



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/03206/2016

THE IMMIGRATION ACTS

Heard at Field House
On 3 April 2018

Decision & Reasons Promulgated
On 9 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

JUSTINA APPIAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Ume-Ezeoke, Counsel instructed by JF Law Solicitors
For the Respondent: Ms N Willocks-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Ghana born on 14 September 1992. She is appealing against the decision of First-tier Tribunal Judge Chana promulgated on 14 April 2017 to dismiss her appeal against the decision of the respondent dated 24 February 2016 to refuse her application under the Immigration (European Economic Area) Regulation 2006 ("the 2006 Regulations") for a permanent residence card.

Relevant legislation

2. In order to determine this appeal it is necessary to have careful regard to several parts of the 2006 Regulations. The relevant regulations are the following:

Regulation 7(1)

7. – (1) *Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person –*

(a) his spouse or his civil partner;

(b) direct descendants of his, his spouse or his civil partner who are –

(i) under 21; or

(ii) dependants of his, his spouse or his civil partner;

Regulation 10(5)

10. – (1) *In these Regulations, “family member who has retained the right of residence” means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).*

.....

(5) A person satisfies the conditions in this paragraph if –

(a) he ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person;

(b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;

(c) he satisfies the condition in paragraph (6); and

(d) either –

(i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

.....

(6) The condition in this paragraph is that the person –

(a) is not an EEA national but would, if he were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; or

(b) is the family member of a person who falls within paragraph (a).

Regulation 15(1)(b)

15. – (1) *The following persons shall acquire the right to reside in the United Kingdom permanently –*

.....

(b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

Regulation 15(1)(f)

15. – (1) The following persons shall acquire the right to reside in the United Kingdom permanently –

.....

(f) a person who –

(i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and

(ii) was, at the end of that period, a family member who has retained the right of residence.

3. The 2006 Regulations transpose into domestic legislation the Citizens Directive (Directive 2004/38/EC “on the rights of citizen of the Union and their family members to move and reside freely within the territory of a member state”) (“the Citizens Directive”). Although the Citizens Directive was not raised in the First-tier Tribunal or in submissions before me, given that the 2006 Regulations must be interpreted and applied consistently with the Citizens Directive unless that is impossible do so, I have had regard to the following provisions of the Citizens Directive, which are relevant to the issues in this appeal.

Article 2: Definitions

"Family member" means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

Article 7: Right of residence for more than three months.

All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

*(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or*

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

Article 13: Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership

1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or

(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or

(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or

(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member

State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4). Such family members shall retain their right of residence exclusively on personal basis.

Article 18: Acquisition of the right of permanent residence by certain family members who are not nationals of a Member State

Without prejudice to Article 17, the family members of a Union citizen to whom Articles 12(2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State.

Factual Background

4. On 4 December 2006 the appellant's father, a citizen of Ghana, married an EEA national (a citizen of the Netherlands) and on 12 December 2006 they both moved to the UK. The genuineness of the marriage has not been questioned.
5. On 31 December 2009 the appellant entered the UK with a valid EEA family permit as a family member of her father's wife.
6. On 26 March 2010 the appellant applied for, and on 23 August 2010 was issued with, a residence card as a family member of an EEA national valid until 23 August 2015.
7. On 21 November 2011 the appellant's father and wife divorced.
8. On 8 August 2012 the appellant's father was issued a document certifying he had a permanent right of residence in the UK under Regulation 15 of the 2006 Regulations. He subsequently (in October 2013) became a British Citizen.
9. On 14 September 2013 the appellant attained the age of 21 years.
10. On 18 August 2015 the appellant applied for a permanent residence card as confirmation of a right to reside in the UK.
11. On 24 February 2016 the application was refused.
12. The appellant's education/work history in the UK is that she attended college from 2010 to 2013 and began working in a shop in 2015.
13. Whilst in the UK the appellant has been living with her father. She has two children, who were born in 2012 and 2016.
14. The respondent refused the application on the basis that the appellant did not meet the requirements of Regulation 15(1)(b) of the 2006 Regulations. The respondent's decision makes no reference to Regulation 10(1)(f), and the respondent gave no

consideration in the Reasons for Refusal letter to the conditions stipulated in Regulation 15(1)(f).

15. The reason given by the respondent in the Reasons for Refusal letter for refusing the application under Regulation 15(1)(b) was that the appellant had not shown that since turning 21 she had been dependent on an EEA national sponsor as she had been working at Primark and receiving Working Tax Credit and Child Tax Credit. In the Notice of Immigration Decision a different reason is given for refusing the application: that the appellant had failed to provide evidence that her EEA national sponsor resided in the UK in accordance with the 2006 Regulations during the relevant five year period.

Decision of the First-tier Tribunal

16. The judge directed himself at paragraph 20 that the case fell to be determined by reference to Regulation 10 and Regulation 15 of the 2006 Regulations. In paragraph 20 the judge referred to Regulation 15(1)(f). However, at paragraph 23 the judge proceeded to assess whether the appellant met the requirements of Regulation 15(1)(b).
17. At paragraph 24 the judge stated that the question for him to answer was whether the appellant has lived in the UK in accordance with the 2006 Regulations for five years. He answered this question, also in paragraph 24, by concluding that the appellant ceased living in the UK in accordance with the 2006 Regulations in 2011 when her father divorced his wife. At paragraph 26 the judge stated:

“The breakdown of [the appellant’s] father’s relationship with his spouse in 2011 put the appellant outside the protection of Community Law. I therefore find that the appellant has not lived in accordance with the regulations from 2001 until the present time.”

18. At paragraph 27 the judge commented that the issue of dependency did not arise but “in any event the appellant is not dependent on her father in the UK as she is working at Primark”

Grounds of Appeal and Submissions

19. The grounds argue that the judge erred by applying Regulation 15(1)(b) rather than 15(1)(f) and failing to appreciate that the appellant had lived for five years in accordance with the 2006 Regulations by the time of the divorce because she became a family member in December 2006 when her father married an EEA national notwithstanding that she did not enter the UK until 2009.
20. A further argument made in the grounds of appeal is that the judge did not recognise that there was only a need to show dependency prior to the appellant’s admission to the UK and it was irrelevant that she subsequently, whilst in the UK, found employment.
21. Before me, Mr Ume-Ezeoke, on behalf of the appellant made the following submissions:

- (1) He argued that the appellant became a family member under the 2006 Regulations upon her father marrying an EEA national in 2006 and it was an error of law for the judge to treat December 2009 (the date she entered the UK) as the starting point for assessment of her rights under the 2006 Regulations.
 - (2) He also argued that the judge erred by failing to recognise that the appellant retained a right of residence under Regulation 10(5) as consequence of her relationship with her father which meant that Regulation 10(6)(b) was satisfied.
22. Ms Willocks-Briscoe acknowledged that the judge's assessment of Regulation 10(5) was confusing and it may be that, properly construed, the requirements are satisfied and the appellant retained a right of residence under that Regulation. However, she contended that if the judge erred in this respect it was not material as the appellant had failed to demonstrate a basis upon which she had resided in the UK for five years in accordance with the 2006 Regulations, which she was required to do in order to satisfy the condition stipulated in Regulation 15(1)(f)(i) of the 2006 Regulations.

Error of Law

23. The issue before the First-tier Tribunal was whether the appellant acquired a permanent right of residence in the UK under Regulation 15(1)(f) of the 2006 Regulations and the definition in Regulation 10(5) of a "family member who has retained the right of residence".
24. Although the judge referred to both Regulation 15(1)(f) and Regulation 10(5), neither has been properly considered. The judge has not made a clear finding in respect of Regulation 10(5) and to the extent he found it was not satisfied it is not possible to discern the reason from the decision. It is also not clear if the judge has reached a conclusion about the applicability of Regulation 15(1)(f), given that he appears to have addressed only whether Regulation 15(1)(b) applies. These errors are material and accordingly the decision will need to be remade.

Remaking the Decision

25. Before considering Regulation 15(1)(f) I pause to note that confusion appears to have arisen because the respondent refused the appellant's application on the basis that Regulation 15(1)(b) was not satisfied, without referring to Regulation 15(1)(f). It is clear (and it was not suggested otherwise by Mr Ume-Ezeoke and Ms Willocks-Briscoe) that Regulation 15(1)(b) is not, and could never have been, a viable route for the appellant to establish a right to permanent residence in the UK. Firstly, Regulation 15(1)(b) requires an applicant to be a family member of an EEA national. The appellant was not, at the time the application was made, a family member of an EEA national and had not been since her father divorced his wife in 2011. Secondly, Regulation 15(1)(b) requires that the applicant must have resided in the UK with an EEA national for a continuous period of five years. It is clear that the appellant had not lived with her father's wife for five years.

26. In order to consider whether Regulation 15(1)(f) is satisfied, I have considered, chronologically, the appellant's status under the 2006 Regulation.

31 December 2009: Entry to UK

27. On 31 December 2009 the appellant entered the UK with a family permit as a family member of her father's wife. She was entitled to a family permit under Regulation 12 of the 2006 Regulations as a family member of her father's wife. She met the definition of a family member, under Regulation 7(1)(b)(i) of the 2006 Regulations, because she was under 21 and a direct descendent of her father's wife.
28. Although the appellant became entitled to apply for an EEA family permit to enter the UK as a family member of her father's wife in December 2006 when his father married and moved to the UK with his EEA national wife, the relevant date for assessing the appellant's entitlement to permanent residence is 31 December 2009 (the date she entered the UK as a family member of her father's wife). Mr Ume-Ezeoke's argument that the starting point is December 2006, which is when the appellant's father married, is not supported by the terms of Regulation 15(1)(f) which explicitly refer to the length of time the applicant must have resided in the UK. Nor does it accord with the scope of the 2006 Regulations, which, as summarised by Article 3 of the Citizen's Directive, are to apply to "Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members..." Accordingly, the date of the appellant's entry to the UK is the starting point for assessing her rights under the 2006 Regulations.

23 August 2010: Appellant issued with a Residence Card

29. On 23 August 2010 the appellant was issued with a residence card as a family member of an EEA national valid until 23 August 2015. Her entitlement to a residence card arose under Regulation 17(1) of the 2006 Regulations which provides that a residence card must be issued to a person who is a family member of a qualified person. It is common ground that when the residence card was issued the appellant was a family member of an EEA national and therefore that she was entitled to the card.
30. The appellant's right to reside in the UK under the 2006 Regulations arose from her relationship to her father's wife, not from the residence card itself. As made clear in *Samsam (EEA: revocation and retained rights) Syria* [2011] UKUT 00165 at 18: "It is trite law that in EU cases, the residence document is the evidence of the right and not the source of it". Therefore, the fact that a residence card was previously issued does not affect the assessment of whether the appellant has acquired a right to permanent residence.

21 November 2011: The appellant's father's divorce and the appellant's retained right of residence under Regulation 10(5)

31. Until the divorce, the appellant was a family member of her father's wife pursuant to Regulation 7(1)(b)(i) (a direct descendent under 21 years old of an EEA national's spouse). Once the divorce took place, the appellant ceased being the direct descendent of the spouse of an EEA national. She was therefore, as of 21 November 2011, no longer the family member of an EEA national.
32. Following the divorce, the potential route by which the appellant could retain a right of residence under the 2006 Regulations was by establishing that she was a family member who had retained the right of residence under Regulation 10(5).
33. In order for the appellant to fall within Regulation 10(5), there are several conditions to be satisfied. I consider each in turn:
 - (1) Firstly, under Regulation 10(5)(a), it must be established that the appellant ceased to be a family member of a qualified person on the termination of the marriage. As explained above, it is clear that she did, as she was no longer the direct descendent, under Regulation 7(1)(b), of her father's (now former) wife. It was common ground that the father's wife was a "qualified person".
 - (2) Secondly, under Regulation 10(5)(b), the appellant must show that she was residing in the UK in accordance with the 2006 Regulations at the date of the divorce. It is accepted by both parties that, at the date of the divorce, the appellant was living in the UK in accordance with Regulation 7(1)(b)(i) as the daughter of the spouse of a qualified person under Regulation 6. Accordingly, this condition of Regulation 10(5) is satisfied.
 - (3) Thirdly, under Regulation 10(5)(d)(i), the appellant must show that before the divorce the marriage between her father and his wife had lasted three years and her father and his wife had resided in the United Kingdom for at least one year during the marriage's duration. The evidence is clear, and it is not in dispute, that the duration requirements for the marriage in this regulation were satisfied. It was raised that this Regulation could be interpreted as applying only to a spouse. However, both Regulation 10(5) and the corresponding Article of the Citizen's Directive (Article 3) are clear that it is applicable to "family members" and is not limited only to spouses. I am therefore satisfied that Regulation 10(5)(d)(i) is satisfied.
 - (4) Fourthly, under Regulation 10(6), the appellant must show either (a) that (if she were an EEA national) she would be a worker, self-employed person or a self-sufficient person under Regulation 6; or (b) she is the family member of a person who (if he were an EEA national) would be a worker, a self-employed person or a self-sufficient person under Regulation 6. This condition is satisfied because, at the time of the divorce, the requirements of Regulation 10(6)(b) were met as a result of the appellant's relationship with her father. This is because her father would, if he were an EEA national, have been a "worker", and

because the appellant was his direct descendent under the age of 21 and consequently his "family member".

31 December 2014: Appellant has been in the UK for 5 years

34. By the end of December 2014 the appellant had been in the UK for five years.
35. To acquire a right to permanent residence under Regulation 15(1)(f) on that date, the appellant was required to show that:
- (1) She had resided in the United Kingdom in accordance with the 2006 Regulations for a continuous period of five years; and
 - (2) At the end of that period, she was "a family member who has retained the right of residence".
36. In *Amos* [2011] EWCA Civ 552 at 31, the Court of Appeal held that provided the conditions in Regulation 10(5) continue to be satisfied, after 5 years' continuous residence in the UK a non EEA national will be entitled to a permanent right of residence under Regulation 15(1)(f).
37. In *Samson* at 53, the Tribunal stated:

"Residence in accordance with these regulations contemplates residence acquired under any of the rights recognised by the regulations and there is no need to have resided a continuous period of five years and only one category..."

38. I am satisfied that between 31 December 2009 and 31 December 2014 the appellant resided in the UK in accordance with the 2006 regulations. She initially resided as a family member of her father's former wife in accordance with Regulation 7. She then resided as a family member who had retained a right of residence under Regulation 10(5) and (6). Throughout the period in question the appellant satisfied the requirements stipulated in regulation 10(6)(b) because she was a family member of a person (her father) who fell within regulation 10(6)(a). Until 14 September 2013 she was a family member of her father because she was under 21; between 14 September 2013 and 31 December 2014 she was his family member as his dependent (under Regulation 7(1)(b)(ii)). She was dependent because during this time she lived for free with her father, had no income, had a small child, and relied upon him for financial support.

Conclusion

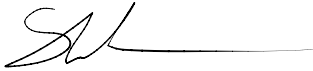
39. I am satisfied, for the reasons set out above, that the appellant retained a right of residence in the UK under the 2006 regulations following her father's divorce and that she has resided for a continuous period exceeding five years in the UK in accordance with the 2006 regulations. Consequently, she acquired a right to reside permanently in the UK under Regulation 15(1)(f).

Decision

40. The decision of the First-tier Tribunal contains a material error of law and is set aside.

41. I remake the decision by allowing the appellant's appeal.

Signed

A handwritten signature in black ink, appearing to be 'SH', followed by a long horizontal line extending to the right.

Deputy Upper Tribunal Judge Sheridan

Dated: 5 May 2018