Upper Tribunal
(Immigration And Asylum Chamber) **Appeal Number: EA/03171/2015**

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
On: 2 October 2017	**On: 18 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MR F M
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr A Briddock, counsel, instructed by Visa Legal
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Algeria, born on 9 May 1979. He appeals with permission against the decision of the First-tier Tribunal Judge who, in a decision promulgated on 16 January 2017, dismissed his appeal against the decision of the respondent refusing his application made on 24 June 2015 for a permanent residence card under the Immigration (EEA) Regulations 2006.

2. The Judge found that the EEA national had established five years' residence by the time she stopped working and still has "a right of permanent residence [16]". At paragraph [20] the Judge stated that although she was satisfied that the EEA national herself would have been entitled to permanent residence by the end of 2012, she had not been exercising Treaty rights since February 2013 until very recently. The appellant had therefore not been living with her as her spouse for a period of five years during which she was exercising Treaty rights.

3. On 27 July 2017, First-tier Tribunal Judge Pickup granted the appellant permission to appeal on the basis that it was arguable that the Judge erred in law in misconstruing the meaning of "residing in accordance with the Regulations" under Regulation 15(1)(b). It was arguable that for a continuous period exceeding five

years the appellant had been a family member of an EEA national who has a right of permanent residence.

4. The appellant had not been represented at the First-tier appeal hearing. The Judge noted that it was accepted that the only issue before her was to determine whether the sponsor had been exercising Treaty rights for a continuous period of five years [7].

5. Mr Briddock submitted that the Judge found at [16] that the appellant's wife had and still does have a right of permanent residence. Moreover, she found that she acquired permanent residence some time in 2012 as she had been a "worker" from some time in 2007.

6. The couple were married on 28 January 2010. Accordingly by the Judge's own findings the appellant's wife had been living in the UK in accordance with the Regulations since 2007 to date, as she was a worker from some time in 2007 until some time in 2012 and then acquired permanent residence which she retains.

7. The couple had been married for a period of at least five years whilst the appellant's wife was living in the UK in accordance with the regulations. Accordingly, he too acquired permanent residence on 28 January 2015, which was five years from the date of their marriage.

8. He submitted that the Judge misdirected herself by finding that the appellant's wife needed to be a "qualified person" during all the five years after marriage. In fact, she needed to be "living in the UK in accordance with the Regulations" which she was.

9. On behalf of the respondent, Ms Isherwood relied on the Rule 24 response. She also sought to contend that the Judge made a "legal error" with regard to her finding that the Polish national had acquired permanent residence. She referred to s.5(2) of the Accession (Immigration and Worker Registration) Regulations 2004 that provides that an accession state worker requiring registration shall be treated as a worker for the purpose of the definition of 'qualified person' in Regulation 5(1) of the 2000 Regulations only during a period in which he is working in the UK for an authorised employer.

10. The national in this case was only registered in 2008. That is when the period begins for calculating whether or not she is entitled to permanent residence. It did not begin in 2007.

11. In reply, Mr Briddock objected to this point which was only raised at the hearing. This 'alleged legal point' had never been raised before. The appellant and his wife require certainty. The application was made in 2015. The decision is now almost two years old having been decided on 19 November 2015.

12. The respondent has been on notice throughout. The respondent has never sought to challenge the findings of the First-tier Tribunal Judge as to his wife acquiring permanent residence.

13. There has never been any cross-appeal. Nor was the issue ever raised in the reasons for refusal. The only matter contended was that the appellant had provided insufficient evidence of how his sponsor was exercising Treaty rights in the UK

from 2010 until 2015. They had only married on 28 January 2010 and had not produced any evidence of being in a relationship before that time.

14. Nor was this matter ever raised before the First-tier Tribunal. The respondent was represented at the time. The point now raised was never reduced to writing. The appellant had never been put on notice that such a point would be raised. There has been no opportunity to address or put forward any legal arguments.

15. The issue was never raised in the Rule 24 letter.

16. The finding of the Judge is clear, namely, that the sponsor was a worker from some time in 2007 until the end of 2012 and would have been entitled to permanent residence by the end of 2012. She found that she had and still has a right of permanent residence [16-20].

17. He submitted that the Judge was in error in finding that the EEA national was not exercising Treaty rights since February 2013. At the time of the application on 24 June 2015 she stated that the sponsor had not been exercising Treaty rights and had ceased to exercise them in February 2013 at the latest.

18. The Judge noted that she had stated that she was registered with the JobCentre during some of the period when she was off work but was clearly not actively looking for work. It is understandable that she wished to remain at home with her children and not go to work but that meant that she ceased to be a worker for the purposes of the 2006 Regulations [17]. Those are the issues which have been raised.

19. In any event, Mr Briddock did not accept that the point raised is "a good point." He submitted that in the circumstances it would be "wholly inappropriate to entertain the new argument".

Assessment

20. The appellant made an application pursuant to the 2006 Regulations, s.15(1)(b) of which provides that the following persons shall acquire the right to reside in the UK permanently, namely a family member of an EEA national who is not himself an EEA national but who has resided in the UK with the EEA national in accordance with these regulations for a continuous period of five years.

21. The evidence before the First-tier Tribunal was that his sponsor began employment in the UK on 8 November 2007 and was working continuously until 23 May 2013 at the end of her maternity leave. The appellant married his sponsor on 28 January 2010 and was issued an EEA residence card in September that year.

22. His wife was on maternity leave from 20 February 2012. Their child was born on 5 May 2012. Her final date of employment was on 31 May 2013.

23. The appellant applied for permanent residence in June 2015.

24. The First-tier Judge found at [16] that the sponsor had acquired permanent residence in 2012 after exercising Treaty rights as a worker since 2007. She had established five years' residence by the time she stopped working.

25. She also found that the appellant has been cohabiting with the sponsor since May 2008 until the present.

26. The Judge stated at [19] that the sponsor must be actively exercising Treaty rights for five years during the period of their marriage in order for the appellant to succeed. That Mr Briddock contended, is incorrect.

27. Regulation 15(1)(2) provides that the right of permanent residence under the Regulations shall only be lost through absence from the UK for a period exceeding two consecutive years. There is however no finding or indeed any contention that the sponsor left the UK for such a period after acquiring a right of permanent residence. As noted, the evidence is to the contrary: she has been resident here since 2007 on a continuous basis.

28. I accept the submission that at the date of the appeal hearing the sponsor had permanent residence and accordingly was not required to be engaged in any qualifying activity in order to reside here in accordance with the regulations.

29. In order for the appellant himself to have acquired the right to reside in the UK permanently, he had to show that he resided in the UK in accordance with the regulations for at least five years. He became a family member of a qualified person at the date of marriage, namely on 28 January 2010 and was issued a residence card on that basis in September that year.

30. As at 28 January 2015 he had been residing in the UK as the direct family member of his wife for a period of five years.

31. From the date of his marriage until the sponsor's final date of employment he was a family member of an EEA national exercising Treaty rights as a worker. Thereafter he became the family member of an EEA national who had a right of permanent residence in 2012 having exercised Treaty rights as a worker since 2007.

32. Ms Isherwood sought to contend at the hearing that the sponsor was however not entitled to permanent residence as she was only issued an accession state worker registration certificate on 8 October 2008.

33. However in the certificate issued to her it is in fact recorded that "Job start date is 8 November 2007". The employer is ATFC Ltd. Ms Isherwood never referred to the content of the certificate itself.

34. She had produced P60s from 2007 until 2012 confirming her employment. None of this evidence was disputed by the respondent at any time.

35. In any event, I do not at this late stage permit the respondent to take any point under the 2004 Accession Regulations. This has never been referred to or relied on by the respondent at any stage. Nor had any notice, written or otherwise, been given to the appellant or her solicitors prior to the date the hearing before the Upper Tribunal.

36. The respondent has at all times accepted that the sponsor began working in the UK in November 2007 and qualified for permanent residence in November 2012. She therefore no longer needed to be a qualified person for the purpose of the appellant's application. Her entitlement to permanent residence continued after May 2013 when her maternity pay ceased and has not since been lost.

37. On the evidence before the Tribunal I find that the appellant has been residing with his sponsor for a period in excess of five years after the marriage in 2010. Accordingly, he is entitled to have his rights recognised by way of a permanent residence card.

38. I accordingly find that the decision of the First-tier Tribunal involved the making of an error on a point of law.

39. In re-making the decision I refer to and incorporate my findings.

40. I find that the appellant has acquired the right to reside in the UK permanently pursuant to Regulation 15(1)(b) of the 2006 Regulations.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Having set aside the decision, I re-make it, substituting for that decision a decision allowing the appellant's appeal.

Anonymity direction made.

Signed Date 15 October 2017

Deputy Upper Tribunal Judge C R Mailer