



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/28426/2014

THE IMMIGRATION ACTS

Heard at Field House  
On Monday 10 August 2015

Determination Promulgated  
On Friday 14 August 2015

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS CLAUDIANA VALERIO  
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Miss C Valerio (in person)

For the Respondent: Mr N Bramble – Senior Home Office Presenting Officer

Anonymity

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal.

2. The Appellant is a citizen of Brazil born on 6 April 1991. She appeals the Respondent's decision dated 30 June 2014 refusing her a residence card as confirmation of a right of residence under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").
3. The Appellant last entered the UK on 18 December 2007 as a visitor. She applied for a residence card under the EEA Regulations on 27 April 2011. This was refused on 9 September 2011. She made a second application on 1 December 2011 which was again refused on 22 February 2012. She appealed against that refusal and her appeal was dismissed on 13 March 2012. She made a third application on 30 July 2013 which was again refused on 9 October 2013. It is the refusal against her sixth application made on 27 May 2014 which is the subject of this appeal.
4. The Appellant relies on her relationship with her sister Cleoni Valerio Da Silva. Her sister is a Portuguese national. She also now has permanent residence in the UK as a result of her EEA status. The application was refused for lack of evidence of dependency on her sister. Article 8 ECHR was not considered as no separate application has been made on that basis.
5. The Appellant's appeal was allowed by First-Tier Tribunal Judge Malins in a decision promulgated on 31 March 2015 ("the Decision"). The Judge allowed the appeal on the basis that regulation 8(2) of the EEA Regulations was satisfied as the Appellant could show that she was dependent on her sister while the Appellant still lived in Brazil because they were members of the same household before her sister left or could show that her sister had sent money to maintain the Appellant after her sister left Brazil. Since that was sufficient to satisfy regulation 8(2)(a) and the Appellant is now dependent on her sister in the UK (thereby meeting regulation 8(2)(c)), the Judge found that the Appellant is entitled to a residence card as an extended family member.
6. The Respondent sought permission to appeal on the basis that the Appellant could not show that she was dependent on an EEA national before coming to the UK. She could only show dependency on her sister who was the spouse of an EEA national at the relevant time but not an EEA national in her own right. Further, permission was sought on the basis that the appeal should not have been allowed outright but remitted to the Respondent to consider the exercise of her discretion under regulation 17(4) of the EEA Regulations. The Appellant would not be entitled as an extended family member to the grant of a residence permit as of right but only as the result of the exercise of discretion in her favour by the Respondent.
7. Permission to appeal was granted by First-Tier Tribunal Judge Nicholson on 3 June 2015 on all grounds. The matter comes before the Upper Tribunal to determine whether the First-tier Tribunal Decision involved the making of an error of law.

## Submissions

8. At the start of the hearing, Mr Bramble handed in the decisions of Dauhoo (EEA Regulations - reg 8(2)) [2012] UKUT 79 (IAC) (“Dauhoo”) and Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340 (IAC) (“Ihemedu”). I also handed the parties the Court of Appeal’s judgment in Soares v Secretary of State for the Home Department [2013] EWCA Civ 575 which appeared to me to be relevant to the issue in this appeal. Miss Valerio was not legally represented. I gave both parties time to read the judgments produced and made clear to her that if she had any questions about those judgments or the issues in this appeal, she should ask and that she would have the opportunity to make any comments about those matters in reply to Mr Bramble’s submissions.
9. Mr Bramble relied on Dauhoo as authority for the proposition that the Appellant has to meet one of the four scenarios in the headnote. She could not do so as she was dependent before coming to the UK on her sister and not on her sister’s husband who was the EEA national. The Judge had therefore erred in allowing the appeal. This submission was reinforced by the Court of Appeal’s judgment in Soares which was on not dissimilar facts to the current case. However, Mr Bramble very fairly indicated that the Appellant’s sister’s status did need to be clarified as it was not clear when her sister had become an EEA national. There is an ID card in the bundle dating from 2009 which indicates that the Appellant’s sister became an EEA national in 2009 but if she had that status before the Appellant came to the UK then obviously this issue would not be pursued.
10. Mr Bramble relied on Ihemedu to show from the headnote that the issue of a residence card to an extended family member is in the Secretary of State’s discretion and that the Judge had therefore erred in allowing the appeal outright. In the event that I agreed there was an error of law in the Decision, he invited me to re-make the Decision on the basis of the material before me but with the necessary clarification from the Appellant’s sister as to the timing of her EEA national status.
11. The Appellant’s sister was in attendance and I therefore clarified her position. She informed me that she made an application for a Portuguese passport as long ago as 2002 (she resided in Portugal from 1999 to 2002). She came to the UK and it was only in 2009 that she was given Portuguese nationality. The ID card in the bundle is therefore correct as to the date when she acquired EEA nationality.
12. The Appellant in her submissions pointed out that she came to the UK in 2007 aged 16. She came to live with and assist her elder sister. She is now aged 24 and has been trying to sort out her visa for a number of years. Her first application was in 2011. Her sister knew that she had made a mistake in the way in which she had brought the Appellant to the UK but neither she nor her sister knew that at the time and neither she nor her sister should be made to pay for this mistake. This submission was reinforced by her sister who said that she assumed because she was working and paying tax in the UK, she could bring her sister to live with her.

She did not realise she needed Portuguese nationality to do this. If she had known that, she would have waited for her Portuguese nationality to be conferred.

13. Both the Appellant and her sister pointed out that they spoke little English at the relevant times and were reliant on legal advice. They had paid lawyers a lot of money - £500 per application - and because they did not speak much English, they were reliant on the lawyers as to the basis of the applications. The Appellant pointed out that the Respondent had refused the earlier applications (and this application) on the basis that she could not show dependency. This was difficult to do due to her lack of status in the UK. She opened a bank account on legal advice to show that her sister was paying her money but it was too slow so she no longer used this. She noted that if the Respondent was going to take the point that her sister could not sponsor her due to her sister's nationality at the relevant time, that point could have been taken earlier rather than refusing on the basis that dependency was not established as a matter of fact.
14. The Appellant said that her father and mother are now dead. She has siblings in Brazil and a sister in Germany but they have their own families. Her sister in the UK is divorced and she wants to stay with her elder sister and her nieces. Her sister was divorced about 5 years ago and obtained permanent residence in the UK in 2013.
15. In reply, Mr Bramble confirmed that the factual issue of dependency was no longer contested. The Respondent accepts that the Appellant was dependent on her sister in Brazil before coming to the UK and is dependent now. However, the Appellant's sister was not an EEA national in 2007 when the Appellant came to the UK and the dependency in Brazil did not therefore satisfy regulation 8(2)(a) of the EEA Regulations. If the application had been under regulation 7, the relevant point in time to consider the issue would be at the date of hearing but regulation 8 is historic. He pointed out that it would be open to the Appellant to make an application under Appendix FM on the basis of the relationship with her sister (although he made no concession as to the likelihood of any application succeeding on that basis). However, she could not succeed under the EEA Regulations. He therefore invited me to find there was a material error and to re-make the Decision by allowing the Secretary of State's appeal.

### **Decision and Reasons**

16. The issue in this appeal is a very narrow one, namely whether the Appellant should be granted a residence card as the extended family member of her sister. In order to succeed, the Appellant has to show, in the circumstances of her case, that she was dependent on her sister in Brazil before coming to the UK and that she has remained dependent on her sister in the UK. There is no dispute that she can show the necessary dependency. The issue is solely one of the status of her sister at the time before the Appellant came to the UK. The Appellant's sister did not obtain Portuguese nationality until 2009. Until then, she was in Portugal and then the UK

as the spouse of her Portuguese, EEA national husband and was therefore herself an EEA family member and not an EEA national.

17. Regulation 7(3) of the EEA regulations provides that an extended family member issued with a residence card shall be treated as an EEA family member. In relation to the granting of a residence card to an extended family member (which as Mr Bramble rightly points out is discretionary), regulation 8 of the EEA regulations provides as follows:-

*“(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 the conditions in paragraph (2), (3), (4) or (5).*

*(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and –*

- (a) the person is residing in an EEA State in which the EEA national also resides and is dependent upon the EEA national or is a member of his household;*
- (b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or*
- (c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.”*

18. As is clear from the above, and confirmed by the Court of Appeal in Soares (in particular paragraphs 22-24), the person seeking a residence card as an extended family member has to be dependent on an EEA national and not the family member of an EEA national.

19. After having considered the grounds of appeal and oral arguments I am therefore satisfied that the First-tier Tribunal Decision involved the making of an error of law in finding at paragraph 13 of the Decision that the Appellant satisfies regulation 8(2) of the EEA regulations. I also find that the Judge erred in law in allowing the Appellant’s appeal outright rather than remitting it to the Respondent to consider the exercise of her discretion to issue a residence card but that is not material in light of the error I have found to exist in relation to the allowing of the appeal under the EEA regulations.

20. The error which I have found to exist is clearly material because as a matter of law, the Appellant cannot meet the EEA regulations as an extended family member. I therefore set aside the Decision and re-make it. Whilst I have sympathy for the predicament in which the Appellant and her sister find themselves, the Appellant cannot succeed under the EEA regulations. I therefore re-make the Decision by allowing the Secretary of State’s appeal. Miss Valerio’s appeal against the Secretary of State’s decision dated 30 June 2014 is therefore dismissed.

## DECISION

The First-tier Tribunal Decision did involve the making of an error on a point of law.

I set aside the Decision

I re-make the decision in the appeal by allowing the Secretary of State's appeal. Miss Valerio's appeal is therefore dismissed.

Signed

A handwritten signature in black ink, appearing to read 'E. Smith', written in a cursive style.

Date

12 August 2015

Upper Tribunal Judge Smith