The BANGER extension

The case of ***Banger (EEA: EFM - Right of Appeal) [2019] UKUT 00194(IAC)*** implementing the decision of the European Court of Justice in the case of Secretary of State for the Home Department v Banger (Citizenship of the European Union - Right of Union citizens to move and reside freely within the territory of the European Union - Judgment) [2018] EUECJ C-89/17 (12 July 2018) states:

It is now established that the "***Surinder Singh*** principle operates so as to require the Secretary of State to facilitate the provision of a residence authorisation to the non-Union unmarried partner of an EU citizen".

What used to be the Surinder Singh Principle?

It can be summed as: A non-EU *partner* of a British citizen/EEA national who had exercised his EU Treaty rights in another EU state but who was now returning to his member State of origin is entitled to bring the spouse of such an EU national to enter and reside in that national's State of origin.

The Issue in Banger was whether the Surinder Singh principle extended to unmarried or extended family members (EFMs) who are third party nationals. The ECJ and the UT accepted that it this now extended unmarried partners as known as Extended Family Members.

This means that third country nationals as family members of a Union citizen, who were not eligible on the basis of the Directive for a derived right of residence, could be accorded such a right on the basis of Article 21(1) of the TFEU (see Coman and others [2018] EUECJ C-673/16 (5 June 2018)). A partner in a durable relationship and not a spouse or civil partner, was not considered to be a 'family member' as defined by Article 2(2) of Directive 2004/38/EC. However, Article 3(2) (b) of the Directive related to partners in a durable relationship and although Article 3(2) of the Directive did not require the Member States to accord a *right* of entry and residence to third country nationals who were partners in a durable relationship (in contrast with family members), it nevertheless **imposed an obligation** on those Member States to confer certain advantages on applications submitted by those third country nationals.

The ECJ at paragraph 33- 35 states:

> *'33 In a situation such as that in question in the main proceedings, Directive 2004/38, including point (b) of the first subparagraph of Article 3(2) thereof, must be applied by analogy as regards the conditions in which the entry and residence of third-country nationals envisaged by that directive must be facilitated.*
>
> *34 That conclusion cannot be called in question by the United Kingdom Government's argument according to which, in paragraph 63 of the judgment of 12 March 2014, O. and B. (C-456/12, EU:C:2014:135), the grant of a derived right of residence in the Member State of origin was confined solely to third-country nationals*

who are a 'family member' as defined in Article 2(2) of Directive 2004/38. As the Advocate General observed in point 35 of his Opinion, although in that judgment the Court held that a third-country national who does not have the status of a family member may not enjoy, in the host Member State, a derived right of residence under Directive 2004/38 or Article 21(1) TFEU, that judgment does not, however, exclude the obligation for that Member State to facilitate the entry and residence of such a national in accordance with Article 3(2) of that directive.

35 In the light of the foregoing considerations, the answer to the first and second questions is that 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, returns with his partner to the Member State of which he is a national in order to reside there.

At [52]

'In the light of the foregoing considerations, the answer to the fourth question is that 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 does Banger establish?

1. That the Surinder Singh principle now extends to unmarried known as extended family members;

2. An effective judicial remedy against a decision 'permitting a review of the legality of that decision as regards matters of both fact and law in the light of EU law' – a right of appeal – following ***SM (Algeria)(Appellant) V Entry Clearance Officer, United Kingdom Visa Section [2018] UKSC 9***;

3. Although not retrospectively applicable to applicants in transit between provisions of the 2006 – 2016 EEA regulations, it was open to applicants to submit to the First-tier Tribunal to consider whether to extend time to facilitate those appeals by applying the overriding objective under rule 2 of the 2014 Rules, which charges the Tribunal 'to deal with cases fairly and justly';

4. An extensive amendment to the EEA Regs of 2006 and 2016 by The Immigration (European Area Nationals) (EU Exit) Regulations 2019;

5. The Tribunal cannot dispose of an appeal of by way of consent under rule 39 unless the appellant did not consent to that method of disposal: ***SM (withdrawal of appealed decision: effect) Pakistan [2014] UKUT 00064 (IAC);***

6. Unreported decisions of the Upper Tribunal are persuasive and may be relied upon - obiter.

Islam Khan
Church Court Chambers
2.12.19