Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48835/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20 June 2014	**On 2 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR IDRISSA KAMAGATE

Respondent

Representation:

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Ms M C Benitez, Counsel, instructed by Ahmed Rahman Carr, Solicitors

DETERMINATION AND REASONS

1. Mr Kamagate is a citizen of the Ivory Coast whose date of birth is recorded as 24 April 1972. On 8 July 2013 he made application for a permanent residence card as confirmation of a right to reside in the United Kingdom. On 5 December 2013 a decision was made to refuse the application. In the notice of immigration decision reference was made to Regulation 15(1)(b) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). It was the Secretary of State's contention that Mr Kamagate not had established that he had resided in the United Kingdom with the EEA National in accordance with the Regulations for a continuous period of five years.

2. Mr Kamagate appealed. However, the appeal which eventually was to be heard by Judge Tipping sitting at Taylor House on 27 February 2014 was not the first appeal involving Mr Kamagate.

3. On an earlier occasion, Mr Kamagate had applied for and been refused a residence card. He appealed that decision and the appeal was heard by Judge Prior. Reference to those proceedings is to be found at paragraph 4 of the Determination of Judge Tipping. Judge Prior, just as Judge Tipping was later to find, found Mr Kamagate a credible witness and found in those earlier proceedings that Mr Kamagate and the EEA National had been in a relationship that had endured since not later than 3 March 2008.

4. Judge Tipping whose Determination is dated 4 March 2014, found no basis for disagreeing with the earlier finding of Judge Prior. Judge Tipping noted that it was the Respondent's case that there was only sufficient evidence to demonstrate that the Sponsor and Mr Kamagate had been in a relationship of an "extended family member" since February 2011. Judge Tipping found that the Respondent had ignored the judicial finding of Judge Prior. Judge Tipping at paragraph 10 of his Determination found as a fact that Mr Kamagate and the Sponsor had been in a relationship for a period in excess of five years and allowed the appeal to the extent that it was remitted to the Secretary of State for a lawful decision to be made.

5. Not content with the Determination of Judge Tipping, the Secretary of State by Notice dated 19 March 2014 made application for permission to appeal to the Upper Tribunal. The grounds rehearsed the reasons for refusal letter making reference to the fact that Mr Kamagate was issued with a residence card, following the Determination of Judge Prior, in February 2011. However, by reference to regulation 7(3) of the 2006 Regulations, the Secretary of State's contention was that Mr Kamagate still was not entitled to succeed because it was not only necessary to establish five years residence but also necessary to show possession of a family permit, registration certificate or residence card for that period. Regulation 7(3) reads as follows:

> *"Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA Family Permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA National for as long as he continues to satisfy the conditions in Regulation 8(2),(3),(4) or (5) in relation to that EEA National and the permit, certificate or card has not ceased to be valid or revoked."*

In other words the Secretary of State contended that the family permit, registration certificate or residence card was a pre-condition of entitlement.

6. On 17 April 2014 First-tier Tribunal Judge PJG White granted permission to appeal thus the matter came before me.

7. Mr Whitwell for the Secretary of State relied on the grounds but had no further submissions to make.

8. Ms Benitez submitted that the starting point in my consideration of this appeal had to be the finding of Judge Prior that the parties had been in a durable relationship since the 3 May 2008 and that the Sponsor had been working in accordance with the regulations, with Mr Kamagate having been in the United Kingdom throughout.

9. Ms Benitez submitted that the Secretary of State's grounds were materially flawed in law because the status of family member was not contingent upon the existence or grant of a residence document under national regulations. The family residence card was, she submitted, a manifestation of an acquired right but not the source. Whether the applicant, in this case, Mr Kamagate, is a family member under EEA law is a question of fact. The permit cannot, she submitted be a pre-condition for the exercise of rights acquired under EEA law because to hold otherwise would run contrary to the basic tenet of the directive on free movement of persons.

10. Ms Benitez submitted further that it is an established principle of law that all measures within the field of community competence are to be interpreted solely by reference to and in accordance with the principles and policy of community obligations giving rise to those measures and she relies on the guidance in the case of ***Marleasing SA v Comercial Internacional de Alimentacion SA [1990] ECR I-4139***. Additionally Ms Benitez contends that the directives must be read purposefully.

11. It is trite law to note that the rights to enter and remain in the United Kingdom for community purpose flow directly from the directive rather than from the regulations and the only formal documentary requirement on free movement under EEA law is the production at the border or on application of an original passport or national ID card.

12. Looking to the directive, 2004/38-EC Article 10.1 provides:

> *"The right of residence of family members of a union citizen who are not nationals of a member state shall be evidenced by the issuing of a document called "Residence Card of a Family Member of a Union Citizen" no later than six months from the date on which they submit the application..."*

The point taken by Ms Benitez is that the residence card is the evidence but it is not the document which confers the right. In much the same way I observe that a person's nationality is not conferred by the issuing of a passport by the National's state but rather the passport is evidence of it.

13. Rather more importantly, by Article 16 the following provision is made:

> *"Union citizens who have resided legally for a continuous period of five years in the host member state shall have the right of*

permanent residence there. This right shall not be subject to the conditions provided for in Chapter III."

14. By reference to Article 16(1), Ms Benitez submits that lawful residence is to be construed to mean that the family member has resided in accordance with the directive not the regulations made under it or any national legislation.

15. Then by Article 25 the following is provided:

> *"Possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a pre-condition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof. "*

16. In this case, Ms Benitez submits that on two separate occasions the First-tier Tribunal has found as a fact that Mr Kamagate and his Sponsor have satisfied the relevant conditions under the directive.

17. It seems to me that the only point upon which Mr Whitwell could realistically rely is paragraph 6 of the pre-amble to the directive which provides:

> *"In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this directive, and therefore do not enjoy an automatic right of entry and residence in the host member state should be examined by the host member state on the basis of its own national legislation in order to decide whether entry and residence should be granted to such persons, taking into consideration their relationship with the union citizen or any other circumstances, such as their financial or physical dependence on the union citizen."*

18. Paragraph 6 of the pre-amble, set out above implies a margin of appreciation for member states. However, when one looks to the directive and to the fundamental principle of freedom of movement, I find that the reasoning of Ms Benitez simply cannot be faulted. Indeed if the Secretary of State were right and the relief sought were dependant upon possession of the permit or card as contended for then there would be an element of arbitrariness since different applicants might apply on the same date, yet not have the documents the Secretary of State contends are a pre-requisite to the relief now being sought in this appeal, issued to them until different dates because of the different demands on the Secretary of State. That simply cannot be right. What the regulations require is clear evidence and the way in which the regulations are to be reconciled with the directive and indeed the very forceful submissions of

Ms Benitez is that paragraph 7(3) should be read to mean "Entitled to be issued with…"

19. In all the circumstances therefore the appeal of the Secretary of State is dismissed. The decision of the First-tier Tribunal shall stand and in those circumstances the matter remains with the Secretary of State.

Signed **Date**

Designated First Tier Tribunal Judge
(Sitting as a Deputy Judge of the Upper Tribunal)