Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04932/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 November 2018	**On 11 December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MR ADU AMANKWAH DUODO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Heybroek, Counsel, instructed by Morgan Mark Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a challenge by the Appellant to the decision of First-tier Tribunal Judge Wilson (the judge), promulgated on 17 July 2017, in which he dismissed the Appellant's appeal against the Respondent's refusal to issue him with a permanent residence card pursuant to the Immigration (European Economic Area) Regulations 2016.

2. The Appellant had arrived in the United Kingdom some years ago and had initially been issued with a residence card as the family member of an EEA

national (his father). This residence card ran from 20 December 2011 until 20 December 2016. On 16 November 2016 the Appellant applied for a permanent residence card. This was refused by the Respondent on the basis that he had failed to provide sufficient evidence to show that he was still dependent upon the EEA national.

The judge's decision

3. The Appellant, for reasons best known to himself, opted to have his appeal decided without an oral hearing. Thus the matter came before the judge as a paper case. The judge concluded that the Respondent was wrong to have applied the 2016 Regulations to the Appellant's case and should instead have applied the 2006 version. However, he decided that this was immaterial to his consideration of the appeal as a whole.

4. The judge then considered whether the Appellant had acquired a permanent right of residence in the United Kingdom. With reference to the evidence before him, in particular various P60s for both the Appellant and his father, the judge concluded that at some point in the past, probably 2014, the Appellant had ceased to be financially dependent upon his father [10]. At [11] the judge accepted that the Appellant had continued to live with his father at the same address despite the change of financial circumstances.

5. At [12] the judge goes on to consider what was said to be an alternative submission set out in the Appellant's skeleton argument which would, it was said, have provided a route to success in the appeal. This alternative argument was put in the following terms: it was accepted that the Appellant had ceased to be a family member of the EEA national. However, the Appellant had then become an extended family member and was entitled to rely on this different status in order to come within Regulation 7(3) of the Regulations and, in consequence, accrue the necessary five-year block of time in order to acquire permanent residence.

6. The judge rejected this argument ostensibly for two reasons: first, that the Respondent had clearly not considered the Appellant's application on this alternative basis (for the simple fact that this argument had not been raised as part of that application, and indeed there had not been any application as an extended family family at all); second, that an individual claiming to be an extended family member of an EEA national did not enjoy a right of appeal in light of Sala (EFMs: Right of Appeal) [2016] UKUT 00411 (IAC) (which was at that point in time the authority on this jurisdiction or issue: this of course was subsequently overturned by the Court of Appeal in Khan [2017] EWCA Civ 1755).

7. In light of the judge's conclusions the Appellant had not acquired a permanent right of residence and the appeal was dismissed.

8. Just for the sake of completeness, the judge's consideration of Article 8 at paragraphs 14-18 was irrelevant. This issue was not justiciable in the appeal.

The grounds of appeal

9. The alternative argument that had been raised in the skeleton argument before the judge is re-stated in the grounds of appeal. In essence it is said that the Appellant was entitled to succeed under this alternative route and that the judge had been wrong not to have engaged with its merits.

10. Permission to appeal was granted by First-tier Tribunal Judge Robertson on 10 January 2018.

The hearing before me on 22 March 2018

11. This appeal first came before me in March of this year. There was a discussion as to the ability of the Appellant to have a right of appeal in respect of the claim to be an extended family member. At that point the judgment of the CJEU in Banger C-89/17 was keenly awaited. In view of all the circumstances I decided to adjourn the error of law hearing to await a decision in that case. I issued directions at that point, asking for skeleton arguments from both parties dealing with two issues: first, did the Appellant have a right of appeal; second if he did, was he able to rely on the provisions of Regulation 8 of the 2016 Regulations in order to acquire a permanent right of residence in the United Kingdom, notwithstanding the fact that he had originally been a "family member". Following a discussion with the representatives there was agreement that the correct Regulations were in fact the 2016 version, not the 2006 versions as had been relied on by the judge. However, it was also agreed that this error would not be material to the outcome of the appeal in any way.

The hearing before me on 26 November 2018

12. Ms Heybroek had prepared a helpful skeleton argument in advance. Ms Everett apologised for the absence of a skeleton from the Respondent's side. In the event this did not create a problem.

13. Following an initial discussion with representatives it was re-confirmed that we were dealing with the 2016 Regulations and that the Appellant had in fact had a right of appeal to the First-tier Tribunal. This was because he applied to the Respondent for the permanent residence card during the currency of the residence card which had been issued to him on the basis that he had been a family member of an EEA national. The right

of appeal arose from the satisfaction of the relevant provisions within Regulation 36 of the Regulations.

14. Ms Heybroek relied on her skeleton argument. In essence, her case was that the Appellant had been able to "metamorphose" (her word) or migrate from being a family member to being an extended family member. This had occurred at some point in the past, probably 2014 or 2015. Ms Heybroek submitted that his status changed and notwithstanding his failure to make an application to the Respondent as an extended family member, he could rely on that status for the purposes of his inclusion under Regulation 7(3) of the Regulations. In turn, he could continue to rely on this new right of residence for the purposes of the accrual of the relevant five years for the purposes of permanent residence under Regulation 15.

15. Ms Everett submitted that that analysis was wrong. There was a distinction between family members and extended family members, with reference to the Directive and the Regulations. The former existed as of right: relevant documentation simply confirmed that right and did not confer it. In contrast, an extended family member did not enjoy a right of residence simply by being in such a category of persons. She submitted that the Appellant's failure to make an application and the absence of any decision from the Respondent in respect of his new status was essentially fatal to his argument in this appeal.

Decision on error of law

16. There are errors in the judge's decision but, in light of the matters which I will set out in some detail below, these are not material to the extent that his decision must be set aside under section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007.

17. The errors relate to the following matters. First, the judge was wrong to have concluded that it was the 2006 Regulations which applied to the Appellant's case. With reference to paragraph 4(1)(e) of schedule 6 to the 2016 Regulations, it was these which were applicable. Second, the Appellant did have a right of appeal to the First-tier Tribunal because, as discussed above, he had applied during the currency of his residence card. Third, the judge had failed to consider the merits of the alternative argument put forward in the Appellant's skeleton argument.

18. Turning to the substance of that argument, it is quite clear from the judge's findings (which were open to him) that the Appellant had ceased to be a family member of the EEA national in 2014 (if not before). It is also clearly the case that the Appellant did not make an application to the Respondent on the basis that he believed himself to be an extended family member. As a result of this failure the Respondent has never made any decision in respect of the Appellant's "changed" status.

19. In respect of the relevant legal position, there is, I conclude, a clear and important distinction between family members and extended family members. The former enjoy a right of residence simply by being within the category of family members: in other words, a decision by the Respondent to issue relevant documentation does not confer a right of residence, but simply confirms it.

20. In contrast, extended family members do not enjoy automatic rights of residence arising out of the Directive or the Regulations simply by virtue of being in that particular category. In their case a right of residence is conferred upon them following an application made to the Respondent and a decision made thereon, after a full consideration of their particular circumstances. With reference to Articles 2 and 3 of the Citizens' Directive 2004/38/EC, the Regulations, Rahman C-83/11 at, for example [19], YB (EEA reg 17(4) - proper approach) Ivory Coast [2008] UKAIT 00062, Macastena [2018] EWCA Civ 1558 at [21-25], and Aladeselu [2013] EWCA Civ 144 at [52], I conclude that the Appellant could not simply rely on his change of factual circumstances (namely from having been financially dependent to this ceasing to be the case) to then create, as it were, a new automatic right of residence on an alternative basis without having made an application to the Respondent (which would of course have entailed an exercise of discretion that only the Respondent can undertake). To conclude otherwise would be to essentially equate the position of family members with that of extended family members and in my view that would be contrary to the Directive, the Regulations, and a line of authority.

21. In turn, I conclude that the Appellant was not able to rely on Regulation 7(3) of the Regulations once he had ceased to be a family member. I interpret this particular provision as meaning that the person (described as "B") is an extended family member if, and only if, they have had a right of residence in that category conferred upon them following an application to the Respondent, and full consideration of circumstances, an exercise of discretion, and the issuance of a residence card. The conjunctive use of the word "and" in between "member" and "has" in Regulation 7(3) is instructive in this regard. If this were not the case, then once again the position of family members and extended family members would be rendered equivalent, and this is simply not the correct position.

22. It follows from what I have just set out that the Appellant has been unable to accrue the relevant five years' residence in accordance with the Regulations. That is because once he ceased to be a family member he did not then simply migrate over and acquire a continuing right of residence as an extended family member. Therefore, time spent in this country following the cessation of his family membership does not count towards the accrual of the relevant five-year period.

23. In light of this, and notwithstanding the failure of the judge to consider the argument in detail, the Appellant's alternative argument could not have succeeded.

24. The decision of the First-tier Tribunal shall therefore stand.

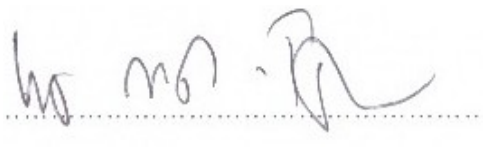
25. By way of an additional observation, the reliance on the extended family member issue may well in any event have amounted to a "new matter" within section 85(6) of the NIAA 2002., and thus have required the consent of the Respondent in order for it to be considered by the First-tier Tribunal (although the absence of an application to the Respondent as an extended family member was probably fatal to the giving of consent).

Notice of Decision

The decision of the First-tier Tribunal does not contain material errors of law and it shall stand.

The Appellant's appeal to the Upper Tribunal is therefore dismissed.

No anonymity direction is made.



Signed Date: 6 December 2018

Deputy Upper Tribunal Judge Norton-Taylor