



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/01235/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 9 January 2020**

**Decision & Reasons
Promulgated
On 5 February 2020**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

**ZORAN JANDRIC
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Komusanac, Solicitor

For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a citizen of Serbia, born on 7 September 1976. On 29 January 2019 he applied for a residence card as the family member of an EEA national, namely his wife Natasa Mrkobrada, who has dual Croatian and British nationality. That application was refused in a decision dated 27 February 2019.

2. The respondent's decision relied on regulation 2(1)(b) of the Immigration (European Economic Area) Regulations 2016 (as amended) ("the EEA Regulations") in terms of the definition of EEA national. It was concluded that because the appellant's wife naturalised as a British citizen on 23 May 2005 and Croatia joined the EU on 1 July 2013, reg 2(1) was not satisfied. A further reason for refusal was that the proxy marriage between them was not valid.
3. The appellant appealed and his appeal came before First-tier Tribunal Judge Scott at a hearing on 2 May 2019 following which the appeal was dismissed on the basis that the appellant's wife was not an EEA national. Judge Scott resolved the issue of the validity of the marriage in the appellant's favour.

The Grounds and Submissions

4. The grounds of appeal in relation to Judge Scott's decision, relying on various decisions of the European Court of Justice, contend, in summary, that Judge Scott was wrong to dismiss the appeal with reference to reg 2(1) of the EEA Regulations. In very able submissions before me, Mr Komusanac relied on his skeleton argument which, in essence, reflected the grounds of appeal. It was submitted that Ms Mrkobrada was exercising Treaty rights before she became a British citizen in 2005. Prior to that, she was the family member of an EU national (her former husband) who was also a Croatian national who was exercising Treaty rights in accordance with Article 7(2) of the Citizens Directive (2004/38/EC).
5. It was submitted that the circumstances of this case were similar to those in *Ziolkowski (Freedom of movement for persons)* [2011] EUECJ C-424/10 (21 December 2011). Thus, in that case the question arose as to whether the applicants were able to rely on periods of residence in Germany prior to Poland's accession to the European Union in order to obtain a permanent right of residence.
6. The decision in *Lassal (European Citizenship)* [2010] EUECJ C-162/09 was also relied on, in terms of general principles in relation to freedom of movement.
7. It was argued that, whereas in the instant appeal the respondent would seek to rely on *Kovacevic (British citizen - Art 21 TFEU) Croatia* [2018] UKUT 273 (IAC), that was a case in which the appellant never exercised any Treaty rights and the case was thus very similar to that of *McCarthy (European citizenship)* [2011] EUECJ C-434/09 (05 May 2011).
8. For his part, Mr Deller did indeed rely on the decision in *Kovacevic* which, he submitted, defeated the appellant's argument in the present appeal. He also referred to *Zekri v Secretary of State for the Home Department* [2019] EWHC 3058 (Admin) (which was the decision on a judicial review application by the spouse of the appellant in *Kovacevic*) and *Lounes v*

Secretary of State for the Home Department (Article 21 TFEU-Directive 2004/38/EC) Case C-165/16.

9. In his reply, Mr Komusanac submitted that insofar as the respondent sought to make any sort of distinction between a member of an EU state and the family member of such, that is contrary to EU law and no lesser rights accrue to either. It was further submitted that one of the principles in the Citizens Directive is to promote social cohesion.

Assessment and Conclusions

10. Notwithstanding Mr Komusanac's able submissions, I am not satisfied that there is any merit in the arguments advanced on behalf of the appellant, for the following reasons.
11. The first obstacle to be overcome by the appellant is the clear provisions of reg 2(1) of the EEA Regulations which provide in relation to the definition of EEA national, as follows:

“‘EEA national’ means—

(a) a national of an EEA State who is not also a British citizen; or

(b) a national of an EEA State who is also a British citizen and who prior to acquiring British citizenship exercised a right to reside as such a national, in accordance with regulation 14 or 15,

save that a person does not fall within paragraph (b) if the EEA State of which they are a national became a member State after that person acquired British citizenship;”

12. It is evident that the appellant's wife is outside the definition of EEA national by reason of sub-paragraph (b), in particular because Croatia became a member state after she acquired British citizenship.
13. In order for the appellant to make good his argument, he would have to persuade me that that provision of the EEA Regulations does not accurately transpose the Citizens Directive, or was otherwise incompatible with EU law, in particular Article 21(1) of the Treaty on the Functioning of the European Union (“TFEU”).
14. I do not consider it necessary to undertake an analysis of the various cases relied on by the parties. That exercise has already been done in *Kovacevic*, and that case is sufficiently similar to the instant case on the facts, and is the same in terms of the applicable law. It provides a clear answer to the issues raised in the appeal before me.
15. The arguments advanced on behalf of the appellant in that case were rejected by a panel of the Upper Tribunal (“UT”) consisting of the President of the UT and UT Judge Blum. There it was decided that a union citizen who resides in a Member State of which he or she is a national is not a beneficiary under Article 3(1) of the Citizens Directive and that a dual

Croatian/British citizen who was residing in the United Kingdom when Croatia joined the EU, and who has never exercised EU Treaty rights, does not acquire a right of residence under Article 21 of the TFEU.

16. It is true that that case concerned the revocation of a registration certificate on the basis that the appellant was a British citizen and not an EEA national. However, on behalf of the appellant before me that difference was not relied on, nor could it be since the principles at play are, to all intents and purposes, the same.

17. In *Kovacevic* the UT said as follows at [33]:

“Despite the impressive array of arguments utilised by Mr de Mello in reliance on the Citizens Directive, in our judgment he cannot overcome the clear and decisive ruling of the Grand Chamber in *Lounes* and the unambiguous terms of Article 3(1). The Grand Chamber concluded, at [41] and [42], that a Union citizen who resides in a Member State of which she is a national is not a beneficiary under the Citizen’s Directive. We agree with Mr Blundell’s submission that none of Mr de Mello’s submissions can assail this fundamental conclusion and the CJEU’s reasoning. The subject matter of the Citizens Directive concerns the conditions governing the exercise of the right to move freely and reside within the territory of the Member States and, as a national of a Member State enjoys an unconditional right to reside in that State, the Citizens Directive cannot govern the claimant’s residence.”

18. The decision in *Lounes* concerned a different situation where a Spanish national, before acquiring British citizenship, had exercised the right of free movement as a union citizen. That is plainly different from the situation in the appeal before me because the appellant in this case was not a union citizen when she came to the UK. Nor was she the family member of a union citizen exercising Treaty rights because her husband was a Croatian citizen. Croatia had not by that time acceded to the EU.

19. The decision in *Ziolkowski* does not assist the appellant either. In the first place, the same argument based on *Ziolkowski* was rejected by the UT in *Kovacevic*, in which it was noted that that case did not concern a dual national and related to a situation where the Citizens Directive “was clearly engaged and the right to free movement had been exercised” [36]. In common with the appellant in *Kovacevic*, this appellant has never exercised any free movement rights (and nor did his wife).

20. In the related judicial review case of *R (on the application of) Redha Zekri* [2019] EWHC 3058 (Admin), Swift J pointed out at [14] that the conclusion reached in *Ziolkowski* was that pre-accession years of residence could count towards the five year continuous legal residence necessary to obtain a permanent right of residence. He also pointed out that that case also rested on the lack of any transitional provisions in the Citizens Directive affecting the states that acceded to the EU on 1 May 2004. He said that the conclusion of the CJEU in *Ziolkowski*:

“was only that pre-accession residence could count for the purposes of the article 16 residence requirement; it was not a decision that prior to accession Mr Ziolkowski had exercised rights under Directive 2004/38 (or for that matter, Article 21 TFEU)”.

21. He pointed out that the claimant’s submission in the case before him required that that appellant’s spouse’s rights (Ms Kovacevic’s rights) as an EU citizen arising from her British nationality be ignored and that the case be approached on the basis that prior to 1 July 2013 Croatian nationals working in the EU were exercising rights under the TFEU which, as a matter of law, were simply not available to them. He said that “To accept this submission would be to depart from reality”.
22. I respectfully agree with the reasoning in *Kovacevic* and adopt it as part of my reasons in this case. Likewise, in respect of the decision in *Zekri*.
23. In those circumstances, I am not satisfied that there is any error of law in the decision of Judge Scott dismissing the appellant’s appeal. He was correct to conclude that the appellant was not entitled to the residence card sought.

Decision

24. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal therefore stands.

Upper Tribunal Judge Kopieczek

04/02/2020