



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

Appeal Numbers:

IA/28007/2013
IA/28008/2013
IA/28009/2013
IA/28010/2013
IA/28011/2013

THE IMMIGRATION ACTS

Heard at: Manchester

On: 20th May 2014

**Determination
Promulgated**

On 5th August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

**Zamir Rauf
Uzma Atta
Hamza Zamir
Iqra Zamir
Ibrahim Zamir
(no anonymity order made)**

Appellants

and

Secretary of State for the Home Department

Respondent

For the Appellant: Ms Khan, Counsel instructed by Parkview Solicitors
For the Respondents: Mr Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are a father, mother and their three dependent children. Mr Rauf is a national of the Netherlands. His family members are all Pakistani. They have permission to appeal against the decision of the First-tier Tribunal (Judge Hague) to dismiss their linked appeals against the Respondent's decision to refuse to issue them with a residence card confirming their permanent rights of residence under the Immigration (EEA) Regulations 2006.
2. The Respondent had refused the applications on the grounds that Mr Rauf had not exercised his treaty rights in the UK for the specified five years. He had come to the UK as a worker but had suffered a traumatic brain injury and was suffering from psychosis so was unable to continue. He contended that he was a worker who had ceased activity. The rest of the family were refused leave in line with Mr Rauf.
3. The First-tier Tribunal found that Mr Rauf could not be considered a worker who had ceased activity within the meaning of the Regulations because he had ceased work only 15 months after his arrival in the UK. In order to qualify for that status he needed to have worked continuously for 2 years prior to stopping work. Judge Hague rejected all arguments to the contrary and dismissed the appeals.
4. The Appellants now appeal to the Upper Tribunal on the ground that the Respondent, and the First-tier Tribunal, failed to recognise the significance of the fact that two of the children had started their education before their father ceased work in the UK. Even if they were not entitled to a permanent right of residence under the Regulations they had established a "derivative right of residence" under Article 12 of Regulation No 1612/68: Ibrahim (European Citizenship) [2010] EUECJ C-310/08. Although the grounds of appeal concede that this was not an argument put to Judge Hague, it is submitted to be *Robinson*¹ obvious. It is further submitted that the First-tier Tribunal failed to consider any of the appeals under Article 8 ECHR, which had been specifically pleaded in the grounds.

Error of Law

5. There is no dispute that Judge Hague was entitled to reach the conclusions he did about whether the Appellants should be granted permanent residence cards. The alleged error of law is that he did not consider an argument that was not put to him.
6. Unpalatable as that might seem, Ms Khan was able to rely on the decision in Alarape and Anr (Article 12, EC Reg 1612/68) Nigeria [2011] UKUT 00413 (IAC) in which the Tribunal consented to considering this new point, not raised before the First-tier Tribunal in that case either:

¹ Robinson v SSHD [1997] Imm AR 568.

“Albeit the appellants’ representatives did not raise Article 12 of Regulation No 1612/68 in their grounds of appeal to the FTT or at the hearing, it was raised in the application for permission to appeal and its potential relevance to the EU rights of both appellants was a point, given the state of the evidence before it, that it was obliged to consider, even of its own motion” [35].

7. See Amos [2011] EWCA Civ 552 to similar effect. Mr Harrison agreed that as a matter of law these children either have that derivative right of residence or they don’t. I therefore find that it was an error of law not to have considered the derivative rights of residence of the Third and Fourth Appellants.
8. In respect of Article 8 Mr Harrison agreed that Article 8 had been raised in the grounds of appeal to the First-tier Tribunal and as such the failure to deal with it was an error of law.
9. I therefore find that the decision of the First-tier Tribunal contained errors of law such that it should be set aside, save for the findings relating to permanent residence are preserved.

The Re-Made Decision

10. The uncontested facts are that Mr Rauf came to the UK in November 2006 and started work in April 2007. In September of that year his wife and children joined him, having been granted EEA family permits by the British Embassy in Istanbul. The two elder children started to attend school and within two months of arrival had been granted residence cards. Mr Rauf ceased employment in February 2008 as a result of mental incapacity.
11. I find as fact that the children entered school when their father was in full time employment and was a worker within the meaning of the Regulations. They have therefore acquired a “derivative right of residence” that is independent of any requirements as to health insurance or financial self-sufficiency. See Ibrahim:

40. The right derived by children from Article 12 of Regulation No 1612/68 is also not dependent on the right of residence of their parents in the host Member State. It is settled case-law that Article 12 requires only that the child has lived with his parents or either one of them in a Member State while at least one of them resided there as a worker (Case 197/86 *Brown* [1988] ECR 3205, paragraph 30, and *Gaal*, paragraph 27).

41. To accept that children of former migrant workers can continue their education in the host Member State although their parents no longer reside there is equivalent to allowing them a right of residence which is independent of that conferred on their parents, such a right being based on Article 12.

...

50. It follows that the children of a national of a Member State who works or has worked in the host Member State and the parent who is their primary carer can claim a right of residence in the latter State on the sole basis of Article 12 of Regulation No 1612/68, without being required to satisfy the conditions laid down in Directive 2004/38.

12. The appeals of the Third and Fourth Appellants are allowed on that basis. They meet the requirements of Regulation 15A (3). Mr Harrison agreed that in those circumstances their mother, as their primary carer, qualifies for a residence card under Regulation 15A(4) and their little brother under Regulation 15A(5):

15A. (1) A person ("P") who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.

...

(3) P satisfies the criteria in this paragraph if—

- (a) P is the child of an EEA national ("the EEA national parent");
- (b) P resided in the United Kingdom at a time when the EEA national parent was residing in the United Kingdom as a worker; and
- (c) P is in education in the United Kingdom and was in education there at a time when the EEA national parent was in the United Kingdom.

(4) P satisfies the criteria in this paragraph if—

- (a) P is the primary carer of a person meeting the criteria in paragraph (3) ("the relevant person"); and
- (b) the relevant person would be unable to

continue to be educated in the United Kingdom if P were required to leave.

...

(5) P satisfies the criteria in this paragraph if—

- (a) P is under the age of 18;
- (b) P's primary carer is entitled to a derivative right to reside in the United Kingdom by virtue of paragraph (2) or (4);
- (c) P does not have leave to enter, or remain in, the United Kingdom; and
- (d) requiring P to leave the United Kingdom would prevent P's primary carer from residing in the United Kingdom.

13. I accept and find as fact that the Second Appellant is the primary carer of her children and that if she were compelled to leave the UK they would have to go with her. The medical evidence indicates that the First Appellant is suffering from psychosis, possibly paranoid schizophrenia. He is not in a position to care for his children on his own, and nor should he be expected to do so.

14. The appeals are therefore allowed with reference to the Regulations. It follows that I need not address Article 8.

Decisions

15. The decision of the First-tier Tribunal contains an error of law and it is set aside to the extent identified above.

16. I re-make the decisions in the appeals by allowing them under the Regulations.

17. I make no direction as to anonymity. None was in place before the First-tier Tribunal and I was not asked to make one in the Upper Tribunal.

Deputy Upper Tribunal Judge Bruce
23rd July 2014