



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
EA/12236/2016**

**APPEAL NUMBERS:
EA/12238/2016**

THE IMMIGRATION ACTS

Heard at: Field House

**Decision and Reasons
Promulgated**

On: 29 January 2018

On: 26 February 2018

Before

Deputy Upper Tribunal Judge Mailer

Between

ENTRY CLEARANCE OFFICER: UK SHEFFIELD

Appellant

and

[L M]

[Y M]

~~(NO ANONYMITY DIRECTION MADE)~~

Respondents

Representation

**For the Appellant: Ms A Holmes, Senior Home Office Presenting
Officer**

**For the Respondents: Ms H Gore, counsel (instructed by R Spio &
Co)**

DECISION AND REASONS

- 1.** I shall refer to the appellant as the entry clearance officer and to the respondents as the claimants.

2. The claimants are nationals of Ghana, born on [] 2002 and [] 2000.
3. The entry clearance officer appeals with permission against the decision of First-tier Tribunal Judge Page who allowed the claimants' appeals against the decision of the ECO refusing to grant them an EEA family permit to join their stepfather, a French national, married to their mother in the UK. Their applications were refused under Regulation 6 and 7 of the Immigration (EEA) Regulations 2006.
4. Judge Page has set out the relevant requirements of Regulation 7 of the 2006 Regulations relating to "family members." He noted that the burden of proof is upon the claimant to demonstrate on the balance of probability that the respondent's decision has "interfered with her protected right to family life under Article 8 ECHR." He stated at [2] that their grounds of appeal are restricted to human rights grounds under s.82 of the 2002 Act, as amended by the Immigration Act 2014.
5. He referred to the reasons for the refusal: First, the ECO was not satisfied that the claimants and their mother in the UK were related as claimed. However, DNA evidence had been provided confirming that "the appellant and her mother are related as mother and child" [6]. That evidence predated the decision to refuse and was available to the ECO. The reports were dated 6 June 2016 and confirmed the probability of maternity as 99.9999%.
6. Secondly, Home Office records showed that the claimants' mother had applied for a visa in 2005 and had stated that her spouse was [FM], born on [] 1951. He was named as the claimants' father in their application.
7. Further, the ECO noted that the claimants' mother was previously customarily married in October 2003 as stated in the order of dissolution of marriage dated 13 December 2010. That document referred to the mother's previous marriage to [NW]. The ECO viewed this as a discrepancy and was not satisfied that the previous marriage to their father had been dissolved prior to their mother's marriage to her current EEA sponsor.
8. Judge Page found that that this was not a discrepancy as the evidence before him was explained. The first name is the tribal name of [FM]. He accepted that the issue relating to the relationship between mother and children had been resolved in the claimants' favour [6].
9. The two names relating to their mother's previous spouse referred to the same person and not to two different people. The statutory declaration exhibited in the claimants' bundle referred to this [7].
10. The claimants' mother produced at the hearing her permanent residence card issued by the Home Office on 2 June 2017. Ms Gore, who represented the claimants before the First-tier Tribunal, argued that this proved that

the Home Office accepted that she was properly married to an EEA national and must be legally divorced from her first husband, the claimants' father. Therefore at the date of the ECO's decision to refuse the application on 20 September 2016, the Home Office had issued their mother with a permanent residence card on the basis that her marriage to [CD] was valid [8].

- 11.** He accepted that evidence. He found that the claimants' mother was credible. It followed that the two issues in the refusal decision have been resolved in the claimants' favour [9].
- 12.** The Judge then proceeded to consider their appeals under Article 8 of the Human Rights Convention. He found that human rights grounds are engaged because the claimants wish to pursue family life with their mother and stepfather in the UK. There were no countervailing reasons for refusing other than those given in the 2016 decision. He therefore allowed the appeal.
- 13.** On 30 November 2017, First-tier Tribunal Judge Grimmett granted the ECO permission to appeal. It was arguable that the Judge erred in apparently allowing the appeals under the Immigration Rules notwithstanding that the applications were made under the 2006 Regulations.
- 14.** Ms Holmes relied on the grounds seeking permission to appeal. She submitted that the Judge misdirected himself; it was incumbent on him to consider the appeal with reference to the 2006 Regulations. She relied on the decision of Amirteymour and Others (EEA Appeals: Human Rights) [201]UKUT 00466 (IAC): Where no notice under s.120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot bring a human rights challenge to a removal in an appeal under the EEA Regulations.
- 15.** Further, the sponsor was now divorced from the EEA national and as such her children could not benefit from the provisions of Regulation 7(1)(b)(i) at the point of divorce, namely 30 November 2016.
- 16.** On behalf of the claimants, Ms Gore submitted that whilst it is correct that the appeals should not have been considered under the Immigration Rules on Article 8 grounds, this did not constitute a material error in the circumstances.

Assessment

- 17.** The First-tier Tribunal Judge allowed the appeal on the basis of human rights. It was accepted by Ms Gore that this constituted an error of law as the decision in Amirteymour applied.

- 18.** However, at the commencement of his decision, the Judge set out in full the relevant provisions of Regulation 7 of the 2006 Regulations. A person is to be treated as the family member of another person who is the direct descendant of his, his spouse or civil partner, who is under 21.
- 19.** The Judge accepted that the evidence which was available at the date of the application demonstrated beyond doubt that the claimants were related as claimed [6].
- 20.** Further, the claimants' mother produced her permanent residence card issued in June 2017. That showed that the Home Office had accepted that she was properly married to an EU national and had therefore been divorced from her first husband, the claimants' father. Accordingly, at the date of the ECO's decision to refuse the claimants' applications, the Home Office had issued their mother with a permanent residence card on the basis that her marriage to [CD] was valid. The claimants had applied for an EEA family permit to join [CD] in the UK as his stepchildren.
- 21.** As at the date of application on 15 August 2016, their mother was still married to [CD].
- 22.** As noted by the Judge, there were only two issues raised by the ECO refusing the application on 20 September 2016. Those two issues were resolved in the claimants' favour.
- 23.** In the circumstances, the evidence showed that at the date of application the claimants were the direct descendants of an EEA national's spouse. Both were under 21 at the time.
- 24.** Judge Page upheld the appeal on human rights grounds. That constituted an error in the making of the decision for the reasons already given.
- 25.** I accordingly set aside the decision and re-make it. I preserve the findings.
- 26.** I find that the claimants are the children of their mother. Further, I find for the reasons given by Judge Page at [7] that there was no discrepancy as to the identity of their father.
- 27.** I accordingly find that the claimants have shown on the balance of probabilities that they were direct descendants of the spouse of an EEA national.
- 28.** There was no other basis upon which the ECO contended that the relevant requirements under Regulation 7 of the 2006 Regulations had not been met.

29. I accordingly find that the claimants were family members for the purpose of the 2006 Regulations. The ECO is obliged to issue them with EEA family permits as family members of an EEA national.

Notice of Decision

Having set aside the decision of the First-tier Tribunal, I re-make it and dismiss the Entry Clearance Officer's appeal.

Anonymity direction not made.

Signed

Date: 20 February 2018

Deputy Upper Tribunal Judge C R Mailer