



Neutral Citation Number: [2017] EWCA Civ 99

Case No: C5/2015/1988

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Upper Tribunal (Immigration and Asylum Chamber)
Deputy Upper Tribunal Judge Murray
IA186932014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2017

Before:

LADY JUSTICE ARDEN
and
LORD JUSTICE LEWISON

Between:

Shakeel Ahmed	<u>Appellant</u>
- and -	
The Secretary of State for the Home Department	<u>Respondent</u>

Parminder Saini (instructed by **MTG Solicitors**) for the **Appellant**
Ben Lask (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates: 01 February 2017

Approved Judgment

LADY JUSTICE ARDEN:

1. Mr Ahmed, a national of Pakistan, appeals against the dismissal by the Upper Tribunal on 10 April 2015 of his appeal against the Secretary of State's refusal to issue him with an EEA residence card. As a non-EU national, he seeks to establish that he has a right to reside here as the former spouse of an EU national. Because of the way the proceedings have been conducted, it is to be assumed that, at the date of their divorce, which became absolute on 19 June 2014, Mr Ahmed's wife had been working in the UK and that the marriage lasted for at least three years. Before the divorce, Mr Ahmed did not need an EEA residence card, but following their divorce he can no longer rely on his ex-wife's Treaty right to reside and work here. He had to show that he independently had the right to reside here.
2. The circumstances in which a non-EU national ex-spouse of an EU national retains the right to reside in the member state, in which he and his ex-spouse resided while married, are governed by Regulation 10(5) of The Immigration (European Economic Area) Regulations 2006 (SI 2006/1003). Regulation 10 relevantly provides:
 - 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)

....
 - 5) A person satisfies the conditions in this paragraph if—
 - (a) he ceased to be a family member of a qualified person or of an EEA national with a permanent right of residence on the termination of the marriage or civil partnership of that 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;
 - (iii) the former spouse or civil partner of the qualified person or the EEA national with a permanent right of residence has the right of access to a child of the qualified person or the EEA national with a permanent right of residence, where the child is under the age of 18 and where 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.

3. The issue is whether Mr Ahmed complied with Regulation 10(5)(c), which must be read with Regulation 10(6):
 - (6) The condition in this paragraph is that the person—
 - (a) is not an EEA national but would, if the person were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; ...
4. As a result of findings of fact by the tribunals which can no longer be challenged, the only status which Mr Ahmed can claim in order to satisfy Regulation 10 (6)(a) is that of “worker”. On this the Upper Tribunal found that Mr Ahmed only became a worker on 6 October 2014 and that he was not a worker at the date of his divorce. Thus, it held, he had failed to satisfy Regulation 10(6).
5. Mr Ahmed contends that Article 13(2) of Directive 2004/38 (“the Directive”), which Regulation 10 is designed to implement, does not require him to have been a worker on 19 June 2014 and so Regulation 10(6) cannot be read as having that effect (“the defective implementation issue”). Alternatively, he contends that the Home Office prevented him from being a worker at any earlier date than October 2014 by its delay in sending him a certificate of application, stating he had applied for an EEA residence card. Mr Ahmed applied for an EEA residence card in January 2014 but only received a certificate of application in September 2014. I will call this “the Home Office delay issue”.

THE DEFECTIVE IMPLEMENTATION ISSUE – NO DIRECTIVE REQUIREMENT TO SATISFY THE REGULATION 10(6) CONDITIONS AT THE DATE OF THE DIVORCE?

6. The relevant Articles of the Directive provide:

Article 13

Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership

1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or

(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or

(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or

(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4). Such family members shall retain their right of residence exclusively on personal basis.

Article 14

Retention of the right of residence

1. Union citizens and their family members shall have the right of residence provided for in article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein. ...

Appellant's submissions

7. Mr Parminder Saini, for Mr Ahmed, relies on a purposive interpretation of the Directive. He submits that the requirements of Article 13 should be interpreted in line with Recital (15) of the Directive, which states that one of the objects of the Directive is to protect the derived rights of family members of EU nationals if, for example, there is a divorce. Mr Saini submits that the Regulations could not, compatibly with EU law, require Mr Ahmed to be a worker at the date of his decree absolute. The second subparagraph of Article 13(2) is addressing the situation where a non-EU national is applying for permanent residence, not the present situation where he is applying simply for a retained right to reside following divorce.
8. Mr Saini relies on C-115/15 *NA Pakistan v Secretary of State for the Home Department* C-115/15 *Secretary of state for the Home Department v A (AIRE Centre Intervening)* [2017] Q.B 109 where the former (non-EU national) spouse of an EU national sought a derived right of residence under Article 13(2)(c) (compassionate grounds, such as domestic violence) although the former spouse had left the UK before divorce proceedings began. The Court of Justice of the European Union ("CJEU") held that she did not retain any right of residence: a non-EU national spouse of an EEA national had a derived right of residence in a member state only if the EEA national spouse was resident in that member state at the start of the divorce proceedings. The CJEU came to the same conclusion under Article 13(2)(c) as it had reached under Article 13(2)(a) in C-218/14 *Singh v Minister for Justice and Equality* [2016] Q.B. 208. Mr Saini submits that the CJEU did not hold that the right to reside was lost because of non-compliance with the second subparagraph of Article 13(2). It held in effect that the retained right to reside was "triggered" by the initiation of divorce proceedings.

Secretary of State's submissions

9. We did not call on counsel for the Secretary of State, Mr Ben Lask, to address us orally. His able skeleton argument sets out a number of reasons why the second subparagraph of Article 13(2) applies. Mr Lask submits that it is clear from the language, context and purpose of Article 13(2), and from CJEU authority, that, to retain a right to reside under that provision a non-EU national must satisfy one of the requirements in (a) to (d) of the first subparagraph and be a worker, self-employed person or self-sufficient person in accordance with the second paragraph.

Language

10. Mr Lask makes the following textual points:
 - i) Article 13(2) is expressly stated to be "without prejudice to the second subparagraph" of Article 13(2).
 - ii) The second subparagraph of Article 13(2) states in terms that:

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall *remain* subject to the requirement that they are able to show that they are workers... (emphasis added)

- iii) Article 14 and 16 confirms his interpretation of Article 13(2):
- a) Article 14(2) emphasises the need for continuity of entitlement. It states that the family member of a Union citizen shall have the right of residence provided for in Article 13 “as long as they meet the conditions set out therein”. These conditions must include the requirement in the second subparagraph of Article 13(2).
 - b) Article 16 provides that the permanent right of residence “shall not be subject to the conditions provided for in Chapter III”. Chapter III of the Directive includes Article 13. Thus, once he has acquired a permanent right of residence, an EU national’s family member no longer needs to satisfy the requirement in the second subparagraph of Article 13(2).
 - c) Mr Saini’s interpretation would effectively confer a right of permanent residence on non-EU nationals under Chapter III of the Directive, which deals with residence, not under Chapter IV which deals with the right of permanent residence, for which other conditions must be satisfied.

Context and purpose

11. Mr Lask submits that his approach produces an interpretation which is in harmony with the provisions governing the residence rights of Union citizens. So, under Article 7(1) of the Directive, an EU national who does not have a permanent right to reside must demonstrate that he is a worker, a self-employed person, a self-sufficient person or a student in order to enjoy a right to reside for more than three months. Mr Saini’s interpretation of Article 13(2) would place non-EU nationals in a more favourable position than EU nationals. It would mean that an EU national had to be a worker, self-employed person, self-sufficient person or student in order to enjoy a right to reside in another member state, while a non-EU national could retain a right to reside following divorce without satisfying any such requirement.

CJEU authority – NA Pakistan and Singh

12. In any event, submits Mr Lask, the point is put beyond all doubt by the CJEU’s judgment in *Singh*. There the CJEU held that a non-EU national whose EU spouse left the host Member State prior to the commencement of divorce proceedings could not derive a right of residence from Article 13(2). In reaching this conclusion, the CJEU explained at paragraph 63 that:

if on the date of commencement of the divorce proceedings the third-country national who is the spouse of a Union citizen enjoyed a right of residence on the basis of Article 7(2) of Directive 2004/38, that right is retained, on the basis of Article

13(2)(a) of that directive, both during the divorce proceedings and after the decree of divorce, provided that the conditions laid down in the second subparagraph of Article 13(2) of the directive are satisfied.

13. On Mr Lask's submissions *NA* was, in effect, a sequel to *Singh*. In *Singh*, the CJEU held that, in order for a non-EU national to retain a right to reside under Article 13(2)(a), his EU national spouse must reside in the host member state in accordance with Article 7(1) up to the date on which divorce proceedings are commenced. Departure of the EU national spouse before the commencement of proceedings was fatal to a claim under Article 13(2). The CJEU did not hold that it was in itself sufficient under Article 13(2) for the EU national spouse to reside in the host member state in accordance with Article 7(1) until the commencement of divorce proceedings. *NA Pakistan* is to the same effect in relation to Article 13(2)(c).

My conclusions

14. I accept Mr Lask's submissions as to the language, context and purpose of Article 13(2) for the reasons he gives.
15. Mr Saini relies on a purposive interpretation of Article 13(2) by reference to Recital (15), which explains that an object of the Directive is the promotion of family life and human dignity. But this cannot result in the grant of a retained right to reside where this is inconsistent with the terms of the operative provisions of the Directive.
16. As I see it, the opening words of Article 13(2) makes it quite clear that the first subparagraph is subject to the second subparagraph. The second subparagraph, which starts "Before acquiring the right of permanent residence", is also clearly laying down a condition to be met where a person claims a retained right to reside under Article 13(2), but has not acquired any right of permanent residence.
17. It is not a tenable construction of Article 13 that the second subparagraph is dealing only with conditions for acquiring permanent residence. It would be absurd if a person has to satisfy the requirement to be a worker, self-employed, self-sufficient or a student only when he applies for that more privileged status.
18. Mr Saini submits that *Singh* and *NA Pakistan* suggest to the contrary but in neither of those cases did the CJEU have to rule on the meaning of the second subparagraph of Article 13(2). In both cases, the former EU national spouse had left the member state before divorce proceedings were started and so the non-EU national spouse had no derivative right of residence under the first subparagraph of Article 13(2). Accordingly, it was unnecessary for the CJEU to consider the second paragraph of Article 13(2).
19. Therefore, I conclude that Regulation 10(6) correctly implements the Directive and reject the appeal on this issue.

HOME OFFICE DELAY IN ISSUING THE CERTIFICATE OF APPLICATION MEANT THAT MR AHMED COULD NOT OBTAIN WORK IN THE RELEVANT PERIOD

20. The second issue on this appeal is whether the Home Office's failure to issue a certification of application prevented Mr Ahmed from working. Mr Saini submits that in the real world that was the position. No employer would have accepted him.
21. There are two answers to this submission. First, Mr Saini exaggerates the effect of not having a certificate of application or EEA residence card. It was always open to an employer to make an online application to the employer checking service for a verification notice, as AT Accessories Ltd did in September 2014. Second, there is no finding that in the period from June to September 2014 Mr Ahmed was even looking for a job. In fact, the findings of the Upper Tribunal are to the contrary. This is sufficient for me to reject Mr Ahmed's appeal on this issue.
22. Mr Lask makes further submissions as to why Mr. Ahmed's arguments on the second issue are wrong, but it is not necessary for me to deal with them.

CONCLUSION

23. I would dismiss this appeal. Mr Saini asks us to refer the question of the effect of the second subparagraph of Article 13(2) of the Directive to the CJEU, but I do not consider that there is sufficient lack of clarity as to its meaning to justify this course.