



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/02247/2017

THE IMMIGRATION ACTS

Heard at Field House
On 28 August 2018

Decision & Reasons Promulgated
On 11 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALEXANDRA [M]
(ANONYMITY DIRECTION NOT MADE)

Claimant/Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer

For the Respondent/Claimant: In person

DECISION AND REASONS

1. The Secretary of State appeals from the decision of the First-tier Tribunal allowing the claimant's appeal against the decision made on 18 February 2017 to refuse to issue the claimant, a Polish national, with a document certifying her permanent right of residence in the United Kingdom as the unmarried partner of another Polish national who has a permanent residence in the UK pursuant to Regulation 15(1)(a) of the Regulations 2006. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant requires anonymity for these proceedings in the Upper Tribunal.

Relevant Background Facts

2. The claimant began her relationship with Mr [P] in June 2001 in London, and they started living together in September 2002. They have had two children together. On 5 April 2016 Mr [P] was issued with a permanent residence card as confirmation that he had acquired a permanent of residence through continued exercise of Treaty rights as a qualified person for a period of 5 years. On 20 September 2016 the claimant applied for a permanent residence card as his unmarried partner.

The Reasons for Refusal

3. On 18 February 2017 the Secretary of State gave her reasons for refusing the application. The claimant must have been married to her EEA national sponsor for a minimum of five years. She was not married to her EEA national sponsor. As an EEA national, consideration had been given as to whether the claimant qualified for a residence card in her own right. She had failed to demonstrate that she had been exercising Treaty rights for a continuous period of five years in the UK, and so it was decided to refuse the confirmation she sought with reference to Regulation 15(1)(a) of the Regulations 2016.

The Hearing Before, and the Decision of, the First-tier Tribunal

4. The claimant's appeal came before Judge Waygood, sitting at Columbus House, Newport, on 9 January 2018. The claimant appeared in person, and the Secretary of State was represented by a Home Office Presenting Officer.
5. In his subsequent decision, Judge Waygood held that the claimant was not a qualified person as defined in Regulation 6. However, her unmarried partner was a qualified person. The Judge went on to consider an extensive volume of documentary evidence which the claimant had provided in support of both her application and her appeal, and he found that the claimant and the sponsor had been living together at their current address since 2005, and that the claimant had told the truth about her circumstances. He was persuaded that her relationship with Mr [P] was a durable one, and that therefore she was an extended family member of an EEA national exercising Treaty rights, and thus came within the scope of Regulation 8(5) of the 2016 Regulations.
6. The Judge turned to consider whether the claimant had a right of permanent residence under Regulation 15(1)(a). He found that the Secretary of State had been wrong to reject her application on the basis that she needed to have been married to her EEA national sponsor for a minimum of five years. This was incorrect, as there was clearly provision in the Home Office guidance for an unmarried partner in a durable relationship to qualify for permanent residence. In coming to this conclusion, he said that he was reinforced by the wording of Article 16 of the Citizens Directive which stated that Union citizens who had resided legally for a continuous period of five years in the host member state shall have the right of permanent residence there, and that this right shall not be subject to the conditions provided for in Chapter III. The Judge concluded that the claimant qualified for permanent residence under Regulation 15(1)(a).

The Reasons for the Grant of Permission to Appeal

7. On 12 July 2018 Upper Tribunal Judge Hanson granted the SSHD permission to appeal for the following reasons:

“The Secretary of State’s position is that the claimant did not become a family member until she was able to satisfy the requirements of Regulation 7(3) which was the starting point in respect of the calculation. Prior to that, the claimant remained an extended family member. As the claimant has not been issued with a residence card time has not begun to run.

The status of the extended family member is also not declaratory and is a matter at the discretion of the Secretary of State.

There is an important distinction between the person who has satisfies Regulation 7 as a family member as they fall within Regulation 7(1)(a)-(c) and an extended family member treated as a family member if certain conditions are fulfilled.

There appears arguable merit in the submission that a person is not a member until they satisfy Regulation 7(3) and the period calculating 5 years’ exercising Treaty rights as a family member can only run from that point in time.

It was argued that the Judge erred in concluding that the claimant has an entitlement on the basis of being an extended family member for 5 years, rather than calculating the appropriate period from the grant of a residence card recognising such status entitling the claimant to be recognised as a family member (if one was granted), and/or in finding the claimant is an extended family member when this is a matter for the Secretary of State having exercised her discretion.”

The Hearing in the Upper Tribunal

8. At the hearing before me to determine whether an error of law was made out, Mr Melvin relied on the case of **Selim Macastena -v- Secretary of State for the Home Department** [2018] EWCA Civ 1558.

Reasons for Finding an Error of Law

9. Judge Waygood fell into error as he failed to apply the correct provision of Regulation 15(1) and he overlooked Regulation 7(3). The claimant did not potentially come within the scope of Regulation 15(1)(a) as she was not an EEA national who had resided in the UK in accordance with the Regulations for a continuous period of five years. In order to have resided in the UK in accordance with Regulations for a continuous period of five years, she would have needed to have been a qualified person for a period of five years, and the Judge had earlier and rightly found that she was not a qualified person.
10. The claimant potentially came within the scope of Regulation 15(1)(b), which applies to a family member of an EEA national who is not himself an EEA national, but who has resided in the UK with the EEA national in accordance with the Regulations for a continuous period of five years.
11. However, Regulation 15(1)(b) only applies to “a family member” of an EEA national qualified person. It does not apply to an “extended family member” of an EEA national qualified person.

12. Regulation 7 defines family members, and Regulations 8 defines extended family members. Regulation 7(3) provides as follows: *"Subject to paragraph (4), a person who is an extended family member and who has been issued with an EEA family permit, a registration certificate or a residence card, shall be treated as a 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 been revoked."*
13. Accordingly, in order to obtain the benefit of Regulation 15(1)(b), a person in the claimant's position must first have been issued with an EEA family permit, registration certificate or a residence card. It is only after they have held such a permit, certificate or residence card for a period of five years that they are eligible for a permanent residence card.
14. In short, on the facts found by Judge Waygood (which are not disputed by way of appeal) the claimant has clearly established her potential eligibility to be issued with a residence card as an extended family member under Regulations 17(4) and (5) - subject to the exercise of discretion by the Secretary of State - but she is not eligible for the issue of a permanent residence card under Regulation 15(1). As the Secretary of State retains discretion as to whether to issue a residence card to an extended family member, it is incumbent on the claimant to now make an application under Regulation 17(4) for a residence card, if she wishes to have one under the current regime. On the other hand, as an EEA national herself, she does not actually need a residence card to affirm the legality of her long residence in the UK.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision substituted:

The claimant's appeal against the decision of the respondent to refuse to issue her with a permanent residence card is dismissed.

Anonymity

No anonymity direction made.

Signed

Date 3 September 2018

Judge Monson
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As I have dismissed this appeal, there can be no fee award.

Signed

Date 3 September 2018

Judge Monson
Deputy Upper Tribunal Judge