Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: IA/33605/2013**

IA/33609/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 September 2014	**On 17 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

NURY PIEDAD MERCHAN CABRERA

ANTHONY RONALDO AYALA MERCHAN

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Subramanian of Lambeth solicitors

For the Respondent: Mr C Avery Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not deem it necessary to make an anonymity direction.

2. This is a resumed hearing of an appeal after I found material errors of law in the decision allowing the appeal of the Appellants against the refusal of an application made on 12 December 2012 for residence cards as conformation of a right of residence as extended family members of an EEA national exercising treaty rights in the UK.

3. The Appellants are a mother and son, citizens of Ecuador born on 21 July 1964 and 1 July 1995 respectively .The Appellants are appealing against the decision of the Respondent made on 22 July 2013 to refuse to grant an application made on 12 December 2012 for an EEA Residence Card as an extended family member of an EEA national namely Mario Italo Cabrera Merchan. The refusal was on the basis that the requirements of Regulations 8 of the Immigration (European Economic Area) Regulations 2006('The Regulations') were not met.

4. Regulation 17(4) of the Regulations provides the Secretary of State with a discretion to grant a residence card to extended family member

"(4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if—

(a) the relevant EEA national in relation to the extended family member is a qualified person

or an EEA national with a permanent right of residence under regulation 15; and

(b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.

(5) Where the Secretary of State receives an application under paragraph (4) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security."

Preliminary Issue

5. Mr Avery indicated that since the last date of hearing it had been realised that the Appellants sponsor became a British citizen on 28 February 2012 before the application made for a residence card. In accordance therefore with the Immigration (European Economic Area) (Amendment) Regulations 2012 Regulation 1(d) the definition of an EEA national excludes someone who is also a United Kingdom national. Therefore these Appellants could not succeed under the EEA Regulations.

6. Mr Subramanian conceded that this was correct but indicated that he intended to argue that the Appellants could meet the private life requirements of the Rules specifically paragraph 276ADE(vi) as he conceded that they could not meet any of the other requirements .

The Law

7. The burden of proof in this case is upon the Appellant and the standard of proof is upon the balance of probability. As the Appellants are in the United Kingdom I can take into account evidence which concerns a matter arising after the date of the decision in accordance with Section 85(4) of the 2002 Act.
8. The application made by the Appellant on the basis of private life I deal with on the basis of the Rules at the time of hearing as that the date of the application. Paragraph 276ADE(vi) reads as follows:

   "(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

Evidence

9. On the file I had the Respondents bundle. I had a copy of the reason for refusal letter. The Appellant put in a bundle of documents1-135. I have taken those into account.
10. I heard evidence from the Appellants and the first Appellant's brother Mario Merchan and his son Merchan Rodriguez. There is a full note of their evidence in the record of proceedings.

Findings

11. On balance and taking the evidence as a whole, I have reached the following findings
12. The Appellants are a mother and son who made applications dated 12 December 2012 for a residence cards by virtue of European Community Law as extended

family members of a European Economic Area national Mario Merchan the brother of the first Appellant and uncle of the second Appellant.

13. I am satisfied that at the time of that application Mr Merchan was in fact a British Citizen and had been since February of 2012. I find it troubling that neither he nor the first Appellant told their instructing solicitor this important fact and while other family members who had provided statements stated that they were British citizens he simply described him as a Spanish national in the application and witness statement provided in support of the application. I find that the failure to disclose what was a material fact in this application undermines the general credibility of Mr Merchan and the first Appellant .

14. I am satisfied that as Mr Merchan was a British national at the time of the application the Appellants cannot benefit from the EEA regulations as the definition of EEA national is someone who 'is not also a United Kingdom national' as Mr Avery argued.

15. The Appellants come to the United Kingdom in November 2001 and the first Appellant accepts that she believed that she was here with leave as she came to the United Kingdom with her spouse who she believed had made the necessary arrangements. The Appellant states that it was only after the breakdown of her marriage that she realised that she had no leave although it is not entirely clear to me in what circumstances that fact emerged and why she did not know prior to the breakdown of her marriage. The fact is however that the Appellants have been in the United Kingdom without leave since 2001.

16. The Appellants now argue that they cannot return to Ecuador as they meet the requirements of paragraph 276ADE(vi) which is set out above.I have considered the Appellants cases separately as they are both adults and their cases are not so inextricably linked that they must stand or fall together.

<u>First Appellant</u>

17. The first Appellant is 50 years old and came to the UK in 2001 having spent the majority of her adult life in Ecuador.

18. I find that the first Appellant could not be described as well integrated into UK society given that she accepts that she speaks little English, all of her connections appear to be with Ecuadorean family members in the UK and there

is little evidence of engagement with the community other than Church attendance. There is no evidence before me that she worked in the UK which given her illegal status is not surprising. The only supporting statement from someone not of Ecuadorean background other than the Church(page 26 of the bundle) is one to which I attach no weight given that they suggest the Appellant is a hard working tax payer which must be wrong, and suggests they are active in the community but there is no evidence of this.

19. The first Appellant when asked why she could not return to live in Ecuador focused I find on her son's circumstances, the fact that he spoke little Spanish and had spent the majority of his life in the UK. She gave no reason for why she would be unable to integrate into Ecuadorian life to pursue her private life. I remind myself that this is the issue in this case as the Appellant does not meet the family life requirements of the Rules.

20. I accept of course that she has a large family in the UK but she also gave evidence that she has her mother, sister and brothers in Ecuador and that she is in contact with them albeit she suggested that this was 'every now and then'. I am satisfied therefore that given her family in Ecuador she would have some support for what I accept would be a period of adjustment. She is otherwise a fit and healthy adult and no argument was placed before me as to why she could not work on her return. Given all of these facts I am satisfied that there would no serious obstacles to the first Appellant integrating back into the Ecuadorean community if returned.

Second Appellant

21. The second Appellant is 19 years old and came to the UK when he was 6 years old. He has therefore spent most of his life in the UK although insufficient purely on the basis of time to meet the requirements of the Rules. I accept that having left Ecuador at that age it is likely that he was focused on his family life at home and would have integrated to only a very limited extent in the wider community.

22. The Appellants mother and Mr Subramanian's argument that the second Appellant would face very significant obstacles to integrating into Ecuadorean life if returned appeared to be underpinned by an assertion that he could not speak Spanish fluently. Before me he gave evidence in English and also suggested that in fact he spoke little Spanish which his mother confirmed. I am satisfied however that the Appellant and his mother exaggerated his lack of fluency in Spanish as I

do not find it credible that given his mother and uncle both accepted that they conversed at home in Spanish he was not able to understand them. I also noted that he accepted that he studied Spanish for GCSE although he asserted that he did not take the examination which again I do not find credible.

23. I note however that the provision in issue now requires the Appellant to establish that he faces ' ***very significant*** *obstacles to the applicant's integration into the country to which he would have to go if required to leave the United Kingdom'* (my bold). This is a high burden. I have found that the first Appellant would be returning to Ecuador and therefore if returned the second Appellant would not be alone. He has family there. He is not unfamiliar with Ecuadorean life as he has been brought up in a large close knit family all originating there. I have found as a fact that he speaks Spanish. He is fit and healthy and would return with the benefit of a good education acquired in the United Kingdom. While accepting that there would be a challenging adjustment to relocating I am not satisfied that there would be 'very significant obstacles' to his integration into Ecuadorean life if returned.

24. Application of the Rules and guidance ordinarily mean that article 8 considerations have been catered for. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) the Upper Tribunal stated:

> *"after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);"*

25. In this case Mr Subramanaian suggested that there were good arguable grounds that there were factors particular to the Appellants that were incapable of being assessed from within the existing framework of rules and guidance. When asked to articulate what these reasons were he simply said that the Appellants had not returned to Ecuador since 2001. I do not find that this is an arguable ground for granting leave outside the Rules as the period they lived in the United Kingdom is the basis of their claim and has been taken into account. Examining the Respondent's decision as a whole , she took into account all relevant factors and matters.

26. I have considered the issue of anonymity in the present instance. Neither party has sought a direction. The Appellant is an adult and not a vulnerable person. I see no reason to make any direction in this regard.

Conclusion

27. I find that the Appellants have failed to discharge the burden of proof on them to show that the terms of paragraph 276ADE(vi)of the Rules are met. I therefore find that the decision of the Respondent appealed against is in accordance with the law and the applicable Immigration Rules.

Decision

28. The appeals are dismissed .

Signed Date 14.9.2014

Deputy Upper Tribunal Judge Birrell