Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05031/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 15 May 2019	**On 16 May 2019**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

MUKESHBHAI RAMESHBHAI TANDEL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr L. Lourdes, counsel instructed by Direct Access
For the respondent: Mr E. Tufan, Senior Home Office Presenting Officer 44

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 05 July 2018 to notify him of his liability to removal as a person who ceased to have a right to reside in the UK as the family member of an EEA national with reference to regulations 23(6)(a) and 32(2) of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016").

2. The respondent gave the following reasons for finding that he ceased to have a right to reside in the UK.

> "You are specifically considered a person who has ceased to have a right to reside in the United Kingdom under the Immigration (European Economic Area) Regulations 2016.
>
> You were previously granted an EEA Residence Card as confirmation of your right to reside as a family member of a 'Qualified Person' however you do not have/have ceased to have this right because. …
>
> - You have failed to evidence that your EEA family member is a 'Qualified Person' as defined by regulation 6(1) of the Regulations or you have not been able to produce sufficient evidence that they are still a qualified person.
>
> This is because you have failed to provide evidence of your wife exercising her treaty rights in the UK. You have also stated that you have had no contact with your wife since February/March 2017 and have been separated since that date, and that she told you she wanted a divorce before you came to the UK."

3. First-tier Tribunal Judge Mill ("the judge") dismissed the appeal in a decision promulgated on 15 February 2019. The judge noted that the appellant was unrepresented and said that he afforded him a "degree of flexibility" as a result. After having heard evidence from the appellant he concluded that the appellant could not raise Article 8 issues in an appeal under the EEA Regulations 2016 [9]. He also concluded that the appellant could not argue that he retained a right of residence under the EEA Regulations 2016, which would have to be done by way of a paid application to the Home Office [9]. He did not find the appellant to be a credible witness and was not satisfied that the marriage was genuine [11]. He found that there was no evidence to show that the appellant had ever lived with his wife, or even to show that they had ever been in a relationship. There was no evidence to show that she exercised rights of free movement in the UK [10(iv)]. Although the respondent's decision was made under regulation 23(6)(a) on the ground that the appellant ceased to have a right to reside in the UK, the judge made no clear finding on the issue. Instead, he decided that the residence card could be revoked on the ground of misuse of rights under regulation 24 [12].

4. The appellant was granted permission to appeal to the Upper Tribunal by First-tier Tribunal Judge Fisher in the following terms:

> "…..
> 2. The grounds seeking permission assert that the Judge erred in terms of the burden of proof, stating that it was upon the Appellant, that he misdirected himself as to the precise nature of the Respondent's assertions, and that he erred in finding that the Appellant could not rely on Article 8 rights in his appeal.
>
> 3. Some of the issues raised in the grounds have no merit. For example, there was no allegation of dishonesty as the grounds suggest. Furthermore, given that the Appellant admitted that his relationship with his wife had broken down by March 2017, it is difficult to see how the

allegation under Regulation 26 was not made out, even if the Judge, arguably, misdirected himself in simply stating that the marriage was not genuine. The grounds complain that the Appellant was denied representation by Counsel, and I have seen the letter from his barrister in support. However, when direct access Counsel was not even on record as acting, and the Appellant had told the Judge that he was not represented, I see no arguable error of law on the grounds of procedural unfairness.

4. However, the judge refused to entertain any argument on Article 8 grounds and, whilst that may be the correct approach in cases where no s.120 notice or removal directions had been issued, there were removal directions in this case. Consequently, it is arguable that the Judge erred in law by failing to consider Article 8 of the ECHR. The Appellant may have difficulty in establishing such a case in the circumstances, but the fact remains that he was not permitted to raise the issue. I grant permission to appeal, but limit it to the issue of the appropriate burden of proof and Article 8."

Decision and reasons

5. The appellant married a Portuguese citizen, Manisha Budia, in India on 08 March 2015. He was issued with a six-month EEA family permit. He entered the UK on 14 January 2016. On 21 December 2016 the appellant was issued with a residence card as the family member of an EEA national, which was valid until 21 December 2021. The judge said that immigration officers visited the appellant's home on 21 July 2017 and that the appellant was interviewed on 24 July 2017. The respondent subsequently issued the decision dated 05 July 2018 to notify the appellant of his liability to removal because he ceased to have a right to reside under European law.

Error of law

6. I indicated to Mr Tufan at the beginning of the hearing that I was minded to expand the grant of permission to other grounds relating to the determination of the appeal under the EEA Regulations 2016 because I was satisfied that there were sufficiently obvious errors of law that could not be ignored. He had no objection to this course of action and did not seek to make any further submissions in relation to errors of law. I am satisfied that the First-tier Tribunal decision involved the making of errors on the following points of law.

   (i) The judge failed to consider the relevant point of law, which was whether the appellant ceased to have a right to reside with reference to regulation 23(6)(a).

   (ii) The judge wrongly considered the appeal with reference to misuse of rights of residence under regulation 24 without notice to the appellant and in circumstances where the issue was not raised by the respondent as a reason for revoking his residence card.

(iii) The judge failed to consider whether, as part of the relevant assessment under regulation 23(6)(a), the appellant continued to meet the requirements for residence as a family member given that the evidence was that the appellant was still married to the EEA sponsor albeit he admitted that they were now estranged. It is not a requirement of EU law for a married couple to live together.

(iv) In refusing to consider any other aspect of the EEA regulations that might have been relevant the judge failed to take into account the broad nature of the ground of appeal i.e. whether the decision breached the appellant's rights under the EU Treaties in respect of entry into or residence in the United Kingdom.

(v) In refusing to consider human rights issues the judge failed in his duty to assist an unrepresented appellant to explore whether he was issued with a section 120 notice and therefore may have been able to raise human rights issues: see *TY (Sri Lanka) v SSHD* [2015] EWCA Civ 1233.

(vi) In refusing to consider human rights issues the judge failed to consider whether there was jurisdiction to do so given that the decision that was the subject of the appeal was a removal decision: see *Amirteymour and others (EEA appeals; human rights)* [2015] UKUT 00466.

(vii) In the alternative, the judge failed to consider the fact that the appellant raised human rights issues as a 'new matter' in the appeal form. It appears that he failed to explore with the respondent's representative whether consent was given for human rights to be considered as a new matter in the appeal.

7. The First-tier Tribunal decision is set aside.

Remaking

8. The appellant entered the UK with a family permit and was subsequently issued a residence card as the family member of an EEA national. At the time, the respondent was satisfied that the appellant was the family member of an EEA national who was exercising rights under the EU Treaties. The appellant admits that he and his wife are estranged. However, that does not necessarily end his status as a 'family member' under EU law. Under EU law the appellant does not have to live with his spouse to remain a family member. His status might only change with the initiation of divorce proceedings. The appellant confirmed that neither party to the marriage has initiated divorce proceedings.

9. The only reason given by the respondent for revoking the residence card was the appellant's inability to show that his wife continued to exercise her rights under the EU Treaties. The appellant produced no further

evidence to show that his wife continues to live and work in the UK or meets any of the other requirements as a 'qualified person' with reference to regulation 6 of the EEA Regulations 2016.

10. However, Mr Tufan confirmed that the Home Office records show that the appellant's wife was issued a permanent residence card on 03 January 2019. In doing so the respondent recognised that the appellant's wife had been exercising rights under the EU Treaties for a continuous period of five years and that she had acquired a right of permanent residence by 30 January 2018. The consequence is that, at the date when the respondent made the decision to revoke the appellant's residence card in July 2018, and at the date of this hearing, the respondent had to accept that the appellant's wife was exercising rights under the EU Treaties.

11. Although Mr Tufan expressed concerns arising from some of the evidence elicited from the appellant when he was interviewed by the respondent, he accepted that the decision to revoke the residence card was made under regulation 23(6)(a) and that the decision had not be based on an allegation that the marriage was one of convenience or that there was a misuse of rights. The interview record had not been produced as evidence.

12. Even on the appellant's own account of events the relationship between him and his wife has never subsisted since he arrived in the UK. No doubt this is what caused the First-tier Tribunal judge to have doubts as to whether the original application was genuine. However, none of those issues were formally alleged by the respondent. Nor did such concerns form the basis for the decision that is the subject of this appeal. It is a matter for the respondent to decide what course of action to take in response to those concerns bearing in mind that no such allegations were made following the interview in July 2017.

13. The only decision that I am asked to consider is the decision dated 05 July 2018 to notify the appellant of his liability to removal with reference to regulation 23(6)(a) on the ground that the appellant's right to reside as a family member had ceased because he was unable to show that his wife was still exercising rights under the EU Treaties. In light of the concession made at the hearing, I find that the two elements of regulation 7 continue to be made out. The appellant continues to be a 'family member' of an EEA national because he is still married to his wife albeit they are estranged and do not live together. The respondent now accepts that there is evidence to show that the appellant's wife acquired a right of permanent residence from 30 January 2018. It was not necessary for her to show that she continued to exercise her rights under the EU treaties thereafter. In any event, the respondent clearly was satisfied that she was.

14. It is not necessary to determine the issue of whether the appellant should be able to argue human rights issues in this appeal if he succeeds under the EEA Regulations 2016. In any event, counsel who attended the hearing was under a duty to the court not to make arguments that are wholly

without merit. Given that the appellant has only lived in the UK for just over three years any human rights claim would be bound to fail. The appellant falls far short of any of the private or family life requirements of the immigration rules and has identified no compelling or compassionate circumstances that might justify granting leave to remain outside the rules.

15. For the reasons given above I conclude that the decision to notify the appellant of his liability to removal on the ground that he ceased to have a right to reside under EU law breaches his rights under the EU Treaties in respect of entry into or residence in the United Kingdom.

DECISION

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

The appeal is ALLOWED on EU law grounds

Signed  Date 15 May 2019
Upper Tribunal Judge Canavan