



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/05737/17

THE IMMIGRATION ACTS

At: Field House
On: 21 January 2019

Decision & Reasons Promulgated
On: 1 February 2019

Before:

UPPER TRIBUNAL JUDGE JOHN FREEMAN

Between:

KE RENTONG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: *Chuen Lam* (counsel instructed by David Tang & Co)
For the respondent: Miss Alexandra Everett

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Pathma Lingam), sitting at Taylor House on 11 October 2018, to dismiss an EEA appeal by a citizen of China, born 1962. The appellant made an illegal entry to this country in 2002, but in 2013 his son married an Italian citizen, and he was given a five-year residence card as a dependant, expiring on 23 June 2018. On 13 June 2017 he was refused a further one, for lack of evidence of dependency.

2. On 4 October last year, just a week before the date of the hearing, the appellant's son's divorce was made absolute. The judge was satisfied that the appellant remained dependent on his son, and so allowed the appeal: she did not allow it on the basis of any retained

NOTE: (1) *no anonymity direction made at first instance will continue, unless extended by me.*
(2) *persons under 18 are referred to by initials, and must not be further identified.*

right of residence. Permission to appeal was granted on the basis that what the appellant needed to show was dependency on his son's ex-wife, rather than on his son himself.

3. **Law** The appellant's son, still in work, may well be entitled to a retained right of residence on the end of his marriage; but the question is whether the appellant himself remains entitled to benefit from that. This is a pure question of law, which has to be decided in the first place on the basis of the Immigration (European Economic Area) Regulations 2016. The relevant parts follow: there was no suggestion that this case involved any extended family member.

"Family member"

- 7.— (1) In these Regulations, "family member" means, in relation to a person ("A")—
- (a) A's spouse or civil partner;
 - (b) A's direct descendants, or the direct descendants of A's spouse or civil partner who are either—
 - (i) aged under 21; or
 - (ii) dependants of A, or of A's spouse or civil partner;
 - (c) dependent direct relatives in A's ascending line, or in that of A's spouse or civil partner.

"Family member who has retained the right of residence"

- 10.— (1) In these Regulations, "family member who has retained the right of residence" means, ... a person who satisfies a condition in paragraph (2), (3), (4) or (5).
- (2) ...
- (5) The condition in this paragraph is that the person ("A")—
- (a) ceased to be a family member of a qualified person or an EEA national with a right of permanent residence on the termination of the marriage or civil partnership of A;
 - (b) was residing in the United Kingdom in accordance with these Regulations at the date of the termination;
 - (c) satisfies the condition in paragraph (6); and
 - (d) either—
 - (i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership, the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;
 - (ii) ...
- (6) The condition in this paragraph is that the person—
- (a) is not an EEA national but would, if the person were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; or
 - (b) is the family member of a person who falls within paragraph (a).
- (f) a person who—
- (i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and
 - (ii) was, at the end of the period, a family member who has retained the right of residence.

Right of permanent residence

15.—(1) The following persons acquire the right to reside in the United Kingdom permanently—

...

(f) a person who—

- (i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and
- (ii) was, at the end of the period, a family member who has retained the right of residence.

Issue of residence card

18.— (1) The Secretary of State must issue a residence card to a person who is not an EEA national and is the family member of a qualified person or of an EEA national with a right of permanent residence under regulation 15 ...

(2) The Secretary of State must issue a residence card to a person who is not an EEA national but who is a family member who has retained the right of residence ...

4. **Discussion** Mr Lam first relied on reg. 7 (1) (c): however by the date of the hearing the appellant's son was no longer the Italian lady's husband, and so the appellant could only claim to be a dependent direct relative in his son's ascending line. Under that paragraph, he had been a family member of the Italian lady till the divorce became absolute. Assuming for present purposes that his son was entitled to a retained right of residence, I will turn to reg. 10 to see if the appellant himself could benefit from such a right.
5. For the appellant to have a retained right of residence, he needed, under reg. 10 (1), to satisfy the requirements of either (2), (3), (4) or (5). Of these, Mr Lam relied only on (5). To qualify under that paragraph, the appellant needs to satisfy all the conditions in subparagraphs (a), (b), (c) and (d), as shown by the draftsman's use of 'and' between (c) and (d). It can be assumed that (b) and (d) were satisfied; so the appellant's case depends on satisfying (a), and (c), for which in turn he needs to satisfy (6).
6. Turning first to reg. 10 (6), the appellant is the family member of his son, who is a worker, so he has no difficulty with that. The difficulty for him comes on reg. 10 (5) (a). For him to benefit from that paragraph, taken together with reg. 10 (1), he needs to show that he is a person ("A") who has "... ceased to be a family member of a qualified person or an EEA national with a right of permanent residence on the termination of the marriage or civil partnership of A".
7. The difficulty with this for the appellant is that he ("A") did not cease to be the family member of the Italian lady on the termination of his own marriage, but on that of his son. The Regulations provide no way round this for him that I can see. Of course the Regulations do not create rights under EEA law, but only means for them to be recognized. With this in mind I invited Mr Lam to refer me to any Directive on which he could rely. However the only such provision he cited directly was article 25 of Directive 2004/38/EC of the European Parliament and of the Council [the Citizens Directive], which does no more than make clear that possession of a registration certificate or similar document may not be made a precondition for the exercise of a right of residence.

8. Mr Lam’s final argument was on *HS* (EEA:revocation and retained rights) Syria [2011] UKUT 165 (IAC), in particular the following passage:

52. Article 18 of the Directive provides that:

“Without prejudice to Article 17, the family members of a Union citizen to whom Articles 12 (2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State”.

53. This provides an alternative route for the appellant to acquire permanent residence. It is accurately reflected in regulation 15(f) [*sic*: 15 (1) (f)] of the 2006 Regulations and requires the appellant to have resided for five years in accordance with these regulations and was “at the end of that period a family member who has retained the right of residence”. “Family member” here must mean former family member as you cease to be a family member if your spouse dies or divorces you. Residence in accordance with these Regulations contemplates residence acquired under any of the rights recognised by the regulations and there is no need to have resided a continuous period of five years in only one category, either as a spouse or a former spouse.

9. Article 12 (2) refers to the death of a Union citizen, so is of no concern here. Article 13 (2) refers back to article 2 (2); but this does no more than make it clear that a civil partner may be a family member. Shorn of references to such a situation, article 13 (2) runs, so far as relevant, as follows:

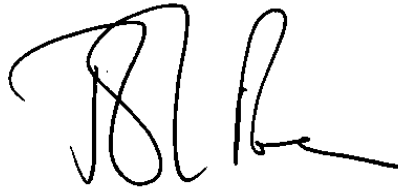
Without prejudice to the second subparagraph, divorce shall not entail loss of the right of residence of a Union citizen’s family members who are not nationals of a Member State where

(a) prior to initiation of the divorce proceedings ... the marriage has lasted at least three years, including one year in the Member State ...

10. In most cases, reg. 10 (5) (d) reproduces the effect of this. However, as already discussed (see 5 – 7), this appellant does not have a retained right of residence under the Regulations, though his son may well do. Is the appellant nevertheless protected by the terms of article 13 (2) (a)? On the basis of *HS*, he had acquired a permanent right of residence after five years’ qualifying residence here, when his residence card ran out on 23 June 2018. If that is right, he continued to benefit from it, regardless of whether his son was still married or not.
11. The definition of ‘family member’ in article 2 (2) of the Directive is reproduced in reg. 7; so article 13 (2) appears to preserve this appellant’s right of residence, without, so far as I can see, being subject to the limitation in reg. 10 (5) (a). The only apparent limitation is imposed by the final words of article 13 (2): “Such family members shall retain their right of residence exclusively on personal basis”. In other words, if I am right in taking the view that the appellant is entitled to the benefit of article 13 (2), that would not extend to any family members of his own.

12. So far as I am aware, this is a novel point. Especially as it appears to detract from my reading of the Regulations approved by Parliament, the Court of Appeal's views on it would be welcome.

Home Office appeal dismissed

A handwritten signature in black ink, consisting of stylized, overlapping letters that appear to be 'JLH' followed by a horizontal line.

(a judge of the Upper Tribunal)

23 January 2019