Neutral Citation Number: [2020] EWCA Civ 98

Case No: C9/2019/0763

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
(Upper Tribunal Judge Jackson)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2020

Before:

LORD JUSTICE LEGGATT
LORD JUSTICE BAKER
and
LORD JUSTICE MALES

- -

Between:

1) HARVINDER KAUR **2) KARANPREET SINGH** **3) KARAMJOT KAUR**	**Appellants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Ramby de Mello and **Mr Adnan Saeed** (instructed by **Abbott Solicitors**) for the **Appellants**
Ms Julia Smyth (instructed by the **Government Legal Department**) for the **Respondent**

Hearing date: 28th January 2020

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Approved Judgment

Lord Justice Males:

1. Mrs Harvinder Kaur is an Indian national who is married to a British citizen, Mr Kulwant Singh. She was previously refused entry clearance to join her husband under the Immigration Rules. She and their two children now contend that they are entitled to enter the United Kingdom as family members of Mr Singh under EU law as a result of being in possession of a Bulgarian residence permit. This was acquired during a period of 19 days when Mrs Kaur and the children joined her husband while he was working in that country.

2. The claim was upheld by the First Tier Tribunal (Judge Chapman) but the SSHD appealed successfully to the Upper Tribunal (Judge Jackson). Mrs Kaur and her children (together, "the appellants") now appeal to this court.

3. We indicated at the conclusion of the hearing that the appeal would be dismissed. These are my reasons for joining in that decision.

The facts

4. The facts found by the FTT were as follows.

5. Mrs Kaur and her husband, Mr Singh, were first married in 1996. Two children of the marriage were born, in 1999 and in 2003. The children, who are Indian nationals, were aged 18 and 14 at the time when they sought admission in reliance on the Bulgarian residence permit. They are now aged 20 and 16 respectively.

6. Mr Singh and Mrs Kaur were divorced in 2004. Mr Singh married a Polish national in 2005 and in the following year he came to live in the United Kingdom as a family member of his EEA national wife. He later acquired permanent residence in the United Kingdom and in 2012 became a British citizen. In 2013 he was divorced from his Polish wife. He remarried Mrs Kaur the same year.

7. Mrs Kaur sought to join her husband as his spouse under the Immigration Rules, but was refused entry clearance on 10th February 2014.

8. In 2014-15 Mr Singh worked in Germany but Mrs Kaur and the children did not seek to join him there.

9. In June 2017 Mr Singh went to work in Bulgaria. He worked in a car wash and was paid in cash. He lived in a shared house. On 22nd December 2017 Mrs Kaur and the children joined him in Bulgaria. Mrs Kaur did not work there. No arrangements were made, either before or after the children's arrival in Bulgaria, to enrol them in any school.

10. After only 19 days together in Bulgaria, on 10th January 2018, Mr Singh, Mrs Kaur and the children flew from Sofia to Heathrow. Mr Singh produced his British passport to immigration officials. Mrs Kaur and the children produced their Indian passports and Bulgarian residence permits. They told immigration officials that they were seeking entry for a two-week holiday, but did not have return tickets to Bulgaria. In view of the previous refusal of leave to enter, the appellants were granted temporary admission while enquiries were conducted.

11. The family went to live in rented accommodation in Birmingham which Mr Singh had rented for the past two years, and in which his cousin had been living while he was away in Bulgaria. The FTT found that Mr Singh had never intended to settle in Bulgaria and that the property was awaiting his return with his family.

12. Two days after his return to the United Kingdom, Mr Singh started work as a courier. He had worked as a courier before going to Bulgaria. The FTT found that his job was waiting for him to return to it.

13. The children were promptly placed in the United Kingdom education system.

14. In a telephone interview Mr Singh told immigration officials that he went to Bulgaria "to do a *Surinder Singh*" case. That was a reference to *R v Immigration Appeal Tribunal, ex parte SSHD* Case C-370/90 [1992] 3 All ER 798 in which the CJEU held that a member state must grant leave to enter and reside to the spouse of a national of that state who had gone with his spouse to work in another member state and then returned to establish himself in the territory of his home state.

15. In the light of these facts the SSHD decided that Mrs Kaur and the children did not qualify for admission under Regulation 9 of the Immigration (European Economic Area) Regulations 2016 (SI 2016 No. 1052). The SSHD decided that the residence in Bulgaria had not been genuine and had been a means of circumventing the United Kingdom immigration laws to which Mrs Kaur and the children would otherwise be subject as non-EU nationals.

The legislative framework

The TFEU

16. Article 20(1) of the Treaty on the Functioning of the European Union ("TFEU") provides that every person holding the nationality of an EU member state is a citizen of the EU. Article 20(2)(a) TFEU provides that EU citizens have "the right to move and reside freely within the territory of the member states". However, this right is qualified by Article 21(1) TFEU which provides that it is "subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect".

Council Directive 2004/38/EC

17. Council Directive 2004/38/EC ("the Citizenship Directive") is such a measure. It lays down the conditions governing the exercise of the right of free movement and residence within the EU by EU citizens and their family members. Recital (5) states that:

> "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."

18. Article 3(1) of the Directive, headed "Beneficiaries", provides that it is to apply to "all Union citizens who move to or reside in a member state other than that of which they are a national, and to their family members as defined in point 2 of article 2 who accompany or join them". The definition of "family members" includes the spouse and children under 21 of an EU citizen.

19. Article 5, headed "Right of entry", provides as follows:

> "1. Without prejudice to the provisions on travel documents applicable to national border controls, member states shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a member state leave to enter their territory with a valid passport.
>
> No entry visa or equivalent formality may be imposed on Union citizens.
>
> 2. Family members who are not nationals of a member state shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in article 10 shall exempt such family members from the visa requirement.
>
> Member states shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.
>
> 3. The host member state shall not place an entry or exit stamp in the passport of family members who are not nationals of a member state provided that they present the residence card provided for in article 10.
>
> 4. Where a Union citizen, or a family member who is not a national of a member state, does not have the necessary travel documents or, if required, the necessary visas, the member state concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.
>
> 5. The member state may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions."

20. Articles 6 and 7 deal with the right of residence:

> "**Article 6**
>
> *Right of residence for up to three months*
>
> 1. Union citizens shall have the right of residence on the territory of another member state for a period of up to three months

> without any conditions or any formalities other than the requirement to hold a valid identity card or passport.
>
> 2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a member state, accompanying or joining the Union citizen."
>
> "**Article 7**
>
> *Right of residence for more than three months*
>
> 1. All Union citizens shall have the right of residence on the territory of another member state for a period of longer than three months if they: (a) are workers or self-employed persons in the host member state; or (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host member state during their period of residence and have comprehensive sickness insurance cover in the host member state; or (c) are enrolled at a private or public establishment, accredited or financed by the host member state on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and have comprehensive sickness insurance cover in the host member state and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host member state during their period of residence; or (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).
>
> 2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a member state, accompanying or joining the Union citizen in the host member state, provided that such Union citizens satisfies the conditions referred to in paragraph 1(a), (b) or (c)."

21. Article 10, dealing with residence cards, provides:

> "1. The right of residence of family members of a Union citizen who are not nationals of a member state shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen" no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately. …"

22. Article 35 sets out measures which member states may adopt to deal with cases of abuse of rights or fraud:

> "Member states may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in articles 30 and 31."

The Immigration (European Economic Area) Regulations 2016

23. The provisions of the Directive were implemented in United Kingdom law by the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") which replaced the 2006 Regulations of the same name.

24. Regulation 9 of the 2016 Regulations deals with the position of family members of British citizens. At the material time, it provided:

> "**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 ("F") of a British citizen ("BC") as though the BC were an EEA national.
>
> (2) The conditions are that –
>
> (a) BC –
>
> (i) is residing in a 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.
>
> (4) This regulation does not apply –
>
> (a) where the purpose of the residence in the EEA State was as a means for circumventing any immigration laws applying to non-EEA nationals to which F would otherwise be subject (such as any applicable requirement under the 1971 Act to have leave to enter or remain in the United Kingdom); or
>
> (b) to a person who is only eligible to be treated as a family member as a result of regulation 7(3) (extended family members treated as family members).
>
> (5) Where these Regulations apply to F, BC is to be treated as holding a valid passport issued by an EEA State for the purposes of the application of these Regulations to F. …"

25. Thus where Regulation 9 applies to a family member, her British spouse is to be treated as holding a valid passport issued by an EEA state other than the United Kingdom. The effect of this provision is to enable the family member to exercise the same rights of residence as a family member of any EEA national.

26. Regulation 11 deals with the right of admission to the United Kingdom:

> "**Right of admission to the United Kingdom**
>
> (1) An EEA national must be admitted to the United Kingdom on arrival if the EEA national produces a valid national identity card or passport issued by an EEA State.
>
> (2) A person who is not an EEA national must be admitted to the United Kingdom if that person is –
>
> (a) a family member of an EEA national and produces on arrival a valid passport and qualifying EEA State residence card, provided the conditions in regulation 23(4) (family member of EEA national must accompany or join EEA national with right to reside) are met; …"

27. Rights of residence for an initial period not exceeding three months, an extended period and permanently are dealt with in Regulations 13 to 15. It is unnecessary to set them out.

28. It is important to note that for the purpose of the 2016 Regulations, "EEA national" is defined by Regulation 2(1) as "a national of an EEA State who is not also a British citizen".

The decision of the First Tier Tribunal

29. The FTT found that the evidence of Mr Singh and Mrs Kaur was not credible. It found that Mr Singh and Mrs Kaur were aware that they could not succeed under the Immigration Rules, that their evidence that they had come to the United Kingdom for a holiday was not true, and that their intention had always been to return to settle in the United Kingdom as a family.

30. The FTT accepted that the marriage between Mr Singh and Mrs Kaur was genuine and that Mr Singh's residence in Bulgaria was genuine in the sense that he had gone there to exercise Treaty rights and did exercise such rights. However, the FTT found that Mrs Kaur did not in any sense reside there with him because of the short-lived nature of their stay and their failure to take any steps to demonstrate that they lived there or intended to do so. The FTT cited McCloskey J's summary of the law in *Osoro v SSHD* [2015] UKUT 593 (IAC) at [15] (with the FTT's own emphasis):

> "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."

31. Applying this summary, the FTT found that there was neither genuine residence nor the creation or fortification of family life during the appellants' short stay in Bulgaria. As a result, Regulation 9 of the 2016 Regulations did not avail the appellants. There has been no challenge to the finding by the FTT that the appellants' residence in Bulgaria was not genuine and that there was no creation or fortification of family life there.

32. The FTT added that in any event the appellants' intentions were to circumvent the immigration laws which would have applied to them as non-EEA nationals, so that Regulation 9(4) would have operated to disapply the other parts of the Regulation. Citing Case C-109/01 *SSHD v Akrich* [2004] QB 756, it found that the intention of Mr Singh and the appellants was artificially to create the conditions laid down for acquiring the status of family members.

33. Despite these findings, however, the FTT went on to say that "this appeal does not concern the right of residence but the right of entry to the United Kingdom" and that, because the appellants possessed Bulgarian residence permits, it was Regulation 11 of the 2016 Regulation which governed the position. Citing *McCarthy v SSHD (No. 2)* Case C-202/13 [2015] QB 651, the FTT concluded that:

> "51. In interpreting Regulation 11, I derive assistance from the case of *McCarthy and others* to which I was referred by Mr Ilahi. Paragraph 58 of the judgment in that case, which I have cited

> above is unequivocal. Admission cannot be denied by a Member State to family members who hold a valid residence card issued by another Member State.
>
> 52. Accordingly, since I find that the Appellants did possess valid residence cards issued by the Bulgarian authorities, I find that, in accordance with Regulation 11, they were entitled to be admitted to the United Kingdom under EU law."

34. The FTT added that it was not required to determine whether the appellants had a right of residence and did not do so.

The decision of the Upper Tribunal

35. The SSHD appealed to the Upper Tribunal which allowed the appeal on two grounds. The first was that the FTT had overlooked that the definition of "EEA national" in Regulation 2 of the 2016 Regulations excluded British citizens. Thus Mr Singh, as a British citizen, was not an "EEA national" for the purpose of the 2016 Regulations. This meant that Regulation 11, which refers to the family members of an "EEA national", could not avail the appellants.

36. The second ground was that the FTT had been wrong to derive support from the CJEU decision in *McCarthy (No. 2)* as the decision "does not expressly deal with *Surinder Singh* rights nor any substantive rights of entry or residence in a Member State and is essentially addressing only the question of the documentary requirements for the right of entry of non-EEA national family members"; it does not "establish any general right of admission to a person on arrival to the United Kingdom in possession of a valid passport and residence card who is accompanied by a person who has a right to reside in the United Kingdom".

The submissions on appeal

37. For the appellants Mr Ramby de Mello submitted, in outline, that:

(1) Mr Singh was exercising Treaty rights as a worker in Bulgaria pursuant to Article 7.1 of the Citizenship Directive.

(2) The appellants were his "family members" within the definition in Article 2 who had joined him in Bulgaria.

(3) Accordingly the appellants were "beneficiaries" of the Directive within the meaning of Article 3.

(4) They were therefore entitled, once in possession of a Bulgarian residence card, to a right of entry to the United Kingdom under Article 5 of the Directive, as interpreted by the CJEU in *McCarthy (No. 2)*.

(5) Accordingly the 2016 Regulations should be interpreted to give effect to that right of entry or, if that was not possible as a matter of interpretation, should be disapplied so as to give effect to the appellants' EU rights.

38. At some points in his submissions Mr de Mello submitted that it followed from steps 1 to 4 in his argument summarised above that the appellants were entitled to a right of residence in the United Kingdom for a period of up to 3 months pursuant to Article 6 of the Directive. In the end, however, I did not understand him to press this point. Rather he contended for a free-standing right of entry under Article 5.

39. For the SSHD Ms Julia Smyth, to the clarity of whose submissions I would pay tribute, submitted, again in outline, that:

    (1) A family member who had resided with a British citizen exercising Treaty rights in another member state would be entitled to return with the British citizen to reside in the United Kingdom, but only if their residence together in the other member state was genuine and had been such as to create or fortify their family life together; this was the effect of the case law culminating in *O v Minister voor Immigatie, Integratie en Asiel* Case C-456/12 [2014] QB 1163.

    (2) There is nothing in *McCarthy (No. 2)* to cast doubt on this settled position. *McCarthy (No.2)* did not create any new substantive rights of entry, let alone residence; it was concerned only with the procedural (and in particular documentary) requirements for exercising a right of entry.

    (3) There can be no "free-standing right of entry" without a right of residence.

    (4) The FTT's findings that the appellants' residence with Mr Singh in Bulgaria was not genuine and that it did not create or fortify family life are fatal to the appeal.

    (5) There is therefore no inconsistency between the 2016 Regulations and the provisions of EU law.

    (6) Alternatively (and by way of Respondent's Notice) if Article 5 does confer a substantive right of entry or a right to reside, any such right fell to be refused in this case as an abuse of rights under Article 35 of the Directive.

Discussion

40. In considering the various candidates which are said to afford the appellants a right of entry to the United Kingdom, I find it helpful to proceed in stages. Before coming to Article 5 of the Citizenship Directive and the decision in *McCarthy (No. 2)* it is convenient to explain why neither the 2016 Regulations nor Articles 6 and 7 of the Directive can assist the appellants, as ultimately Mr de Mello accepted.

The Immigration (European Economic Area) Regulations 2016

41. It is clear that the appellants do not have either a right to reside in the UK or a right of entry under the 2016 Regulations.

42. Where Regulation 9 applies to a family member, her British spouse (or parent) is to be treated as holding a valid passport issued by an EEA state other than the UK. The effect of this provision is to enable the family member to exercise the same rights of freedom of movement, including residence in the United Kingdom, as a family member of any EEA national. However, Regulation 9 only applies where the residence of the family member and the British citizen together in the EEA state was "genuine". It does not

apply to the appellants because, on the unchallenged findings of the FTT, their residence with Mr Singh for 19 days was not "genuine" (Reg 9(2)(c)). Moreover, Regulation 9 expressly does not apply where, as here, the purpose of residence in the EEA state was to circumvent the United Kingdom immigration laws to which the appellants would otherwise have been subject (Reg 9(4)(a)).

43. Mr de Mello was therefore right not to suggest that Regulation 9 can assist the appellants.

44. Regulation 11 is concerned with rights of entry. It provides that a family member of an "EEA national" must be admitted to the UK if she produces on arrival a valid EEA residence card. However, as the Upper Tribunal pointed out, "EEA national" is defined as "a national of an EEA State who is not also a British citizen" (Reg 2(1)). Mr Singh is a British citizen so Regulation 11 cannot apply to the appellants. Mr de Mello submitted that Regulation 11 should be interpreted in conformity with (what he submitted was the effect of) EU law, but there is no process of "interpretation" which would enable the court to ignore the definition of "EEA national" in Regulation 2(1).

45. So far, therefore, as a matter of the terms of the 2016 Regulations, there can be no doubt that the Upper Tribunal was right to reverse the decision of the FTT. In order to succeed the appellants must therefore show that they are entitled under EU law to more extensive rights than those contained in the 2016 Regulations.

Council Directive 2004/38/EC

46. The obvious place to look for such rights is the Citizenship Directive which (as Article 1(a) explains) "lays down the conditions governing the exercise of the right of free movement and residence within the territory of member states by Union citizens and their family members".

47. Rights of residence are dealt with in Article 6 (rights of residence for a period up to 3 months) and Article 7 (rights of residence for a longer period for workers, the self-sufficient and students). These articles deal with the rights of Union citizens (and their family members) in member states *other than* the citizen's home state: *McCarthy v SSHD* Case C-434/09 [2011] ECR I-3375 at [29], [2011] All ER (EC) 729, and *O v Minister voor Immigratie, Integratie en Asiel* at [29] and [37] to [43]. In the latter case the CJEU stated (emphasis added):

> "37. **It follows from a literal, systemic and teleological interpretation of Directive 2004/38 that it 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.**
>
> 38. Article 3(1) of Directive 2004/38, defines the 'beneficiaries' of the rights conferred by it as 'all Union citizens who move to or reside in a member state other than that of which they are a national, and … their family members as defined in [article 2(2)] who accompany or join them'.

> 39. Accordingly, Directive 2004/38 establishes a derived right of residence for third country nationals who are family members of a Union citizen, within the meaning of article 2(2) of that Directive, only where that citizen has exercised his right of freedom of movement by becoming established in a member state other than the member state of which he is a national: see *Metock's* case, para 73; *Dereci v Bundesministerium für Inneres* (Case C-256/11) [2011] ECR I-11315; [2012] All ER (EC) 373, para 56; *Iida's* case, para 51; and para 41 below.
>
> 40. Other provisions of Directive 2004/38, in particular article 6, article 7(1)(2) and article 16(1)(2), refer to the right of residence of a Union citizen and to the derived right of residence conferred on the family members of that citizen either in 'another member state' or in 'the host member state' and thus confirm that a third country national who is a family member of a Union citizen cannot invoke, on the basis of that Directive, a derived right of residence in the member state of which that citizen is a national: see *McCarthy's* case, para 37; and *Iida's* case, para 64.
>
> 41. As regards the teleological interpretation of Directive 2004/38, it should be borne in mind that whilst it is true that Directive 2004/38 aims to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the member states that is conferred directly on each citizen of the Union, the fact remains that the subject of the Directive concerns, as is apparent from article 1(a), the conditions governing the exercise of that right: *McCarthy's* case, para 33.
>
> 42. Since, under a principle of international law, a state cannot refuse its own nationals the right to enter its territory and remain there, **Directive 2004/38 is intended only to govern the conditions of entry and residence of a Union citizen in a member state other than the member state of which he is a national**: see *McCarthy's* case, para 29.
>
> 43. In those circumstances and having regard to what is said in para 36 above, **Directive 2004/38 is therefore also not intended to confer a derived right of residence on third country nationals who are family members of a Union citizen residing in the member state of which the latter is a national**."

48. Thus the Directive itself confers no right to reside in the United Kingdom on the appellants.

49. I come now to Article 5 of the Directive, on which the appellants rely. It provides that member states shall grant leave to enter to family members of a Union citizen without requiring an entry visa or equivalent formality. Possession of a residence card issued by a member state exempts family members from the requirement to have an entry visa. In *McCarthy v SSHD (No. 2)* the CJEU held that Article 5 (unlike Articles 6 and 7) is

not limited to states other than the Union citizen's home state but applies also to the conditions for entry by a family member to the Union citizen's home state:

> "41. Article 5 of Directive 2004/38 refers to 'member states' and does not draw a distinction on the basis of the member state of entry, in particular in so far as it provides that possession of a valid residence card as referred to in article 10 of the Directive is to exempt family members of a Union citizen who are not nationals of a member state from the requirement to obtain an entry visa. Thus, there is nothing at all in article 5 indicating that the right of entry of family members of the Union citizen who are not nationals of a member state is limited to member states other than the member state of origin of the Union citizen.
>
> 42. Accordingly, it must be held that, pursuant to article 5 of Directive 2004/38, a person who is a family member of a Union citizen and is in a situation such as that of Ms McCarthy Rodriguez is not subject to the requirement to obtain a visa or an equivalent requirement in order to be able to enter the territory of the Union citizen's member state of origin."

50. However, this decision does not mean that the effect of Article 5 is to confer a right to reside on a family member of a Union citizen merely because that family member is in possession of a residence card:

(1) Rights of residence were not in issue in *McCarthy (No. 2)*. Mr McCarthy (a British citizen) and his wife were resident and wished to remain resident in Spain. Nor was there any issue about rights of entry. It was not disputed that the family member, Ms McCarthy Rodriguez, had a right of entry. The only question was whether, in order to exercise that right, she was required to go through the tedious and inconvenient formality of obtaining a "family permit" in advance every time she wished to accompany her husband on a visit to the United Kingdom. That would have required her to travel from their home in Marbella to the United Kingdom diplomatic mission in Madrid. The CJEU held that she was not required to do this and that the United Kingdom was not entitled to impose such a requirement as a general measure under Article 35 of the Directive, without regard to the circumstances of the individual family member, because of a concern about widespread abuse by those wishing enter this country, for example sham marriages.

(2) It is in any event apparent from the terms of Article 5 considered as a whole, which I have set out above, that the Article is concerned with the documents which must be produced by a person having a right of entry. See for example the terms of Article 5.4. It does not purport to confer any new right of entry, let alone residence.

(3) It would make no sense to say that a person has a right of entry but not a right to reside. The two are inextricably linked. Thus, as Article 10 of the Directive makes clear, the purpose of a residence permit to a family member is to evidence a right of residence. When asked what the appellants would be entitled to do in the United Kingdom once they had exercised a right of entry, Mr de Mello could

only say that they would be entitled to reside here for a period of up to three months in accordance with Article 6. But as the citation from *O v Minister voor Immigratie, Integratie en Asiel* set out above demonstrates, Article 6 does not confer any such right on a family member in the Union citizen's home state.

(4) To have held that an unqualified right of entry for the family member of a Union citizen in the latter's home state (or for that matter in any member state as the decision in *McCarthy (No. 2)* was that Article 5 draws no distinction between different member states) can be derived from Article 5 would have run counter to the scheme of Articles 6 and 7 with their careful distinction between temporary residence and more permanent residence for the purpose of exercising rights of free movement.

51. Accordingly the decision in *McCarthy (No. 2)* is solely concerned with the procedural question of the formalities with which a family member must comply in order to exercise a right of entry. It has no bearing on the present case and does not confer a right of entry on a person who has no right to come here.

52. I note that this understanding of *McCarthy (No. 2)* accords with the analysis of Lang J in *Benjamin v SSHD* [2016] EWHC 1626 (Admin). She said:

> "83. Accordingly, while *McCarthy* establishes that it is unlawful for the Defendant to insist on the possession of an EEA family permit by a family member of a UK citizen seeking to enter the UK, where that family member holds a valid residence card under Article 10 of the Directive, it remains lawful for the Defendant to determine, before granting entry, whether the family member in question in fact fulfils the conditions for entry provided by EU law. The legal position as clarified in *McCarthy* is reflected in regulations 11(2)(a) and 19(2)(b) of the 2006 Regulations, which together make clear that the family member of an EEA national may be admitted to the UK on presentation of a valid passport and a 'qualifying EEA state residence card', but only provided that the EEA national has a 'right to reside in the United Kingdom under these Regulations'. The relevant regulation in this case was regulation 9."

Article 21(1) TFEU

53. However, the terms of the Directive are not an exhaustive statement of a family member's right to enter and reside in an EU state. In some circumstances, even where the terms of the Directive itself do not apply, they have been held to apply "by analogy" in order to render effective the fundamental Treaty provisions concerning free movement.

54. This can be seen in *O v Minister voor Immigratie, Integratie en Asiel*. O, a Nigerian national, was resident in Spain and had a Spanish residence card. He was married to a Dutch citizen, who lived in the Netherlands. She lived with him in Spain for two months after their marriage, but otherwise only visited him there for holidays. He sought the right to reside in the Netherlands, his Union citizen spouse's home state. The position of O was therefore very similar to that of Mrs Kaur.

55. The CJEU held that O could not rely on Articles 6 and 7 of the Directive as they are concerned with the legal situation of the Union citizen in a member state of which the citizen is not a national (see [29] and [37] to [43], quoted above).

56. However, there could be a derived right of residence for a family member based on Article 21 TFEU, the basic Treaty provision concerning freedom of movement. That would arise because to deny a right to reside in the Union citizen's home state to a family member could act as a deterrent to the exercise of freedom of movement by the Union citizen (see [49]). For example, a French citizen might be deterred from going to work in Germany by the thought that, if he developed a family life in Germany, his family members might not be able to accompany him when he returned home to France. This is the *Surinder Singh* principle. In such circumstances, although the Directive did not apply directly, it should be applied "by analogy":

> "50. So far as concerns the conditions for granting, when a Union citizen returns to the member state of which he is a national, a derived right of residence, based on article 21(1)FEU, to a third country national who is a family member of that Union citizen with whom that citizen has resided, solely by virtue of his being a Union citizen, in the host member state, those conditions should not, in principle, be more strict than those provided for by Directive 2004/38 for the grant of such a right of residence to a third country national who is a family member of a Union citizen in a case where that citizen has exercised his right of freedom of movement by becoming established in a member state other than the member state of which he is a national. Even though Directive 2004/38 does not cover such a return, it should be applied by analogy to the conditions for the residence of a Union citizen in a member state other than that of which he is a national, given that in both cases it is the Union citizen who is the sponsor for the grant of a derived right of residence to a third country national who is a member of his family."

57. However, for this analogy to operate, the residence of the Union citizen in the host member state had to be "sufficiently genuine so as to enable that citizen to create or strengthen family life in that member state":

> "51. An obstacle such as that referred to in para 47 above will arise only where the residence of the Union citizen in the host member state has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that member state. Article 21(1) TFEU does not therefore require that every residence in the host member state by a Union citizen accompanied by a family member who is a third country national necessarily confers a derived right of residence on that family member in the member state of which that citizen is a national on the citizen's return to that member state."

58. As the CJEU put it at [56]:

> "Accordingly, it is genuine residence in the host member state of the Union citizen and of the family member who is a third country national, pursuant to and in conformity with the conditions set out in article 7(1)(2) and article 16(1)(2) of Directive 2004/38 respectively, which creates, on the Union citizen's return to his member state of origin, a derived right of residence, on the basis of article 21(1) FEU, for the third country national with whom that citizen lived as a family in the host member state."

59. The CJEU added at [60]:

> "So far as concerns Mr O, who, according to the order for reference, holds a residence card as a family member of a Union citizen pursuant to article 10 of Directive 2004/38, it should be borne in mind that Union law does not require the authorities of a member state of which the Union citizen in question is a national to grant a derived right of residence to a third country national who is a member of that citizen's family because of the mere fact that, in the host member state, that third country national held a valid residence permit. … A residence card issued on the basis of article 10 of Directive 2004/38 has a declaratory, as opposed to a constitutive, character …"

60. It is unnecessary in this appeal to consider what counts as "genuine" or "sufficiently genuine" residence. A derived right of residence on the basis of Article 21(1) TFEU is not available to the appellants in view of the unchallenged (and, I would add, unsurprising) findings of fact by the FTT that their residence with Mr Singh in Bulgaria was not genuine and that there was no creation or fortification of family life there.

61. Moreover, the CJEU's statement at [60] that the mere possession of a Spanish residence permit did not provide Mr O with a right to reside with his spouse in her home state applies equally to the appellants. There is nothing in the decision to suggest that a family member whose residence in another member state is not "genuine" has a right to enter or reside in the Union citizen's home state merely because of possession of a residence permit and [60] of the judgment is inconsistent with any such suggestion.

62. Mr de Mello submitted that *O v Minister voor Immigratie, Integratie en Asiel* can be distinguished on the basis that the sponsor in that case, Mrs O, was not exercising Treaty rights in Spain. While that may be a point of factual distinction, it played no part in the reasoning of the CJEU, which was as I have summarised it above.

63. There is in my judgment no basis for thinking that the CJEU in *McCarthy (No. 2)* intended to overrule the decision in *O v Minister voor Immigratie, Integratie en Asiel*. It did not say so and the two cases were dealing with very different issues. *O v Minister voor Immigratie, Integratie en Asiel* is referred to repeatedly in the *McCarthy (No. 2)* judgment (see [31], [34], [36], [54] and [62]), at one point being cited as "settled case law", while at [62] the CJEU even referred to [60] of the judgment in *O v Minister voor Immigratie, Integratie en Asiel* as confirming that residence permits issued on the basis of EU law declare and do not create rights. It added that "the fact remains that … the member states are, in principle, required to recognise a residence card issued under

article 10 of Directive 2004/38, for the purposes of entry into their territory without a visa", going on to say at [63] and [64] that the United Kingdom was entitled to verify the correctness of the data appearing on the Spanish residence permit in that case, although it could not impose further conditions on entry additional to those provided for by EU law.

64. In the present case, therefore, the United Kingdom was entitled to investigate whether the appellants had a right to enter and to conclude that, because their residence in Bulgaria was not "genuine", they did not.

Later authorities

65. Moreover, cases decided after *McCarthy (No. 2)* have continued to adopt the analysis in *O v Minister voor Immigratie, Integratie en Asiel*. See *Coman v Inspectoratul General pentru Imigrari* Case C-673/16 [2019] 1 WLR at [20], [23] and [24] and Case C-89/17 *SSHD v Banger* [2019] 1 CMLR 6 (extending the reasoning to same sex and unmarried partners of a Union citizen).

Conclusions

66. In the light of the discussion above I return to the way in which Mr de Mello puts the appellants' case, as summarised above. I accept the first step in his argument (that Mr Singh was exercising Treaty rights as a worker in Bulgaria) and I am prepared to assume (without deciding) that the appellants were his "family members" who had joined him there and were therefore "beneficiaries" of the Directive within the meaning of Article 3.

67. However, even accepting this, the question remains whether the Directive conferred relevant rights upon them. Undoubtedly it conferred some rights, for example (subject to any question of abuse) a right to reside with Mr Singh in Bulgaria while he was exercising Treaty rights there. But it did not confer on them a right to reside in the United Kingdom, Mr Singh's home state, because (as I have explained) Articles 6 and 7 do not confer any such right. Nor did it confer on them any right of entry to the United Kingdom pursuant to Article 5, whether characterised as "free-standing" or otherwise, because Article 5 confers no such rights, but rather is concerned with the documents which must be produced by a person who has such a right.

68. Further, the appellants cannot benefit from any application of the Directive "by analogy". The findings of the FTT rule out any such possibility.

69. For these reasons I conclude that the Upper Tribunal reached the right conclusion. The appellants did not have the right to enter pursuant to the 2016 Regulations. Nor do they have any more extensive right to enter under the provisions of EU law which the 2016 Regulations have failed to confer on them.

The Respondent's Notice – Abuse of rights

70. If the analysis above is correct, that is sufficient to dismiss the appeal. It is therefore unnecessary to say anything about the principle of abuse of rights pursuant to Article 35 of the Directive, on which we did not hear oral argument.

Disposal

71. I would dismiss the appeal.

Lord Justice Baker:

72. I agree.

Lord Justice Leggatt:

73. I also agree.