



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/24865/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 13 July 2017

**Decision & Reasons
Promulgated
On 13 October 2017**

Before

**UPPER TRIBUNAL JUDGE RINTOUL
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN**

Between

**R L
(ANONYMITY ORDER MADE)**

Appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Representation:

For the Appellant: Mr. P. Saini, counsel instructed by Universal Solicitors

For the Respondent: Mr. T. Melvin, Home Office Presenting Officer

1. The Appellant is a national of the Philippines, born on 29.1.74. On 1.2.15 she applied for a residence card pursuant to the Immigration (EEA) Regulations 2006 (hereafter “the EEA Regulations”) as the family member of an EEA national *viz* her mother’s partner, Mr E. This application was refused in a decision dated 24.6.15, on the basis that the Appellant had not established that the EEA national was exercising treaty rights in the United Kingdom; she had not established dependency upon the EEA national prior to or since she had entered the United Kingdom. Her appeal came before First tier Tribunal Judge Moan for hearing on 31 March 2016. In a decision promulgated on 3.4.16 the appeal was dismissed on the basis that the Appellant did not qualify as a family member under regulation 7(1) and failed to establish that she was dependent on the EEA national prior to arriving in the United Kingdom.
2. An application for permission to appeal in time was made on 27.4.17. The grounds in support of the application asserted that the Judge had erred materially in law in the following respects:
 - (i) the Judge had applied the incorrect Regulation in that the Appellant’s case was that she qualified as a family member pursuant to regulation 7(b)(ii) of the EEA Regulations, rather than an extended family member. Further or in the alternative, it was a *Robinson* obvious point;
 - (ii) the Judge erred in his analysis of and findings as to dependency *cf. VN (EEA rights – dependency)* [2010] UKUT 380 (IAC); *Moneke (EEA-OFMs) Nigeria* [2011] UKUT 00341 (IAC) and *Reyes (EEA Regs: dependency)* [2013] UKUT 00314 (IAC).
3. Permission to appeal was granted on 7.9.16 by Designated Judge Appleyard on the basis that the grounds seeking permission to appeal are all arguable.

Hearing

4. The hearing first came before the Upper Tribunal on 17.10.16 when it was adjourned due to the absence of any jurisprudence directly on point i.e. whether a *de facto* stepchild qualifies as a family member of an EEA national and the fact that the parties had not come prepared to argue the point. The appeal then came before the Upper Tribunal on 8.12.16 when it was again adjourned as the Presenting Officer on that occasion, Mr Tarlow, had only received the Appellant’s skeleton argument the previous day and wished to take instructions. A request for a panel hearing was acceded to and the Respondent was given 6

weeks to set out her position. Directions in respect of both hearings are appended. Due to unforeseen circumstances the appeal did not come back before the Upper Tribunal until 13 July 2017 and we apologise for the delay.

5. We had before us a skeleton argument drafted by Mr Saini dated 7.12.16 and from the Respondent, drafted by Mr Deller dated 18.1.17 further to his previous skeleton argument in which it is asserted that the Appellant cannot qualify as a family member under the EEA Regulations on the basis that she is a de facto stepchild of an EEA national, given that her mother and Mr E are unmarried partners, rather than spouses.
6. At the outset of the hearing, we drew the parties' attention to: *Depesme* [2016] EUECJ C401/15 [15.12.16]; *Rahman* [2012] C83/11 3 CMLR 55 per A-G Bot SC and the Supreme Court judgment in *R ota Brewster* (2017) UKSC 8 and gave them time to consider these judgments.
7. Mr Saini's submissions, as set out in his skeleton argument, comprise the following:
 - (i) the term "family member" is not confined to blood relatives *cf.* *Dulger* [2012] EUECJ C-451/11 at [23] and in *Alarape* [2011] UKUT 443 (IAC) (Article 12, EC Reg 1612/68) Nigeria [2011] UKUT 413 (IAC) the Upper Tribunal found that, although undefined in the European Regulations, the term "child" should be read to include "stepchild". Mr Saini asserted that there is no preclusion or restriction stating that a stepchild's parent must be married to the qualifying person;
 - (ii) to distinguish her as not being a stepchild due to her mother and partner not being married (or in a civil partnership) would be an act of indirect discrimination and would be in contravention of European law via Council Directive 2000/78/EC article 1 and a contravention of domestic law via the Equality Act 2010 *cf.* *Bull & Anor v Hall & Anor* [2013] UKAC 73 and regulation 3 of the Equality Act (Sexual Orientation) Regulations 2007;
 - (iii) it is implicit from the decision of the FtTJ at [49]-[50] that the Appellant has been dependent on the EEA national since her arrival in the United Kingdom in 2004 and she is thus entitled to a residence card pursuant to regulation 7(1)(b)(ii) of the EEA Regulations;
 - (iv) in the alternative, Mr Saini submitted that *Sala* (EFMs: right of appeal: Albania) [2016] UKUT 411 (IAC) had been wrongly decided on four bases:
 - (a) an unlawful failure to apply a purposive approach in interpreting the EEA Regulations transposing the Citizens

- Directive [CD];
- (b) unlawful assessment of the rights and entitlements of OFM's/EFMs against the CD;
 - (c) unlawful assessment of the rights and entitlements of OFMs/EFMs against the EEA Regulations;
 - (d) unlawful assessment of parliamentary intent re regulation 2(1) of the EEA Regulations;
 - (e) the Appellant is entitled to a right of appeal by virtue of articles 31 and 15 of the CD;
 - (f) the extinguishment of the right of appeal has the effect of unlawfully depriving the EEA national of their right to free movement;
 - (g) for the reasons set out by counsel for the Appellant in *Sala*

In his oral submissions, Mr Saini submitted that the question was not simply one of being married or unmarried but a question of status. If the Directive draws a distinction between a married and unmarried status it may be lawful at EU level but not on a domestic level. However, he submitted that the discrimination arises in both domestic and EU law.

8. He submitted that a *de facto* adult stepchild could be considered a descendant of an EEA national within the meaning of regulation 7(b) in light of the judgment in *Ayaz* [2004] EUECJ C-275/02 at [46] and [48] which makes clear that the term "family member" is not limited to blood relations and *Alarape* (op cit) where the Upper Tribunal found that, although undefined in the Regulations, the term "child" should be read to include stepchildren. He submitted that there is no preclusion or restriction stating that the stepchild's parent must be married to the qualifying person. However, he accepted that in light of the authorities drawn to his attention by the Upper Tribunal at the outset of the hearing that he was in difficulty arguing that the Appellant is a stepchild given that she did not enter the United Kingdom until she was an adult.
9. However, Mr Saini submitted that an adult can still be a dependant of an EEA national and qualify as a family member and that a dependant can still be a direct descendant even if over 21. He submitted that if regulation 7 does not permit a stepchild of an unmarried partner to qualify as a family member then that would represent discrimination against the stepchild of the partner, regardless of whether she is a direct descendant. The Appellant is a child of the unmarried partnership and to the extent that unmarried partners are not considered family members, this was a disadvantage to both the unmarried partner and to that child.
10. Mr Saini submitted this disadvantage was not cured by virtue of the fact that such persons could be considered as other family members because they are considered as a secondary class of family and this was contrary to the Equality Act Sexual Orientation Regulations 2007. He drew attention to the judgment of the Supreme Court in *Bull v*

Hall [2013] UKSC 73 and Lady Hale's judgment makes clear that EU law only goes so far at [3] & [29]. Mr Saini submitted that sexual orientation only an example and the issue was being unmarried and sharing a bed, which was contrary to the Christian values of the hotel keepers.

11. Mr Saini submitted that whilst there was nothing to stop the step parent from marrying, it is discriminatory to treat them differently because they are not married and that the choice of non-marriage and following a non-marriage partnership has resulted in discriminatory treatment. He submitted that [40] of the judgment in *Bull v Hall* makes clear that this is indirectly discriminatory and it is for the Secretary of State to justify such treatment.
12. He submitted that the hallmarks are there in that the Regulations do provide for a benefit to family members in that they have different requirements and a right of appeal.
13. Mr Saini further submitted that there is no justification or rationale for the differential treatment, which is prohibited. He submitted that if there is discriminatory treatment in eg pensions this is analogous to a spousal partner of an EEA national. One does not have rights of entitlement simply because one is married. The criterion applied eg in *Bull v Hall* are not distinguishable from a class of persons based upon gender. In this case there is a distinction in civil law between classes of person. He submitted that if there are Regulations the State has responsibility for this area as has sought to regulate it and there is a right not to be unlawfully discriminated against *cf. Brewster* at [30] per Lord Kerr and at [48].
14. In respect of the issue of dependency, Mr Saini submitted that this had been accepted by First tier Tribunal Judge Moan. His attention was drawn to the decision of the First tier Tribunal Judge at [38] and [39] of First tier Tribunal Judge's decision and [47] where the Judge stated that she was not satisfied that prior dependency had been established. Consequently, the Appellant could not qualify in any event as she did not previously live in the same household nor was she dependent on the EEA national, on the findings of the First tier Tribunal Judge.
15. Mr Saini sought to challenge these findings, however, we indicated that we were not prepared to permit at this late stage a challenge to the findings of fact by the First-tier Tribunal and that it was long past the time that challenge could be made, particularly given that no reasons had been provided as to why this issue was not dealt with in the initial grounds and it was not an immediately obvious point. In effect it was an out of time application to challenge a decision on a particular point and it could not be said that the point is clearly meritorious thus we refused the application to amend the grounds of appeal.
16. We further stated that the alternative argument in respect of

Regulation 8 should be put to one side in light of the fact that the Supreme Court will be considering the effect of Sala in *SM* and that the Court of Appeal had adjourned *MK* for this reason.

17. Mr Melvin, on behalf of the Respondent, sought to rely on the skeleton arguments and did not seek to make further submissions.

Error of law

18. The first issue to determine is whether there is a material error of law in the decision of First tier Tribunal Judge Moan. The Judge at [18] - [21] of the decision considered whether the Appellant qualified as a family member pursuant to regulation 7 of the Immigration EEA Regulations 2006, as amended. She concluded, correctly at [21] that the Appellant did not qualify as a family member pursuant to regulation 7(1)(c) because she is a descendant not an ascendant. However, we consider that the Judge fell into error at [19] in finding that "regulation 7(1)(b) uses the phrase "descendants" to make it clear that this means children." Whilst this is the case in respect of Regulation 7(1)(b)(i) which provides that the direct descendant of an EEA national, his spouse or civil partner is under 21, sub-section (ii) makes provision for "dependants of his, his spouse or his civil partner." The Judge simply did not consider whether or not the Appellant is a dependant of an EEA national, his spouse or civil partner within the meaning of regulation 7(1)(b)(ii) of the Regulations as amended.
19. The issue, however, is whether that error is material. The focus of the case as put before us at the hearing was that it was unlawfully discriminatory to treat the Appellant, who is a de facto stepchild of an EEA national, by virtue of her mother's unmarried relationship with Mr Enright, as falling outside the definition of "family member" for the purposes of regulation 7 of the Immigration EEA Regulations 2006, as amended.
20. Whilst we accept that Regulation 7, which is concerned with (direct) family members, does not encompass unmarried partnerships and this is discriminatory, we do not consider that this is an impermissible form of discrimination. Our reasons are as follows:
 1. There is provision for unmarried partnerships (durable relationships) as extended family members pursuant to regulation 8. Whilst the provisions of regulation 8 are less favourable and in light of the current caselaw, a negative decision in relation to an application made pursuant to regulation 8 does not attract a right of appeal, the decision to distinguish between married/civil partners and unmarried partners is deliberate and reflects the differing legal status.
 2. There has always been a distinction between a descendant and a dependant and between family members and descendants, who

are different in that one is a subset of the other. The Association Agreement was drafted on the basis of family members, who are defined at 10[1] of Council Directive 2004/68 which predates the Regulations and the distinction between the different groups has been maintained and carried through.

3. We accept that the jurisprudence upon which Mr Saini sought to rely recognizes the rights of step-children and the fact that “family member” in EU law terms encompasses non-blood relations *cf. Dulger* [2012] EUECJ C-451/11 at [23]; *Ayaz* [2004] EUECJ C-275/02 at [46] and [48] and *Alarape* (Article 12, EC Reg 1612/68) Nigeria [2011] UKUT 413 (IAC) but these cases concerned the step-children of a marriage and not a *de facto* step-child as is the case before us.
4. We further do not accept that the Equality Act (Sexual Orientation) Regulations 2007 assist us, given that the complaint of discrimination relates to marital status and the position would be identical were the Appellant to be the *de facto* step child of an unmarried gay couple. Whilst in *Bull v Hall* [2013] UKSC 73 the Supreme Court found in favour of a couple in a civil partnership on the basis that they had been subjected to discriminatory treatment by the refusal of a Christian hotel keeper to provide them with a double-bedded room, the Appellants had a protected characteristic *viz* their sexual orientation. However, Mr Saini was unable to identify the protected characteristic in play in this case. We do not consider that the fact of being unmarried partners or the descendant of an unmarried partner can constitute a protected characteristic.
5. Similarly, whilst in *R ota Brewster* [2017] UKHL UKSC 8, the Supreme Court found in favour of an unmarried partner in respect of her right to receive a survivor’s pension, her legal right was established by way of the Local Government Pension Scheme (Benefits, Membership & Contributions) Regulations (Northern Ireland) 2009, which made express provision for the right of a cohabiting surviving partner to receive a survivor’s pension. The issue in the case was the fact that she had to be nominated by the member and the administering body had not received the nomination form. Their Lordships per Lord Kerr disapplied the requirement for nomination essentially on the basis of proportionality, in order to give effect to the objective which was to remove the difference in treatment between a longstanding cohabitant and a married or civil partner. The EEA Regulations have a different objective, which is to preserve family unity whilst maintaining a distinction between direct and extended family members on the basis of *inter alia* marital status.
6. It is further clear from both the law and the jurisprudence that some forms of discrimination are permissible. It is not unlawful

to discriminate against an unmarried person under the Sex Discrimination Act 1975 or now the Equality Act 2010. Being an unmarried person is not, in itself, a protected characteristic. Thus being the child or descendant of an unmarried person is also not a protected characteristic.

7. Moreover, the logical effect of Mr Saini's argument is that, whilst the Appellant's mother falls to be considered as an extended family member by virtue of being the unmarried (durable) partner of an EEA national, the Appellant is entitled to recognition as a family member. This is not only inconsistent but perverse.
21. In respect of Mr Saini's alternative argument as to whether or not the Appellant qualified as an extended family member pursuant to regulation 8(2), it is now clear that, following Sala (EFMs: Right of Appeal) [2016] UKUT 00411 (IAC) promulgated on 19 August 2016 (which post dates the promulgation of the First tier Tribunal Judge in this case) there is no statutory right of appeal against the decision of the Secretary of State not to grant a Residence Card to a person claiming to be an Extended Family Member. We did not consider it appropriate to entertain arguments designed to challenge the reasoning underlying the decision in Sala given that this will shortly be considered by the Supreme Court.
22. We have no hesitation in concluding that whilst there are clear errors in the decision of First tier Tribunal Judge Moan, the errors are not material given that the Appellant does not qualify as a dependant of an EEA national, his spouse or his civil partner within regulation 7(1) (b)(ii) of the Immigration EEA Regulations 2006 as amended.

Decision

23. 2. For the reasons set out above, we find no material error of law in the decision of First tier Tribunal Moan, which we uphold.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

24 July 2017