



OUTER HOUSE, COURT OF SESSION

[2018] CSOH 96

P439/18

OPINION OF LORD BOYD OF DUNCANSBY

In the petition of

HARPEET SINGH (AP)

Petitioner

for

Judicial review of a decision of the Secretary of State for the Home Department that the
Petitioner is not entitled to have a right to reside in the UK recognised

Respondent

Petitioner: Caskie; Drummond Miller LLP
Respondent: Pugh; Office of the Advocate General

26 September 2018

[1] On 21 February 2018 the Secretary of State decided that the petitioner did not have a right to reside in the UK. There is no appeal against that decision. The petitioner has sought to judicially review that decision. By interlocutor dated 30 July 2018 Lady Wise refused permission for the petition to proceed for the reasons set out in her note. The petitioner has requested a review of that decision.

[2] The petitioner is an Indian national. He is the first cousin of Pawandeep Singh. It appears that he is also an Indian national. Pawandeep Singh is married to Katerina Malisova who is a Czech national. She is resident in the UK exercising her EEA rights as a

worker. The petitioner avers that by virtue of his relationship to Pawandeep Singh he is an “extended family member” under the Immigration (EEA) regulations 2016 and thus entitled to reside in the UK.

[3] Ms Malisova is a qualified person under the 2016 regulations. Regulation 6 states:

“‘qualified person’ means a person who is an EEA national and in the United Kingdom as—

- (a) a jobseeker;
- (b) a worker.”

Extended family member is defined in regulation 8 as follows:

“8.— Extended family member

- (1) In these Regulations “*extended family member*” means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies a condition in paragraph (2), (3), (4) or (5).
- (2) The condition in this paragraph is that the person is—
 - (a) a relative of an EEA national; and
 - (b) residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of the EEA national's household; and either—
 - (i) is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or
 - (ii) has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national's household.
- (3) The condition in this paragraph is that the person is a relative of an EEA national and on serious health grounds, strictly requires the personal care of the EEA national.
- (4) The condition in this paragraph is that the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national.

- (5) The condition in this paragraph is that the person is the partner (other than a civil partner) of, and in a durable relationship with, an EEA national, and is able to prove this to the decision maker.
- (6) In these Regulations, "*relevant EEA national*" means, in relation to an extended family member—
- (a) referred to in paragraph (2), (3) or (4), the EEA national to whom the extended family member is related;
 - (b) referred to in paragraph (5), the EEA national who is the durable partner of the extended family member.
- (7) In paragraphs (2) and (3), "*relative of an EEA national*" includes a relative of the spouse or civil partner of an EEA national where on the basis of being an extended family member a person—
- (a) has prior to the 1st February 2017 been issued with—
 - (i) an EEA family permit;
 - (ii) a registration certificate; or
 - (iii) a residence card; and
 - (b) has since the most recent issue of a document satisfying subparagraph (a) been continuously resident in the United Kingdom.

[4] These Regulations implement the Directive 2004/38/EC ("The Citizens' Directive"),

Family member is defined in Article 2(2) as follows:

"2. 'family member' means:

- (a) the spouse;
- (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
- (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
- (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)."

[5] Article 3 sets out the beneficiaries. Article 3(2) is in the following terms:

"2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

- (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
- (b) the partner with whom the Union citizen has a durable relationship, duly attested."

[6] In the oral submission Mr Caskie submitted that the regulation needs to be interpreted in accordance with the Directive 2004/38/EC. The overriding principle was to ensure that there was no disincentive to free movement; *Dogan v Bundesrepublik Deutschland* [2015] 1 CMLR 16, paragraphs 37 and 38; *Stöber and Poisa Pereira v Bundesanstalt Für Arbeit* [1997] 2 CMLR 213, paragraphs 37 and 38. The test for permission is set out in the decision of the Lord President in *Wightman v Advocate General for Scotland* 2018 SLT 356. The test was met.

[7] For the respondent Mr Pugh replied that there was no authority to support Mr Caskie's interpretation. The Directive was clear and it did not extend to family members of the spouse; see also *Bigia v Entry Clearance Officer* [2009] EWCA Civ 79, paragraph 43.

[8] The test for permission to proceed is clear and authoritative guidance has been given by the Inner House in *Wightman*.

[9] The petitioner is not an extended family member of an EEA national for the purposes of article 8 unless article 8(7) applies. There is no suggestion that the petitioner fulfils the conditions for article 8(7) and accordingly he is not an extended family member of Ms Masilova under the Regulations.

[10] The petitioner submits that "cousin" in Home Office Guidance on extended family members of EEA nationals should include cousins in law. That is not what the regulations

state. If this submission was correct article 8(7) would be redundant as all that would have to be shown was that the petitioner was related to either the EEA national exercising EEA rights or to the dependant spouse or civil partner.

[11] Turning to the Directive Mr Caskie submits that it should be interpreted in accordance with the underlying principle of freedom of movement. That may be but freedom of movement is not unregulated. The Citizens' Directive sets out the rights that are accorded Union citizens and the beneficiaries of these rights. Articles 2 and 3 are quite clear in their terms and I can see no argument that the beneficiary of the rights under EEA rules extend to a cousin of a spouse of an EEA national exercising Treaty rights in the UK.

[12] For these reasons I am satisfied that there is no real prospect of success and I shall refuse permission to proceed.