



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

Appeal Number: IA/34868/2014

THE IMMIGRATION ACTS

**Heard at Field House, London
On 11 March 2015**

**Determination Promulgated
On 12 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAMUEL IZUCHI AMAZIRO

Respondent

Representation:

For the Appellant: Mr D Clarke, Home Office Presenting Officer

For the Respondent: Mr S Mahmud, instructed by West Ham Solicitors

DETERMINATION AND REASONS

1. Whilst this is an appeal by the Secretary of State for the Home Department, for convenience I will refer to the parties in the determination as they appeared before the First-tier Tribunal.
2. The appellant, a national of Nigeria, appealed to the First-tier Tribunal against the decision of the Secretary of State to refuse his application for a residence card as confirmation of a right of residence as the partner of a Hungarian national, Aniko Kovacs, being an EEA national living in the UK. The reason given for the refusal in the reasons for refusal letter is that the appellant had failed to provide sufficient evidence to demonstrate that his partner is currently a qualified person in the UK as a worker in accordance

with regulation 6 of the Immigration (EEA) Regulations 2006 (the 2006 Regulations). First-tier Tribunal Judge C Burns allowed the appeal and the Secretary of State now appeals with permission to this Tribunal.

3. The relevant provisions of the 2006 Regulations for the purposes of this appeal are as follows;

"Family member

7....

(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 regulation 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(3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked.

...

"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).

...

(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 to the decision maker 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).

Issue of EEA family permit

- 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.

...

(2) An entry clearance officer may issue an EEA family permit to an extended family member of an EEA national who applies for one if—

(a) the relevant EEA national satisfies the condition in paragraph (1)(a);

(b) the extended family member wishes to accompany the relevant EEA national to the United Kingdom or to join him there; and

(c) in all the circumstances, it appears to the entry clearance officer appropriate to issue the EEA family permit.

(3) Where an entry clearance officer receives an application under paragraph (2) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.

(4) An EEA family permit issued under this regulation shall be issued free of charge and as soon as possible.

...

Issue of residence card

17. (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 permanent right of residence under regulation 15 on application and production of—

(a) a valid passport; and

(b) proof that the applicant is such a family member.

(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 on application and production of—

(a) a valid passport; and

(b) proof that the applicant is a family member who has retained the right of residence.

(3) On receipt of an application under paragraph (1) or (2) and the documents that are required to accompany the application the Secretary of State shall immediately issue the applicant with a certificate of application for the residence card and the residence card shall be issued no later than six months after the date on which the application and documents are received.

(4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if—

(a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and

(b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.

(5) Where the Secretary of State receives an application under paragraph (4) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.

...”

4. The First-tier Tribunal Judge considered the appeal on the papers in accordance with the appellant's request. He considered the documentary evidence and found that the appellant's partner is working as claimed and is therefore a qualified person in accordance with regulation 6 (1) (b) of the 2006 Regulations. The Judge allowed the appeal stating that the appellant is entitled to a residence card under regulation 17.
5. The sole ground of appeal is that the First-tier Tribunal Judge erred in allowing the appeal outright. It is contended that he should instead have returned the matter to the Secretary of State for the exercise of her discretion under regulation 17 (4) and (5). Mr Clarke submitted that the Judge did not have jurisdiction to allow the appeal outright as the Secretary of State had not yet exercised her discretion. He relied on the decision of the Tribunal in MO (regulation 17(4) EEA Regulations) Iraq [2008] UKAIT 00061.
6. In the instant appeal the appellant's passport shows that he was issued with an EEA Family Permit in Warsaw on 18 December 2013 valid until 18 June 2014 on the basis of his relationship with his partner. He entered the UK on 22 January 2014. According to the reasons for refusal letter he applied for a residence card on 13 June 2014. The First-tier Tribunal Judge stated at paragraph 5 of the determination that because the appellant was issued with an EEA family permit he is treated as a family member by virtue of regulation 7 (3) of the 2006 Regulations.

7. The appellant was issued with an EEA Family Permit and applied for a residence card during the currency of that Family Permit. Mr Mahmud relied on UKVI modernised guidance which advises caseworkers that in such cases it is necessary only to consider whether the appellant's partner is a qualified person and not to go on to consider the remaining three stages which relate to the relationship, the qualifying conditions and the extensive examination of the appellant's personal circumstances. He submitted that this demonstrates the application of regulation 7(3). However this guidance was issued in January 2015. The parties endeavoured to obtain the guidance applicable before then and agreed that the previous, undated, guidance only set out the provisions of regulation 7 (3) without advising as to the necessity to be satisfied as to all the elements of regulation 17 (4).
8. In these circumstances I must revert to the ordinary meaning of regulation 7(3) read with the Regulations as a whole and in particular regulation 12. Subsequent to the hearing I became aware of the Tribunal's decision in Ewulo (effect of family permit - OFM) UKUT 238. Neither party drew my attention to this decision but it is relevant to the issue to be determined in this appeal and is a reported case and in the public domain. That was an appeal chaired by the then President of the Tribunal, Mr Justice Blake. The decision is summarised in the head note as follows;
 - "i) Where a family permit has been issued by an ECO after inquiry pursuant to regulation 12 of the Immigration (European Economic Area) Regulations 2006 and is used to enter the United Kingdom a subsequent application for a residence card is to be determined under regulation 7(3) of the Regulations.
 - ii) Where the validity of the issue of the family permit is not contested by the Secretary of State and the permit has not been revoked, the issue is whether there has been a material change of circumstances since arrival with the consequence that the claimant no longer qualifies as an extended family member"
9. Having noted that no case had been made that the EEA family permit should be revoked and that findings had been made that the appellant in that case continued to meet the requirements for being the extended family member of an EEA national, the Tribunal concluded that "*... regulation 7(3) requires the respondent to treat the appellant as a family member of a qualified person and, under regulation 17(1), the issue of a residence card to such a person is mandatory.*"
10. This gives further support to Mr Mahmud's submission. He submitted that the ECO had already exercised discretion in this case. I agree that regulation 12 requires the ECO to exercise discretion and undertake an extensive examination of the appellant's circumstances. Further, regulation 17 (4) states that it does not apply to an extended family member covered by regulation 7 (3). It seems to me that if regulation 7 (3) does not mean that the appellant, having been issued with an EEA Family Permit which remained valid when he applied for a residence card,

should be treated as a family member for the purposes of that application, it is not at all clear when regulation 7 (3) can apply.

11. Accordingly I am satisfied that the First-tier Tribunal Judge did not make an error of law in the determination of this appeal. He was right to treat the appellant as a family member in accordance with regulation 7 (3) and, in light of his findings as to the substantive issue which are not challenged, was right to allow the appeal outright. In light of the Judge's findings the appellant is entitled to the issue of a residence card under regulation 17 (1). He is not treated as an extended family member subject to the discretion in regulation 17 (4).

Conclusion:

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

Signed

Date: 11 March 2015

A Grimes

Deputy Judge of the Upper Tribunal