**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Appeal Numbers: EA/01427/2018
EA/01428/2018
EA/01430/2018

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 3 January 2019** | **On 17 January 2019** |

**Before**

**UPPER TRIBUNAL JUDGE JACKSON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**HARVINDER KAUR**
**KARANPREET SINGH**
**KARAMJOT KAUR**
**(ANONYMITY DIRECTIONS MADE)**

Respondents

**Representation:**
For the Appellant: Mr Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr M Ilahi of Counsel, instructed by Abbot Solicitors

**DECISION AND REASONS**

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Chapman promulgated on 6 July 2018, in which the appeals against the Secretary of State's decision to refuse admission to the United Kingdom as family members of a British citizen under the Immigration

(European Economic Area) Regulations 2016 ("the EEA Regulations") were allowed under regulation 11 of the same. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with the three individuals as the Appellants and the Secretary of State as the Respondent.

2. The Appellants are all nationals of India and rely on their respective relationships with the Sponsor, a naturalised British citizen. The First Appellant is the mother of the Second and Third Appellants, born in 1999 and 2003. The First Appellant is the spouse of the Sponsor and the Second and Third Appellants are the Sponsor's children.

3. The Respondent refused the Appellant's admission to the United Kingdom under regulation 9 of the EEA Regulations on the basis that the family's residence in Bulgaria was for the purpose of circumventing immigration laws to which the Appellants would otherwise be subject as non-EU nationals. The facts relied upon were that the Sponsor had only spent seven months in Bulgaria, the Appellants were there for only two weeks; the Sponsor rented a room in a shared house in Bulgaria and continued to pay for rented accommodation in the United Kingdom where he kept his belongings and where he intended to live on return; none of the family spoke Bulgarian; and the Appellants did not work or enrol in education in Bulgaria.

4. Judge Chapman essentially upheld the Respondent's decision under regulation 9 of the EEA Regulations, on the basis that the Appellants intended to come to the United Kingdom on a permanent basis with the Sponsor but that they had not "resided" with the Sponsor in Bulgaria because of the shortness of their stay and the failure to take any steps to demonstrate that they lived there all intended to live there for any further period of time. It was not accepted that the Appellants' residence with the British citizen Sponsor was genuine, nor was there the creation of or fortification of family life during the Appellants' short stay in Bulgaria. In addition, the Appellants' intentions were to circumvent the requirements of the Immigration Rules which would otherwise apply to them, but which they did not satisfy when making an application on that basis in 2014. In the circumstances, the First-tier Tribunal found that the Sponsor and the Appellants had artificially created the conditions laid down for acquiring the status of the Appellants to be considered as family members of the Sponsor and were not therefore assisted by EU law by reference to the case of Akrich C-109/01. The Appellants have not sought permission to appeal the findings in this part of the decision, which therefore stand.

5. Judge Chapman however allowed the appeals under regulation 11 of the EEA Regulations on the basis that the appeals concerned not the right of residence but the right of entry to the United Kingdom. The Appellants possessed Bulgarian residence cards and passports, the validity of which had not been challenged by the Respondent. Regulation 11 was set out in the decision and it was noted that the Appellant satisfied regulation 23(4)

as the Sponsor was accompanying them on arrival. The reasoning for the appeals being allowed continued as follows:

> *"51. In interpreting Regulation 11, I derive assistance from the case of McCarthy and others, to which I was referred by Mr Ilahi. Paragraph 58 of the judgement in that case, which I have cited above is unequivocal. Admission cannot be denied by Member States to family members who hold a valid residence card issued by another Member State.*
>
> *52. Accordingly, since I find that the Appellant did possess valid residence cards issued by the Bulgarian authorities, I find that, in accordance with Regulation 11, they were entitled to be admitted to the United Kingdom under EU law."*

6. The Appellants appeals were allowed on this basis under the EEA Regulations.

## The appeal

7. The Respondent appeals on the basis that regulation 11 of the EEA Regulations could not benefit the Appellants because it applies only to family members of EEA nationals, as defined in regulation 2 of the EEA Regulations as expressly excluding those who hold British citizenship. Further, the decision in McCarthy was based on a different factual scenario with no reliance on Surinder Singh rights and could not assist the Appellants in these appeals.

8. Permission to appeal was granted by Judge of the First-tier Tribunal Nightingale on 20 September 2018 on all grounds.

9. At the oral hearing, Mr Tufan relied on the written grounds of appeal and submitted that regulation 11 of the EEA Regulations simply had no application in this case and the First-tier Tribunal erred in law in failing to consider the definition of an EEA national in regulation 2 of the same. The Sponsor could only have come within this definition for the Appellants to be family members under the EEA Regulations if they could meet the requirements of Regulation 9, the Surinder Singh provision. It was submitted that the Appellants' reliance on the decision in McCarthy was misplaced given the different factual background, the sponsor in that case being a dual national who had been exercising treaty rights in Spain and whose spouse was accepted to have a right of entry to the United Kingdom without any reliance on Surinder Singh principles.

10. In response, on behalf of the Appellants, Mr Ilahi submitted that the First-tier Tribunal was entitled to allow the Appellants' appeal is under regulation 11 of the EEA Regulations on the basis of the reasoning in paragraph 41 of McCarthy by reference to Article 5(2) of Directive 24/38/EC. To the extent necessary for the purposes of this appeal, he submitted that there had been a failure to correctly transpose this part of the Directive in the EEA Regulations.

## Findings and reasons

11. To determine whether there was an error of law in the decision of the First-tier Tribunal, it is necessary to set out more fully the domestic legal provisions, relevant provisions of Directive 24/38/EC and the decision in McCarthy and others C-202/13 and assess the analysis of the First-tier Tribunal in accordance with those.

12. In regulation 2 of the EEA Regulations, "EEA national" means a national of an EEA state who is not also a British citizen. That definition expressly excludes the Sponsor who is a British citizen and therefore not an EEA national for the purposes of the EEA Regulations.

13. By virtue of regulation 9(1), the EEA Regulations apply to a person who is the family member ("F") of a British citizen ("BC") as though they were an EEA national if the conditions in regulation 9(2) are met; which provide as follows:

> *"(2) The conditions are that –*
>
> *(a) BC –*
>
> *(i) is residing in an EEA state as a worker, self-employed person, self-sufficient person a student, also resided immediately before returning to the United Kingdom; or*
>
> *(ii) has acquired the right of permanent residence in an EEA state;*
>
> *(b) F and BC resided together in the EEA state; and*
>
> *(c) F and BC's residence in the EEA State was genuine."*

14. Regulation 9 goes on to set out factors relevant to determining whether residence was genuine, circumstances in which this regulation does not apply, provisions as to a valid passport, permanent residence and whether BC would be a qualified person. It is not necessary to set out the further detail contained in Regulation 9 given the unchallenged findings of the First-tier Tribunal that the Appellants and the Sponsor do not meet the conditions set out in regulation 9(2).

15. Regulation 11 of the EEA Regulations, makes provision for the right of admission to the United Kingdom for an EEA national and their family members, subject to certain documentary requirements, including, inter alia, the provision of a valid passport and qualifying EEA State residence card, as well as other administrative conditions.

16. There is no express consideration by the First-tier Tribunal of the definition of an EEA national for the purposes of regulation 11, nor any recognition that the Sponsor was expressly excluded from this as a British citizen. If one was looking only at the EEA Regulations, this would amount to a clear error of law. However, the EEA Regulations must be interpreted

in a way which is consistent with the Directive and caselaw of the CJEU, upon which the Appellants expressly rely in this appeal.

17. The relevant provisions of Directive 2004/38/EC are as follows. Article 3 sets out the beneficiaries to whom the directive applies, which includes, inter-alia all Union citizens (defined in Article 2 as any person having the nationality of a Member State) who move to or reside in a Member State other than that of which they are a national, and their family members as defined in Article 2 who accompany or join them.

18. Article 5 of the Directive provides for a right of entry as follows:

> *"1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter the territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State 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 (EEC) No 539/21 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. …"*

19. Chapter III of the Directive goes on to set out the rights of residence available to Union citizens in the territory of another Member State and available to their family members accompanying or joining the Union citizen, together with the appropriate procedures and administrative formalities. These provisions are expressly as to the right of residence in a host Member State, as opposed to in an EEA national's home Member State, which of course they would have the right to reside in as a matter of domestic law.

20. In the context of a reference from the High Court as to whether Article 35 of Directive 2004/38 and Article 1 of Protocol No 20 must be interpreted as permitting a Member State to require, in pursuit of an objective of general prevention, family members of the Union citizen who are not nationals of a Member State and to hold a valid residence card issued under Article 10 of Directive 2004/38 by the authorities of another Member states to be in possession, pursuant to national law, of an entry permit, such as the EEA family permit, in order to be able to enter its territory, the CJEU considered the interpretation and applicability of Directive 2004/38 in the case of McCarthy and others. The findings on the general applicability of the Directive are as follows:

*"31. As is apparent from settled case-law, Directive 2004/38 aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by Article 21(1) TFEU and to strengthen that right (judgement in O and B., C-456/12, EU:C:2014:135, paragraph 35 and the case-law cited).*

*32. Having regard to the context and objectives of Directive 2004/38, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness (judgement in Metock and Others, C-127/08, EU:C:2008:449, paragraph 84).*

*33. As regards, first, any rights of family members of a Union citizen who are not nationals of a Member State, recital 5 in the preamble to Directive 2004/38 points out that the right of all Union citizens to move and reside freely within the territory of the Member State should, if it is to be exercised under objective conditions of dignity, he also granted to their family members, irrespective of nationality (judgement in Metock and Others, C-127/08, EU:C:2008:449, paragraph 83).*

*34. Whilst the provisions of Directive 2004/38 do not confer any autonomous right on family members of a Union citizen who are not nationals of a Member State, any rights conferred on them by provisions of EU law on Union citizenship rights derived from the exercise by a Union citizen of his freedom of movement (see, to this effect, judgement in O and B., C-456/12, EU:C:2014:135, paragraph 36 and the case-law cited).*

*35. Indeed, Article 3(1) of Directive 2004/38 defines as 'beneficiaries' of the rights conferred by the directive 'all Union citizens whoo move to or reside in a Member State other than that of which they are a national, and … Their family members as defined in point 2 of Article 2 who accompany or join them'.*

*36. Thus, the Court has held that not all family members of a Union citizen who are not nationals of a Member States derive rights of entry into and residence in a Member State from Directive 2004/38, but only those who are family members, within the meaning of point 2 of Article 2 of that directive, of a Union citizen who has exercised his right to freedom of movement by becoming established in the Member State other than the Member State of which he is a national (judgements in Metock and Others, C-127/08, EU:C:2008:449, paragraph 73; Dereci and Others, C-256-11, EU:C:2011:734, paragraph 56; Iida, C-40/11, EU:C:2012:691, paragraph 51; and O and B., C-456/12, EU:C:2014:135, paragraph 39).*

*37. In the case in point, it is common ground that Mr McCarthy has exercised his right to freedom of movement by becoming established in Spain. Furthermore, it is likewise common ground*

*that his wife, Ms McCarthy Rodriguez, resides in that Member State with him and the child born of their union and that she is in possession of a valid residence card issued by the Spanish authorities under Article 10 of Directive 2004/38 that permits her to reside lawfully in Spanish territory.*

*38. It follows that Mr McCarthy and Ms McCarthy Rodriguez are 'beneficiaries' of that directive, within the meaning of Article 3(1) thereof.*

*39. So far as concerns, second, the issue of whether Ms McCarthy Rodriguez derives a right of entry into the United Kingdom from Directive 2004/38 when she is coming from another Member State, it is to be noted the Article 5 of that directive governs the right of entry and conditions for entry into the territory of the Member States. As set out in Article 5(1), 'Member States shall grant Union citizens leave to enter the territory … and shall grant family members who are not nationals of a Member State leave to enter the territory with a valid passport'.*

*40. In addition, the first subparagraph of Article 5(2) of Directive 2004/38 provides that '[f]or 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'. As is apparent from recital 8 in the preamble to the directive, that exemption is intended to facilitate the free movement of third-country nationals who are family members of a Union citizen.*

*41. Article 5 of Directive 2004/38 refers to 'Member States' and does not draw a distinction on the basis of the Member State of entry, in particular in so far as it provides that possession of a valid residence card as referred to in Article 10 of the directive is to exempt family members of a Union citizen who are not nationals of a Member State from the requirement to obtain an entry visa. Thus, there is nothing at all in Article 5 indicating that the right of entry of family members of the Union citizen who are not nationals of a Member State is limited to Member State other than the Member State of origin of the Union citizen.*

*42. Accordingly, it must be held that, pursuant to Article 5 of Directive 2004/38, a person who is a family member of a Union citizen and is in a situation such as that of Ms McCarthy Rodriguez is not subject to the requirement to obtain a Visa or an equivalent requirement in order to be able to enter the territory of that Union citizens Member State of origin."*

21. The CJEU went on to find that neither Article 35 of Directive 2004/30 80 Article 1 of Protocol No 20 permitted a Member State to require a family member of a Union citizen who is not a national of a Member State and who holds a valid residence card issued under Article 10 of that directive

to be in possession, pursuant to national law, of an entry permit in order to be able to enter its territory. That was the answer to the specific question referred to the CJEU.

22. It is important to note that the McCarthy decision does not expressly deal with Surinder Singh rights nor any substantive rights of entry or residence in a Member State and is essentially addressing only the question of the documentary requirements for the right of entry of non-EEA national family members. The findings as to the application of Directive 2004/38 must also be read in the context of the agreed position of Mr McCarthy and Ms McCarthy Rodriguez, to which the decision is directed and applicable only to persons in a situation such as those individuals. The common ground in relation to those individuals included, that Ms McCarthy Rodriguez lawfully resided in another Member State, with the child of her marriage to the EEA national, a dual British and Irish citizen. There was no dispute that as McCarthy Rodriguez had a right of admission to the United Kingdom and has exercised it on a number of times previously with the benefit of an EEA family permit arranged in advance.

23. Although at first glance the facts may appear similar to those of the Appellants in the present appeal, in fact they are materially different in an important respect. That is the unchallenged findings of the First-tier Tribunal that the Appellants did not in any sense 'reside' with the sponsor in Bulgaria (paragraph 40) and further therefore that the requirements of regulation 9 of the EEA Regulations did not apply to the Appellants such that the EEA Regulations could not apply to them as if the Sponsor were an EEA national as defined.

24. Although the Court in McCarthy sets out unequivocally that Article 5 of Directive 2004/38 applies without distinction on the basis of the Member State of entry, that is in the context of those who are beneficiaries of that Directive, such as those in the same position as Mr McCarthy and Ms McCarthy Rodriguez, the former who had exercised his right to freedom of movement by becoming established in Spain and the latter residing in Spain with him in possession of a valid residence card issued by the Spanish authorities under Article 10 of the Directive. The decision in McCarthy goes no wider than that nor does it establish any general right of admission to a person on arrival to the United Kingdom in possession of a valid passport and residence card who is accompanied by a person who has a right to reside in the United Kingdom.

25. On the facts of the present appeal, neither Article 5 of Directive 2004/30 nor the decision in McCarthy is of any benefit or relevance to the Appellants and cannot be used as a way of interpreting regulation 11 of the EEA Regulations, contrary to the express definition of an EEA national in regulation 2 of the same, as was done by the First-tier Tribunal in the decision under challenge before me. The First-tier Tribunal failed to consider or apply its own findings that the EEA regulations did not apply to the Appellants because they could not satisfy regulation 9 of the same and

failed to apply the definition of an EEA national in regulation to, when considering the right of admission under regulation 11.

26. The First-tier Tribunal therefore materially erred in law in allowing the appeal under regulation 11 of the EEA Regulations when the Sponsor was not an EEA national as defined. The Appellants could not benefit directly from Article 5 of Directive 2004/38 nor by using this as an aid to interpretation of the EEA Regulations. No detailed submissions were made on behalf of the Appellants that the EEA Regulations did not correctly transpose Article 5 of Directive 2004/38 but in any event it is not necessary to decide the point as on the facts the Appellants cannot possibly derive any benefit or right of admission from Article 5 for the reasons already given.

27. For all of these reasons, I find that the decision of the First-tier Tribunal involved the making of a material error of law and as such it is necessary to set aside the decision. As agreed by the parties at the oral hearing, I go on to remake the decision under appeal in accordance with the error of law findings which are determinative of the Appellants circumstances and appeals. As above, they cannot satisfy the requirements in regulation 11 of the EEA Regulations for a right of admission to the United Kingdom because the Sponsor is not an EEA national as defined in regulation 2 and the application of those regulations to the facts of this case are not inconsistent with the Directive of the decision of the CJEU in McCarthy. I remake the decision on the appeal is to dismiss them under the EEA Regulations.

## Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remake the decision as follows:

The appeals are dismissed under the Immigration (European Economic Area) Regulations 2016.

## Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed  Date 4th January 2019

Upper Tribunal Judge Jackson