



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/05526/2013

THE IMMIGRATION ACTS

Heard at: Manchester
On: 18th June 2014

Determination Promulgated
On: 11th August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Iwinnosa Gift Ekhaguere
(no anonymity order made)

Appellant

and

Entry Clearance Officer, Lagos

Respondent

For the Appellant: Mr Sadiq, Adam Solicitors
For the Respondent: Ms Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Nigeria. She has permission to appeal against the decision of First-tier Tribunal Judge Edwards to dismiss her appeal against the Respondent's decision to refuse her entry clearance as a family member of an EEA national exercising treaty rights.
2. The Appellant sought leave to enter to join her mother in the UK. Her mother is also a Nigerian citizen who was formerly married to an EEA national. The Appellant submitted that her mother has a retained right of residence and that as such she is entitled, by virtue of Regulation 10(5)(c) read with Regulation 10(6), to a right of residence with her mother.

3. The Respondent did not accept this to be the case. The application was simply refused on the basis that the Appellant is not a family member of an EEA national exercising treaty rights.
4. Judge Edwards did not accept it either. He found the Sponsor to be a person with retained rights of residence but found that the Appellant could not qualify under Regulation 7. The Sponsor and her EEA spouse are long since divorced and it follows that the Appellant cannot be considered to be a family member. In respect of the argument advanced by the Appellant Judge Edwards said this:

“That leaves Regulation 10. While the Sponsor qualifies under this, I do not see that the appellant does. For one thing, she is not in the UK as is required by Regulation 10(5)(b) and I cannot see how she can have greater rights than those the sponsor currently enjoys”

On that basis he dismissed the appeal.

5. The Appellant now appeals on the ground that the First-tier Tribunal misinterpreted Regulation 10. It does not require the Appellant to be in the UK.

My Findings

6. Regulation 10 reads:

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. Mr Sadiq contends that the Appellant benefits from Regulation 6(b) because she is the family member of her mother who is the person mentioned at 10 (6)(a) read with 10(5). I am afraid I cannot agree. Regulation 6 is not free standing. As can be seen from Reg 10(2)(c) and 10(5)(c) all regulation 6 does is add to the factors that confer a retained right of residence the requirement that the person also be acting as if he or she is exercising treaty rights. This is confirmed by Regulation 10(1) which limits the definition of a 'family member with retained rights' to those individuals falling within 10(2)-10(5).

8. Judge Edwards was correct to say that the individual described at 6(b) needs to be in the country to benefit from the provision. She also needs to have met the requirements in for instance, Regulation 5: had she been living with her mother and stepfather prior to the termination of the marriage she could have met the conditions at 5(a)-(d).

9. There is no error in the determination.

Decision

10. The decision of the First-tier Tribunal contains no error of law and the findings are upheld.

Deputy Upper Tribunal Judge Bruce
2nd August 2014