

RIGHT TO RESIDE – FAMILY MEMBERS AND EXTENDED FAMILY MEMBERS OF BRITISH CITIZENS – IS, JSA, ESA & SPC

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INTRODUCTION

- 1 The purpose of this memo is to inform DMs about the Upper Tribunal (“UT”) judgment¹, delivered on 11.3.20, in which Judge Ward found that domestic legislation² is to be interpreted as not requiring a British citizen (“BC”) to fulfil the condition of being a qualified person³ on their return to the UK.

1 HK v SSWP (PC) [2020] UKUT 73 (AAC); 2 Imm (EEA) Regs 2016, reg 9(1); 3 Reg 6(1)

UT JUDGMENT

Background

- 2 The claimant (“HK”) is an Austrian national. His wife is a BC who in 1979, before the couple met, went to work in Germany and did so for many years, eventually acquiring a right of permanent residence¹ in Germany. It was while living and working in Germany that she met and married HK. In November 2014, they moved back to the UK, to live with a relative in Scotland. They initially lived on savings and the pension HK received from his job in Germany.

1 Directive 2004/38/EC



- 3 In April 2018 HK applied for SPC, which is subject to the condition that, as an EEA national, the claimant has a qualifying right to reside. On 30.7.18, the Secretary of State decided that HK did not have such a right to reside and so his claim was refused. The basis of the refusal was that applying the domestic legislation¹ correctly, there is a requirement to consider whether HK's wife, upon her return to the UK, was a qualified person², and since she was not, HK could not acquire any right dependent on hers.

1 Imm (EEA) Regs 2016, reg 9; 2 Reg 6(1)

- 4 HK¹ challenged the domestic legislation², as not being drafted in line with EEA case law on the Surinder Singh principle i.e. that the domestic legislation² as drafted, required a returning BC who had exercised their treaty rights in another Member State to become a qualified person upon their return to the UK, in order for their family member to access benefits. It was argued by HK that the way the regulation was drafted meant that the family members of those who had ceased employment because of retirement or permanent incapacity were excluded from claiming benefits.

1 HK v SSWP (PC) [2020] UKUT 73 (AAC); 2 Imm (EEA) Regs 2016, reg 9

UT Decision

- 5 Judge Ward made the point¹ about the nature of the Surinder Singh right, namely that it focuses on the right of free movement to the other Member State. That right exists so that a person is not deterred from leaving his own Member State. On that basis, the imposition of conditions on return to the UK is contrary to the principle of free movement, because as Judge Ward states, what "earns" the individual the right, is the initial exercise of free movement rights to the other Member State, so when they come back the right has already crystallised. Judge Ward determined that the relevant EU case law² was clear and the matter was found in favour of the claimant.

1 HK v SSWP (PC) [2020] UKUT 73 (AAC), paras 25-26, 31 and 33-34;

2 Surinder Singh (C-370/90); Eind (C-291/05); O and B (C-456/12)

DMS ACTIONS

- 6 The HK judgment is not being challenged by DWP. Consequently, when considering the treaty rights assessment on family members of Surinder Singh beneficiaries, DMG guidance at 073261 should no longer be followed. Access to benefits for the family member is not conditional on the family member showing that the BC is currently a qualified person. All the family member needs to show is that they have a right to reside and that they are habitually resident.



- 7 DMs should continue to consider current DMG guidance at 073258 – 073260 i.e. whether
1. the BC either
 - 1.1 exercised free movement rights as a qualified person (i.e. worker, self-employed person, self-sufficient person or student) in an EEA host country immediately before returning to the UK¹ **or**
 - 1.2 had acquired the right of permanent residence in the EEA host country² **and**
 2. the family member or extended family member and BC resided together in the other EEA member state³ and that residence was genuine⁴ **and**
 3. the extended family member's residence in the other EEA member state was lawful⁵ **and**
 4. the person was a family member or extended family member of BC during all or part of their joint residence in the EEA Member State⁶ **and**
 5. genuine family life was created or strengthened during their joint residence in the EEA Member State⁷ **and**
 6. the conditions in 1. and 2. have been met concurrently⁸ **and**
 7. the purpose of the residence in the EEA host country was not to avoid any UK immigration law applying to non-EEA nationals (e.g. the Immigration Rules)⁹.

*1 Imm (EEA) Regs 2016, reg 9(2)(a)(i); 2 Reg 9(2)(a)(ii); 3 Reg 9(2)(b); 4 Reg 9(2)(c);
5 Reg 9(1A)(b); 6 Reg 9(d); 7 Reg 9(e); 8 Reg 9(f); 9 Reg 9(4)*

- 8 If the conditions in paragraph 7 above are satisfied, the family member or extended family member of the BC will have the same EU law right to reside as they would if they were the family member or extended family member of an EEA national¹.

1 Imm (EEA) Regs 2016, reg 9(1)

ANNOTATIONS

Please annotate the number of this memo (DMG Memo 21/20) against DMG paragraphs:

073254 (Heading)



CONTACTS

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, 3E19, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in [Memo DMG 04/19](#) - Obtaining legal advice and guidance on the Law.

DMA Leeds: October 2020

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