



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/05380/2016

THE IMMIGRATION ACTS

Heard at Field House
On 17th May 2018

Decision & Reasons Promulgated
On 7th June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MISS DEUSA GOMES BATICA FERREIRA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Puar, Counsel

For the Respondent: Miss L Kenny, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Guinea-Bissau born on 24th September 1991. The Appellant applied for a retained right to permanent residence under the Immigration (European Economic Area) Regulations 2006 on the basis that she was the family member of an EEA national who has now left the United Kingdom and that the Appellant had resided in the United Kingdom with that EEA national in accordance with the Regulations for a continuous period of five years. The Appellant's application was refused by Notice of Refusal dated 27th April 2016 on the basis that the Appellant had not provided evidence that she and her EEA national family member resided in the UK in accordance with those Regulations during that five year period.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Obhi sitting at Birmingham on 15th June 2017. In a decision and reasons promulgated on 29th June 2017 the Appellant's appeal was dismissed.
3. On 29th July 2017 the Appellant lodged Grounds of Appeal to the Upper Tribunal. On 3rd January 2018 First-tier Tribunal Judge Chamberlain refused permission to appeal. Renewed grounds to appeal were lodged to the Upper Tribunal. These appear to mirror the original Grounds of Appeal from the First-tier Tribunal. On 14th March 2018 Deputy Upper Tribunal Judge O'Ryan granted permission to appeal. Judge O'Ryan's grant of permission is extensive, running to some fifteen paragraphs over three pages. It appears to set out his own analysis of the law. Judge O'Ryan notes that the Appellant's father had ceased to be a qualified person in the UK in 2015 when he returned to Guinea. The First-tier Tribunal Judge had accepted that the Appellant's father had left the UK, the Appellant satisfied the requirements of Regulation 10(3)(a) of the 2006 Regulations and that the Appellant met the relevant educational requirements of Regulation 10(3)(b). However Judge O'Ryan noted that the First-tier Tribunal Judge had dismissed the appeal on the basis that she was not satisfied that during periods of unemployment experienced by the Sponsor the Appellant would have remained dependent for the purpose of the Regulations on the Sponsor.
4. Thereafter Judge O'Ryan goes on to make his own analysis of the situation at paragraphs 4 to 6 before stating at paragraph 7 of his grant of permission

"The judge's finding at paragraph 20 that it was difficult to see how the Appellant could have been dependent on the Sponsor during periods in which the Sponsor was a work seeker is arguably to have erroneously excluded the route, apparently open to the Appellant, to continue to remain living in accordance with the Regulations as an extended family member by residing with the Sponsor (and by operation of Regulation 7(3) potentially also continuing to be treated as a family member)."
5. Judge O'Ryan considered that to be an arguable error of law but then went on at paragraph 9 to set out the basis upon which he considered that that arguable error would not be material. In such circumstances Judge O'Ryan granted permission to appeal and made the rather unusual comment at paragraph 13

"The Appellant may be best advised to consider submitting any further evidence she has, under Rule 15(2A), in relation to her father's economic activity and his status as a qualified person. It is also necessary to identify with some precision what the five year qualifying period is that the Appellant relies on in order to determine the relevance of the Sponsor's economic activity from time to time."
6. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Secretary of State has not filed a Rule 24 response and there is no further evidence submitted before me nor is there any application made by the Appellant's legal representatives pursuant to Rule 15(2A). The Appellant appears by her instructed Counsel, Mr Puar. Mr Puar is familiar with this matter having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer, Miss Kenny.

The Regulations

7. It is appropriate to set out the Regulations with which this appeal is concerned. They are all to be found within the Immigration (European Economic Area) Regulations 2006. Paragraph 7 relating to family members states

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 –*
- (a) *his spouse or his civil partner;*
 - (b) *direct descendants of his, his spouse or his civil partner who are –*
 - (i) *under 21; or*
 - (ii) *dependants of his, his spouse or his civil partner;*
 - (c) *dependent direct relatives in his ascending line or that of his spouse or his civil partner;*
 - (d) *a person who is to be treated as the family member of that other person under paragraph (3).*
- (2) *A person shall not be treated under paragraph (1)(b) or (c) as the family member of a student residing in the United Kingdom after the period of three months beginning on the date on which the student is admitted to the United Kingdom unless –*
- (a) *in the case of paragraph (b), the person is the dependent child of the student or of his spouse or civil partner; or*
 - (b) *the student also falls within one of the other categories of qualified persons mentioned in regulation 6(1).*
- (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.*

8. Regulation 8 sets out what constitutes an extended family member

“Extended family member”

8. – (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 [F¹a country other than the United Kingdom] F²... 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.*

9. Regulation 10 refers to a family member who has retained the right of residence.

“Family member who has retained the right of residence”

- 10. – (1)** *In these Regulations, “ family member who has retained the right of residence ” means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).*
- (2) *A person satisfies the conditions in this paragraph if –*
- [F¹(a) *he was a family member of a qualified person or of an EEA national with a permanent right of residence when that person died;]*
 - (b) *he resided in the United Kingdom in accordance with these Regulations for at least the year immediately before the death of [F² the qualified person or the EEA national with a permanent right of residence] ; and*
 - (c) *he satisfies the condition in paragraph (6).*
- (3) *A person satisfies the conditions in this paragraph if –*
- (a) *he is the direct descendant of –*
 - (i) *[F³ a qualified person or an EEA national with a permanent right of residence] who has died;*
 - (ii) *a person who ceased to be a qualified person on ceasing to reside in the United Kingdom; or*
 - (iii) *the person who was the spouse or civil partner of [F⁴ the qualified person or the EEA national with a permanent right of residence] mentioned in sub-paragraph (i) when he died or is the spouse or civil partner of the person mentioned in sub-paragraph (ii); and*
 - (b) *he was attending an educational course in the United Kingdom immediately before [F⁵ the qualified person or the EEA national with a permanent right of residence] died or ceased to be a qualified person and continues to attend such a course.*

Submission/Discussions

10. Mr Puar submits that there is a material error of law due to the lack of following by the judge of Regulation 8(2)(c). He points out that the key issue is what happens thereafter. He reminds me that the Secretary of State was not represented at the hearing before Immigration Judge Obhi and that this is important as the judge only had the Notice of Refusal to go on and that the Secretary of State had not raised the issue of the weight to be given to the Sponsor as a qualifying person. He submits that bank statements produced reflect the issue of dependency which is a requirement of paragraph 8(2)(c) and that it was not essential to the appeal to consider evidence provided regarding the Appellant's continuing studies. Consequently he submits that the background is clear. He submits that until the Appellant's 21st birthday on 24th September 2012 she would, as Judge O'Ryan has commented, have been a "family member" of the Sponsor under Rule 7(1)(b)(i) and that by the time her father left the UK she would have been in the UK for some six years, fourteen days, i.e. for a period well over the five year mark. Bearing in mind that it was accepted by the judge that she had been living with her father until he left the UK he submits on these facts that the Appellant should have succeeded in her appeal.
11. Miss Kenny points out that the judge did not make any explicit claim or finding that the Appellant had been living with her father and that there was missing evidence which has not been provided. It is not accepted by the Secretary of State that the Appellant was living with her father at the same point that she was at university and that the appeal had failed originally by way of lack of evidence. She submits that based on the evidence that was before the judge it was not possible for the appeal to succeed on a balance of probabilities. She points out it was necessary to consider the evidence that was before the judge at the hearing.
12. In response Mr Puar submits that there is clearly an error at paragraph 21 of the judge's decision. He submits it was not open to the judge to re-determine the facts and that the judge misunderstood paragraph 8(3) and that it is necessary to show dependency and be a member of the household. He submits that if I accept that there has been clear factual findings that the Appellant was living with her father at the relevant period but not dependency, I can still allow the appeal outright. He submits that the judge identifies the period in excess of five years and once dependency is removed the Regulation is met.

The Law

13. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
14. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the

evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

15. There are certain facts in this matter that are of considerable relevance. The Secretary of State did not provide a Home Office Presenting Officer at the first hearing and I accept that that in this particular matter that created a difficulty for the judge in that the judge was constrained solely to the reliance on the Secretary of State's position in the Notice of Refusal. However whilst noting that the judge indicates at paragraph 20 of her decision that there are shortcomings in the evidence relied upon by the Appellant to demonstrate that the Sponsor remained a qualified person, I agree with the view expressed by Deputy Upper Tribunal Judge O'Ryan that the judge has not when giving due consideration to that paragraph and to paragraph 21 come to a clear and unequivocal finding on the issue of whether the Sponsor remains a qualified person during any relevant period even taking into account the final sentence of paragraph 21. To that extent I am satisfied that the lack of finding is an error of law and that it is material. Further there is some merit to the finding made by Deputy Upper Tribunal Judge O'Ryan that whilst the judge accepted at paragraph 21 that the economic activity of the Sponsor was not queried within the decision letter, it is arguable that the Appellant was caused prejudice by the judge scrutinising this issue to the extent that she did.
16. There is a requirement of fairness. Having found that there has been a material error of law I am not satisfied that it is appropriate for me to go on and remake the decision or to rehear the matter at this juncture. Judge O'Ryan however did make it clear in his grant of permission that documentary evidence should be made available by the Appellant to satisfy the requirements of the Regulation and that there was before the First-tier Tribunal Judge a lacuna of evidence. This case turns on credibility and it is for the Appellant to prove her case on a balance of probabilities. Having found that there is a material error of law the correct approach is to remit the matter back to the First-tier Tribunal for rehearing. The Appellant is however warned that unless she has provided evidence to the satisfaction of the First-tier Tribunal that the Regulation is met there is no guarantee whatsoever that another judge will even on a full rehearing of this matter come to a different decision to that of the original judge.

Notice of Decision and Directions

The decision of the First-tier Tribunal Judge contains a material error of law and is set aside. Directions are given for the rehearing of this matter.

- (1) On the finding that the First-tier Tribunal Judge made a material error of law in her decision the decision is set aside and the matter is remitted back to the First-tier Tribunal, sitting at Birmingham for rehearing on the first available date 28 days hence with an ELH of two hours.
- (2) That the appeal is to be before any Judge of the First-tier Tribunal other than Immigration Judge Obhi.
- (3) That there be leave to either party to file and serve a bundle of such further subjective and/or objective evidence upon which they seek to rely at least seven days prior to the restored hearing.
- (4) That in the event that the Appellant requires an interpreter it is incumbent upon her/her legal representatives to notify the Tribunal within seven days of these directions that an interpreter is required and of the language requirement of that interpreter.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

06/06/2018

**TO THE RESPONDENT
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

06/06/2018