In the Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard at Birmingham
On 21 November 2013

Determination Promulgated
On 4 December 2013

Before

UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE M HALL

Between

NANA YAW AMPOMAH

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: In person
For the respondent: Mr Parkinson, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. This matter comes before us as a re-making of an appeal concerning the appellant's claim that he is entitled to confirmation of his right of permanent residence as someone who has resided in the UK for 5 years

as the family member of an EEA citizen in line with the requirements of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

2. The respondent refused the appellant's application in a decision dated 10 July 2012. The appellant's appeal was initially refused by First-tier Tribunal Judge Hawden-Beal in a determination dated 9 October 2012. That decision was found to contain an error of law by Deputy Upper Tribunal Judge Hall in a decision dated 12 February 2013 and was set aside to be re-made.

Preliminary Issue

3. The appellant applied for his appeal to be linked to those of his wife and children. We did not have the details of those appeals before us but see no reason to dispute that they have appeals which are currently before the First-tier Tribunal. Where the appeals are within another tier of the Chamber, we indicated that this was not a situation where they could be linked.

Our decision

4. The appellant was granted a residence card following a Tribunal determination dated 2 April 2008 in his favour. The facts found that led to the appeal being allowed were that one of the appellant's children is an Irish national, the family, certainly since moving to the UK, are self-sufficient and have comprehensive medical insurance. The Irish national child was exercising a Treaty right by his residence in the UK, being self-sufficient.

5. As we see it, then, as now, the appellant was entitled to reside in the UK and to a residence card in 2008 in line with the judgment of the European Court of Justice in Case C-200/02 Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department [2004] ECR I-9925 [2005] 1 QB 325, [2004] 3 WLR 1453 (Chen).

6. In that case it was accepted the EEA citizen children were exercising Treaty rights on the grounds of self sufficiency. To give their rights of residence effect, their parents, as their primary carers, were allowed to remain. The parents derived their right of residence from the child, therefore, rather than having them in their own right under Directive 2004/38 (the Citizen's Directive). Indeed, the determination dated 2 April 2008 states at [33] that the appellant "can derive rights of residence from" the Irish national child.

7. However, the determination went on to state that the appellant fell within the definition of a family member in Article 2 of the Citizen's Directive, incorporated into domestic law by regulation 7 of the EEA Regulations.

8. The appellant relies on that statement now as showing that his right of residence arises from the Citizen's Directive and that he qualifies for permanent residence, having resided in the UK as the family member of an EEA citizen for over 5 years. He also maintains that this must also be so as the residence card which was endorsed in his passport in 2008 refers to him as a "family member of an EEA national".

9. We should indicate that we did not find that the description in the determination of 2 April 2008 of the appellant as someone who met the requirements of Article 2 of the Citizen's Directive or regulation 7 of the EEA Regulations was correct in law.

10. In setting out our reasons for this we can do no better than to cite [33] to [35] of Bee and another (permanent/derived rights of residence) [2013] UKUT 00083 (IAC) (Bee).

> "33. Chapter IV of Directive 2004/38/EC deals with the right of permanent residence. Article 16(2) states :
>
> > 2. Paragraph 1 shall apply also to family members who are not nationals of a Member State who have legally resided with the Union citizen in the host Member State for a continuous period of five years.
>
> The appellants have resided lawfully for at least five years because they have been granted leave for at least that period. However, the definition of "family members" in Article 2 (2) (d) refers to:
>
> > "the dependant direct relatives in the ascending line…"
>
> 34. This was considered in Chen in relation to the earlier Directive 90/364:
>
> > "42 Article 1(2)(b) of Directive 90/364, which guarantees 'dependent' relatives in the ascending line of the holder of the right of residence the right to install themselves with the holder of the right of residence, regardless of their nationality, cannot confer a right of residence on a national of a non-member country in Mrs. Chen's situation either by reason of the emotional bonds between mother and child or on the ground that the mother's right to enter and reside in the United Kingdom is dependent on her child's right of residence.
> >
> > 43 According to the case-law of the Court, the status of 'dependent' member of the family of a holder of a right of residence is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence (see, to that effect, in relation to Article 10 of Regulation No 1612/68, Case 316/85 Lebon [1987] ECR 2811, paragraphs 20 to 22).
> >
> > 44 In circumstances such as those of the main proceedings, the position is exactly the opposite in that the holder of the right of residence is dependent on the national of a non-member country who is her carer and wishes to accompany her. In those circumstances, Mrs. Chen cannot claim to be a 'dependent' relative of

> Catherine in the ascending line within the meaning of Directive 90/364 with a view to having the benefit of a right of residence in the United Kingdom."

35. It is clear from this that the appellants are not their children's dependants. As in Chen the factual situation is exactly the opposite. Consequently, they do not satisfy the definition of "family member" and so cannot benefit from the right to permanent residence in Article 16(2)."

11. The appellant here is not the dependent of his Irish national child. His child is dependent on him. He is not now and has never been someone coming within the definition of a "family member" as defined in Directive 2004/38/EC.

12. Further, none of the law or case law before us showed that parents deriving rights of residence from their self-sufficient EEA citizen children had a permanent right to reside. Chen did not indicate that was so.

13. More recently, in the case of Case C-529/11 Olaitan Ajoke Alarape v SSHD the European Court of Justice confirms that there is no right to permanent residence to those in the situation of this appellant, which concludes on similar facts at [48]:

> "In the light of the foregoing, the answer to the fifth question is that periods of residence in a host Member State which are completed by family members of a Union citizen who are not nationals of a Member state solely on the basis of Article 12 of Regulation No 1612/68, where the conditions laid down for entitlement to a right of residence under Directive 2004/38 are not satisfied, may not be taken into consideration for the purposes of acquisition by those family members of a right of permanent residence under that directive."

14. Regulation 15A of the EEA Regulations, dealing with permanent rights of residence, reflects the ratio of Alarape in regulation 15(1A) which states:

> "Residence in the United Kingdom as a result of a derivative right of residence does not constitute residence for the purpose of this regulation".

15. We did not find that the judge in the determination of 2 April 2008 or a later determination of 10 February 2009 referring to the appellant as the family member of an EEA national and to possible qualification under the Citizen's Directive or the EEA Regulations or to the appellant being able to apply for permanent residence in 2010 could have the force of altering the true basis on which he was and is entitled to reside in the UK.

16. Nor was it our view that a residence card endorsed in his passport referring to him as a family member of an EEA national afforded the appellant any legitimate expectation of obtaining permanent residence under the Citizen's Directive or regulation 7 of the EEA Regulations.

17. Further, when specifically stating that a right to permanent residence did not arise in the circumstances of this appellant, the European Court of Justice in Alarape used the term "family members", confirming us in our view that nothing material turns on the use of this wording.

18. The appellant also argued that he was not someone with a derived right of residence as a result of the provisions of Schedule 3 of The Immigration (European Economic Area) (Amendment) Regulations 2012. That argument could not succeed where the appellant has never had residence rights covered by the EEA Regulations, before or after the 2012 amendments.

19. As we understood it from the appellant, his Irish national child's right to permanent residence is in the process of being considered by the First-tier Tribunal. That application, of course, does fall to be considered under the Citizen's Directive and EEA Regulations on the basis of whatever evidence is put before the First-tier Tribunal.

Conclusion

36. We re-make the appeal, finding that the appellant's derivative rights do not confer a permanent right of residence.

37. We accordingly re-make this appeal by dismissing it.

Fee Award Note: this is **not** part of the determination.

We make no fee award as the appeal has been dismissed.

Upper Tribunal Judge Pitt 21 November 2013