



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/03108/2017

THE IMMIGRATION ACTS

Heard at Field House
On 5th October 2018

Decision and Reasons Promulgated
On 15th November 2018

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

Mrs O P
(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Malik, instructed by Ashfield Solicitors.

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a Russian Federation national, born on 10th June 1982, was granted permission to appeal a determination of First-tier Tribunal Judge B A Morris, which dismissed the appellant's appeal, under the Immigration (European Economic Area) Regulations 2016 against a decision of the Secretary of State dated 8th March 2017
2. A short chronology of the immigration history showed that the appellant came to the United Kingdom in 2009 and forged a relationship with MSJ, a British national. The appellant obtained leave to remain under the immigration rules from 2010 to 2012. She had a British citizen

child born 19 December 2010. Her then partner, MSJ, took up employment in Amsterdam on 1st of December 2011. On 29th June 2011 the appellant and MSJ married. The appellant moved to Amsterdam and between October 2011 August 2014 the appellant obtained a Dutch residence card valid from 5th June 2012 to 4th June 2017. On 1st September 2014 the appellant returned to the UK and in September 2014 was granted a five-year residence card due to expire on 27th November 2019 (under the Surinder Singh Rule). She separated from her husband in 2015. She submitted her application for a residence card in June 2016. In her application the appellant stated she had no contact with her husband and she did not know where he lived, their relationship had broken down and she had experienced non-violent abuse during the course of the relationship.

3. On 27th February 2018 she received a divorce petition from her husband who appeared to live in Spain.
4. The Secretary of State refused the appellant's application dated 23 June 2016 for an EEA residence card as the family member of a British citizen M S J who had previously exercised treaty rights in the Netherlands. The Secretary of State stated that there was no evidence that the appellant had terminated her relationship with her sponsor in the form of decree absolute. Her application was considered but refused under regulation 9 of the EEA regulations because she had not shown she was a direct family member of a British citizen who had exercised treaty rights on another EU member state.
5. The decision letter specifically identified that a copy of the birth certificate for OJ, the minor British Citizen son, had been produced, and, it was stated that the evidence had been considered but the appellant not shown that her sponsor (MSJ) was a 'qualified person' under the regulations.
6. The grounds of appeal to the First-tier Tribunal submitted that the decision was not in accordance with the EEA regulations, the respondent had failed to give proper consideration to relevant matters, had failed to have regard to the appellant's unique circumstances, and failed to consider the human rights of the appellant. In particular the appellant's particular circumstances, it was submitted, the decision gave rise to discrimination. The relationship had ended owing to domestic violence and it was clear that had she applied under the immigration rules, she would have been in a better position than she now found herself. There was disparity in the treatment of the appellant and this violated EU law principles of equal treatment and proportionality as well as violating the fundamental rights of partners of EEA nationals who had been victims of domestic violence.

7. The First-tier Tribunal Judge found at paragraph 11 that there was no evidence to show when the appellant's husband began residing in Spain no evidence to show that he resided in Spain as a worker, a self-employed person, self-sufficient person or student (Regulation 6 of the EEA Regulations). The appellant had not lived with Spain. The appellant stated in her witness statement that her husband had started employment in the UK on 9 August 2014 but there was no evidence as to how long he was employed and no evidence as to any further employment in UK or elsewhere. His home address was now given as Spain (paragraph 10) and it was from there that he had issued divorce proceedings. The judge found only that the appellant had not met the requirements of Regulation 9 or Regulation 14(2).

Application for Permission to Appeal to the Upper Tribunal

8. The application for permission asserted that
 - (i) the judge erred in failing to refer the matter for a preliminary ruling by the court of justice of the European Union under article 267 of the Treaty on the functioning of the European Union
 - (ii) the judge's decision was not in accordance with the procedure rules
 - (iii) the decision was not in accordance with EEA regulations and directive
 - (iv) the judge failed to engage with the principle of equivalence point decision was not in the EU directive

Permission was refused on the basis of ground (i) but granted because

'it is arguable that the tribunal may have erred in not engaging with the issue raised by the appellant'.

The Hearing

9. At the hearing, Mr Malik confirmed that he did not draft the grounds but argued that the appellant had a derivative right of residence further to Regulation 16 and should be afforded retained rights of residence under Article 10. He did not pursue, sensibly in my view, much of the *detail* of the grounds as drafted.
10. Mr Melvin agreed that none of the facts were contested and although not conceding the matter outright, agreed that it appeared the appellant had a right of residence card on the facts, owing the existence of the child.

Conclusions

11. As the First-tier Tribunal recorded, there was no evidence that the sponsor was exercising treaty rights in Spain and the appellant had

never lived in Spain. The husband was clearly no longer exercising treaty rights in the UK (further to Regulation 9 – the Surinder Singh principle) because he had left the United Kingdom. The evidence given was that he served the applicant with divorce proceedings from Spain and lived there. There was no firm evidence as to when her husband had left the UK and established himself abroad such that the appellant can establish a retained right of residence under Regulation 10. Under the Directive 2004/38/EC, Article 7(2) the applicant is a family member for as long as the EU national (in this case the British citizen) was exercising treaty rights in the host member state.

12. The appellant’s application, however, had clearly identified the British citizen child and the evidence demonstrated that the appellant had sole and primary care for the child in the UK.
13. The judge failed to consider whether the decision was contrary to the Immigration (European Economic Area) Regulations 2016, which the grounds of appeal to the First-tier Tribunal, in general terms, did argue. It was contended also that the respondent had arrived at the decision without due consideration of the facts.
14. It is evident that the judge failed to address Regulation 16. This sets out as follows:

‘Derivative right to reside

16. – (1) *A person has a derivative right to reside during any period in which the person –*

- (a) *is not an exempt person; and*
- (b) *satisfies each of the criteria in one or more of paragraphs (2) to (6).*

(2) *The criteria in this paragraph are that –*

- (a) *the person is the primary carer of an EEA national; and*
- (b) *the EEA national –*
 - (i) *is under the age of 18;*
 - (ii) *resides in the United Kingdom as a self-sufficient person; and*
 - (iii) *would be unable to remain in the United Kingdom if the person left the United Kingdom for an indefinite period.*

(3) *The criteria in this paragraph are that –*

- (a) *any of the person’s parents (“PP”) is an EEA national who resides or has resided in the United Kingdom;*

- (b) *both the person and PP reside or have resided in the United Kingdom at the same time, and during such a period of residence, PP has been a worker in the United Kingdom; and*
 - (c) *the person is in education in the United Kingdom.*
 - (4) *The criteria in this paragraph are that –*
 - (a) *the person is the primary carer of a person satisfying the criteria in paragraph (3) (“PPP”); and*
 - (b) *PPP would be unable to continue to be educated in the United Kingdom if the person left the United Kingdom for an indefinite period.*
 - (5) *The criteria in this paragraph are that –*
 - (a) *the person is the primary carer of a British citizen (“BC”);*
 - (b) *BC is residing in the United Kingdom; and*
 - (c) *BC would be unable to reside in the United Kingdom or in another EEA State if the person left the United Kingdom for an indefinite period.*
 - (6) *The criteria in this paragraph are that –*
 - (a) *he person is under the age of 18;*
 - (b) *the person does not have leave to enter, or remain in, the United Kingdom under the 1971 Act;*
 - (c) *the person’s primary carer is entitled to a derivative right to reside in the United Kingdom under paragraph (2), (4) or (5); and*
 - (d) *the primary carer would be prevented from residing in the United Kingdom if the person left the United Kingdom for an indefinite period.*
 - (7) *In this regulation –*
 - (a) *“education” excludes nursery education but does not exclude education received before the compulsory school age where that education is equivalent to the education received at or after the compulsory school age;*
 - (b) *“worker” does not include a jobseeker or a person treated as a worker under regulation 6(2);*
 - (c) *an “exempt person” is a person –*
 - (i) *who has a right to reside under another provision of these Regulations;*
 - (ii) *who has the right of abode under section 2 of the 1971 Act(13);*
 - (iii) *to whom section 8 of the 1971 Act(14), or an order made under subsection (2) of that section(15), applies; or*

(iv) who has indefinite leave to enter or remain in the United Kingdom.

- (8) *A person is the “primary carer” of another person (“AP”) if –*
- (a) the person is a direct relative or a legal guardian of AP; and*
 - (b) either –*
 - (i) the person has primary responsibility for AP’s care; or*
 - (ii) shares equally the responsibility for AP’s care with one other person who is not an exempt person.*

(9) In paragraph (2)(b)(iii), (4)(b) or (5)(c), if the role of primary carer is shared with another person in accordance with paragraph (8)(b)(ii), the words “the person” are to be read as “both primary carers”.

(10) Paragraph (9) does not apply if the person with whom care responsibility is shared acquired a derivative right to reside in the United Kingdom as a result of this regulation prior to the other person’s assumption of equal care responsibility.

(11) A person is not be regarded as having responsibility for another person’s care for the purpose of paragraph (8) on the sole basis of a financial contribution towards that person’s care.

(12) A person does not have a derivative right to reside where the Secretary of State or an immigration officer has made a decision under regulation 23(6)(b), 24(1), 25(1), 26(3) or 31(1), unless that decision is set aside or otherwise no longer has effect.

15. The applicant is not an exempt person as she has no right to reside under another provision under the EEA regulations. I have found she cannot comply with Regulation 10, specifically 10(5): She did not cease to be a family member of a qualified person on the termination of marriage under Regulation (5) (a). Specifically, Regulation 10(5) refers to the termination of the marriage. **Baigazieva** [2018] EWCA Civ 1088, however, confirms that this can be on the initiation of divorce proceedings, but this does not assist the appellant. Indeed, the Directive under Article 7(1) and (2) confirms that the right of residence is extended to family members accompanying or joining the Union citizen in the host member state. Crucially there was no evidence that MSJ was living in the United Kingdom at the date of the initiation of the divorce proceedings – rather the reverse from the divorce petition.
16. Nor can the appellant succeed under Regulation 10(3) and (4) because under Regulation 2, ‘general interpretation’, ‘an EU national’ means a national of an EEA State who is not also a British citizen’ and Regulation 9 qualifies this only under certain provisions as follows:

9. – (1) *If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member (“F”) of a British citizen (“BC”) as though the BC were an EEA national.*
- (2) *The conditions are that –*
- (a) *BC –*
- (i) *is residing in an EEA State as a worker, self-employed person, self-sufficient person or a student, or so resided immediately before returning to the United Kingdom; or*
- (ii) *has acquired the right of permanent residence in an EEA State;*
- (b) *F and BC resided together in the EEA State; and*
- (c) *F and BC’s residence in the EEA State was genuine.*

There was no evidence that MSJ was residing in an EEA state as a worker, self-employed person or was self-sufficient or had acquired permanent residence in an EEA state. He had returned under the Surinder Singh principle but had subsequently left the United Kingdom.

17. Therefore, on the facts as presented, the applicant can succeed under Regulation 16 (4). She is the primary carer of a British Citizen who would be unable to continue to reside in the UK or other EEA member state if the applicant was unable to remain in the United Kingdom. As a Russian national she would have to remove her child to her home country which is outside the European Union. None of the elemental facts were in dispute. I therefore set aside and remake the decision of the First-tier Tribunal and allow the appeal of Mrs P under Regulation 16.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Helen Rimington

Date 8th October 2018

Upper Tribunal Judge Rimington