



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/08946/2016
EA/08948/2016

THE IMMIGRATION ACTS

Heard at Field House
On 30 July 2018

Decision & Reasons Promulgated
On 13 September 2018

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

(1) AROKIYA COLLEY
(2) MAMA MARIAMA COLLEY

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant:

Ms U. Miszkiel, instructed by Queen's Park Solicitors

For the respondent:

Mr I. Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants entered the UK on 07 July 2010 as family members of an EEA national. The first appellant was 18 years old on arrival in the UK. The second appellant was 19 years old. They are the daughters of an EEA national, Mr Borry Colley. Mr Colley says that he entered the UK in December 2000 and has been exercising his rights of free movement in the UK since then. As a result, it is likely that he acquired a right of permanent residence some time ago.

2. The appellants appealed the respondent's decision dated 06 July 2016 to refuse to issue a residence card recognising a right of permanent residence as the family members of an EEA national. First-tier Tribunal Judge Ghani ("the judge") dismissed the appeal in a decision promulgated on 25 August 2017. The judge was not satisfied that the appellants were dependent on the EEA sponsor for the purpose of The Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations 2006"). The Upper Tribunal set aside the decision on 15 May 2018 (see annex). The appeal was listed for a resumed hearing to remake the decision.

The hearing

3. The appellants and their father, the EEA sponsor, attended the hearing and gave evidence in English. The appellants and the sponsor were asked questions about the history of their family life in the UK. The details of the proceedings are a matter of record. The relevant details of the evidence given by the witnesses are incorporated into my findings of fact below.
4. I have considered the appellants' grounds of appeal, the oral evidence and submissions along with the reasons given for refusing the application before coming to a decision in this appeal.

Legal framework

5. The Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations 2006") are the relevant regulations for the purpose of this appeal.
6. Regulation 7 defines a 'family member' as a direct descendant who is under the age of 21 years old or who is a dependent of the EEA sponsor.
7. Regulation 15 states that a 'family member' shall acquire a permanent right of residence if they have resided in accordance with the EEA Regulations 2006 for a continuous period of five years.
8. Recital (5) of the Citizens' Directive (2004/38/EC) states:

"The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality."

Decision and reasons

The first appellant (Arokiya Colley)

9. The first appellant entered the UK on 07 July 2010 with a family permit. On 01 February 2011 she was issued with a residence card as a 'family member'. She resided in the UK in accordance with the EEA Regulations 2006 until she turned 21 years old on 27 January 2013. At that point she needed to show that she continued to be dependent upon her father.
10. The appellant was 18 years old when she arrived in the UK. As might be expected of someone of that age, she entered higher education. On 25 January 2014 she went to study nursing at the University of Wolverhampton. Like many students, she continued

to use her father's address as her home address. There is evidence to show that correspondence from her university was sent to her term-time address and recorded her father's address in London as her home address. There is evidence to show that Newham council still registered her as a member of his household in April 2015. Like many young adults who go to university, she had to apply for a student loan to cover the cost of her tuition fees and living expenses. To apply for the loan, she had to produce evidence to show that she was the 'family member' of a qualifying EEA national so that she could be recognised as a 'domestic' student. Like many students, the appellant worked to supplement her income while she was studying. As a nursing student, she was able to obtain agency work. Like many students, she returned to her father's home in the holidays. He continued to provide her with emotional support and supplemented her income and student loans with financial support when necessary albeit it is accepted that he did not need to provide financial support on a regular basis.

11. By 07 July 2015, the appellant had resided in the UK for a continuous period of five years. At that date she was still studying for her degree. The respondent argues that the appellant was not 'dependent' on her father while she was at university because she was able to support herself through a bursary and student loans. Whether the appellant was 'dependent' on her father within the meaning of European law must be considered in light of the clear intention of the Citizens' Directive. Dependency is not necessarily confined solely to financial support. The appellant was not directly reliant on regular funds from her father while she was at university, but like many young adults of her age, she had not yet established an independent life. She maintained ties to her father's household while she was studying and returned there during the holidays. She continued to be reliant on him for advice and support and occasional financial support. She needed to rely on her status as the 'family member' of an EEA national to obtain a bursary and student loans as a 'domestic student'.
12. The Citizens' Directive recognises young adults as 'family members' until they are 21 years old. Many young adults go to university, which is often the beginning of the process of establishing an independent life away from their parents. But it is also common for young adults at university to maintain links to the family home and a level of dependency on their parents. It is often the first step to forming an independent life. The evidence shows that the appellant has gone on to do just that since she graduated from university. At the date of the hearing she is working and rents a home in Wolverhampton where she lives for most of the week with her sister, albeit she says that she continues to spend a lot of time with her father in London when she is not working. Although the appellant's situation now indicates that she is far less dependent on her father, I am satisfied that she could properly be described as continuing to be 'dependent' on her father while she was at university within the intended meaning of European law.
13. The appellant was living in the UK in accordance with the EEA Regulations 2006 from 07 July 2010 until her 21st birthday on 27 January 2013. Thereafter, she continued to be a 'dependent' within the meaning of European law while she was at university. She continued to reside in the UK in accordance with the EEA Regulations 2006 until 07 July 2015, at which point she acquired a right of permanent residence under regulation

15 of the EEA Regulations 2006. Although she has established an independent life since leaving university, and it is unlikely that she has the required level of dependency at the date of the hearing, it matters not because she had already acquired a right of permanent residence in 2015.

The second appellant (Mama Mariama Colley)

14. In contrast, the second appellant quite clearly established an independent life away from the family home shortly after arriving in the UK. She entered the UK on 07 July 2010 with her sister. She was also issued a residence card as the 'family member' of an EEA national on 01 February 2011. However, by 25 July 2011 she gave birth to a daughter. In September 2011 she moved out of the family home. For the purpose of EU residence rights it mattered not, at that stage, that she was not dependent on her father because she was still under 21 years old. When she turned 21 on 24 December 2011 she was living independently from her father with her partner who was the father of her child. In evidence at the hearing she confirmed that she supported herself through work. On 22 May 2013 she gave birth to a second child.
15. The second appellant has been deliberately opaque about her family circumstances. No detail was given about her relationship with the father of her children in the witness statement or by any of the other witnesses. At the hearing, she was at least honest enough to admit that her partner was also working in the UK. When his leave to remain expired, this prompted them to move to Wolverhampton where the rent was cheaper. At that stage she became dependent on benefits. She admitted that her partner lives with her and the children. He has not worked since 2015 because he has no permission to do so. Since benefits were stopped, she has had to rely on her father and her sister for financial support. It transpired that the tenancy agreement is in her sister's name and that her father pays £200 a month towards the rent and other expenses. The evidence of the other witnesses was broadly consistent. I am satisfied that they were sufficiently credible to accept that, between them, they support the second appellant. The level of support provided by Mr Colley is sufficient to show that the second appellant is now 'dependent' on her father to a large enough extent to engage the operation of European law.
16. On the facts outlined above I conclude that the second appellant has been unable to show that she continued to be 'dependent' on her father after she turned 21 years old. She established an independent life with the father of her children. They worked to support themselves. She was resident as a 'family member' for the first year and half in the UK. After that there is a gap because she has been unable to show that she was likely to be dependent on her father once she moved out of the family home and established an independent life with her partner. I conclude that the second appellant has failed to show on the balance of probabilities that she has resided in the UK in accordance with the EEA Regulations 2006 for any continuous period of five years. She has not acquired a right of permanent residence.
17. It was only after her partner was unable to continue working in 2015 that the second appellant and her family moved to Wolverhampton. At the date of the hearing their family circumstances are such that they have now become dependent on Mr Colley for financial support to meet a large part of their essential living needs. Although I

conclude that the appellant has not acquired a right of permanent residence I am satisfied that, at the date of the hearing, her circumstances have changed to the extent that she once again qualifies as the dependent 'family member' of an EEA national under regulation 7 of the EEA Regulations 2006.

18. It was agreed that I did not need to determine further elements of EU law that might apply to the second appellant's case because the application was not made on that basis and has not been considered by the Secretary of State. However, it is not disputed that the appellants' oldest child was issued with a permanent residence card in 2016. It is at least arguable that some right of residence might be derived from that relationship, but it is not necessary for me to determine the issue for the purpose of this appeal.

Conclusion

19. I conclude that the first appellant acquired a right of permanent residence in 2015. Having acquired a right of permanent residence she does not need to show that she continues to be a dependent 'family member' at the date of the hearing. At the date of the hearing, she meets the requirements of regulation 15 of the EEA Regulations 2006.
20. I conclude that the second appellant has failed to establish that she acquired a right of permanent residence. At the date of the hearing she has failed to show that she meets the requirements of regulation 15 but is a dependent 'family member' under regulation 7 of the EEA Regulations 2006.

DECISION

The first appellant (Arokiya Colley)

The appeal is ALLOWED under the EEA Regulations 2006

The second appellant (Mama Mariama Colley)

The appeal is ALLOWED under the EEA Regulations 2006

Signed  Date 10 September 2018
Upper Tribunal Judge Canavan

[ANNEX]



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

Appeal Number: EA/08946/2016
EA/08948/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 15 May 2018**

Decision Promulgated

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Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

**(1) AROKIYA COLLEY
(2) MAMA MARIAMA COLLEY**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant:

Ms U. Miszkiel, Counsel instructed by Queen's Park Solicitors

For the respondent:

Ms A. Holmes, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appealed the respondent's decision dated 06 July 2016 to refuse to issue a residence card recognising a right of permanent residence as the family members of

an EEA national. The appellants are sisters. At the First-tier Tribunal a third appellant (the second appellant's child) was included in the appeal (EA/08950/2016). The appeal was withdrawn at the hearing.

2. First-tier Tribunal Judge Ghani ("the judge") dismissed the appeal in a decision promulgated on 25 August 2017. The judge was not satisfied that the appellants were dependent on the EEA sponsor for the purpose of The Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations 2006"). At [26] the judge stated that he must consider the circumstances at the date of the hearing. At [30] he repeated that the "relevant date for deciding whether the requirements of Regulation 7 are met becomes the date of the hearing. (REYES 2013 UKUT 312 IAC)".
3. The two grounds of appeal essentially make the same point. It is argued that the judge erred in assessing the evidence at the date of the hearing when they might have acquired a right of permanent residence at an earlier stage.

Decision and reasons

4. The parties agreed that the decision involved the making of an error of law. In view of the agreement between the parties it is not necessary to set out my findings in detail, but for the following reasons, I find that the decision involved the making of a material error of law.
5. Although the judge mentioned regulation 15 at [8] it is not clear from the decision that he applied the relevant legal test. A person can acquire a right of permanent residence if they have resided in the UK in accordance with the regulations for a continuous period of five years. It follows that a person can acquire a right of permanent residence at a point prior to the date of the hearing. Although the judge was correct to say that rights of residence under regulation 7 should be considered at the date of the hearing because the Tribunal is being asked to determine existing rights of residence, it is not correct to say that the assessment under regulation 15 must be considered at the date of the hearing. The assessment involves consideration of whether there was, at any point, a continuous period of five years where an appellant resided in accordance with the regulations. If the appellant acquired a right of permanent residence at an earlier point, it matters not if they are no longer residing in accordance with the regulations at the date of the hearing, because the purpose of permanent residence is to recognise that they are now integrated in the UK.
6. I have considered whether, despite the misdirection as to when the evidence should be considered, the judge made sufficient findings to determine the issue of permanent residence. Although the judge set out the evidence given by the appellants and the EEA sponsor, the parties accept that his findings are not sufficiently clear to render the error immaterial. Because of the misdirection, the judge's findings were focussed on the situation at the date of the hearing. At [30] the judge wrongly referred to regulation 7 rather than regulation 15. He repeated that his consideration of the evidence was 'at the date of the hearing' in his conclusion at [31].

7. For these reasons I conclude that the First-tier Tribunal decision involved the making of an error on a point of law. The decision is set aside.
8. Ms Miszkiel argued that the appeal should be remitted for a fresh hearing in the First-Tier Tribunal because the appellants had not been afforded proper findings in the First-tier Tribunal. I have considered the terms of paragraph 7.2 of the Practice Statement (25 September 2012). It cannot be said that the appellants did not have a fair opportunity to put their case before the First-tier Tribunal. There is no suggestion of procedural unfairness. The judge heard evidence from three witnesses and made findings. The decision has been set aside because the judge did not assess the case within the correct legal framework. It appears that the judge proceeded on the evidence taken at its highest. There is no suggestion that he had any concerns about the credibility of the witnesses. Although the Tribunal might need to make some fresh findings, the focus of the remaking will be to apply the facts to the relevant legal framework. The nature and extent of any judicial fact finding is likely to be fairly limited. For these reasons I conclude that it is appropriate to remake the decision in the Upper Tribunal.
9. I considered whether it was possible to remake the decision on the evidence currently before the Upper Tribunal. Ms Miszkiel indicated that there was further evidence that might be relevant to a proper determination of the appeal. The standard directions issued by the Upper Tribunal make clear that there is a presumption that, in the event the First-tier Tribunal decision is set aside, the re-making will take place at the same hearing. The fresh decision will normally be based on the evidence before the First-tier Tribunal and any further evidence admitted. Parties are told to be prepared accordingly. No explanation was offered for the failure to submit any additional evidence that the appellants now wish to rely on. However, the nature of the evidence described by Ms Miszkiel is likely to be relevant to a proper determination of the appeal. The Upper Tribunal would also be assisted by further documents, such as a detailed chronology in relation to each appellant. For these reasons I considered that it was in the interests of justice to adjourn the appeal to allow time for the appellants to adduce further evidence despite the failure to comply with the standard directions of the Upper Tribunal.

Directions


10. The appellants shall file up to date witness statements, a detailed chronology of events and any further evidence relied upon no later than **seven days** before the next hearing. This direction shall stand as permission to adduce further evidence that was not before the First-tier Tribunal for the purpose of rule 15(2A) of The Tribunal Procedure (Upper Tribunal) Rules 2008.

DECISION

The First-tier Tribunal decision involved the making of an error of law

The decision is set aside

The appeal will be listed for a resumed hearing in the Upper Tribunal

Signed 
Upper Tribunal Judge Canavan

Date 16 May 2018