Upper Tribunal
(Immigration and Asylum Chamber)

Banger (Unmarried Partner of British National) [2017] UKUT 00125 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision promulgated on:**
On 13 April 2016	**30th March 2017**
Further submissions completed 22 May 2016	

Before

THE PRESIDENT, THE HON. MR JUSTICE MCCLOSKEY
DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ROZANNE BANGER
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation

For the Respondent: Mr A Metzer QC and Ms S Saifolahi (of counsel), instructed by Breytenbachs Immigration Consultants
For the Appellant: Mr P Deller, Senior Home Office Presenting Officer

The Upper Tribunal has referred the following questions to the CJEU for a preliminary ruling under Article 267 TFEU:

(1) Do the principles contained in the decision in Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department (Case C-370/90) [1992] operate so as to require a

Member State to issue or, alternatively, facilitate the provision of a residence authorisation to the non-Union unmarried partner of a EU citizen who, having exercised his Treaty right of freedom of movement to work in a second Member State, returns with such partner to the Member State of his nationality?

(2) Alternatively, is there a requirement to issue or, alternatively, facilitate the provision of such residence authorisation by virtue of European Parliament and Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ("the Directive")?

(3) Where a decision to refuse a residence authorisation is not founded on an extensive examination of the personal circumstances of the Applicant and is not justified by adequate or sufficient reasons is such decision unlawful as being in breach of Article 3(2) of the Citizens Directive?

(4) Is a rule of national law which precludes an appeal to a court or tribunal against a decision of the executive refusing to issue a residence card to a person claiming to be an extended family member compatible with the Directive?

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DECISION

Introduction

1. This is the decision of the panel to which both members have contributed. While the application for permission to appeal was made by the Secretary of State we shall refer to the parties as they were described before the First-Tier Tribunal.

2. The Appellant is Rozanne Banger, a national of South Africa aged 50 years. The origins of the appeal lie in the decision of the Secretary of State to refuse the Appellant a residence card as confirmation of her right to reside with her partner in the United Kingdom under the Immigration (European Economic Area) Regulations 2006 (the "EEA Regulations"). The Appellant's partner, Mr Rado, is a British national with whom she formerly resided in South Africa, from January 2008. In May 2010, both migrated to The Netherlands, her partner having accepted a work assignment there. They lived together in The Netherlands for a period of some five years during which the Appellant was granted a Dutch residence card in her capacity of extended family member of an EU citizen.

3. Some three years later, they decided to move together to the United Kingdom. In advance, the Appellant applied to the Secretary of State for the Home Department (the "Secretary of State") for a residence card. On 26 September 2013, this application was refused in the following terms:

"Your application has been considered under regulation 9 which states that to qualify as the family member of a British citizen you

must show that you are either the spouse or civil partner of the British citizen. An unmarried partner is not recognised as the family member of a British Citizen. You do not have a basis of stay in the United Kingdom under the Immigration (European Economic Area) Regulations 2006."

[We shall describe this legislative measure as the "EEA Regulations"]

The battle lines between the parties were thereby drawn.

Appeal and Permission to Appeal

4. The Appellant applied to the First-tier Tribunal ("*FtT*") which allowed her appeal. In thus deciding the FtT gave effect to the unreported decision of the Upper Tribunal in SSHD v Kamila Santos Campelo Cain Appeal IA 40868/2013 (hereinafter "Cain "). The grant of permission to appeal is couched in the following terms:

> "*The Secretary of State for the Home Department appeals against the decision of Judge of the First-tier Tribunal Hanes who, in a decision promulgated on 18 May 2015, and with the agreement of both representatives, allowed the Appellant's appeal against a refusal to issue her a residence card under the Immigration (European Economic Area) Regulations 2006 to the limited extent that it was remitted to the respondent for a lawful decision to be made.*
>
> *The Secretary of State for the Home Department contends that, in holding that the Surinder Singh principles apply to unmarried partners, the Judge erred in law. The Secretary of State for the Home Department further contends that, in relying on an unreported decision of the Upper Tribunal (Cain ……. Appeal Number IA/40868/2013), which apparently held that the Surinder Singh principle did apply to persons in a durable relationship), the Judge erred in law."*

While reliance on an unreported decision without supporting reasoning, as in this case, may constitute an error of law which is material, giving rise to a set aside order pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007, we prefer to approach this appeal on the footing that the main question of law raised is whether, in substance, the FtT erred in law in holding (our summary) that the Appellant, being the non-EU partner of a British citizen/EEA national exercising his EU Treaty right of freedom of movement in returning to his member State of origin, enjoyed the benefit of the 'Surinder Singh' principle.

The Competing Cases In Outline

5. The central argument advanced on behalf of the Secretary of State is that the 'Surinder Singh' principle (see Immigration Appeal Tribunal and Surinder Singh ex parte Secretary of State for the Home Department (Case C -370/90) [1992] does not apply to unmarried partners or extended family members of EU citizens but is confined to spouses. It was further

contended that the FtT had erred in law in relying on the decision in Cain. The cornerstone of the submissions of Mr Metzer QC and Ms Saifolahi on behalf of the Appellant is that she benefits from the embrace of the Surinder Singh principle.

The Surinder Singh Principle

6. The Surinder Singh principle, at heart, allows a British citizen who has been exercising Treaty rights in an EEA state to be treated as an EEA national with the attendant rights for a spouse and children on return to the United Kingdom. The family members are not to be treated less favourably than required by Community law. The contours and rationale of the principle are ascertainable from the following passages:

> "*19. A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State.*
>
> *20. He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State.*
>
> *21. It follows that a national of a Member State who has gone to another Member State in order to work there as an employed person pursuant to Article 48 of the Treaty and returns to establish himself in order to pursue an activity as a self-employed person in the territory of the Member State of which he is a national has the right, under Article 52 of the Treaty, to be accompanied in the territory of the latter State by his spouse, a national of a non-member country, under the same conditions as are laid down by Regulation No 1612/68, Directive 68/360 or Directive 73/148, cited above.*
>
> *22. Admittedly, as the United Kingdom submits, a national of a Member State enters and resides in the territory of that State by virtue of the rights attendant upon his nationality and not by virtue of those conferred on him by Community law. In particular, as is provided, moreover, by Article 3 of the Fourth Protocol to the European Convention on Human Rights, a State may not expel one of its own nationals or deny him entry to its territory.*
>
> *23. However, this case is concerned not with a right under national law but with the rights of movement and establishment granted*

to a Community national by Articles 48 and 52 of the Treaty. These rights cannot be fully effective if such a person may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse. Accordingly, when a Community national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State. Nevertheless, Articles 48 and 52 of the Treaty do not prevent Member States from applying to foreign spouses of their own nationals rules on entry and residence more favourable than those provided for by Community law.

…

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

The Developing Legal Landscape

7. The Surinder Singh principle has been considered in subsequent decisions of the ECJ and CJEU. In Minister Voor Integratie v Eind (Case C-291/05); [2007], a national of the Netherlands, Mr Eind, came to the United Kingdom to work. His daughter migrated from Surinam and joined him there. On return to the Netherlands Mr Eind applied for confirmation of his daughter's right to reside with him. She was refused a residence permit. The ECJ found that Mr Eind's daughter was entitled to return with him to the Netherlands. In thus deciding, the Court gave effect to the principle of free movement and the related principle of efficacious enjoyment of Community law rights.

8. In Cases C-456/12 and C-457/12, O, B, S and G the CJEU held that where a Member State had refused to grant a derived right of residence to a third-country national who was a family member of a citizen of that same Member State and a citizen of the EU, by virtue of Article 20, residence rights may be derived directly from Article 21(1) TFEU. The Court invoked the decisions in Surinder Singh and Eind and the Treaty right of free movement of workers, considered that the same reasoning applies in cases where the general free movement right enshrined in Article 21(1) TFEU is at stake. The Court held that the derived right of residence conferred on family members by Article 21(1) TFEU extends to family

members of a third country and that the conditions governing such residence (which, in the United Kingdom, are prescribed in the EEA Regulations) should not be stricter than those provided for by the Citizens Directive.

9. This Tribunal had occasion recently to review the Surinder Singh stream of jurisprudence in Osoro (Surinder Singh) [2015] UKUT 00593 (IAC), summarising the last mentioned decision of the CJEU in the following terms:

> *"13. ...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."*

This Tribunal further observed in Osoro:

> *"14. 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."*

At [25], it was noted that that the ECJ had decided Surinder Singh –

> *"….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."*

10. Post-Surinder Singh the developing jurisprudence of the CJEU has continued to display a succinctly purposive and progressive flavour. This is exemplified in Metock v Minister for Justice, Equality and Law Reform [Case C-127/08] where the Grand Chamber decided that the Citizens Directive precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State, though not having its nationality, to have previously been lawfully resident in another Member State before entering the host Member State in order to benefit from the provisions of the Directive: see [80]. In its judgment the court emphasised that the Community legislature has progressively recognised the importance of ensuring the protection of the family life of nationals of Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the EC Treaty: see [56]. Next, the court highlighted one of the express aims of the Citizens Directive, namely to strengthen the right of free movement and residence of all Union citizens. The principle of efficacious enjoyment of Community law rights emerges in the following passages:

> *"62. … if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed.*

63. *Consequently, within the competence conferred on it by those articles of the Treaty, the Community legislature can regulate the conditions of entry and residence of the family members of a Union citizen in the territory of the Member States, where the fact that it is impossible for the Union citizen to be accompanied or joined by his family in the host Member State would be such as to interfere with his freedom of movement by discouraging him from exercising his rights of entry into and residence in that Member State.*

64. *The refusal of the host Member State to grant rights of entry and residence to the family members of a Union citizen is such as to discourage that citizen from moving to or residing in that Member State, even if his family members are not already lawfully resident in the territory of another Member State.*

65. *It follows that the Community legislature has competence to regulate, as it did by Directive 2004/38, the entry and residence of nationals of non-member countries who are family members of a Union citizen in the Member State in which that citizen has exercised his right of freedom of movement, including where the family members were not already lawfully resident in another Member State."*

See [62] – [65].

Notably, the Grand Chamber also used the language of "*rights*" with reference to the third country family members concerned. See [70]:

"70. Consequently, Directive 2004/38 confers on all nationals of non-member countries who are family members of a Union citizen within the meaning of point 2 of Article 2 of that directive, and accompany or join the Union citizen in a Member State other than that of which he is a national, rights of entry into and residence in the host Member State, regardless of whether the national of a non-member country has already been lawfully resident in another Member State."

11. The right of freedom of movement of workers was formerly regulated by EC Directive no: 73/148, which was later absorbed into an enlarged measure, namely Directive 2004/38/EC (the "Citizens Directive"). By these measures EU nationals and, progressively, members of their families acquired the right to move freely within EU Member States. No rights of entry or residence were conferred on third country family members.

12. Post-Surinder Singh the EU legal landscape underwent a significant development through the introduction of citizenship of the European Union. This was initially established by the Maastricht Treaty in 1992, in tandem with the creation of the EU itself. By this measure every national of each Member State became an EU citizen, thereby acquiring certain rights not through their nationality of their own Member State, but *qua* EU citizens by virtue of the Treaties and secondary legislation provisions.

Citizenship of the Union is now governed by Article 20 TFEU, which provides as follows:

> *"Article 20 TFEU (ex Article 17 TEC)*
>
> *1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*
>
> *2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:*
>
> *1.(a) the right to move and reside freely within the territory of the Member States;*
>
> *...*
>
> *These rights shall be exercised in accordance with the **conditions** and limits defined by the Treaties and by the measures adopted thereunder."*

The next succeeding provision of TFEU, Article 21, provides:

> *"1. 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.*
>
> *2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1."*

13. We have adverted above to the Citizens Directive. This measure of secondary EU Law contains the detailed outworkings of the primary provisions noted above. Its rationale is clearly expressed in the first and second recitals. Citizenship of the Union confers on each of its citizens a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and the measures adopted to give it effect. Further, the free movement of persons constitutes one of the fundamental freedoms of the internal market. These two principles form the prelude to the grand declaration that Union citizenship should be the fundamental status of nationals of the Member States "*when they exercise their right of free movement and residence*": per recital (3). The lengthy recitals which follow are an indication of the moderately complex nature of the regime established by the Directive.

We turn our attention particularly to two provisions of the Citizens Directive. First, Article 2, which provides:

> *"**Definitions***
>
> *For the purposes of this Directive:*
>
> 1. *'Union citizen' means any person having the nationality of a Member State;*
>
> 2. *'family member' means:*
>
> (a) *the spouse;*
>
> (b) *the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;*
>
> (c) *the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);*
>
> (d) *the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);*
>
> 3. *'Host Member State' means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence."*

Next, by Article 3:

> ***"Beneficiaries***
>
> 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 host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

[Our emphasis]

14. In the United Kingdom legal system the EEA Regulations are the transposing measure in respect of the Citizens Directive. In this appeal there is particular focus on Regulation 9, which is concerned with "family members" of EEA nationals and provides as follows:

"9.-

(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 United Kingdom national were an EEA national.***

(2) The conditions are that-

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

(b) if the family member of the United Kingdom national is his 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 that State before the United Kingdom national returned to the United Kingdom.

(3) Where these Regulations apply to the family member of a British citizen the British citizen shall 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."

It is convenient to interpose here the observation that the Appellant cannot satisfy Regulation 9 as the definition of "*family member*" does not encompass the unmarried partner of an EEA national/British citizen. The impugned decision of the Secretary of State is, to this extent, correct.

15. Logically, the next port of call is Regulation 8, which is concerned with "*extended family members*", as defined. It provides, in material part:

> ***"8.— 'Extended family member'***
>
> *(1) In these Regulations 'extended family member' means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).*
>
> *...*
>
> *(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.*
>
> *(6) In these Regulations 'relevant EEA national' means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4)* ***or the EEA national who is the partner of the extended family member for the purpose of paragraph (5)."***

[The emphasis is ours]

It is also necessary to consider the definition of "EEA National" which, per Regulation 2, is as follows:

> *"'EEA national'" means a national of an EEA State who is not also a British citizen."*

16. To summarise, Regulation 9 makes provision for a British national to be treated as an EEA national for the purposes of the EEA Regulations in the circumstances specified. Regulation 8, however, makes **no** provision for a British national to be treated as an EEA national for the purposes of considering the circumstances and entitlement of a person who is neither the spouse nor the civil partner of the EEA national/British citizen, but is the partner of the latter, and between whom there is a durable relationship.

17. There is evident disharmony between Article 3 of the Directive and Regulation 8 of the EEA Regulations. Whereas the former imports no stipulation relating to the nationality of the Union citizen concerned, the latter does: British citizens are, in this context, excluded from the definition of "EEA national". Furthermore, Article 3 does not require the Union citizen's partner to be either the spouse or the civil partner of the former, whereas Regulation 8 does. Thus we recognise the argument that Regulation 8 purports to legislate in a manner neither contemplated nor permitted by the Citizens Directive. This argument, potentially, involves the discrete contention that when Articles 2 and 3 of the Citizens Directive

are read as a whole and considered in their full context, the words "*irrespective of their nationality*" in Article 3(2)(a) apply also to Article 3(2)(b). If correct, this argument would yield the conclusion that there is disparity of treatment between British citizens and EEA nationals.

18. Some reflection on non-discrimination on the ground of nationality is appropriate. This is one of the pillars of the Surinder Singh principle. It is also a principle of EU law of some vintage and pedigree. Its origins are traceable to Regulation 1612/68 which entitled migrant workers and, though in qualified terms, members of their family to equal treatment in respect of employment conditions, access to vocational training and a series of social and tax benefits. While the equivalent secondary legislation regarding the right of establishment and the provision of services did not have the same effect, the ECJ declared that a comparable protection reposed in certain Treaty provisions (Konstantinidis [1993] ECR 1-1191, at [46]. Non-discrimination on the ground of nationality has evolved. It is now expressly prohibited by Article 18 TEU, which provides:

> *"Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited".*

Article 18 operates in tandem with the Citizens Directive. Thenceforth, the economically active citizens of the Member States have made the transition from exercising the rights of an individual servicing an economic organisation of states to exercising the rights of a person who has the status of citizen of the EU.

19. It is, of course, necessary to acknowledge that the Directive differentiates between "family members" as defined and other persons who could be considered members of the family unit in a wider sense. This is made particularly clear by recitals (5) and (6). The former highlights the importance of the definition of "family member". What follows immediately thereafter, in recital (6), gives rise to a clear dichotomy:

> "*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.*"
>
> [Our emphasis.]

20. It cannot be denied that the Directive accords different treatment to "family members", as defined and other members of the family unit "in a broader sense". One further aspect of this discrete topic is that Article 2 of the Citizens Directive confers rights on family members, whereas Article

3(2) provides for the facilitation of entry and residence for family members outwith the definition of "family members". This potentially, raises interesting questions concerning the Treaty prohibition against discrimination on the ground of nationality and the decision in Metock wherein, as we have highlighted in [11] above, the CJEU used the language of rights conferred on third country nationals in its elaboration of the effects of the Citizens Directive.

21. If there is merit in the argument which we have sketched above, it would follow that Regulation 8 of the EEA Regulations reflects a failure by the United Kingdom to take all appropriate measures to ensure fulfilment of its obligations arising out of the Treaty, in contravention of Article 5 TEU. Thus the failure of the Regulations to recognise the rights of Union citizens' durable relationship partners who do not have the status of spouse or civil partner would equate to a failure to properly transpose the Citizens Directive. We bear in mind that we have not received full argument on the issue.

22. We consider that this challenge falls to be determined within the confines of the Surinder Singh principle. It seems to us that this principle continues to operate in a residual, probably small, category of cases in which the Citizen's Directive is not dispositive. In pure legal doctrinal terms it might be said that the Surinder Singh principle co-exists with, and seeks to give effect to, those measures of primary EU legislation which we have highlighted above which are not fully implemented in the relevant EU secondary legislation, namely the Citizens Directive, or are undermined or diluted by either the EU secondary legislation or the transposing domestic legislation in the decision in any given case. On this analysis the Citizens Directive is not exhaustive of rights and obligations in the field to which it applies.

23. We consider that the decision of the CJEU in Case C-83/11, Secretary of State for the Home Department v Rahman and Others has a bearing on the issues raised in this appeal. There it was held unambiguously that Member States must ensure that their legislation contains criteria which enables family members falling outwith the definition of family member in Article 2(2) of the Citizens Directive -

> "*….. to obtain a decision on their application for entry and residence that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons …..*"

See [26]. The Grand Chamber further ruled:

> "*The Member States have a wide discretion when selecting those criteria, but the criteria must be consistent with the normal meaning of the term 'facilitate' and of the words relating to dependence used in Article 3(2) and must not deprive that provision of its effectiveness.*"

24. The matrix of this appeal is as follows. During their sojourn in The Netherlands, Mr Rado, the Appellant's Union citizen/British national

partner, exercised his free movement rights and the Appellant, as his partner, secured residence authorisation. The legal foundation of this authorisation can be traced to Article 3(2)(b) of the Citizens Directive. Upon the couple's return to the United Kingdom the Appellant has been denied a residence card by the Secretary of State. This refusal accords with the regime of the EEA Regulations. It is based upon the consideration that the Appellant's partner is a British national.

25. If the Appellant's partner were the national of another Union state, the refusal could not be lawfully made under the EEA Regulations. Thus there is disparity of treatment because, firstly, the Appellant's partner, being a British national, is treated differently from the nationals of other EU Member States. His British nationality is the impetus for the disparate treatment. It is the *sine qua non.* We further observe that the impugned decision of the Secretary of State does not proffer any justification for treating Mr Rado in a manner differing from the treatment which would have been accorded to the Appellant's partner if he were a national of another EU Member State. Secondly, there is prima facie differential treatment as regards the Appellant and other analogous partners of non-British nationals.

26. The treatment of Mr Rado, therefore, differs from that which would be accorded to the nationals of other EU Member States. This, raises the question of whether the Secretary of State's refusal to grant the Appellant a residence card, infringes both the EU general principle of non-discrimination and Article 18 TEU.

27. At this juncture we return to the Surinder Singh principle. As was observed in Osoro, while this principle co-exists with the Citizens Directive, the precise terms of the relationship between the two are not entirely clear. Cases such as the present proceed on the basis that, in the abstract, the Surinder Singh principle is capable of applying to the relationship under scrutiny. The question thereby raised is whether it does apply in the particular context. As subsequent decisions demonstrate, the principle does not operate in a straightjacket. Rather, it has sufficient flexibility to be extended to contexts analogous to that in which it was devised. As observed above, the jurisprudence of the CJEU in this field has a distinctly purposive, progressive flavour.

28. This case, in common with Surinder Singh, involves a third country partner of the EU citizen/British citizen concerned. The only difference is that Mr and Mrs Singh were married, whereas the relationship between this Appellant and Mr Rado is of the unmarried variety. There is no dispute that the Appellant and Mr Rado are united by a durable relationship. In Eind, the third country national in the matrix was the daughter, rather than the adult partner, married or unmarried, of the EU citizen concerned. Thus to apply the Surinder Singh principle to the relationship in the present case would involve a relatively short step. What is unclear, however, is the legal trigger for the extension of the Surinder Singh principle in a case such as the present.

29. Two of the three pillars of the Surinder Singh principle, namely freedom of movement of an EU worker (Mr Rado) and the efficacious enjoyment of this right are undoubtedly engaged. The third pillar is the crucial one in the present context. It requires determination of the question of whether the facility accorded to this Appellant during the couple's sojourn in The Netherlands, namely a residence authorisation, was a requirement of Community law. The CJEU has held unequivocally that neither Article 21(1) TFEU nor the Citizens Directive confers autonomous rights on third country nationals: see O, B, S and G (*supra*). Any right acquired by a third country national is derived from the freedom of movement exercised by the EU national.

30. We have canvassed above the possibility that the necessary requirement of EU law is contained in Article 3(2)(b) of the Citizens Directive. Persons embraced by Article 3(2) cannot, however, lay claim to a right of residence in the host Member State. Nor does Article 3 confer any rights on the EU citizen member of the relationship under scrutiny. Rather, it seems to us that Article 3, reflecting a presumptively deliberate choice on the part of the Community legislature involving a dichotomy of EU citizen family members (on the one hand) and third country family members (on the other), is a provision of restrained effect and scope.

31. Two particular features underline the limitations of the Article 3 prescription. First, it is specifically contemplated that its detailed outworkings will be prescribed by "national legislation", in which context the principle of subsidiarity applies. Second, it provides that the host Member State –

> "*.... shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.*"

This creates a clear margin of appreciation. It also envisages that national legislation regulating third country nationals connected to an EU citizen by one of the specified relationships may differ from one Member State to another. Notably, the requirement of detailed individualised examination in all cases is expressed in uncompromising terms.

32. Given our analysis above, it seems unlikely that Mr Rado, on whom the spotlight must fall primarily, being the EU citizen concerned, can acquire from the Citizens Directive a requirement that his third country national partner, the Appellant, be granted a right to reside with him in the United Kingdom or that the Appellant can derive any such right from Mr Rado. In light of [34] below we decline to decide this discrete issue conclusively.

33. We draw attention to one further dimension of Article 3(2) of the Citizens Directive. This imposes on all Member States the duty to facilitate entry and residence for third country nationals such as the Appellant, to undertake an extensive examination of the personal circumstances of the family members concerned and, in the event of deciding to deny entry or residence to a family member, to justify such refusal. Whether these inter-related duties are discharged via a formulaic letter which,

mechanistically, refuses the facility sought by reference to an inflexible provision of the EEA Regulations may be open to question.

34. Finally, we refer to Article 7 of the Charter of Fundamental Rights of the European Union which confers on everyone the "*right to respect for his or her private and family life, home and communications*". Having regard to the basis upon which the impugned decision of the Secretary of State was made, no consideration was given to the question of whether an infringement of the rights of the Appellant and her partner under this provision was thereby occasioned. As a result, there is no evidence relating to issues such as legitimate aim or proportionality. This may be linked to what we have said in [23] – [24] and [31] above.

Conclusion and Order

35. Having tentatively formulated certain questions of pure EU law we have considered the parties' further representations and have reviewed the contents of this inconclusive judgment. Our preliminary view that the *acte claire* principle does not apply is confirmed. We have also considered the supervening decision of this Chamber in Sala (EFM's – right of appeal) [2016] UKUT 411 (IAC), which held that there is no right of appeal to the FtT against a decision of the executive refusing to issue a residence card to a person claiming to be an extended family member.

36. Accordingly, we have determined to make a reference to the CJEU under Article 267 TFEU in the terms of the Order annexed. These proceedings will be stayed in the meantime.

Edward McCloskey.

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

20 January 2017

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/42398/2013**

Before

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

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ROZANNE BANGER

Respondent

Order for Reference

to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union

INTRODUCTION

1. By this reference, the Immigration and Asylum Chamber of the United Kingdom Upper Tribunal requests the Court of Justice of the European Union ("*the CJEU*") to provide a preliminary ruling on certain questions relating to the situation of a non-EU citizen seeking a residence card to enable her to live in the United Kingdom with her unmarried partner, a British national, in circumstances where both have returned to the United Kingdom from another EU Member State wherein the British national worked for some five years.

FACTS

2. The material facts, which are agreed by the parties, are:

(i) The Appellant, the Secretary of State for the Home Department ("the Secretary of State"), is the *alter ego* of the United Kingdom Government.

(ii) The Respondent is Rozanne Banger, a national of South Africa, aged 50 years. Her partner is Mr Philip Rado, a British national and, hence, an EU citizen, with whom she resided in South Africa between 2008 and 2010.

(iii) In May 2010, Mr Rado, having accepted a work assignment in The Netherlands, and Ms Banger migrated to that EU Member State. They lived together there for a period of some five years during which the Respondent was granted a Dutch residence card in her capacity of extended family member of an EU citizen.

(iv) In 2013, following a sojourn of some three years in The Netherlands, the Respondent and Mr Rado decided to move together to the United Kingdom. The Respondent applied to the Secretary of State for a residence card. This application was refused on the sole ground that she was the unmarried partner of Mr Rado.

THE SECRETARY OF STATE'S DECISION

3. The Secretary of State refused the Respondent's application for a residence card in the following terms:

> "*Your application has been considered under regulation 9 which states that to qualify as the family member of a British citizen you must show that you are either the spouse or civil partner of the British citizen. An unmarried partner is not recognised as the family member of a British citizen. You do not have a basis of stay in the United Kingdom under the European (Economic Area) Regulations 2006.*"

RELEVANT LEGISLATION

4. By Article 20 of the Treaty on the Functioning of the European Union ("TFEU"), every national of an EU Member State is a citizen of the Union, a status which confers the right to move and reside freely within the territory of the Member States. The right to freedom of movement of workers and the associated benefits which may be enjoyed by certain of their family members are regulated by Directive 2004/38/EC (the "Citizens Directive"). In deciding to make this reference, the Tribunal has given particular consideration to Articles 2 and 3 of the Citizens Directive.

5. Under United Kingdom law, the transposing measure of the Citizens Directive is the Immigration (European Economic Area) Regulations 2006 [SI 2006/1003], as amended (the "EEA Regulations"). The provisions of

this measure which are particularly germane in the present litigation context are Regulations 2, 8 and 9.

THE PRELUDE TO THIS REFERENCE

6. Following the Secretary of State's decision refusing the Respondent's application for a residence card the Respondent exercised her statutory right of appeal to the First-tier Tribunal, which allowed her appeal. The Secretary of State was granted permission to appeal to the Upper Tribunal on the ground that the first instance Tribunal had arguably erred in law.

7. The Secretary of State's appeal to the Upper Tribunal was conducted by the media of both an oral hearing and written submissions in April and May 2016. The Upper Tribunal reserved its decision.

8. The reserved decision of the Upper Tribunal, which is inconclusive on account of having decided to make this reference to the CJEU, is available. It records, in [5], the central issue of EU law considered to arise:

> "*The central argument advanced on behalf of the Secretary of State is that the 'Surinder Singh' principle (see Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department (Case C-370/90) [1992] does not apply to unmarried partners or extended family members of EU citizens but is confined to spouses.*"

In its decision, in [6] – [10], the Upper Tribunal reviewed the Surinder Singh principle and subsequent jurisprudence of the Court of Justice of the European Union ("CJEU") and its predecessor. Consideration was also given to the decision of this Tribunal in Osoro (Surinder Singh) [2015] UKUT 00593 (IAC), at [9]. This Tribunal further reviewed the legislative history relating to freedom of movement of workers and citizenship of the Union, at [11] – [14]. In the context of the EEA Regulations, the critical fact in the present litigation matrix is that the Respondent is the unmarried partner, and not the spouse, of the EU citizen concerned. This issue is encapsulated in [17]:

> "*To summarise, Regulation 9 makes provision for a British national to be treated as an EEA national for the purposes of the EEA Regulations in the circumstances specified. Regulation 8, however, makes* ***no*** *provision for a British national to be treated as an EEA national for the purposes of considering the circumstances and entitlement of a person who is neither the spouse nor the civil partner of the EEA national/British citizen, but is the partner of the latter, and between whom there is a durable relationship."*

9. In its decision, at [18], this Tribunal considered the question of disharmony between Article 3 of the Citizens Directive and Regulation 8 of the EEA Regulations:

"There is evident disharmony between Article 3 of the Directive and Regulation 8 of the EEA Regulations. Whereas the former imports no stipulation relating to the nationality of the Union citizen concerned, the latter does: British citizens are, in this context, excluded from the definition of "EEA national". Furthermore, Article 3 does not require the Union citizen's partner to be either the spouse or the civil partner of the former, whereas Regulation 8 does. Thus we recognise the argument that Regulation 8 purports to legislate in a manner neither contemplated nor permitted by the Citizens Directive. This argument, potentially, involves the discrete contention that when Articles 2 and 3 of the Citizens Directive are read as a whole and considered in their full context, the words "irrespective of their nationality" in Article 3(2)(a) apply also to Article 3(2)(b). If correct, this argument would yield the conclusion that there is disparity of treatment between British citizens and EEA nationals."

10. Next, at [19], this Tribunal gave consideration to the principle of non-discrimination on the ground of nationality, including Article 18 of the Treaty of the European Union. At [20], this Tribunal identified the differential treatment which the Citizens Directive accords to "family members", as defined and other members of the family unit "in a broader sense". It further noted the language of rights as regards family members and facilitation as regards persons falling outwith the definition of "family members".

11. At [22], this Tribunal noted the centrality of the Surinder Singh principle in the litigation. At [27], it recorded that the only material difference between the present case and Surinder Singh is that the Respondent is the unmarried partner of the EU citizen concerned, whereas Mr and Mrs Singh were married. The decision continues, at [27]:

    "*Thus to apply the Surinder Singh principle to the relationship in the present case would involve a relatively short step. What is unclear, however, is the legal trigger for the extension of the Surinder Singh principle in a case such as the present.*"

    This Tribunal noted, at [28], that two of the three pillars of the Surinder Singh principle, namely freedom of movement of an EU worker and the efficacious enjoyment of this right were engaged. The third pillar, namely whether the residence authorisation conferred on the Respondent during the couple's sojourn in The Netherlands was a requirement of Community law, is the critical one.

12. This Tribunal concluded, at [34], that the *acte claire* principle does not apply and determined in principle to make this reference.

13. The parties were then invited to make written submissions on the issue of a reference to the CJEU under Article 267 TFEU and did so. On behalf of the Secretary of State the main argument advanced was that a reference is inappropriate as the issue concerning unmarried partners of EU Nationals is *acte claire* against the Respondent by reason of the decision of the CJEU in Case C-456/12 O and B v Minister Voor Immigratie, Integratie en Asiel. This Tribunal does not agree.

14. Postdating the hearing of this appeal a differently constituted chamber of this Tribunal decided that a person who is refused a residence card as an "extended family member" has no right of appeal to the relevant tribunal under regulation 26 of the Immigration (EEA) Regulations 2006 (SI2006/1003): Sala (EFM's: Right of Appeal) [2016] UKUT 411 (IAC). If correctly decided, the effect of this decision would appear to be that the Respondent in these proceedings had no right to pursue the appeal noted in [6] above.

THE QUESTIONS REFERRED

15. In accordance with Article 267 TFEU, this Tribunal refers the following questions for preliminary ruling by the CJEU:

(1) Do the principles contained in the decision in Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department (Case C-370/90) [1992] operate so as to require a Member State to issue or, alternatively, facilitate the provision of a residence authorisation to the non-Union unmarried partner of a EU citizen who, having exercised his Treaty right of freedom of movement to work in a second Member State, returns with such partner to the Member State of his nationality?

(2) Alternatively, is there a requirement to issue or, alternatively, facilitate the provision of such residence authorisation by virtue of European Parliament and Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ("the Directive")?

(3) Where a decision to refuse a residence authorisation is not founded on an extensive examination of the personal circumstances of the Applicant and is not justified by adequate or sufficient reasons is such decision unlawful as being in breach of Article 3(2) of the Citizens Directive?

(4) Is a rule of national law which precludes an appeal to a court or tribunal against a decision of the executive refusing to issue a residence card to a person claiming to be an extended family member compatible with the Directive?

Signed: Edward McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: **20 January 2017**