Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number:
UI-2021-001798, EA/02800/2020
UI-2021-001797, EA/02799/2020

THE IMMIGRATION ACTS

Heard at Field House
On the 9 September and 1 November 2022

Decision & Reasons Promulgated
On the 23 January 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL
and
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HARI SINGH & MANJIT KAUR
(ANONYMITY NOT ORDERED)

Respondents

Representation:
For the Appellant: Ms Ahmed, Senior Presenting Officer
For the Respondent: Mr Nadeem, Legal Representative of City Law Immigration

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals, with permission granted by Designated Judge Shaerf, against the decision of Judge Sweet ("the judge"), who allowed Mr Singh's and Mrs Kaur's appeals against the refusal of their applications for Residence Cards on the basis set out in R v Immigration Appeal Tribunal & Surinder Singh *ex parte* SSHD (C-370/99); [1992] 3 CMLR 358.

2. To avoid confusion, we will refer to the parties as they were before the FtT: Mr Singh and Mrs Kaur as the appellants and the Secretary of State as the respondent.

Background

3. The appellants are Indian nationals who were born on 8 January 1936 and 1 March 1939 respectively. Their son, Sukhdev Singh, is their sponsor. He is a British national who was born on 20 May 1975.

4. The appellants entered the United Kingdom on 27 March 2019. They entered by aeroplane from Fiumicino Airport in Rome to Gatwick Airport, South Terminal. On arrival, an Immigration Officer with stamp number 6465 placed a stamp in both appellants' passports. The stamp stated that the appellants had been

> Admitted to the United Kingdom under the Immigration (EEA) Regulations 2016.

5. On 20 September 2019, the appellants applied for Residence Cards as the family members of a UK national, under regulation 9 of the Immigration (EEA) Regulations 2016. It was submitted that the sponsor had lived and worked in Italy and that the appellants had been granted visas to enter that country as his dependents. The letter which supported the application stated that

> The application for his parents were submitted whilst Mr Sukhdev Singh as [sic] living and working in Italy. Both applicants were subsequently granted their visas to live in Italy as the dependent upon Sukhdev Singh an [sic] they moved to Italy on a permanent basis on the 22 July 2018. Both applicants live [sic] at the same address and all their costs of living in Italy were met by the Sponsor who was working and paying the costs for the Applicants to live in Italy.

6. It was submitted that the appellants fell within the scope of 'the Surinder Singh policy'[1] and that they should be 'granted leave to remain accordingly'. It was also submitted that the appellants satisfied the definition of an extended family member in regulation 8(3) of the 2016 Regulations (the relative of an EEA national who required the care of the EEA national on serious health grounds).

7. Various documents were submitted in support of the application, establishing the relationship between the appellants and the sponsor and his economic activity in Italy, amongst other things. We note two features of those documents at this stage. The appellants' passports clearly showed that they entered Italy from India on 22 July 2018, having been granted Schengen visas which were valid from 16 July to 19 August 2018. The appellants' application form stated that the sponsor had stopped working in Italy and returned to the UK (for the purposes of his children's education) in April 2018.

[1] No such policy has ever been adduced in the course of this case, whether before the SSHD, the FtT or the Upper Tribunal. The reference to a policy is inapt, and appears to refer simply to regulation 9 of the Immigration (EEA) Regulations 2016.

8. The applications were refused by the respondent on 13 March 2020. There were two grounds of refusal:

   (i) Noting the dates outlined above, the respondent did not accept that the appellants had resided together with the sponsor in Italy, as he had returned to the UK by the time they entered Italy (regulation 9(2)(b)); and

   (ii) There was no evidence to show that the residence of the appellants or the sponsor in Italy was 'genuine', as required by regulation 9(2)(c) and defined by regulation 9(3).

9. No consideration was given to the submission that the appellants met the definition of an extended family member in regulation 8(3).

The Appeal to the First-tier Tribunal

10. The appellants appealed and their appeals were heard by the judge, sitting at Hatton Cross, on 26 March 2021. The appellants were represented by counsel. The respondent was not represented. The judge heard oral evidence from the sponsor and submissions from counsel before reserving his decision.

11. In his reserved decision, which was issued on 30 March 2021, the judge found that the appellants 'had received an EEA family permit on 29 March 2019 and that the 'Surinder Singh policy applied in respect of their existing family permit' and that they met the requirements of regulation 9(2). He noted that there had been some conflicting evidence about whether the appellants lived in Italy with the sponsor but he attached significance to the fact that the sponsor had been 'responsible for the costs of the Italian rental property from July 2017 to May 2019 and he visited them there on a number of occasions'.

12. The judge found in the alternative that the appellants met the requirements of regulation 8(3) as a result of their health conditions.

The Appeal to the Upper Tribunal

13. The respondent sought permission to appeal on three grounds. The *first* was that the judge had misdirected himself in law in allowing the appeal under regulation 9(2) because the sponsor was not living with the appellants in Italy before he returned to the UK in April 2018. The *second* ground was that the judge had failed to consider whether the sponsor or the appellants' residence in Italy was genuine. The *third* ground was that the judge had misdirected himself in law because regulation 8 applied only to those whose sponsors were EEA nationals which, by definition, excluded British citizens.

14. Judge Shaerf granted permission. He considered it arguable 'that the judge erred in law when he decided the appeal by way of reference to reg 7 of the 2016 Regs when the relevant question was reg 9 because the judge's conclusion that the appellants satisfied the requirements of reg 9(2) was incorrectly based on the fact that the appellants had obtained EEA Residence Cards in Italy'.

15. There was a provisional view expressed by the Resident Judge at Taylor House that Judge Sweet's decision should be reviewed and set aside under rule 35 of the FtT Procedure Rules. That suggestion was opposed by the appellants, however, as it was observed (correctly) that both the Resident Judge and Judge Shaerf were mistaken about Judge Sweet having referred to regulation 7. The matter was therefore listed before the Upper Tribunal pursuant to the grant of permission to appeal.

16. The appeal first came before us on 9 September 2022. We observed that there was no information before us concerning the circumstances in which an Immigration Officer at Gatwick had admitted the appellants to the United Kingdom on 27 March 2019. We adjourned the hearing in order for the respondent to clarify in writing what had occurred on that date and for the parties to produce the original passports for our consideration.

17. In the event, Ms Ahmed filed a short, written submission in advance of the reconvened hearing in which she stated that there were no contemporaneous records of the events of 27 March 2019. It was nevertheless clear, she submitted, that the Immigration Officer had not given the applicants a Family permit on that occasion, as a Family Permit could only be granted by an Entry Clearance Officer.

18. There was also a flurry of emails between the parties, all of which were copied to the Upper Tribunal, about our second direction. We need say nothing more about those exchanges than this: the passports were not discovered by the appellants' representatives, or by the respondent, and it is not clear where they are.

19. Mr Nadeem also filed a short, written submission for the assistance of the Tribunal. We are grateful for that document although it is correct to note that matters moved on significantly during oral argument.

20. We suggested to the advocates in advance of their submissions that the appellants might have been admitted to the UK under regulation 11(5)(e).

21. Ms Ahmed thought that was correct, noting that the officer from Border Force with whom she had corresponded in connection with the Tribunal's directions had also identified that as a potentially relevant provision. She submitted, as she had in her note, that the reality was that an Immigration Officer could not as a matter of law have given the appellants a Family Permit. The judge had been wrong to think that was so. The judge had also erred, she submitted, in finding this to be a case in which the appellants could meet the Surinder Singh definition; the appellants and the sponsor had never cohabited in Italy. The payment of rent and suchlike by the sponsor took matters no further and the judge failed to explain in any way how it was thought that the sponsor was exercising Treaty Rights in Italy whilst the appellants were there. Regulation 8(3) plainly did not apply as a result of the nationality of the sponsor.

22. Mr Nadeem accepted that the FtT had erred in its conclusion that regulation 8 could apply. Relying on the rule 24 response which had been settled by counsel, however, he submitted that the remainder of the decision was sustainable. The key, he submitted, was to be found in the fact that the appellants had been granted admission by an Immigration

Officer in 2019. We asked Mr Nadeem to explain to us what he said was the legal significance of that decision. He submitted that there had been no change of circumstances and that the Secretary of State was estopped from taking a different view. There must have been an interview at the border, after which the Immigration Officer was satisfied that the appellants met the requirements for admission. It was surprising that the respondent was unable to explain the basis upon which that decision had been taken.

23. Ms Ahmed agreed in reply that it was unhelpful that no light could be shed on the circumstances in which the appellants had been admitted. The reality appeared to be, however, that they had secured a right of admission and had then sought a residence card. The Secretary of State was required to determine the latter application on its merits and it was quite clear that it was unmeritorious. The appeal should therefore be allowed and a decision to dismiss the appeals should be substituted.

24. We reserved our decision

The Immigration (EEA) Regulations 2016

25. For reasons which will shortly become apparent, we propose to set out only the relevant parts of regulations 8 and 9.

26. Regulation 8 provided categories of individuals who were to be treated as 'extended family members' (ie those to whom the facilitation duty in Article 3(2) of Directive 2004/38/EC applied). Regulation 8(3) provided one such category of individuals:

> (3) The condition in this paragraph is that the person is a relative of an EEA national and on serious health grounds, strictly requires the personal care of the EEA national.

27. Regulation 9(1) provided for the regulations to apply to a person who was the family member ("F") of a British citizen ("BC") as though the British citizen was an EEA national if the conditions in paragraph (2) were satisfied. Paragraphs (2)-(3) were 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 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 and BC resided together in the EEA State; and
>
> (c) F and BC's residence in the EEA State was genuine.
>
> (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 and BC's joint residence in the EEA State;

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

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

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

Analysis

28. It is clear that the First-tier Tribunal erred in law. Mr Nadeem accepted before us that the judge erred in concluding that the appellants could satisfy regulation 8. He was correct to do so. It is not clear to us why it was ever submitted that the appellants could be the extended family members of an EEA national. By regulation 2 of the 2016 Regulations, the term 'EEA national' means a national of an EEA State who is not also a British citizen. The sponsor is a British citizen. There is no evidence that he holds any other European nationality.

29. On the facts, it is equally clear that the appellants could not satisfy the requirements of regulation 9 because they did not live with the sponsor in Italy. As we have noted above, it is abundantly clear on the facts that the sponsor left Italy in April 2018, three months before the appellants arrived in July 2018. It could not be shown, therefore, that the appellants and the sponsor 'resided together in the EEA State' in question (ie Italy) before the sponsor returned to the United Kingdom. That is clearly the requirement in regulation 9(2)(b), and it was not satisfied on the facts of this case.

30. It has never to our knowledge been submitted that the terms of regulation 9(2)(b) fail to reflect the jurisprudence of the European Court from Surinder Singh onwards. The requirements of the Surinder Singh route were set out by the Grand Chamber of the CJEU in O & B v Minister voor Immigratie, Integratie en Asie (C-456/12); [2014] 3 CMLR 17. At [46]-47], the court said this:

> [46] The Court has accordingly held that where a Union citizen has resided with a family member who is a third-country national in a Member State other than the Member State of which he is a national for a period exceeding two and a half years and one and half years respectively, and was employed there, that third-country national must, when the Union citizen returns to the Member State of which he is a national, be entitled, under Union law, to a derived right of residence in the latter State (see Singh, paragraph 25, and Eind, paragraph 45). If that third-country national did not have such a right, a worker who is a Union citizen could be discouraged from leaving the Member State of which he is a national in order to pursue gainful employment in another Member State simply because of the prospect for that worker of not being able to continue, on returning to his Member State of origin, a way of family life which may have come into being in the host Member State as a result of marriage or family reunification (see Eind, paragraphs 35 and 36, and Iida, paragraph 70).
>
> [47] Therefore, an obstacle to leaving the Member State of which the worker is a national, as mentioned in Singh and Eind, is created by the refusal to confer, when that worker returns to his

> Member State of origin, a derived right of residence on the family members of that worker who are third-country nationals, where that worker resided with his family members in the host Member State pursuant to, and in conformity with, Union law. [emphasis added]

31. It is therefore clear beyond doubt that regulation 9(2)(b) is uncontentious and does nothing more than reflect a consistent line of European authority in requiring that the sponsor and the applicant have lived together in another Member State. In concluding otherwise, the judge appears to have attached significance to the fact that the sponsor had continued to pay for the accommodation into which the appellants had moved after he returned to the UK. We do not understand why that was thought to be significant. It might be that the judge had in mind other parts of the 2016 Regulations and was thinking that the appellants were members of the sponsor's household, or that he was responsible for meeting their essential living needs. Insofar as he might have imported these tests from elsewhere in the Regulations, he also erred in law. The only proper answer to the question posed by regulation 9(2)(b) was that the appellants and the sponsor did not live together in Italy and that they were accordingly ineligible for Residence Cards.

32. The judge also erred in law in failing to consider whether the residence of the appellants and the sponsor was 'genuine' for the purposes of regulation 9(2)(c). That issue was clearly identified in the respondent's decision, yet it was overlooked by the judge. In circumstances in which the sponsor is said to have spent around two years in Italy, and the appellants spent something in the region of eight months there, it might well be that this question was capable of being resolved in the appellants' favour but we need say no more about that for present purposes, given the conclusion we have reached in the preceding paragraph.

33. Up to this point, we have expressed no view on the issue to which most of the submissions were directed in the FtT and the Upper Tribunal: the significance, if any, of the admission stamps in the appellants' passports. We have chosen to consider that issue at the end of this decision in order to demonstrate that the appellants have no semblance of a case under the Regulations (or the Treaties) but for that point.

34. It is unsatisfactory that the Secretary of State was unable, in a month or more, to provide any details of the basis on which the appellants were granted admission to the United Kingdom. There was some suggestion in the FtT and before us that the appellants were granted Family Permits when they arrived at Gatwick but that cannot be so; Family Permits are applied for and issued overseas by Entry Clearance Officers under regulation 12. In fairness to Mr Nadeem, he did not press the submission that the passport stamps were Family Permits or were somehow to be equated thereto.

35. Ms Ahmed was unable to assist us in either her written or oral submissions when it came to the basis upon which the appellants might have been admitted. We were attracted at the hearing to the possibility that they were admitted under regulation 11(5)(e) but that cannot, on reflection, be the

case. That regulation applies to the admission of Zambrano[2] carers of British citizens, whereas it is the appellants in this care who potentially require the care of the British sponsor. Despite our best endeavours, we have been unable to discover any basis upon which the appellants might properly have been admitted to the United Kingdom under the 2016 Regulations.

36. Be that as it may, Mr Nadeem submits that the decision of the Immigration Officer to admit the appellants is of real legal significance in the context of these appeals. He relied in this regard on the rule 24 response settled by trial counsel. The argument in that document may be summarised quite shortly, in that it is submitted that 'issue estopple [sic]' applies to prevent the respondent from asserting in this appeal that the appellants do not meet the very requirements which the Immigration Officer formerly accepted them to have met. We note that the same argument was pursued before the FtT, albeit that it was said at that stage to be a submission of 'no case to answer'.

37. There are at least three fundamental problems with this submission. The first arises as a result of the uncertainty over what happened when the appellants arrived from Rome. We think it is likely that there was some form of interview and that some evidence was seen as to their admission to Italy but, beyond that, we cannot know on what basis it was asserted or accepted that they should be admitted to the United Kingdom. As we have already said, we cannot discern any proper basis upon which they could have been given a right of admission under the 2016 Regulations. They cannot have been granted a Family Permit at the border for the reasons we have already set out. Insofar as it was submitted that they were granted a right of admission under regulation 9, that cannot be correct; it is Part 2 of the Regulations which provide the EEA rights of admission and residence. If, as is clearly the case, it is not possible to understand the basis upon which the appellants were admitted, we cannot begin to see how it can be said that the respondent cannot now assert that they have no right to reside.

38. The second difficulty is equally significant. It was submitted in the rule 24 response that 'it is now common ground that issue etopple [sic] applies in the area of public and immigration law'. The authority cited for that statement of the law is the decision of Timothy Corner QC, sitting as a Deputy Judge of the High Court, in R (Xhelilaj) v SSHD [2021] EWHC 408 (Admin).

39. Xhelilaj was a case in which the Secretary of State had resolved prior judicial review proceedings by consent, stating that she had decided not to deprive the claimant of his British citizenship. She subsequently refused, however, to return the claimant's British passport to him as a result of concerns about his identity. It was submitted before the Deputy Judge that the defendant was estopped from taking the latter course by her conduct in the earlier proceedings. The Deputy Judge concluded, firstly, that the deprivation decision and the passport decision were 'distinct and different in nature': [69]. He concluded, secondly, that no issue estoppel could arise because no-one could know why the defendant had settled the previous proceedings: [75]. In those circumstances, he held, there had been no

[2] Zambrano v Office national de l'emploi (C-34/09); [2011] 2 CMLR 46

determination of a legal right of a public authority to take action, and where that determination should be given finality: [76].

40. There is obviously a certain similarity between the appellants' cases and that of the claimant in Xhelilaj, in that we cannot know in this case why the Immigration Officer concluded that the appellants fell to be admitted to the UK. There is also a fundamental difference between this case and Xhelilaj and the cases cited by the Deputy Judge under the sub-heading 'Issue estoppel in public law cases'. All of those cases were matters in which there had been previous *judicial* proceedings during which a particular issue had been determined.

41. The main authority cited by the Deputy Judge was R (Al-Siri) v SSHD [2021] EWCA Civ 113; [2021] 1 WLR 2137. In that case, there had been a decision by the FtT(IAC) that the appellant should not be excluded from the Refugee Convention under Article 1F(c) but the SSD subsequently decided that there were reasonable grounds for regarding his as a danger to the security of the UK (under Article 33(2) of the Convention) and gave him restricted leave. That was held to be impermissible at first instance. The Secretary of State appealed.

42. It is the way in which Phillips LJ (with whom Underhill LJ and Sir Stephen Irwin agreed) resolved the Secretary of State's first ground of appeal which is particularly relevant in the present context. By that ground, the SSHD contended that the judge at first instance had erred in concluding that she was required to bring before the Tribunal any case under Article 33(2) when resisting a claim to refugee status under Article 1F(c). Phillips LJ undertook a detailed review of the authorities on finality in litigation, including SSHD v TB (Jamaica) [2008] EWCA Civ 977; [2009] INLR 221. He concluded that the ratio of TB (Jamaica) was not as restricted as had been submitted by the SSHD and that it was a recognition of the broad principles of finality and proper use of process (or power), which were applicable in the public law sphere just as in the private law context: a party must bring before the court their entire case, will be bound by the resulting decision and will not be permitted to re-open that decision on the basis of matters which could have been raised, but which were not.: [46]

43. Phillips LJ went on to consider the authorities on *res judicata* and, at [48]-[50], he cited three authorities in which *res judicata* and issue estoppel had been considered by the House of Lords or Supreme Court. In each of those cases, there had been previous *judicial* proceedings, during which a relevant point had either been raised unsuccessfully or had not been raised, despite being available to the party in question. The essential starting point, in all of these authorities, is that there were previous *judicial* proceedings from which the issue estoppel is said to have arisen. Where, as here, there have been no previous judicial proceedings, there can be no issue estoppel. We were not referred to any authority, whether in Mr Nadeem's submissions or in the rule 24 response settled by trial counsel, to suggest that an issue estoppel can arise where there has been a previous administrative decision on the same or a similar issue. We do not think it at all likely that there is any such authority; the very basis of the principle is that there have been previous judicial proceedings in which a relevant question has been (or

should have been) litigated. As Lord Hoffman explained at [31] of Watt (formerly Carter) v Ahsan [2007] UKHL 51; [2008] 1 AC 696:

> Issue estoppel arises when a court of competent jurisdiction has determined some question of fact or law, either in the course of the same litigation (for example, as a preliminary point) or in other litigation which raises the same point between the same parties.

44. We therefore come to the clear conclusion that there was no issue estoppel in this case which prevented the respondent from considering on their merits the Residence Card applications made by the appellants. Nor was there any issue estoppel which prevented her from asserting in the appeal before Judge Sweet that the appellants were unable to meet the requirement of regulation 9.

45. The doctrine of legitimate expectation was not raised before us but we think it is appropriate to say something about it, albeit briefly. Had it been argued before us, we cannot see that the appellants have ever received from the Secretary of State, or an Immigration Officer, a representation which was clear, unambiguous and devoid of relevant qualification, such that the respondent should not be permitted to go behind what was said or done in the past. The first of the 'fundamental ingredients' of a legitimate expectation, as recently reaffirmed in R (MP) v Secretary of State for Health and Social Care [2020] EWCA Civ 1634; [2021] PTSR 1122 is accordingly absent, and there can be no legitimate expectation, whether procedural or substantive.

46. The appellants' third difficulty in this argument may be stated more shortly. The ground of appeal which was available to them was that the decision under appeal breaches the appellant's rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2020: Geci (EEA Regs: transitional provisions; appeal rights) [2021] UKUT 285 (IAC). There was no ground of appeal, in other words, that the decision was not in accordance with the law. What the judge was required to do was to consider the appellants' entitlements under the EU Treaties on their merits. If the appellants wished to contend that the respondent was estopped from taking a different view to the view taken by the Immigration Officer in March 2019 (whatever that might have been), the FtT was not the correct venue for that submission.

47. For all of these reasons, we come to the clear conclusion that the appellants were unable to demonstrate on the evidence before the FtT that they had any entitlement under the 2016 Regulations or the EU Treaties and that no significance could properly be attached to the Immigration Officer's decision to admit the appellants to the UK in March 2019. In concluding otherwise, the judge in the FtT erred materially in law and his decision must be set aside. The conclusions which we have reached are determinative of the appeals and we therefore remake the decisions on the appeals by dismissing them.

48. We add this. The appellants are not permitted to raise section 6 of the Human Rights Act 1998 in an appeal of this nature and they may yet be advised to raise an application based on Article 8 ECHR. We express no view

on any such application but we note that the appellants are clearly elderly and quite frail and that it might well have been preferable to advance that claim from the outset, rather than pursuing a Surinder Singh application which could not succeed on any legitimate view of the facts.

Notice of Decision

The First-tier Tribunal erred in law and its decision is set aside. We substitute a decision to dismiss both appeals.

No anonymity order is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

01 November 2022