Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/08774/2016

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 16 October 2018	**On 5 November 2018**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

MRS HANIFA ABDUL HAMID GANDHI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Sobowale, Counsel, instructed by Kingswell Watts Solicitors
For the Respondent: Ms H Aboni, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of Mrs Gandhi against the decision of a First-tier Judge on 1 August 2017 refusing her application for a residence card on the basis that her sponsor is an EEA national exercising treaty rights. The sponsor is her son-in-law, who is, as is common ground, a British national

and also a Portuguese national, and the reason why the application was refused was because the Immigration (EEA) Regulations precluded a person being able to provide the means of obtaining a residence card as a relative where they were also a British citizen, so in other words, the fact that the son-in-law was a British citizen as well as a Portuguese citizen precluded him being the route for the appellant being able to obtain a residence card and it was common ground before the judge that that was the case.

2. The judge was asked to adjourn on the basis that there had been a reference by the Administrative Court in the case of Lounes to the Court of Justice in March 2016 and there was produced to the judge a copy of the Advocate General's opinion, which, I think, made it clear that although the matter could not succeed, under Directive 2004/38 under broader principles of European Union law it could. The judge was asked to adjourn and declined to do so on the basis that the Advocate General's opinion was no more than an opinion. There was no guarantee that it would be accepted or followed but even if it were correct it would not necessarily mean that Regulation 2 of the EEA Regulations would be amended. There was no definitive date for the outcome to the questions raised in Lounes as well, and so the judge's reasoning is essentially set out at paragraphs 14 and 15.

3. Events have moved on since then and since the grant of permission in this case. The Court of Justice produced a judgment in the case of Lounes sometime toward the end of last year, which essentially, as I understand it, adopted the Advocate General's reasoning, and this has subsequently led, as Mr Sobowale pointed out, to an amendment of the EEA Regulations which in the material part says that a national of an EEA state who is also a British citizen and who prior to acquiring British citizenship exercised a right to reside as such a national in accordance with Regulation 14 or 15 can now come within the definition of an EEA national.

4. The question I have to decide is whether there is an error of law in the judge's decision and I do not think that can simply be determined on an ex post facto basis and reading back from what has happened to what the judge could or should reasonably have anticipated at the time when the decision to refuse the adjournment was made. Obviously, I have every sympathy for the appellant since, certainly on the instructions that Mr Sobowale has and what was said in the grounds of appeal and the original letter, the timing of Mr Rashid, the sponsor's, obtaining British citizenship would appear to accord with Regulation 2(1)(b) of the amended Regulations. The difficulty is that there was no evidence of that and the Secretary of State has not had an opportunity to consider any evidence that might be put forward in that regard.

5. On the face of it, it looks clear that the requirements of the Regulations are likely to be made out but it does not seem to me that I can exercise a degree of pragmatism which would allow me to say that the judge erred as

a matter of law because the law has now changed in what appears to be in favour of the appellant. The question must solely be whether the judge erred as a matter of law in refusing an adjournment in this case and it seems to me that the reasons given at paragraphs 14 and 15 are perfectly sound.

6. The Advocate General's opinion binds nobody. There was no date to the outcome in Lounes. It was not clear what would happen and as a consequence the court might have agreed with the Advocate General or might have disagreed and even if it agreed it would not mean that the law would be changed in the manner in which it has been. Thankfully, in relation to the fresh application that, I imagine, will be made the law, or the legal structure at least, is clear and if the evidence as asserted can fit within that then there is no reason why a fresh application should not succeed.

7. So, as I said, I have sympathy for the situation in which the appellant finds herself. It is, as it seems, a matter of making a fresh application only but on the law as it was at the time in relation to the basis upon which the judge's decision was challenged it seems to me there was no error of law by the judge in refusing an adjournment in this case. The reasons given are perfectly sensible and legally sound ones and accordingly, since that is essentially the basis upon which the judge's decision is challenged, the appeal is dismissed.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date 25 October 2018

Upper Tribunal Judge Allen