

Subject-matter concerned	<input type="checkbox"/> 1) non-discrimination on grounds of nationality <input checked="" type="checkbox"/> 2) freedom of movement and residence - linked to which article of the Directive 2004/38 – <a href="#">Articles 7 and 16</a> <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
Full reference	<i>R. (on the application of Benjamin) v Secretary of State for the Home Department</i> , Queen's Bench Division (Administrative Court), 11 July 2016, [2016] EWHC 1626 (Admin), available at: <a href="http://www.bailii.org/ew/cases/EWHC/Admin/2016/1626.html">www.bailii.org/ew/cases/EWHC/Admin/2016/1626.html</a> .
Decision date	11 July 2016
Deciding body (in original language)	Queen's Bench Division (Administrative Court)
Deciding body (in English)	/
Case number (also European Case Law Identifier ( <a href="#">ECLI</a> ) where applicable)	[2016] EWHC 1626 (Admin)
Parties	R. (on the application of Mark Benjamin and Margaret Benjamin) v Secretary of State for the Home Department
Web link to the decision (if available)	<a href="http://www.bailii.org/ew/cases/EWHC/Admin/2016/1626.html">www.bailii.org/ew/cases/EWHC/Admin/2016/1626.html</a>
Legal basis in national law of the rights under dispute	Regulation 9 of the Immigration (European Economic Area) Regulations 2006

<b>Key facts of the case</b> (max. 500 chars)	<p>The claimants, Mr and Mrs Benjamin, applied for judicial review of a decision by the Secretary of State, in 2013, refusing to grant an EEA family permit or entry clearance to enable Mrs Benjamin to enter and reside in the UK with her husband and their children. Mr Benjamin and their children are British citizens but Mrs Benjamin is a Kenyan national. The family had previously been residing together in France, where Mr Benjamin was registered as self-employed. The Secretary of State refused entry to Mrs Benjamin by decision of 15 November 2013, stating that Mr Benjamin had failed to establish that he had been exercising EU Treaty rights in France. On 15 December, Mrs Benjamin attempted to travel to the UK from France but was refused entry. On 16 December, the claimants issued a claim for judicial review. On 27 December, Mrs Benjamin was again refused entry. After reviewing the refusal decision, the Secretary of State granted Mrs Benjamin a family permit with effect from 17 July 2014. The claimants maintained their claim for judicial review, submitting further documentation in support of that claim and seeking damages for breaches of EU law in respect of the refusal decisions of 15 November and 15 and 27 December.</p>
<b>Main reasoning / argumentation</b> (max. 500 chars)	<p>The application was refused. With regard to the first ground, the ECJ <i>Surinder Singh</i> principle and Regulation 9 of the EEA Regulations, the court held that the burden was on the claimants to establish that they were entitled to exercise a right of residence in accordance with <i>Surinder Singh</i>. Therefore, the immigration officials were entitled to conclude, based on the limited evidence provided by the claimants, that Mr Benjamin had not been engaging in genuine and effective employment or self-employment in France sufficiently recently to entitle him and his wife to a <i>Surinder Singh</i> right of residence in the UK. The fact that a subsequent application supported by further evidence was successful did not render the earlier decisions unlawful. With regard to the second ground, on the alleged unlawfulness of the requirement of a visa, the court held that that it remained lawful for the Secretary of State to determine, before granting entry, whether the family member in question in fact fulfilled the conditions for entry provided by EU law. Mr Benjamin was unable to establish that he had met the Article 7 conditions so as to become entitled to a permanent right of residence in France. Furthermore, the court stated that it was not clear from Mrs Benjamin's residence card that she had in fact obtained a permanent right of residence in France in accordance with Article 16, since it had been issued less than three years after she began living in France with Mr Benjamin.</p>
<b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)	<p>The court clarified the need for genuine and effective (self-)employment in order to acquire a right of residence for non-EEA family members.</p>
<b>Results (e.g. sanctions) and key consequences or implications of the case</b> (max. 500	<p>The application for judicial review was refused.</p>

chars)	
<b>Key quotations in original language and translated into English with reference details</b> (max. 500 chars)	<p>“The Claimants relied upon <i>Levin v Staatssecretaris van Justitie</i> Case 53/81 (endorsed as the "leading authority" on this question by the Court of Appeal in <i>Barry v London Borough of Southwark</i> <a href="#">[2008] EWCA Civ 1440</a> at [18]) in which the CJEU held that a person who pursues effective and genuine employment may be exercising Treaty rights, even though his income may be lower than subsistence level or he supplements his income from other sources. However, the CJEU made it clear, at [17], that the EU rights to freedom of movement "<i>cover only the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary</i>". Mr Benjamin produced very limited evidence of effective and genuine employment or self-employment. In my view, the Defendant's officials were entitled to conclude on the evidence before them that Mr Benjamin had not demonstrated that he was pursuing effective and genuine self-employment in France. The evidence suggested that, although registered as self-employed, in reality, he was relying on the State and his father to support him and his family, whilst he dabbled in projects which interested him but were non-remunerative". [Para. 69]</p> <p>“Such evidence of employment and self-employment as there was indicated that the work in France had been intermittent and was carried out some years before the applications were made in 2013. There was only evidence of economic activity in France prior to 2010, not thereafter. The immigration officials were informed by Mrs Benjamin that Mr Benjamin ceased work in France at the end of 2010 because he had to look after his disabled son. We also now know that from 2010 until his departure for the UK in September 2012, he was heavily involved in a property purchase and renovation project in Miami, USA. He spent a good deal of time living in the USA and his family also joined him for some of the time - his third child was born in Florida in 2011. He had been residing in the UK since September 2012". [Para. 70]</p> <p>“A sufficient degree of proximity is required between the exercise of Treaty rights in another Member State and the EU national's return to his home Member State in a <i>Surinder Singh</i> case". [Para. 71]</p> <p>“Regulation 9(2)(a) of the 2006 Regulations requires that the British citizen "<i>is</i>" residing in another Member State as a worker or self-employed person, or "<i>was so residing before returning to the United Kingdom</i>". [Para. 72]</p>

"In *OB v. Secretary of State for the Home Department* [2010] UKUT 420, the Upper Tribunal held that, although *Surinder Singh* did not address the period of time between employment in the host country and the return to the state of origin, the case law did establish the principle that the right of entry should not 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 member states. There had to be some link between the exercise of the Treaty rights and the return of the spouse to the UK, but there was no requirement that employment in the host state had to be established immediately before the return to the state of origin. It would be a matter of assessment in the individual case". [Para. 73]

"In this case, the Defendant's immigration officials were entitled to conclude that the requirements of regulation 9, even when given a broad purposive interpretation, were not met. Even if he had ever engaged in genuine and effective employment or self-employment in France, the evidence indicated it ceased in 2010, a long time before the applications in 2013 and Mr Benjamin's departure to the UK in September 2012. By December 2013, Mr Benjamin had not been residing in France for 15 months". [Para. 74]

"Accordingly, while *McCarthy* establishes that it is unlawful for the Defendant to insist on the possession of an EEA family permit by a family member of a UK citizen seeking to enter the UK, where that family member holds a valid residence card under Article 10 of the Directive, it remains lawful for the Defendant to determine, before granting entry, whether the family member in question in fact fulfils the conditions for entry provided by EU law. The legal position as clarified in *McCarthy* is reflected in regulations 11(2)(a) and 19(2)(b) of the 2006 Regulations, which together make clear that the family member of an EEA national may be admitted to the UK on presentation of a valid passport and a "*qualifying EEA State residence card*", but only provided that the EEA national has a "*right to reside in the United Kingdom under these Regulations*". The relevant regulation in this case was regulation 9". [Para. 83]

"I accept the Defendant's submission that the immigration officials at Calais were justified in investigating the validity of the Claimants' claim that they had acquired a permanent right of residence in France, not least because of the equivocal residence cards which they produced. The card in Mr Benjamin's name, dated 2009, did not indicate on its face that Mr Benjamin held a permanent right of residence pursuant to Article 16. It simply indicated that he was a beneficiary of the (repealed) Directive 73/148 i.e. as a self-employed person. Mr Benjamin told me that he had been in dispute with the French authorities over their refusal to grant him a permanent residence card but he did not disclose any correspondence about this and so I was unable to form a concluded view as to why he did not have a permanent residence card. At Calais, upon further investigation, Mr Benjamin was unable to establish to the satisfaction of the immigration officials that he had met the Article 7 conditions of employment or self-employment for a period of 5 years in France, so as to become entitled to a

	<p>right of permanent residence in France". [Para. 84]</p> <p>"Whilst Mrs Benjamin's card referred to a "<i>séjour permanent</i>", it was by no means clear from this that she had in fact obtained a permanent right of residence in France in accordance with Article 16 of the Directive. The card was issued on 6 July 2009, less than three years after Mrs Benjamin began living in France with Mr Benjamin. A family member's permanent right of residence under Article 16(2) arises only after five years' continuous legal residence with the Union citizen in the host Member State. This inevitably raised questions which required further investigation". [Para. 85]</p>
<p><b>Has the deciding body referred to the Charter of Fundamental Rights. If yes, to which specific Article.</b></p>	<p>No.</p>