Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/12630/2016
EA/12631/2016

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
On: 13 November 2018	**On: 26 November 2018**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

AKISSI [Y]
[A D]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr I Khan, instructed by ICS Legal
For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants, mother and son, appeal, with permission, against the decision of the First-tier Tribunal dismissing their appeals against the respondent's decision to refuse to issue them with permanent residence cards under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"), in the first appellant's case on the basis of having retained a right of residence as the former spouse of an EEA national and in the second appellant's case as the family member of an EEA national.

2. The appellants are citizens of the Ivory Coast born on 19 September 1983 and 4 September 2008 respectively. It is not known when they arrived in the UK, but on 20 May 2009 they first applied for residence cards under the EEA Regulations following the first appellant's marriage to the sponsor, Aly [S], on 14 June 2008 and the birth of her child, the second appellant, on 4 September 2008. The second appellant's father was not the sponsor, but he was Mamadou [D], a British citizen.

3. The background to the application, as claimed by the first appellant, is as follows. She met Mamadou [D] in the Ivory Coast in January 2007 and commenced a relationship with him. She became pregnant with the second appellant and, as a result of her pregnancy, Mamadou [D] left her. She then met the EEA national sponsor Aly [S] in December 2007 in the Ivory Coast and their relationship began in January 2008. They got married on 14 June 2008, by proxy, and lived together in the UK from 2009 to 2012. In the meantime the second appellant's father, Mamadou [D], made contact with her in 2011 as he wanted to see his son. That led to problems in the first appellant's marriage with the EEA sponsor and she then resumed her relationship with Mamadou [D] and had a daughter with him on 12 August 2012, [MD]. The first appellant then divorced her EEA national husband. The divorce was finalised on 11 March 2016. According to the first appellant, Mamadou [D] has since died in the Ivory Coast.

4. The first appellant applied for an EEA residence card on 20 May 2009, but her application was refused as the sponsor's ID card had been reported as lost/ stolen. On 20 January 2011 she applied again for an EEA residence card as the family member of Aly [S]. The documentation produced by the first appellant shows that she was issued with an EEA residence card on 20 April 2011, valid until 20 April 2016, as the family member of an EEA national. On 4 April 2016 the first appellant applied for permanent residence cards for herself and her son the second appellant. The applications were refused on 3 October 2016.

5. The respondent, in refusing the applications, did not accept that the first appellant's marriage to Aly [S] was genuine, as it was considered that her real partner was Mamadou [D] who was, according to the documentation produced, living with her and their children at that time. The respondent considered that Mamadou [D] was the father of the two children and believed that the first appellant's relationship with him was ongoing and that the marriage to Aly [S] had been entered into for immigration purposes only. The respondent concluded that the first appellant's marriage to the EEA national sponsor was one of convenience and therefore she was not a "spouse" for the purposes of Regulation 2 of the EEA Regulations. In addition, the respondent noted that the sponsor's registration certificate was revoked on 30 June 2016 on the basis that he had been found to have been involved in an organised criminal network, following a joint investigation between HMRC and DWP and the Home Office, which facilitated the entry of French nationals to the UK to participate in bogus proxy and customary marriages with non-EU nationals and which involved benefit fraud leading to the DWP being defrauded of £3.45 million in bogus benefit payments. The leader of the organised criminal network had been sentenced to six years imprisonment on 26 April 2016. Further, the sponsor's French ID card, which had

been submitted to the Home Office as part of the application in 2009, had been reported by the French authorities as lost/stolen in October 2008. As a result of the deception the respondent was not satisfied that the evidence of the sponsor's treaty rights was genuine. The respondent considered that even if the first appellant's marriage had been genuine, the respondent could not be satisfied that the sponsor was a qualified person. The respondent therefore refused to issue the appellants with residence cards under regulation 15(1)(f) with reference to regulation 10(5) and regulation 2 of the EEA Regulations 2006.

6. The appellants appealed against that decision and their appeals were heard on 15 February 2018 by Designated First-tier Tribunal Judge Shaerf. At the hearing the judge heard from the first appellant who denied that her marriage to the EEA national sponsor, Aly [S], had been one of convenience and denied knowledge of his criminal activities. The first appellant said that her children's father, Mr [D], had died in the Ivory Coast but had been a British national at the time their son was born. By way of submissions the appellants' representative, Mr Khan, maintained that the first appellant's marriage to the sponsor had been genuine but he also suggested that the Tribunal could consider the appellants' appeal by way of reference to regulation 15A of the EEA Regulations.

7. Designated Judge Shaerf rejected the first appellant's claim that her marriage had been genuine and concluded that the respondent had discharged the burden of proving that it was a marriage of convenience. He found that, in any event, the first appellant could not qualify for permanent residence on the basis of her own employment and the employment of Aly [S]. The judge found there to be no evidence to show that there was a viable claim under regulation 15A and he dismissed the appeal under the EEA Regulations.

8. The appellant sought permission to appeal to the Upper Tribunal on the basis that the judge had failed to consider the full matrix of the first appellant's relationship with her EEA national ex-husband and that the judge had failed to consider all the evidence showing that the requirements of regulation 16 of the EEA Regulations 2016 were met on the basis of her being the primary carer of a British national child.

9. Permission was initially refused, but was subsequently granted on 21 September 2018, on the sole ground that the judge had arguably failed to consider regulation 16.

Appeal hearing and submissions

10. At the hearing it was agreed that the only ground of appeal was in relation to regulation 16. Mr Khan submitted that the judge had failed to consider regulation 16 when he had adequate evidence before him to allow the appeal on that basis. Ms Willocks-Briscoe submitted that regulation 16 was not part of the appellants' application and was therefore not part of the matrix considered by the respondent. The respondent's decision focussed on regulation 10 as the application had been made on the basis of a retained right of residence upon divorce. This was therefore a new matter raised at the Tribunal and the provisions of the Nationality, Immigration and Asylum Act 2002 applied so that the judge had no jurisdiction to consider the matter. Mr Khan replied that the relevant parts of the

2002 Act did not apply to cases under the EEA Regulations and in any event the respondent was on notice that the first appellant had a British child. The judge ought, therefore, to have considered the matter.

Consideration and findings.

11. It was Ms Willocks-Briscoe's submission that the judge had no jurisdiction to consider the new matter of regulation 16. In that respect she relied upon section 85 of the NIAA 2002 and regulation 26(7) of the EEA Regulations 2006/ Regulation 36(10) of the EEA Regulations 2016. However whether or not the terms of s85 applied, no objection was raised by the respondent at the hearing despite the matter being raised in the skeleton argument and, as Mr Khan submitted, the respondent was already aware that the first appellant had a British child. In addition it is relevant to note that no challenge had been made by the respondent to the judge's decision in that respect prior to Ms Willocks-Briscoe's submission and that is particularly relevant given that that was the only basis upon which permission was granted to the appellants. Accordingly I find no merit in the suggestion that the judge had no jurisdiction to consider the matter.

12. As for the grant of permission itself, whilst the judge did not consider regulation 16 of the EEA Regulations 2016, he did indeed consider the question of a derivative right of residence under regulation 15A of the 2006 Regulations which Mr Khan accepted were the relevant regulations in this case. In any event the relevant criteria are almost identical in both sets of regulations in regulation 15A(4A) and (5) of the 2006 Regulations and regulation 16(5) and (6) of the 2016 Regulations. The judge made his findings in that respect at [28] of his decision, concluding as follows:

> "There was no evidence before the Tribunal of the type which could show the Appellant had any viable claim under Reg 15(A) of the EEA Regs other than the bio-data page of her daughter's passport. There was no evidence that went anywhere near satisfying the evidential requirements outlined in *Nilay Patel v SSHD [2017] EWCA Civ 2028* and in particular at paras. 23 and 26 and 72-78."

13. The ground of appeal seeking to challenge the judge's findings at [28] is that the appellants' appeal bundle contained all the relevant evidence to show that the requirements of regulation 16 were met and that the judge erred by failing to apply the relevant criteria in the light of that evidence. The relevant evidence referred to in the ground of appeal consisted of the fact that the first appellant was a lone parent (with reference to the death certificate of the children's father), that her daughter was only 5 years of age and was in full-time education at school and relied on her mother for emotional, parental and financial care.

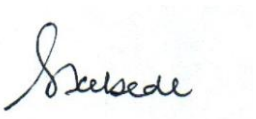
14. However it seems to me that the judge was perfectly entitled to conclude that there was insufficient evidence to show that the requirements of the regulations were met. He referred in particular to paragraphs 23, 26 and 72-78 of Patel, which confirmed that the relevant question was whether the child would, in practice, be compelled to leave the EU if the first appellant was obliged to leave, and which included the question of whether the child was legally, financially or emotionally dependent on the first appellant. Paragraph

25 of Patel makes it clear that the third country national bears the evidential burden of establishing that the child citizen will, in practice, be compelled to leave the EU. Turning to the evidence before the judge, there was the bio-data page of the first appellant's daughter's British passport, a photocopy of a document referred to as the death certificate of Mamadou [D], and the first appellant's claim in her statement to be a single mother. The judge was perfectly entitled to consider that evidence in the context of the fact that the application had not been made on the basis of derivative rights but on entirely different basis and that the appeal itself focussed almost exclusively upon the issue of retained rights of residence. The oral evidence was only concerned with the first appellant's relationship with the EEA sponsor, with no evidence of her relationship with her children and issues of their dependency upon her. In view of the fact that the first appellant had relied, in her application, upon a sham marriage linked to a fraud perpetrated on a large scale, the judge could not be expected in any way to take at face value, and on the basis of a photocopied document, the claim that the children's father had died and that they were wholly dependent upon her such that the British child would be forced to leave the EU if she had to leave.

15. The judge was, in my view, perfectly entitled to conclude as he did, namely that the evidence did not go anywhere near satisfying the evidential requirements outlined in Patel and that there was no evidence of the type required to show that the first appellant had a viable claim under regulation 15A. Of course if the first appellant has such evidence it is open to her to make an application under the relevant EEA Regulations, but for the purposes of this appeal, the judge was fully entitled, on the limited evidence before him and for the reasons cogently given, to reject the claim and dismiss the appeals. Accordingly I find that there are no errors of law in the judge's decision.

DECISION

16. The appellants' appeal is accordingly dismissed. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appellants' appeal therefore stands.

Signed:  Date: 14 November 2018

Upper Tribunal Judge Kebede