



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/06428/2014
IA/08108/2014

THE IMMIGRATION ACTS

Heard at Field House
On 2 December 2014

Determination Promulgated
On 9 December 2014

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MS BETINA FERNANDES AZEVEDO JUNQUEIRA
MISS LADJA FERNANDES MUNHOZ QUEIROZ
(No Anonymity Direction Made)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Wortley a legal representative from Wortley Legal Consultants
For the Respondent: Mr S Walker a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are citizens of Brazil born respectively on 22 March 1978 and 21 October 1997. They are mother and daughter. The daughter is the mother's dependant for the purposes of this appeal. I will refer to them as the appellant and the daughter. They have been given permission to appeal the determination of First-Tier Tribunal Judge JDL Edwards ("the FTTJ") who dismissed their appeals against the respondent's decisions of 15 October 2013

to refuse their applications for residence card as confirmation of their right to reside in the United Kingdom. The appellant had applied on the basis that she retained a right of residence as the former spouse of an EEA national under the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") with her daughter as her family member.

2. The respondent refused the applications because she was not satisfied that the appellants had submitted sufficient documentary evidence to show that they met regulation 15(1)b of the 2006 Regulations.
3. The appellants appealed and the FTTJ heard their appeal on 11 September 2014. Both parties were represented, the appellants by Ms Wortley who appeared before me.
4. In paragraph 10 of the determination the FTTJ said; "The sole point at issue in this appeal is whether or not Mrs Junquiera qualifies under Regulation 10(5). She married Mr Ule in New York on 7th March 2000. They were divorced by Cambridge County Court on 19th of July 2011. It is accepted that Mr Ule was and is exercising treaty rights in UK."
5. The FTTJ's conclusion was set out in paragraph 15; "In the light of the evidence by Mrs Junquiera, that she was neither an employee, self-employed person nor a self-sufficient person between her divorce and 30th of March 2012, she cannot satisfy Regulation 10(6). There is no reference therein to a person seeking employment as the Mrs Junquiera (sic) claimed. This appeal must fail on that basis."
6. The FTTJ went on to consider Article 8 human rights grounds, reaching the conclusion that no human rights point arose because there had been no decision to remove the appellants. The appeals were dismissed under the 2006 Regulations and on human rights grounds.
7. The appellants applied for and were granted permission to appeal. The main point in the grounds is that the FTTJ erred in law by stating in paragraph 15 that the appellant had to show that she was "an employee, self-employed person or self-sufficient person" Mr Walker concedes and I find that this was a clear and material error of law. What the appellant had to show was that she was "a worker, a self-employed person or a self-sufficient person under regulation 6" (my emphasis). Regulation 10 of the 2006 Regulations provides;

"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 conditions in this paragraph if –

(a) he was a family member of a qualified person when the qualified 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; and

(c) he satisfies the condition in paragraph (6).

(3) A person satisfies the conditions in this paragraph if –

(a) he is the 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 sub-paragraph (i) when he died or is the spouse or civil partner of the person mentioned in sub-paragraph (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 conditions in this paragraph if the person is the parent with actual custody of a child who satisfies the condition in paragraph (3).

(5) A person satisfies the conditions in this paragraph if –

(a) he ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person;

(b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;

(c) he satisfies the condition in paragraph (6); and

(d) either –

(i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

(ii) the former spouse or civil partner of the qualified person has custody of a child of the qualified person;

(iii) the former spouse or civil partner of the qualified person has the right of access to a child of the qualified person under the age of 18 and a court has ordered that such access must take place in the United Kingdom; or

(iv) the continued right of residence in the United Kingdom of the person is warranted by particularly difficult circumstances, such as he or another family member having been a victim of domestic violence while the marriage or civil partnership was subsisting.

(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).

(7) In this regulation, "educational course" means a course within the scope of Article 12 of Council Regulation (EEC) No. 1612/68 on freedom of movement for workers.

(8) A person with a permanent right of residence under regulation 15 shall not become a family member who has retained the right of residence on the death or departure from the United Kingdom of the qualified person or the termination of the marriage or civil partnership, as the case may be, and a family member who has retained the right of residence shall cease to have that status on acquiring a permanent right of residence under regulation 15."

8. It is common ground that the appellant meets these requirements, subject to the condition in 10(6)(a) and for her daughter, subject to the condition in 10(6)(b). Regulation 6 provides;

"Qualified person"

6. (1) In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as –

(a) a jobseeker;

(b) a worker;

(c) a self-employed person;

(d) a self-sufficient person; or

(e) a student.

(2) A person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if –

(a) he is temporarily unable to work as the result of an illness or accident;

(b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom, provided that he has registered as a jobseeker with the relevant employment office and –

(i) he was employed for one year or more before becoming unemployed;

(ii) he has been unemployed for no more than six months; or

(iii) he can provide evidence that he is seeking employment in the United Kingdom and has a genuine chance of being engaged;

(c) he is involuntarily unemployed and has embarked on vocational training; or

(d) he has voluntarily ceased working and embarked on vocational training that is related to his previous employment.

(3) A person who is no longer in self-employment shall not cease to be treated as a self-employed person for the purpose of paragraph (1)(c) if he is temporarily unable to pursue his activity as a self-employed person as the result of an illness or accident.

(4) For the purpose of paragraph (1)(a), "jobseeker" means a person who enters the United Kingdom in order to seek employment and can provide evidence that he is seeking employment and has a genuine chance of being engaged."

9. Whilst in paragraph 5 the FTTJ mentions the appellants' two bundles of documents running to 86 pages these do not appear to have been considered in any detail; in particular the detailed skeleton argument between pages 4 and 16, the appellant's witness statement between pages 17 and 20 and the supporting documentary evidence in the rest of the bundles. I find that the FTTJ erred in law by failing to give proper consideration to the evidence before him.
10. It is most unusual for a Presenting Officer representing the respondent in the First-Tier Tribunal to concede an appeal. However, this is what appears to have happened. The FTTJ records, in paragraph 12; "For the respondent, Miss Chopra submitted that Mrs Junquiera had demonstrated that she qualified for

a permanent residence card, by virtue of Regulation 10(6)". It is reasonable to conclude that Ms Chopra did so in the light of the evidence before her and the FTTJ.

11. Mr Walker not only conceded that the determination contained a material error of law and should be set aside but that on the evidence before him the FTTJ should have allowed the appellants' appeals under the 2006 Regulations. I agree. The recognition by both Presenting Officers that the appeals should be allowed under the 2006 Regulations enables me to summarise my reasons for the same conclusion.
12. It is common ground, accepted by the respondent, that the appellant's EEA sponsor was exercising Treaty rights at the date of the decree absolute of divorce. By that stage the marriage had lasted more than three years and the appellant and her husband had lived together in the UK for at least one year during the marriage. I find that the evidence submitted by the appellant establishes, to the standard of the balance of probabilities, that between the date of the divorce and the date of the application she was at all times either a worker or self-employed. She was a worker because she was employed, in receipt of Jobseeker's Allowance or on holiday in Brazil for a short period of less than two months. During the holiday in Brazil she was both self-employed and continued to seek work in the UK using the Internet and sending emails. By the time she returned from holiday in Brazil and as a result of her efforts she had obtained employment with her current employers which commenced on 24 September 2013. There was no period during which the appellant did not fall within one of the required categories.
13. I find that the appellant has established that she meets the requirements of the 2006 Regulations and is entitled to a residence card as confirmation of her right to reside in the UK. Her daughter is also entitled to a residence card as her family member.
14. Ms Wortley said that if the appellant's appeals were allowed under the 2006 Regulations they did not wish to pursue the appeals on Article 8 human rights grounds.
15. I have not been asked to make an anonymity direction and can see no good reason to do so.
16. Having found that the FTTJ erred in law I set aside the decisions and remake them, allowing the appeals of both appellants under the 2006 Regulations.

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Signed
Upper Tribunal Judge Moulden

Date 3 December 2014