



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/04333/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 19 July 2017**

**Decision &
Promulgated
On 20 July 2017**

Reasons

Before

UPPER TRIBUNAL JUDGE SMITH

Between

[OYINKASOLA M]

and

ENTRY CLEARANCE OFFICER, ABUJA

Appellant

Respondent

Representation:

For the Appellant: Mr J M Rene, Counsel instructed by Queen's Park solicitors

For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity order was made by the First-tier Tribunal. There is no good reason to make an anonymity direction in this case.

DECISION AND REASONS

Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge N J Bennett promulgated on 14 November 2016 (“the Decision”). By the Decision the Judge dismissed the Appellant's appeal against the Respondent's decision dated 14 October 2014 refusing her a family permit as the child of the durable partner of an EEA national.

2. The facts of the Appellant's case are not in dispute and nor is there any credibility issue in play. The Appellant is a national of Nigeria born on [] 2005. She applied to visit her father (“the Sponsor”) and stepmother, a Spanish national, (“the EEA national”) in the UK. It is common ground that the Sponsor is neither the spouse nor the civil partner of the EEA national. He has however been given a residence permit as a durable partner and is therefore a person who falls within regulation 7(3) of the Immigration (European Economic Area) Regulations 2006 (“the EEA Regulations). The Appellant was, it appears, cared for by her Sponsor's father in Nigeria until he died and now attends boarding school there.

3. Although the above facts were disputed by the Respondent, it was conceded by the Presenting Officer before Judge Bennett that the Sponsor is the Appellant's father ([23]). There were however legitimate concerns raised about the extent to which the Appellant's mother continues to have any involvement in her life and whether it was genuinely the Appellant's and Sponsor's intention that the Appellant should visit the UK since the evidence appeared to be that the Appellant wished to settle in the UK with her father ([21]). The Appellant's representative submitted however that her intention is irrelevant because the Appellant is entitled to a family permit under regulation 12 of the EEA Regulations 2006 as of right and family permits are valid only for six months ([22]).

4. The Judge rejected that latter argument finding that the Appellant does not fall within the definition of “family member” for the purposes of Regulation 7 of the EEA Regulations. Accordingly, he found that the Appellant is not entitled to be issued with a family permit. He noted that the Appellant could make an application under the Immigration Rules and Article 8 ECHR if she so wished but there was no reliance placed on those provisions before him.

5. Permission to appeal was refused by Designated First-tier Tribunal Judge Murray on 11 May 2017 in the following terms (so far as relevant):-

“... [2] The grounds of application state that the judge failed to correctly understand, consider and apply the law set out in the Immigration EEA Regulations 2006 when he stated that Regulation 7(3) does not assist the appellant. The grounds state that the judge did not consider Regulation 7(3) in tandem with Regulation 7(1)(a) or (b). The grounds go on to state that the judge failed to give adequate reasons for his findings.

[3] The Judge has given detailed reasons for his findings. He pointed out that the appellant is not a family member of the EEA sponsor although she is a family member of the unmarried partner of the EEA sponsor. Regulation 7(3) does not assist the appellant. This paragraph relates to the EEA sponsor's unmarried partner. I have considered Regulation 7(1)(a) and (b) but the

appellant is not a family member of the EEA sponsor as the EEA family member and the appellant's father are not married and do not have a civil partnership"

6. Permission was however granted by Upper Tribunal Judge Clive Lane on 7 June 2017 in the following terms:-

"The assertions made in the grounds of appeal as regards the construction of regulations 7 and 8 of the Immigration (European Economic Area) Regulations 2006 (as amended) are arguable. The Upper Tribunal will need to consider whether the conclusions of Judge Bennett at [29] are correct in law."

7. The appeal comes before me to determine whether there is a material error of law in the Decision. As I note at [8] below, the decision whether there is a material error of law will be determinative of the appeal. I was not therefore invited to resume for a further hearing or remit the appeal and I was invited to either uphold the appeal or allow it (if I find that there is a material error of law).

Decision and Reasons

8. At the outset of the hearing, Mr Rene drew my attention to the Rule 24 statement filed on behalf of the Respondent which is in the following terms (so far as relevant):-

"2. The respondent does not oppose the appellant's application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing to consider the applicability of Regulation 7."

It was apparent that Mr Duffy had not seen this Rule 24 statement before the hearing. He indicated that he did not agree with it and wished to withdraw reliance on it. I permitted him to do so, first, because it was not a clear concession that there is an error of law (reference is only to the application for permission to appeal) and in any event, as transpired in the course of submissions, the point is one of construction. If the Appellant is right and is the family member of the Sponsor, then not only is there an error of law but she is entitled to a family permit (so that the appeal is allowed). If she is wrong in her interpretation of the EEA Regulations, there is either no error of law or none that can be material and the Decision would stand with the result that the appeal stands dismissed.

9. I also record that Mr Rene very frankly accepted at the outset of his submissions that there is what he described as a "lacuna" in Regulation 7. I enquired of him whether that "lacuna" might not be a deliberate one, having regard to the distinction which is often drawn in EU law between family members such as a spouse or civil partner on the one hand and an extended family member such as a durable partner on the other. His only submission in response was that the Appellant could not come within Regulation 8 (as that applies only to a relative of the EEA national or his/her spouse or civil partner). She therefore has no other avenue open to her under EU law except to be "treated as" a family member within Regulation 7(1)(d) because of her

relationship with the Sponsor and the Regulation should be construed accordingly.

10. I also record that Mr Duffy did not accept what is said at [28] of the Decision. He submitted that the Sponsor is not a person who falls within Regulation 7(1)(d). However, he said, the Decision read as a whole does not disclose any material error because the Appellant cannot succeed applying Regulation 7(1)(d) unless she is “treated as a family member” under Regulation 7(3) and she has not been treated as such because she has not been issued with a family permit. There would appear to be a degree of circularity about that position since it is a family permit which the Appellant seeks.

11. As it is, for the reasons which follow, in my judgement both representatives are wrong in their submissions and Judge Bennett has reasoned the Decision correctly. I start therefore with the basis of the Decision as set out not just in [29] (as noted in the grant of permission) but also from [24] onwards as follows:-

“[24] I therefore start with Regulation 12, which sets out the circumstances in which family permits can be issued to family members of an EEA national. So far as it is relevant, Regulation 12 provides:-

“12(1) An Entry Clearance Officer must issue an EEA family permit to a person who applies for one if the person is a family member of an EEA national; and

- (a) the EEA national -
 - (i) is residing in the UK in accordance with these Regulations; or
 - (ii) will be travelling to the United Kingdom within six months of the date of the application and will be an EEA national residing in the United Kingdom in accordance with these Regulations on arrival in the United Kingdom; and
- (b) the family member will be accompanying the EEA national to the United Kingdom or joining the EEA national there.”

[25] Regulation 7 defines what is meant by a “family member”. So far as it is relevant the regulation provides

“7(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 civil partner;
 - (b) direct descendants of his spouse or his civil partner who are-
 - (i) under 21; or
 - (ii) dependents of his, his spouse or his civil partners,
 - (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)
- (2) Not relevant
- (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 Regulations 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.”

[26] As paternity is not disputed, the Appellant is the Sponsor’s family member for the purposes of Regulation 7. However, to be eligible for a family permit under Regulation 12, the Appellant must show that she is the EEA Sponsor’s family member because the Sponsor is not a citizen of the European Union.

[27] As this issue was not canvassed at the hearing, I arranged for directions to be issued to the parties on 14th October 2016 inviting the Appellant to file and serve a marriage certificate which shows the Sponsor and the EEA Sponsor are married to each other or, alternatively, submissions showing how the Appellant qualifies as the EEA Sponsor’s family member.

[28] Mr Darboe wrote to me on the 21st October 2016. He accepted that the Sponsor and the EEA Sponsor were not married but argued that the Appellant was to be treated as a family member of the Sponsor under Regulation 7(1)(d). he also argued that she was to be treated as a family member of an EEA national under Regulation 7(3) because the Sponsor was to be treated as a family member of the EEA Sponsor, as he had been granted a residence card in 2010 as the EEA Sponsor’s partner and he had subsequently been granted a permanent residence card as the EEA Sponsor’s partner. He argued that this was confirmed by **RK (OFM - membership of household - dependency) India [2010] UKUT 421** which, he submitted, established that an applicant could be a dependant of an EEA national or the non-EEA spouse or partner.

[29] In my judgment, Regulation 7(3) does not assist the Appellant. It makes the Sponsor the EEA Sponsor’s family member for the purposes of the Regulations but it does not confer any rights on the Appellant or, therefore, make her the EEA Sponsor’s family member. She would only be the EEA Sponsor’s family member if the EEA Sponsor were the Sponsor’s spouse. An unmarried partner is not a spouse: **Netherlands v Reed [1986] ECR 1283** and **ex parte Lopez [1997] Imm AR 11**. That is why separate provision is made for unmarried partners in Regulation 8. **RK India** does not assist the Appellant because it was concerned with the admission of an EEA national’s dependent son’s wife as an extended family member under Regulation 8, and not with the admission of an unmarried partner’s child. Regulation 8, like Regulation 7, makes provision for the relatives of spouses and civil partners but not for relatives of unmarried partners. I am not therefore satisfied that the Appellant is the EEA Sponsor’s family member or that she is, or could be, a member of the EEA Sponsor’s extended family member. In any event, the Appellant would not have a right of appeal if she were only a member of the EEA Sponsor’s extended family. It follows that the appeal must fail under the Regulations.”

12. Before turning to provide my reasons for finding that there is no material error of law in the above passage, it is convenient to set out two further legal provisions of relevance, namely Regulation 8 of the EEA Regulations (as that stood at the date of Decision) and Articles 2 and 3 of Directive 2004/38/EC (the Citizens’ Free Movement Directive).

Regulation 8: ‘extended family member’

“ 8 - (1) In these Regulations ‘extended family member’ means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

- (2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and –
- (a) the person is residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of his household;
 - (b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or
 - (c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.
- (3) A person satisfies the condition in this paragraph if the person is a relative of an EEA national or his spouse or his civil partner and, on serious health grounds, strictly requires the personal care of the EEA national, his spouse or his civil partner.
- (4) A person satisfies the condition in this paragraph if the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national were the EEA national a person present and settled in the United Kingdom.
- (5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove that he is in a durable relationship with the EEA national.
- (6) In these Regulations ‘relevant EEA national’ means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purpose of paragraph (5).”

Directive 2004/38/EC (Citizens’ Free Movement)

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

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.”

[my emphasis]

13. I begin with the submission made by Mr Rene that the Appellant cannot qualify as an extended family member under Regulation 8 since that is pertinent in my view to what is intended by Regulation 7. Mr Rene’s submission is rightly made. The Appellant could potentially apply for entry as an extended family member based on the Sponsor’s maintenance of her in Nigeria if the Sponsor were the spouse or civil partner of the EEA national. He is not. The Appellant is not a relative of the EEA national and it is not said in any event that the EEA national is supporting her. It is her father, the durable partner (and therefore extended family member) of the EEA national who is related to the Appellant and supports her.

14. I turn next then to the construction of Regulation 7. I asked the representatives whether it was accepted that the Sponsor falls within Regulation 7(1)(d). Neither submitted that he did. Both said that he falls within Regulation 7(3). Here in my estimation lies the misconception by both representatives about the proper interpretation of Regulation 7. To paraphrase the submission, it is that the Sponsor is treated as a family member by Regulation 7(3). Following on from that submission, the Appellant says that she is the family member of a person treated as a family member under Regulation 7(3) and therefore is entitled to be treated herself as a family member of the EEA national (by reason of Regulation 7(1)(d)). The Respondent says that, whilst it is right that the Sponsor is treated as a family member under Regulation 7(3), the Appellant is not a family member and cannot become one under Regulation 7(1)(d) unless she too is treated as such under Regulation 7(3). I have already remarked on the potential circularity of that submission if the analysis is correct.

15. In my judgement, however, those submissions fundamentally misinterpret Regulation 7(1)(d). It became clear in the course of submissions that this misinterpretation arises from the words “that other person” in

Regulation 7(1)(d). Both representatives appear to be reading that as being the person who is to be treated as a family member under Regulation 7(3) i.e. the Sponsor. If one reads that sub-paragraph in context though it is clear that the “person” there referred to is the EEA national. Regulation 7(1) begins with reference to “another person”. There can be no dispute based on what follows at Regulation 7(1)(a) to (c) that “another person” in this context is the EEA national to whom the family member is related as specified. Once that is understood, the reference to a person being treated “as the family member of that other person” can only mean the extended family member of the EEA national on whose right of residence the extended family member is dependent and who is recognised as coming within the definition of Regulation 7(1)(d) by reason of Regulation 7(3).

16. Whilst I recognise that there is some ambiguity of drafting in Regulation 7, I am reassured that my interpretation is the correct one for three reasons. The first is Mr Rene’s acceptance (as I record, rightly made) that the Appellant could not claim to be an extended family member under Regulation 8. If that is right, it is difficult to see why Regulation 7 would be drafted in such a way as to put the Appellant in a better position than that of an extended family member. The second is the Directive on which Regulations 7 and 8 are based. Article 2 makes clear that family members are limited to the categories specified in Regulation 7(1)(a) to (c). Article 3 makes clear that extended family members are limited to the categories set out in Regulation 8. There is a very clear differentiation between dependent relatives on the one hand and durable partners on the others. The Directive provides no mechanism for a right to be accorded to the dependent relative of a person who is a durable partner. The third is that, whilst there is some ambiguity of drafting in Regulation 7, if the draftsman had intended that regulation to cover the dependents of extended family members, it would have been very easy to make that plain by including at Regulation 7(1)(b) that family members was to include also the direct descendants of a person recognised as an extended family member under Regulation 7(3).

17. As Judge Bennett observed, the case of RK (India) cannot assist the Appellant. That case turned on the dependency of the spouse of the son of an EEA national. However, the dependency of the Appellant in that case was directly on the EEA national parent in-law.

18. The point of interpretation is succinctly resolved by Judge Bennett at [29] of the Decision on the basis that “Regulation 7(3) does not assist the Appellant. It makes the Sponsor the EEA Sponsor’s family member for the purposes of the Regulations but it does not confer any rights of the Appellant or, therefore, make her the EEA Sponsor’s family member.” I can do no better than repeat what is there said. There is no error of law in the Decision.

DECISION

The First-tier Tribunal Decision did not involve the making of a material error on a point of law. I therefore uphold the First-tier

Tribunal Decision of Judge N J Bennett promulgated on 14 November 2016 with the consequence that the Appellant's appeal is dismissed.



Signed
Upper Tribunal Judge Smith

Dated: 20 July 2017