Upper Tribunal
(Immigration and Asylum Chamber)

OB (EEA Regulations 2006 – Article 9(2) – Surinder Singh spouse) Morocco [2010] UKUT 420 (IAC)

THE IMMIGRATION ACTS

Heard at Laganside Combined Court Centre, Belfast

Determination Promulgated

On 28 October 2010

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Before

MR JUSTICE BLAKE, PRESIDENT

MR CMG OCKELTON, VICE PRESIDENT

SENIOR IMMIGRATION JUDGE DEANS

Between

OB

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Ms B. Muldoon instructed by P Drinan Solicitors

For the Respondent: Mrs M. O'Brien, Home Office Presenting Officer

British citizen working and residing with Moroccan spouse in Republic of Ireland ("RoI") – 13 month gap between end of employment in RoI and return to Belfast – the term "was so residing" does not have to be immediately before returning to the United Kingdom – there was a sufficient link between the exercise of Treaty rights and the return in this case.

DETERMINATION AND REASONS

1.
This is an appeal from a decision of Immigration Judge Grace delivered on 8 March 2010 when the appellant's appeal from the respondent's refusal of a residence card was dismissed.

2.
The relevant facts are as follows. The appellant is a national of Morocco. In 2006 he was resident in Dublin in the Republic of Ireland. In August 2006 he married a British citizen normally resident in

Northern Ireland. The appellant and his wife lived together in Dublin from November 2006 to July 2008, although we understand towards the end of the period the appellant's wife made frequent return visits to Northern Ireland where she had a child by a previous marriage. The appellant's wife was working in Dublin from November 2006 to April 2007. The appellant had a resident document issued by the Irish authorities as a family member of an EU worker.

3.
In July 2008 the appellant's wife returned to Northern Ireland to live and work there permanently. The appellant joined her and in September 2008 applied for a residence card as the spouse of a British national who had exercised Treaty rights. This application was refused in October 2009 because the respondent was not satisfied that the appellant's wife had worked in Dublin as claimed. At the hearing of the appeal the IJ was satisfied that the appellant had established the facts set out above. There was no attendance by a Home Office Presenting Officer.

4.
Regulation 9(1) of the Immigration (European Economic Area) Regulations 2006 makes provision for family members of a United Kingdom national to be treated as an EEA national within the meaning of Article 2(1) of the Regulations, if the conditions in Regulation 9(2) are made out.

5.
The Regulation 9(2) conditions are that:-

"a. The United Kingdom national is residing in an EEA State as a worker or

self-employed person or was so residing before returning to the United

Kingdom; and

b.
If the family member of the United Kingdom national is his spouse……..the parties had entered into the marriage…and were living together in that (EEA) State before the United Kingdom national returned to the United Kingdom."

6.
Despite finding in the appellant's favour on the sole factual issue in the case, (whether his wife had worked in Dublin), the IJ dismissed the appeal on the basis that the wife was not so working in the 13 months before she returned to Northern Ireland. The Regulation does not specify when the United Kingdom national must be residing in another EEA state as a worker before returning to the United Kingdom. The IJ appears to have concluded that the Regulation required employment immediately or very shortly before the return.

7.
Regulation 9 was designed to give effect in the United Kingdom to the EU law right of a British national and her spouse of whatever nationality to enter the United Kingdom on return from economic activity in another EU state first identified in the case of R v IAT and Surinder Singh ex parte Secretary of State for the Home Department (Case C 370/90) 7 July 1992; [1992] Imm AR 565 (see paragraphs [21], [23], and [25]). The Court of Justice concluded at [23]:

" when a Community national who availed himself or herself of those (Treaty) rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as

would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State .”

8.
In the case of Eind (C-291/05) December 2007, the Court applied the same principles in concluding that a Dutch worker who had resided in the United Kingdom as a worker and had there been joined by his daughter a national of Surinam, had the right to secure his daughter’s admission to the Netherlands under the provisions of Community law. The Dutch government had argued that there would be no deterrence against the exercise of Treaty rights if the daughter of the worker were to be denied residence in the Netherlands because she had not resided with the Dutch national there before he moved to the United Kingdom. The Grand Chamber did not agree. It said at [35]-[37]:

“ A national of a Member State could be deterred from leaving that Member State in order to pursue gainful employment in the territory of another Member State if he does not have the certainty of being able to return to his Member State of origin, irrespective of whether he is going to engage in economic activity in the latter State.

That deterrent effect would also derive simply from the prospect, for that same national, of not being able, on returning to his Member State of origin, to continue living together with close relatives, a way of life which may have come into being in the host Member State as a result of marriage or family reunification.

Barriers to family reunification are therefore liable to undermine the right to free movement which the nationals of the Member States have under Community law, as the right of a Community worker to return to the Member State of which he is a national cannot be considered to be a purely internal matter.”

9.
The Court also rejected the submission of the Dutch government that the fact that the Dutch national had not found employment on his return to the Netherlands was determinative of whether his daughter had a Community law right of entry. Equally it concluded that the fact that the Dutch national had been granted a residence card in the United Kingdom was not conclusive in his favour on return to the Netherlands. It said as follows:

“43. First of all, the basis for requiring such a right is not laid down, expressly or by implication, in any provision of Community law relating to the right of residence in the Community of third-country nationals who are members of the families of Community workers. According to settled case-law of the Court of Justice, secondary Community legislation on movement and residence cannot be interpreted restrictively (see, inter alia, in respect of Regulation No 1612/68, Case 267/83 Diatta [1985] ECR 567, paragraphs 16 and 17, and Case C-413/99 Baumbast and R [2002] ECR I-7091, paragraph 74).

44. Secondly, such a requirement would run counter to the objectives of the Community legislature, which has recognised the importance of ensuring protection for the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty (Case C-60/00 Carpenter [2002] ECR I-6279, paragraph 38, and Case C-459/99 MRAX [2002] ECR I-6591, paragraph 53).”

10. Although neither Surinder Singh nor Eind addresses the period of time (if any) between employment in the host state and the return to the state of origin of the EEA national, the case law

does establish the principle that the right of entry afforded to the non-national spouse cannot be restrictively interpreted and Community law must be interpreted sufficiently broadly to promote the objective of ensuring protection for the family life of nationals of the Member States. In our judgment similar principles must apply to the interpretation of a national law measure designed to implement Community law rights (see Case C-106/09 Marleasing [1990] ECR 1-4135).

11. Before us the appellant contended:-

i.
The IJ was wrong to read Regulation 9(2)(a) to mean that employment had to be immediately before the return to the state of origin;

ii.
Once an EEA national has exercised Treaty rights by working in another Member State no time period is to be imported into the exercise of the spouse's right to enter the worker's state of origin for the purpose of family unification there;

iii.
In any event on the particular facts of the present case, the link between the employment and the return was not broken.

12.
Mrs O'Brien for the respondent accepted that there was no requirement for the employment to have been engaged in immediately before the return to the state of origin. She informed us that there had been a Home Office policy that a gap of up to six months had been considered acceptable but this had been withdrawn in the light of the developing jurisprudence of the Court of Justice. Now an overall case by case assessment was made whether the claim was a reasonable one in all the circumstances. She had no submissions to make as to how such a test would apply on the present facts. We invited her to consider the effect of a period of non-employment by the British national as a result of child rearing, involuntary unemployment or extended visits to the non-national spouse's country of origin.

13.
We conclude that the judge made a material error of law in applying Regulation 9. We propose to set aside the decision and remake it on the basis of the evidential findings made by the IJ below and the uncontested evidence as to the wife's circumstances and employment.

Conclusions

14.
We accept the first and third of the appellant's submissions. Applying a broad approach to Regulation 9 in the light of the importance of the protection of the family life enjoyed in the Republic of Ireland when the wife was exercising Treaty rights, we conclude that the appellant qualified for the residence card. We assume that there has to be some link between the exercise of the Treaty rights in the Republic of Ireland and the return of the spouse to the United Kingdom, but that link has not been broken in the present case. In the circumstances it is not necessary to reach a decision on the appellant's second submission.

15.
As to the nexus between the spouse's employment in Dublin and the return to Northern Ireland we observe:

i.
At all material times the appellant was lawfully resident in the Republic of Ireland with a residence permit and was entitled to work to support his family there.

ii.
There was genuine and effective employment by the spouse in the Republic of Ireland.

iii.
There was family life established in Republic of Ireland that required respect in the United Kingdom when the appellant and his spouse relocated there.

iv.
The exercise of Treaty rights to move between states to seek employment would be impaired if she could not be accompanied by her spouse, when deciding to relocate from the Republic of Ireland to Northern Ireland.

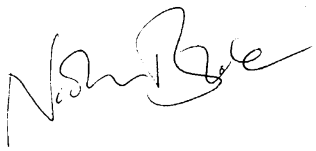
v.
Although the decision in Eind establishes that obtaining employment in the Member State of origin is not a necessary condition for the exercise of the Treaty right, in the present case we are satisfied that the wife both sought and obtained employment in Northern Ireland.

vi.
Although there was a thirteen month period when the appellant was working in Dublin but the wife was not, during which time she was making visits to Northern Ireland, that period of time has not broken the link between the Community right to reside and work in Ireland and the right to return to the United Kingdom in accordance with Community law.

vii.
We conclude that a period of interruption of employment for maternity and child rearing purposes or temporary illness or involuntary unemployment would also not of itself break such a link having regard to the general principles of Community law reflected in Directive 2004/38/EC.

16.
The appeal is allowed and we direct that the respondent do issue the appellant with a residence card pursuant to Regulation 17 of the Immigration (EEA) Regulations 2006.

Signed



President of the Upper Tribunal,

(Immigration and Asylum Chambers)