



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-89/17  
Secretary of State for the Home Department v Rozanne Banger

**Advocate General Bobek: where an EU citizen returns to his Member State of origin, that Member State must facilitate the entry and residence of the citizen's non-EU partner with whom he has created or strengthened family ties in another Member State**

*The requirement to facilitate does not confer an automatic residence right but does require the Member State to undertake an extensive examination of the personal circumstances of the non-EU citizen and justify any refusal of entry or residence*

Ms Banger, a South African national, is the partner of Mr Rado, a British national. Ms Banger and Mr Rado lived together in South Africa between 2008 and 2010 before moving to the Netherlands. Ms Banger was granted a Dutch residence card in her capacity as an extended family member of an EU citizen, in accordance with the free movement directive.<sup>1</sup>

The directive requires Member States to facilitate the entry and residence of the partner of an EU citizen with whom he/she has a durable relationship, where the EU citizen has moved to a Member State *other* than that of which they are a national. In relation to requests made by such persons, Member States are required to undertake an extensive examination of the personal circumstances and justify any refusal of entry or residence.

In 2013, Ms Banger and Mr Rado moved to the UK and Ms Banger applied for a residence card. The Secretary of State for the Home Department refused Ms Banger's application on the basis of UK legislation transposing the free movement directive.<sup>2</sup> That legislation provides for the rights of family members of UK nationals returning to that Member State after having exercised free movement rights. To qualify as a family member of a British citizen, the applicant must either be the spouse or civil partner of the British national. Ms Banger was not married to Mr Rado at the time her application for residence was made and her application was therefore refused.

Ms Banger has brought a challenge to the Secretary of State's decision. The Upper Tribunal (Immigration and Asylum Chamber) has decided to refer questions to the Court of Justice concerning the correct interpretation of the free movement directive and the implications of the judgment of the Court in *Singh*.<sup>3</sup> According to that case-law, when EU citizens return to their Member State of nationality after having exercised a right of residence in another Member State, their family members must enjoy at least the same rights as would be granted to them under EU law in another Member State. However, that case concerned the spouse of an EU citizen, whereas the present case concerns an unmarried couple.

The Upper Tribunal therefore asks the Court of Justice whether the principles set out in *Singh* also apply in circumstances where the non-EU citizen is not married to the EU national returning to his/her Member State of origin. It also asks whether a decision to refuse a residence authorisation,

<sup>1</sup> Directive of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158 p. 77) ('Directive 2004/38').

<sup>2</sup> The Immigration (European Economic Area) Regulations 2006 [SI 2006/1003].

<sup>3</sup> Case: [C-370/90](#) *Singh*.

which is not founded on an extensive examination of the personal circumstances of the applicant, and is not justified by adequate or sufficient reasons, is unlawful under EU law.

In today's Opinion, Advocate General Michal Bobek notes, first, that the Court of Justice has confirmed on a number of occasions that EU rules on free movement may, by virtue of the Treaties, also apply by analogy in situations concerning EU citizens returning to their Member State of nationality after having exercised free movement rights. The logic of this case law is that a person might otherwise be deterred from leaving his country of origin in order to undertake economic activity in another Member State if, on his return, the conditions of his entry and residence were not at least equivalent to those which he would enjoy in the territory of another Member State. This logic also applies fully to 'extended family members', including unmarried partners of EU citizens.

However, the Advocate General takes the view that the Court should place more emphasis on the fact that, rather than being discouraged *ex ante*, a person should not effectively be *penalised ex post* for having exercised free movement rights. He considers that such a disadvantage arises in cases where, even though 'returning' citizens are subject to the same regulatory regime as nationals who have never exercised free movement, national rules do not acknowledge family ties created or strengthened in another Member State. Objectively different situations cannot and should not, in his view, be treated the same.

Consequently, the Advocate General concludes that the Court should find that **a non-EU citizen, who is a durable partner of an EU citizen who has exercised his right of free movement, must, upon the return of the EU citizen to his home Member State, not receive treatment less favourable than that which the directive lays down for extended family members of EU citizens exercising their freedom of movement in other Member States.**

Next, the Advocate General notes that **the provision of the directive which requires Member States to facilitate the entry and residence of non-EU citizens with whom an EU citizen has a durable relationship** does not confer an automatic residence right. As such, the Advocate General's conclusion that this provision should apply by analogy to EU citizens returning to their Member State of origin **cannot lead to the recognition of an automatic residence right for their non-EU partner in the Member State of origin.** Instead, that provision must apply to 'returning' citizens in the same way it would apply to citizens living in another Member State.

The Advocate General acknowledges that **the directive grants the Member States some discretion as to the specific conditions and factors to be taken into account in relation to an application for entry and/or residence made by the non-EU partner.** However, he notes that it is clear from the directive that **that discretion is limited by (i) the requirement to ensure that 'extended family members' must be better off than the general category of non-EU nationals; and (ii) that Member States must undertake an extensive examination of the personal circumstances of the applicant and justify any denial of entry or refusal.**

In addition, according to the Advocate General, the fact that a residence card has been issued by another Member State may not necessarily lead to the right of residence in the EU citizen's Member State of origin being granted (or in any other Member State). The obligation to facilitate does not mean the obligation to grant, and the fact that Member States are entitled to set their own, different criteria means there is no 'mutual recognition obligation' or requirement to provide at least the same, or better treatment, in the preceding host Member State.

In the present case, **the Advocate General concludes that the Court should find that Ms Banger is entitled, in accordance with a combined interpretation of free movement rules in the Treaties and the directive, to have an extensive examination of her application for residence in the UK, and to have justifications provided for any denial of entry or residence on the basis of that examination.** This shall cover her specific personal circumstances, including her relationship with the EU citizen.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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*The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.*

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