Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10041/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29th July 2015	**On 28th August 2015**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

IRENE OHUI SACKEY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Wells, instructed by Maliks and Khan Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Ghana born on 14 February 1970. She is the widow of Davies Addie, an Italian citizen, who died in the UK on 21st March 2013. She has two children born 25th September 2001 and 25th June 2004. They are Italian citizens.

2. The Appellant applied for a residence card as confirmation of her right to reside in the United Kingdom as the parent of an EEA national on 6th August 2013 but that application was refused in a decision dated 4th February 2014. The children were not self sufficient because the Appellant was in receipt of state benefits and under the **Chen (ECJ C2000/02)**

principle, they did not have relevant insurance cover to prevent them being a burden on the state. The Appellant, as their primary carer, could not satisfy Regulation 15A(2) of the Immigration (European Economic Area) (Amendment) Regulations 2012 ["the Regulations"]. She could not benefit from Regulation 15A(3) because, although her late husband was in the UK for a period of about two years before his death, the Appellant and her children remained in Italy. There was no suggestion that she does in fact comply with the Regulations.

3. The First-tier Tribunal found that the Appellant and her children were prejudiced by the decision which, it was said, breached their rights of residence under EU law on the basis that the Appellant had no status in Italy. The Respondent's appeal was allowed by the Upper Tribunal on 30th June 2015 on the basis that First-tier Judge Griffith erred in law in accepting the Appellant's mere assertion of a lack of status in Italy. The decision was set aside and the appeal adjourned for re-hearing.

Submissions

4. Mr Wells confirmed that enquiries had been made and the Appellant would be granted a right of residence in Italy. However, the Appellant still wished to pursue her appeal on Article 8 grounds. The children had a right to education in the UK following Baumbast (C-413/99) [73] and Teixeira (C-480/08) [65]. The children had spent a considerable amount of time in Italy, but they had also been educated in the UK. Interference with their education was sufficient to engage Article 8. It was disproportionate to expect them to return to Italy with their mother given the ruling in Teixeira. The fact that a reference to the CJEU had been made in NA Pakistan v SSHD [2014] EWCA Civ 995, strengthened the Appellant's argument that there should be no interference with the children's education at this time.

5. Mr Avery submitted that the Appellant could not meet the requirements of the Regulations. Any reference to EU considerations had a minimum impact on Article 8. The Appellant had a right of residence in Italy and she and her children had lived there until they came to the UK in 2013. The children could continue their education in Italy. Any interference was not so significant so as to engage Article 8 or to render the refusal of a residence card disproportionate.

6. Mr Wells submitted that education was not transitory and was intrinsic to the child. Interference with education was a serious matter and the children in this case should be treated the same as British citizen children. Interference with their education would have a long lasting effect and requiring the to return to Italy was disproportionate in the circumstances.

Relevant EU provisions

7. Article 12 of Directive 2004/38/EC provides:

> "Retention of the right of residence by family members in the event of death or departure of the Union citizen

> 1. Without prejudice to the second subparagraph, the Union citizen's death or departure from the host Member State shall not affect the right of residence of his/her family members who are nationals of a Member State.
>
> Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b),(c) or (d) of Article 7(1).
>
> 2. Without prejudice to the second subparagraph, the Union citizen's death shall not entail loss of the right of residence of his/her family members who are not nationals of a Member State and who have been residing in the host Member State as family members for at least one year before the Union citizen's death.
>
> 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 a personal basis.
>
> 3. The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies."

8. Article 12 of Regulation 1612/68 provides:

> "The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.
>
> Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions."

Discussion and conclusions

9. The Appellant came to the UK in April 2013 in order to bury her late husband, returned to Italy, and then re-entered the UK in August 2013. She came to the UK, with her children, after her husband had died. Therefore, they cannot benefit from Article 12 of Directive 2004/38/EC because they did not reside in the UK for at least one year before his death. They do not have a retained right of residence in EU law.

10. The underlying purpose of Article 12 is explained in Recital (15) to the Directive which provides:

> "Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken 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."

11. In Baumbast the Court held that children of an EU citizen "who have installed themselves in a Member State during the exercise by their parent of right of residence as a migrant worker in that Member State are entitled to reside there in order to attend general educational courses there, pursuant to Article 12 of Regulation 1612/68. The fact that the parents of the children concerned meanwhile divorced, the fact that only one parent is a citizen of the Union and that parent has ceased to be a migrant worker in the host Member State and the fact that the children are not themselves citizens of the Union are irrelevant in this regard."

12. In this case the children have not installed themselves in UK whilst their father was exercising a right of residence. They came to the UK after their father died. They do not have a right to education under Regulation 1612/68 and cannot derive a right of residence in these circumstances.

13. This case can be distinguished from Teixeira because in that case the child was born in the UK and was residing with the EEA parent prior to the divorce. The child was in education and had an independent right of residence under Article 12 of Regulation 1612/68 when her mother sought to rely on it as her primary carer. The Appellant, in this appeal, cannot therefore benefit from the ruling in Teixeira because the children were not already residing in the UK and in education prior to their father's death.

14. In Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC) the Upper Tribunal held that where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made an appellant cannot bring a human rights challenge to removal in an appeal under the EEA Regulations.

15. Accordingly, the Appellant cannot succeed under Article 8. In any event the Appellant and her children can return to Italy and continue their family and private life there. They have spent the majority of their lives there and have only been educated in the UK for a limited time. The appeal is dismissed.

Notice of Decision

Appeal dismissed

No anonymity direction is made.

Signed Date 27th August 2015

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 27th August 2015

Upper Tribunal Judge Frances