



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

Appeal Number: EA/07875/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 25 November 2019**

**Decision & Reasons Promulgated  
On 3 December 2019**

**Before**

**Upper Tribunal Judge Kopieczek  
Upper Tribunal Judge Pickup**

**Between**

**Nataliia Golichnikova  
[No anonymity direction made]**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

**Representation:**

For the appellant: Mr A Pipe, instructed by Arlington Crown Solicitors  
For the respondent: Ms A Everett, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals the decision of First-tier Tribunal Judge Burns, promulgated 29.3.19, dismissing her appeal against the decision of the respondent, dated 22.11.18, to refuse her application made on 20.9.18 for an EEA Residence Card as the direct family member of a British citizen who has previously exercised his Treaty rights in other EEA member states, pursuant to regulations 7 and 9 of the Immigration (EEA) Regulations 2016, as amended (the Regulations).

2. First-tier Tribunal Judge Parker refused permission to appeal on 8.5.19. However, on renewal of the application to the Upper Tribunal, Upper Tribunal Judge Smith granted permission to appeal on 29.7.19.
3. Upper Tribunal Judge Smith granted permission finding it arguable that the First-tier Tribunal misinterpreted the Regulations in circumstances where the sponsor's wife has already been recognised as his family member and the sponsor has been 'recognised as an EEA national' for the purposes of the Regulations. Judge Smith also considered it arguable that if the respondent's and the First-tier Tribunal Judge's interpretation of regulation 9 is correct, it would violate the principle of equivalence.
4. The matter was previously listed before Judge Pickup on 3.9.19. At the outset of the error of law hearing, there was a discussion with both representatives as to the principles and law involved. Mr Pipe had produced a skeleton argument and asserted that the issue had not previously been considered by the Upper Tribunal or any superior court. Acting for the Secretary of State, Ms Everett was in some difficulties in obtaining instructions on the points raised by Mr Pipe, but did not make an adjournment application.
5. Considering that the issues in the appeal were not straightforward and requiring a more careful consideration, particularly on the part of the respondent, Judge Pickup concluded that the appropriate course was to adjourn the hearing with directions enabling the issues to be addressed by both sides in skeleton arguments supplemented by case authority.
6. The appeal came back before the tribunal on 25.11.19, listed before ourselves sitting as a panel of the Upper Tribunal.
7. The Upper Tribunal has received the respondent's undated skeleton argument. The appellant continues to rely on Mr Pipe's skeleton argument of 29.8.19. In addition, the appellant has submitted a bundle of authorities comprising 36 pages, for which we are grateful. Together with the oral submissions we have carefully considered all relevant material and taken into account the arguments advanced on both sides.

## **EU Law**

8. Article 21(1) of the Treaty on the Functioning of the European Union (TFEU) provides:

'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.'
9. Recitals 6 of Directive 2004/38 (the Directive) states:

'(6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the

definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.'

10. Article 2 of the Directive defines family member as including a spouse or registered partner and the dependent direct relatives in the ascending line and those of the spouse or partner.

11. Article 3 of the Directive states:

'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 Relevant Regulations**

12. The Directive was transposed into UK law by the Immigration (European Economic Area) Regulations 2006. The current applicable regulations are those from 2016, as amended.

13. The regulations relevant to this case are set out below. The words in square brackets are as amended by by The Immigration (European Economic Area Nationals) (EU Exit) Regulations 2019 (S.I. 2019/468), which came into force on 28.3.19, the day before the decision of the First-tier Tribunal was promulgated. The amendments extended regulations 7 and 9 to an Extended Family Member (EFM) of a British citizen.

*"Family member"*

7.- (1) In these Regulations, "family member" means, in relation to a person ("A")—

(a) A's spouse or civil partner;

(b) A's direct descendants, or the direct descendants of A's spouse or civil partner who are either—

(i) aged under 21; or

- (ii) dependants of A, or of A's spouse or civil partner;
  - (c) dependent direct relatives in A's ascending line, or in that of A's spouse or civil partner.
- (2) Where A is a student residing in the United Kingdom otherwise than under regulation 13 (initial right of residence), a person is not a family member of A under paragraph (1)(b) or (c) unless—
- (a) in the case of paragraph (1)(b), the person is the dependent child of A or of A's spouse or civil partner; or
  - (b) A also falls within one of the other categories of qualified person mentioned in regulation 6(1).
- (3) A person ("B") who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card must be treated as a family member of A, provided—
- (a) B continues to satisfy the conditions in regulation 8(2), (3), (4) or (5); and
  - (b) the EEA family permit, registration certificate or residence card remains in force.
- (4) A must be an EEA national unless regulation 9 applies (family members [and extended family members] of British citizens).

*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; F16...
    - (c) F [or EFM] and BC's residence in the EEA State was genuine.
    - [(d) F was a family member of BC [or EFM was an extended family member of BC] during all or part of their joint residence in the EEA State; and
    - (e) genuine family life was created or strengthened during [F or EFM and BC's] joint residence in the EEA State]

(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);...
  - (b) ...
- (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.

## **Factual Background**

14. The essential facts are not in dispute. The appellant is the mother-in-law of the sponsor, a British citizen who genuinely exercised his Treaty rights in the EU Member States of Norway and Greece, accompanied by his Russian citizen wife, daughter of the appellant. Both husband and wife then returned to live in the UK. The daughter holds an EEA Residence Card as a family member (spouse) of the sponsor. It is not disputed that the appellant is a direct relative in the ascending line of the spouse, living with

and presently dependent on the British citizen sponsor and his wife in the UK.

15. It is important to note that the appellant never lived with the sponsor and his wife whilst he was exercising his Treaty rights of free movement in any other EU Member State, although it is asserted that she was nevertheless dependent on them.
16. The application was refused and the subsequent appeal dismissed on the basis that the appellant cannot meet the requirements of Regulation 9, which applies the Regulations to a family member of a British citizen but only on certain conditions.
17. It is common ground that the first of those conditions, that under regulation 9(2)(a)(i), is met in that the sponsor resided in a host EU Member State as a worker immediately before returning to the UK. However, to meet the condition under regulation 9(2)(b), the appellant must have genuinely resided together with the sponsor in the other EU Member State before he returned to the UK. Before us, Mr Pipe conceded that the appellant cannot bring herself within regulation 9 as she cannot meet the 'resided together' requirement.
18. In summary, the argument as advanced by Mr Pipe is that the appellant does not need to bring herself within regulation 9 at all but qualifies directly as a family member under regulation 7(1)(c) as the dependent direct relative in the ascending line of her daughter, the sponsor's spouse, in the specific circumstances where that daughter has herself been recognised as a family member pursuant to the Surinder Singh principle of equivalence enshrined in regulation 9. In the alternative, it is submitted that if regulation 9 does apply to the appellant it must be interpreted in the light of EU law, including the Directive and the Surinder Singh principle, and that to adopt the interpretation contended for by the respondent to exclude the appellant from entitlement to a Residence Card as the family member of the British citizen sponsor is inconsistent with EU law.

### **Family Member under Regulation 7**

19. Regulation 7 defines 'family member' as someone in relation to a person 'A'. Regulation 7(4) provides that 'A must be an EEA national unless regulation 9 applies (family members and extended family members of British citizens).'
20. The appellant's primary argument is that as the daughter was issued with a Residence Card pursuant to regulation 9, this satisfies regulation 7(4). As noted above and in Ms Everett's skeleton argument, the respondent concedes the relationship referred to is met with regard to both the family relationship and dependence elements. Mr Pipe accepted that regulation 7(4) must be met before the appellant can be regarded as a family member for the purpose of the Regulations. Even though regulation 7(4)

specifically refers to family members (or EFM) of a British citizen, Mr Pipe submitted that it is possible to read regulation 7(4) consistently with his argument that once the British citizen sponsor's wife was recognised as his family member under regulation 9, then regulation 9 'applies'.

21. After due consideration of the arguments of both Mr Pipe and Ms Everett we find we cannot accept the interpretation of regulation 7(4) contended for by Mr Pipe.
22. We first note that Article 3(1) of the Directive provides that it 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,*' (emphasis added). The Directive limits its application to those family members who accompany or join a EU Member State national exercising his Treaty rights to work in a host Member State. It is those persons who, pursuant to subsequent case-law, including R v Immigration Appeal Tribunal et Surinder Singh, ex parte SSHD (freedom of movement for persons) [1992] EUECJ C-370/90, are to have the right to join the Union citizen who returns to live in the Member State of which he is a national.
23. In Surinder Singh, the ECJ held that the Treaty and Directive 73/148 must be construed "as requiring 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... and returns to establish himself or herself...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 her under Community law if his or her spouse entered or resided in the territory of another Member State." Again, it is clear that the extension of rights is limited to those who accompany or have joined the national of a EU Member State in a host Member State.
24. The appellant also relies on SSHD v Banger (Citizenship of the European Union - Right of Union citizens to move and reside freely within the territory of the European Union - Judgment) [2018] EUECJ C-89/17. However, unlike the appellant in this case, that case concerned the non-EEA national partner of a British citizen who had lived with him in the Netherlands before returning to the UK. As she was an EFM and not a family member, Regulation 9 in the form in which it then appeared, could not apply to her. In consequence, the Secretary of State refused to issue her with an EEA Residence Card. The Upper Tribunal referred the issue to the ECJ for a preliminary ruling on the question of whether the Surinder Singh principle operates so as to require a Member State to issue or facilitate the provision of residence authorisation to the non-Union unmarried partner of an EU citizen who, having exercised his Treaty right of freedom of movement to work in a second Member State accompanied by his partner, returns with such partner to the Member State of his nationality.

25. In Banger, the ECJ noted that the purpose of Directive 2004/38 was 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 on citizens of the Union by Article 21(1). Article 3(1) of the Directive provides that the Directive is to apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and, according to the ECJ, “to their family members as defined in Article 2(2) of that directive who accompany or join them.”
26. At [23] the ECJ pointed out that it had previously held that the Directive “governs only the conditions determining whether a Union citizen can enter and reside in Member States other than that of which he is a national and does not confer a derived right of residence on third-country nationals, who are family members of a Union citizen, in the Member State of which that citizen is a national.” However, it was acknowledged at [27] that in “certain cases” a third-country national family member who could not qualify under the Directive for a derived right of residence could, nevertheless, be accorded such a right on the basis of Article 21(1). At [28] it was stated that this was based on “settled case-law,” according to which, in essence, if no such derived right of residence were granted to such a person, a Union citizen would be discouraged from leaving his Member State to exercise Treaty rights in another Member State “because he is uncertain whether he will be able to continue in his Member State of origin a family life *which has been created or strengthened, with that third-country national, in the host Member State, during a genuine residence,*” (emphasis added). In such circumstances, the conditions under which the derived right of residence is provided should not, in principle, be stricter than those provided for under the Directive and should be applied by analogy. At [32]-[34] the ECJ agreed that this should also apply to a partner in a durable relationship with a Union citizen and rejected the Secretary of State’s argument that such a derivative right should be confined solely to third-country nationals who are a ‘family member’.
27. However, whilst Banger extended the Surinder Singh principle from a spouse to a partner, none of the reasoning of the ECJ supports the argument advanced by Mr Pipe. In both Banger and Surinder Singh, the EU Member State national was returning to the Member State of his nationality after exercising his Treaty rights in a host Member State, accompanied or joined by his family member. That is not analogous to the facts of the present case where the British citizen sponsor did not have any family life with his third-country national mother-in-law appellant in a host Member State before returning to the UK.
28. Turning to the Regulations, it is to be noted that regulation 7 does not itself grant any rights but defines the term ‘family member’ for the purpose of the Regulations. It does so with reference to a person ‘A’ and defines whether another person is a family member of ‘A’, in distinction to a relative who is an extended family member (EFM) and other relatives who are neither. As stated above, it is not disputed that the appellant is the dependent direct relative in the ascending line of her daughter, the



sponsor's wife. However, regulation 7(4) specifically limits the ambit of its application by the condition that 'A' must be an EEA national, unless regulation 9 applies. The parentheses immediately following that condition refers directly to family members or EFMs of British citizens and requires consideration of the conditions of regulation 9.

29. In his submissions, Mr Pipe conceded that the appellant does not meet the requirements to be a EFM and confirmed that we need not address the definition of an EFM within regulation 8, or consider the ambit of EFMs as referred to within in the provisions of regulations 7 and 9.
30. The wording of 7(4) includes the phrase, 'unless regulation 9 *applies* (family members and extended family members of British citizens),' (emphasis added). Regulation 9 (1) provides that if the conditions in regulation 9(2) are satisfied, "these Regulations *apply* to a person who is a family member ('F') of a British citizen ('BC') as though the BC were an EEA national,' (emphasis added). It is clear that the words 'applies' and 'apply' specifically relate to the family member, not to the British citizen. For the reasons stated above, the appellant cannot meet regulation 9(1). Given the concession by Mr Pipe, neither can the appellant meet regulation 9(1A) in relation to being the EFM of a British citizen. It follows that in relation to the claimed family member, the appellant, regulation 9 does not and cannot apply in the sense intended by regulation 7(4).
31. Whilst the appellant's daughter qualified in her own right as the family member of her British citizen spouse under regulation 9, that does not assist the appellant's argument. Neither the Regulations nor the ECJ case-law relied on by Mr Pipe are authority to extend the Surinder Singh principle to what, effectively, would be the family member of a family member of a British citizen. On the facts of this case, where the appellant never lived with the British citizen sponsor in either of the host Member States in which he lived and worked, we consider the relationship too remote from the Surinder Singh principle. The appellant coming to live with the British citizen and his wife in the UK has nothing to do with the exercise of his Treaty rights in host Member States.
32. We acknowledge, as did Ms Everett in her submissions, that had the appellant gone to live with her British citizen son-in-law whilst he was working in either Greece or Norway, she would have qualified as a family member under regulation 7 on the basis of being dependent on him in the UK and under regulation 9 on the basis of meeting the 'resided together' condition. Similarly, to apply the analogy deployed by Mr Pipe in his submissions, had the sponsor living in the UK been not British but, say, Greek, there would be no difficulty for the appellant in being recognised as the family member of his spouse for the purpose of the Regulations. However, both such situations would arguably meet the Surinder Singh principle because in each case the sponsor would be exercising his Treaty rights. Further, not to permit the entry of his family members or those of his wife, provided all other conditions such as dependency are met, could

potentially deter him from exercising his Treaty rights in a host EU Member State.

33. Neither does it assist the appellant to consider whether she can rely on her daughter's recognition of being a family member, which derived from her British citizen husband's work in a host Member State. As a Russian citizen, the daughter is neither a British citizen nor the citizen of any other EEA state, so regulation 7(4) cannot be met even if the daughter is regarded as person 'A'.
34. Having considered the arguments carefully, we find no support in EU law, including the case-law relied on by Mr Pipe, for the proposition that once regulation 9 has been applied to a family member of a British citizen who returns to the UK after working in a host EU Member State, he becomes for all purposes thereafter in effect a different class of EU national whose relatives, or those of his spouse, who meet the relationship and dependency elements of regulation 7 are also entitled to be recognised as family members for the purposes of the Regulations. We conclude that it would be stretching the meaning, purpose and interpretation of regulation 7(4) beyond all sense to conclude that because regulation 9 was applied to the daughter to bring her within the definition of family member within regulation 7, then regulation 9 'applies' to the appellant. As stated above, for the appellant to be a 'family member' she must meet regulation 7(4), which in turn requires her to meet the 'resided together' condition of regulation 9. We must, therefore, reject Mr Pipe's argument that the appellant can succeed on the basis of regulation 7 alone, or on any variant of the interpretation of regulation 7(4) advanced by Mr Pipe.
35. For the reasons set out above, neither do we find that the decision refusing the appellant a Residence Card on the basis that she cannot meet the conditions of regulation 9 infringes the equivalence principle of Surinder Singh. As stated above, it is clear that the ECJ case-law relied on by Mr Pipe is restricted on the facts to family members who have accompanied or joined the EU Member State national in a host Member State before he returns to the Member State of his nationality. On the facts of this case, the extension of the Surinder Singh principle to the appellant, or someone in her position, is not justified by any consideration of whether a national of a Member State might be deterred from exercising his Treaty rights by working in a host Member State.
36. In the circumstances, we are driven to the clear conclusion that there was no error of law in the decision of the First-tier Tribunal.

## **Decision**

The making of the decision of the First-tier Tribunal did not involve an error of law.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

**Signed** DMW Pickup

**Upper Tribunal Judge Pickup**

**Dated** 1 December 2019

**Anonymity**

We have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014. In the circumstances, we make no anonymity order.

**Signed**

**DMW Pickup**

**Upper Tribunal Judge Pickup**

**Dated**

**1 December 2019**