

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 30 November 2004

Date Determination notified:
20 April 2005

Before:

Mr C M G Ockelton (Deputy President)
Mrs J A J C Gleeson (Vice President)
Miss K Eshun (Vice President)

Between:

APPELLANTS

and

Entry Clearance Officer, Bombay

RESPONDENT

For the Appellant:

Mr N Ahmed, instructed by Jasvir Jutla & Co

For the Respondent:

Mr M Vale, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are citizens of India. They appeal, with permission, against the determination of an Adjudicator, Mr A G O'Malley, dismissing their appeals against the decision of the Respondent on 8 July 2002 refusing them EEA family permits for residence in the United Kingdom with the sponsor.
2. The Appellants and the sponsor are all from Goa. We envisage that the principles we set out in this determination will be deployed in the determination of many similar appeals by Goans. Goa, as is well known, was a colony of Portugal. As a result, some Goans have the right to Portuguese citizenship. One of them is the sponsor. We do not know exactly the history of his movements, but he has a Portuguese identity card, issued in Lisbon on 25 May 2001 and giving his place of residence as "Marvila Lisbon". He subsequently acquired a Portuguese passport, issued on 29 May 2001. He came to the United Kingdom in June and has been working here since 25 June 2001. The present applications were made in Bombay on 23 April 2002. The applicants at that stage

were the present Appellants, who are the son and daughter of the sponsor, both aged thirty-two at the date of the decision and their daughter, aged three; and the sponsor's wife, his unmarried daughter aged twenty-eight and another son aged under eighteen at the time of the application. The three last have subsequently been granted permits. The three Appellants were refused on the ground that the Entry Clearance Officer did not think that they were dependent on the sponsor. The Adjudicator heard oral evidence, which he regarded as lacking in credibility. He too found that the Appellants had failed to establish dependency on the sponsor. The basis of the Appellants' appeal is that they may nevertheless be entitled to the permits they seek.

3. We have considered the oral and written submissions in this appeal with care. We do not need to set them out. We proceed at once to give our views on the law, including its background and its application.
4. Regulation (EEC) No 1612/98 of the Council of 15 October 1968 is on the subject of freedom of movement for workers within the Community. Regulation 10 is in the following terms:

"1. The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:

- (a) his spouse and their descendants who are under the age of 21 years or are dependants;
- (b) dependent relatives in the ascending line of the worker and his spouse.

2. Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes.

3. For the purposes of paragraphs 1 and 2, the worker must have available for his family housing considered as normal for national workers in the region where he is employed; this provision, however must not give rise to discrimination between national workers and workers from the other Member States."

5. That Article finds its expression in United Kingdom law in the Immigration (European Economic Area) Regulations 2000, as amended. The relevant Regulations are as follows:

"13. Issue of EEA family permit

(1) An entry clearance officer must issue an EEA family permit, free of charge to a person who applies for one if he is a family member of-

- (a) a qualified person; or
- (b) a person who is not a qualified person, where that person-
 - (i) will be travelling to the United Kingdom with the person who has made the application within a

- (ii) year of the date of the application; and
will be a qualified person on arrival in the United Kingdom.

(2) But paragraph (1) does not apply if-

- (a) the applicant; or
- (b) the person whose family member he is

falls to be excluded from the United Kingdom on grounds of public policy, public security or public health.

10. Dependants and members of the household of EEA nationals

(1) If a person satisfies any of the conditions in paragraph (4), and if in all the circumstances it appears to the decision-maker appropriate to do so, the decision-maker may issue to that person an EEA family permit, a residence permit or a residence document (as the case may be).

(2) Where a permit or document has been issued under paragraph (1), these Regulations apply to the holder of the permit or document as if he were the family member of an EEA national and the permit or document had been issued to him under regulation 13 or 15.

(3) Without prejudice to regulation 22, a decision-maker may revoke (or refuse to renew) a permit or document issued under paragraph (1) if he decides that the holder no longer satisfies any of the conditions in paragraph (4).

(4) The conditions are that the person [is a relative of an EEA national or his spouse and]-

- (a) is dependent on the EEA national or his spouse;
- (b) is living as part of the EEA national's household outside the United Kingdom; or
- (c) was living as part of the EEA national's household before the EEA national came to the United Kingdom.

(5) However, for those purpose 'EEA national' does not include-

- (a) an EEA national who is in the United Kingdom as a self-sufficient person, a retired person or a student;
- (b) an EEA national who, when he is in the United Kingdom, will be a person referred to in sub-paragraph (a)."

6. "*Family member*" is defined in Regulation 6. Save where the principal is a student, the persons who are the members of his family are, by Regulation 6(4):

- "(a) his spouse;
- (b) descendants of his or of his spouse who are under 21 or are their dependants;
- (c) dependent relatives in his ascending line or that of his spouse."

7. It is clear from both the Council Regulation and the UK Order that there is a mandatory requirement of issue of a permit to some persons and a further discretion to issue a permit to others.

8. Clearly one should begin with the mandatory elements. If an applicant is a "*family member*", as defined, of a qualified person, he is entitled to a permit. In deciding whether an applicant is a family member for these purposes, it may be necessary to make a finding of fact on dependency. For these purposes, it is clear that dependency is a question of fact. There is no requirement that dependency be of necessity.
9. If there are applicants who do not qualify under Regulation 13, the decision-maker must next consider Regulation 10. The crucial part is Regulation 10(4), which poses three separate questions of construction. First, what is a "*relative*"? There is no definition in these Regulations, but, given the terms of Regulations 13 and 6, which we have just considered, it is clear to us that "*relative*" must be intended to have a wider sense than "*family member*". We would regard the question of whether a person is a "*relative*" for these purposes as one of fact and degree. Certainly, the word is apt to include a person's daughter-in-law, like the second Appellant in the present case.
10. The second question is the relationship between the three lettered sub-paragraphs of Regulation 10(4). Is (a) a requirement in all cases, to be accompanied by either (b) or (c)? Or are (a), (b) and (c) alternatives? This is a point of some concern to the writer of the written submissions made to us. We do not, however, regard it as posing any real difficulty. It is quite usual at the present time for draughtsmen to use a conjunction only between the last two elements of a list, so that the fact that the word "*or*" appears only between (b) and (c) does not rule out the possibility that all three are alternatives. What is clear is that the wording of Regulation 10(2) of the EEC Council Regulation demonstrates that dependency and prior residence are alternatives. Therefore, (a), (b) and (c) are alternatives. The decision-maker should consider whether any one of the three applies to any applicant.
11. The third question is the meaning of "*before the EEA national came to the United Kingdom*" in Regulation 10(4)(c). Does it mean "*immediately before*", or does it mean "*at any time before*"? In order to decide this issue, we have to bear two things in mind. The first is that the EU right is the right of the person who has citizenship of an EU country: it is not a right which belongs essentially or independently to his relatives. The purpose of the Regulations we are considering is to enable a qualified person – that is to say, an EU national exercising treaty rights – to exercise his rights freely, without being hindered or discouraged by having to leave family members behind when he exercises his rights. The second consideration is closely related. It is that the purpose of these Regulations is to ease the movement of qualified persons around the Union. There is no suggestion of any additional intention to enable non-EU nationals to enter the Union.
12. Regulation 10(4)(c) must be interpreted in its context and in a way

that best promotes the purpose of this legislation. A person who comes from a non-EU country, country A, to the EU is not exercising treaty rights. He is not exercising treaty rights even if he has, or is entitled to acquire, citizenship of EU country B. In those circumstances, when he moves to country B he is simply exercising the rights of a citizen of that country. If, however, he moves from EU country B to EU country C, he may well be exercising treaty rights. EU law has nothing to do with his movement from country A to country B, but it may have a great deal to do with his movement from country B to country C. The Regulations relating to family members will apply to enable him to have his family with him when he moves from country B to country C. If they did not so apply, his movement from country B to country C would be less easy.

13. Where country C is the United Kingdom, the governing regulations are those in the Immigration (European Economic Area) Order. In its context, and for the reasons we have given, we take the view that Regulation 10(4)(c) refers to the members of the person's family who were with him in country B. If he had already separated from his family by moving from country A to country B, then the absence of his family cannot have affected his movement from country B to country C. It is only if his family was with him in country B that his exercise of treaty rights in moving from country B to country C would be hindered by not being able to take his family with him. Thus sub-paragraphs (b) and (c) of Regulation 10(4) have an identical effect. Where the family moves together in the exercise of one family member's treaty rights, Regulation 10(4)(b) applies. If the qualified person goes ahead his family members can make the same journey, because Regulation 10(4)(c) applies. Nothing in any of the Regulations suggests to us that they give a right for a person who was formerly a member of a qualified person's household to move directly from country A (outside the EU) to country C. Any such interpretation would be well outside the purpose of these Regulations and, as it happens, would also produce an absurd disparity between Regulations 10(4)(b) and 10(4)(c). That is because a family moving together from country A to a country within the EU could not benefit from the Regulation because none of them would be exercising treaty rights; in these circumstances, it cannot be intended that they should acquire such rights by travelling separately. Further, it would be surprising if EU Regulations designed to secure the freedom of movement of a national of country B to country A had the effect of allowing his relatives to enter country A in circumstances where they would not be permitted to be with him in country B, his country of nationality.
14. We turn now to the application of these principles to the Appellants. We may begin with Upasnaben. She is the granddaughter of the sponsor and, being under twenty-one, falls within the definition of "*family member*" in Regulation 6(4)(b). She is entitled to a family permit under Regulation 13(1). The other two Appellants have entirely failed to establish their dependency on the sponsor. They have no right to a family permit. It is, however, common ground

that the Entry Clearance Officer ought to have considered whether they fall within Regulation 10(4)(c) and, if so, ought further to have considered whether to exercise his discretion in their favour. We have indicated our view of the proper interpretation of that Regulation, but the matter is clearly not beyond dispute and it was not explored fully before us. For this reason, we take the view that it is right to determine this appeal in the sense agreed at the hearing, which is that, because of the Entry Clearance Officer's failure to consider Regulation 10, the decision that he made is not in accordance with the law and that the first and second Appellants' applications accordingly remain outstanding before him.

15. These appeals are therefore allowed. The third Appellant's appeal is allowed in substance and we direct that she be issued with the permit she sought. The first and second Appellants' applications are now to be decided by the Entry Clearance Officer under Regulation 10.

C M G OCKELTON
DEPUTY PRESIDENT