Unmarried partners recognised under the 'Surinder Singh' route (Banger v Secretary of State for the Home Department)

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Immigration analysis: Does the Surinder Singh rationale apply to the unmarried partner of a British citizen? Anthony Metzer QC and Sanaz Saifolahi, barristers of Goldsmith Chambers who represented the applicant, look at the ruling of the Court of Justice of the European Union in the ground-breaking case of Banger v Secretary of State for the Home Department.

Banger v Secretary of State for the Home Department Case C-89/17, [2018] All ER (D) 70 (Jul)

What was the background?

Ms Banger is a citizen of South Africa. Her partner, Mr Philip Rado, is a British citizen. In May 2010, Mr Rado accepted employment in the Netherlands. He lived together with Ms Banger in the Netherlands until 2013, where she obtained a residence card in her capacity as an 'extended family member' of a Union citizen.

In 2013, Ms Banger and Mr Rado decided to move together to the UK. Ms Banger applied for a residence card, which was refused on the sole ground that she was the unmarried partner of Mr Rado and that the Immigration (European Economic Area) Regulations 2006 (EEA Regs 2006) SI 2006/1003, reg 9, provided that only the spouse or civil partner of a British citizen could be considered a family member of that person.

The following questions were referred to the Court of Justice:

> '(1) Do the principles contained in the [judgment of 7 July 1992, *Singh* (Case C-370/90)], 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 an EU citizen who, having exercised his [Treaty on the Functioning of the European Union (TFEU)] right of freedom of movement to work in a second Member State, returns with such partner to the Member State of his nationality?
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> (2) Alternatively, is there a requirement to issue or, alternatively, facilitate the provision of such residence authorisation by virtue of [Directive 2004/38/EC (freedom of movement in the EU)]?
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> (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 [Directive 2004/38]?
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> (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 [Directive 2004/38]?'

What did the court decide?

In accepting all of the arguments presented on behalf of Ms Banger, the Court of Justice held, for the first time, that the *Surinder Singh* rationale (*R v Immigration Appeal Tribunal and another, ex parte Secretary of State for the Home Department* Case C-370/90, [1992] 3 All ER 798) applies to the unmarried partner of a British citizen. The legal basis for this finding can be located in Article 21 TFEU. The court found that Article 21 TFEU applies to extended family members by analogy.

In addition, the court found that the refusal of a residence card must follow after an extensive examination of an applicant's personal circumstances and must be justified by reasons. Finally, on the issue of appeal rights, the court held that the redress procedure must enable a full assessment of the facts and involve an extensive examination of the applicant's personal circumstances.

The court ruled as follows:

> '1. Article 21(1) TFEU must be interpreted as requiring the Member State of which a Union citizen is a national to facilitate the provision of a residence authorisation to the unregistered partner, a third-country national with whom that Union citizen has a durable relationship that is duly attested, where the Union citizen, having exercised his right of freedom of movement to work in a second Member State, in accordance with the conditions laid down in Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States…returns with his partner to the Member State of which he is a national in order to reside there.
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> 2. Article 21(1) TFEU must be interpreted as meaning that a decision to refuse a residence authorisation to the third country national and unregistered partner of a Union citizen, where that Union citizen, having exercised his right of freedom of movement to work in a second Member State, in accordance with the conditions laid down in Directive 2004/38, returns with his partner to the Member State of which he is a national in order to reside there, must be founded on an extensive examination of the applicant's personal circumstances and be justified by reasons.
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> 3. Article 3(2) of Directive 2004/38 must be interpreted as meaning that the third-country nationals envisaged in that provision must have available to them a redress procedure in order to challenge a decision to refuse a residence authorisation taken against them, following which the national court must be able to ascertain whether the refusal decision is based on a sufficiently solid factual basis and whether the procedural safeguards were complied with. Those safeguards include the obligation for the competent national authorities to undertake an extensive examination of the applicant's personal circumstances and to justify any denial of entry or residence.'

What are the practical implications of this case?

The case is significant because it means the Secretary of State for the Home Department has wrongly refused Ms Banger's residence card and has been wrongly refusing *Surinder Singh* applications on the basis that applicants are unmarried partners at the relevant time.

In addition, it is anticipated that the current regulations in this area, the Immigration (European Economic Area) Regulations 2016, SI 2016/1052, (EEA Regs 2016) will need to be amended as a consequence of this judgment.

In respect of appeal rights, while the Court of Justice is silent on whether judicial review is adequate redress, the judgment is very helpful in that it clarifies that the national court must be able to undertake a review of the facts as well as the law, and must be able to undertake an extensive examination of the personal circumstances of the applicant. Judicial review is a review of the lawfulness of a decision, and is a challenge to the decision-making process. It is difficult to see how judicial review could enable an extensive examination of the facts and the law, and thus how it could be an adequate remedy. This analysis will now need to be tested in the UK courts.

Unmarried partners of British citizens who benefit from the judgment will want to make an application for a residence card relying on the *Surinder Singh* rationale as soon as possible. In relation to appeal rights, it is anticipated that unless the UK amends the EEA Regs 2016 to restore appeal rights at the tribunal for extended family members, further challenges will need to be brought to test whether judicial review is an adequate remedy.

Interviewed by Evelyn Reid.

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