



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/15590/2015

THE IMMIGRATION ACTS

Heard at Field House
On 3 September 2019

Decision & Reasons Promulgated
On 19 September 2019

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR RICHARD BOLUWATIFE OYERINDE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Coleman, instructed by Paul John & Co Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Talbot promulgated on 13 August 2018, dismissing his appeal under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") against a decision of the respondent made on 13 May 2015 to remove him from the United Kingdom on the grounds that the decision violated his rights pursuant to the

EEA Regulations as a person who does not have or who has ceased to have a right to reside under those Regulations.

2. The appellant is a citizen of Nigeria. His father, Shina Oyerinde who is also a national of Nigeria was in 2011 issued with a residence card as a spouse of an EEA national. The father was, at the time, living in the United Kingdom.
3. In 2014, the appellant applied under the EEA Regulations for an family permit to join his father in the United Kingdom. That application, a copy of which appears in his bundle, that an application was made on 2 May 2014 and was issued on 19 January 2015. The appellant arrived in the United Kingdom on 30 January 2015.
4. After the application had been made but before the family permit was issued the appellant's father was divorced from his former wife. The decree absolute was issued on 10 November 2014.
5. On 20 November 2014 the appellant's father applied for a residence card on the basis he had retained the right of residence following his divorce from the EU national, that application being refused on 13 April 2015. The basis of the refusal was that the Secretary of State concluded that the marriage had been one of convenience. That decision was, however, overturned on appeal the judge finding that the respondent had not shown that there were reasonable grounds for suspecting this was a marriage of convenience.
6. On appeal the judge found the appellant was not a "family member" of an EEA national within Regulation 7 of the EEA Regulations nor was he satisfied, having had regard to Article 13 of Directive 2004/38 that the appellant did fall within the category of those non- EEA nationals who were entitled to retained rights of residence following divorce.
7. The appellant sought permission to appeal on the grounds that the judge had erred in law in finding that the appellant could not be "sponsored" by his father, this being an incorrect interpretation of Article 3 of the Directive, this in turn relying on a misinterpretation of the term "personal basis". It is also submitted that the judge erred in his interpretation as it offended against the principle of equivalence as, if the appellant's father had required a right of residence under domestic legislation without reference to EEA law that he would not be barred from acting as a sponsor to the advocate.
8. It is also averred that the First-tier Tribunal's reasoning is inadequate.

The law

9. The Immigration (European Economic Area) Regulations 2006 apply to this appeal as, although they were repealed by the Immigration (European Economic Area) Regulations 2016, Section 3 of Schedule 3 to those Regulations operates to preserve them for this appeal as the date of decision is prior to the coming into force of the 2016 Regulations.

10. The grounds on which the appellant can challenge the decision are set out in Schedule 1 to the EEA regulations. The grounds were amended with effect from 6 April 2015, by operation of the Immigration (European Economic Area) (amendment) Regulations 2015 (SI 2015/694), Schedule 1 to the 2006 Regulations was amended to read:

The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal [against a decision of the Secretary of State under section 82(1) of the 2002 Act (right of appeal to the Tribunal) –

section 84 (grounds of appeal), as though the *sole* [emphasis added] permitted ground of appeal were that the decision breaches the appellant's rights under *the EU Treaties* [emphasis added] in respect of entry to or residence in the United Kingdom (“an EU ground of appeal”);

11. Regulation 7 of the EEA Regulations provided as follows:

7.– Family member

(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).

...

(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.

Directive 2004/38 on which the EEA Regulations are based provides as follows:

Article 2 Definitions

For the purposes of this Directive:

- 1) “Union citizen” means any person having the nationality of a Member State;
- 2) “Family member” means:
 - (a) the spouse;
 - (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member

State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

Article 3 of the Directive provides as follows:

Article 3 Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.
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 its national legislation, facilitate entry and residence for the following persons:
 - (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
 - (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.

12. Article 13.2 of the Directive provides:

Article 13

Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership

...

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:
 - (a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or
 - (b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or

(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or
 (d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. “Sufficient resources”« shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on personal basis.

13. It is not in doubt that the appellant’s father has retained the right of residence which he first acquired as the spouse - and thus family member of - an EEA national.
14. Not all non-EEA nationals or EEA national spouses have their rights preserved; in cases where marriage lasted less than three years and where there has been no difficult circumstances such as domestic violence, then their rights are not preserved.
15. In Singh and Others [2015] EUECJ C-218/14 the court held at [50] to [53]:

50 As regards the right of residence in the host Member State of nationals of third countries who are family members of a Union citizen, attention should be drawn, as a preliminary point, to the settled case-law of the Court which states that the rights conferred on third-country nationals by Directive 2004/38 are not autonomous rights of those nationals but rights derived from the exercise of freedom of movement by a Union citizen. The purpose and justification of those derived rights are based on the fact that a refusal to allow such rights would be liable to interfere with the Union citizen’s freedom of movement by discouraging him from exercising his rights of entry into and residence in the host Member State (see, to that effect, judgment in *O and B*, C-456/12, EU:C:2014:135, paragraphs 36 and 45 and the case-law cited).

51 It must also be recalled that it is not all third-country nationals who derive rights of entry into and residence in a Member State from Directive 2004/38, but only those who are a ‘family member’ within the meaning of Article 2(2) of that directive of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national (judgment in *Iida*, C-40/11, EU:C:2012:691, paragraph 51 and the case-law cited).

52 Moreover, Article 3(1) of Directive 2004/38 requires that the family member of the Union citizen moving to or residing in a Member State other than that of which he is a national should accompany or join him, in order to be a beneficiary of the directive (see judgment in *Iida*, C-40/11, EU:C:2012:691, paragraph 61).

53 Article 7 of Directive 2004/38, which concerns the right of residence for more than three months, likewise requires that the family members of a Union citizen who are not nationals of a Member State 'accompany' or 'join' him in the host Member State in order to enjoy a right of residence there (judgment in *Metock and Others*, C-127/08, EU:C:2008:449, paragraph 86).

16. Further, at [57] the Court of Justice stated:

57 Finally, under Article 14(2) of Directive 2004/38, the right of the family members of a Union citizen to reside in the host Member State on the basis of Article 7(2) of the directive continues only as long as they meet the conditions laid down in that provision

17. It is also stated at [65] that on the departure from the host member state of an individual who is a Union citizen, spouse who is a third country national no longer meets the conditions for enjoying a right of residence see Article 7(2).

18. It is necessary also to have regard to SSHD v NA [2016] EUECJ C-115/15 where at [40] to [41] the Court of Justice said this:

40 It is apparent, first, from the wording employed both in the heading and in the text of Article 13(2) of Directive 2004/38, that provision is made for the right of residence, to which, on the basis of that provision, a Union citizen's family members who do not have the nationality of a Member State are entitled, to be retained, in particular, in the event of divorce and that, as a consequence, when the conditions laid down in that provision are satisfied, divorce does not entail the loss of such a right of residence.

41 Second, as regards the context of that provision, Article 13(2) of Directive 2004/38 constitutes a derogation from the principle that Directive 2004/38 confers rights of entry into and residence in a Member State not on all third-country nationals, but solely on those who are a 'family member', within the meaning of point 2 of Article 2 of that directive, of a Union citizen who has exercised his right of freedom of movement by settling in a Member State other than the Member State of which he is a national, that principle being established by the Court's settled case-law (see, inter alia, judgment of 16 July 2015, *Singh and Others*, C-218/14, EU:C:2015:476, paragraph 51).

19. The Court also stated at [45] to [49]:

45 Last, as regards the aims of Article 13(2) of Directive 2004/38, that provision corresponds to the objective, stated in recital 15 in the preamble of that directive, of providing legal safeguards for family members in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership, taking measures in that respect to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.

46 In that regard, it is apparent from the history of Directive 2004/38 and, more particularly, from the explanatory memorandum of the Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM/2001/0257 (final)), that,

under EU law prior to Directive 2004/38, the divorced spouse could be deprived of the right of residence in the host Member State.

47 In that context, that proposal for a directive states that the purpose of the envisaged provision, now Article 13(2) of Directive 2004/38, was to offer certain legal safeguards to third-country nationals whose right of residence was dependent on a family relationship by marriage and who could therefore be open to blackmail accompanied by threats of divorce, and that safeguards were necessary only in the event of final divorce, since, in the event of *de facto* separation, the right of residence of a spouse who is a third-country national is not at all affected.

48 It follows from the foregoing that it is apparent from the wording, the context and objectives of Article 13(2) of Directive 2004/38 that the application of that provision, including the right derived from Article 13(2)(c) of Directive 2004/38, is dependent on the parties concerned being divorced.

49 It follows also that an interpretation of Article 13(2)(c) of Directive 2004/38 to the effect that a third-country national is entitled to rely on the right derived from that provision where her spouse, who is a Union citizen, has resided in the host Member State, in accordance with Article 7(1) of Directive 2004/38, not until the date of the commencement of divorce proceedings but, at the latest, until the date when the domestic violence occurred, is contrary to the literal, systematic and teleological interpretation of Article 13(2) of Directive 2004/38.

20. The principle of law is clear: rights conferred by the Directive do so to give effect to the principles of free movement as set out in the TFEU in particular at Articles 20 and 21. Any rights that their non-EEA family members derive from that flow from the EEA national and are derived from the rights that EEA national has. The rights of non-EEU nationals are entirely derived from the right of the EEA family member. The default position is that those rights cease to exist once the EEA national ceases to be exercising Treaty Rights in the host member state or ceases to be a family member of the non-EEA national as defined.
21. The appellant contends that the phrase “personal basis” should be interpreted as meaning “a basis held only by that person without reference to another”, that is without reference to the former spouse, and does not mean that he cannot pass the benefits of that status on to another.
22. The difficulty of that interpretation is that it would confer on such a person direct rights under EU law as if he were an EEA national which he is not. That is contrary to the jurisprudence set out above. As the respondent submitted, the non-EEA family member has no discrete right to have his family members with him; that right derives only from the EEA national. The interpretation contended for by the appellant would require the conferring on the non-EEA national rights equivalent to EEA nationals which is out of the scope of the TFEU and the Directive.
23. Accordingly, I do not accept that Article 13.2 can bear the interpretation put on it by the appellant. I accept in principle that Article 13.2 applies to non-EEA dependent children of a marriage which is dissolved (and it is notable that the reference is to

family members, not spouse). An interpretation permitting a former spouse to continue to reside post-divorce but not her children who had been here with her and who had had rights to be here so long as they were part of the family of an EEA national would be open to objection, but that is not the scenario here.

24. On the facts of this case there were no rights to be retained. That is because the appellant was in Nigeria at the point when his father's marriage was dissolved. At that moment, by operation of law he ceased to be a family member. This is entirely analogous to the legal position of the spouses both in NA and in Singh.
25. Article 13 is about the retention of rights which had been conferred by EU law. It is evident from the chronology set out above that while the appellant was still in Nigeria, he ceased to be with a family member, as defined, as his father was no longer the partner of an EEA national. He was no longer a family member as defined by operation of the decree absolute.
26. Further, the beneficiaries of the Directive as set out in Article 3 are Union citizens and to their family members as defined who accompany or join them. As at the date of entry into the United Kingdom the appellant was not such a person.
27. Whilst I accept that the appellant was issued with a permit and was treated as though he had the right of entry that right is under Article 5 of the Directive, confined to those who are members of the family of a Union citizen. That does not apply here and accordingly neither does the right of residence for up to three months (Article 6) or Article 7, right of residence for more than three months. The position is the same under the EEA Regulations.
28. In summary, as the appellant was outside the UK (and for that matter the EEA) when he ceased to be a family member, he had no rights which had been conferred on him by EU law which were capable of being preserved.
29. I turn next to the issue of equivalence. While that was raised in the grounds of appeal, it is not addressed in the skeleton argument nor did Mr Coleman make submissions on the issue. The respondent observed in her skeleton argument at [5] that this issue was no longer relied upon, and the appellant has not disagreed with that observation.
30. In any event, I am not persuaded that there is any merit in that ground. Even were the applicant's father a British Citizen, given the appellant's age at all material times, the circumstances in which he could obtain leave as an adult dependant are very limited and there is nothing in the material to show he could meet the relevant requirements.
31. It cannot be argued that the judge erred in his interpretation of the law albeit that there is little explanation for his conclusion but it was a conclusion as to the law which was, for the reasons set out above, correct. No purpose is, however, served in setting the decision aside as it is clear from the law as set out above that the appeal was bound to fail in any event.

32. Accordingly, the decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Notice of Decision

1. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it
2. No anonymity direction is made.

Signed

Date 17 September 2019

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

Upper Tribunal Judge Rintoul