



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

Appeal Number: IA/44887/2013

THE IMMIGRATION ACTS

Heard at Manchester

On 30th July 2014

Determination

Promulgated

On 11th Aug 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

**MS SOHNA BUSU MBYE
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Singh, South Manchester Law Centre

For the Respondent: Ms Johnson, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Ms Sohna busu Mbye date of birth 9 September 1996 , is a citizen of Gambia.
2. I have considered whether any of the parties to the present proceedings requires the protection of an anonymity direction. Taking account all of

the circumstances I do not consider it necessary to make an anonymity direction.

3. This is an appeal by the respondent against the determination of First-tier Tribunal Judge Harris promulgated on 2 May 2014. Whilst it is the respondent's appeal I have kept the designation of the parties as they appear in the original determination.
4. The judge allowed the appeal of the appellant against the decisions of the respondent dated 9 October 2013 to refuse the appellant a permanent residence card under the Immigration (EEA) Regulations 2006.
5. By decision made on 6 June 2014 Upper Tribunal Judge Deans granted permission to appeal and the following terms:-

1 Judge of the First-tier Tribunal Harris allowed this appeal under the EEA Regulations. The appellant claimed a permanent right of residence as the child of an EEA national. The difficulty she faced was that the EEA national, who was her stepfather, had returned to Germany and was unwilling to assist the Appellant by providing evidence to show that he had been exercising Treaty rights in the UK for a continuous period of five years. The Appellant was able to produce some wage slips for her stepfather and on the basis of these and the appellant's oral testimony the judge accepted that the requirement was satisfied.

2 The application could permission to appeal to contends that the judge erred in finding that the requirement was satisfied where there was a lack of ' corroborative evidence ' and where the Appellant had not discharge the burden of proof.

3 Arguably the approach the judge should have taken was to issue a direction requiring the Respondent to produce evidence from National Insurance records in relation to the stepfather, as contemplated in Amos [2011] EWCA Civ. 552. Presumably the Respondent should be in a position to remedy this omission prior to any further Tribunal hearing. In that that the judge did not follow this course the grounds are arguable.

6. It was clearly contemplated that upon receipt of the permission granted the respondent would make enquiries with the National Insurance records to check the work record of the stepfather. There were no further records before me. The respondent had made no checks and there was no information as to the work record of the stepfather from National Insurance, Inland Revenue or any other source.
7. Within the determination in paragraph 10 First-tier Tribunal Judge Harris had noted that the parties agreed that the only issue in the case was whether or not the stepfather was exercising treaty rights at the time that he left the United Kingdom.
8. Before me Miss Johnson on behalf of the respondent sought to raise a further issue as to whether or not the appellant had been studying on a single course of study for the relevant period of time. That arises because

of the wording of Regulation 10 as set out below. That was not an issue that was raised either before the First-tier Tribunal or in the grounds of appeal to the Upper Tribunal.

Factual background

9. The appellant is a Gambian national. Her mother is Sukai Sarr, she is also a Gambian national. On 2 April 2006 Sukai Sarr married Mr Lamin Sambou, who is a German national. Mr Sambou was in the United Kingdom exercising treaty rights. The appellant's mother joined her husband in the United Kingdom in 2006. Since that time the appellant's mother and Mr Sambou have had two children together.
10. On the 22nd April 2008 the appellant, who would have been 11 years old at the time, came to the United Kingdom. At that point she came to the United Kingdom to join her mother and stepfather on a European family permit. It does not appear that any application was thereafter made for a residence card. It appears to have been accepted that the stepfather was at that point working otherwise no family permit would have been issued.
11. On 16 October 2008 Mr Sambou applied for a permanent residence card. On 3 November 2009 the UK Border Agency wrote requesting further evidence that Mr Sambou had been working for a continuous period of five years. It appears that further documents were submitted but such were insufficient for the UKBA. On the 16th February 2010 UKBA refused Mr Sambou a permanent residence card.
12. Shortly thereafter Mr Sambou left the United Kingdom returning to Germany. Sukai Sarr returned to Germany at some time in 2011. Whether that was to join her husband is unclear. Subsequently they appear to have parted. The appellant appears to have been left in the United Kingdom with a Mr and Mrs Yarbo, although there is some reference to the local authority or social services being aware of and approving the arrangement. .
13. Since coming into the United Kingdom the appellant has been in school attending Whalley Range School from September 2008 to June 2013. She is now studying her A-levels. However because of problems with regard to her immigration status she could only study her A-levels at Rutland County College.
14. On the basis of the facts as presented the appellant claims that she is entitled to a permanent right of residence. As identified by the parties before the judge the only issue was whether the EEA national was exercising treaty rights at the time that he left the United Kingdom. A secondary issue is now being raised as to whether or not the appellant was studying on a single course.

Relationship of the appellant to the EEA national

15. This matter is governed by the Immigration (European Economic Area) Regulations 2006. The relevant provisions of Regulation 7 provide as follows: --

Subject to paragraph (two), for the purposes of these regulations the following person shall be treated as family members of another person-

- (a) his spouse or civil partner;
- (b) direct descendants of his, his spouse or his civil partner who are-
 - (ii) under 21; or
 - (iii) dependence appears, his spouse or civil partner;.....

16. Thus the purposes of the regulations the appellant is a family member of an EEA national, as a child under 21 of an EEA national's spouse.

Permanent right of residence

17. The provisions of regulation 15 deal with a permanent right of residence. Regulation 15 provides: --

15 (1) The following person shall acquire the right to reside in the United Kingdom permanently

(a) an EEA national who has resided in the United Kingdom in accordance with these regulations for a continuous period of five years;

(b) A family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these regulations for a continuous period of five years;...

(f) a person who -

(i) has resided in the United Kingdom in accordance with these regulations were continuous period of five years; and

(ii) was, at the end of that period, a family member who has retained the right of residence.

18. Thus as a family member the appellant could if she had resided in the United Kingdom with an EEA national for a continuous period of five years have acquired the right of residence or under subparagraph (f) if she has resided in the United Kingdom for five years and was at the end of the period a family member who had a retained right of residence. Provided

the appellant met the requirements she would have acquired a permanent right of residence.

19. The issue of a retained right of residence is dealt with in Regulation 10. Regulation 10 provides as follows: --

10 (1) In these regulations, family member who has retained right of residence means, subject to paragraph (8), a person who satisfies the conditions in paragraphs (2), (3), (4) or (5).

(2) ...

(3) A person satisfies the condition in this paragraph if-

(a) he is a direct descendant of-

(i) a qualified person or an EEA national with a permanent right of residence who has died

(ii) a person who ceased to be a qualified person on ceasing to reside in the United Kingdom; or

(iii) the person who was the spouse or civil partner of the qualified person or the EEA national with a permanent right of residence mentioned in subparagraph (1) when he died or is the spouse or civil partner of the person mentioned in sub-paragraph (ii); and

(b) he was attending an educational course in the United Kingdom immediately before the qualified person or the EEA national with a permanent right of residence died or ceased to be a qualified person and continues to attend such a course.

20. The appellant is the direct descendant of the spouse of a qualified person who ceased to be a qualified person by reason of ceasing to reside in the United Kingdom. As such the appellant meets the requirements of Regulation 10(3)(a)(iii) and (b).

21. The argument on behalf of the appellant is that:-

a) The appellant is a family member of an EEA national by virtue of Regulation 7.

b) The appellant by virtue of regulation 10(3)(a)(iii) and (b) has a retained right of residence entitling her to remain in the United Kingdom in accordance with the regulations.

c) The appellant by virtue of regulation 15(1)(f) having been in the United Kingdom for five years under the regulations is entitled to a permanent right of residence.

22. The issue before Judge Harris was whether at the time that the EEA national ceased to reside in the United Kingdom the EEA national was immediately prior to that exercising treaty rights.
23. The secondary argument sought to be advanced by the representative for the respondent was that the appellant was not at the material time attending an course but had changed to a different course and therefore did not meet the requirements of regulation 10 (3)(b).
24. The judge had specifically identified the only issue that was taken before him with regard to the appellant qualifying for a permanent right of residence. That was related to the work record of the EEA national. On the basis of the evidence presented the judge was entitled to come to the conclusion that at the time that the EEA aim national left the United Kingdom the EEA national was working and therefore had been exercising treaty rights at that stage. Further the judge found that that the EEA national had been working through out. That is a finding of fact made by the judge.
25. On the basis of the findings the judge found that on EEA national ceasing to reside the appellant had a retained right of residence under Regulation 10.
26. Thereafter the appellant continue to reside in the United Kingdom in accordance with the regulations and had been residing in the United Kingdom from the period of April 2008 until April 2013 in accordance with the regulations that at that stage she had acquired a permanent right of residence.
27. Even if I had allowed the respondent to pursue a point not taken before the first-tier tribunal and not within the grounds of appeal on the basis of the findings of fact made by the judge the appellant continued in a single course of study through until April 2013 by which time she had acquired a permanent right of residence. I do not however allow the respondent to amend the grounds of appeal. The issue was not raised in the grounds to the First -tier Tribunal and was not the basis of the appeal to the Upper Tribunal.
28. In the circumstances there is no material error of law in the determination. I uphold the decision to allow this matter under the EEA regulations.

Signed

Date

Deputy Upper Tribunal Judge McClure

Appeal Number: