



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/00594/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 8 November 2018**

**Decision & Reasons
Promulgated
On 14 November 2018**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

**SUKHPAL [S]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms Iengar, Counsel, instructed by Aston Bond

For the respondent: Mr Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a re-made decision following the setting aside of the decision of Judge of the First-tier Tribunal H Suffield-Thompson, promulgated on 19 March 2018, who allowed the appeal of Mr Sukhpal [S] (appellant) against the respondent's decision dated 23 October 2015 refusing to issue him a residence card as confirmation of his right to reside in the UK under the provisions of the EU Treaties.
2. In a decision promulgated on 25 September 2018 I explained why the making of the judge's decision involved the making of a material error

on a point of law. I adjourned the hearing and gave permission to both parties to adduce further evidence having indicated to the parties that if the appellant's estranged wife has been a qualified person (or indeed an EU national with a permanent residence) for a continuous period of 5 years since their marriage, even if they separated within that time, then the appellant may have attained a right of permanent residence.

3. At the start of the hearing to remake the decision Mr Walker served on Ms Lengar and the Tribunal a copy of a decision dated 4 November 2015 in which the respondent revoked the appellant's residence card because his spouse was not exercising Treaty rights as a qualified person. Ms Lengar indicated that the focus of her submissions would now centre on the appellant's relationship with his current partner.

Background

4. The appellant is a national of India, born in 1987. He entered the UK on 3 April 2011 as a Tier 4 (General) Student, with leave valid to 20 December 2014. The appellant married [MW] (hereafter 'spouse') on 18 February 2012. She is a Polish national. On 24 August 2012 the appellant was issued a residence card as the family member of an EU national exercising Treaty rights in the UK as a qualified person. Although the respondent had considered curtailing the appellant's leave to remain because his college stopped sponsoring him, curtailment did not proceed due to the issuance of the residence card. The appellant and his spouse had a son, [A], born on 16 September 2013. [A] is a Polish national.
5. On 14 May 2015 the appellant applied for a new residence card. He was open and forthright in this application. His relationship with his spouse had broken down and they had separated. The application was accompanied by a Child Arrangements and Prohibited Steps Order issued by the Family Court at Slough on 5 February 2015. Under the terms of the Order [A] was to live with his mother but he could spend time with the appellant every Sunday from 11:00 to 18:00. Any further contact could be agreed between the parties. The covering letter accompanying the application stated that the appellant was a self-sufficient individual in employment and that his now estranged wife was also working. The covering letter claimed that [A] needed his father and that it would be unreasonable for the spouse to raise [A] without support from the appellant. Reference was made to CJEU decision in **Zambrano** (C-34/09) which relates to derivative rights of residence.
6. In his Reasons For Refusal Letter the respondent was not satisfied that the appellant had established a derived right of residence, as set out in Reg 15A of the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations).

7. The respondent then set out the provisions of Reg 7, which establish the requirements for someone to be treated as a family member of an EEA national. The respondent stated,

“Due to your separation from your wife and son and, in particular, the court order awarding custody of the child of this union to her (as the mother at a separate address), the relationship, cohabitation & dependency no longer exist in your case.”

8. Having cited extracts from the Family Court Order, the respondent refused to issue a residence card because the appellant did not meet the definition of family member in Reg 7. The respondent stated that the appellant had submitted “... *some evidence only that your EEA national sponsor is exercising free movement rights.*” In the actual Notice of Immigration Decision the respondent stated that the appellant did not meet the requirements for the issuance of a residence card under Reg 8 of the 2006 Regulations as an extended family member.
9. By this time the appellant’s appeal against the respondent’s decision came before the First-tier Tribunal the appellant had entered into a relationship with Ms [IN] (hereafter ‘partner’), also a Polish national. In a signed witness statement dated 23 February 2018 the partner claimed she was working in the UK and had two children from another relationship, and that one of these children enjoyed a close relationship with their biological father.

Documentary evidence

10. There were two large bundles of documents filed with the First-tier Tribunal containing, *inter alia*, the appellant’s Indian passport and his residence card issued in August 2012, [A]’s birth certificate and Polish passport, the Child Arrangements and Prohibited Steps Order dated 5 February 2015, the partner’s Polish ID card, payslips and bank account statements relating to the partner, wage slips relating to the estranged spouse dating from 2012 to 2014, the estranged spouse’s P60s for 2012 and 2013, and her bank account statements from 2012 to 2013. There were also payslips, P60s and bank account statements relating to the appellant, and copies of his current partner’s children’s passports. There were also statements from the appellant and from his estranged spouse. In his statement the appellant maintained that his spouse had been exercising Treaty rights in the UK, and that she was now in a new relationship. In her statement the spouse confirmed that she and the appellant were not yet divorced because of the cost, but that divorce was imminent.
11. Two further bundles of documents were filed and served with the Upper Tribunal. These contained a further statement from the appellant, dated 6 November 2018, and a statement from his partner,

also dated 6 November 2018. In the appellant's most recent statement he confirmed that his estranged spouse had only recently started to work, and he was not sure whether she was employed on a permanent basis. He confirmed that he still had regular contact with his son, who resided with the estranged spouse, and that this sometimes involved his son staying overnight. He described the difficulties he believed he would encounter in trying to maintain a relationship with his son if he was removed to India. He confirmed that he had been living with his current partner for over 2 years and that their relationship was genuine. He confirmed that she had two children and they all resided together as a family unit. He confirmed that his partner's son had no relationship with his biological father and that the appellant was a father figure to him, and that the biological father of his partner's daughter did have contact with her. He stated that his partner was exercising Treaty rights as evidenced by the payment of taxes, national insurance, and pay slips.

12. In her statement the applicant's partner confirmed they had lived together for more than 2 years, that they were in a durable relationship, and that this assertion was supported by various items of documentary evidence. She repeated the evidence contained in the appellant's statement concerning her children, and confirmed that the appellant continued to have a relationship with his son. She confirmed that she worked in the UK and referred to bank account statements and wage slips in support.
13. The new bundles additionally contained wage slips and bank account statements relating to the appellant which were addressed to his partner's residence, wage slips relating to the partner, P60s for the tax years ending April 2017 and April 2018 confirming the partner's employment with Pizza Express, bank account statements relating to the partner, mobile phone documents addressed to the appellant at his partner's residence, and photographs of the appellant with his son and with his partner and her children. A further statement from the appellant's estranged spouse was provided, signed but not dated, confirming the appellant's relationship with his son and that she recently commenced employment.

Oral evidence

14. Both the appellant and his partner adopted their statements. In his oral evidence the appellant confirmed that he met his partner in Pizza Express, where she was a waitress, in December 2015, and that they started to live together in February 2016. His partner continued to work for Pizza Express. Also living with them were his partner's two children, her partner's mother (although she sometimes returned to Poland), and, on occasions, the partner's brother would visit. He gave the details of his current employer. In cross-examination the appellant described his weekly contact with his son, and that his son sometimes

stayed overnight. He still intended to obtain a divorce but finances prevented this from happening at the moment. He confirmed the circumstances in which he left the matrimonial home and commenced living with his partner.

15. In her oral evidence the applicant's partner gave evidence relating to her relationship with the appellant that was consistent with his evidence. This included details of when and where they met, when they began to cohabit, details of her employment, details of the people who lived at her residence, and details of the appellant's relationship with his son. She confirmed that theirs was a durable relationship. She has never been married but wanted to stay with the appellant. Marriage itself was not important to her.
16. Mr Walker relied on the Reasons for Refusal Letter and the decision revoking the appellant's previous residence card. Mr Walker indicated there was no reason to question the appellant's credibility or that of his partner. He submitted that the respondent was entitled to refuse the application for a residence card as the estranged wife was not exercising Treaty rights, as evidenced in the decision revoking the residence card in November 2015. Mr Walker, very properly, indicated that he could not take the matter any further.
17. Having indicated my preliminary view that the appellant and his partner were indeed in a durable relationship and that she was and continued to exercise Treaty rights as a worker, Ms Lengar accepted that reliance on Art 24 of the Charter of Fundamental rights did not assist the appellant as his son's mother had not been exercising Treaty rights herself until very recently. Ms Lengar also accepted that the respondent had a discretion as to whether to issue a residence card under Reg 17 of the Immigration (European Economic Area) Regulations 2006. I indicated that I would allow the appeal to the extent that I found the appellant was an extended family member within the terms of Reg 8 of the 2006 Regulations, and that it would be for the respondent to determine whether to issue a residence card pursuant to Reg 17 of the 2006 Regulations.

Discussion

18. This appeal is governed by the provisions of the Immigration (European Economic Area) Regulations 2006, although those provisions are not materially different from the Immigration (European Economic Area) Regulations 2016. Reg 8(5) provides that the partner of an EEA national with whom he is in a durable relationship is an extended family member. A person who meets the definition of extended family member may be granted an EEA residence card, after an extensive examination of their personal circumstances (Regs 17(4) and (5)).

19. I agree entirely with Mr Walker's observation that there was no reason to question the credibility of the appellant or his partner. Their evidence was given in a direct and forthright manner, and there was no discernible attempt at embellishment. Their evidence was measured, inherently plausible, and consistent. Their evidence was also supported by documentary evidence confirming the partner's Polish nationality, her employment with Pizza Express, and their joint residence as a family unit. I have no reason to doubt their claim to have commenced cohabitation around February 2016 and that they are in a genuine and subsisting relationship. I therefore find that the requirements of Reg 8 are made out. The appellant is in a durable relationship with a EEA worker and is therefore an extended family member.
20. The issuance of a residence card under Reg 17(4) of the 2006 Regulations is however within the discretion of the respondent, and the respondent must undertake an extensive examination of the appellant's personal circumstances. This examination must however be carried out within the factual matrix established in this decision.

Notice of Decision

The appeal is allowed to the extent that the Tribunal finds that the appellant is an Extended Family Member of an EEA national, within the terms of Reg 8 of the Immigration (European Economic Area) Regulations 2006.



8 November 2018

Signed

Date

Upper Tribunal Judge Blum