Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/14646/2014**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 30 January 2019 **On 13 March 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

SATYA DEV SHARMA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Mold, Counsel, instructed by MT UK Solicitors
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a widower age 84, has permission to challenge the decision of Judge Kimnell of the First-tier Tribunal (FtT) sent on 28 August 2018 dismissing his appeal against the decision made by the respondent on 12 March 2014 to refuse to issue a residence card as confirmation of the right of residence under EU law as father-in-law of an EEA national exercising treaty rights in the UK. The vintage of the decision is a result of there having been an earlier decision of the FtT promulgated on 11 December 2014 dismissing his appeal; a decision made by Upper Tribunal Rimington finding an error of law in that determination confined to the issue of dependency: and a consent order by the Court of Appeal directing that there should be a hearing before the FtT de novo on all issues.

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2. The basis of the appellant's application is that he qualifies as a direct family member by virtue of being a dependent on his son-in-law who was exercising treaty rights in Belgium but has not returned to the UK. It is not in dispute in this case that the appellant has never lived with his son-in-law in Belgium. Nor is it in dispute that he is a dependent direct relative in the ascendant line and so a "direct family member".

3. Judge Kimnell noted at paragraph 8 that the respondent did not challenge the evidence that the appellant's son-in-law and sponsor Mr Tramboo, has been exercising Treaty rights in Belgium. At paragraph 8 Judge Kimnell said that as a result the appeal was confined to two matters, namely whether or not regulation 9(2) of the Immigration (European Economic Area) EEA Regulations applies in this case; and whether or not the "Centre of Life Test" in regulation 9(3) was satisfied. I should clarify that it is common ground that the applicable Regulations are the Immigration (European Economic Area) Regulations 2006 as amended from 1 January 2014, **not** the Immigration (European Economic Area) Regulations 2016 (the text of the new regulation 9(1)-(3) is set out below in a footnote to paragraph 15).

4. Having considered the evidence, the judge found at paragraph 17 that the appellant did meet the "Centre of Life" requirement of regulation 9(2)(c). At paragraphs 18 and 19, the judge stated:

> "18. The real question on which this case turns is regulation 9(2)."

Regulation 9 (1)-(2), as it applied at the date of the decision under appeal[1], is reproduced at paragraph 9 of Mr Mold's skeleton argument as follows:

> '9. **Family Members of British Citizens**
>
> (1)If the conditions in paragraph (2) are satisfied these Regulations apply to a person who is a family member of a British citizen as if the British citizen (P) were an EEA national.
>
> .. . (2)The conditions are that=
>
> (a) P is residing in an EEA State as a worker or self-employed person or was so residing before returning to the United Kingdom;
>
> (b) If the family member of P is P's spouse or civil partner, the parties are living together in the EEA State or had entered into the marriage or civil partnership and were living together in the EEA State before the British citizen returned to the United Kingdom; and

[1] Regulation 9 was substituted from 1 January 2014, subject to transitional provisions (SI/2013/3032)

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

5. Judge Kimnell concluded that regulation 9(2)(b) applied to the appellant and contained a test that the appellant could not meet because he had never lived with his son-in-law in Belgium. At paragraph 20 the judge recorded:

> "20. It appears obvious from a plain reading of regulation 9 that this applies to all family members in sub-sub-paragraphs (a)-(c), but in the case of a family member who is a spouse of a civil partner, not only must that family member have been residing in the EEA State, but must in addition have been living 'together' in that EEA State with the UK citizen wo is residing there. The provision is clearly designed to prevent a person who is separated from the UK national from taking advantage of the provision in order to gain admission to the United Kingdom when in reality there is no substance to the marital relationship with the UK sponsor."

6. Judge Kimnell added a further reason at paragraphs 25 and 26 why he considered his reading of regulation 9(2)(b) to be the correct one.

> "25. From the facts it is perfectly obvious that the appellant's son-in-law, Mr Tramboo, has not in any way been prevented or impeded or discouraged from exercising free movement rights as an EEA national, hence his decision to live on his own and work in Belgium, so it is not the case that the appellant was returning from another European country to the United Kingdom with his son-in-law, keeping the family intact. The appellant and his son-in-law never lived together in Belgium and of course the underlying purpose of Regulation 9 is to permit freedom of movement.
>
> 26. Mr Mold made the point that a Member State is entitled to adopt national Regulations that go further than European directives require but I do not think that the intention of regulation 9, as I have said, did intend to go further. The intention was to impose an additional requirement that in the case of a spouse of civil partner the two people in question had not only to be living in the European country before return to the UK, but also living together in that European country."

7. The appellant's grounds of appeal maintain that the judge misconstrued regulation 9(2). Regulation 9(2)(b) only applied to spouses and civil partners and so did not apply to the appellant. As the judge had accepted that the appellant met the conditions set out in regulation 9(2)(c), he came within regulation 9. In amplifying the written grounds, Mr Mold submitted that the language of regulation 9(2)(b) was clear and explicit and must therefore be given effect.

8. I heard full submissions from both Mr Mold and Mr Kotas. Both agreed that the only live issue concerned regulation 9(2)(b). It was agreed that Judge Kimnell's decision finding that the appellant met the Centre of Life conditions set out in regulation 9(2)(c) was not the subject of challenge by either party. It was not in dispute that the appellant met the condition set out in regulation 9(2)(a) by virtue of his son in law exercising Treaty Rights in Brussels.

9. Mr Kotas urged that I endorse the point made by Judge Kimnell in paragraph 25 that the regulation was only intended to assist those family members whose free movement would be prevented or impeded or discouraged, which, he submitted, was not the case on the facts of this case. He prayed in aid the Upper Tribunal decision in **Osorio** [2015] UKUT 593 (IAC**)**. He pointed out that the Regulation transposed the Citizens Directive 2004/38/EC and that it was Article 7 of that Directive wherein the EU legislator set out the rights of direct family members and it imposed a requirement of "accompanying or joining". Mr Mold contended that the Directive did not address the issue of the rights of direct family members of EU nationals returning to their own Member States. Such rights had only been identified by the Court of Justice in **Surinder Singh** [1992] ECR I-4265 and later cases. The Court of Justice in **Surinder Singh** had derived such a right, not from the Directive, but from EU primary law. Whether or not the UK government and Parliament when enacting the EEA Regulations had intended to simply give effect to Court of Justice rulings or be more generous, there was no basis for attempting to construe regulation 9(2)(b)purposively, when its ordinary meaning was unequivocal.

10. During the hearing both parties made reference to the respondent's policy guidance, Free Movement Rights: Direct Family Members of EEA Nationals, Version 6, 24 July 2018. Neither, however, could produce the document. At the end of the hearing I gave an oral direction that the respondent produce it together with any equivalent documents in existence since January 2014 (the month when the respondent first made her decision) and I also directed that the respondent have a specified period to make further submissions regarding it and that the appellant's representative have a further specified period to respond. I received responses from Mr Kotas and Mr Mold and I have taken both into account in reaching my decision.

My analysis

11. In my judgement, the wording of regulation 9(2)(b) is clear and unambiguous and as a result I must construe it in accordance with its plain and ordinary meaning. Not only is the meaning of regulation 9(2)(b) clear on its face, but there would have been no point in the drafters limiting its personal scope to "P's spouse or civil partner" if they had meant to include all categories of direct family members. If that had been the meaning intended, they would simply have referred to "P's [direct] family member."

12. Mr Kotas submits that Mr Mold's argument as to the meaning of regulation 9(2)(b) relies on an absence of wording to justify his proposed construction. I cannot agree. The express wording of regulation 9(1) provides that the Regulations will apply to a family member of a British citizen if the conditions in regulation 9(2) are met. Regulation 9(2) sets out expressly the conditions that

need to be met and these confine the personal scope of regulation 9(2)(b) to spouses and civil partners. As such the conditions specified in regulation 9(2)(b) cannot be applied to direct family members who are not spouses and civil partners.

13. There being no lack of linguistic clarity about the plain and ordinary meaning of regulation 9(2)(b), it is not open to me to apply a purposive approach.

14. Mr Kotas is right to point out that the Court of Justice when construing the Directive has highlighted the importance of Member States avoiding measures that would have a deterrent effect on EU nationals exercising their treaty rights (he cited in this connection the case of C-456/12 **O and B** at paragraphs 48 and 49), but that cannot assist me in construing a domestic provision that is clear and unambiguous. Even though the 2006 Regulations were introduced to transpose the Directive, Article 37 of that Directive permits Member States to enact national law measures that are more generous. What I have to interpret is not the Directive, but the 2006 Regulations. Accordingly, the fact that the sponsor in this appeal has never been discouraged from leaving the UK to work in Belgium because of the position of his father-in-law is irrelevant.

15. I do not consider Mr Kotas can derive any assistance from **Osorio** since at paragraph 20 of that case it was not in dispute that the appellant could not meet the requirements of regulation 9. (In any event if the analysis in Osorio is at odds with mine, I most respectfully disagree with it). Nor do I consider that Mr Kotas's submission that the appellant's position, if accepted, would create unjustified discrimination between spouses and other family members, gets anywhere, since as already stated, it is the text of regulation 9(2)(b) that creates the discrimination (if any).

16. It can only be a point of secondary relevance going to the legislative context, but it is instructive that the respondent has now amended regulation 9 so that in the 2016 Regulations, the requirement to have been "residing in an EEA State" with the EEA national exercising treaty rights in another Member State is imposed on all direct family members: see the new regulation 9(1) and (2), applicable to decisions taken after 25 November 2016[2]. If Mr Kotas's submission were correct, such amendment would not have been necessary. Insofar as it might be suggested that the amendment was purely intended to

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[2]" **9.**—(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 an 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."

be clarificatory, that presupposes agreement that the previous text was unclear, which I have rejected.

17. Can any assistance be derived from the Home Office guidance on direct family members? From the further responses, I received from the parties, it is clear that the only relevant Home Office guidance is the 2014 Guidance, European Economic Area (EEA) and Swiss nationals: free movement rights, v10.0EXT valid from 24 February 2014. The 25 October 2017 and the 24 July 2018 Guidance relate to a differently formulated version of regulation 9 applicable only in respect of decisions taken after 25 November 2016: see footnote 2.

18. For the most part, the 2014 Guidance mirrors the text of regulation 9 (as it then was). Whilst at page 34 this Guidance states that direct family members must have been living with the British national as part of their household, this is followed by the sentence: "[f]or information on conditions to be satisfied by family members of British nationals from outside the EAA, you must read regulation 9…". . Somewhat confusingly, the guidance given later at p.37 makes no mention of a condition that the family member must have lived with the British national exercising treaty rights in another Member States.

19. Taking into account internal confusion in this Guidance, I do not see that it assists the respondent's case regarding the constraints of regulation 9(2), since what is said at p.37, which states that it describes the principles established in **Surinder Sing**h, at least casts doubt on Mr Kotas' view that the intentions behind regulation 9(2) must have been to impose a requirement that all direct family members had to show they had lived together with the EEA national before returning to their own Member State.

20. Even if I had found the 2014 Guidance to be crystal clear in maintaining that direct family members must have been living with the British national as part of their household in another Member State, I would have concluded that, in line with established principles of case law (see e.g. **Ahmed Mahad and others** [2009] UKSC 16), it is inappropriate to use such guidance as an aid to interpretation of a domestic provision that is clear and unambiguous.

21. For the above reasons, I conclude that the judge materially erred in law.

22. For the above reasons I conclude that the FtT judge materially erred in law.

23. It follows from my analysis that I can proceed straightforwardly to re-make the decision on this appeal by determining that the appellant fully met the applicable conditions of regulation 9(2). As already noted, the respondent concedes that this is the only live issue as it was previously accepted that the appellant met the test relating to exercise of treaty rights by the son-in-law in another member state, set out at regulation 9(2)(a) and also met the Centre of Life test set out in regulation 9(2)(c).

24. To conclude:

The decision of the FtT judge is set aside for material error of law.

The decision I re-make is to allow the appellant's appeal.

No anonymity direction is made.

Signed Date: 11 March 2019

Dr H H Storey
Judge of the Upper Tribunal