Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05735/2016

THE IMMIGRATION ACTS

Heard at Field House
On 26 April 2017

Decision & Reasons Promulgated
On 8 May 2017

Before
UPPER TRIBUNAL JUDGE C MARTIN
UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

S B D T
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr P Deller, Senior Home Office Presenting Officer
For the Respondent: Mr D Bazini, Counsel

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge L James promulgated on 10 October 2016, allowing the respondent's appeal against the decision of the respondent made on 10 May 2016 to refuse his application for a residence card as confirmation of his right of permanent residence under the Immigration (European Economic Area) Regulations 2006 ("the EEA

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Regulations") as the spouse of a person who had ceased activity. The applicant is a citizen of Trinidad and Tobago. On 3 May 2014, he married [BA] ("the sponsor"), a German citizen who has been resident in the United Kingdom and since 2001 has worked for a number of nursing agencies. He last worked on 30 July 2015 but has been unable to return to work owing to illness as he is permanently incapacitated due to ill-health.

2. On 18 November 2015 the respondent applied for a residence card as confirmation of his right of permanent residence pursuant to Regulation 15(1)(d) of the EEA Regulations.

3. On 10 May 2016 the Secretary of State refused the application on the basis that the respondent did not fulfil the requirements of Regulation 15(1)(b) as, in order to qualify for permanent residence under that provision he had to have been an EEA family member for a continuous period of five years and to have resided in accordance with the Regulations. This letter contains a number of errors including the reference to the sponsor being a Dutch national and stating that as the applicant had no alternative basis of stay in the United Kingdom he should now make arrangements to leave.

4. The respondent appealed against this decision requesting that this matter be dealt with on the papers. The grounds of appeal do, however aver that the Secretary of State has erred in applying Regulation 15(1)(b) as opposed to Regulation 15(1)(d).

5. The judge found that:-

   (i) the application clearly stated that the respondent is the family member of an EEA national who had ceased activities [6] and is thus based on Regulation 15(1)(d).

   (ii) the Secretary of State had misunderstood the basis of the applications [7]; that the sponsor met the requirements of Regulation 5(b) as a worker who had ceased activity; that he had been resident in the United Kingdom for more than two years prior to 30 October 2015, the date at which he ceased work [8]; that this was permanent [9]; and, the respondent satisfied the requirements of Regulation 15(1)(d), having concluded he was the family member of the sponsor

6. The judge allowed the appeal on that basis.

7. Although accepting that she had mischaracterised the basis of the application and had made a number of additional errors in the letter, the Secretary of State sought permission to appeal on the grounds that:

   (i) The sponsor had acquired the permanent right of residence well before he had married the respondent and was thus not residing as a worker under Regulation 6(1)(b);

(ii) As the sponsor had previously acquired permanent residence, the judge was not entitled to hold that the sponsor was a worker who had ceased activity as he could not have been a worker who had acquired the right of permanent residence by becoming a worker who had ceased activity

8. On 30 January 2017 Acting Resident Judge Appleyard granted permission.

9. The matter first came before Judge Martin on 15 March 2017 when the Secretary of State was represented by Mr K Norton, a Senior Presenting Officer. That hearing was adjourned.

10. On that occasion, the argument put by the Secretary of State was that an individual could not simultaneously be an individual who had acquired the permanent right of residence through five years' continuous residence and an individual who had acquired permanent right of residence owing to ceasing the activity

11. That is not the argument which was pursued by Mr Deller who changed his position from what had been said by Mr Norton.

12. Mr Deller accepted, after some probing by the panel, that it was the Secretary of State's case that although on a literal reading of the EEA Regulations, it could be said that the respondent did qualify for permanent residence as a family member of a worker who had ceased activity, this needed to be construed in the context of the Citizenship Directive (Directive 2004/38/EC) ("the Directive") under Articles 16 and 17 of which the respondent would not qualify for permanent residence. He accepted that he was, unusually, asking the Tribunal to interpret the Regulations more strictly than they appear on their face so as to conform with the Directive although he accepted that the Article 37 of the Directive provides that it would not affect any laws, Regulations or administrative provisions laid down by a member state which would be more favourable to the persons covered by the Directive.

13. We did not need to hear from Mr Bazini. We dismissed the Secretary of State's appeal for reasons which we now give.

<u>Decision</u>

<u>The Law</u>

14. Neither the EEA Regulations nor the Directive define "worker" except by reference to Article 45 of the Treaty on the Functioning of the European Union ("TFEU").

15. Regulation 5 of the EEA Regulations provides, so far as is relevant, as follows:-

> "**5.**—(1) In these Regulations, "worker or self-employed person who has ceased activity" means an EEA national who satisfies the conditions in paragraph (2), (3), (4) or (5).
>
> …

(3) A person satisfies the conditions in this paragraph if—

(a) he terminates his activity in the United Kingdom as a worker or self-employed person as a result of a permanent incapacity to work; and

(b) either—

(i) he resided in the United Kingdom continuously for more than two years prior to the termination; or

(ii) the incapacity is the result of an accident at work or an occupational disease that entitles him to a pension payable in full or in part by an institution in the United Kingdom.

…

(7) For the purposes of this regulation—

(a) periods of inactivity for reasons not of the person's own making;

(b) periods of inactivity due to illness or accident; and

(c) in the case of a worker, periods of involuntary unemployment duly recorded by the relevant employment office,

shall be treated as periods of activity as a worker or self-employed person, as the case may be".

16. Regulation 7 provides, so far as is relevant as follows:-

"**7.**—(1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person—

(a) his spouse or his civil partner;

…

17. The right of permanent residence is set out in Regulation 15 as follows:-

"**15.**—(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) 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".

18. Given the nature of the submissions made by Mr Deller we considered it also a necessary to have regard to Articles 16 and 17 of the Directive which provide, so far as is relevant, as follows:-

'**Article 16**

General rule for Union citizens and their family members

1. 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.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

Article 17

Exemptions for persons no longer working in the host Member State and their family members

1. By way of derogation from Article 16, the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by:

…

(b) workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work.

If such incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by an institution in the host Member State, no condition shall be imposed as to length of residence;

…

For the purposes of entitlement to the rights referred to in points (a) and (b), periods of employment spent in the Member State in which the person concerned is working shall be regarded as having been spent in the host Member State.

Periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness or accident shall be regarded as periods of employment.

3. Irrespective of nationality, the family members of a worker or a self-employed person who are residing with him in the territory of the host Member State shall have the right of permanent residence in that Member State, if the worker or self-employed person has acquired himself the right of permanent residence in that Member State on the basis of paragraph 1.

…'

19. It is the consistent case law of the CJEU that "worker" within the Directive is the same as "worker" as set out in the TFEU, and must, be construed widely - see for example **Jessy St Prix v SSWP** [2014] CJEU C-507/12 at [31] and [33].

20. Mr Deller was unable to provide us with any authority for the proposition that "worker" can be interpreted to exclude those who have also acquired the status of permanent residence. We conclude that it cannot. Not all workers acquire permanent residence, nor is being a worker a pre-condition to acquiring that status as students, the self-employed and the self-sufficient can also acquire that status. It is also evident that workers who have acquired permanent residence do not lose that status if they cease to be workers through ceasing to be economically active by simply choosing not to work. It follows that the reference to "worker" in reg.5 cannot be confined to those who have not yet acquired permanent residence.

21. The different circumstances in which an individual acquires permanent residence set out in Reg. 15 (1) are separate and to be read disjunctively; there is no basis in the EEA Regulations for reading into reg. 15 (1) (d) any requirement or proviso restricting its application to circumstances where the EEA national had not yet acquired permanent residence.

22. In reaching that conclusion, we accept that the provisions of the Directive as set out above are less generous. Unlike the EEA regulations, article 17.3 of the Directive limits the circumstances in which a family member of an EEA national acquires a permanent right of residence after less than five years' lawful residence to the situation where the EEA national has ceased activity to situations in which that person has acquired the permanent right of residence on the basis of ceasing activity,

23. That the Directive underpinning the EEA Regulations is less generous is not a basis for interpreting them to have the same effect as the Directive. Article 37 of the Directive expressly provides that it the Directive shall not affect any laws, Regulations or provisions laid down by a member state to be more favourable to the persons covered by the Directive. Consequently, and in the light of Recital 29 that the Directive should not affect more favourable national provisions, there is no merit whatsoever in the Secretary of State's arguments in this case.

24. For these reasons, we find that properly construed, reg. 15 (1) (d) of the EEA Regulations applies to the family members of workers or self-employed persons who have ceased activity, irrespective of whether the worker or self-employed person had already acquired permanent residence.

25. We now turn to the facts of this appeal. It is not disputed that the sponsor has now ceased activity or that prior to ceasing his activity he was a worker. He was clearly in active employment as is shown by the evidence adduced. It is not in dispute either that the respondent as the husband of the sponsor is a member of his family, nor that the sponsor had resided continuously in the United Kingdom for more than two years prior to the termination of his economic activity. On that basis, the sponsor meets the requirements of reg. 5 (3) of the EEA Regulations, and is thus, a worker who has ceased activity as defined in reg. 5 (1).

26. Accordingly, we consider that on the proper construction of Regulation 15(1)(d) the respondent had acquired the permanent right of residence and thus, by operation of Regulation 18(2)(a) is entitled to permanent residence card as confirmation of that right.

27. For these reasons, we find that the decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it.

28. Mr Bazini's applied for his costs in this matter and we have therefore made directions in respect of that application which are set out below.

SUMMARY OF CONCLUSIONS & DIRECTIONS

1. The decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it.

2. We direct:

   (i) Any application by the respondent for his costs to be paid by the Secretary of State must be made in writing within 10 working days of the issue of this decision, and must be limited to 3 sides of A4. It must also be accompanied by a Schedule of Costs so that the Upper Tribunal can make a summary assessment.

(ii) Any response by the Secretary of State to that application must be served within 10 days of service on her of the respondent's application.

(iii) If the Secretary of State does not reply to the respondent's application within the time provides, she will be deemed not to object to the application for costs and the Upper Tribunal will proceed to determine it accordingly.

Signed Date 4 May 2017

Upper Tribunal Judge Rintoul