



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

Appeal Number: EA/06519/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 19 December 2018**

**Decision and Reasons
Promulgated
On 10 January 2019**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

KHEIRA BENNADJI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms D. Taiwo of Justice & Rights Law Firm

For the respondent: Ms A. Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is an Algerian national who is said to have entered the UK in 2008 as a visitor with her father. She was 15 years old at the time. It is said that her father abandoned her here because he wanted to return to Algeria to remarry. She lived with her sister, Amel Bennadji, from 2008 to 2011. She has two other sisters in the UK, Sara and Karima. In 2011 the appellant went to live with her sister Sara. At the time, her sister was married to an Italian national, Giuseppe Fiorita. On 18 August 2011 she

was issued with a five-year residence card recognising a right of residence as an 'extended family member' of an EEA national.

2. Her sister Sara separated from her husband in 2012. The appellant and her sister continued to live together. Her sister was issued with a permanent residence card as a 'family member' who retained rights of residence on 11 June 2015. On 22 June 2016 the appellant applied for a permanent residence card as the 'family member' of an EEA national. The application was refused in a decision dated 09 January 2017. On 25 January 2017 the appellant submitted a further application for a permanent residence card.
3. The respondent refused the second application in a decision dated 07 July 2017. The Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016") did not make provision for former 'extended family member' of an EEA national to be granted permanent residence on the ground of retained rights of residence following the divorce. Nor did the regulations make provision for a person who has retained a right of residence as a former 'family member' to act as a sponsor for their 'extended family member'.
4. First-tier Tribunal Judge Young ("the judge") dismissed the appeal in a decision promulgated on 20 July 2018. The judge concluded that the appellant could not show that she was a 'family member' of an EEA national for the purpose of regulation 15(1)(b) of the EEA Regulations 2016 because she had not been living with the EEA national (Giuseppe Fiorita) as an 'extended family member' for a continuous period of five years. She was not a dependent of the EEA sponsor or a member of his household from 2012. She did not meet the requirements for a retained right of residence under regulation 10. He noted the terms of a Home Office policy, which stated that a person who was issued with an EEA residence permit as relative of an EEA national's spouse prior to 01 February 2017 could continue to rely on the relationship after the changes made in the EEA Regulations 2016.
5. The grounds of appeal drafted by the appellant's previous representatives, Bhogal Partners Solicitors, submit that the appellant was protected by unparticularised 'transitional arrangements' relating to those who had been issued with a residence card before 01 February 2017. It was asserted that the appellant had a legitimate expectation that she would be granted a further residence card.
6. First-tier Tribunal Judge Shimmin granted permission to appeal because he thought that it was at least arguable that "those transitional arrangements" might have covered the appellant's circumstances.

Decision and reasons

7. The grounds of appeal are misconceived, poorly particularised and disclose a fundamental misunderstanding of basic principles of European law. The submissions made by her current representative at the hearing were equally general in nature and amounted to little more than a general assertion that the appellant had a right of residence under European law solely because her sister had been issued with a permanent residence card.
8. At the hearing, I attempted to explain to the appellant in a way that she might understand why the First-tier Tribunal judge's decision did not contain an error of law. The judge was entitled to conclude that she could not acquire a right of permanent residence.

Rights of European citizens

9. The fundamental right of residence under European law arises from a person's status as a European citizen. As an Italian citizen the appellant's brother in law, Mr Fiorita, has the right of free movement within the European Union (Article 20 Treaty on the Functioning of the European Union).

Rights of 'family members' of a European citizen

10. As a European citizen, Mr Fiorita also has the right to have 'family members' with him while he exercises his rights of free movement. A 'family member' is (i) a spouse or civil partner; (ii) a direct descendant of the EEA citizen or his spouse or civil partner who is under 21 years old or is dependent on the EEA citizen i.e. children or grandchildren. In this way a 'family member' is defined by a specific relationship to the European citizen. 'Family members' of a European citizen have rights of residence with the European citizen under European law (regulation 7 of the EEA Regulations 2016) as long as the relationship is genuine and of the kind defined in the regulations. In this case, the appellant's sister was a 'family member' of a European citizen because she was married to Mr Fiorita.
11. European law recognises that a marriage might break down and that a 'family member' may have established ties to the country where they live with the European citizen. For this reason, the EEA Regulations 2016 provides for the spouse of a European citizen to retain a right of residence under European law if various conditions are satisfied. In this case, the appellant's sister was able to show that the marriage lasted for at least three years prior to the initiation of divorce proceedings and that she resided with her husband in the United Kingdom for at least one year during the marriage (regulation 10(5) of the EEA Regulations 2006 or 2016). Only a 'family member' can retain a right of residence. There is no provision for an 'extended family member' to retain a right of residence.

Rights of 'extended family members' of a European citizen

12. The appellant was not Mr Fiorita's 'family member' within the meaning outlined in European law. She was issued with a residence card as his 'extended family member' in 2011.
13. 'Extended family members' of European citizens do not have an automatic right of residence. They must show that they meet the conditions giving rise to a right of residence as an 'extended family member'. When the appellant was issued with a residence card in 2011 the Secretary of State must have been satisfied that she was a relative of an EEA national's spouse and that she had been dependent upon Mr Fiorita before she came to the UK and continued to be dependent upon him or was a member of his household in the UK (regulation 8 of the EEA Regulations 2006).
14. Even if a person meets the conditions to show that they are an 'extended family member' of a European citizen, they do not have an automatic entitlement to a residence card. The Secretary of State must issue a residence card to a person who meets the requirements as a 'family member' (regulation 17(1) of the EEA Regulations 2016). However, the position is different for 'extended family members'. The Secretary of State may issue a residence card to an 'extended family member' if in all the circumstances it appears that it is appropriate to issue a residence card (regulation 17(4) of the EEA Regulations 2016).
15. In this way we can see that European law distinguishes between the automatic right of 'family member' to be issued with a residence card and the discretion to issue a residence card to an 'extended family member' of a European citizen.

Effect of being issued with a residence card

16. If a person applies for leave to remain in the UK under British immigration law (as opposed to rights of residence under European law), the effect of being issued with a visa is to grant the person a right to remain in the UK that they did not have before.
17. The position under European law is different. A European citizen has an inherent right of free movement and to have family members with him or her whether a residence card is issued or not. The issuing of a residence card recognises the right of residence but does not grant a right of residence. A person might meet the conditions giving rise to a right of residence even if they have not been issued with a residence card. Conversely, a person might have a valid residence card but no longer meets the conditions giving rise to a right of residence under European law.

Right of permanent residence

18. A European citizen can acquire a right of permanent residence in the UK if he or she has exercised their rights of free movement for a continuous period of five years (regulation 15(1)(a) of the EEA Regulations 2016).
19. Only 'family members' of European citizens can acquire a right of permanent residence if they have also been residing in the UK for a continuous period of five years in accordance with European law (regulation 15(1)(b)). In the case of the appellant's sister, she was the 'family member' of an Italian citizen and then retained a right of residence as the former spouse of a European citizen. She was able to show a continuous period of five years residence as a 'family member' in accordance with European law.
20. It is possible for an 'extended family member' to acquire a right of residence under regulation 15 but only if they can show that they have become a 'family member' as defined by regulation 7(3) of the EEA Regulations 2016. An 'extended family member' will only be treated as a 'family member' for the purpose of regulation 15(1)(b) if:
 - (i) they were issued with a residence card as an 'extended family member'; and
 - (ii) they continue to be dependent or a member of the EEA national's household under regulation 8; and
 - (iii) the residence card remains in force.
21. In this case the appellant was issued with a residence card recognising a right of residence as an 'extended family member' in 2011 because, at that time, she was a dependent of Mr Fiorita and was living in his household. However, she only continued to be dependent on him for around one year before the circumstances changed. After her sister's marriage broke down in 2012, and Mr Fiorita left the family home, the appellant was no longer residing in the UK as Mr Fiorita's dependent and was no longer a member of his household. Although she still had a valid residence card, her underlying right of residence under European law, which could only be derived from her dependency upon Mr Fiorita, ceased in 2012.
22. In order to acquire a right of permanent residence the appellant needed to be the dependent of Mr Fiorita throughout the five-year period of the residence card. In fact, she was only dependent upon him for a period of one year. For this reason, she did not meet the requirements of regulation 7(3) of the EEA Regulations 2016 to become a 'family member' and fell far short of being able to show that she had resided in accordance with European law as Mr Fiorita's dependent for a continuous period of five years for the purpose of regulation 15(1)(b).

Relationship with her sister

23. It is not arguable that the appellant has any rights under European law merely because she is dependent on her sister. Her sister has a right of

residence under European law through her relationship with Mr Fiorita. The appellant only had a right of residence as long as she was a dependent on Mr Fiorita or was a member of his household. The rights of 'extended family members' are derived solely through their relationship with the European citizen. Her sister is not a European citizen, so the appellant can derive no right of residence under European law through her sister.

“Transitional arrangements”

24. The vague and unparticularised argument about “transitional arrangements”, in fact, has no relevance to this case. The transitional arrangements outlined in the respondent’s policy “Extended Family Members of EEA Nationals” issued in August 2017 recognises that there was a change in the definition of ‘extended family members’ when the EEA Regulations 2016 came into force. Regulation 8 of the EEA Regulations 2006 included relatives of the EEA national and of his or her spouse. Regulation 8 of the EEA Regulations 2016 restricted the definition to relatives of the EEA national. The relatives of the EEA national’s spouse are no longer included in the definition.
25. The transitional provisions in the respondent’s policy recognise that it might be unfair for a person who has already been issued with a residence card as an ‘extended family member’ who is the relative of the EEA national’s spouse to be required to leave because of the changes. However, the transitional arrangements do not impact on the conditions that the appellant still had to meet in order to acquire a right of permanent residence under European law. In order to show that she had become a ‘family member’ for the purpose of regulation 15(1)(b) of the EEA Regulations 2016 the appellant still needed to show that she had been dependent upon Mr Fiorita or was a member of his household throughout the five-year period of the residence card. She fell far short of meeting that requirement because her rights of residence as the ‘extended family member’ of a European citizen ended when she ceased to be dependent upon Mr Fiorita. Although her sister, for different reasons, has a right of permanent residence, the appellant cannot derive any right of residence through her because her sister is not a European citizen.
26. For the reasons given above I conclude that the First-tier Tribunal decision did not involve the making of an error of law.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

The decision shall stand

Signed  Date 20 December 2018
Upper Tribunal Judge Canavan