Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23577/2013

THE IMMIGRATION ACTS

Heard at Field House
On 14th April 2014

Determination Promulgated
On 22nd May 2014
…………………………………

Before

UPPER TRIBUNAL JUDGE KING TD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR NOSA IGUMA JOE

Respondent/Claimant

Representation:

For the Appellant: Miss Appiah, of Counsel
For the Respondent: Mr Bramble, Senior Presenting Officer

DECISION AND DIRECTIONS

1. The claimant is a citizen of Nigeria, born on 22nd January 1980. He married Miss Glockner, a German citizen, on 28th July 2007. He was granted a residence card valid for five years on 8th February 2008.

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2. The claimant applied on 8th November 2012 for permanent residence under the provisions of the Immigration (European Economic Area) Regulations 2006. This was refused by the respondent on 5th June 2013.

3. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Lindsley on 17th January 2014.

4. The Judge found that the claimant satisfied the requirements of the 2006 Regulations as to allow the appeal. The claim under Article 8 of the ECHR was allowed in line with the successful appeal.

5. The Secretary of State for the Home Department sought to appeal against that decision on the basis that the Judge had misapplied the Regulations and should not have allowed the appeal in the circumstances. On 25th February 2014 permission to appeal was granted and thus the matter comes before me in pursuance of that permission.

6. At the hearing Ms Appiah, who represents the claimant, sought to take a preliminary issue, namely that the appeal was in fact out of time.

7. She invited my attention to Rule 24 of the Asylum and Immigration Tribunal (Procedure) Rules 2005. Rule 24(2) provides that an application must be sent or delivered to the Tribunal so that it is received no later than five days after the date on which the party making the application is deemed to have been served with written reasons for the decision.

8. Notification of that it was received by the Secretary of State for the Home Department on 27th January 2014.

9. Five working days from that moment of receipt meant that the appeal should have been lodged on 3rd February. It is common ground that the notice of appeal was signed on 3rd February but not sent to the Tribunal until 7.21am on 4th February.

10. Ms Appiah submits, firstly, that the grounds of appeal as received by the Tribunal were in fact out of time and therefore that the decision granting permission was void for lack of jurisdiction.

11. I indicated to her that I did not agree with that argument. It is clear that nobody had noticed the fact that the grounds were just out of time. No point was taken either by the Tribunal or by any representative nor indeed by the Judge who considered the matter. The fact that an appeal is out of time does not remove the appeal from the jurisdiction of the Tribunal. It is always for the Tribunal to extend time in the appropriate circumstances.

12. It seemed to me that the grant of permission stands as a conditional grant. The decision whether or not to extend time for appealing rests with me, standing as it

were in the shoes of the Immigration Judge and applying Rule 24(4)(a) of the 2005 Rules. Such Rules indicate that the Tribunal may extend time for appealing if satisfied that by reason of special circumstances it would be unjust not to do so.

13. Mr Bramble, who represents the Secretary of State for the Home Department, indicated that he had only been able to make limited inquiries given that this point was only taken on the morning of the hearing. It is clear he submits that the caseworker had considered the matter in time, as evidenced by the dated signature to the grounds of appeal. Why the grounds were not sent by facsimile on that same day is a matter of speculation. There could be a number of reasons for that, either that that particular fax did not go through and had to be resent or the volume of faxes made sending on the same day difficult. What is clear however is that urgent steps were taken on the following day to send through the grounds of appeal well before the working day at 7.21am. There was no lack of diligence on the part of the Secretary of State for the Home Department. It is also relevant in considering whether or not it would be just to extend time to note the merits of the appeal in any event.

14. Ms Appiah invited me to find that I had to be satisfied that there were special circumstances but none had been advanced. No explanation had been made as to the causes of the delay and therefore that the first hurdle as envisaged under the Rule had not been complied with.

15. It seems to me that the interests of justice require a realistic and not unduly technical approach to this issue. Special circumstances would seem to be in this case that it was an appeal clearly prepared and signed within the requisite period and as sent soon after that period as could be imagined. There can be no suggestion of any prejudice by the delay, indeed the delay itself cannot be said to be significant in any practical way at all.

16. In the circumstances I have no hesitation to extend time in this case. I deem, therefore, that the application for permission to appeal is properly before the Tribunal for a substantive consideration of the merits.

17. The permanent right of residence is to be acquired in accordance with Regulation 15 of the 2006 Regulations. That provides as follows:-

    (1) 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) the 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.

18. What lies at the heart of this appeal therefore is whether or not the claimant's spouse, Miss Glockner, has resided in the United Kingdom as an EEA national exercising treaty rights for the five year period.

19. It seems to be common ground that between 2007 and 2008 the claimant's spouse was a worker within the meaning of the Regulations and that since April 2010 she is to be regarded as self-employed.

20. Thus the requisite period for consideration under the focus of this appeal is the period 2008 to April 2010. It is contended on behalf of the claimant that during this period his wife was exercising treaty rights as a self-sufficient person and thus accordingly the whole five year period has been duly accounted for.

21. The Judge at paragraph 41 of the determination looks therefore at this crucial period between April 2008 and January 2010. It was argued on behalf of the claimant that his wife was a self-sufficient person reliant on her husband's wages and gift payments from her parents in accordance with Regulation 6(1)(d) of the Immigration (EEA) Regulations 2006. This claimant's wife supplied a Lloyds Bank statement for the period from April 2008 to October 2009, showing cash payments into the account. In addition the claimant supplied his P60s for his work with Superdrug Store for the year ending April 2009. It was the finding of the Judge that those figures gave the claimant and his partner a net income of £22,145 for the period of two years April 2008 to April 2009 which in effect meant a weekly amount after payment of rent of £134, which was in excess of £195 paid per week to a couple on income support. The Judge also found it likely that Miss Glockner also received cash from her parents although that such figures were not quantified. The Judge therefore went on to find that Miss Glockner satisfied Regulation 4(1)(c)(i) of the Immigration (EEA) Regulations 2006 during the period April 2008 to January 2010.

22. Mr Bramble submitted that that was to misunderstand the import of the Regulations. The claimant derived his right to reside in the United Kingdom from the status of his wife as an EEA national exercising her rights. There would be an undue circularity of matters if her ability to exercise her rights in fact derived from his financial support of her.

23. Further it is submitted that to be a self-sufficient person within the Regulations is to have comprehensive sickness insurance cover in the United Kingdom. Mr Bramble submits that there again the Judge has fallen into error in paragraph 42. The Judge had regard to the National Health Service (Charges to Overseas Visitors) Regulations 1989 and had concluded that such Regulations provided to the claimant and to his spouse the relevant cover that was required.

24. Mr Bramble invited my attention to the text of the National Health Service (Charges to Overseas Visitors) Regulations 1989 which sets out what is the interpretation of an overseas visitor. "Overseas visitor" means "a person not ordinarily resident in the

United Kingdom." Mr Bramble submits that the claimant and his spouse are ordinarily resident in the United Kingdom. They have been for the past five years or more. I was invited to find that there needs to be cover other than under this particular Regulation and that that is not established.

25. Ms Appiah, who represents the appellant, invited my attention to Regulation 4 as set out in her Rule 24 response. Self-sufficient person is one who has sufficient resources not to become a burden on the social assistance system of the United Kingdom during the period of residence and has comprehensive sickness cover in the United Kingdom.

26. The Regulation goes on as follows in Regulation 4(2):

> " For the purposes of paragraph (1)(c), the family members of the person concerned reside in the United Kingdom and their right to reside is dependent upon their being family members of that person –
>
> (a) the requirement for that person to have sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence shall only be satisfied if his resources and those of the family members are sufficient to avoid him and the family members becoming such a burden;
>
> (b) the requirement for that person to have comprehensive sickness insurance cover in the United Kingdom shall only be satisfied if he and his family members have such cover.
>
> (4) For the purposes of paragraph (1)(c) and (d) and paragraphs (2) and (3), the resources of the person concerned and, where applicable, any family members, are to be regarded as sufficient if they exceed the maximum level of resources which a United Kingdom national and his family members may possess if he is to become eligible for social assistance under the United Kingdom benefit system."

27. Ms Appiah relies particularly upon Regulation 4(2)(a) and the words "be satisfied if his resources and those of the family members are sufficient." She invites me to find that on the plain wording of the Rules the earnings from the claimant as a family member can be taken into consideration to determine whether or not the sponsor is a self-employed person or not.

28. So far as the issue of comprehensive sickness insurance cover in the United Kingdom is concerned, she invites me to find that the Judge's approach cannot be faulted. There is no definition beyond the general statement as to what "ordinarily resident" means. Neither the claimant nor his wife are citizens of the United Kingdom. She invites me to find that ordinarily does not apply to them such as they may fall to

benefit from the terms of the National Health Service (Charges to Overseas Visitors) Regulations 1989.

29. Although the wording of Regulation 4(2)(a) may be capable of supporting the argument that the claimant's wife may use his resources to found her status as a self-sufficient person, it is clear from the jurisprudence such a situation is not permissible. The circularity of the position was considered in particular in **MA and Others (EU national; self-sufficiency; lawful employment) Bangladesh [2006] UKAIT 00090** That case decided that an EEA national child cannot rely upon income derived from a parent lawfully working in the United Kingdom during a period of limited leave in order to establish her right of residence based upon "self-sufficiency". The parent/carer can derive no right of residence under EU law in such circumstances either. Paragraph 34 of that judgment is as follows:-

> "Third, it is equally clear that in none of the decided cases has income earned by a family member of an EU national in the host member state been taken into account where that family member thereby acquired or sought to sustain a right of residence derived from the right of residence of the EU national who is 'dependent' upon that income to establish or sustain his own right of residence."

The case of **Chen** was considered particularly in that regard.

30. As was commented in paragraph 35 when looking at another case the EU national's partner was not seeking to derive any right to reside or work in Belgium from the EU national:-

> "There was in that case no element of bootstrapping or circularity whereby the right of a family member to reside and work was established only through the EU national whose right was likewise dependent upon the family member working."

31. It was stressed in the course of the judgment that the requirement of "self-sufficiency" goes to the "existence" of the EU's national's rights and that that right and the derivative rights of the parents can only be established if the strictly limited conditions imposed by the EU Directives are satisfied.

32. Similar considerations were noted by the Court of Appeal in the decision of **W (China) and Another v Secretary of State for the Home Department [2006] EWCA Civ 1494**.

33. It is clear that the claimant in this case cannot acquire the right of residence on account of his spouse's exercise of treaty rights, unless she is exercising those rights independently of him. He cannot use his earnings to create that status for her and through her, himself.

34. It may well be that she can use the contributions from her parents to create that self-sufficiency. There is little evidence as to precisely the amounts that were provided by her parents. Certainly there is no indication that the amounts which were provided would have exceeded the requirements of £109 per week for a couple on income support.

35. Thus I find that the Judge has fallen into error seeking to use the earnings of the claimant to give rise to the finding of self-sufficiency.

36. So far as the question of comprehensive insurance is concerned, it was considered by the Court of Appeal in **FK (Kenya) v Secretary of State for the Home Department [2010] EWCA Civ 1302** where at paragraph 15 of the judgment it is set out as follows:-

> "The Regulations give effect to the United Kingdom's obligations under EU law to facilitate the free movement, not merely of workers and those who are self-employed, but also those who are self-sufficient together in each case with their family members. The requirement that a person be self-sufficient is no less a matter of substance than a requirement that a person be either employed or self-employed. A person who has had to rely on the United Kingdom's National Health Service is no more self-sufficient than a person whose resources are inadequate so that he may become a burden on the United Kingdom social assistance system."

37. It is precisely because a self-sufficient person is not to become a burden on the state that the requirement for comprehensive sickness insurance is made. Therefore no answer to say that if medical treatment is required that it can be accessed under the National Health Regulations.

38. A similar sentiment was reflected in the decision of **W China** where it was held that in order to fulfil the requirements of Directive 90/364 there had to be a demonstration of a possession of sickness insurance and sufficient resources to avoid becoming a burden on the social assistance system of the United Kingdom. The court in that case considered at length the question of sickness insurance.

39. I find, therefore, that the approach taken by the Judge to the issue of comprehensive sickness insurance was fundamentally flawed.

40. In the circumstances therefore I find that the approach taken by the Judge to the Regulations was flawed and in error of law, such that it should be set aside and the decision remade.

41. The finding that the sponsor was not self-sufficient during that period of April 2008 to January 2009 does not entirely dispose of the appeal as was recognised by the Judge in paragraph 43, there may be an argument that she remains a job seeker for

that period. The Judge did not make findings on that matter and left the matter somewhat open.

42. In relation to the issue of Article 8 that was linked in paragraph 44 with the findings that were made that the claimant indeed fell to be granted permanent leave to remain. That finding clearly is vitiated by the error of law to which I have referred.

43. Ms Appiah indicated that, in the event that I found an error of law so as to set aside the decision, she would seek to argue that the spouse still fell to be considered as a job seeker for the purposes of the Regulations and would seek to develop that argument.

44. In those circumstances having regard to paragraph 7 of the senior president's practice direction I shall send the matter back to the First-tier Tribunal for that issue to be determined.

45. It is to be noted in any event that removal of the claimant is not envisaged because at present he is entitled to reside in the United Kingdom as a family member of an EEA national currently exercising treaty rights. The real issue is whether or not he is entitled to the permanent residence under the Regulations or not.

46. Any further documentation or evidence relating to the issues which are the subject of appeal should be sent to all parties no later than five days prior to the hearing.

Signed Date

Upper Tribunal Judge King TD