

Secretary of State for the Home Department v Banger (C-89/17)

European Court of Justice (Fourth Chamber)

12 July 2018

Case Analysis

Where Reported

EU:C:2018:570; [2018] I.N.L.R. 628; Times, October 23, 2018;

Case Digest

Subject: Immigration

Keywords: Freedom of movement; Immigration; Residence permits; Right to effective remedy; Unmarried couples

Summary: Where an EU citizen returned to his Member State of origin, that Member State had to facilitate the entry and residence of the citizen's non-EU partner with whom he had created or strengthened family ties in another Member State. The partner might be accorded a derived right of residence under TFEU art.21 and the conditions under which such a right should be granted must not, in principle, be stricter than those provided for by [Directive 2004/38](#). A decision to refuse a residence authorisation therefore had to be founded on an extensive examination of the partner's personal circumstances and be justified by reasons.

The ECJ was requested by a UK court to give a preliminary ruling concerning the interpretation of [Directive 2004/38](#). The request was made in the context of proceedings where Ms Bangor, a South African national, objected to the decision by the UK competent authorities rejecting her application for a residence card on the basis that she was the unmarried partner of Mr Rado, a UK national. Ms Banger and Mr Rado had lived in South Africa between 2008 and 2010 before moving to the Netherlands, where they lived for 5 years. Ms Banger was granted a Dutch residence card in her capacity as an extended family member of an EU citizen. In 2013, the couple moved to the UK, but, on the basis of UK legislation transposing Directive 2004/38 and providing for the rights of family members of UK nationals returning to that Member State after having exercised free movement rights, Ms Banger's residence request was refused since she was not married to Mr Rado at the time her application was made. According to the relevant UK legislation ([Immigration \(European Economic Area\) Regulations 2006](#)), an applicant must either be the spouse or civil partner of the British national to qualify as a family member of a British citizen.

The UK court hearing the case referred a number of questions concerning the compatibility of the UK decision with EU law. Specifically, it referred to the Surinder Singh principle which provided that a non-EU national could apply for an EEA family permit if he/she had lived in another EEA country with an eligible family member who was a British citizen (R. v Immigration Appeal Tribunal Ex p. Secretary of State for the Home Department, Case C-370/90). The British citizen must, however, be a spouse or civil partner, the parent, grandparent or child of the applicant. The UK court asked whether that principle must also apply to the non-married partner of a EU citizen. Further, the referring court asked whether a decision to refuse a residence authorisation breached Directive 2004/38 when it was not founded on an extensive examination of the personal circumstances of the applicant.

Derived right of residence - The ECJ first pointed out that [Directive 2004/38](#) governed only the conditions determining whether an EU citizen could enter and reside in Member States other than that of which he was a national. That directive could therefore not confer a right on Ms Banger for her application for residence authorisation to be facilitated by the UK, her partner's Member State of origin. However, in accordance with the court's case-law, non-EU family members of an EU citizen may be accorded a derived right of residence in the Member State of which that citizen was a national, on the basis of [TFEU art.21](#) which directly conferred on EU citizens the right to move and reside freely within the EU. An EU citizen would be discouraged from leaving his home Member State if he was uncertain whether he would be able to continue in his Member State of origin a family life which had been created or strengthened, with the non-EU national, in the host Member State, during a genuine residence. The court further stated that the conditions under which such a derived right of residence may be granted must not, in principle, be stricter than those provided for by Directive 2004/38. Consequently, in a situation such as the one concerned, that directive must be applied by analogy. Under that directive, the host Member State must facilitate entry and residence for the partner with whom the EU citizen had a durable relationship. This accordingly also applied where the EU citizen had exercised his right of freedom of movement and returned with his partner to the Member State of which he was a national.

Grounds for refusing residence to non-EU nationals having a durable relationship with an EU citizen - The ECJ noted that the Member States were not required to accord a right of entry and residence to non-EU nationals having a durable relationship with an EU citizen, but were only under an obligation to confer a certain advantage on applications submitted by those nationals, compared with applications of other nationals of non-EU countries. However, given that Directive 2004/38 applied by analogy to the case in which an EU citizen returned to his Member State of origin, a decision to refuse a residence authorisation to the non-EU national and unregistered partner of an EU citizen must be founded on an extensive examination of the applicant's personal circumstances and be justified by reasons.

Redress procedure - Since Directive 2004/38 had to be interpreted in a manner which complied with the requirements flowing from the EU Charter of Fundamental Rights art.47, non-EU nationals must have available to them a redress procedure to challenge the decision to refuse them a residence authorisation. In that context, the national court must be able to ascertain whether the refusal decision was based on a sufficiently solid factual basis and whether the procedural safeguards were complied with.

Judge: Judge von Danwitz (President)

Significant Legislation Cited

[Directive 2004/38](#)

[Immigration \(European Economic Area\) Regulations 2006 \(SI 2006/1003\)](#)

[TFEU \(2008\) Preamble art.21](#)

Legislation Cited

[Directive 2004/38](#)

[Immigration \(European Economic Area\) Regulations 2006 \(SI](#)

[2006/1003\)](#)

[TFEU \(2008\) Preamble art.21](#)

Journal Articles

Where EU citizen returns home, entry and residence of non-EU partner to be facilitated

EU law; EU nationals; Foreign nationals; Freedom of movement; Rights of entry and residence; Unmarried couples.

[EU Focus 2018, 370, 15-16](#)

Immigration, extradition, deportation and asylum

Asylum seekers; Children; Cyprus; EU nationals; Family reunification; Freedom of movement; Immigration; Refugees; Rights of entry and residence.

[P.L. 2018, Oct, 764-766](#)

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