IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02400/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 October 2016	**On 09 December 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NATASHA ANN CHRISTY
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Walker, Home Office Presenting Officer
For the Respondent: In person

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Davey) allowing an appeal by the applicant against the respondent's decision

made on 29 October 2015 refusing her a residence card as confirmation of a right to reside in the UK. The appeal was allowed, to the extent that the decision was returned to the Secretary of State to consider the exercise of discretion. In this decision, I will refer to the parties as they were before the First-tier Tribunal, the applicant as the appellant and the Secretary of State as the respondent.

Background

2. The appellant is a citizen of the United States born on 13 January 1988. In September 2011 she left the USA and travelled to Slovakia via Prague in the Czech Republic. In October 2011 she began working for a Canadian language school in Slovakia and duly received a one year Slovak visa valid until 24 October 2011. She first met her partner, Scott Alan Jones, a citizen of the UK born on 2 March 1978, on a trip she made to London from Slovakia. There was a further visit in June 2011 and on 2 July 2011 her partner went to meet her in Slovakia. On 16 September 2011 they moved together to Opole in Poland. Her partner started working for Bizneslingua of Opole and shortly afterwards at the British School of Opole. They both continued to work in Poland until September 2014 when they drove through a number of European countries as part of a commemoration project, finally arriving in the UK. On 25 February 2015 they travelled back to France to complete the commemoration project, returning to the UK via Calais.

3. On 29 April 2015 the appellant applied for a residence card as a family member but her application was refused on 29 October 2015. The respondent was not satisfied that the appellant could meet the requirements of reg. 9 of the Immigration (European Economic Area) Regulations 2006 ("the Regulations") as she was unable to show that she and her partner had been married in an EEA country before returning to the UK. In a supplementary decision letter dated 1 December 2015, following further representations from the appellant drawing the respondent's attention to a decision of the Upper Tribunal in Secretary of State for the Home Department v Cain (IA/40868/2013) holding that reg. 9 was inconsistent with the principle of Surinder Singh [1992] EUECC-370/90 as it did not extend to durable partners, the respondent decided to maintain her previous refusal, taking the view that the decision in Cain was limited to the facts of that particular case and that any conclusions were not binding on the respondent with respect to her wider policy.

4. The appeal against the decision the appeal was listed on 12 May 2016 for an oral hearing but was adjourned pending a review by the respondent. This led to the issue of a decision letter dated 9 June 2016 in which the respondent again maintained her decision. She accepted that the appellant and her partner were in a genuine and durable relationship and that the appellant's relationship with her partner was that of an extended family member. However, she could not meet the requirements of reg. 8(5) as her partner did not fall within the meaning of an EEA national as set out in reg. 2. The letter referred to the judgment in Surinder Singh, indicating that the respondent interpreted it as referring to "family members" as defined in Article 2(2) of Directive 2004/38/EC. The decision also refers to regs. 17(4) and (5) but it was the

respondent's view that as the sponsor was not considered an EEA national under reg 2, the requirements of reg. 17 could not be met. The respondent also maintained that the decision in Cain was limited to the facts of that particular case and that any conclusions were not binding on the respondent.

The Hearing before the First-tier Tribunal

5. At the hearing of the appeal on 22 July 2016, the judge found that the appellant could not meet the requirements of reg. 8(5) of the Regulations as an extended family member because her partner was a UK national the requirements of reg. 9(b) as that was limited to those who were married or in a civil partnership. The judge found that the difference between EEA nationals and UK nationals under reg. 8 in terms of its consequences was discriminatory and arguably prevented the free movement of a UK national to go and work in other EU countries because of the uncertainty as to whether he or she could bring their partner back to the UK. This would confound the objective of freedom of movement of people enabling an EEA national to travel and work accompanied by family and other dependants. He found that it was significant that nationals of Member States should not be deterred from leaving to work elsewhere in the EEA because of uncertainty of being able to return to their Member State of origin.

6. The judge referred to examples in EU case law demonstrating, albeit by reference to different relationships, the importance of enabling family members to accompany a worker to another EEA country. He noted there were frequent references to non-discrimination and the movement of workers in Directive 2004/38/EC and under Article 2 of the Convention. He considered them in their own right, unaffected by the judgment in Surinder Singh, which related to a married couple returning to the UK. He considered the Tribunal decisions in Cain and Osoro (Surinder Singh) [2015] UKUT 593.

7. The judge noted that the expression "durable partner" was to be found in Article 3 of the Directive under the heading "Beneficiaries", where the Directive sought to identify those intended to benefit from and, in effect, not impede free movement and residence. The judge found that on the facts of the present case the provisions of reg. 9 and reg. 8(5) prevented free movement and reg. 8(5) was discriminatory between EEA nationals and UK nationals and therefore contrary to law. In these circumstances, he allowed the appeal to the extent that the matter was returned to the respondent to consider the exercise of discretion.

The Grounds and Submissions

8. In the grounds of appeal the respondent argues that it was not open to the First-tier Tribunal to declare the Regulations discretionary. Secondly, having considered that the appellant could not fall within the requirements of the Regulations, there was no basis for the judge to find that the respondent was bound nonetheless to exercise her discretion under reg. 17(4). It was not for the First-tier Tribunal judge, so it is argued,

to dispense with the requirements of secondary legislation whatever he considered were the purposes or otherwise behind such legislation.

9. Thirdly, it is argued that in the case of durable relationships there can be no expectation under EEA law of receiving specific rights in other Member States as the rights for those durable relationships are not harmonised. Article 3.2 of the Citizens Directive is clear that it is national legislation that determines the position of extended family members not Union law, provided national legislation facilitates their entry and residence. The Directive, it is submitted, correctly assumes that Union law does not need to preserve the free movement of nationals in their own Member State.

10. Mr Walker adopted the grounds arguing that the appellant could not bring herself within the Regulations. He confirmed that the consequence of his submission was that to option leave to enter or remain the appellant would need to comply with the requirements of the Immigration Rules as EEA law could not help her in her particular situation. He submitted that the appellant could not bring herself within the Surinder Singh principle and that, although she was in a durable relationship, this brought with it no expectation of receiving particular rights in a any Member State.

11. The appellant, assisted in her submissions by her partner, submitted firstly that the respondent's application for permission to appeal had been made out of time. So far as the substance of the appeal was concerned, she submitted that the judge had been right to find that the Regulations were discriminatory as they prevented free moment of British citizens and allowed different freedoms for EEA nationals. She submitted that her situation was similar to that considered in the Cain and she should be treated in a similar way. She argued that reg. 17(4) related precisely to her situation as equivalent to an extended family member. So far as the respondent's comment that there could be no expectation under Union law of receiving specific rights as the rights for those in durable relationships were not harmonised, she submitted that this was in effect saying that she would have no rights in the UK unless she married.

12. She made the point that she wanted to enter into that relationship of her own volition and at a time of her choosing and, referred to Judge Davey's comments at [17], that there may be a number of reasons why only a durable relationship is possible, e.g. an existing previous marriage, no wish to be married or religious reasons. She submitted that the judge's approach properly acknowledged that in the modern world, people in committed long term relationships did not always get married right away. She also made the point that when preparing and submitting her application under the EEA Regulations, she had followed the advice received from various officials at the Home Office and expressed her upset and concern at the effect of the decision on her and her partner in creating a situation where she was unable to work which had now been going on for at least a year and a half.

Assessment of the Issues

13. The issue I must assess is whether the First-tier Tribunal erred in law in finding that the provisions of reg 9 and reg 8(3) prevented free movement and that reg. 8(5) was discriminatory between EEA nationals and UK nationals and therefore contrary to law. The essence of the respondent's submission is that the Regulations are clear that the appellant cannot bring herself within the provisions of either reg. 8(5) or reg, 9, that the Regulations are consistent with the Citizens Directive and that the Regulations are not discriminatory and do not inhibit free movement of EU citizens. The appellant's case is that it has been accepted that she is in a durable relationship in that, although not married to her partner, they have been living together and the relationship is akin to marriage. The fact that she is not allowed to enter the UK within the EEA Regulations is discriminatory and prevents the free movement of her partner, a UK national, to go and work in other EEA countries because of the uncertainty as to whether he could bring a partner back with him to the UK.

14. In Surinder Singh, the question referred by the UK High Court to the European Court for a preliminary ruling was:

> "Where a married woman who is a national of a Member State has exercised treaty rights in another Member State by working there and enters and remains in the Member State of which she is a national for the purposes of running a business with her husband, do Article 52 of the Treaty of Rome and Council Directive 73/148 of 21 May 1973 entitle her spouse (who is not a Community national) to enter and remain in that Community state with his wife?"

15. The answer given by the Court of Justice was as follows:

> "The answer to the question referred for a preliminary ruling must therefore be that Article 52 of the Treaty and Directive 73/148, properly construed, require a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that state who has gone, with that spouse, to another Member State in order to work there as an employed person as envisaged by Article 48 of the treaty and returns to establish himself or herself as envisaged by Article 52 of the treaty in the territory of the state of which he or she is a national. The spouse must enjoy at least the same rights as would be granted to him or here under Community law if his or her spouse entered and resided in the territory of another Member State."

16. In Osoro (Surinder Singh) [2015] UKUT 593 the Tribunal warned that the linguistic formulation "the principle in Surinder Singh":

> "…required particular care and circumspection on the part of both practitioners and judges as it was a fact sensitive case decided by the European Court by resort of free movement provisions of primary Community law. The case was decided and accordingly its rationale has the two-fold doctrinal components of the principle of efficacious enjoyment of Community law rights and the principle of non-discrimination and it is these principles which demand attention in any given context

rather than treating Surinder Singh as authority for some principle of wider application".

17. As the Tribunal pointed out, the importance of the case of Surinder Singh lay in its reasoning that the rights conferred by Articles 48 and 52 of the Treaty cannot be fully effective if an EU citizen may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse. Accordingly, when a Community national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State.

18. The Tribunal then commented that within this passage one could readily identify the familiar principle of efficacious enjoyment of Community Law rights and the related concept of dissuasion, or deterrence, coupled with the principle of non-discrimination.

19. The appellant seeks to rely on the unreported decision of the Upper Tribunal in Cain. The facts in that case were that the appellant and her partner were in a durable relationship and had been living together since June 2008. They had three children. The appellant's partner had been exercising treaty rights in Spain and Portugal from January 2010 until January 2012 where they had lived together. In January 2012 they returned to the UK. The applicant's partner made an application for a residence card as the family member of an EEA national but this was refused. The Tribunal identified as the heart of the appeal whether an unmarried partner was entitled to the benefit of the decision in Surinder Singh which concerned British citizens returning to the UK after having exercised treaty rights in another EEA state and the extent to which a third country national family member of such a British citizen was entitled to reside in the UK under EU law.

20. The Tribunal noted that Surinder Singh answered the question submitted by holding that where a spouse of whatever nationality of a citizen of an EU state had gone with that spouse to another Member State to work there, and then returned, the spouse must enjoy at least the same rights that would be granted under Community law if they entered and resided in the territory of another Member State.

21. The Tribunal then considered a subsequent decision of the ECJ in Eind [2007] EUECJC-291/05 concerning a national of the Netherlands who had come to the UK, become employed and was later joined by his daughter, a national of Suriname. On return to the Netherlands the authorities refused to grant a residence permit to his daughter. The Court said that the national of a Member State could be deterred from leaving that member state to pursue gainful employment in the territory of another member state if he did not have the certainty of being able to return to his Member State of origin irrespective of whether he was going to engage in economic activity there. The deterrent effect would derive simply from the prospect on that national

of not being able, on returning to his Member State of origin, to continue living with close relatives a way of life which may have come into being in the host Member State as a result of marriage or family reunification.

22. The Tribunal said:

> "37. Barriers to family reunification are therefore liable to undermine the right to free movement which the nationals of Member States have under Community law, as the right of a Community worker to return to the member state of which he is a national cannot be considered to be a purely internal matter."

The Tribunal noted that this and subsequent cases, S and G case C-457/12 and O and B case C-456/12 concerned family members and not unmarried partners.

23 The Tribunal considered the distinction in Articles 2 and 3 of the Citizens Directive 2004/38/EC between a family member as defined in Article 2(2) and beneficiaries as defined in Article 3, including a partner with whom the Union citizen has a durable relationship duly attested. The Tribunal said that it could not see that there was any distinction in principle between the cases it had been referred to and the case of the applellant before it. The exercise of the right of free movement by an EEA national was as likely to be adversely affected by the inability of a durable partner to reside with the EEA national in the host state, as it would be if his or her spouse was denied residence status.

24. The Tribunal set out its conclusions at [54] as follows:

> "Drawing all these threads together we are satisfied that First-tier Tribunal Judge Powell was correct to conclude that the Surinder Singh principle applies to this appellant, albeit it not for precisely the reasons that he gave. The principle does not derive from the Directive which has no equivalent provision, but from Community law. We are nevertheless satisfied that Regulation 9 is inconsistent with the principle in Surinder Singh in its application to this appellant as a durable partner, being an extended family member."

25. The Tribunal did, however, find that the judge had been wrong to purport to allow the appeal outright and that the appeal should be remitted to the Secretary of State to consider the exercise of discretion under reg. 17(4) in that the appellant was not a family member as defined in Article 2 but another beneficiary within Article 3.2.

26. Turning now, in the light of these authorities, to the respondent's grounds in the present appeal, it is argued firstly that it was not open to the First-tier Tribunal to declare the Regulations discriminatory. I am not satisfied that there is any substance in this ground if it is being argued that the Tribunal had no jurisdiction to make such a declaration. European law is directly applicable and it was open to the judge to make such a finding if justified in the circumstances of the appeal.

27. In any event, I do not treat the grounds as limited to issues of jurisdiction but as challenging the substance of the decision particularly in the light of paragraph 10 of the grounds, where it is argued that in the case of those in durable relationships, there can be no expectation under Union law of receiving specific rights in another Member State as those rights are not harmonised and Article 3.2 of the Citizens Directive makes it clear that it is national legislation that determines the position of extended family members, not Union law. It is further argued that the Directive correctly assumes that Union law does not need to preserve the free movement of nationals in their own Member State.

28. However, so far as the substance of the appeal is concerned, this ground overlooks the core European principles of the efficacious enjoyment of Community law rights and the principle of non-discrimination. The grounds have little if anything to say on these aspects which were at the heart of the judge's decision. I am satisfied on the evidence and submissions before him, it was open to the judge to find that in the circumstances of the appellant and her partner the application of reg. 9 and reg. 8(5) inhibited her partner's free movement and the impact of the Regulations was discriminatory.

29. As Judge Davey pointed out at [15] of his decision, the respondent in arguing the case before him did not seek to argue there was any justification for the exclusion of partners from reg. 9 and in this context it is worth noting the fact that reg. 9 is limited to spouses and civil partners in contrast with the provisions in the Immigration Rules which defines partners as including a spouse, a civil partner, a fiancé, a proposed civil partner and a person in a relationship akin to marriage or civil partnership for at least two years prior to the date of application.

30. There are two further points I should cover for the sake of completeness. Firstly, I do not accept that the respondent's notice of appeal was filed out of time. In any event, the delay would have been minimal and the issues are such that an extension of time would inevitably have been granted. Secondly, at the hearing before me no reference was made to the decision of the Upper Tribunal in Sala (EFMs: right of appeal) [2016] UKUT 411 issued on 19 August 2016 where the Tribunal held that there was no statutory right of appeal against a decision of the respondent not to grant a residence card to a person claiming to be an extended family member. However, in the present case the application was in substance based on general principles of EU law rather than a specific application under the Regulations as an extended family member. Accordingly, I am not satisfied that the appeal falls within the scope of the decision in Sala and there was therefore jurisdiction to hear the appeal.

31. In summary, the grounds and submissions do not satisfy me that the judge erred in law by finding that the combined effect of reg. 9 and reg. 8(5) prevented freedom of movement and was discriminatory between EEA nationals and in consequence the proper course was for the judge to refer the application back to the respondent.

Decision

32. The First-tier Tribunal did not err in law. It follows that the decision stands. No anonymity order was made by the First-tier Tribunal.

Signed H J E Latter Date: 4 December 2016

Deputy Upper Tribunal Judge Latter