



**Upper Tribunal  
(Immigration and Asylum Chamber)  
EA/09012/2016**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 7 March 2018**

**Decision & Reasons  
Promulgated  
On 29 March 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MRS TETIANA NAUMOVA  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms A Everett, Home Office Presenting Officer  
For the Respondent: Mr B Hawkin, Counsel instructed by Arlington Crown Solicitors

**DECISION AND REASONS**

**Background**

- 1.** The appellant in this case is the Secretary of State and the respondent is Ms Naumova. However for the purposes of this decision and reasons I refer to the parties as they were before the First-tier Tribunal, where Ms Naumova was the appellant.
- 2.** Ms Naumova is a citizen of the Ukraine born on 18 September 1976. She was previously granted an EEA family permit on 29 July 2015 as the family

member of an EEA national. However the appellant's spouse died on 3 December 2015 (and no further application had been submitted by that stage). The appellant submitted an application for a retained right of residence under Regulation 10 of the Immigration (European Economic Area) Regulations 2006 (EEA Regulations). The respondent refused that application on the basis that the respondent was not satisfied that the appellant had resided in accordance with the EEA Regulations for at least one year prior to the death of her EEA spouse. In a decision and reasons promulgated on 1 August 2017, Judge of the First-tier Tribunal S Meah allowed the appellant's appeal.

**3.** The Secretary of State appeals with permission on the following grounds:

- (1)** The judge arguably made a material error of law in his interpretation of Regulation 10(2)(b) as the appellant was married to her EEA spouse for less than eight months from 25 April 2015 until his death on 3 December 2015.
- (2)** Although this falls short of the one year requirement the judge went on to find that the appellant had resided in accordance with the EEA Regulations. It was submitted that the judge erred in accepting that the appellant resided in accordance with the Regulations prior to her marriage and in further finding that the appellant was in a durable relationship prior to her marriage and therefore would have been "deemed to be an extended family member".

**Error of law discussion**

- 4.** Ms Everett relied on the grounds of appeal and submitted that, contrary to the appellant's Rule 24 response, the Presenting Officer had not made a concession that the appellant and her spouse were in a durable relationship where the appellant was residing in accordance with the Regulations and was an extended family member prior to the couple's marriage. In any event she submitted that if the Home Office Presenting Officer had made such a concession it was wrong in law and the Presenting Officer was unable to concede that the EEA Regulations said something when they clearly did not. She further submitted that it is clear from the case law in this area that extended family members are different from family members, not least given recent jurisprudence (**Sala (EFMs: right of appeal) [2016] UKUT 00411 (IAC) and Khan v SSHD [2017] EWCA Civ 1755**). It was her submission that extended family members do not have the same declaratory rights that family members have under the EEA Regulations; a discretion is given to the respondent in relation to extended family members. It was her further submission that there was nothing in either the Directive or the EEA Regulations to suggest that the provisions on extended family members had been wrongly implemented by the respondent. Although Ms Everett considered there were no credibility issues in this case it was her submission that the law was clear.
- 5.** Mr Hawkin relied on his Rule 24 response. The facts of this case are not disputed. Ms Naumova is a citizen of the Ukraine who met her future

husband, Mr Horst Friedrich Kiessling, a citizen of Germany, on 21 September 2013. They commenced a relationship and subsequently began cohabiting on 2 February 2014. The couple married on 25 April 2015 and the appellant was issued with an EEA family permit valid until 29 January 2016, on 29 July 2015. On 3 December 2015 the appellant's husband died, suddenly. The appellant made her application for an EEA residence card on the basis of having a retained right of residence, on 26 January 2016.

6. It was Mr Hawkin's submission that the decision of the First-tier Tribunal did not contain any material errors of law and that the Secretary of State's grounds were no more than a disagreement with the findings and conclusions. It was submitted that the First-tier Tribunal Judge was entitled to conclude that the respondent had retained her right of residence for the reasons given at [21]-[26] in light of the submissions the judge had heard and Mr Hawkin relied on Ms Naumova's witness statement and her 496-page bundle and the skeleton argument produced for the First-tier Tribunal.
7. Mr Hawkin relied on the fact that the Secretary of State accepted Ms Naumova's credibility and the evidence regarding her relationship and that the judge noted that the Secretary of State accepted that the respondent had resided in accordance with the EEA Regulations having been in a "durable relationship with her late spouse since September 2013". The judge went on to note at [23] that the Secretary of State accepted that the respondent was an extended family member prior to her marriage. It was argued that the Secretary of State should not be allowed to rely on Regulation 7(3) and Regulation 17(4) as this was contrary to the way the appeal was argued before the First-tier Tribunal.

### **Decision on error of law**

8. The relevant provisions of the EEA Regulations are as follows:

#### *Family member, Regulation 7*

....

"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, Regulation 8:*

"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."

*"A family member who has retained the right of residence"*

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

- (2) A person satisfies the condition in this paragraph if -
  - (a) He was a family member of a qualified person or of an EEA national with a permanent right of residence when that person died;
  - (b) he resided in the United Kingdom in accordance with these Regulations for at least the year immediately before the death of the qualified person or the EEA national with a permanent right of residence; and
  - (c) he satisfies the condition in paragraph (6).
- (3) A person satisfies the conditions in this paragraph if -
  - (a) he is a direct descendant of -
    - (i) a qualified person 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 mentioned in subparagraph (i) when he died or is the spouse or civil partner of the person mentioned in subparagraph (ii); and
  - (b) he was attending an educational course in the United Kingdom immediately before the qualified person died or ceased to be a qualified person and continues to attend such a course.
- (4) A person satisfies the condition in this paragraph if the person is the parent with actual custody of a child who satisfies the conditions in paragraph (3).

....

- (6) The condition in this paragraph is that the person
  - (a) is not an EEA national but would, if he were an EEA national be a worker, a self-employed person or a self-sufficient person under Regulation (6); or
  - (b) is the family member of a person who falls within paragraph (a).

...".

*"Regulation 17 - Issue of residence card:*

17-(4) The Secretary of State may issue a residence card to an extended family member a person who is not an EEA national and is the 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.”

9. Although there was some discussion as to whether a concession had been made before the First-tier Tribunal I am not persuaded that this is the case, particularly as the judge records, at [17] of the decision and reasons, that the Presenting Officer argued that the appellant could not show at the time of her application that she had resided in accordance with the EEA Regulations for at least a year immediately prior to the death of the qualified person, namely her spouse. This is reflected in the Record of Proceedings where the judge notes that the Presenting Officer relied on the refusal and reiterated that the appellant had become a family member when she had married and “extended family member was not included”. Even if that were not the case the Presenting Officer had no power to concede this matter, given that it was founded on an error of law.
10. I am satisfied that the Judge of the First-tier Tribunal erred in his interpretation of the EEA Regulations. In order for the appellant to have resided in accordance with the EEA Regulations prior to her marriage (and thus be entitled to a derivative right of residence) she needed to establish that she was an extended family member prior to her marriage. As noted above, an extended family member is someone who is not a family member, which she was not at that point, and who satisfied the conditions in Regulations 8(2), (3), (4) or (5), the latter being the relevant provision for the appellant. To satisfy the condition in that paragraph the person must be the partner of an EEA national, which I accept that she was, and “can prove to the decision maker that she is in a durable relationship with the EEA national.”
11. I take into account that in extended family member cases it is settled law that the Regulations include a discretion to the respondent with regards to whether or not a residence card is issued under Regulation 17(4). (see **YB (EEA reg 17(4) - proper approach) Ivory Coast [2008] UKAIT 00062**). Unlike therefore, the position of a family member, which the appellant subsequently became upon her marriage, the appellant could not be said to be residing in accordance with the Regulations unless and until the respondent issued a residence card and such an application was not made.
12. I accept that although the judge might have been in a position to find that the appellant and her partner were in a relationship akin to marriage at the relevant time that does not assist the appellant as she had not taken

the further step of having asked the respondent to exercise her discretion and issue her with a residence card which would have meant that she was then residing in accordance with the EEA Regulations.

- 13.** I do therefore find an error of law and I set the decision of the First-tier Tribunal aside. Although Mr Hawkin submitted that if I was not with the appellant further submissions and/or a reference to the ECJ would be required on remaking, I am not persuaded that either is required.

### **Remaking the decision**

- 14.** Although I accept that the appellant and her partner were in a relationship prior to their marriage (although she appeared to have only entered the UK as a visitor prior to their marriage) it is not disputed that the couple did not marry until 25 April 2015 (in the UK). The appellant then returned to the Ukraine and was issued with an EEA family permit on 29 July 2015, re-entering the UK on 4 August 2015. Her husband passed away on 3 December 2015. The earliest point when the appellant could have been said to have been residing in accordance with the EEA Regulations was 25 April 2015 (there was no argument before me that the date may in effect have been 4 August 2015 given that the appellant left the UK after her marriage before returning on an EEA family permit; I need not resolve this question as it is ultimately immaterial given the facts in this case).
- 15.** I rely on my reasoning above, that prior to her marriage, in the absence of any application to the respondent, the appellant was not an extended family member for the purposes of the EEA Regulations prior to her marriage and therefore could not be said to have resided in accordance with those Regulations prior to 25 April 2015.
- 16.** The appellant cannot therefore meet the requirements of Regulation 10(2) (b) of the EEA Regulations as she did not reside in accordance with the Regulations for at least the year before the death of the qualified person (in December 2015), for the reasons I have given.
- 17.** Ms Everett relied on the EEA Regulations and submitted that there was nothing to suggest that the Directive had not been properly transposed. The EEA Regulations transposed the provisions of the Citizens Directive, Directive 2004/38/EC. Article 3, beneficiaries provides as follows:
- “1. This Directive shall apply to all union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.
  2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
    - (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants of

family members of the household of the union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

- (b) the partner with whom the Union citizen has a durable relationship, duly attested;

The host Member State shall undertake extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.”

**18.** Article 12 contains the provisions in relation to retention of the right of residence by family members in the event of death or departure of the Union citizens.

**19.** I accept Ms Everett’s submission that it has not been demonstrated there is any error identified in the transposing of the relevant parts of the Directive in relation extended family members and to the retained right of residence.

**20.** In addition to the Rule 24 response, at the hearing Mr Hawkin relied on the judgment of the ECJ in **Netherlands v Reid Case 59/85 [1986]**. Mr Hawkin further relied on Appendix FM, bereaved partner, section BPILR. He submitted that the only requirements in cases of partners of British citizens, where a bereavement was suffered, were eligibility and suitability, the suitability requirements relating to conduct such as criminal offences etc. which did not apply in this case and eligibility required only that the applicant must have had a grant of leave to remain as a partner of a British citizen or a person settled in the UK or a bereaved partner and that their partner must have died and that the relationship was genuine and subsisting with the intention to live permanently in the UK. He submitted that this was much less onerous than the requirements of the EEA Regulations. He relied on the answer to the questions referred to the ECJ in **Reid** as follows:

“Article 7 of the Treaty, in conjunction with Article 48 of the Treaty and Article 7(2) of Regulation No. 1612/68 must be interpreted as meaning that a Member State which permits the unmarried companions of its nationals, who are not themselves nationals of that Member State, to reside in its territory cannot refuse to grant the same advantage to migrant workers who are nationals of other Member States.”

**21.** I am not persuaded that **Reid** is authority for Mr Hawkin’s proposition in the appellant’s case. The respondent does indeed make provision for the unmarried partners of EEA nationals in the form of the relevant EEA Regulations. Although Mr Hawkin’s relied on BPILR under Appendix FM, as indicated that requires the partner of a British or settled person to already have a grant of leave to remain in the UK as a partner (or a bereaved partner).

**22.** To obtain leave to remain as a partner of a British or settled person an applicant must meet criteria which in themselves have arguably much more onerous requirements (rather than less) than those which must be met by the partner of an EEA national seeking to remain in the UK. Given that threshold, of existing leave under the Immigration Rules in one of the specified categories, which a bereaved partner must meet under the Immigration Rules, Mr Hawkin's submission that the appellant is not being given the same advantage as a bereaved partner of a British citizen, is misconceived. It has not been demonstrated therefore that the Secretary of State is refusing to grant the same advantage to migrant workers as to British citizens, with respect to bereaved partners.

**Notice of Decision**

**23.** The decision of the First-tier Tribunal contains an error of law such that it is set aside. I remake the decision dismissing the appellant's appeal.

No anonymity direction was sought or is appropriate in this case and none is made.

Signed

Date: 28 March 2018

Deputy Upper Tribunal Judge Hutchinson

**TO THE RESPONDENT**  
**FEE AWARD**

The appeal of the appellant before the First-tier Tribunal is dismissed and no fee award is made.

Signed

Date: 28 March 2018

Deputy Upper Tribunal Judge Hutchinson