Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number:**
UI-2022-001718 (EA/05556/2020)
UI-2022-001714 (EA/05553/2020)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 30 August 2022	**On the 12 September 2022**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

MAAME EFUA PESSEH

First Appellant

JEREMIAH FRIMPONG

Second Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr J. Dhanji, instructed by
For the respondent: Mr E. Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Ghana who appealed the respondent's decision date 29 September 2020 to refuse to issue residence cards recognising a permanent right of residence under EU law. The appeals were brought under regulation 36 of The Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016') on the ground that

the decision breached their rights under the EU Treaties in respect of entry into or residence in the United Kingdom.

2. It is not necessary to give detailed reasons for my decision because Mr Tufan accepted on behalf of the respondent that the First-tier Tribunal decision involved the making of an error of law and that on a correct interpretation of the law the decisions should be remade and the appeals allowed. Having discussed the legal framework with the legal representatives at the hearing I was satisfied that this was a correct concession.

3. The appellant's entered the UK on 09 March 2014 with a family permit recognising their right of residence as the direct descendants of an EEA national's spouse (their mother) (regulation 7(1)(b)). On 26 October 2014 they were issued with residence cards recognising the same right of residence, which were valid for five years. Their mother's marriage to the EEA national broke down and I am told that the divorce was finalised on 22 December 2016. On 21 March 2017 their mother was issued with a permanent residence card based on a retained right of residence. The appellants applied for permanent residence on 05 September 2019. The respondent refused the applications in decisions dated 29 September 2020 on the ground that they did not meet the requirements of regulation 10 of the EEA Regulations 2016.

4. First-tier Tribunal Judge Young-Harry ('the judge') dismissed the appeals in a decision promulgated on 18 October 2021. The judge found that it was arguable that the appellants ceased to be family members of the EEA national when their mother divorced in 2016. She concluded that the appellants were not entitled to retain their rights of residence and did not meet the requirements of regulation 10. As such, they were unable to show that they had resided in the UK in accordance with the regulations for a continuous period of five years in order to qualify for permanent residence under regulation 15.

5. At the hearing before the Upper Tribunal the parties were in agreement as to the relevant law. Neither party had been able to find any authority from the European Court of Justice on the point, but Mr Tufan had clear instructions that the point made by Mr Dhanji in his grounds of appeal was correct.

6. Mr Dhanji argued that the wording of Article 13(2) of the Citizens' Directive (2004/38/EC) was not transposed accurately into regulation 10(5). The Article 13(2) states:

> '(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 the 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;
>
> …
>
> 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 defined in Article 8(4).
>
> Such **family members** shall retain their right of residence exclusively on personal basis.' [emphasis added]

7. It is clear from the use of the plural 'family members' that the retention of a right of residence is not confined to the non-EEA national spouse but also to any other family members who have been recognised as having a right of residence prior to the initiation of divorce proceedings. At the point when their mother retained a right of residence so too did the appellants. The judge erred in finding that they ceased to have a right of residence.

8. At the hearing it was argued that the wording of regulation 10(5) of the EEA Regulations 2016 focussed solely on the non-EEA national whose marriage has come to an end. At the date of the decision regulation 10(5) and (6) stated:

> (5) The condition in this paragraph is that the person ("A")—
>
> (a) ceased to be a family member of a qualified person or an EEA national with a right of permanent residence on the initiation of proceedings for the termination of the marriage or civil partnership **of A**;
>
> (b) was residing in the United Kingdom in accordance with these Regulations at the date of the initiation of proceedings for the termination;
>
> (c) satisfies the condition in paragraph (6); and
>
> (d) either—
>
> (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 United Kingdom 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 the person 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 paragraph (a).' [emphasis added]

9. On a closer reading of regulation 10 there is some provision for family members of the non-EEA national who has retained a right of residence in the wording of regulation 10(6). However, the parties are correct to point out that regulation 10 requires both conditions in sub-paragraphs (5) and (6) to be satisfied. If the appellants had made applications to retain rights of residence alongside their mother it is possible that they could have been dealt with together. As stand alone applications, the appellants could not meet the initial condition of regulation 10(5) because it is focussed on the initiation of divorce proceedings of 'the person' who was married to the EEA national.

10. Mr Tufan accepted that regulation 10 appeared to provide a narrower interpretation of EU law than the Directive. The respondent accepts that EU law has direct effect and is binding. He also accepted that the wider scope of the Directive included family members of the EEA national that could include the direct descendants of the non-EEA spouse who had been recognised as having a right of residence prior to the initiation of divorce proceedings.

11. The residence card applications were made and decided before 31 December 2020, when for legal purposes the UK left the European Union ('IP Completion Day'). Since this appeal is decided after that date the appellants can no longer be issued with permanent residence cards. Mr Tufan said that an application for settlement under domestic law should be made and will be honoured in light of the outcome of this appeal.

12. For the reasons given above, I conclude that the First-tier Tribunal decision involved the making of an error on a point of law. The decision is set aside. The decisions breached the appellants rights under the EU Treaties relating to entry into and residence in the United Kingdom.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The appeals are ALLOWED under the EEA Regulations 2016

Signed M. Canavan Date 30 August 2022
Upper Tribunal Judge Canavan

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email