Upper Tribunal

(Immigration and Asylum Chamber) **Appeal number: EA/02814/2019 (V)**

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC **Decision & Reasons Promulgated**

On 16 July 2021 **On 3 August 2021**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

AK

(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (V)

For the appellant: Mr M Ul-Haq, instructed by Dicksons Solicitors

For the Respondent: Mr A Tan, Senior Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote

hearing. At the conclusion of the hearing, I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a Pakistani national with date of birth given as 25.9.85, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 20.9.19 (Judge Raikes), allowing her appeal against the decision of the respondent, dated 31.5.19. However, the appeal was allowed on the alternative basis of a derivative right to reside, the judge rejecting the claim to a right of permanent residence, pursuant to the Immigration (EEA) Regulations 2016, as amended (the Regulations). A derivative right of residence cannot be counted towards the period of time necessary to acquire a permanent right of residence.

2. The grounds of application for permission to appeal argue that:

   i. The judge was wrong to conclude that the appellant's continuity of residence was broken three months before the prerequisite five years as a result of the sponsor's imprisonment for unlawful wounding and threats to kill, and his subsequent deportation. It is argued that imprisonment did not stop the clock for the purpose of continuous residence, but even if it did, it should have been disregarded because of the "important reason" for it pursuant to article 16(3) of the Citizen's Directive 2004/38/EC (CD);

   ii. The judge was wrong to conclude that the respondent's decision/policy is not discriminatory under EU law on grounds of nationality/race and or immigration status;

   iii. The judge was wrong to conclude that the application was one made under regulation 17 and that the respondent exercises a discretion such that the Tribunal's jurisdiction is fettered on appeal;

   iv. The judge was wrong not to consider the appellant's protected rights with reference to the Charter, relying on the best interests of the child principle pursuant to article 24.

3. Permission to appeal was granted by the First-tier Tribunal on 18.3.20, the judge granting permission considering that "Whilst the judge considered whether the appellant was the family member of a qualified person for the requisite period and whether she thereafter had a derivative right of residence (which is not residence in accordance with the EEA Regulations for the purpose of acquiring permanent residence), he or she does not appear to have considered whether the appellant was a family member with retained rights (in which capacity residence could contribute to the acquisition of permanent residence rights)."

4. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal.

5. The relevant background is that of the appellant's five children, four are Italian nationals like their father. The fifth child is a British national who, of course, needs no permission to reside in the UK. The children are now aged between 7 and 17 years of age. The Italian children are not appellants in their own right but dependants on the appellant's application and subsequent appeal. The children are all enrolled at school in the UK. In December 2003, the appellant and the Italian children were all issued with EEA Residence Cards as, respectively, the spouse and children of their EEA national sponsoring husband/father. The appellant last entered the UK in July 2013 and for the purposes of permanent residence, the requisite five-year period expired in July 2018. It is not contested that the appellant and to some degree the children were all victims of serious and sustained domestic violence. Prior to the end of the five-year period, on 10.4.18, the sponsor was convicted of violent crimes and sentenced to a term of immediate imprisonment and on 20.9.18 he was deported to Italy.

6. The retained right of residence referred to in the grant of permission can lead to a right of permanent residence under Regulations 15(1)(f)(ii), for a person who "was, at the end of the period, a family member who has retained the right of residence." A family member who has retained the right of residence is defined in Regulation 10 and must meet one of the conditions there set out. Amongst those conditions, Regulation 10(4) provides for a person who is the parent with actual custody of a child who satisfies the condition in paragraph (3). This would require the child to be the direct descendant of a qualified person or an EEA national with a right of permanent residence who has either died or ceased to be a qualified person on ceasing to reside in the UK, where the child was attending an educational course in the UK immediately before the death or cessation of qualification, and continues to attend such a course. Contrary to the view of the judge granting permission, the appellant cannot avail herself of this provision, as Mr Ul-Haq conceded, as the sponsor did not acquire a permanent right of residence before he was imprisoned. If he does not have a permanent right of residene, the appellant cannot have a retained right of residence.

7. In submissions, the grounds set out above were consolidated by Mr Ul-Haq into two essential grounds. In essence, the first is that the appellant's argument is that the Regulations do not properly transpose the CD. The second is that the Regulations discriminate against the appellant in that the third-country member does not have the same safeguard against domestic violence as the partner of a British citizen under the domestic violence concession. Mr Tan's submission is that it is beyond dispute that continuity of residence is broken by imprisonment and furthermore, detention during a sentence of imprisonment cannot come

within the definition of legal residence in Article 16 for the purpose establishing a right to permanent residence for a EEA citizen or their third-country family member.

8. For the reasons set out below, I entirely reject both arguments advanced at some length by Mr Ul-Haq. In summary, the arguments depend on an interpretation of the CD which, in my view cannot be sustained or justified.

9. As established in MG (Portugal) EU:C 2014.9, and case 378/12 Onuekuiere ECU EC 2.2 01413, imprisonment breaks continuity of residence. Mr Ul-Haq's argument to the contrary is unsustainable.

10. Mr Ul-Haq accepted that he had to establish that the appellant had a right of residence, either dependent on the sponsor, or in her own right, over the 3 month gap between her partner's imprisonment and the end of the five-year period of lawful residence necessary to establish a right of permanent residence.

11. Mr Ul-Haq took me carefully through the relevant articles of the CD, evidently in the same way as the First-tier Tribunal Judge was taken through them. However, I do not accept that CD can be purposefully interpreted to encompass the appellant's circumstances. Article 13 refers to the protection of the rights of family members in the event of death, divorce, annulment of marriage, or termination of a registered partnership. For the reasons stated above the sponsor cannot comply with the requirement of residence for a continuous period of five years.

12. Mr Ul-Haq relied particularly on the provision in Article 16(3) that continuity of residence shall not be affected by temporary absences for 'important reasons' such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country. It was submitted that this provision should be interpreted to include the victims of domestic violence and prevent the 'stopping of the clock' where the perpetrator is sentenced to imprisonment. It was argued that rejecting such an interpretation would compel a victim to remain with the abuser until she had completed the necessary five-year period. I do not accept that Article 16(3) can be interpreted as suggested; it would require importing entirely different wording and for a different purpose. Article 16(3) is intended to provide protection where there are 'temporary absences' for 'important reasons.' Imprisonment is not a temporary absence from the host Member State and I cannot see that the appellant's circumstances can be stretched to come within the classification of important reasons such as those set out in Article 16(3). The 'important reasons' provision was transposed into Regulation 3. Mr Ul-Haq was effectively seeking to expand the CD into contexts not even contemplated in the CD. In the premises, I am satisfied that the First-tier Tribunal Judge was correct to consider the sponsor's imprisonment as

breaking both his and the appellant's continuity of residence for the purpose of the Regulations. I also do not accept the argument that the Regulations have not correctly transposed the CD; Mr Ul-Haq's argument would require a wholesale re-writing of the CD. There has been no failure of transposition.

13. The alternative argument, that the appellant retained a right of residence in her own right, independently of the sponsor, also fails. Mr Ul-Haq argued that if the departure of the Union Citizen did not affect the right of the third-country family member, then incarceration should not affect that right, as, in Mr Ul-Haq's submission, it would otherwise run counter to the purpose of the CD. However, I am satisfied that the sponsor's imprisonment cannot properly be brought within Article 12(3)'s reference to death or departure of the Union Citizen from the host Member State. Once again, the loss of a right of residence referred to cannot confer a right the appellant did not have at the point of the break in continuity of the sponsor's own period of residence. In this argument, I have not addressed Mr Tan's argument that there was in fact no evidence that the sponsor's residence in the UK was qualifying residence, but have taken Mr Ul-Haq's argument at its highest. The appellant's argument is one that is impossible to bring within the CD by any sensible interpretation. In consequence I reject both grounds, rejecting the argument that the Regulations did not properly transpose the CD and the argument that the Regulations or the actions of the respondent in refusing the application improperly discriminate against her.

14. The second ground alleging discrimination was also taken at the First-tier Tribunal and adequately dealt with by the judge. Mr Ul-Haq argued that without interpreting the CD in the way he contended for would be to create a whole category of persons who are not safeguarded in the same way as the victims of domestic violence perpetrated by a British citizen, as opposed to a Union Citizen. However, the argument fails because the Union Citizen, the sponsor, did not acquire a right of permanent residence, neither could it be said that the appellant was on the path to settlement as is the case for those falling within the concession, which, it is clear from the Court of Appeal's decision in Regina (FA) v Secretary of State [2021] EWCA Civ 59, provided only a temporary respite for those on a pathway to settlement. There is no proper comparison or equivalence between the appellant's circumstances and those for whom the DV concession was intended. It cannot be argued that the appellant was on a pathway to settlement and to argue that she would have been entitled to permanent residence is mere speculation. I am satisfied that there is no gender/sex, ethnic, nationality, or other discrimination as argued for. Article 13(2(c), which was transposed into Regulation 10(5)(iv), including the important reference to "particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting." However, once again, as the sponsor did not have a right of permanent residence, the

appellant had no right to be retained in the circumstances of being the victim of domestic violence. This is not a case where she lost something that she had acquired. As a third-country national, her continued residence depended entirely on the sponsor's right to remain, which was lost.

15. In the circumstances and for the reasons set out above, I find no material error of law in the decision of the First-tier Tribunal.

Decision

The appeal of the appellant to the Upper Tribunal is dismissed

The decision of the First-tier Tribunal stands and the appeal remains dismissed on all grounds.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 16 July 2021

Anonymity Direction

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

> "*Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings*."

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 16 July 2021