Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: EA/01280/2019
EA/01281/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 March 2020	**On 23 March 2020**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

YAW [M]
LAURYN [M]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms H Gore, instructed by R Spio & Co Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are brother and sister and are citizens of Ghana. They appealed to a Judge of the First-tier Tribunal against the respondent's decision of 15 January 2019 refusing their applications for EEA residence cards to confirm retained rights under the EEA Regulations as the children of a spouse of an EEA national. The claim relates to their mother who is Ghanaian and her husband, an EEA national.

2. The respondent refused the applications because the marriage between the appellants' mother and the sponsor was dissolved as of 30 November 2016. The respondent noted that the appellants both entered the United Kingdom on 16 August 2018 and therefore it was clear that they could not have been living with the EEA sponsor at the termination of the marriage as they had not yet been granted leave to enter the United Kingdom at that point. Also they had failed to provide any documentation to show that they were resident in the United Kingdom prior to the dissolution of the marriage. It was concluded that they had therefore failed to show that they had retained a right of residence in the United Kingdom.

3. The judge noted that the couple had married on 4 June 2011 and, as set out above, the marriage was dissolved on 30 November 2016. The judge thereafter noted that in May 2016 an application was made for a residence card for the appellants. This was refused, the appellants' mother appealed and her appeal was allowed by an immigration judge (the first judge). The Upper Tribunal remade the decision and allowed the appeal on 20 February 2018. It was accepted that she was the mother of the appellants and that they were family members of her husband for the purposes of Regulation 7 of the 2006 Regulations because at the relevant time the couple were married. On 24 July 2018 the appellants had been issued with residence permits by the Home Office and travelled to the United Kingdom on 16 August of that year and have remained living with their mother subsequently.

4. In his conclusions the judge stated that at the time of the refusal in 2016 the appellants were, for the purposes of Regulation 7, dependent direct relatives of their mother's EEA spouse and that was why the appeal had been allowed. However, he remarked, the situation now was different in that the marriage has ended and as a matter of fact and law the appellants were not dependent direct relatives on their mother's EEA spouse since the dissolution of the marriage had taken place on 30 November 2016.

5. The judge noted that Ms Gore, who also appeared below, did not argue that the appellants retained rights under the EEA Regulations but argued that they were still the family members of the sponsor even after the divorce because he remained their stepfather. The judge did not accept this argument and as a consequence, noting that the appellants were not required to leave the United Kingdom as a result of the decision, concluded that there was no interference with any Article 8 right and dismissed the appeals against the EEA decision.

6. The appellants sought and were granted permission to appeal against this decision on the basis that it was arguable that the judge had materially erred in finding that the family relationship ended on divorce, for the reasons given at paragraph 18 in the grounds. This paragraph contained a reference to Article 13(2) of Directive 2004/38/EC.

7. In her submissions Ms Gore relied on the grounds and argued that the judge's decision was wrong. As had been argued in the grounds, the respondent should have applied Regulation 18 of the Immigration (European Economic Area) Regulations 2016 to the case. Instead the respondent had focused on Regulation 10(5). The grounds set out an explanation as to the grant of the family permit in Ghana which had been granted after the divorce. The decision of the Upper Tribunal had been after 30 November 2016 so the judge was aware of the fact of the divorce. The appeal had been allowed and the Secretary of State had not appealed it further. It was significant that a family permit had been granted to the appellants pursuant to Regulation 12(1) of the EEA Regulations. The respondent accepted at that point that they were family members. The appellants arrived in the United Kingdom and should not have been admitted unless they were family members of an EEA national or family members who had retained a right of residence. That had happened in this case. They had not been refused entry on the basis of not being family members but had been admitted as they had the right to admission under Regulation 11. The matter should then have been considered under Regulation 18 when the residence card application was made. When the appellants applied for a residence card they provided proof of family membership with the family member's entry in the passport and should have been granted residence cards under Regulation 18.

8. With regard to the judge's decision, he had noted the reasons for refusal and with regard to paragraph 10 setting out the history the court had misunderstood and they had not applied for a residence card but had applied for a family permit in 2016. That mistake was repeated in paragraph 12. There was a reference at paragraph 17 to the change of circumstances, but at the time when the matter was under appeal the Upper Tribunal was aware that the divorce had happened. Nothing turned on that as the Secretary of State and the Upper Tribunal were aware. As a consequence the wrong test had been applied and it should have been Regulation 18.

9. If the Tribunal disagreed then the issue was whether the children had ceased to be family members and it had not been referred to on that basis so Regulation 10(5)(a) did not apply. That, if Ms Gore was correct, referred to the mother. For Regulation 10(5) to apply there had to be a cessation of being a family member and not being refused on the basis of the mother of the appellants ceasing to be a family member but with regard to residence in the United Kingdom. At paragraph 18 of the grounds it could be seen that it was clear that residence permits had been granted because the Directive referred to marriage. Regulation 10(5) did not apply. The application had been for a residence card.

10. Mr Lindsay put in a bundle, which Ms Gore had seen, concerning the previous appeal proceedings. There was first of all the refusal of an EEA family permit, on 2 March 2017. There had been an earlier decision of 20 September 2016 refusing the appellants an EEA family permit and an appeal against that decision was heard and allowed by a Judge of the First-

tier Tribunal on 9 November 2017. The judge noted at paragraph 10 of his decision the refusal of 2 March 2017 in which it was observed that the appellants' mother had subsequently submitted a Ghanaian divorce certificate issued on 5 December 2016 annulling her marriage and as a consequence the respondent had questioned the credibility of the appellants' claims to be family members of EEA nationals. The judge was not satisfied that he had jurisdiction to engage with that decision as apparently it had not been served on the appellants. He could therefore not engage with the issue of the appellants' mother allegedly being divorced from the sponsor.

11. Permission to appeal against that decision was sought by the respondent and granted, and there was a subsequent hearing before a Deputy Judge of the Upper Tribunal at which among other things the respondent's argument was noted that the sponsor was now divorced from the EEA national and as such her children could not benefit from the provisions of Regulation 7(1)(b)(i) at the point of divorce, namely 3 November 2016. The judge found that the claimants had shown on the balance of probabilities that they were direct descendants of the spouse of an EEA national and were family members for the purposes of the 2006 Regulations, and that the respondent was obliged to issue them with EEA family permits as family members of an EEA national.

12. The final document in that bundle is a Specialist Appeals Team minute in which it is noted that there had been an intention to challenge the Deputy Upper Tribunal Judge's decision to the Court of Appeal after refusal of permission by the Upper Tribunal but they ran out of time and as a consequence it was concluded that it should be signed off and the Entry Clearance Officer notified that family permits should be issued, although the respondent had strong doubts that the appellants enjoyed a right to reside following their mother's divorce from the EEA national stepfather.

13. Mr Lindsay argued that the appellants were not at all material times entitled to say they had a right of residence to entry under the EEA Regulations. More broadly it was relevant to note they did not rely on retained rights so they needed to show that at the date of the hearing they were family members of an EEA national and that could not be done as their mother had been divorced from their stepfather in 2016 and therefore in 2019 there was no family relationship under the Regulations.

14. The earlier appeal could not be dipositive. The Devaseelan guidance related to an authoritative statement of the facts in a previous decision but did not bind the subsequent Tribunal with regard to the law. The law had not been properly applied in the previous proceedings. The first judge had failed to consider that it was not disputed that in 2016 the appellants' mother was divorced from her EEA spouse so there was no family relationship in EEA law terms. It should be noted that there had been no Presenting Officer before the First-tier Tribunal on that occasion. The Deputy Upper Tribunal Judge in the appeal had failed to consider all the evidence as at the date of the hearing. It was relevant to note his

reference at paragraph 27 and again at paragraph 29 that the claimants "were" direct descendants of the spouse of an EEA national. That could not be right. The matter had to be considered as at the date of decision.

15. I questioned whether there might not be a point for legal argument here about issue estoppel/cause of action estoppel in light of the decision of the Judge of the Upper Tribunal in February 2018. Neither representative wished to apply for an adjournment for further consideration or further submissions to be made. Mr Lindsay argued that as to whether issue estoppel or legitimate expectation was relevant to Article 8, this was a pure EEA appeal and the judge had noted at paragraph 21 that there would be no effect on Article 8 as the appellants were not required to leave the United Kingdom and there was no challenge to that so it was just a question of whether the First-tier Judge was entitled to find that there was no EEA family relationship at the date of the hearing. If there were a future decision requiring the appellants to leave then Article 8 issues could be raised then but it was not in issue for today.

16. Ms Gore referred to paragraph 14 of her grounds. Mr Lindsay had confirmed that the Secretary of State was aware of the point now being made and was trying to appeal the Upper Tribunal decision through the back door. She had not appreciated that there had been an unsuccessful attempt to appeal that decision to the Court of Appeal. Extra time was not being sought for an application out of time.

17. Ms Gore had not seen this as an issue. The respondent had not made the arguments now being made in the refusal decision. The decision had not been withdrawn and there were issues of natural justice and they were not the issues before the First-tier Judge and there was the question of whether Regulation 18 was the correct Regulation to be applied. The points were irrelevant and the judge could not deal with them. The Secretary of State could not change the case without notice. The issue was that about the family permit and the respondent's point had been argued on appeal.

18. Mr Lindsay thereafter argued that the judge was not bound by the earlier Upper Tribunal decision and it was necessary to have a simple binary assessment as at the date of hearing as to whether the appellants were family members of an EEA national or not. After the divorce there was no family relationship. The family permit should not have been issued. It had been done because of the First-tier Tribunal's decision but in any event circumstances changed and that was among other things why the burden was on appellants to show that they were entitled to the rights that they claimed to enjoy. They needed to show they were family members of an EEA national and could not do so. There was no surprise and no change in the Secretary of State's position. It was clear from the refusal decision in the penultimate paragraph that they had not been family members of an EEA national at all material times, and hence it was dealt with as it had been. Retained rights had not been argued. They had not been family members since 2016 upon the divorce.

19. Ms Gore further argued that with regard to the judge's paragraph 17 the situation was not in fact different. The Upper Tribunal had been aware of the fact that the sponsor was now divorced from the EEA national. She accepted that there were two different applications, the application from Ghana for a family permit being different from the United Kingdom application for a residence permit, but otherwise the issues were the same and the issue before the Upper Tribunal was whether the children were family members of the sponsor. That had also been in issue before the First-tier Judge so the issues were the same. Despite the Tribunal's invitation to consider whether it would be appropriate to seek an adjournment for an argument to be put in on any legal issues arising, her instructions were to continue and she did not seek an adjournment. She had stated the distinction which she saw and the Upper Tribunal had been aware in its decision in February 2018 that the divorce was in place and it was very important to look at what the judge there had said. The decision was made on the issues. The Secretary of State had raised an issue as to the name of the children's father and the decision was in their favour and also as to whether they were actually the children of their mother was positive in their favour so on that basis it was found they were the sponsor's family members. If the Tribunal did not agree that the judge was bound by the Upper Tribunal, Ms Gore would say that it was a different situation in the sense that the Upper Tribunal was deciding what was in place at the date of application in 2016 and at which time there had been no divorce so the Upper Tribunal was correct to find the children were family members at the date of the application. It could be one of those cases where the Secretary of State had stopped deciding cases and that was relevant to the timing under consideration.

20. The children were in the United Kingdom now and living here, having been admitted with family permits and made an application for residence permits and under Regulation 18 they had the right to make the application. If the Tribunal disagreed there was paragraph 18 in the grounds and a distinction that the judge had not made and issues about the marriage subsisting and they had clearly been found as family members and continued to have rights of residence. In summary therefore the points made by Mr Lindsay had no bearing and there was no issue estoppel. The judge had been aware that the situation was different and clearly saw it as different from what he had to do and at paragraph 17 it had been argued that the situation was different.

21. I reserved my determination.

22. It can be seen from the above that there are some factual complications in this case. The appellants applied for family permits to join their mother and their stepfather, a French national, in the United Kingdom. I have not seen the refusal letter which was appealed, but only the subsequent letter which made reference to the divorce, dated 2 March 2017, which the first judge, who heard the appeal in October 2017 declined to take into consideration as it apparently had not been served on the appellants and

could not engage with the issue of the fact of the mother now being divorced from the sponsor as was said to be the case.

23. Thereafter it is clear from the decision of the Deputy Upper Tribunal Judge who heard the appeal against the first judge's decision that, as can be seen from paragraph 15 of his decision, he was aware of the fact that the sponsor had now been divorced from the EEA national and the argument being made on behalf of the respondent that the appellants could not benefit from the provisions of Regulation 7 from the point of divorce, i.e. 30 November 2016.

24. When the judge came to the point in his decision of assessing the claim, it appears that he was taking into account the fact of the marriage at the date of application on 15 August 2016 (paragraph 21), which perhaps links with his reference to the claims showing as he noted at paragraphs 27 and 29 that the claimants were direct descendants of the spouse of an EEA national. As can be seen from the above analysis, the Secretary of State was unsuccessful in appealing that decision to the Court of Appeal since permission was not granted by the Upper Tribunal and the Secretary of State was thereafter out of time to bring a renewed application for permission to appeal to the Court of Appeal.

25. The judge in the appeal with which we are now concerned was aware of the earlier decision of the Upper Tribunal but as he noted at paragraph 17 the situation now was different in that the appellants were not dependent direct relatives of an EEA spouse because the marriage had come to an end on 30 November 2016. That is clearly right as a matter of law. Ms Gore argued that the decision should have been under Regulation 18, but that is concerned with the Secretary of State's obligation to issue a residence card to a person who was not an EEA national and is the family member of a qualified person or of an EEA national. That is inapplicable because the appellants were no longer family members of a qualified person or of an EEA national in light of the divorce in November 2016. Accordingly the matter clearly came under Regulation 10(5) and the refusal was a proper refusal on that basis. It is relevant in this regard also to note that there was no reliance before the judge on retained rights. As regards the application of Article 13(2) of Directive 2004/38/EC, that is predicated upon the persons in question being family members and involves retention of rights of residence. It is clear that retained rights were not relied on before the judge and in any event the appellant ceased to be family members of the EEA national upon their mother's divorce.

26. As regards the status of the Deputy Upper Tribunal Judge's decision, that in no sense bound the First-tier Judge who was considering an appeal against a different decision. The fact that the Deputy Upper Tribunal Judge allowed the appeal albeit being aware of the fact of the divorce in November 2016 in no sense precluded the First-tier Tribunal Judge from taking the fact of the divorce into account in deciding the matter in the way he did in particular as observed at paragraph 17 of his decision. There is no point of issue estoppel or cause of action estoppel here. The

fact that the Secretary of State was unsuccessful in appealing the earlier decision in no sense precluded the refusal in respect of the subsequent application made by the appellants any more than it precluded the dismissing of the appeal by the First-tier Judge of the challenge to that decision. Accordingly I conclude that no error of law in the judge's decision has been identified and his decision dismissing these appeals stands.

No anonymity direction is made.

Signed Date 16 March 2020

Upper Tribunal Judge Allen