



Neutral Citation Number: [2019] EWCA Civ 124

Case No: C9/2016/0855

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS
Appeal Nos IA/41656/2103, IA/41694/2013 & IA/41680/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/19

Before :

LADY JUSTICE RAFFERTY

LORD JUSTICE HICKINBOTTOM

and

LORD JUSTICE COULSON

Between :

- (1) KANIZ FATIMA
(2) WAQAS ZAMURRAD
(3) FIZZA NISAR

Appellants

- and -

**THE SECRETARY OF STATE FOR
THE HOME DEPARTMENT**

Respondent

Ramby de Mello (instructed by **jJ Law Chambers**) for the **Appellants**
Julia Smyth (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 29 January 2019

Approved Judgment

Lord Justice Hickinbottom:

Introduction

1. The Appellants are all citizens of Pakistan. The Second Appellant (“Waqas”) is the son of the First Appellant (“Mrs Fatima”). The Third Appellant (“Fizza”) is Mrs Fatima’s niece.
2. The Appellants appeal against the determination of the Upper Tribunal (Immigration and Asylum Chamber) (Deputy Upper Tribunal Judge D N Harris (“the Deputy Judge”)) who, on 5 January 2016, having set aside the determination of the First-tier Tribunal promulgated on 30 December 2014 allowing the Appellants’ appeal, remade the decision by refusing their appeal against the decision of the Secretary of State dated 3 September 2013 refusing their applications for a residence card as family members of an EEA national.
3. Before us, Ramby de Mello of Counsel appeared for the Appellants, and Julia Smyth of Counsel for the Secretary of State.

The Legal Background

4. Articles 20 and 21 of the Treaty on the Functioning of the European Union (“the TFEU”) grant Union citizens the primary and individual right to move and reside in the territory of other Member States. That right is subject to the limitations and conditions set out in Directive 2004/38/EC of the European Parliament and of the Council (“the Citizens Directive” or, in this judgment, just “the Directive”), which also grants rights of movement and residence to some “family members”, a term which includes (so far as relevant to this appeal) “spouse” and “the dependent direct relatives in the ascending line and those of the spouse or partner...” (article 2(2)(a) and (d) respectively).
5. Article 3 of the Directive concerns “Beneficiaries”.

“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 or 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 an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.”

The Directive therefore identifies two distinct categories of family member: those who fall within article 2(2) (“direct family members”), and those who fall within article 3(2) (“other family members” or, in the term used in the Immigration (European Economic Area) Regulations 2006 (SI 2006 No 1003) (“the 2006 Regulations”) which implemented the Directive in the United Kingdom (see paragraph 7-10 below), “extended family members”). Direct family members generally enjoy rights of residence. Extended family members do not: in respect of them, a Member State has more limited, facilitation obligations so far as entry and residence are concerned.

6. Three other parts of the Directive are said to be particularly relevant to this appeal.
 - i) Article 6 deals with the rights of Union citizens and non-Union citizen family members to reside in a Member State for under three months. Article 7 provides that various categories of Union citizens have the right of residence in another Member State for over three months including those who are workers, or “have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence...” (article 7(1)(b)), or are family members of a Union citizen who satisfy one of these sets of criteria.
 - ii) Article 10 provides that the right of residence of a non-Union citizen shall be evidenced by the issuing of a document called “Residence card of a family member of a Union citizen”; and it sets out the criteria for the grant of such a document.
 - iii) Article 13 provides that, with caveats not relevant to this appeal, a right of residence by a family member is retained in the event of divorce of the relevant Union citizen’s marriage.
7. At the relevant time, the Directive was transposed into UK law by the 2006 Regulations, which granted rights to “EEA nationals” (i.e. a national of a Member State (other than the UK), Norway, Iceland, Liechtenstein and Switzerland). The 2006 Regulations have been revoked and replaced by the Immigration (European Economic Area) Regulations 2016 (SI 2016 No 1052), which made substantial changes to the relevant provisions from 1 February 2017; but this appeal concerns only the earlier regime.
8. Regulation 7 of the 2006 Regulations, so far as relevant to this appeal, provided:

“(1) ... [F]or the purposes of these Regulations the following persons shall be treated as the family members of another person—

- (a) his spouse or his civil partner;
- (b) ...;
- (c) dependent direct relatives in his ascending line or that of his spouse or his civil partner;
- (d) a person who is to be treated as the family member of that other person under paragraph (3).

(2)

(3) ... [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...”.

9. “Extended family member” is defined in regulation 8, as follows (so far as relevant to this appeal):

“(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).

(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and—

(a) the person is residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of his household;

(b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or

(c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.

....

(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).”

10. It is unnecessary to set out any other provisions of the 2006 Regulations, but:
- i) Articles 7 and 8 of the Directive were given effect by regulations 13 and 14 of the 2006 Regulations. By regulation 15, an EEA national who had resided in the UK in accordance with the Regulations for a continuous period of five years acquired the right to reside in the UK permanently; as did a non-EEA national who had resided in the UK with an EEA national in accordance with the Regulations for a continuous period of five years.
 - ii) Reflecting article 10 of the Directive, regulation 12 of the 2006 Regulations set out the criteria for the issue of an EEA family permit.
 - iii) Regulation 10(5) of the 2006 Regulations implemented article 13 of the Directive.

The Factual Background

11. The Appellants’ immigration history is lengthy; but, for the purposes of this appeal, I can be brief.
12. Mrs Fatima’s eldest son, Hammad Zamurrad (“Hammad”), arrived in the UK with leave in February 2001. In June 2007, he married Fedra de Melo Mourra (“Ms Mourra”), a Portuguese national then living in the UK; and he was granted a residence card on the basis of that marriage. From 2007 until 2012, Ms Mourra worked. In the meantime, Hammad had a job as an accountant; and, in addition to contributing to his own household, he supported Ms Mourra and the Appellants who were at this time still living in Pakistan. In 2011, Hammad was granted indefinite leave to remain on the basis of ten years’ residence. In 2012, he was granted British citizenship. Hammad and Ms Mourra separated in November 2012, and were divorced on 16 May 2013. Hammad has continued to work as an accountant, and his evidence was that he had made nine business trips to other Union territories in the period from 2009 to 2015.
13. In September 2010, the Appellants made applications for EEA residence cards, which were each refused; and, by February 2012, all appeal rights had been exhausted.
14. On 20 March 2013, each Appellant made a second application for an EEA residence card, which were all refused on 3 September 2013. The First-tier Tribunal allowed the appeal, but that determination was set aside by the Deputy Judge; and, on 5 January 2016, he remade the decision refusing the Appellants’ appeals against the refusal of their EEA residence card applications. It is that refusal against which the Appellants now appeal, with permission granted by Christopher Clarke LJ.

15. To complete the relevant chronology, on 2 February 2018 Mrs Fatima made an application for permanent residence on the basis of five years' lawful residence, which was granted on 9 March 2018.

Grounds of Appeal

16. Distinct grounds of appeal were made on behalf of (i) the First Appellant, Mrs Fatima, and (ii) the Second and Third Appellants, Waqas and Fizza.
17. I can deal with the grounds of appeal in respect of Mrs Fatima shortly. In Ms Smyth's skeleton argument, the Secretary of State conceded that Mrs Fatima's appeal was well-founded, because she is to be treated as a "direct" family member of Ms Mourra falling within regulation 7(1)(c) of the 2006 Regulations which includes within its scope "dependent direct relatives in his ascending line *and that of his spouse...*" (emphasis added). At the time of Ms Mourra's divorce from Hammad, Mrs Fatima accordingly had a right to reside in the UK. After the divorce, Mrs Fatima retained that right to reside pursuant to regulation 10(5) of the 2006 Regulations.
18. However, Ms Smyth contended – and, in his opening before us, Mr de Mello conceded – that the appeal should be refused as now being academic because, as I have described, last year Mrs Fatima was granted a right to permanent residence on the basis of the length of her own lawful residence. Therefore, whether she had a right to reside as a result of her relationship with anyone else is now immaterial to her status.
19. It is therefore common ground that the First Appellant's appeal be dismissed on that basis.
20. In respect of the Second and Third Appellants, Mr de Mello accepted that neither fell within the scope of article 2(2) of the Directive, or regulation 7 of the 2006 Regulations. However, he submitted the Directive still gave them rights and/or imposed obligations on the UK so far as their residence here is concerned. He relied upon two grounds.
21. First, he submitted that the Deputy Judge erred in holding that regulation 8(2)(c) of the 2006 Regulations required the extended family member to be dependent upon the EEA national: it also applied where the dependency was on a non-EEA national spouse of an EEA national if that spouse provided relevant resources. He submitted that, although the criterion in regulation 8(2)(c) is that the non-EEA national "has joined the EEA national in the United Kingdom and continues to be dependent upon him [i.e. the EEA national]", this has to be construed in the light of recent Court of Justice of the European Union ("CJEU") authorities which explain and extend the concept of "dependency" for the purposes of article 3(2)(a) (and, thus, regulation 7(2) of the 2006 Regulations) to include dependency on the EEA national and a non-EEA national spouse considered together. By analogy, "dependency" in regulation 8(2) should be viewed in the same way. Thus, Mr de Mello submitted, Waqas and Fizza were dependent extended family members for the purposes of regulation 8(2)(c).
22. In support of this submission, Mr de Mello relied upon two CJEU authorities, Singh v Minister of Justice and Equality Case C-218/14, [2015] 3 WLR 1311 and Secretary of State for the Home Department v Banger Case C-89/17, [2019] 1 CMLR 6.

23. In Singh, each of the applicants was a non-Union citizen who had married a Union citizen and had thus gained rights of residence as a spouse. The issue was whether, in applying article 7(1)(b) (see paragraph 6(1) above), the “sufficient resources” that a Union citizen must have to be entitled to the right of residence in another Member State could include the earnings of the non-Union spouse. The CJEU held that the source of the resources required to satisfy article 7(1)(b) is immaterial; and therefore a Union citizen has sufficient resources for himself and his family members not to become a burden on the social services of the host Member State within the meaning of that article even where those resources derive in part from his non-Union citizen spouse (see [73]-[76]). Mr de Mello submitted that dependency upon a non-Union citizen was therefore within the scope of article 7(1)(b); and, by analogy, “dependants” as used in article 3(2)(a) must be construed against the same gauge. Thus, the host Member State (in our case, of course, the UK) must facilitate the residence of such non-Union citizens in the position of Waqas and Fizza who were at all relevant times dependent upon Hammad who, as Ms Mourra’s spouse, financially contributed to her household. The Secretary of State – and, in his turn, the Deputy Judge – erred in failing to consider Waqas and Fizza in that light.
24. In Banger, it was common ground that Mrs Banger (the claimant/respondent) fell within article 3(2)(b) of the Directive because she was in a durable relationship with a British citizen (and, thus, he was a Union citizen whilst they lived in the Netherlands). The primary issue in the case was whether her status changed as a result of her and her partner moving to the UK (where, because he was a UK citizen, her partner would cease to be a “Union citizen”); but the passages to which we were referred (notably [AG46] and following, and [AG84]-[AG90] of the Advocate General’s Opinion; and [27] and following of the Court’s judgment) concerned the consequences of falling within the article 3(2) facilitation regime. Mr de Mello submitted that these passages assisted in construing the scope of article 3.
25. I am entirely unpersuaded by these submissions. Regulation 8(2)(c) is clear on its face: its scope is limited to those who have joined an EEA national in the UK and continue to be dependent “upon him”, i.e. upon the EEA national. Singh is not to the point, as not concerning “dependency” at all. In that case each of the applicants had the right of residence, not as a dependent, but as a spouse, the issue being whether or not the relevant Union citizen herself had a right of residence which turned on the issue of the issue of access to sufficient resources so as not to become a burden on the social assistance system of the host Member State, Ireland. Nothing can be drawn from Singh, whether by analogy or otherwise, that assists in the interpretation of the concept of “dependency” in article 3(2) (and, thus, regulation 8(2)(c) of the 2006 Regulations which implemented that article). Nor is Banger any more helpful to Mr de Mello’s cause: the consequences of falling within the article 3(2) regime cannot logically or in practice assist in construing the scope of that regime.
26. In my view, article 3(2) of the Directive means what it says: the dependency has to be on the relevant Union citizen. That is clearly and correctly transposed into the domestic law by regulation 8(2)(c) of the 2006 Regulations.
27. Ms Smyth submitted that, even if Mr de Mello were correct in his construction of the scope of article 3(2), and Waqas and Fizza qualified as extended family members before Hammad’s divorce, to retain that right pursuant to regulation 10(1) and (5)(a) it is insufficient merely to qualify as such – there must have been a positive exercise of

discretion and issue of a residence card by the Secretary of State under regulation 17(4). In the case of the two Appellants, there was no exercise of discretion and neither was granted a residence card.

28. That submission appears to me to have considerable force; but it is unnecessary to determine it. Mr de Mello accepted that, if he failed to establish his primary proposition (as he has), this first ground could not succeed.
29. The first ground consequently fails.
30. As his second ground, Mr de Mello submitted that Waqas and Fizza had derived rights of residence as a result of Hammad's cross-border work within the Union, i.e. if they are removed from the UK, Hammad's rights as a Union citizen under article 20 and 21 of the TFEU will be infringed because he will be forced to leave the territory of the Member States or he will be discouraged from exercising his right to free movement within that territory.
31. In granting permission to appeal, Christopher Clarke LJ was less than encouraging in respect of this ground; and, in the event, it was but faintly pursued by Mr de Mello. I do not consider it has any substance. I accept that Hammad does some work abroad. However, there is no suggestion that he is dependent upon Waqas and/or Fizza: if they were to leave the UK, he would not be compelled to follow them. He would have the free choice of voluntarily joining them in Pakistan or not. There is no room in this case for the application of the principle drawn from Zambrano v Office national de l'emploi Case No C-34/09, [2012] QB 265, in which it was held that a parent could derive a right of residence parasitic upon a child's rights as a Union citizen.
32. As Ms Smyth emphasised in her helpful and compelling argument, whilst Carpenter v Secretary of State for the Home Department Case C-60/00, [2003] QB 416 and S v Minister voor Immigratie, Intergatie en Asiel Case C-457/12, [2014] QB 1207 establish that the effectiveness of the right to freedom of movement for workers or to provide services is capable of giving rise to a derived right of residence to a non-Union national who is a family member of the Union worker or service provider, a derived right will only be granted where such a grant is necessary to guarantee the Union citizen's effective exercise of the right to work or provide services. In this case, as the Deputy Judge found (at [30] of his determination), there is no evidential basis for the proposition that, if Waqas and Fizza were to leave the Union territories, Hammad would in some way be discouraged from exercising his rights to freedom of travel etc within those territories. That finding is unimpeachable; and, on the evidence, in my view clearly correct.

Conclusion

33. For those reasons, I would dismiss this appeal.

Lord Justice Coulson:

34. I agree.

Lady Justice Rafferty:

35. I also agree.