



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/34041/2014

THE IMMIGRATION ACTS

Heard at Field House
On 15 February 2016

Decision & Reasons Promulgated
On 25 April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MICHAEL TYRONE ROBERTS
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Mr J Chipperfield, Counsel

DECISION AND REASONS

1. The respondent to this appeal is a citizen of South Africa born on 8 October 1980. The appellant is the Secretary of State for the Home Department, who has appealed with the permission of the Upper Tribunal against a decision of Judge of the First-tier Tribunal M Davies, sitting at Hatton Cross, allowing the respondent's appeal against decisions of the Secretary of State made on 12 August 2014, to refuse to issue him a Permanent Residence Card and to revoke his current Residence Card.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. I shall therefore refer to Mr Roberts from now on as “the appellant” and the Secretary of State as “the respondent”.
3. There was no application for an anonymity directions and I saw no reason to make one.
4. This appeal turns on the correct interpretation of Regulations 15(1)(b), 7(1)(d) and 7(3) of the Immigration (European Economic Area) Regulations 2006 and it is helpful to set these out:

“Permanent right of residence

15. – (1) The following persons shall acquire the right to reside in the United Kingdom permanently –

(a) ...

(b) a family member of an EEA national who is not himself 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;

Family member

7. – (1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person –

...

(d) a person who is to be treated as the family member of that other person under paragraph (3).

(2) ...

(3) Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked.”

5. Regulation 8(5) provides that the partner of an EEA national shall be an ‘extended family member’ if he can prove that he is in a ‘durable relationship’ with the EEA national.
6. The decision with respect to the revocation of the appellant's current Residence Card was taken by reference to Regulation 20(2) which provides that the respondent may revoke a Residence Card where the holder has ceased to have a right to reside. No separate issues arise in relation to the appellant’s appeal against that decision. He resists the decision on the basis he has acquired a permanent right of residence.

7. There are no factual disputes in this case. The respondent was not represented at the hearing in the First-tier Tribunal and the judge found the appellant entirely credible. The judge made the following findings.
8. The appellant first came to the UK as a working holidaymaker in January 2004 and then, after briefly extending his stay as a visitor, returned to South Africa before his leave expired. In South Africa he secured entry clearance as a work permit holder valid for five years and he returned to the UK on 29 June 2006.
9. In 2004, while working at a hotel on the Isle of Wight, the appellant had met and formed a relationship with Ms Daniela Rusu, a Romanian national. They lived together from March 2004 until January 2012, when the relationship broke down.
10. Romania joined the EU on 1 January 2007. The appellant did not apply for a Residence Card until October 2009 because he did not need to while he had leave to remain. He provided evidence that he and Ms Rusu were in a durable relationship and he was granted a Residence Card as an extended family member from 2 November 2009 until 2 November 2014. As noted, the appellant's relationship ended in January 2012, a little over two years into the duration of his Residence Card.
11. In March 2013 the appellant applied for a Permanent Residence Card, which was refused. The reasons for the refusal of that application are not of interest in this appeal. The appellant made a further application in June 2014 and this led to the decision now appealed. The reasons for refusal letter pointed out the appellant was no longer in a durable relationship with Ms Rusu. The appellant had not resided in the UK for a continuous period of five years as an extended family member because such status only counted from the date of the issuance of the Residence Card.
12. The judge disagreed with this interpretation. He reasoned as follows:

“20. The Appellant was issued a Residence Card on the 2nd November 2009. Since he is a person who is both an extended family member and has been issued a Residence Card then pursuant to Regulation 7(3) he shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions of Regulation 8(3). In the absence of any case law directly on the point that I am aware of I accept [counsel's] submission that a purposive interpretation should be given to the EEA Regulations which achieve a just outcome. It is clear that the Appellant has been in a durable relationship with Ms Rusu since March 2006 which was the second anniversary of their cohabitation. He has been issued with a Residence Card. I find that he should therefore be treated as the family member of an EEA national “for as long as he continues to satisfy the conditions in Regulation 8(3)”. He has satisfied those conditions since March 2006 and I therefore find that he should be treated as the family member of Ms Rusu from that date until when the relationship ended in July 2012.”
13. I read the references to Regulation 8(3) as intended to refer to 8(5).

14. The judge concluded the appellant had acquired a permanent right of residence by March 2011, five years after the second anniversary of his cohabitation with Ms Rusu, and which was before the relationship broke down in January 2012. He therefore allowed the appeal under the EEA Regulations.
15. Permission to appeal was granted by the Upper Tribunal because it was arguable the judge's interpretation overlooked the requirement in the EEA Regulations that a person cannot be treated as a family member in such circumstances until he has been issued with a Residence Card. It was arguable the judge had erred in taking into account a period of residence as an extended family member that pre-dated the issuance of a Residence Card.
16. I heard submissions on whether the judge made a material error of law.
17. Ms Isherwood argued the judge erred by overlooking the fact that the issuance of a Residence Card to an extended family member is discretionary. The respondent had not had the opportunity to assess an application prior to November 2009 and the judge should not have taken into account any period before that.
18. Mr Chipperfield argued the judge had been entitled to look back before November 2009 and make a finding that the couple had been in a durable relationship. He acknowledged the wording of Regulation 7(3) was not helpful to the appellant. However, it was legitimate for the judge to have made findings on the earlier period. The Residence Card had evidenced the existing circumstances. He took me to the wording of Article 16 of Directive 2004/38/EC and said that the appellant had "legally resided" in the UK for a continuous period of five years so as to qualify for permanent residence. Unlike the EEA Regulations, the Directive was broad enough to encompass a period before the issuance of the Residence Card. He suggested the respondent's restrictive interpretation would breach Article 25, which prohibits Member States from treating the possession of a document as a precondition to the exercise of a right. The appellant was exercising a 'right' prior to November 2009.
19. Ms Isherwood argued Article 25 was not engaged in this case.
20. I reserved my decision on whether the judge's decision is vitiated by error of law.
21. It is clear to me that the judge's interpretation is contrary to the plain meaning of the EEA Regulations. The use of the word "and" in Regulation 7(3) means that, in order to be treated as a family member under Regulation 7(1)(d), the person must satisfy the definition of 'extended family member', in this case by showing he is in a durable relationship with an EEA national, *and* to have been issued a Residence Card on that basis. The judge in this case accepted the appellant was in a durable relationship prior to November 2009 in order to calculate the five-year period for the purposes of Regulation 15(1)(b).

22. The judge referred to the need to give a purposive interpretation to the EEA Regulations so as to arrive at a just result. No submissions were made to me regarding the correct approach to the interpretation of the EEA Regulations. However, there was discussion of whether the EEA Regulations, in limiting the period which can be taken into account for the purposes of showing a permanent right of residence, correctly transpose the provisions of the Directive.
23. After giving this matter careful consideration, I reject Mr Chipperfield's arguments to the effect that the Directive is more permissive than the EEA Regulations. It seems to me that his submissions overlooked Article 3 "Beneficiaries", which extends the scope of free movement provisions to persons other than Union citizens and their family members in certain circumstances. It provides in relevant part as follows:
- "2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with national legislation, facilitate entry and residence for the following persons:
- (a) ...
- (b) the partner with whom the Union citizen has a durable relationship, duly attested. The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."
24. In other words, the "right" of an extended family member is only to have their application "facilitated", in contrast to family members who have enforceable rights of free movement. More significantly for the purposes of this appeal the durable relationship must be "duly attested". I interpret this as meaning that it has been considered and approved by the host Member State. In the situation envisaged by the EEA Regulations, it means that a Residence Card has been issued after an application and I therefore understand the Directive to have been correctly transposed into domestic law in the form of Regulation 17(3). Put another way, the requirement in Regulation 17(3) for a Residence Card to have been issued in recognition of a durable relationship before a period of residence shall count towards the five-year period required to show entitlement to permanent residence, is not inconsistent with the provisions of the Directive which the EEA Regulations seek to transpose into domestic law.
25. Article 16(2), which extends the right of permanent residence to other family members, must be read in conjunction with Article 3, which precedes it and which comes within Chapter 1: General Provisions of the Directive.
26. Article 15 is a general provision which makes it clear that possession of a document is simply declaratory of rights and entitlements.
27. It follows that I must find the judge made a material error of law in allowing the appeal. His decision is set aside and I substitute a decision dismissing the appeal under the EEA Regulations.

NOTICE OF DECISION

The Judge of the First-tier Tribunal made a material error of law and his decision allowing the appeal is set aside.

The following decision is substituted:

The appeal is dismissed under the EEA Regulations.

Signed

Date 16 February 2016

**Judge Froom,
sitting as a Deputy Judge of the Upper Tribunal**