in line with the judgment of the Grand Chamber of the CJEU in Joined Cases C-424-425/10 *Ziolkowski v Land Berlin [2014]* All ER (EC) 314, concerning the meaning of the phrase "have resided legally" in Article 16(1) of the Directive, at paras. [45]-[49], where the Court says that this phrase means "a period of residence which complies with the conditions laid down in the directive, in particular those set out in Article 7(1)"; i.e. the relevant test is set by reference to whether the individual satisfies the conditions laid down in Article 7(1) so as to enjoy a right under that provision, even if he may not have had to exercise or invoke that right in his dealings with the

immigration authorities of the host Member State. This interpretation of the *O and B* judgment affords further support for the interpretation of the *Banger* judgment for which Mr Collins contends.

42. Fourthly, the CJEU's reference in para. [28] of the *Banger* judgment to "a family life which has been created … with [the] third country national, in the host Member State [i.e. in the relationship Member State], during a genuine residence" (which also reflects similar language used in para. [54] of the *O and B* judgment) is a positive indication that the derived right does not depend upon the third country national exercising rights under the Directive in the relationship Member State. This is because a durable relationship will only be capable of being "created" in the relationship Member State at a time before the person who becomes the durable partner has any rights under the Directive stemming from that relationship. **(The CJEU makes reference here and elsewhere to the relevant residence needing to be "genuine": that would in my view probably preclude a third country national having a derived right of residence or facilitation if they had been in the relationship Member State as an illegal immigrant, since an EU citizen could not reasonably expect that a relationship established in another Member State in circumstances of illegal presence there of his partner should be recognised by the home Member State as the foundation of any derived rights for the partner; however, that is not this case, and it is unnecessary to explore this point any further)**.

43. In addition, when one looks at Article 3(2) itself, the right of facilitation it sets out is expressed to be "Without prejudice to any right to free movement and residence the persons concerned [i.e. the relevant third country nationals] may have in their own right …". Thus the article itself recognises that the third country national who is said to be a durable partner of an EU citizen might well have a right of residence in the relationship Member State derived from a source other than EU law. In my view, this indicates that in the world of the hypothetical EU citizen contemplating the exercise of his own free movement rights to leave his home Member State to go to another Member State, and then wishing to return to the home Member State with a durable partner acquired in that other Member State, he would reasonably expect that the derived rights of his durable partner would arise if her residence in the relationship Member State was the result of the ordinary domestic immigration law of that state, as well as in a case where she had found she had to rely on her right under Article 3(2).

44. In relation to the primary ground of appeal, Mr Lask was unable to identify any coherent policy rationale why the

> derived right of facilitation sought to be relied on by Ms Christy in this case, on the authority of the *Banger* judgment, should be limited to cases in which the third country national who is the durable partner has in fact made an application to the immigration authorities of the relationship Member State relying on Article 3(2) of the Directive and has obtained an immigration decision from those authorities based on that provision. As I have said, there will be many cases where the third party national is lawfully in the relationship Member State by virtue of its ordinary domestic immigration rules, without having any need or occasion to make an application for residence relying upon the right of facilitation in Article 3(2), at the time when the durable relationship is created or strengthened. Ms Christy's case is one of these. It would be inconsistent with the rationale given by the CJEU for the derived right of facilitation, in particular at para. [28] in the *Banger* judgment, to deny the existence of a derived right of facilitation in such a case. To limit the derived right in this way would also mean it operated in an arbitrary manner which could never have been intended by the CJEU, since for the reasons given above it may be entirely adventitious whether the durable partner ever thought it necessary to rely on their rights under Article 3(2) or not.

(emphasis added).

34. It was these passages in Christy which led Mr Deller to neatly characterise that judgment "as taking away with one hand and giving with the other". Sales LJ definitively rejects the idea that someone asserting a Banger right of facilitation must demonstrate that they were recognised under the EU treaties to have a right to reside in another member state. To that extent Mr Deller recognised that the decision presented difficulty for the Secretary of State in establishing that the interpretation of Reg 9 (1A)(b) contended for in the accompanying policy note was correct, insofar as the first limb of that guidance was concerned. The Court holds that there is no requirement that an extended family member of a British citizen must have been "issued with documentation under EU law that has not been cancelled, revoked or otherwise invalidated".

35. What, however, about the remaining limb? The policy guidance provides in the alternative that the "lawfully resident" requirement should be interpreted to mean that the applicant has been "granted leave to enter or remain (or an equivalent) under the domestic law of the EEA host country that has not been curtailed, revoked or otherwise invalidated". Here the Secretary of State finds some support in the judgment in Christy, insofar as Lord Justice Sales remarks that the requirement for "genuine" residence would probably preclude a right of facilitation arising where the non-EEA family member had been living in the host member state unlawfully. In the passages I have highlighted in bold above, he suggests, on the contrary, that there would be a requirement for the individual to have

held, like Ms Christy, valid leave under the domestic immigration provisions of the country in question.

36. Drawing all of this together I find as follows.

37. To succeed in their appeal the Appellants must demonstrate that the decision to refuse them a residence card (or equivalent) breaches their rights under the EU Treaties. As non-EEA extended family members they have no substantive 'rights' as such. The extent of any right they might enjoy is the Banger 'right of facilitation': they say that the United Kingdom is obliged to facilitate their entry and residence, accepting that the Secretary of State is obliged in so doing to undertake an extensive examination of their personal circumstances.

38. It is common ground that the Secretary of State, having undertaken that exercise, refused leave on the sole ground that the Appellants could not demonstrate their residence in Ireland to have been lawful.

39. Insofar as the Secretary of State contends that 'lawful residence' should be interpreted to mean that the family were granted residence cards by the Irish authorities pursuant to their obligations under the EU Treaties, there is no support for that in any of the materials to which I have been referred. The issue did not arise in either Banger or Surinder Singh, since the applicants in those cases had in fact been granted residence cards in the host member state: it is however of note that in neither case did the Court of Justice regard that as in any way relevant. In O & B the Court placed no weight at all on the fact that Mr B had not been granted a residence card in Belgium, and commented in respect of Mr O that the "mere fact" that he had been granted a residence card in Spain could not compel the Netherlands to follow suit. In Christy the Court of Appeal comprehensively demolishes the Secretary of State's suggestion that the Surinder Singh route is open only to those whose EU residence rights have been expressly recognised elsewhere. Moreover all of these authorities are consistent with the principle in Metock: as the Court notes in that decision, the fact that Article 5 of the Directive does not mandate applicants to have entered the EU in possession of a family permit speaks for itself. It would be nonsensical if the Treaties operated to protect family life *created* when treaty rights were being exercised but only on the proviso that the subject of their affection was already *in situ* as someone else's family member. By contrast, there is no authority at all in support of the Secretary of State's position – and policy guidance - on this point.

40. The Secretary of State's case does not however end there. In the alternative she submits that it is legitimate to require applicants in these circumstances to demonstrate that they were 'lawfully resident' in the sense that the host member state in which they were

previously resident should have granted them leave to enter or remain under its domestic immigration law.

41. Again, no support for this notion can be found in any of the CJEU cases to which I have been referred. It seems clear from the recital of the facts in O & B that Mr B was living in Belgium with no leave at all in any capacity – domestic or European – and although the question before the Court did not turn on that, it is of note that this was apparently deemed to be of no consequence. Nor is the Secretary of State's position consistent with the principles in Metock, which must be applied, by analogy, here. In Metock the Court expressly ruled that non-EEA national spouses were entitled to benefit from the provisions of the Directive "irrespective" of how he or she entered the host member state [§99]. Insofar as the Directive requires non-EEA nationals to enter the Union in possession of either a family permit or a valid visa (see Article 5 set out at my §16 above), the Court held that where member states wish to penalise an individual for a failure to do so, it must either demonstrate the impugned conduct to justify expulsion under the Directive, or be limited to the imposition of proportionate measures which "do not interfere with freedom of movement and residence", such as a fine [§97].

42. In the final analysis then, the Secretary of State's case rests upon Lord Justice Sales' comments in Christy, to the effect that the requirement of "genuine" residence would "probably preclude" the third country national having a Banger right of facilitation if the family life in question had been created or strengthened at a time when he was living in the EU illegally.

43. The first thing to be said, and acknowledged by Mr Deller, is that these comments are *obiter*. As such they do not appear to be a good foundation upon which to deny a right of facilitation that would otherwise seem to exist.

44. The second point to be made is that the judgment in Christy predates the Upper Tribunal's exploration of the term "genuine" in ZA (Regulation 9: EEA Immigration (European Economic Area) Regulations 2016: abuse of rights) Afghanistan [2019] UKUT 00281 (IAC); [2020] Imm AR 162. It is this term which expressly leads Lord Justice Sales to infer that no benefit could be expected to accrue from a relationship formed under these circumstances:

> "The CJEU makes reference here and elsewhere to the relevant residence needing to be "genuine": that would in my view probably preclude a third country national having a derived right of residence or facilitation if they had been in the relationship Member State as an illegal immigrant, since an EU citizen could not reasonably expect that a relationship established in another Member State in circumstances of illegal presence there of his partner should be recognised by the home Member State as the foundation of any derived rights for the partner…"

45. In ZA, however, Upper Tribunal Judge Rintoul explains how the word "genuine" has a specific meaning in this context. The First-tier Tribunal had dismissed ZA's appeal, accepting the Secretary of State's case that bad faith was at play, and that the family in question had only ever gone to Ireland in order to take advantage of the Surinder Singh route. Careful analysis of the jurisprudence, in English and French, led the Upper Tribunal to conclude that for the purpose of Regulation 9 motive is irrelevant: it did not matter, on the facts of that case, why the couple in question had chosen to go and live in Ireland. The only legitimate questions were whether they had in fact done so, whether the EEA national sponsor had exercised treaty rights whilst there, and whether family life had been created or strengthened during that period of residence. The term "genuine" is used by the CJEU simply in the sense that the exercise of treaty rights must have been *real*, *substantive* or *effective*. Whether there was another ulterior - or primary – purpose is, absent abuse of rights or fraud, of no concern to decision makers.

46. Applying this definition to the scenario considered in Sales LJ's *obiter dicta*, it is difficult to see how the status of the non-EEA family member might impact upon whether the relevant residence is "genuine" or not. That is particularly so when one considers the principle underlying all of these cases: would a national of a member state be inhibited from exercising his free movement rights if he knew that a family life created or strengthened during that time would not be recognised upon his return home? Synthesising the principle in Metock with that in Surinder Singh there would appear to be no basis for distinguishing between the family members of those with leave, and those without. As Lord Justice Sales points out, albeit in another context, it matters not to the EEA national:

> 36. First and most importantly, in my view para. [28] of the judgment in *Banger* case is founded on a rather abstract and hypothetical inference regarding the effect upon the mind of the relevant EU citizen while still in his home Member State if he thinks that after residing in another Member State and creating or strengthening a family life there with a spouse or a durable partner he will not be able to return to live in the home Member State with his spouse or durable partner. Whilst in the case of a durable partner this does not lead to a derived right of residence, it is taken to lead to a derived right of facilitation in respect of consideration of the prospective application by the durable partner of the EU citizen for a residence card to live with the EU citizen upon return to the home Member State. Such a process of reasoning, turning as it does on inferences regarding the attitude of the EU citizen, does not depend in any way upon whether his prospective durable partner might happen to have been in the relationship Member State as a result of exercising any right she might have in the relationship Member State under Article 3(2)(b) of the Directive. It cannot

> be thought that the attitude of the EU citizen would be any different, depending upon whether the person who became his durable partner happened to be residing with him in the relationship Member State as a result of exercising her right of facilitation under Article 3(2)(b) or (as in the present case) as a result of being in the relationship Member State by reason of being admitted to reside there under that state's ordinary domestic immigration rules.

37. Finally, Mr Holmes properly draws the distinction between the position of the “illegal immigrant” referenced by Sales LJ, and the position of these Appellants, who are accepted to have entered Ireland with valid visit visas in accordance with Article 5 of the Directive, and who thereafter made applications asserting a right of residence as extended family members.

38. For those reasons I must conclude that there is no basis in law for the conclusion reached by the Respondent, and the First-tier Tribunal, that these Applicants are not eligible for residence cards simply because they failed to show that they were “lawfully resident” for the entire time that they lived in Ireland with their Sponsor. In treating the requirement at Regulation 9 (1A)(b) of the Immigration (European Economic Area) Regulations 2016 as determinative the decision-maker breached the Appellants’ rights under the EU Treaties in respect of their residence in the United Kingdom.

39. It follows that the appeals must be allowed.

Decisions

40. The decision of the First-tier Tribunal is set aside by consent.

41. The appeals are allowed.

42. There is no order for anonymity.

Upper Tribunal Judge Bruce
15th February 2022