



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

Appeal Numbers: EA/07283/2016
EA/07287/2016

THE IMMIGRATION ACTS

Heard at Field House

**Oral decision given following hearing
On 22 November 2019**

**Decision & Reasons
Promulgated**

On 22 January 2020

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

**EFDT (FIRST APPELLANT)
AGT (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: The first appellant appeared in person

For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal has been before this Tribunal on a number of occasions. On 7 November 2018 a Tribunal consisting of myself and Mr Justice Mark Turner found that a decision previously made by First-tier Tribunal Judge Bristow sitting at Birmingham Civil Justice Centre on Thursday, 26 April 2018 and Wednesday, 13 June 2018 had contained a material error of law, such that

it had to be remade and subsequently the appeal was relisted on a number of occasions for Case Management Reviews in the expectation that it might be possible to resolve the problems in this case without the need for a full hearing.

2. The facts can be outlined succinctly, but before doing so I record that the second appellant, who is now around 11 years old, has now been granted British citizenship and so her appeal does not need to be considered because as a British citizen clearly she is entitled to remain in this country. The only live appeal therefore is that of her mother.
3. Briefly, the first appellant has been in the UK since around 2001 and in 2006 she married a French national in this country. Her daughter, who was the second appellant was born in 2008.
4. The first appellant's marriage to the French national (who had been exercising treaty rights) did not survive and he instituted divorce proceedings. Although there was an issue as to whether or not the first appellant had been properly notified of these proceedings it was found by Judge Bristow (and this was a finding open to the judge) that the marriage had not lasted a sufficient period of time prior to the commencement of divorce proceedings to entitle her to a permanent right of residence.
5. That however has left open the question of whether or not the first appellant was entitled to a derivative right of residence under paragraph 15 of the Immigration (EEA) Regulations 2016 on the basis of her relationship with her daughter.
6. The relevant parts of paragraph 15 provide as follows:

“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 ...”.

7. Paragraph 16 then goes on to provide as follows:

“Derivative right to reside

16.- (1) A person has a derivative right to reside during any period in which the person—

- (a) is not an exempt person; and
- (b) satisfies each of the criteria in one or more of paragraphs (2) to (6).

- (2) The criteria in this paragraph are that—
- (a) the person is the primary carer of an EEA national; and
 - (b) the EEA national—
 - (i) is under the age of 18;
 - (ii) resides in the United Kingdom as a self-sufficient person; and
 - (iii) would be unable to remain in the United Kingdom if the person left the United Kingdom for an indefinite period ...”.

8. It is not entirely clear whether or not the application that was made by the first appellant for a permanent residence card relied solely on her marriage to the French national, in which case because the divorce proceedings had been commenced before they had been married for the requisite period she would not have been entitled to a permanent residence card or whether as a matter of proper construction it implicitly relied also on her relationship with her daughter, who it was at all times asserted was a French national and who clearly could not have exercised any treaty rights in this country without the presence of her mother, the first appellant, because her father had very early on deserted her. It was on the basis that Judge Bristow had not considered this aspect of the appeal adequately that permission to appeal was granted and it was partly because of this failure that Mr Justice Turner and myself found that Judge Bristow’s decision had contained a material error of law, such that it had to be remade. This aspect is happily not now one that needs to be considered in any further detail because very sensibly and properly Ms Cunha, acting for and on behalf of the respondent at today’s hearing, has stated that insofar as it could be argued that any right to a permanent residence card based on the first appellant’s derivative rights from her position as the carer of her daughter is a new matter and she does not object to this Tribunal now deciding this case on the basis that the child was a French national and had a right as such to remain in this country.
9. This issue had been canvassed on a previous hearing because the Tribunal was concerned to establish that the second appellant, that is the first appellant’s daughter, had had the appropriate sickness insurance in place and the Tribunal has been shown evidence that this sickness insurance was in fact in place and on rehearing this appeal I accept that the sickness insurance was in place as established by the documents I was shown.
10. Judge Bristow had dismissed the appeal on this ground also because although at paragraph 2 of her decision she had seemed to accept that the second appellant was a French national, further down in her decision she appeared to resile from this finding on the basis that “it has to be proved to the required standard that the second appellant is a direct descendant of Mr M”, that is the French national to whom the first appellant was married. The judge did not take account of the presumption of legitimacy whereby it is to be presumed absent evidence against this

presumption that a child born to parents who are legally married is the child of those parents. Furthermore, it left out of account the fact that the child had a French passport and the presumption there also must be that the child is a French national. At no stage before this Tribunal have any of the representatives appearing on behalf of the respondent sought to argue that the second appellant is not the child of the French national and is not entitled to French nationality.

11. Although Judge Bristow was not satisfied that the appellants had adduced sufficient evidence to show that the second appellant had comprehensive sickness cover as at the date of the hearing to establish that she was a self-sufficient person within the meaning of the Regulations, as I have already noted, I am so satisfied having been shown evidence to this effect.
12. Accordingly, I am able to proceed on the basis that first, the first appellant is the mother of the second appellant, who while now a British citizen, was at all material times a French national, secondly, that her daughter was at all times exercising her rights as an EEA citizen because the relevant sickness cover was in place and thirdly, that because she has been exercising her derivative rights for a period in excess of five years, she is now entitled to a permanent residence card.
13. It follows that this appeal must be allowed and I so find.

Decision

The first appellant's appeal is allowed, under the Immigration (EEA) Regulations 2016. For the avoidance of doubt, it is the decision of this Tribunal that the first appellant is entitled to a permanent residence card.

With regard to the second appellant, as she is now a British national, it is not necessary to make any further decision.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:

A handwritten signature in black ink, appearing to read 'Ken Craig', is written over a light blue rectangular stamp.

Upper Tribunal Judge Craig
January 2020

Dated: 14

