Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02473/2016

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 21 August 2017	**On 6 October 2017**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MR IKECHUKWU CHINEDU NZEAKOR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Singh, Solicitor
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria. He made an application for a permanent residence card but that application was refused by the respondent in a decision dated 24 February 2016.

2. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge Chohan ("the FtJ") on 25 November 2016. The FtJ dismissed the appeal.

3. The FtJ recited the basis of the appellant's claim to be entitled to confirmation of his right of residence in the UK. The appellant's spouse is

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a Portuguese national and they have a child born on 29 December 2011. The appellant's wife was employed until she took maternity leave between 17 October 2011 and 14 October 2012. Although the respondent had concluded that there was no evidence that the appellant's wife had been exercising Treaty rights for the years 2013 to 2015, so that she could not establish five years' continuous residence as a qualified person, the appellant's argument was that his wife had a medical problem which meant that she was unable to work and she was in receipt of income support.

4. The FtJ noted that the contention on behalf of the appellant was that she had a problem with her right arm and shoulder which meant that she was unable to work. He also noted that her medical history included that she had had a colostomy. He said that there was evidence in the documents confirming receipt of income support.

5. The FtJ heard evidence from the appellant and his wife. He found that both of them had been in the UK for a period of more than five years, and noted that it was not disputed but that the appellant's wife was in employment between 2010 and the tax year ending 2013. He identified the issue in dispute as being whether she had been exercising Treaty rights between 2013 and 2015.

6. The FtJ referred to regulations 15 and 6 of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"), and also referred to various authorities.

7. At [13] he found that it was clear that the appellant's wife did not return to work after her maternity leave ended on 17 October 2011 (although it seems to me that the FtJ meant 14 October 2012, since that is when her maternity leave ended). He noted that during his oral evidence the appellant said that his wife had stopped working after she went on maternity leave and did not go back to work, and that he also said that for the period 2013 to 2015 his wife was looking after their baby and that she did not work. Although the appellant had said that she was looking for work, the FtJ said that there was no evidence that that was the case.

8. He referred to the appellant's wife's oral evidence that from April 2012 to August 2016 she had been in receipt of income support and had done some part-time work as a cleaner which had not been declared to the Department for Work and Pensions ("DWP"). She said in evidence that the Job Centre had told her that she did not have to declare that income.

9. Referring to the earlier assertion that she had had difficulties with her hand that prevented her from looking for work, the FtJ concluded that there was no evidence that any such difficulties had prevented her from looking for work, or indeed prevented her from actually working.

10. He referred to the lack of documentary evidence for the period 2013 to 2015, and in particular nothing from the Job Centre or the Inland Revenue.

He accepted that the appellant's wife had been receiving income support but there was no evidence to establish that she was seeking work, and according to her own evidence and the appellant's evidence she had not in fact worked. The evidence was that the appellant's wife decided to look after their baby and, in effect, stay at home. He concluded therefore, that it was difficult to see how she could be classified as a worker and thus a qualified person under reg 6 of the EEA Regulations.

11. He found at [17] that she was not exercising Treaty rights for the period 2013 to 2015, and thus she had not been exercising Treaty rights for a continuous period of five years. Thus, the appellant could not succeed under reg 15 of the EEA Regulations.

12. At [18] the FtJ referred to a further argument to the effect that the appellant was entitled to a derivative right of residence under reg 15A, and it was argued on the appellant's behalf that this had not been considered by the respondent. However, the FtJ pointed out that in his application the appellant had not raised this as a basis upon which he was entitled to a residence card and the matter had not been raised in the grounds of appeal. He said that it was, in effect, a new matter and under s.85 of the Nationality, Immigration and Asylum Act 2002, the consent of the Secretary of State was required before that matter could be addressed.

Submissions

13. In submissions before me Mr Singh referred to reg 5(3) of the EEA Regulations, which has a subheading "Worker or self-employed person who has ceased activity". He accepted however, that there was no evidence that the appellant's wife had ceased work "as a result of a permanent incapacity to work". Nevertheless, I was referred to various aspects of the appellant's bundle in terms of the medical evidence that was before the FtJ. This was relevant to the submissions made before me in relation to reg 5(3).

14. It was then submitted that the appellant could rely on reg 5(4), although again, for reasons which I shall briefly explain below, the appellant is not able to rely on that aspect of the EEA Regulations either.

15. Mr Singh also relied on reg 6(2)(a), on the basis that the appellant's wife was temporarily unable to work as the result of an illness or accident. Again, I was referred to the medical evidence in the appellant's bundle.

16. It was submitted that the evidence showed that she had been receiving continuous treatment since she had become pregnant and that that was an obstacle to her continuing working. She was assessed as eligible for income support.

17. I enquired as to whether it was argued on behalf of the appellant that he qualified for a derivative right of residence under reg 15A, albeit that that

is not advanced in the skeleton argument submitted in support of the appeal to the Upper Tribunal provided on the day of the hearing (although it is in the grounds). Mr Singh did not refer me in detail to the provisions of reg 15A, although I indicated my reservations about whether the appellant could qualify in that respect.

18. Mrs Aboni submitted that there was no error of law in the FtJ's decision. The FtJ was entitled to conclude on the evidence that was presented that the appellant's wife was not a worker between 2013 and 2015. Although she was in receipt of income support, it was not explained why that was the case. She was not a job seeker and was not exercising Treaty rights.

19. With reference to a printout that was relied on on behalf of the appellant in submissions, being information about income support, it was submitted that it was not clear where that information came from because it does not appear to be from a government website.

20. The appellant was not able to meet the requirements of reg 5(3) or (4). There was no evidence of permanent incapacity or of work in another EEA state.

21. In relation to the appellant's wife's inability to work, it appears from the FtJ's decision that the argument in that respect was put in terms of a problem with her right arm and shoulder, which is different from the evidence in the appellant's bundle.

22. It was initially submitted by Mrs Aboni that the FtJ was correct to refuse to consider argument in relation to a derivative right of residence given that this was not the basis of the application for a residence card and the Secretary of State's consent was required. However, it was then accepted that in this respect the FtJ may have erred in law since an appeal under the EEA Regulations is not governed by the s.85 provision.

23. In reply, Mr Singh then contended that the respondent should have considered the issue of a derivative right of residence since it was known that the appellant had a child in the UK.

Conclusions

24. Reg 6(2)(a) of the EEA Regulations provides that a person who is no longer working shall not cease to be treated as a worker (and thus a 'qualified person') if he is temporarily unable to work as the result of an illness or accident.

25. Reg 5 deals with workers or self-employed persons who have ceased activity. Reg 5(3) is one of the bases upon which a person could be qualified as a worker or self-employed person who had ceased activity, but it requires the individual to have terminated his activity in the UK as a worker or self-employed person "as a result of permanent incapacity to work".

26. Reg 5(4) relates to a worker or self-employed person in an EEA state who retains his place of residence in the UK and to which he returns "as a rule" at least once a week. Such an individual may also be classified as a worker or self-employed person who has ceased activity, subject to the other qualifications.

27. The FtJ accepted that there was evidence that the appellant's wife was receiving income support. However, it was not established why she was receiving income support. At [16] the FtJ said that there was no evidence, notwithstanding her income support, that she was seeking work and there was no evidence of her employment. Instead, she had decided to look after their baby and stay at home.

28. Whilst it does appear from [14] that the appellant's wife said that she had done some part-time work as a cleaner, it does not appear that there was any evidence to support that contention. Indeed, it is contrary to the appellant's case which was to the effect that she was unable to work. For the period 2013-2015, there was simply no evidence that she was employed or looking for work.

29. Whilst the appellant relies on a letter dated 10 December 2015 at page 147 of the appellant's bundle, in relation to various health issues that the appellant's wife has, there is actually no evidence that she was unable to work "as the result of an illness or accident", per reg 6(2)(a). This is not a matter that can be inferred from that medical report. The evidence that she had had a colostomy indicates that that was a procedure that was performed 13 years ago and since then the appellant's wife plainly has been in employment.

30. Other medical evidence goes back to 2011 but includes, for example, a letter dated 4 October 2013 at page 142 of the bundle, and another dated 11 January 2016 on the following page. But none of that evidence reveals that the appellant's wife during the period 2013-2015 was unable to work as a result of illness or accident. Certificates of fitness for work, stating that she was not fit for work are at pages 132-134, but are dated March to May 2011. They refer to shoulder pain, as does the letter dated 22 February 2011 at page 135 from the Occupational Health Nurse Adviser. There is no evidence however, that that condition prevented her from working between 2013 and 2015, as appears to have been the basis of the argument on her behalf.

31. I do not at all accept that the fact that the appellant's wife was receiving income support in that period necessarily indicates that she was unfit for work as a result of illness or accident. The one does not (necessarily) follow the other at all, and the arguments advanced on behalf of the appellant did not make good that assertion.

32. I am satisfied that the FtJ was entitled to conclude on the basis of the evidence before him that the appellant had not established that his wife

was a qualified person within the meaning of the EEA Regulations and thus exercising Treaty rights for a continuous period of five years, as required.

33. The arguments put before me in terms of reg 5 are plainly unsustainable. There was and is no evidence that the appellant's spouse is or was unable to work as a result of a permanent incapacity to work (reg 5(3)), and she is not active as a worker or a self-employed person in an EEA state (reg 5(4)) who retains her place of residence in the UK to which she returns at least once a week. That provision relates to people working in States other than the UK but retaining a place of residence in the UK. Under reg 2, for the purposes of the EEA Regulations, the UK is not to be regarded as an EEA State.

34. The FtJ at [13] referred to the appellant's evidence that for the period 2013 to 2015 his wife was looking after their baby and that she did not work. Although it was said that she was looking for work, there was no evidence to that effect.

35. The FtJ was plainly correct to conclude as he did in relation to the appellant's wife's exercise of Treaty rights.

36. The case in relation to reg 15A was not one that was put before the Secretary of State. That has not been demonstrated with reference to the application for a residence card. Although I was referred to a document in the appellant's bundle before the FtJ entitled "Grounds of Appeal", that document is undated and it is not the same as the grounds of appeal which initiated the appeal. Regardless of that, it is not apparent that this was an argument put before the respondent.

37. Having said that, it was conceded before me that the FtJ was wrong to find that s.85 of the 2002 Act (as amended) prevented him from considering that matter. An appeal under the EEA Regulations is not an appeal under s.82 of the 2002 Act, to which this provision applies.

38. Nevertheless, the evidence before the FtJ simply did not support the contention that the appellant is entitled to a derivative right of residence under reg 15A, which requires the appellant to establish that he is the primary carer of an EEA national. It was submitted to me that his child, born on 29 December 2011 to the appellant's wife, a Portuguese national, was therefore an EEA national because of the nationality of his mother. Even if that is so, the appellant nevertheless needed to establish, for example, that he is the "primary carer" of that child. There was no evidence that the child is in full-time education, which is one of the other ways in which a derivative right of residence may be obtained. Apart from anything else, in that context the EEA national parent needs to have been a worker, which is not established in this case.

39. Reg 15A(7) defines what is meant by "primary carer". That can include where a person has primary responsibility for that person's care, in respect of which there was no evidence in this case, or shares equally the

responsibility of that person’s care with one other person who is not an exempt person.

40. Again, the evidence before the FtJ was absent in terms of the extent to which the appellant shares responsibility for the care of his child.

41. Additionally, reg 15A(2)(b)(iii) in terms of the primary carer ‘route’ requires it to be established that the child would be unable to remain in the UK if the appellant were required to leave. I was not referred to any evidence that was before the FtJ which establishes that that was the case.

42. The argument in relation to reg 15A and a derivative right of residence could not have succeeded in any event. Therefore, any error of law on the part of the FtJ in not considering that argument is not material.

43. I am not satisfied that there is any material error of law in any respect in the FtJ’s decision.

Decision

The decision of the First-tier Tribunal did not involve the making of a material error of law. Its decision to dismiss the appeal on all grounds therefore stands.

Upper Tribunal Judge Kopieczek 5/10/17