



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/01626/2016

THE IMMIGRATION ACTS

Heard at Field House  
on 10 July 2018

Decision & Reasons Promulgated  
On 27 July 2018

Before

UPPER TRIBUNAL JUDGE DAWSON  
UPPER TRIBUNAL JUDGE BLUM

Between

ANDREW [I]  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Balroop, Counsel, instructed by Chris Alexander Solicitors  
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Beg (the judge), promulgated on 21 November 2017, dismissing the appellant's appeal against the respondent's decision dated 28 January 2016 refusing to issue him a

permanent residence card under the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations).

### **Factual Background**

2. The appellant is a national of Nigeria, date of birth 27 June 1971. According to his witness statement dated 20 April 2017 he entered the UK in 2000. On 30 December 2006 he was served with a notice indicating that he was an illegal entrant as there was no evidence of his lawful entry to the UK.
3. The appellant claims to have commenced a relationship with a dual Italian/Nigerian national in 2005. Their first child was born in April 2007. On 11 April 2008 the appellant applied for a residence card as an extended family member of an EEA national. On 31 August 2010 he was issued with a residence card. This was valid for 5 years, until 31 August 2013. The appellant and his former partner had two further children, born in April 2009 and November 2011.
4. On 12 August 2015 the appellant applied for a permanent residence card as confirmation of a right of permanent residence in the UK. According to a solicitor's covering letter accompanying the application the appellant's relationship with his former partner broke down in 2013. The covering letter referred to a Family Court Order issued on 7 July 2015 giving the appellant overnight contact with his children twice a month and visiting contact two Saturdays a month, and indicating that the children's holidays shall be shared between the parents as may be agreed between them. The covering letter relied on Reg 10(5), although this related to the termination of a marriage or civil partnership.
5. The respondent was not satisfied that the appellant had acquired a right of permanent residence under Reg 15 of the 2006 Regulations, or that he had a retained right of residence under Reg 10 of the 2006 regulations, and refused to issue the permanent residence card. The respondent noted that the appellant and his former partner were never married, and that the appellant did not have sole custody of their children. The respondent's stated that the appellant had a right of appeal under Reg 26 of the 2006 Regulations but that if the appellant also wished to rely on his private/family life rights he needed to make an application on the appropriate form.

### **The decision of the First-tier Tribunal**

6. The grounds of appeal contended, *inter alia*, that the appellant shared custody of his children as they spent weekends, nights and part of the holidays with him, and that he met the requirements of Reg 10(4) of the 2006 Regulations as he was the parent with actual custody of a child. The grounds additionally claimed the respondent failed to consider her duty under s.55 of the Borders, Citizenship and Immigration Act 2009.

7. The judge heard oral evidence from the appellant and considered a bundle of documents that included the appellant's statement. In his statement the appellant claimed his relationship broke down in 2014, although he accepted in oral evidence that he had been paying child support to his children since 2012 and that he was living in a different property in 2012. In the reasoning section of her decision the judge noted the Child Arrangements Order issued by the family Court, that the children were living with their mother, and that, according to the Order, the appellant had rights of contact with the children at weekends. The judge consequently found *"that the appellant does not meet the requirements of Regulation 10(4) of the 2006 Regulations."*

8. At [14] the judge stated,

*Regulation 15(1)(b) states that a person can acquire the right to reside in the United Kingdom permanently if he is a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with the Regulations for a continuous period of five years. I find that there is no corroborative documentary evidence that the appellant began living with his partner in 2005. His immigration history shows that he applied for a residence card on 11 April 2008 as the extended family member of an EEA national. I accept that from 2008 until 2012 he was living with the EEA national.*

9. At [15] the judge recounted the appellant's evidence that he began paying child support in 2012 and was living in a different property, and his claim that he would periodically return home whenever his former partner asked for him back until their next argument, but rejected this account. *"I find that when he moved out of the home that he shared with her in 2012, he was no longer in a relationship with her. I find that he could not be deemed to be a family member of an EEA national. At [16] the judge concluded that the appellant could not rely on 5 years continuous residence as the family member of an EEA national.*

10. At [17] the judge stated,

*I take into account Section 55 of the Borders, Citizenship and Immigration Act 2009 [in] respect of the duty to safeguard the welfare of children in the United Kingdom. I find however that the children are being well cared for by their mother with whom they live. I take into account the letters from the school as well as the appellant's own evidence and his witness statement regarding his involvement in the children's lives. I accept that the appellant has regular contact with his children. In conclusion I find for the reasons that I have given, that the appellant does not meet the requirements of the Immigration (European Economic Area) Regulations 2006.*

### **The grounds of appeal, the grant of permission and the error of law hearing**

11. The appellant advanced four grounds in seeking permission to appeal to the Upper Tribunal. Ground 1 contended that the judge materially erred in concluding that Reg 10(4) of the 2006 Regulations did not apply as she conflated 'residence' with 'custody'. While the children live mainly with their mother, they

also live with the appellant and that the judge failed to appreciate that 'custody' is different to 'residence'.

12. Ground 2 contends that the immigration rules have provisions to enable a parent with access rights to a British child to remain in the UK, and that EEA law requires equivalent treatment for EEA nationals. As such, the judge failed to appreciate that Reg 10(4) permits parents of EEA nationals with access rights to come within that provision.
13. Ground 3 contends that the judge erred in law in rejecting the appellant's evidence that he had been in a relationship with his former partner since 2005 on the basis that there was no corroborative evidence, and by failing to make a finding in respect of the appellant's oral evidence.
14. Ground 4 contends that the judge failed to determine whether the absence of the appellant would be averse to the welfare and best interests of the children, especially given the frequent and extensive contact and overnight stays granted by the Family Court Order.
15. The grounds did not challenge the judge's factual finding that the appellant's relationship with his former partner broke down in 2012.
16. The Upper Tribunal granted permission on all grounds.
17. On the morning of the appeal hearing we drew Mr Balroop's attention to the terms of Reg 10(3) of the 2006 Regulations in respect of grounds 1 and 2, and Mr Wilding provided a copy of Macastena v Secretary of State for the Home Department [2018] EWCA Civ 1558, handed down on 5 July 2018. Recognising that Reg 10(3) conditioned Reg 10(4), Mr Balroop merely submitted that Reg 10(4) had been considered in isolation when the grounds were drafted. Mr Balroop concentrated his submissions on Grounds 3 and 4. He submitted that the judge failed to take into account the birth of the appellant's first child in 2007 as indicative that his relationship with his former partner commenced in 2005, and that the judge failed to appreciate that the grant of a residence card in 2010 would only have occurred after an extensive examination of the appellant's circumstances. He submitted that the terms of Reg 7(3) of the 2006 Regulations allowed the appellant to be treated as a family member in accordance with the Regulations throughout the course of the relationship itself, even if the residence card was only issued in 2010. With respect to Ground 4, Mr Balroop submitted that the judge failed to adequately consider the best interests of the children in accordance with s.55 of the Borders, Citizenship and Immigration Act 2009, or in accordance with Art 24 of the Charter of Fundamental Rights, or to make findings in respect of the children's best interests.
18. We reserved our decision.

## Discussion

19. Ground 1 takes issue with the judge's approach to the term 'custody' in Reg 10(4) of the 2006 Regulations. Reg 10 sets out the criteria that must be met for a person to show they have a retained right of residence. Reg 10(3) reads,

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

(a) he is the direct descendant of –

(i) a qualified person or an EEA national with a permanent right of residence 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 or the EEA national with a permanent right of residence 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 or the EEA national with a permanent right of residence 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).

20. It is clear from the provisions set out above that a person can only succeed under Reg 10(4) if they are the parent with custody of a child in circumstances where the other parent, being a qualified person or an EEA national with a right of permanent residence, has either died or has ceased to reside in the UK. The mother of the appellant's children is not dead and there is no suggestion that she has ceased to reside in the UK. As such, the appellant cannot, on any view, demonstrate that he has a retained right of residence under the provisions upon which he relies.

21. Given that Ground 2 is anchored to Ground 1, as accepted by Mr Balroop, who did not advance either Ground 1 or 2 in his oral submissions, we find that the appellant cannot succeed in his contention that Reg 10(4) permits parents of EEA nationals with access rights to come within that provision. In any event, we find that the principle of equivalence, upon which the appellant relies, has no application on the present facts. The principle of equivalence requires that the national rules at issue be applied without distinction, whether the action is based on rights which nationals derive from EU law or whether it is based on an

infringement of national law, where the purpose and cause of action are similar (see Benallal v Etat belge (Directive 2004/83/EC) Case C-161/15, 17 March 2016). As the Court of Appeal pointed out in Khan v Secretary of State for the Home Department [2017] EWCA Civ 1755, at [31], “*The principle of equivalence bites where rights and remedies for breaches of EU law are inadequate or inferior to those arising in respect of breaches of domestic law.*” In the present case, for reason which we give later in our decision, the appellant is unable to assert or rely on EU law rights because he is no longer regarded as the family member of his former partner, or the extended family member of his former partner, and he has not acquired a permanent right of residence. He is the father of three EU nationals residing in the UK, but they reside with their mother. There has been no suggestion that the children will be compelled to leave the UK if their father is not issued a residence card. He has not therefore acquired a derivative right of residence pursuant to the principles established in Ruiz Zambrano v Office National de l'Emploi (C-39/09) 8 March 2011 [2012] QB 265, and Chavez-Vilchez and Others v Raad van Bestuur van de Sociale Verbekeringsbank and Others (10 May 2017) (Case C-133/15) (Grand Chamber), [2017] 3 WLR 1326, [2017] 3 CMLR 35. There is therefore no disturbance of the EU law rights of the children, notwithstanding considerations of family life, the desirability of preserving family bonds and the best interests of children enshrined in Article 7 of the Charter of Fundamental Rights and the rights of the child enshrined in Article 24. (see Patel v The Secretary of State for the Home Department [2017] EWCA Civ 2028, at [13] and [72] to [75]). As there is no infringement of any rights flowing from EU law, or the protection or enforcement of those rights, there is no comparator with national legislation to trigger the principle of equivalence.

22. Ground 3, as amplified by Mr Balroop in his oral submissions, essentially contends that the judge erred in requiring corroborative evidence to support the appellant’s assertion that he commenced his relationship with his former partner in 2005 and that, even if it ended in 2012, he was in the relationship for a continuous period of 5 years.
23. While we accept that a judge may fall into legal error by requiring corroborative evidence in support of a factual assertion (although a judge is entitled to take into account an absence of evidence one would reasonably expect to be available), on the particular facts of this appeal and for the following reasons, any error by the judge is not material.
24. Reg 8(5) provides that the partner of an EEA national with whom he is in a durable relationship is an extended family member. A person who meets the definition of extended family member may be granted an EEA residence card, after an extensive examination of their personal circumstances (Regs 17(4) and (5)). Reg 7(3) reads,
  - Subject to paragraph (4), 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.

25. Reg 7(3) therefore acts as a gateway to the acquisition of rights of residence of extended family members on the basis that, once the relevant document has been issued, the extended family member is to be treated as a family member. In our judgment, it is unambiguously clear that the treatment of an extended family member as a family member is conditional on the issuance of, *inter alia*, a residence card, and that the treatment is coextensive with and dependent upon the validity of that residence card. It is also clear that a person shall only be treated as a family member for so long as they remain in a durable relationship.
26. We conclude that an extended family member of an EEA national will only be considered as a family member after the issuance of a residence card. Unless and until a residence card is issued, the extended family member cannot be treated as a family member. We find our conclusion is supported by the recent Court of Appeal decision in Macastena v Secretary of State for the Home Department [2018] EWCA Civ 1558.
27. The appellant was only issued with a residence card on 31 August 2010. He could not therefore have acquired a right of residence when his relationship broke down. Even if we were to take the date of his application for a residence card (11 April 2008) as our starting point, he had not been living with his partner in a durable relationship for a continuous period of 5 years by the time the relationship broke down in 2012 (a finding of fact made by the judge and not challenged in the grounds of appeal). Although he may have been an extended family member since 2005, the appellant cannot establish that he acquired a permanent right of residence as he has not resided in the UK with his former partner in accordance with the 2006 regulations for a continuous period of 5 years.
28. Even if we were wrong in the above assessment, there was no satisfactory evidence before the First-tier Tribunal capable of entitling the judge to conclude that the Italian mother of the applicant's children had exercised Treaty rights for a continuous period of 5 years during the term of their relationship. While the respondent was satisfied that the appellant and his former partner were in a durable relationship when the residence card was issued in 2010, and that the former partner was, at that time, a qualified person, the appellant's bundle did not contain any reliable evidence that the former partner continued to be a qualified person after that date. Although the appellant's bundle contains some payslips indicating that the former partner was employer in 2005, there was insufficient evidence of her employment in 2006, and no evidence as to the length of her employment prior to the residence card application in April 2008. Given the paucity of evidence of the former partner's exercise of Treaty rights as a qualified person for a continuous period of 5 years, or that she had obtained a permanent right of residence, the judge could not, on any rational view, have concluded that the appellant acquired a right of permanent residence.

29. In respect of the final ground, we observe that the decision to refuse to issue the appellant a residence card as confirmation of his right of permanent residence is not a decision to remove him, and that, as yet, no removal decision has been issued. There is consequently no obstacle to his continued contact with his children and no significant impact on their welfare or best interests. Nor was there any independent evidence before the First-tier Tribunal of the likely impact on the children even in the event that, at some time in the future, a decision was to be taken to remove the appellant. We have also taken into account Article 24 of the Charter of Fundamental Rights which provides, *inter alia*, that in all actions relating to children the child's best interests must be a primary consideration, and that every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests. The decision to refuse to issue a residence card in circumstances where the appellant has no right of residence under EU law and where the children's rights of free movement and residence are unaffected does not of itself prevent the appellant from continuing to have direct contact with his children. The appellant did not meet the requirements contained in the 2006 Regulations for the establishment of a retained or permanent right of residence, or the core criteria for the issuance of a permanent residence card. In these circumstances the best interests of the children cannot compel the issuance of a residence card.

### **Notice of Decision**

**The judge did not make a material error of law. The appeal is dismissed.**



20 July 2018

Signed  
Upper Tribunal Judge Blum

Date