

Immigration, Asylum and Citizenship
Bar Association

“Strings attached”: the derived
rights of third country national
spouses and carers of EU citizens

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Today's Menu

- Introduction
- **5 Categories** of rights asserted / rights contested before EU courts
- Selected case-law :
 - C-93/18 Bajratari: the right to work of TCN parents
 - C-218/14 Singh: Residence in the case of family breakdown
 - C-754/18 – Ryanair: conditions for travel within the Union
 - E-1/20 Kerim:– Sham marriages
- Conclusions

A. Intro: rights claimed / contested (1)

- Category 1: TCN considered not to qualify as **family member** within scope of Directive 2004/38
 - Case C-129/18 *SM* (*legal guardian - kefala*)
 - Case C-165/16 *Lounes* (*acquisition of nationality*)
 - Case C-673/16 *Coman* (*same sex marriage covered regardless of host MS law*) [incidentally: Case C-490/20 *V.M.A* (pending) – (*Birth cert for child of same sex marriage*)]

A. Intro: rights claimed / contested (2)

- Category 2 : Failure to facilitate entry - delays in granting entry visas to TCN spouses
 - Case C-89/17 *Banger* (facilitation under Article 3(2))
 - Case C-169/18 *Mahmood and Shabina Atif and others* (settled before oral hearing – therefore no judgment)

A. Intro: rights claimed / contested (3)

- Category 3: TCN considered not to meet [or no longer meet] **conditions for lawful residence** and/the rules for consequent expulsion
 - Case C-247/20 V.I. (pending)
 - Case C-94/18 *Chenchooliah*
 - **Case C-93/18 *Bajratari***
 - Case C-115/15 *NA*
 - **Case C-218/14 *Singh***

A. Intro: rights claimed / contested (4)

- Category 4: TCN considered not to meet conditions for **free movement**
 - Failure to recognise status or evidentiary value of residence card
 - **Case C-754/18 *Ryanair Designated Activity company***
 - Case C-202/13 *McCarthy*

A. Overview: rights claimed / contested (5)

- Category 5: TCN alleged not to be acting in **good faith**:
 - Article 35 of Directive 2004/38
 - Abuse of law doctrine / Marriage of convenience
 - **Case E-1/20 *Kerim v Norwegian Govt***

1. Bajratari: the right to work of TCN parents

- Formal interpretation of Article 23 of Directive 2004/38 results in Chicken and Egg scenario:
 - EU citizen child will need:
 - sufficient resources for lawful residence
 - lawful residence for TCN parent to have a right to work
 - TCN right to work for sufficient resources
- Impact for sequencing: It should be possible to treat family as a unit and permit TCN worker to work at the moment of the exercise of free movement rights
- Application to spouses?

2. Singh: residence after family breakdown

- Status remains for *as long as* divorce is not actually granted even if separated
 - Case C-267/83 *Diatta*
 - Case C-244/13 *Ogieriahkhi*
- *The “flip side” : if Union citizen leaves MS (and marriage) prior to divorce decree*
 - Case C-218/14 *Singh*
 - Case C-115/15 *NA*
- If TCN family member loses rights, Union law safeguards to expulsion continue to apply:
 - Case C-94/18 *Chenchooliah*

3. Ryanair: TCN free movement rights

- Recognition of residence cards issued by another MS and the rights they entail
 - Case C-202/13, *McCarthy*
 - Case C-754/18 – *Ryanair Designated Activity company*

4. Kerim: Marriages of Convenience (1)

- Efta Case E-1/20 *Kerim v Norwegian Govt* (pending)
 - What are the criteria for a “sham marriage”
 - Is there abuse if “**Sole purpose**” (recital 23) to obtain residence rights or “**predominant purpose**”?
 - Do authorities have to prove abusive intent from both spouses or is the intention the TCN spouse alone enough?
- The fact that an EEA national wishes to exercise his or her rights as conferred upon by them by the Treaties does not in itself constitute an abuse of such a right
 - Case C-200/02 *Zhu and Chen*, paras 34-41
 - Case C-212/97 *Centros*, paras 23-30
- Sham Marriages just one form of abuse –subject to general abuse case-law

4. Kerim: Marriages of Convenience (2)

General Abuse of law Case law:

Case C-251/16, *Cussens, Jennings and Kingston*

Case C-110/99, *Emsland-Stärke*

- Combination of objective and subjective elements.
- The **objective element** requires that it be evident from the specific set of circumstances in question that despite the fact that the **formal conditions** laid down in law appear to have been adhered to, the **underlying purpose** of those rules has not been achieved.
- The **subjective element** requires there to be an obvious intention by the party in question to attain an **improper benefit** resulting from the application of Union law through artificially establishing the conditions which are necessary to obtain it.

4. Kerim: Marriages of Convenience (3)

- What are the criteria for a “sham marriage”

Issues to consider:

- The distinction between “**Sole purpose**” (recital 23) to obtain residence rights or “**predominant purpose**” not decisive.
- Genuine relationship v “artificial construct” for “improper benefit”
- Genuine couples may decide to marry for sole purpose to secure residence? (Not abusive)
- Possible to marry for many abusive reasons including right of residence (abusive).
- Marriages of convenience v Marriages of deception
- “Green card question”: When is relevant time to determining intention: at time of contracting marriage or at time of requesting application?

4. Kerim: Marriages of Convenience (4)

- Commission Guidance

- The Commission's 2009 Guidelines on the Application of Directive 2004/38/EC (COM(2009) 313 final).
- The Communication entitled "Free movement of EU citizens and their families: Five actions to make a difference" (COM/2013/0837 final).
- The Communication entitled "Helping national authorities fight abuses of the right to free movement" {COM(2014) 604 final}. accompanied by a Staff Working Document entitled "Handbook on addressing the issue of alleged marriages of convenience between EU" (the "Handbook"). SWD (2014)284 final.

- Handbook:

- Use is not abuse: not surprising that couples would want to live together
- Burden of Proof is on competent authorities
- Case by case assessment of all facts (those in favour and those against)
- Where well founded suspicious, Applicants may be requested to provide more info

4. Kerim: Marriages of Convenience (5)

- Abuse of Law in EU Law:

- Case C-251/16, *Cussens, Jennings and Kingston* (General principle of EU law)
- Case C-255/02, 'Halifax'
- Case C-110/99, *Emsland-Stärke*,

Use and abuse in the free movement of persons:

- Case E-4/19 *Campbell* (Efta Court)
- Case C-202/13, *McCarthy*
- Joined Cases C-58/13 and C-59/13, *Angelo Alberto Torresi*
- Case C-456/12 *O. and B*, Case C-202/13
- Case C-200/02, *Zhu and Chen*,

- Marriages of Convenience

- Case E-1/20 *Kerim v Norwegian Govt* (Efta Court - pending)

Selection of TCN Cases (1)

- Case C-490/20 V.M.A (pending)
- Case C-247/20 V.I. (pending)
- Case C-754/18 *Ryanair Designated Activity company*
- Case C-129/18 *SM*
- Case C-94/18 *Chenchooliah*
- Case C-93/18 *Bajratari*
- Case C-89/17 *Banger*
- Case C-673/16 *Coman*
- Case C-165/16 *Lounes*
- Case C-113/15 *Chavez-Vilchez*
- Case C-115/15 *NA*

Selection of TCN Cases (2)

- Case C-218/14 *Singh*
- Case C-165/14 *Rendón Marín*
- Case C-244/13 *Ogieriahkhi*
- Case C-456/12 *O and B*
- Case C-40/11 *Ida*
- Case C-34/09 *Ruiz Zambrano*
- Case C-127/08 *Metock*
- Case C-200/02 *Zhu and Chen*
- Case C-413/99 *Baumbast and R*

Selection of TCN Cases (3)

EFTA Court

- Case E-1/20 *Kerim v Norwegian Govt*
- Case E-4/19 *Campbell v Norwegian Govt*
- Case E-28/15 *Jabbi v Norwegian Govt*



THE END.....

Thank you for your attention