



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/13754/2016

THE IMMIGRATION ACTS

Heard at Field House
On 9th July 2018

Decision & Reasons Promulgated
On 7th September 2018

Before

UPPER TRIBUNAL JUDGE KING TD

Between

MISS PLA NADINE MIREILLE YAO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Ngwuocha, Solicitor of Carl Martin Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of the Cote d'Ivoire born on 16th August 1986. On 22nd April 2016 she applied for a permanent residence card as a family member of her father, the sponsor, who is a Swedish national who acquired the right to permanent residence in the United Kingdom on 22nd January 2008.
2. The refusal was in the terms that the appellant has failed to show that for a continuous five year period she had remained a dependant of her father since the issue of her residence card on 13th January 2010. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge James for hearing on 1st February 2018. In a determination promulgated on 23rd February 2018 the appeal was dismissed.

3. It was noted that at the time of the application the appellant was aged 29 and therefore failed to satisfy Regulation 7(1)(b), namely the requirement of being under 21 or a dependant of the sponsor in order to be treated as a family member. It was noted that the appellant lived separately and apart from the sponsor.
4. The appellant sought to appeal against that decision.
5. It is contended first of all that the Judge misunderstood the nature and ambit of the Regulations, it being said that the appellant, having been granted initially a residence card on the basis of her dependency she now having undertaken five years residence, was entitled to permanent residence without having to show any dependency during that period.
6. In any event it is contended that the Judge fundamentally misunderstood that the right of residence began when she joined her Swedish national father on 31st December 2003 and not on the date of the grant of the residence card.
7. Leave to challenge the decision to the Upper Tribunal was granted and thus it is the matter comes before me to determine the issue.
8. The primary submission in respect of the appellant is that having been granted a residence card on the basis of being a family member, i.e. dependent upon the sponsor and having resided upon that residence card for five years the appellant is entitled to permanent residence notwithstanding that she is no longer a dependant.
9. Reliance was placed particularly upon the Upper Tribunal decision in **PM (EEA - spouse - "residing with") Turkey [2011] UKUT 89 (IAC)**.
10. This was a case where the appellant was married to the EEA sponsor and was given a residence card in 2014 on that basis. However in 2017 she left the matrimonial home and although remained married to the sponsor did not live with him.
11. Regulation 15(1)(b) of the Immigration (European Economic Area) Regulations 2006 applies to those who entered a genuine marriage where both parties had resided in the United Kingdom for five years since the marriage. It was the decision of the Tribunal that "residing with" related to presence in the United Kingdom and did not require living in any common family home.
12. The present case is of course not a marriage case but a family member otherwise than a spouse. The appellant acquired the EEA relationship with the sponsor as a family member initially by reason of her age and/or her dependency upon him.
13. It is submitted that Regulation 15(1)(b) applies also to the appellant as she has resided within the United Kingdom in accordance with the Regulations for a continuous period of five years but not necessarily resident with him. The issue of course that exercised the Secretary of State in the decision under challenge was whether in that

five year period she resided in accordance with the Regulations, namely as a dependent family member.

14. Mr Ngwuocha submits that such is an unduly narrow interpretation of the construction of the Regulation. He relies particularly on paragraph 16 of PM which provides as follows:-

“Turning to the context of the regulations, the scheme (reflecting the requirements of Community law) deals with initial residence, then extended rights of residence, next retained rights of residence and finally permanent rights of residence. Regulation 13(2) concerns the right of initial residence of a non-EEA family member of an EEA national. The position of such a family member is distinguished from that of EEA nationals by the requirement to produce a valid passport, but otherwise the initial right of residence is not expressed to be subject to a requirement to reside with the EEA national. No distinction is made between EEA and non-EEA family members for the purposes of the extended right of residence under reg 14(2). All family members are entitled to extended residence as long as the EEA national remains a qualified person (in the present context this means works in the United Kingdom) or has become entitled to a permanent right of residence. There is no requirement that the family member be residing with the EEA national in the same house or household.”

At paragraph 33:-

“We have no doubt that in the light of its objects and purpose Article 16(2) is intended to afford all family members (irrespective of their nationality) the right of permanent residence after five years residence in the host state where the EEA national has resided. With this reading the Directive adds to the residence rights identified in Diatta and applicable to all family members.”

15. Reliance is also placed upon the decision of the Court of Justice of the European Communities in Ogieriakhi [2014] EUECJ C-244/13 (10 July 2014).
16. That, again, was essentially a marriage case.
17. The appellant in that case was a Nigerian national married to a French national living in Ireland. He obtained a residence permit for the period 1999 to 2000. At the end of that period he applied for renewal of the residence permit which was granted until 2004. In 2004 he applied for renewal of his residence permit which was refused because he was unable to show that his wife had been exercising her treaty rights.
18. Reliance is placed upon paragraph 34 of that determination which provides as follows:-

“In that regard it must be noted that, in considering Article 16(2) of Directive 2004/38, the Court has held that the acquisition of a right of permanent residence by family members of a Union citizen who are not nationals of a Member State is

dependent, in any event, on the fact that, first, the Union citizen himself satisfies the conditions laid down in Article 16(1) of that directive and, secondly, those family members have resided with him for the period in question (**Alarape and Tijani EU:C:2013:290**).

19. Accordingly at paragraph 38 the court noted that between the period the spouses had ceased to live together and were living with other people, but held that such was irrelevant for the purposes of the acquisition of a right of permanent residence.
20. I do not find this to be a relevant authority for the purposes of the consideration now undertaken.
21. In any event, whether or not those decisions support the propositions which are relied upon, it is unnecessary to rely upon those decisions in the practical circumstances of this case.
22. As was conceded most properly by Mr Tufan that the decision under challenge omitted to make reference to the proper and detailed immigration history of the appellant.
23. She claimed a residence card as a family member of her father in 2003 and the residence card was granted to her on 23rd January 2004 for a period of three years to 2007. At the time that she made that application and indeed at the time of the grant she was both under 21 and a dependant of her father. In 2007 she sought to renew her residence card also on the basis of being a family member and a dependant of her father, but for some reason that was not dealt with and considered until 2010 when she was indeed granted a five years residence card.
24. Essentially, from 2004 to 2012 she had been living at home and studying at school and from 2008 to 2009 she was at university studying in Westminster. Although during the term time she was living apart from her family and earning some money for her studies essentially it was conceded that she remained in practical terms a dependant of her father as a student. As it was it was only after 2017 that she began to be independent and now works as a financial accountant. She lives in the same area as her parents but not with them. She is no longer dependent upon them.
25. As Mr Tufan readily agreed, however, it is apparent that from 2004 until 2015 she resided with a residence card and in conformity with the appropriate Regulations. Her father continues to reside in the United Kingdom.
26. The decision only considered her position as dependent since 2010 and not since 2004.
27. It was conceded by Mr Tufan that, had the Judge properly considered the length of residence in accordance with the Regulations, there would have been an entirely different outcome and the Judge was therefore in error in the approach that was taken in this case.

28. In the circumstances I find that the Judge made a fundamental error in the assessment as to the appellant's entitlement to a permanent residence card and accordingly I set aside the decision. I proceed to remake the decision in light of the corrected information presented and allow the appeal under the relevant Regulations.

Notice of Decision

The appeal before the Upper Tribunal succeeds. The decision of the First-tier Tribunal is set aside, the decision remade and appeal allowed.

No anonymity direction is made.

Signed

A handwritten signature in black ink, appearing to read 'P. King', enclosed within a thin black rectangular border.

Date 30 July 2018

Upper Tribunal Judge King TD