



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/03708/2015
EA/03713/2015

THE IMMIGRATION ACTS

Heard at Field House
On 8 August 2018

Decision & Reasons Promulgated
On 12 September 2018

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

IFEANYI KENNETH AMOBI
JENNIFER AMOBI UJUNWA
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: No attendance
For the Respondent: Mr N Bramble, Senior Presenting Officer

DECISION AND REASONS

(Decision delivered orally on 8 August 2018)

Preamble

1. Notice of this hearing was sent to the appellants on 22 June 2018 at the address provided for service. Neither appellant has responded to notification of today's hearing either by seeking an adjournment, by writing in and indicating that there would be no attendance at the hearing or by attending the hearing. Indeed, there has been no correspondence from the appellants since the service of the hearing notice.

2. Having taken full account of all the circumstances of the case as well as the overriding objective set forth in the 2008 Procedure Rules, I concluded that justice would not be impeded by proceeding with the hearing of this appeal in the absence of the appellants or legal representatives acting on their behalf.

Introduction

3. The appellants are nationals of Nigeria, born in 1991 and 1994 respectively and are siblings. On 1 July 2015 both appellants applied to the Secretary of State for an EEA residence card as confirmation of their right to reside in the United Kingdom. The named 'sponsor' in these applications was the appellants' Nigerian national sister who was, but is no longer, married to an EEA national. The exact date of the decree absolute is not identified in the papers; however, it is not in dispute that by the time of the Secretary of State's decision on 1 December 2015 the appellants sister was no longer married to an EEA national.
4. I further observe that the appellants have never had an EEA residence card, a fact which has assumed great importance in this appeal. They have, however, previously each submitted applications for an EEA residence card, in 2012 and 2013 – such applications being made on the basis that the applicants were extended family members of an EEA national (the appellants' sister's former husband). The Secretary of State rejected these applications, most recently on 13 August 2014.

Proceedings before the First-tier Tribunal

5. Before the First-tier Tribunal ("FtT") the appellants asserted that after their sister's divorce from the EEA national each had a retained right of residence in the United Kingdom, relying on regulation 10(5) of the 2006 EEA Regulations.
6. In a decision promulgated on 6 September 2017, the FtT dismissed the appeal for want of jurisdiction, following the reasoning of the Upper Tribunal in Sala (EFMs: right of appeal) [2016] UKUT 00411 – in which the Tribunal had concluded that decisions made by the Secretary of State on applications for EEA residence cards by extended family members did not accrue a right of appeal.
7. Importantly, the FtT also made alternative findings in relation to the application of regulation 10(5) of the 2006 EEA Regulations. By regulation 10 of the 2006 EEA Regulations a person who satisfies one of the conditions identified in subparagraphs (2) to (5) thereof, retains a right to reside in the United Kingdom after a specified event. The specified event identified in subparagraph 5 is the termination of a marriage between an EEA national and a non-EEA national.
8. One of the conditions required to satisfy subparagraph 5 is that the applicant must have 'ceased to be the family member' of the qualifying EEA national on the termination of the marriage.
9. In this regard the FtT identified that the appellants must each demonstrate that they were a family member of the EEA national prior to the termination of the marriage

between the EEA national and their sister. Applying this legal analysis to the facts of the instant case, the FtT said as follows at paragraph 27:

“I find that the relationship of the Appellants and their sister and the Appellants and their sister’s ex-husband does not fall within the one of the categories in (a) to (c). In respect of category (d), the Appellants’ case is that they have always been financially dependent on their ex-brother-in-law [i.e. the EEA national sister’s ex-husband] since coming to the United Kingdom.”

10. The reference to categories (a) to (c) is a reference to Regulation 7(1) of the 2006 EEA Regulations which defines the meaning of family member for the purposes of the 2006 EEA Regulations. I need not read out paragraphs 7(1)(a) to (c) because the appellants obviously do not fall within their confines and there has been no challenge to the finding in this regard made by the FtT.

11. By regulation 7(1)(d) and person is to be treated as a family member if they fall within the confines of regulation 7(3). Regulation 7(3) reads:

“...a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or 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 the EEA national...”

12. The FtT identified that an extended family member cannot be treated as a family member for the purposes of regulation 7(1)(d) unless the Secretary of State has issued a residence card etc confirming status as an extended family member. Given that the appellants have never been issued with an EEA residence card the FtT concluded that the requirements of regulation 7(1)(d) had not been met.

13. The FtT ultimately found (in the alternative to its findings on jurisdiction) that the appellants could not demonstrate that they had been, at any point in time prior to their sister’s divorce from the EEA national, family members of the EEA national. It was consequently concluded that neither appellant could retain rights of residence after the termination of the marriage because they did not have such rights prior to the termination.

Decision and Reasons

14. Turning then to the appeal before the Upper Tribunal. Permission to appeal was granted by FtT Judge Chohan in a decision dated 9 March 2018. Judge Chohan’s decision focused entirely on the jurisdictional issue and correctly identified that it was arguable that the FtT did have jurisdiction to hear the appeal. In fact, we now know that this point was more than arguable because the Court of Appeal in Khan [2017] EWCA Civ 1755 confirmed that the decision in Sala was wrong.

15. The consequence in this case is that both appellants had a right of appeal to the FtT against the Secretary of State’s decisions of 1 December 2015. The FtT’s conclusion to the contrary was plainly in error.

16. In the normal course this would lead to the setting aside of the FtT's decision and the remitting of the appeal back to the FtT to consider afresh. However, that is not the course I take in the instant case.
17. The FtT made clear findings in the alternative which have not been the subject of challenge and which are, in any event, unimpeachable. To put it another way the FtT's error is not one which was capable of affecting the outcome of the appeal. The appellants clearly cannot meet the definition of family member found in regulation 7(1)(a)-(c) and the FtT's interpretation of regulation 7(1)(d) and 7(3) is clearly correct and its rationale is now supported, albeit in a slightly different context, by the recent decision of the Court of Appeal in Macastena [2018] EWCA Civ 1558. The appellants were not the family members of an EEA national prior to their sister's divorce and had no right to reside at that time. They cannot therefore accrue a retained right pursuant to regulation 10(5), for the reasons identified by the FtT.
18. The appeal would have been dismissed in any event for the reasons provided by the FtT, in the alternative. For this reason, in my conclusion the appropriate course in this case is not to set aside the FtT's decision despite the error of the FtT in finding it did not have jurisdiction.

Notice of Decision

The decision of the FtT dismissing the appellants' appeals stands.

Signed:



Upper Tribunal Judge O'Connor

Date 06 September 2018