Upper Tribunal
(Immigration and Asylum Chamber)

PM (EEA – spouse –"residing with") Turkey [2011] UKUT 89 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21 December 2010	.....

Before

MR JUSTICE BLAKE, PRESIDENT

SENIOR IMMIGRATION JUDGE STOREY

SENIOR IMMIGRATION JUDGE PERKINS

Between

PM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr A. Berry of Counsel instructed by Turpin Miller Solicitors

For the Respondent: Ms F. Saunders, Home Office Presenting Officer

Regulation 15(1)(b) of the Immigration (European Economic Area) Regulations 2006 applies to those who entered a genuine marriage where both parties have resided in the United Kingdom for five years since the marriage; the EEA national's spouse has resided as the family member of a qualified person or otherwise in accordance with the Regulations and the marriage has not been dissolved. The "residing with" requirement relates to presence in the UK; it does not require living in a common family home.

DETERMINATION AND REASONS

Introduction

1.
This is an appeal from a decision of Immigration Judge (IJ) Harmston given on the 16 March 2010 upholding the respondent's refusal of 16 January 2010 to issue the appellant with a permanent residence card under reg 15(1)(b) of the Immigration (European Economic Area) Regulations 2006 SI 2006/1003 ("the Regulations").

2.
The material facts can be taken from the decision of the IJ and may be summarised as follows:-

i)
the appellant is a Turkish national now 28 years old;

ii)
she first came to the UK in September 2001 when she had entry clearance for two years as an au pair;

iii)
a few months later she met PM, an Italian national exercising Treaty rights by working in the UK;

iv)
the couple started cohabiting as man and wife in September 2003 by which time the appellant had secured an extension of her stay;

v)
on the 21 February 2004 the couple married and the appellant gave birth to their son Leo on 6 August 2004;

vi)
in April 2004 the appellant was given a residence card as the spouse of an EEA national for a period of 5 years until 29 March 2009;

vii)
in December 2007 PM left the matrimonial home and the couple have not cohabited since;

viii)
they remain married to each other and in social contact with each other. PM visits his son twice a week and provides financial support in the sum of £50.

3.
In 2009 the appellant applied for permanent residence. This was refused on the basis that there was insufficient evidence that PM had worked for the requisite period and thus resided in the United Kingdom for five years in accordance with the Regulations. This issue of fact was decided in favour of the appellant by the IJ and is no longer in contention.

4.
The IJ nevertheless dismissed the appeal because he was not satisfied that the appellant had resided in the United Kingdom with PM for five years. Permission to appeal to the UT was granted by SIJ Nichols on 22 April and the appeal heard by SIJ Perkins on 3 September 2010.

5.
On 13 October 2010 he decided that the appeal should be heard by a panel of this chamber for consideration to be given to whether a reference needs to be made to the Court of Justice of the European Union (CJEU) as to the meaning of Article 16(2) of Directive 2004/38/EC (the Citizens Directive) that the Regulations endeavour to transpose into national law.

6.
We heard the appeal on 21 December 2010. Having heard from Ms Saunders in response to Mr Berry’s skeleton argument we indicated that:

i)

the IJ made a material error of law;

ii)
we would set aside the decision and remake it on the basis of the factual findings reached below;

iii)
we could decide this appeal without the need to make a reference to the CJEU since we could find the meaning of the legislative provisions in issue with complete confidence;

iv)
the appeal was allowed and directions given that the appellant be issued with a permanent residence card;

v)
we would give our reasons in writing for this conclusion as soon as practicable.

The Regulations

7.
Regulation 15(1) provides as follows:

“ The following persons shall acquire the right to reside in the United Kingdom permanently –

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(b) 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 these Regulations for a continuous period of five years;

(c) a worker or self-employed person who has ceased activity;

(d) the family member of a worker or self-employed person who has ceased activity;

(e) a person who was the family member of a worker or self-employed person where -

(i)
the worker or self-employed person has died;

(ii) the family member resided with him immediately before his death; and

(iii) the worker or self-employed person had resided continuously in the United Kingdom for at least the two years immediately before his death or the death was the result of an accident at work or an occupational disease;

(f)
a person who –

(i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and

(ii) was, at the end of that period, a family member who has retained the right of residence.”

8.

Regulation 15(1)(a) and (b) both refer to a person “who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years”. Regulation 15(1)(a) deals with EEA nationals while reg 15(1)(b) concerns a family member of an EEA national who is not herself an EEA national; in such a case the words “with the EEA national” are added after the United Kingdom.

9.
Before us the parties were agreed that the issue of construction is whether the words “resided in the United Kingdom with the EEA national” mean:

i)
The family member (in this case the spouse) and the EEA national must both reside in the United Kingdom for the requisite period, or

ii)
The family member should be residing in a common family home with the EEA national in the United Kingdom for the requisite period.

10.
The IJ concluded that the second meaning was the correct one. In reaching this conclusion he considered that support for this conclusion could be found in the reported decision of the AIT in OA (EEA-retained right of residence) Nigeria [2010] UKAIT 00003 a judgment of SIJ Storey. The IJ was wrong about that. The decision was concerned with a retained right of residence under regulation 15(1)(f) and turned on the point that the EEA national in that case had not worked for the requisite period and thus could not show that he had resided in the United Kingdom in accordance with the Regulations. For the same reason the family member could not qualify under reg 15(1)(b) and at [22] the AIT stated it was not necessary to consider the precise meaning of the phrase “with the EEA national”.

11.
No other national case law was referred to by either side, and we are aware of none. We will first consider whether the meaning can be discerned from the language of the regulation itself and its relevant context, before considering Community legislation and case law.

The text of the Regulations

12.
As to the words used, we note first that the words “with the EEA national” come after “United Kingdom”. Putting the disputed words in parenthesis, the words appear to address attention to the question of whether the non–EEA national family member has resided in the United Kingdom as opposed to elsewhere.

“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 these Regulations for a continuous period of five years;

13.
Second, that the regulation is concerned with any family member and not just spouses, and cannot therefore be construed as meaning “living together as husband or wife” or conjugal cohabitation. The range of family members within the ambit of reg 15(1)(b) includes children under 21 and dependent relatives in the ascending and descending line (see reg 7).

14.
Third, the legislator has not used words such as “resided as a member of the household in the United Kingdom” (contrast the provision for extended family members in reg 8).

15.
Each of these observations is a pointer to the first of the two possible meanings being the appropriate one.

The context of the words to be construed

16.
Turning to the context of the regulations, the scheme (reflecting the requirements of Community law) deals with initial residence, then extended rights of residence, next retained rights of residence and finally permanent rights of residence. Regulation 13(2) concerns the right of initial residence of a non-EEA family member of an EEA national. The position of such a family member is distinguished from that of EEA nationals by the requirement to produce a valid passport, but otherwise the initial right of residence is not expressed to be subject to a requirement to reside with the EEA national. No distinction is made between EEA and non-EEA family members for the purposes of the extended right of residence under reg 14(2). All family members are entitled to extended residence as long as the EEA national remains a qualified person (in the present context this means works in the UK) or has become entitled to a permanent right of residence. There is no requirement that the family member be residing with the EEA national in the same house or household.

17.
Both sides recognise that the European Court of Justice has dealt with the extended right of residence in Community law in the case of C/267-83 Diatta v Land Berlin [1985] ECR 567. This was a decision concerned with EEC Regulations 1612/68. The Court said this:

“17. Having regard to its context and the objectives which it pursues, that provision cannot be interpreted restrictively.

18. In providing that a member of a migrant worker's family has the right to install himself with the worker, article 10 of the Regulation does not require that the member of the family in question must live permanently with the worker, but, as is clear from article 10(3), only that the accommodation which the worker has available must be such as may be considered normal for the purpose of accommodating his family. A requirement that the family must live under the same roof permanently

cannot be implied.

19. In addition such an interpretation corresponds to the spirit of article 11 of the regulation, which gives the member of the family the right to take up any activity as an employed person throughout the territory of the Member State concerned, even though that activity is exercised at a place some distance from the place where the migrant worker resides.

20. It must be added that the marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority. It is not dissolved merely because the spouses live separately, even where they intend to divorce at a later date.”

Ms Saunders informed us that her policy department had instructed her that Diatta provided a cogent indication of what the content of the permanent right of residence should consist of, although the IJ did not agree with this proposition when first advanced on behalf of the appellant. She accepted that the IJ did not have the benefit of a submission on this question from the respondent as the initial refusal was based on the proposition that the husband had not worked for five years.

19.
For our part we recognise that while the decision in Diatta is highly influential as to the proper construction of Regulation 1612/68 it cannot be decisive on the question since it was a decision on the meaning of different words and was not concerned with a permanent right of residence.

20.
Turning to reg 15 itself, we are struck with the contrast between 15(1)(a) and (b). If the IJ's conclusion is correct then (assuming in both cases that the EEA national has resided in the United Kingdom in accordance with these Regulations) there is a very significant difference in treatment of family members depending on their nationality. A French spouse of an Italian national obtains permanent residence without any requirement to reside with the EEA national. A Turkish spouse, such as the appellant, can never obtain permanent residence if the EEA spouse never established a common matrimonial home or moves out of it before the expiry of the period of five years. Such a startling distinction in treatment would be very surprising when the basic definition of family member affords no decisive importance to the nationality of that person.

21.
Moreover, it is common ground that no distinction is made on the grounds of the nationality of the family member who obtains a permanent right of residence in the circumstances set out in reg 15(1)(b) (e) or (f). Thus in the circumstances set out in those provisions a non-EEA national wife may achieve permanent residence when the EEA national ceases working, dies, or divorces her. In none of these cases is the permanent right of residence dependent on residence in a common family home, and the period of retained residence in the United Kingdom may in certain circumstances be shorter than three years. Regulation 15(1)(f) refers to the retained right of residence that is further provided for.

22.
In short if the IJ's construction of reg 15(1)(b) is correct it would result in anomalous and discriminatory treatment of the non-EEA national spouse who could not or would not get a divorce to terminate the marriage.

23.
There is no reason to believe that this is what the national legislator intended to achieve and every reason to believe that it would be a result intended to be avoided.

The Citizens Directive

24.
Our construction of the Regulations is reinforced by examination of the Community legislation they were designed to implement.

25.

Chapter III of the Citizens Directive provides for an initial period of residence of three months, a residence card evidencing a right of residence for five years and retained rights of residence. Chapter IV then turns to the right of permanent residence.

26.
Article 16 has the heading “General rule for Union citizens and their family members”.

27.
Article 16.1 provides “Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in chapter III.”

28.
Article 16.2 continues “Paragraph 1 shall apply also to family members who are not nationals of a Member State and have resided with the Union citizen in the host Member State for a continuous period of five years”.

29.
The French text is in the following terms:

“2. Le paragraphe 1 s'applique également aux membres de la

famille qui n'ont pas la nationalité d'un État membre et qui ont

séjourné légalement pendant une période ininterrompue de

cinq ans avec le citoyen de l'Union dans l'État membre d'accueil.”

30.
It is clear from the English and French text and the case of C-162/09 Secretary of State for Work and Pensions v Lassal 7 October 2010 at [30] that this new right of permanent residence granted to Union citizens and their family members was an extension of rights granted under previous provisions of Community law. It would accordingly seem most unlikely that a non-national spouse would have to comply with a new restrictive requirement of residence in the household of an EEA national during the five years preceding the acquisition of the right of permanent residence that was not a requirement under the previous law as exemplified in Diatta and the provisions of Articles 8 to 14 that need not be set out here.

31.
It is equally unlikely that Community law would distinguish so radically between the rights of an EEA and non-EEA family member. Indeed Article 24 as well as recitals 17 and 20 in the Preamble to the Directive are indicators to the contrary:

“(17)…. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with conditions laid down in this Directive during a continuous period of five years…”

(20) In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy in that Member State equal treatment with nationals…”

32.

Whilst it is possible to reach an interpretation of Article 16(2) that imposes a requirement on the non-EEA family member to reside both with the EEA national and in the same host state, strict linguistic construction is not the correct way to approach the interpretation of Community legislation.

33.
We have no doubt that in the light of its objects and purpose Article 16(2) is intended to afford all family members (irrespective of their nationality) the right of permanent residence after five years residence in the host state where the EEA national has resided. With this reading the Directive adds to the residence rights identified in Diatta and applicable to all family members.

Conclusions

34.
We recognise that the fact that spouses or civil partners decide not to live together in a common household, may sometimes invite inquiry into the nature of the relationship.

35.
No such inquiry could possibly arise in this case, where there has been genuine matrimonial cohabitation for some time, a child has been born to the couple and there are continuing social relations by the parties to the marriage in the context of contact with the child.

36.
The EEA Regulations (reg 2(1)) precludes those who are party to a marriage of convenience from being a spouse and therefore a family member under reg 7. As recital 28 of the Citizens Directive makes clear, a marriage of convenience is an abuse of rights but it is a term strictly limited to relationships “contracted for the sole purpose” of enjoying free movement rights and with no effective social nexus between the parties. An inference of marriage of convenience cannot arise solely because a married couple are not living in the same household.

37.
However, for the reasons we have given above, we conclude that reg 15(1)(b) applies to those who entered a genuine marriage where both parties have resided in the United Kingdom for five years since the marriage; the EEA national’s spouse has resided as the family member of a qualified person or otherwise in accordance with the Regulations and the marriage has not been dissolved.

38.
The appellant accordingly qualified for permanent residence on the facts found by the IJ and is entitled to a permanent residence card.

This appeal is allowed.

Signed 

Mr Justice Blake

President of the Upper Tribunal,

Immigration and Asylum Chamber