



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/28511/2015

THE IMMIGRATION ACTS

Heard at Field House
On 12 April 2017

Decision & Reasons Promulgated
On 15 June 2017

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

MISS NOOR FATIMAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Gajjar
For the Respondent: Mr Avery

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan born in 1986. Her immigration history is that on 11 October 2007 she was refused an entry clearance from abroad. She entered the UK on a Tier 4 (General) Student visa on 23 June 2009 valid until 30 June 2011. On 28 March 2011 she was granted Tier 1 HS Post-Study leave until 4 May 2013. On 14 December 2012 she sought leave as an entrepreneur but this was refused. She overstayed. On 2 March 2015 she submitted an application for a residence card as a confirmation of a right to reside in the UK. The application was made under regulation 9 of the Immigration (European Economic Area) Regulations 2006.
2. The application was refused on 3 August 2015.

3. The basis of the refusal was that the Appellant, who is the sister of the British citizen Sponsor, was not a family member as required. Rather, she is an extended family member.

First tier hearing

4. Following a hearing at Taylor House on 23 June 2016 Judge of the First-tier N M K Lawrence dismissed the appeal under the Regulations. His findings are at paragraph [8] to [10] of his decision.
5. At [8] he found that regulation 9 applies to *'partners'* of the British national who moved to another EEA State and not to the British national's sibling.
6. At [9] he found that as an extended family member under regulation 8, she does not meet the requirements of regulation 9. He noted, also, that regulation 7(3) provides that *'a person who is an extended family member'* be treated as a *'family member'* if that person *'has been issued with an EEA family permit, a registration certificate or a residence card ... as long as he continues to satisfy conditions in regulation 8(2) ...'*. The judge, however, found that there was no evidence that regulation 7(3) applied in this case: *'There is no evidence that the Appellant was ever issued with a family permit, a registration certificate or a residence card.'*
7. At [10] the judge noted that he had been referred to an unreported Upper Tribunal decision **Campelo Cain** (IA/40868/2013) promulgated in October 2014. In that case the UT considered that regulation 9(2) included not only the spouse or civil partner but also an applicant who is in a durable relationship. Judge Lawrence distinguished that case as the Appellant in the instant case is in none of those categories. Such was the same in respect of a European Court of Justice case **O & B C.456/12**.
8. Miss Fatimah sought permission to appeal which was granted on 27 February 2017.

Error of law hearing

9. At the error of law hearing before me Mr Gajjar made two points. First, the judge had been wrong to find that there had been no evidence that the Appellant was ever issued with a registration certificate. In fact, there was evidence before him in the bundle that she had been issued with a registration certificate in the Republic of Ireland. Had he been aware of that and applying regulation 7(3) he would have concluded that the Appellant satisfied regulations 7 and 9.
10. Second, in **Campelo Cain** it was found that regulation 9 also applies to an unmarried partner, thus an *'extended family member'*. There was thus no reason why it should not also apply to a sibling who is also an *'extended family member'*.
11. Further, the Directive 2004/38/EC makes no distinction between a *'family member'* and an *'extended family member'* in the exercise of an EEA treaty right.
12. Mr Gajjar asked me to set aside the decision and remake it by allowing the appeal.

13. In reply Mr Avery on the first point questioned whether a registration certificate given by the Irish Authorities had validity in the UK. Also, he noted that the registration certificate had expired.
14. On the second point, Mr Avery referred to the words '*in accordance with its national legislation*' in the Directive in respect of facilitating entry and residence for other family members. The way an extended family member is recognised is by regulation 17(4).

Consideration

15. In considering this matter the issue is whether the Appellant satisfies regulation 9.
16. Regulation 9 resulted from the Respondent's interpretation of the effect of **Surinder Singh (case C-370/90) [1992]**. In essence the principle established by the **Surinder Singh** case is that the right in European Union law for a person moving from one Member State to another must include a right to return, otherwise a person would be deterred from moving in the first place. If a person is exercising a right of return to his home Member State he is therefore doing so under European Union law. Therefore, it is European Union law and not the domestic Rules of the person's Member State that also applies to any family members. In the judgment the court held that free movement laws:

'Require a member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who has gone to work there as an employed person as envisaged by Article 48 of the treaty and returns to establish himself or herself as envisaged by Article 52 of the treaty in the State of which he or she is a national. A spouse must enjoy at least the same rights as would be granted to him or her under community law if his or her spouse entered and resided in another Member State.'

17. The Respondent's interpretation of **Surinder Singh** is set out in regulation 9, which is also set out in paragraph [7] of the judge's decision. The crux is that a residence card will be issued to a non-EEA national who is the spouse or civil partner or other direct family member of a British citizen if certain conditions are met.
18. There is no dispute that these conditions are satisfied. The only issue taken by the Respondent was that the Appellant is not a family member of the British citizen. Family members are defined in Regulation 7. In summary, the spouse or civil partner; direct descendants of her, her spouse or civil partner who are under 21 or dependants of her, her spouse or civil partner; dependent direct relatives in her ascending line or that of her spouse or civil partner.
19. In this appeal the Appellant is not a family member as defined because she is a sibling. She is an '*extended family member*' who satisfies the conditions in regulation 8.
20. The judge found that the Appellant, being an extended family member and not a family member, specifically a partner, could not satisfy Regulation 9.

21. As indicated, Mr Gajjar's first point was that the judge failed to have regard to regulation 7(3) which provides that

'...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 ... in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked.'

22. The judge states (at [9]) *'there is no evidence that the Appellant was ever issued with "a family permit, a registration certificate or a residence card."*' However, he failed to notice that there was in fact a copy of a registration certificate in the Appellant's bundle. It was issued by the Government of the Republic of Ireland.

23. Whilst the failure to notice that there was a registration certificate was an error it was not material. In 'General interpretation' (regulation 2) it states:

"'registration certificate" means a certificate issued to an EEA national, in accordance with regulation 16, as proof of the holder's right of residence in the United Kingdom as at the date of issue.'

24. A registration certificate issued by the Irish Authorities is not proof of the holder's right of residence in the UK.

25. The second limb of Mr Gajjar's submission was that Directive 2004/38/EC makes no distinction between a family member and an extended family member in the exercise of an EEA treaty right.

26. Article 3 of the Directive provides:

'Article 3 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...'*
 - (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.'

27. There appears to be a tension between Article 3 of the Directive and regulation 8 of the EEA Regulations. From a plain reading of Article 3 it does not require that only a family member may move to or reside with the Union citizen. Rather it includes '*any other family members irrespective of their nationality*'.
28. Such is not the position under the regulations. However, I note two other significant matters which qualify that position. First, as Mr Avery noted, it is specifically stated in Article 3 that '*the host Member State shall, in accordance with its national legislation facilitate entry and residence ...*'
29. Such indicates that the principle of subsidiarity applies.
30. Further, it provides that 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*'. This indicates a margin of appreciation by the host Member State. It is reflected in regulation 17 (4).
31. I conclude that Ms Ayub being the EU citizen concerned cannot acquire from the Directive a requirement that the third country national sibling, the Appellant, be granted a right to reside with her in the UK or that the Appellant can derive any such right from Ms Ayub.
32. Accordingly, I consider the judge's conclusion that the Appellant, as sibling and not the spouse or partner of Ms Ayub, could not succeed in her appeal was correct.
33. There is a final matter which confirms in my mind that the judge was correct to dismiss the appeal. As Mr Avery indicated there is no right of appeal against a decision refusing to issue a residence card to a person who is an extended family member (per Sala (EFMs - Right of Appeal) [2016] UKUT 411).
34. The Appellant is an extended family member. Thus, in any event, the appeal would have to be dismissed for want of jurisdiction.

Notice of Decision

The judge's decision shows no material error of law. That decision dismissing the appeal under the Immigration (European Economic Area) Regulations 2016 stands.

No anonymity direction is made.

Signed

Date 14/6/2017

Upper Tribunal Judge Mr D Conway