IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/33617/2013
IA/38757/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 February 2015	**16 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS AKOUA JOSEPHINE KOMENAN
MR YANNICK JORDANE KOUAME
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr P Nath, Home Office Presenting Officer
For the Respondents: Mr Bandegani, Counsel instructed by Kirwins Solicitors

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal, the Secretary of State as the respondent and Ms Komenan and Mr Kouame as the appellants.

2. The appellants are citizens of the Ivory Coast born on 11 December 1970 and 18 May 1994 and they applied for permanent residence cards on 30 May 2013 as family members of an EEA national. That was refused on the

basis that it could not be established that Mr Seri Clement Tina, a Finnish national, born on 20 December 1966, could be shown as having exercised treaty rights in the UK for a continuous period of five years. Evidence from the EEA national sponsor showed he had been made redundant in the UK in 2011 and gone back to Finland for retraining with a view to enhancing his employment prospects.

3. First-tier Tribunal Judge Raymond allowed the appeals of both appellants further to Regulation 15(2) accepting that Mr Tina as the EEA national was working for more than five years up to mid 2011 in the United Kingdom, from whence he went to look for work after being made redundant in February or March 2012 for training.

4. The judge accepted two things. First that the sponsor did not lose his permanent residence status from that point as under Regulation 15(2) only an absence of two years can have that result given he had only been out of the UK since February or March 2012.

5. Also in paragraph 27 the judge found that the sponsor did not have to be a qualified person from mid 2011 as he was already by then a person with permanent right of residence.

6. Further, at paragraph 14, the judge recorded that the copied P60s and P45s in the appeal bundle for the appellant established that from 2002 the sponsor Mr Tina had been working in the UK and that from 2007 onwards there were five P60s covering five years of employment to 2011 and with P45s for 2005-2006 pointing to employment before 2007.

7. An application for permission to appeal was granted on the basis that in respect of Regulation 15(2) Mr Tina left the UK in April 2012 and on 28 August 2014 he was still in Finland due to commence work placement and did not return. The sponsor had been out of the UK for a period in excess of two years and had lost his right to permanent residence in the UK and therefore the appeal of the appellants could not succeed.

8. Permission to appeal was granted by First-tier Tribunal Judge Levin on the basis that the respondent argued that the judge wrongly applied the European cases of **Lair** and **Bernini** in his finding that by studying in Finland the sponsor had not lost his continuity of residence in the UK.

9. I find there is no error of law in the determination. Mr Bandegani took me to the Directive 2004/58-EC to consider whether the appellants had met the requirements of Regulation 15(2) independently. The main appellant had married the EU national on 15 October 2008. It could be shown that, even if it was concluded that the sponsor had lost his permanent residence, he had not done so by 15 October 2013. The appellant's sponsor had worked for five years to 2011 and this was found at paragraph 24 of the judge's determination. Article 16(1) of the Directive confirmed that Union citizens who had resided legally for a continuous period of five years should have a permanent right of residence, their not subject to the condition in chapter 3, such as sickness insurance. Thus, the sponsor had a permanent right of residence and did not require for him to continue economic activity as per the Directive. This is exactly that

which the judge found at paragraph 25 as only an absence of two years could have that result. As stated at 16.4 once acquired the right of permanent residence shall be lost only through absence from the host Member State for a period **exceeding** two consecutive years.

10. Thus, in 2013 when the appellants completed five years' residence, the appellants' sponsor, Mr Tina had not lost his five years' permanent residence. At that point he was not out of the UK for a period of two years. Thus the judge's finding at paragraph 25 was legally sustainable and therefore what the Secretary of State stated at paragraphs 11 and 12 of the permission to appeal was indeed irrelevant. I can accept that the judge may have erred at paragraphs 28 and 29 , in his legal analysis in relation to **Lair v Hanover University** [1988] ECR 3161 **and Bernini v Minister van Onderwijs en Wetenschappen [1992] ECR 1-1071**. The question was whether the appellant's residence continued during the period February 2012 to May 2013 and the answer can be found at Article 12(3) of the Directive which confirms that a Union citizen's departure from the host Member State or his/her death shall not incur the loss of right of residence of his/her children or of the parent who has actual custody of the children irrespective of the nationality if the children reside in the host state and are enrolled at an educational establishment for the purpose of studying there until the completion of their studies. The judge accepted that at that point the second appellant was, when the union citizen departed, under the age of 18 and in full-time education. Therefore their residence would continue regardless of the situation at the date of hearing.

11. A further point was made in that Regulation 15(2) of the EEA Regulation confirms a permanent right of residence on a family member of an EEA national who is not himself an EEA national but has resided in the UK with the EEA national in accordance with these Regulations for a continuous period of five years. The point is that the judge found at paragraph 14 that Mr Tina had been living in the UK since at least 2005/2006, in employment [14]. Although Mr Tina and the first appellant married at Enfield Registry on 13 May 2008 they had lived together as a family since 2006. Thus the appellants could claim a period of five years in accordance with the Regulations as an extended family member during which time they were living in accordance with these Regulations until the time when the first appellant and the sponsor were married. Thereafter and until the sponsor left the UK which was in 2005 they had both clocked up five years in which to base their permanent residence.

Notice of Decision

12. I therefore find that even if there was an error in the determination of the judge it was not a material error and the decision shall stand.

No anonymity direction is made.

Signed Date 14th March 2015

Deputy Upper Tribunal Judge Rimington