



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

Appeal Number: IA/44857/2013

THE IMMIGRATION ACTS

**Heard at Bradford
On 1 July 2014**

**Determination
Promulgated
On 13 January 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GRACE CARANI TOWLE

Respondent

Representation:

For the Appellant: Mr Diwnycz, Senior Home Office Presenting Officer

For the Respondent: Ms C Warren, instructed by Howells, Solicitors

DETERMINATION AND REASONS

1. The respondent, Grace Carani Towle, was born on 6 March 1971 and is a citizen of the Philippines. I shall hereafter refer to the appellant as the respondent and to the respondent as the appellant (as they appeared respectively before the First-tier Tribunal).
2. The appellant had applied for a residence card as confirmation of a right to reside in the United Kingdom but her application was refused on 11 October 2013. The appellant appealed to the First-tier Tribunal (Judge Hindson) which, in a determination promulgated on 18 March 2014,

allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

3. The appellant is the widow of the late Mr Patrick Towle who died in August 2013. The appellant had worked in Cyprus as a housekeeper from about 2009 and it was there that she met Mr Towle who was visiting the island at the time. They married in August 2011. The appellant continued to work in Cyprus and Mr Towle moved there where he had a number of jobs as a self-employed painter and decorator. In November 2012, he returned for medical treatment to the United Kingdom and the appellant was granted a family permit to enter the country as his spouse.
4. The appellant's application fell to be considered under the Immigration (European Economic Area) Regulations 2006, Regulation 10:

10.(1) In these Regulations, "family member who has retained the right of residence" means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).

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

(a) he was a family member of a qualified person when the qualified person died;

(b) he resided in the United Kingdom in accordance with these Regulations for at least the year immediately before the death of the qualified person; and

(c) he satisfies the condition in paragraph (6).

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

(a) he is the direct descendant of—

(i) a qualified person who has died;

(ii) a person who ceased to be a qualified person on ceasing to reside in the United Kingdom; or

(iii) the person who was the spouse or civil partner of the qualified person mentioned in sub-paragraph (i) when he died or is the spouse or civil partner of the person mentioned in sub-paragraph (ii); and

(b) he was attending an educational course in the United Kingdom immediately before the qualified person died or ceased to be a qualified person and continues to attend such a course.

(4) A person satisfies the conditions in this paragraph if the person is the parent with actual custody of a child who satisfies the condition in paragraph (3).

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

(a) he ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person;

(b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;

(c) he satisfies the condition in paragraph (6); and

(d) either—

(i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

(ii) the former spouse or civil partner of the qualified person has custody of a child of the qualified person;

(iii) the former spouse or civil partner of the qualified person has the right of access to a child of the qualified person under the age of 18 and a court has ordered that such access must take place in the United Kingdom; or

(iv) the continued right of residence in the United Kingdom of the person is warranted by particularly difficult circumstances, such as he or another family member having been a victim of domestic violence while the marriage or civil partnership was subsisting.

(6) The condition in this paragraph is that the person—

(a) is not an EEA national but would, if he were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; or

(b) is the family member of a person who falls within paragraph (a).

(7) In this regulation, “educational course” means a course within the scope of Article 12 of Council Regulation [\(EEC\) No. 1612/68](#) on freedom of movement for workers ([1](#)).

(8) A person with a permanent right of residence under regulation 15 shall not become a family member who has retained the right of residence on the death or departure from the United Kingdom of the qualified person or the termination of the marriage or civil partnership, as the case may be, and a family member who has retained the right of residence shall cease to have that status on acquiring a permanent right of residence under regulation 15.

5. At [20], Judge Hindson noted:

The EEA national is now deceased and the appellant must show that she has retained a right of residence in accordance with that Regulation [Regulation 10]. In issue is the requirement in 10(2)(b) that [the appellant] must have resided in the UK in accordance with these Regulations for at least the year immediately before the death of her [husband]. The appellant and her husband returned to the UK in November 2012 and [he] died in August 2013. This requirement is therefore not satisfied.

6. Later, at [25], the judge dealt with a submission put to him by Ms Warren (who also appeared before the First-tier Tribunal). The difficulty for the appellant was that she had not remained in the United Kingdom with her husband for at least one year prior to his death; they had lived together in the United Kingdom for about 9 months. The judge wrote:

... I am prepared to accept that the appellant is able to rely on the cumulative period that she had spent with her husband in Cyprus and in the UK when determining whether the requirement of twelve months contained in Regulation 10(2)(b) is met. Consequently, this provision is satisfied and the appeal is allowed.

7. The grounds of appeal complain that the judge has been inconsistent in finding both that 10(2)(b) was met and was not met. They also challenge the judge’s adoption of Ms Warren’s submission (regarding the cumulative period of time required to amount to twelve months, as required by the Regulations) without reference to any authority.

8. Dealing with that latter point first, it is, of course, not necessarily an error of law if the judge makes a ruling which is right in law but is novel, never having been considered before. The issue raised in this case would appear to fall into that category.

9. Secondly, there is, on the face of the determination, no inconsistency. The judge has accepted that, on the plain wording of the Regulation, the appellant is unable to show that she had lived in the United Kingdom with

her husband for more than twelve months. The point which he accepted is that she was able to aggregate time spent in Cyprus and in the United Kingdom in order to satisfy the twelve month requirement.

10. The grounds, therefore, do not, in my opinion, succeed in undermining the determination of the First-tier Tribunal Judge. Furthermore, I find that the judge was right to find that the appellant should succeed in her appeal. I say that for the following reasons.
11. The judge was referred to the Court of Justice of the European Communities judgment of July 1992 in *Surinder Singh (Case C-370/90)*. The court concluded that, in answer to the question referred to it by the High Court of England and Wales,

The abolition of restrictions on movements and residence within the Community for nationals of Member States in regard to establishment and the provision of services, are properly construed, requiring a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who has gone, with that spouse, to another Member State in order to work there as an employed person as envisaged by Article 48 of the Treaty and returns to establish himself or herself as envisaged by Article 52 of the Treaty in the State of which he or she is a national. A spouse must enjoy at least the same rights as would be granted to him or her under Community law if his or her spouse entered and resided in another Member State.

12. I have no difficulty accepting the judge's finding [at 19] that Mr Towle had returned to the United Kingdom, the country of his nationality, in order to work here notwithstanding the fact that the particular timing of his return lay in his need to obtain medical treatment. The judge was right to hold that the principles of *Surinder Singh*, intended to combat prejudicial treatment in the operation of EU law, were properly invoked. Indeed, there arises from the appellant's particular circumstances another issue which was not raised before the judge but which also appears to give rise to discrimination. Had the appellant entered the United Kingdom as the wife of Mr Towle under the Immigration Rules and had Mr Towle then died, it is clear that the operation of Appendix FM of HC 395 would have put her into a better position than she now finds herself. Paragraph FM E-BPILR sets out the requirements for a bereaved partner or spouse to acquire indefinite leave to remain. E-BPILR1.3 provides that, "a person who was the applicant's partner at the time of the last grant of limited leave as a partner must have died" whilst the surviving partner must show that there was a genuine and subsisting relationship at the time of her partner's death; in the present case, that latter circumstance was clearly accepted by the Presenting Officer before the First-tier Tribunal. Only any unspent convictions of the deceased partner might limit the leave (30 months) of the surviving partner. Significantly, there is, in the Immigration Rules, no requirement (as appears in both the Directive and in the 2006 Regulations) for the surviving spouse to have spent a minimum period of at least twelve months living with the deceased partner in the host Member State.

13. In the light of the operation both of the 2006 Regulations and Appendix FM, I hold that for the appellant to be denied the right to remain in the United Kingdom because she had failed to complete twelve months of residence here with the late Mr Towle amounts to discrimination contrary to the principles of *Surinder Singh*. Accordingly, the appeal of the Secretary of State is dismissed.

NOTICE OF DECISION

14. This appeal is dismissed.

Signed

Date **1 July 2014**

Upper Tribunal Judge Clive Lane