IAC-AH-LEM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/44463/2013
IA/44467/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 6 November 2014	**On 20 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE GIBB

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANA GUISELLA FRERKING DAVALOS (FIRST RESPONDENT)
LESLIE DARLYNE FRERKING DAVALOS (SECOND RESPONDENT)
(ANONYMITY ORDERS MADE)

Respondents

Representation:
For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondents: Mr R Subramanium, of Lambeth Solicitors

DECISION AND REASONS

1. These appeals were allowed at the First-tier, and the appellant before me is the Secretary of State. For the sake of clarity and convenience, however, I will refer to the parties as they were at the First-tier, where the Secretary of State was the respondent.

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2. The appellants are mother and daughter, both German citizens. The first appellant came to the UK from Bolivia in 2007, when the second appellant was only 1. The first appellant has a second daughter, born in the UK in 2009. The first appellant is a single parent, and has been living in the UK with her daughter since 2007 (and with her 2 daughters since 2009).

3. Applications were made for permanent residence. These were refused, and the appeals were then allowed, under the 2006 Regulations, by Judge of the First-tier Tribunal Lingam (promulgated on 8 September 2014).

4. Permission to appeal was granted to the Secretary of State by First-tier Tribunal Shimmin. The grounds on which permission had been sought were that it was not clear on what basis the appeals had been allowed, particularly as the judge had indicated that the appeals would only be remitted as being not in accordance with the law; and it was not open to the judge to allow the appeal where there had been no finding that there had been the necessary five years' residence.

5. At the hearing before me Mr Bramble produced a note by Suki Dhadda, Counsel, who had represented the Secretary of State at the hearing. This note recorded the appellant's main submission at the hearing, which was that the Secretary of State needed to show a valid reason why a passport was required, in the light of **Barnett and Others (EEA Regulations: rights and documentation) [2012] UKUT 00142 (IAC)**. The note then indicated that the judge had remitted the matter back to the respondent on the basis that the decision was not in accordance with the law, because it was unlawful to refuse an application merely because a passport was not forthcoming.

6. Mr Subramanium, for the appellants, relied on his skeleton argument. He had been the representative at the First-tier hearing. He confirmed that there had been a preliminary discussion about whether the decisions were not in accordance with the law, but at the end of the hearing the judge did not give an indication that this was the basis on which the appeals would be allowed. Instead she reserved her decision. In addition Counsel for the Secretary of State did not challenge any of the evidence put forward to show that the first appellant had been living and working in the UK since 2007, and indeed did not challenge any aspect of the evidence or submissions.

7. Mr Bramble, for the Secretary of State, made the following points. In the **Barnett** case the facts were different, because a valid passport had been submitted earlier. In this case the first appellant had made no prior applications to the Home Office. By the time of the application for permanent residence the first appellant's passport had expired. There was a need for the Home Office to be satisfied as to her identity. It was accepted that the refusal letter was silent as to the documentary evidence submitted to show the history of residence and working. It was accepted that this could be read both ways, either that the evidence was not being

challenged, or that it had not been considered at all. The judge therefore erred in law in allowing the appeals outright.

8. Mr Subramanium referred to the last line of the refusal letter, which suggested that there was no challenge to the first appellant's identity as an EU national. The first appellant had provided her original passport. Although this had expired she had provided an explanation for why she had not been able to get it renewed. The original passport was produced at the hearing. It was valid between 19 October 2006 and 18 October 2011. This application had been made in 2013.

Decision and Reasons

9. I have decided that no material error has been shown, and that the judge's decisions allowing the appeals under the 2006 Regulations therefore remain undisturbed.

10. On the issue of the application of the **Barnett** case, and the interpretation of Regulation 18 of the 2006 Regulations, it appears to me that the judge's decision was entirely correct. She pointed out, at paragraph 19 of her determination, the crucial difference between Regulation 11 on the one hand, which requires the production of a valid national identity card or passport on arrival, and Regulation 18 which does not. What is required by Regulation 18 is proof that the EEA national has a permanent right of residence. What this amounts to is proof that the EEA national has been resident in the UK in accordance with the Regulations for a continuous period of five years. The judge quoted from the **Barnett** case within paragraphs 20, 21, and 24 of her determination. This is exactly the point that was made in that case, namely that the issue of entitlement to the permanent right of residence did not involve any express requirement to submit identity documents or passports.

11. For these reasons it appears to me to be clear that the judge made no legal error in her application of the **Barnett** case.

12. Where there is uncertainty is in the question of what approach was taken by the Secretary of State to the evidence presented to show that the first appellant had been living and working in the UK for five years. This uncertainty appears to me to flow from two things. The first is that the refusal letter is silent on this point. The refusal letter concentrates on only two narrow issues, namely the fact that the first appellant's passport had expired, and the fact that the second appellant's passport was not regarded as sufficient evidence to show that she was related as claimed to her mother. On every other matter, including all the documentary evidence presented to show five years' continuous residence, the refusal letter says nothing at all. The second point is that this silence continued at the hearing. The judge, in her record of proceedings, notes that Counsel for the Secretary of State restricted her submissions to a single

sentence, saying nothing more than that she relied on the refusal letter and notice of decision.

13. It seems to me that there are two ways of looking at this. The first is that the judge was entitled to regard all the evidence of continuous residence as unchallenged. The second is that she should have regarded it as evidence that had not yet been considered at all, and that the decision maker, rather than the Secretary of State's representative at the hearing, should therefore have an opportunity to do so.

14. The first approach would justify allowing the appeal outright; whereas the second would only justify allowing the appeal to the limited extent that the decisions were not in accordance with the law, thus giving the Secretary of State an opportunity to make a further decision.

15. On this issue the judge's determination makes no mention of allowing the appeal to a limited extent. The understanding of Mr Subramanium, who was present, was that this was considered in a discussion of the issues at the start, but that the judge reserved her determination at the end of the hearing, and gave no indication that this would be the outcome. The note by the Home Office Counsel, on the other hand, suggests that her understanding was that the remittal for not being in accordance with the law was the outcome of the hearing, as well as being a matter that was discussed as a preliminary issue.

16. Looking at paragraphs 23 to 25 of the determination it appears to me that the judge took the first approach, namely that there was no challenge before her to the evidence of continuous residence. This flows from the fact that she adopted, in paragraph 24, a passage from the **Barnett** case to the effect that the applications should have been granted.

17. Did the judge err in law in taking this approach? It appears to me that she did not. This was an application in which the appellants submitted a considerable volume of documentary evidence to establish residence (see paragraphs 4 and 5 of the determination). The Secretary of State had had an opportunity to challenge any or all of this evidence in the refusal letter and had not done so. The Secretary of State then had a second opportunity at the hearing and again had not challenged any of the evidence. These were adversarial proceedings, and it therefore appears to me that the judge was entitled to proceed in the way that she did.

18. There is the remaining issue of whether the judge gave an indication that she would be allowing the appeals only to a limited extent. On this point there is a conflict between the judge's determination and record of proceedings, which fits with the memory of Mr Subramanium on the one hand; and the note by Home Office Counsel on the other. In the circumstances it appears to me that I should prefer the version of events set out in the judge's determination and record of proceedings. It appears to me to be likely that counsel for the respondent confused a preliminary

discussion of the issues and the actual outcome. This is suggested by the fact that the note is under the heading of 'preliminary issues'.

19. What I would say, however, is that it would remain open to the Secretary of State to bring forward specific challenges to the evidence of continuous residence, rather than proceeding to issue permanent residence cards. If there has been an unintended failure by the Secretary of State to give proper consideration to the evidence, both at the application stage and the appeal stage, I cannot see that there would be anything to prevent the respondent from giving that evidence proper consideration now, although it does appear unlikely, looking at the range of evidence provided, that there would be any serious challenge to the first appellant having established that she has been living and working in the UK since 2007.

20. For these reasons I have therefore concluded that it has not been established that the judge made a material error on a point of law.

21. I have decided that the decision should be anonymised in the interests of the first appellant's two children. The First-tier Judge made a full fee award in respect of both appellants, and that also remains undisturbed.

Notice of Decision

The appeal of the Secretary of State is dismissed.

The judge's decision allowing the appeals under the 2006 Regulations remains undisturbed.

Direction Regarding Anonymity – Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

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

Signed Date **20 November 2014**

Deputy Upper Tribunal Judge Gibb