



Upper Tribunal  
(Immigration and Asylum Chamber)

Osoro (Surinder Singh) [2015] UKUT 00593 (IAC)

THE IMMIGRATION ACTS

Heard at Field House, London  
on 08 September 2015

Determination promulgated  
.....

Before

The President, The Hon. Mr Justice McCloskey  
Upper Tribunal Judge Reeds

Between

WYCLIFFE OSORO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

Appellant: In person, accompanied by his sponsor  
Respondent: Mr K Norton, Senior Home Office Presenting Officer

- (i) *The rationale of the decision in R v Immigration Appeal Tribunal and Surinder Singh ex parte Secretary of State for the Home Department [1992] ECR I-4265 is formed by two principles, namely the principle of the efficacious enjoyment of Treaty rights and the principle of non-discrimination.*
- (ii) *These are the two principles to which Tribunals must have particular regard in deciding cases in which the appellant does not satisfy any of the provisions of the Immigration (European Economic Area) Regulations.*
- (iii) *The co-existence of the decision in Surinder Singh with Directive 2004/38/EC (“the Citizens Directive”) raises questions which may require to be determined in some appropriate future case.*

## DECISION AND REASONS

### Introduction

1. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department (hereinafter the "*Secretary of State*"), the Respondent, dated 30 April 2014 whereby the Appellant's application for a residence card under the Immigration (EEA) Regulations 2006 (hereinafter the "*EEA Regulations*") was refused. The Appellant's appeal against this decision was dismissed. The central question of law raised by this appeal concerns the ambit of the decision of the European Court of Justice (the "*ECJ*") in the case of R v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department (Case C-370/90); [1992] ECR I-04265 (hereinafter Surinder Singh).

### Factual Matrix

2. The material facts are uncontentious. The Appellant is a national of Kenya, aged 29 years. His application for a residence card is dated 15 March 2014. In his application he was required to provide particulars of his EEA national family member. He identified this person as his uncle, a male British national born in 1975.

Section 5 of the application form, entitled "*Surinder Singh Cases*", recognises, by implication, that the decision in "*Surinder Singh*" provides a specific route to the acquisition of a residence card. In completing this section, the Appellant made the following representations:

- (a) His British citizen family member (his uncle) had exercised Treaty rights as a worker in another EEA member state, Belgium.
  - (b) The Appellant was the family member of the British citizen (his uncle) during such period.
  - (c) The Appellant did not reside with his uncle during such period.
  - (d) His uncle worked in Belgium between 01 July and 15 November 2013, returning to the United Kingdom on 19 December 2013.
3. At the hearing before us the uncontentious factual matrix was amplified somewhat. The Appellant's uncle explained that the Appellant had been living with him and his family in London since 1996, when he was aged around eight. The Appellant has been a member of his uncle's household ever since. When the uncle went to Belgium in mid-2013 he was accompanied by his wife. At that time their plan, stimulated mainly by the apparent prospect of long term employment, was to reside there for some considerable time. However, the employment period which materialised was unexpectedly short and, further, some family problems developed in London. As a result, they returned to the family home in London in December 2013. Throughout the intervening period the Appellant lived in the family home with other members of the uncle's family. The uncle added that his spouse has an EEA family permit.

4. The “Surinder Singh” section of the Form contains the following instruction:

*“You must provide evidence to show that you resided in the EEA member state at a time when your family member was exercising Treaty rights in that EEA member state.”*

No such evidence was provided. Appended to his application were various materials, including his passport, his birth certificate and the Belgium identity card of his uncle. There was also a species of certification from the Kenya Ministry of Interior describing the relationship between the Appellant and the British citizen as nephew/uncle and representing that they lived together in London. None of this is contentious.

### **The Secretary of State’s Decision**

5. The Secretary of State’s reasons for refusing the Appellant’s application were formulated in the following terms:

*“It is noted that your sponsor ... is a British citizen and thus not an EEA national as claimed. This therefore means that you have no basis of application under the [EEA Regulations] as you have failed to provide evidence that you are the family member of an EEA national. ...*

*In addition to the above, it is noted that you have failed to provide any evidence of your dependency and/or residence with your sponsor prior to entering the United Kingdom pursuant to regulation 8(2)(a).”*

The decision also articulates the following omnibus reason for refusal:

*“Your application is therefore refused under regulation 8(2) .. as you have not provided evidence that you are the relative of an EEA national.”*

As these passages indicate, the decision maker viewed the Appellant’s application exclusively through the lens of the EEA regulations. Notwithstanding the invitation in the Secretary of State’s application form to seek a residence card under the “Surinder Singh” route, there is no mention of this decision and no recognition of any such route in the determination. We shall revisit this issue presently.

### **The Decision In Surinder Singh**

6. Mr Singh, a national of India, married a British national in the United Kingdom in 1982. From 1983 to 1985 both were employed in Germany, following which they returned to the United Kingdom in order to establish a business. In 1986 Mr Singh was granted limited leave to remain in the United Kingdom as the husband of a British national. The following year Mr and Mrs Singh were divorced. This was the impetus for a decision refusing to grant him indefinite leave to remain.

Subsequently, at a stage when he had no leave to remain a deportation order was made against him under section 3(5)(a) of the Immigration Act 1971.

7. The provisions of EU law raised by this preliminary reference from the United Kingdom High Court for a preliminary ruling were Articles 48 and 52 of the EEC Treaty and Council Directive 73/148. The two Treaty provisions are concerned with the freedom of movement of EU citizens throughout EU Member States for the purpose of working or establishing oneself. The Court also considered the prohibition of discrimination prescribed by Article 7 of the Treaty. The subject matter of the Council Directive, which is complimentary to the substantive Treaty provisions, is the abolition of restrictions on movement and residence within the community for nationals of Member States with regard to establishment and the provision of services. The EU law framework has altered subsequently. Regulation 1612/68 was repealed by Regulation 492/2011, Article 41 while Directive 68/360 was repealed and replaced by Directive 2004/38/EC, the so-called "Citizens Directive". These measures were designed to, *inter alia*, develop and fortify the free movement principles enshrined in the Treaties.
8. What did Surinder Singh decide? The essence of the decision of the Immigration Appeal Tribunal was that Mr Singh had a Community law right as the spouse of a British citizen who, in turn, had a Community law right to set up business in the United Kingdom. This decision was challenged by the Secretary of State by an application for judicial review, giving rise to the reference to the ECJ for a preliminary ruling. The ECJ ruled in favour of Mr Singh. Its decision was that Article 52 of the Treaty and the Council Directive, in tandem, 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 in circumstances where both have travelled to another Member State in order to work, following which the national concerned returns to the Member State of which he or she is a national for the purpose of establishing a business. *Vis-à-vis* the British citizen concerned (Mrs Singh), both movements were protected by Treaty provisions. The first was protected by Article 48 of the Treaty. The second was protected by Article 52.
9. The Court further held that, by virtue of the prohibition against discrimination, the non-national 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 and resided in another Member State. In [21], notably, family members were clearly at the heart of the Court's thinking. What is the essential reasoning of the decision? The Court reasoned, in [23], 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 choose to enter and reside in another Member State."*

Within this passage one readily identifies 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. This, viewed through a common law prism, is the *ratio decidendi*.

10. Summarising, the effect of the decision of the ECJ was to grant to the third country spouse of a EU citizen the right of residence under EU law in the country of the EU citizen provided that the third country spouse had accompanied the EU citizen from the “first” EU state to the “second” EU state, the object of the transition being to pursue employment or self-employment on the part of the EU citizen, and further accompanied the EU citizen spouse on the reverse journey undertaken with the same purpose. The central breach of EU law found by the Court was that the conditions in the United Kingdom applicable to Mr Singh upon return were less favourable than those from which he benefited when the first movement was made. In thus deciding, the ECJ rejected the argument of the United Kingdom Government that the position of the returning spouse of the EU citizen was governed by national law, holding that the rights engaged were those conferred by Articles 45 and 49 of the Treaty.

### **Post – Surinder Singh**

11. There has been some evolution in the case law of the ECJ since Surinder Singh was decided. In Akrich, (Case C-109/01); [2003] ECRI – 9607, the ECJ made clear that the right identified in Surinder Singh arises where the national concerned returns to his Member State of origin in either an employed or self employed capacity: see [47] – [48] especially. The focus is on re-entry to the EU citizen’s Member State, rather than departure therefrom. The concept of deterrence, or discouragement, features strongly in the Court’s judgment. As the Court’s case law developed subsequently, one of its themes was that of derivative rights, namely rights derived by family members from the EU citizen concerned. The Court has recognised that national limitations on the rights conferred by Articles 45 and 49 TFEU may be lawful if they pursue a legitimate objective compatible with the Treaty and is justified by pressing reasons of public interest: see Kraus (Case C-19/92); [1993] ECRI – 1663, at [37] especially. In Gebhard (Case C-55/94); [1995] ECRI – 4165, the Court formulated the four conditions which must be satisfied, at [37]:

*“National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it ....”*

### **We draw attention to this decision as forming part of the broader juridical matrix.**

12. In Grzelczyk (Case C-184/99); [2001] ECRI – 6193, the Court made the following landmark declaration:

*“Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same*

*treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for."*

This decision foreshadowed the advent of the co-called Citizens Directive (2004/38). This measure governs the exercise of movement between and residence within the territories of Member States by EU citizens and their family members. The Directive is not constitutive of the rights of movement and residence. Such rights are conferred by primary EU legislation. By Article 21 TFEU, Union citizens have a right to move and reside freely within the territory of any of the Member States subject to the limitations and conditions contained in the Treaties and secondary legislation. Union citizenship is established by Article 20 TFEU. Article 18 prohibits any discrimination on grounds of nationality.

13. Subsequently, in Minister Voor Integratie v Eind (Case C-291/05); [2007] ECR I - 10719, a case involving family reunification, the Grand Chamber stated:

*"[37] Barriers to family reunification are therefore liable to undermine the right to free movement which the nationals of the Member States have under Community law ...."*

In [44] it repeated the familiar theme of eliminating obstacles to the exercise of the fundamental freedoms guaranteed by the Treaties. One of the Court's more recent major pronouncements on Articles 21 and 45 TFEU and the Citizens Directive is contained in Cases C-456/12 and C-457/12, O, B, S and G, where the Netherlands authorities had refused to grant a right of residence to a third-country national who was a family member of an EU citizen of Netherlands nationality. The Court held as follows:

- (i) Article 21(1) TFEU and Directive 2004/38 do not confer any autonomous rights on third-country nationals. Any rights conferred on them by provisions of EU law on Union citizenship are rights derived from the exercise of freedom of movement by a Union citizen.
- (ii) Directive 2004/38 does not establish a derived right of residence for third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national.
- (iii) The purpose and justification of a derived right of residence is that the denial thereof would interfere with the Union citizen's freedom of movement by discouraging him from exercising his rights of entry into and residence in another Member State. The trigger for the derivative right is the return of the Union citizen to his Member State of nationality.
- (iv) The conditions for granting a derived right of residence to the third-country family member should not, in principle be stricter than the grant of a derived right of residence under the Directive, even though this does not govern the return of the Union citizen to his home Member State, following his migratory movement to a host Member State in the exercise of Treaty rights.

- (v) The effectiveness of the right to freedom of movement of workers may require that a derived right of residence be granted to a third-country national who is a family member of the Union citizen in the latter's Member State. Such a derived right of residence may arise in circumstances where its refusal would interfere with the exercise of fundamental freedoms guaranteed by the Treaty.

Thus the link between the relevant provisions of primary and secondary Community legislation continues to feature in the Court's jurisprudence.

15. Accordingly, where an EU citizen has, pursuant to and in conformity with the provisions of the Directive relating to a right of residence for a period exceeding three months, genuinely resided in another Member State and, during such period, a family life has been created and/or fortified, the effectiveness of Article 51 TFEU requires that the citizen's family life in the host Member State continue upon returning to his Member State of origin. In such cases, the third-country national who is a member of the EU citizen's family may qualify for the grant of a derived right of residence. An essential prerequisite is that the third-country national must have had the status of family member of the EU citizen during at least part of the period of residence in the host (or second) Member State.

### **The EEA Regulations**

16. The measure of domestic law which implements the Citizens Directive in the United Kingdom is the EEA Regulations. It is instructive to reflect on the question of whether the decision in Surinder Singh survives the advent of the Directive and the Regulations. Since these measures apply only to those who are in the territory of a Member State other than that of their nationality, the decision in Surinder Singh, which focuses on the second element of the matrix viz the return of the Union citizen from the host Member State to the Member State of which the citizen is a national, is of no import. However, the decision would appear to have some continuing impact in the context of the application of the primary Treaty provisions. This issue did not generate any argument before us and is best reserved for consideration in a suitable future case.
17. Regulation 9 of the EEA regulations, which is concerned with the conferral of rights of "family members" of British citizens, is couched in terms which resonate strongly with the decision in Surinder Singh, albeit more prescriptively. It provides:

#### ***"9. – Family members of British citizens***

*(1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member of a British citizen as if the British citizen ("P") were an EEA national.*

*(2) The conditions are that –*

*(a) P is residing in an EEA State as a worker or self-employed person or was so residing before returning to the United Kingdom;*

*(b) if the family member of P is P's spouse or civil partner, the parties are*

*living together in the EEA State or had entered into the marriage or civil partnership and were living together in the EEA State before the British citizen returned to the United Kingdom; and*

*(c) the centre of P's life has transferred to the EEA State where P resided as a worker or self-employed person.*

*(3) Factors relevant to whether the centre of P's life has transferred to another EEA State include –*

*(a) the period of residence in the EEA State as a worker or self-employed person;*

*(b) the location of P's principal residence;*

*(c) the degree of integration of P in the EEA State.*

*(4) Where these Regulations apply to the family member of P, P is to be treated as holding a valid passport issued by an EEA State for the purpose of the application of regulation 13 to that family member."*

"Family member" is defined by Regulation 7. By regulation 8 there is a free standing category of "extended family members". The mechanisms applicable to qualifying persons under the Regulations are a residence card, a permanent residence card and an EEA family permit. It is instructive to recall the rationale underpinning these provisions. It is expressed in recital (5) of the Citizens Directive in these terms:

*"The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality ....."*

The cornerstone of the regime is the act of migration by the national of a Member State to the territory of another Member State in the exercise of free movement or establishment rights, coupled with subsequent residence there.

### **This Appeal**

18. Permission to appeal to the Upper Tribunal was granted in the following terms:

*"It is arguable that the [FtT] erred in concluding that the decision in Surinder Singh was not applicable to the facts of this case and/or that its application was limited to cases where an appellant is a family member (as defined) of a British citizen."*

The determination of the FtT contains only a fleeting reference to the decision of the ECJ in Surinder Singh. While the Judge recorded that the Appellant's application was made on the basis of this decision, there is no consideration of or engagement with the decision itself. Neither the FtT nor this Tribunal received any argument on the question of the enduring impact of the decision in Surinder Singh in the wake of the Citizens Directive and EEA Regulations. While it is at least conceivable that the decision will continue to apply in context where the applicant's case is based on



resort to primary Treaty provisions, we reserve questions such as these to an appropriate future case.

19. It was argued before the FtT that the Appellant qualified for a residence card under regulation 9 of the EEA Regulations and that the Secretary of State had erred in law in considering, and refusing, the application under regulation 8. The FtT decided, in summary:
  - i. The Appellant does not fall within the scope of regulation 8 because his uncle is a United Kingdom national by virtue of the definitions contained in Regulation 2. Further and in any event, the Appellant is unable to satisfy any of the disjunctive requirements enshrined in regulation 8(2)(a), (b) and (c) or (3), (4) or (5).
  - ii. The Appellant does not fall within the scope of Regulation 9 since he does not satisfy any of the other relationships or other requirements in Regulation 7.

The FtT was plainly correct in thus deciding. The correctness of its conclusions under the EEA regulations lies outwith the grant of permission to appeal.

20. Having regard to the grounds of appeal and the grant of permission to appeal in tandem, the reality is that this appeal proceeds on the basis of an acknowledgement on behalf of the Appellant that he cannot satisfy the provisions of the EEA Regulations and, hence, that the FtT committed no error of law in this respect. His case is confined to the single proposition that he qualifies for the grant of residence in the United Kingdom pursuant to the decision in Surinder Singh. We shall determine the appeal on this basis.
21. One of the unmistakable features of the factual matrix of this case is that the Appellant was at all material times inert. The EU citizen concerned, his uncle, made the two movements in question viz from the United Kingdom to another EU Member State and, some months later, the reverse, without the Appellant. The EU citizen in the matrix exercised and enjoyed his Treaty rights fully and without interference of any kind. Nor is there any element of discriminatory treatment. In short, the principles of efficacious enjoyment of Treaty rights and non-discrimination, the twin cornerstones of the decision in Surinder Singh, are fully satisfied. The Appellant's case is confounded accordingly.
22. Finally, we have been alerted to the (unreported) decision of the Upper Tribunal in Secretary of State of the Home Department v Cain [IA/40868/2013]. The Appellant sought to rely on this decision. It involved a person who secured leave to enter the United Kingdom as a student, not as a family member of an EEA national but as someone who was the unmarried partner of the EU citizen concerned. The Appellant's application for a residence card *qua* family member of an EEA national was refused by the Secretary of State. The conclusion of the Upper Tribunal was twofold. First, it agreed with the FtT that the Surinder Singh principle applied to the Appellant. Second, it considered regulation 9 of the 2006 Regulations to be

“inconsistent with” this principle – see [54] – because it does not embrace “a durable partner” as an extended family member. The rationale of the Tribunal’s decision appears in [32]:

*“In our judgment, the exercise of the right of free movement by an EEA national is 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 where his or her spouse to be denied residence status.”*

23. It would appear that there was no exercise of Treaty rights in the matrix of the Cain appeal. This *per se* distinguishes it from the present appeal. It would appear that permission to appeal to the Court of Appeal has been requested of, and refused by, the Upper Tribunal. Authoritative and binding guidance will become available if the Court of Appeal accedes to the Secretary of State’s application for permission to appeal. Some of the issues which may foreseeably arise for determination include the impact of the relevant secondary Community Law viz the Citizens Directive and the corresponding EEA regulations; whether it is necessary to identify any provision of primary Community law said to render the secondary Community legislation in some way incompatible or inadequate as the Tribunal appears to have held; and whether the Tribunal was competent to decide that there was a defect in the relevant secondary Community legislation and the corresponding United Kingdom legislative code because both are, in the Tribunal’s view, too narrow.
24. We conclude that the decision in Cain has no bearing on the determination of this appeal.
25. We would add, finally, that the linguistic formulation “*the principle in Surinder Singh*” requires particular care and circumspection on the part of both practitioners and judges in their consideration of what was actually decided in Surinder Singh, which was a fact sensitive case decided by the CJEU by resort to the free movement provisions of primary Community law. The case was decided accordingly and its rationale, or *ratio decidendi*, has the twofold doctrinal components of the principle of efficacious enjoyment of Community law rights and the principle of non-discrimination. These are the two principles which demand attention in any given context. It is not clear to us that Surinder Singh is authority for some principle of wider application. In law, discipline is everything.

## DECISION

26. For the reasons elaborated above we find no error of law in the decision of the FtT and affirm same accordingly. The appeal is dismissed.

*Seamus McCloskey*

THE HON. MR JUSTICE MCCLOSKEY  
PRESIDENT OF THE UPPER TRIBUNAL  
IMMIGRATION AND ASYLUM CHAMBER

Dated: 09 October 2015