



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/04002/2017

THE IMMIGRATION ACTS

**Heard at: Bradford
On 12th September 2018**

**Decision Promulgated
On 9th October 2018**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

And

**Abdelaziz Harbil
(no anonymity direction)**

Respondent

For the Appellant: Mr Diwnycz, Home Office Presenting Officer

For the Respondent: -

DETERMINATION AND REASONS

1. The Respondent Mr Harbil is a national of Morocco date of birth 26th April 1974. On the 12th January 2018 the First-tier Tribunal (Judge Andrew Davies) allowed his appeal under The Immigration (European Economic Area) Regulations 2016 ('the Regs'). The Tribunal allowed the appeal because it accepted that Mr Harbil met the requirements of Regulation 15, namely that he had accrued five continuous years of residence as the family member of an EEA national prior to his relationship breaking down and therefore 'retained' his rights of residence.

2. Although the Secretary of State's grounds of appeal to this Tribunal were many and varied, permission was granted on one point alone: for the purpose of calculating his five year period of continuous residence can Mr Harbil rely on time spent in this country before he was issued with a residence permit conferring a right of residence as an 'extended family member'?

Background and Matters in Issue

3. The facts as found are these:

23rd December 2008 Mr Harbil given leave to enter the United Kingdom

8th March 2010 Mr Harbil commences cohabitation with his partner, Polish national 'M'

8th April 2011 Mr Harbil was granted a residence card on the basis that he was the 'extended family member' (partner in a durable relationship) of M

27th February 2016 Mr Harbil's relationship with M came to an end when M left the country

4. Applying these facts to the requirements in Regulation 15 the First-tier Tribunal found:

- a) That Mr Harbil had been the partner of M between the 8th March 2010 and 27th February 2016;
- b) That at all material times M had been exercising treaty rights;
- c) That for the purpose of the Regulations the five-year period of continuous residence could be calculated as 27th February 2011 to the 27th February 2016;
- d) For the duration of that five-year period Mr Harbil had been residing in accordance with the Regulations;
- e) He therefore had a retained right of residence.

The appeal was thereby allowed.

5. Whilst the Secretary of State accepts that an 'extended family member', once so recognised, is to be treated as a 'family member', he submits that prior to such recognition Mr Harbil cannot be said to have been living "in accordance with" the Regulations. The clock would only start to tick from the point at which the Secretary of State issued his 'extended family member'

residence card. The card was issued on the 11th April 2011; it follows that when M left the country on the 27th February 2016 Mr Harbil was a few weeks short of having accrued his continual period of five years' residence.

Discussion and Findings

6. The applicable legal framework is found at Regulation 15:

Right of permanent residence

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

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(b) **a family member of an EEA national who is not 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;**

(c) a worker or self-employed person who has ceased activity;

(d) the family member of a worker or self-employed person who has ceased activity, provided—

(i) the person was the family member of the worker or self-employed person at the point the worker or self-employed person ceased activity; and

(ii) at that point, the family member enjoyed a right to reside on the basis of being the family member of that worker or self-employed person;

(e) a person who was the family member of a worker or self-employed person where—

(i) the worker or self-employed person has died;

(ii) the family member resided with the worker or self-employed person immediately before the death; and

(iii) the worker or self-employed person had resided continuously in the United Kingdom for at least two years immediately before dying or the death was the result of an accident at work or an occupational disease;

(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 the period, a family member who has retained the right of residence.

(2) Residence in the United Kingdom as a result of a derivative right to reside does not constitute residence for the purpose of this regulation.

(3) The right of permanent residence under this regulation is lost through absence from the United Kingdom for a period exceeding two years.

(4) A person who satisfies the criteria in this regulation is not entitled to a right to permanent residence in the United Kingdom 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.

7. It will be noted that the provision says nothing about 'extended family members'. It is however accepted by the Secretary of State that Regulation 15 can apply where an 'extended family member' is treated as a 'family member' pursuant to Regulation 7 (3):

7.

(1) In these Regulations, "family member" means, in relation to a person ("A")—

- (a) A's spouse or civil partner;
- (b) A's direct descendants, or the direct descendants of A's spouse or civil partner who are either—
 - (i) aged under 21; or
 - (ii) dependants of A, or of A's spouse or civil partner;
- (c) dependent direct relatives in A's ascending line, or in that of A's spouse or civil partner.

(2) Where A is a student residing in the United Kingdom otherwise than under regulation 13 (initial right of residence), a person is not a family member of A under paragraph (1)(b) or (c) unless—

- (a) in the case of paragraph (1)(b), the person is the dependent child of A or of A's spouse or civil partner; or
- (b) A also falls within one of the other categories of qualified person mentioned in regulation 6(1).

(3) A person ("B") who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card must be treated as a family member of A, provided

- (a) B continues to satisfy the conditions in regulation 8(2), (3), (4) or (5); and**
- (b) the EEA family permit, registration certificate or residence card remains in force.**

(4) A must be an EEA national unless regulation 9 applies (family members of British citizens).

8. What the Secretary of State does not accept is that a person whose right to reside in the United Kingdom has not been recognised by the issuance of a residence card can be classed as a 'family member' and thus meet the requirements of Regulation 15 (b). As far as the Secretary of State is concerned Mr Harbil became a 'family member' on the 11th April 2011 when his residence card was issued. He ceased to be a 'family member' on the 26th February 2016 when by his own admission he ceased to be an 'extended family member', his relationship with M having come to an end. As unattractive an outcome as this argument compels, I conclude that the Secretary of State must be correct.
9. In order to 'retain' a right under Regulation 15(1)(b) Mr Harbil must satisfy three requirements. He must show:
 - (i) that he is a "family member of an EEA national"
 - (ii) that he is not an EEA national himself
 - (iii) that he and his EEA family member have resided in the United Kingdom in accordance with the Regulations for a continuous period of five years
10. As an extended family member Mr Harbil will be treated as a 'family member' where these criteria, set out in Regulation 7(3) are met:

(3) A person ("B") who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card must be treated as a family member of A, provided—

 - (a) B continues to satisfy the conditions in regulation 8(2), (3), (4) or (5); and**
 - (b) the EEA family permit, registration certificate or residence card remains in force.**
11. Regulation 7(3) says nothing about that status of the individual concerned *prior* to the residence card being issued, but it is self-evident from 7(3)(b) above that a period without a card would be excluded. I am satisfied that there is no basis under the Regulations to class Mr Harbil as a 'family member' prior to the date upon which his right to reside as an 'extended family member' was recognised. It follows that he was approximately 2 weeks short of the requisite five-year period when his relationship came to an end. He may have been in a relationship with M for a far longer period, but prior to 11th April 2011 this was not as a 'family member'. The Secretary of State's appeal must therefore be allowed, and Mr Harbil's underlying appeal dismissed.

Decision

12. The decision of the First-tier Tribunal contains an error of law such that the decision is set aside.
13. I remake the decision in the appeal as follows:
 “the appeal is dismissed”.
14. There is no order for anonymity.

Upper Tribunal Judge Bruce
16th September 2018