



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/11590/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 25 January 2019

Decision & Reasons Promulgated  
On 20 February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CYNTHIA DEUFI MONKAN

Respondent

**Representation:**

For the Appellant: Mr E Tufan, Home Office Presenting Officer

For the Respondent: Mr M Al-Rashid, Counsel

**DECISION AND REASONS**

1. The Respondent, to whom I shall refer as the Claimant, is a national of Cameroon born on 9 July 1991. The history of the appeal is a little complex but with the assistance of the parties the issues were clarified and narrowed.
2. The Claimant applied for an EEA family permit as the dependant of Mr [GD], whom she believed to be her father, having been brought up in his household since the age of 5 years old. It was only upon the necessity to obtain DNA evidence in support of her application for an EEA family permit that it was discovered she was not his daughter biologically but that he was likely to be her uncle.

3. The basis of the issue of the EEA family permit is that the Appellant's uncle was married to an EEA national, [ML] on 31 July 2000. The Claimant arrived in the UK on 17 June 2007. She was 15 at that time. Her former representatives applied for permanent residence cards both in respect of her uncle and the Claimant. Her uncle was issued with permanent residence on 3 March 2008, whereas the Claimant was issued with a residence card valid for five years as the family member of an EEA national.
4. Her uncle's relationship subsequently broke down. On 29 June 2009 he petitioned for divorce and the decree absolute was pronounced on 18 November 2009. The Claimant remained living with her uncle, but not with his EEA national wife, until March 2015 when she moved out to live with her fiancé who is a French national living and working in the UK.
5. The Claimant made an application for permanent residence on the basis of a retained right of residence on 22 February 2016. This application was refused on 6 September 2016. The Claimant appealed to the First-tier Tribunal who allowed her appeal in a decision promulgated on 6 March 2018. The Judge at [86] was satisfied the Claimant and her uncle were honest and credible witnesses. He found at [95] that the Claimant had, at all material times, been financially dependent on her uncle, whom she had resided with from her entry to the UK in June 2007 until March 2015.
6. The Judge took into account that in a previous determination in respect of an application for indefinite leave to remain, Judge Mayall had made a declaration that the Claimant had acquired a right to reside permanently. The Secretary of State then wrote to the Claimant on 6 October 2014, referring to that decision and informing her she would not be required to leave the UK and that if she wished to submit her passport it would be endorsed with a permanent right to reside in the UK and should be submitted with an appropriate application form. The Claimant then made an application but this was rejected because she paid the old fee.
7. A further application made on 19 February 2016 was refused on 6 September 2016 under Regulation 15(1)(b) of the Immigration (EEA) Regulations 2006. Judge Blake in a decision and reasons dated 23 February 2018 found at [110] that the Claimant had resided in the UK as a family member of an EEA national from 17 June 2007 until 18 November 2009, and held as follows at [111]:
  - “111. I further noted from the time of the divorce of her uncle from his EEA national spouse the Appellant had retained the right of residence as a family member and that the five years were therefore made up.
  112. In light of my findings I concluded that the Appellant was entitled to a permanent residence card as had been recognised in June 2014”.
8. The Secretary of State sought and obtained permission to appeal to the Upper Tribunal on the basis that the judge had erred materially in law at [95], in that it was asserted that:

- (1) the Claimant would have needed to show she had been dependent on her uncle's ex-wife, the EEA national or been a member of her household, rather than being dependent on her uncle;
  - (2) that the decision of Judge Mayall had clearly been made in error when he found that the Claimant had acquired the permanent right to remain pursuant to Regulation 15 of the 2006 Regulations on the basis he believed the Claimant to be the Sponsor's daughter; and
  - (3) that the Secretary of State had accepted Judge Mayall's finding and had written to her informing her she had acquired the right to reside, whereas in fact the Secretary of State had simply noted that the Immigration Judge found the Claimant had acquired the right to reside in the UK permanently and the letter of October 2014 was not a grant of leave and could not give rise to a legitimate expectation.
9. Permission to appeal to the Upper Tribunal was granted and in a decision and reasons promulgated on 4 September 2018, Upper Tribunal Judge Rimington found that the judge had erred materially in law. A copy of that decision and reasons is appended.

#### *Hearing*

10. The matter came before the Upper Tribunal for hearing on 25 January 2019, where I invited submissions from both Mr Al-Rashid for the Claimant and Mr Tufan for the Secretary of State, in order to narrow the issues.
11. Mr Al-Rashid's primary position is that, as set out in his written submissions and his oral submissions, a purposive interpretation must be made in respect of CD 2004/38 and that the EEA Regulations did not properly give effect to the Directive bearing in mind recital 15 and Article 13(2). Recital 15 of the Directive provides:

*"Family members should be legally safeguarded in the event of death of the Union Citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain circumstances to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis."*

Article 13 of the Directive provides:

***"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."*

12. Mr Al-Rashid submitted that the Regulations do not appear to cater for the Claimant's situation as a former child whose relative has divorced an EEA national. Whilst her uncle was able to retain residence because the marriage lasted for more than three years, there is no express provision in the Regulations for dependants in that situation. Mr Al-Rashid submitted it was necessary to go back to first principles as set out in the Directive, see also Gauswami [2018] UKUT 275, a decision of President Lane, where it is clear that the Directive should offer protection to children and family members.
13. There was a discussion as to whether or not the amended EEA Regulations 2016 applied given that they had come into force on 1 February 2017. In respect of the previous Regulations, i.e. the 2006 Regulations, Mr Al-Rashid invited me to interpret those in the following manner. Starting with Regulation 10(6)(b) the Claimant is the family member of a person who falls within regulation 10(6)(a), which provides that s/he is not an EEA national but would if s/he were an EEA national be a worker, a self-employed person or a self-sufficient person under Regulation 6.

14. Mr Al-Rashid submitted that the Claimant's uncle falls within regulation 10(6)(a) and the Appellant falls within sub-paragraph (b). He also sought to rely on Regulation 10(5) as follows:

*"(5) a person satisfies the conditions in this paragraph if*

- (a) he ceased to be a family member of the qualified person on the termination of the marriage or civil partnership of the qualified person;*
- (b) he was residing in the UK in accordance with these Regulations at the date of termination;*
- (c) he satisfies the condition in paragraph 6; and*
- (d) (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 UK for at least one year during its duration".*

15. Mr Al-Rashid submitted that the Claimant's uncle clearly meets the conditions set out in Regulation 10(5)(a), (b), (c) and (d) of the Immigration (EEA) Regulations 2006. He was at all material times employed by the NHS and thus was a worker in his own right, and in order to meet the underlying purposive intention of the Directive, Regulation 10(6)(b) must be seen to cover the Claimant, who is thus also entitled to be treated as somebody who has retained the right of residence.
16. Mr Tufan for the Secretary of State expressly accepted that Article 13(2) of CD 38/2004 includes all family members and that that is not reflected in the Regulations. Mr Tufan was also prepared to accept that the Claimant is an extended family member and thus qualifies under the Directive if properly interpreted.

#### *Findings and Reasons*

17. I am indebted to both parties for their assistance in this matter, in the absence of any clear jurisprudential guidance. In light of what ultimately was the agreed position of the parties, I find that, properly construed, the Claimant should be considered as a family member who has retained the right of residence with reference to Regulation 10 of the Immigration (EEA) Regulations 2006. This provides as follows:

#### *"Family member who has retained the right of residence*

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) *...*
  - (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 UK 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 (a)”.*

18. Whilst on the face of it Regulation 10 would appear to clearly cover the Claimant’s uncle, in light of the fact that it is clear from Article 13(2) of the Directive 2004/38 EC that the retention of the right of residence also applies to family members who are not nationals of a member state, I find that Regulation 10 of the 2006 Regulations properly interpreted must also cover the Claimant and that the reference in Regulation 10, sub-paragraph 6(b) to a family member of a person who falls within paragraph (a) must be read as including that person as to fall properly within Regulation 10(5) as a whole. This would be consistent with a purposive interpretation of the Regulation and the President’s recent judgment in Gauswami [2018] UKUT 275 (IAC) at [42] to [43]. See also recital 15 of 2004/38 EC.

19. Whilst I find that Schedule 4 (2) (3) of the 2016 Regulations provides that that 2006 Regulations continue to apply to a case where a person had a right to an appeal or a pending appeal on 31st January 2017, I have also with the agreement of the parties, taken account of Regulation 8 of the Immigration (EEA) Regulations 2016, which post date the Secretary of State’s decision and which came into force on 1 February 2017. I find that the amendments to the Regulations has informed the Secretary of State’s position in this particular appeal. Regulation 8 provides:

- “8. (1) *In these Regulations ‘extended family member’ means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies a condition in paragraph (2), (3), (4) or (5).*
- (2) *The condition in this paragraph is that the person is –*
    - (a) *a relative of an EEA national; and*
    - (b) *residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of the EEA national’s household; and either –*
      - (i) *is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or*

- (ii) *has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national's household.*

...

- (6) *In these Regulations, 'relevant EEA national' means, in relation to an extended family member –*
  - (a) *referred to in paragraph (2), (3) or (4), the EEA national to whom the extended family member is related;*
  - (b) *referred to in paragraph (5), the EEA national who is the durable partner of the extended family member.*
- (7) *In paragraphs (2) and (3), 'relative of an EEA national' includes a relative of the spouse or civil partner of an EEA national where on the basis of being an extended family member a person –*
  - (a) *has prior to the 1<sup>st</sup> February 2017 been issued with –*
    - (i) *an EEA family permit;*
    - (ii) *a registration certificate; or*
    - (iii) *a residence card; and*
  - (b) *has since the most recent issue of a document satisfying sub-paragraph (a) been continuously resident in the United Kingdom".*

20. Mr Al-Rashid drew attention to Regulation 8(7) of the 2016 Regulations 2016 and submitted that the definition of family member had been expressly amended to include extended family members within the definition of relative of an EEA national as set out in Regulation 8(2) and (3) and Mr Tufan accepted that this was correct.

21. It follows in light of the above that the Claimant is properly to be considered as a person who has retained the right of residence in the UK, pursuant to regulation 10(6)(b) of the Immigration (EEA) Regulations 2006.

### **Notice of Decision**

The appeal by the Secretary of State is dismissed, with the effect that the decision by First tier Tribunal Judge Blake allowing the Claimant's appeal is upheld.

Signed *Rebecca Chapman*

Date 19 February 2019

Deputy Upper Tribunal Judge Chapman