Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01892/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 January 2018	**On 2 February 2018**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

BLESSING [J]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr E. Yerokun, A & A Solicitors
For the respondent: Mr I. Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed against the respondent's decision dated 28 January 2016 to refuse to issue a residence card recognising a right of permanent residence as the family member of an EEA national. The decision, wrongly, concentrated on whether the appellant had retained a right of residence when regulation 10 did not apply to the appellant because she was, at that time, still married to an EEA national.

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2. First-tier Tribunal Judge James ("the judge") dismissed the appeal in a decision promulgated on 29 June 2017. The judge stated that the appellant's EEA rights did not commence until the date of the marriage for the purpose of her assessment of regulation 15 of The Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations 2006"). She analysed the evidence accordingly and decided that there were gaps in the evidence, which indicated that the appellant's husband was not a 'qualified person' for a continuous period of five years and therefore the appellant could not show that she was residing in accordance with the regulations for a continuous period of five years to acquire a right of permanent residence.

Background

3. It is said that the appellant's EEA national partner entered the UK in 2004. They began their relationship in 2006. The appellant applied for a residence card recognising a right of residence as an extended family member (durable relationship) in January 2011. The couple married on 07 May 2011. The respondent issued a residence card, which was valid from 13 May 2011 to 13 May 2016. It is unclear from the evidence currently before the Tribunal whether the residence card was issued recognising a right of residence as a 'family member' or as an 'extended family member'. In any event, it is not disputed that the couple were in a genuine and subsisting relationship. They have two children. "D" was born on [ ] 2007 and there is evidence to show that he has been issued with a German passport. "M" was born on [ ] 2008. She does not have a passport, but is likely to be entitled to German citizenship in the same way as her brother. The respondent accepts that the appellant separated from her husband in 2014 because of domestic violence. Since then it would appear that she has been the primary carer for the two children. On 21 August 2015 the appellant applied for a residence card recognising a permanent right of residence. The respondent refused the application in a decision dated 28 January 2016. Although it appears that there was a second application for a permanent residence card, this appeal relates to the decision made on 28 January 2016. At the hearing before the Upper Tribunal the appellant said that she became divorced from her husband in December 2017.

Error of law

4. In view of the concession made by Mr Jarvis, the hearing largely took place in Mr Yerokun's absence. Mr Yerokun did not appear at the Tribunal until 11.30am, by which time the Tribunal had completed the other cases on the list. I decided that it was not an effective use of court time to delay the matter any further. Ms [J] attended the hearing on time. The respondent agreed that the First-tier Tribunal decision involved the making of an error of law so there was no unfairness to the appellant in proceeding with the hearing in the absence of her legal representative. Mr Yerokun arrived in

time to make some last-minute representations, which I considered before completing the hearing.

5. Mr Jarvis accepted that the First-tier Tribunal decision involved the making of an error of law although he maintained that the respondent may still have arguments as to whether there was sufficient evidence to show that her husband was a ‘qualified person’ for a continuous period of five years and therefore whether the appellant had acquired a right of permanent residence. He acknowledged that relevant matters were not considered.

6. Under regulation 15 the appellant had to show that she was a ‘family member’ who had resided in accordance with the regulations for a continuous period of five years. The status of a ‘family member’ (spouse) is distinct from an ‘extended family member’ (durable relationship/unmarried partner) under the regulations. Regulation 7(3) states that a person who is an extended family member who has been issued with an EEA residence card shall be treated as the ‘family member’ of the relevant EEA national. Although the appellant might have been in a durable relationship with an EEA national for several years before she applied for a residence card as an ‘extended family member’ in January 2011, the card was not issued until 13 May 2011, at which point, she had become a ‘family member’ by virtue of her marriage. As such, the judge was correct to begin her assessment from around the date of the marriage given the fact that a residence card was issued in response to her application as an ‘extended family member’ at almost the same time.

7. However, it is argued that the judge erred in failing to consider whether it was likely that the appellant’s husband had acquired a right of permanent residence before the start of the five-year period considered by the judge. It is arguable that if he had already acquired a right of permanent residence then any gaps in employment did not necessarily detract from the appellant’s lawful period of residence as a ‘family member’. In failing to consider the evidence relating to the EEA national’s work history pre-dating the marriage the First-tier Tribunal erred in law.

8. The hearing involved a discussion as to whether the applicant might have other EEA rights that have not been considered by the Secretary of State and were not considered by the First-tier Tribunal within the broad scope of an appeal under regulation 26. For example, even if the appellant had not acquired permanent residence it was at least arguable that she might have had a continuing right to reside as a ‘family member’ given that she had not divorced from her husband at the date of the hearing. It was also arguable that she might have a derivative right of residence arising from her role as the primary carer of EEA national children. Even if these matters were not argued properly on the appellant’s behalf, they were sufficiently obvious on the facts of the case and were relevant to the core issue, which was whether the decision to refuse a residence card was in accordance with the EEA Regulations 2006. I conclude that the First-tier

Tribunal's failure to consider these obvious matters also amounts to an error of law.

9. If the matter is to be re-heard, which it must be, the current circumstances indicate that it is at least arguable that the appellant might now retain a right of residence following divorce. This is another matter that falls within the broad scope of an appeal under regulation 26 of the EEA Regulations 2006, which will need to be considered at the next hearing.

10. For the reasons given above I conclude that the First-tier Tribunal decision involved the making of an error of law. The First-tier Tribunal decision is set aside. Because new findings of fact will need to be made it is appropriate to remit the appeal to the First-tier Tribunal for a fresh hearing.

DIRECTIONS

11. The Upper Tribunal does not usually issue directions in preparation for an appeal which is remitted to the First-tier Tribunal. This is a rare case where I consider that it is appropriate to do so given the discussion that took place at the hearing and the need to make directions for further evidence and reconsideration of the case. However, listing directions are a matter for the First-tier Tribunal.

(i) The appellant shall serve a copy of the final divorce order (Decree Absolute) on the respondent **within 14 days** of the date this decision is sent.

(ii) In view of the fact that the appellant might be hindered in obtaining further records of her former husband's employment history as a result of domestic violence and divorce it is appropriate to make an *Amos* direction for the respondent to obtain records of Mr [SJ]'s history from HMRC (2004-present). The evidence should be filed **no later than 14 days** before the next hearing.

(iii) In view of the fact that the respondent considered the original application on the wrong factual basis, and there might now be other strands of European law applicable to this case, it is necessary for the respondent to reconsider the case in light of the evidence that she will obtain from HMRC and the other elements of European law highlighted above [8-9]. The respondent shall reconsider the application and file a supplementary decision letter stating her position **at least 14 days** before the next hearing.

(iv) If the decision is to be maintained, the appellant shall file the following documents **at least 7 days** before the next hearing:

(a) A detailed witness statement outlining a history of her relationship with Mr [J] including what she can remember of

his work history and a detailed description of the current arrangements for the care of the children, including the extent of any contact that Mr [J] has with the children.

(b) A chronological schedule of evidence outlining Mr [J]'s work history (and that of the appellant) cross-referenced to the evidence contained in the appellant's bundle.

(c) A composite bundle of evidence arranged in chronological order.

12. It is a matter for the appellant whether she wishes to prepare the evidence as soon as possible so that the Secretary of State can consider any further representations as part of her reconsideration of the case, but it might benefit her to do so.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside

The appeal is remitted to the First-tier Tribunal for a fresh hearing

Signed Date 01 February 2018
Upper Tribunal Judge Canavan