



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/03630/2016
EA/03632/2016
EA/03633/2016

THE IMMIGRATION ACTS

Heard at Field House
On 12 July 2018

Determination Promulgated
On 30 July 2018

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MS AMYNETTA ELIZABETH DAVIES
MISS WILLIETA SHARUN KNOX
MISS PRINCETTA TIAWO MONICA KNOX

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr C Talaechi, Counsel instructed by Edmans & Co
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Appellants appeal against the decision of First-tier Tribunal Judge Obhi promulgated on 24 August 2017 ("the Decision"). By the Decision the Judge dismissed the Appellants' appeals against the Respondent's decisions dated 15 February 2016 refusing them a permanent right of residence as the family members of Mr Wolfram Schneider ("the Sponsor"). The Sponsor is a German national. He is the husband of the First Appellant and stepfather of the Second and Third Appellants. The Second and Third Appellants are the (adult) daughters of the First Appellant who are (and were at the date of the hearing before Judge Obhi) aged over twenty-one years.

2. The Judge did not accept that the Sponsor had exercised Treaty rights over a period of five years from 2010. She also did not accept that the Sponsor had “lived with” the Appellants over the relevant period entitling them to permanent residence.
3. The Appellants appeal the Decision on three grounds:
 - (1) That the Judge misdirected herself as to the appropriate test. On the evidence, the Sponsor had in fact completed five years’ residence even before 2010. As such, his entitlement to remain in the UK thereafter did not depend on him showing that he remained a qualified person (unless he had lost permanent residence through absence);
 - (2) The First Appellant and the Sponsor remained legally married and there was no allegation that this is a marriage of convenience. Accordingly, they did not have to be “living with” the Appellants (although the Appellants’ case is that they were in any event);
 - (3) The Judge has failed to deal with the cases of the Second and Third Appellants and has wrongly treated their position as depending entirely on that of the First Appellant. There are no findings made in relation to their own entitlement.
4. Permission to appeal was refused by First-tier Tribunal Judge Farrelly in a decision sent on 26 February 2018. However, by a decision dated 31 May 2018, I granted permission to appeal in the following terms (so far as relevant):-

“...[2] It is arguable that the Decision contains an error of law. In particular, the Judge has arguably erred by failing to consider the impact of the EEA national’s previous residence applying regulation 14 (and whether that gave rise to a right of permanent residence from the outset of the marriage). That alone could not constitute an error of law which is arguably material on the facts here. However, that failure, coupled with the Judge’s failure to make clear findings as to whether the EEA national has resided in the UK during the period of five years since the marriage arguably gives rise to an error of law which is arguably material.

[3] Although ground three is not arguable as a stand-alone ground because the EU law rights of the Second and Third Appellants are dependent on the First Appellant (as her dependents), I do not restrict the grant of permission.”
5. The matter comes before me to assess whether the Decision does disclose an error of law and to re-make the decision or remit to the First-tier Tribunal for re-hearing.

Discussion and conclusions

6. Mr Melvin confirmed at the outset of the hearing that the Respondent did not object to me determining the error of law even though I had granted permission to appeal.
7. I confirmed with the representatives that the Respondent’s decisions under appeal dated 15 February 2016 were correctly made under The Immigration (European Economic Area) Regulations 2006 (“the 2006 Regulations”).

8. The section of the Decision which gives rise to the errors of law asserted is at [31] to [32] and [35] as follows:

"[31] There are two issues before me. The two matters are related. The first is whether Mr Schneider is actually exercising Treaty Rights and whether he has been for five years from 2010 and the second is whether the couple remain in a relationship as husband and wife. The respondent does not accept that Mr Schneider is exercising Treaty Rights and believes that he has been living in Germany for the majority of his time and that the couple have not lived together. It is for the appellants to prove that the requirements are met, not for the respondent. In 2010 the three appellants were given Residence Cards on the basis of the first appellant's marriage to Mr Schneider. They now seek permanent rights of residence based on five years residence. The relevant provision in the EEA Regulations is Regulation 15 which provides that

15. - (1) the following persons acquire the right to reside in the United Kingdom permanently -

- (a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;
- (b) a family member of an EEA national who is not an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;
- (c) a worker or self-employed person who has ceased activity;
- (d) the family member of a worker or self-employed person who has ceased activity, provided

- (i) the person was the family member of the worker or self-employed person at the point the worker or self-employed person ceased activity;

and

- (ii) at that point, the family member enjoyed a right to reside on the basis of being the family member of that worker or self-employed person;

[32] The first issue therefore is whether Mr Schneider has been exercising Treaty Rights for the period under question. In support of his claim that he has been, he has provided a number of salary slips. They date back to 2010 and 2012. There are odd salary slips for 2016, 2015 and 2017. I note at page 55 what is described as an income statement which shows the monthly income for Fritz4moves which I am assuming is Mr Schneider's business, for the period between March 2015 and March 2016. I noted that from October 2015 there appears to have been no activity according to this schedule. However his Barclays Bank shows payments being received from a variety of different sources. There is no consistent or regular employment. It is clear that for some periods during the five years between 2010 and 2015 Mr Schneider was clearly working, but it is equally clear that there are periods when he wasn't. He claims that he was sick for a period in 2010 when he went back to Germany, but this is not demonstrated in any official document, such as a claim for sickness pay and it is clear that during that time he went back to Germany. There is some confusion as to how much time he spent in Germany and whether he went there for two or three days at a time and lived primarily in the UK or whether he lived in Germany and returned to the UK for some days at a time. The evidence is not clear and is not persuasive that the appellant's husband has indeed been exercising his Treaty rights during the period in question. The fact that there is ambiguity is confounded by Mr Schneider's own statement in which he confirms that he paid NICs between 2004 and 2009. He

does not refer to his employment beyond 2010. At best his employment was sporadic. It is more likely than not that he was, as submitted on behalf of the respondent, working and living in Germany for most of the time. He said in his evidence that most of his belongings are in Germany, which would support that claim. He apparently lives with his belongings contained in two boxes. That is not the picture of a married man in a settled relationship, but a single man moving from one address to the other.

...

[35] Taking all the evidence into account, having considered the documents, statements and oral evidence of the witnesses I find that Mr Schneider has not exercised his Treaty rights over the period in question and that he has not lived with the first second or third appellants. It is more likely that he has returned to Germany and comes to the UK on a more limited basis."

8. As Mr Talaechi pointed out, Regulation 3 of the 2006 Regulations makes plain that continuity of residence is not broken by an absence of a total of up to six months in any one year or any one absence not exceeding twelve months if for reasons of a serious illness. He also pointed out, that under Regulation 6 of the 2006 Regulations, a person may still be a qualified person if self-employed and unable to work due to illness. Even on the Judge's self-direction, therefore, there was a failure to make relevant findings as to the period of absence and whether certain absences and periods of inactivity were by reason of illness.
9. The Appellants' main point though in relation to ground one is that Mr Schneider's evidence recorded at [19] of the Decision is that he had been in the UK since 2003, had first worked for an agency and then became self-employed until 2010. It was only in 2010 that he became unwell. The Judge accepted at [32] of the Decision that there was evidence that the Sponsor had paid national insurance contributions between 2004 and 2009 which is a period of five years. Mr Talaechi therefore submitted that the Judge should have accepted that the Sponsor had established a permanent right of residence before 2010. By Regulation 15(2) of the 2006 Regulations, he could only lose that right of residence if he was out of the United Kingdom for a period exceeding two consecutive years. The Judge has not made any finding to that effect. Accordingly, Mr Talaechi submitted, the Judge should have accepted that the Sponsor is someone with a permanent right of residence.
10. Although Mr Melvin pointed out that the Appellants had not relied on the earlier period as foundation for the Sponsor's right to permanent residence either in their permanent residence application or the appeal. However, that is not determinative of whether there is an error of law.
11. It was for the Judge to apply the relevant legal provisions to the facts. In circumstances where the Judge accepted that the Sponsor had paid national insurance contributions in the UK from 2004 to 2009, it was incumbent on her to consider whether the Sponsor had already obtained a permanent right of residence, to determine what interruptions there had been to the continuity of residence

thereafter and whether the Sponsor had, as a result of any absences, lost that right of residence.

12. For that reason, ground one is made out.
13. As I observed when granting permission, that is not the end of the matter. The Sponsor's right of residence is not the issue to be determined by these appeals. The lack of findings and misdirection in this regard could not be material unless the Judge has failed to deal with whether the Appellants have resided with the Sponsor during the period on which they rely. That then brings me on to ground two.
14. As is pointed out in the grounds, the Appellant was and still is legally married to the Sponsor and there is no allegation by the Respondent that this is a marriage of convenience. The only question for the Judge was therefore whether the First Appellant had been "residing with" the Sponsor in the UK for a continuous period of five years. The point made earlier by Mr Talaechi in relation to Regulation 3(2) continues to have force. The continuous period is not broken by a total of up to six months in any one year nor any period of absence exceeding twelve months caused by illness.
15. The Respondent's position on this ground is that the Judge has made a finding at [32] that the "evidence is not clear and is not persuasive" that the Sponsor has been exercising Treaty rights during the period in question (2010 - 2015) but that is considering a different question. Having concluded that the Judge should have considered whether the Sponsor had already obtained a permanent right of residence, the other finding required was whether the Sponsor and the First Appellant had lived with each other for the requisite period.
16. I have considered whether the finding later in [32] of the Decision that the Sponsor was most likely working and living in Germany for most of the time is sufficient to show that the Judge has found that the couple were not living together (in the sense of residing in the same country). I have however concluded that it is not for the following reasons.
17. First, there is a misdirection by the Judge at [31] of the Decision as to what is required in this regard. The issue is not whether they remain in a relationship; that relationship still subsists and unless and until they are divorced. It is a question whether the couple are residing with one another. As the case of PM (EEA - spouse - "residing with") Turkey [2011] UKUT 89 makes clear, this is not a requirement that the couple be living together under the same roof (although the Appellants and Sponsor say they were in any event). It is a requirement that they be residing with each other in the same country.
18. Second, whilst PM therefore makes clear that the relevant question is whether the Sponsor was living in the UK in the relevant period, the finding that he was likely to have been living in Germany "most of the time" is insufficient by way of a finding as

to the absences from the UK and whether those were sufficient to break the continuity of residence. The finding is not a determination of the issue the Judge needed to resolve.

19. For those reasons, I am satisfied that ground two also discloses an error of law. The Judge needed to make a clear finding whether the Sponsor had lived in the UK for a continuous period of five years whilst still married to the First Appellant (as he still is) and which finding needed to include consideration of the length of any absence and whether that broke the continuity of evidence. If the Judge's finding is intended to be to the effect that the Sponsor had relocated permanently to Germany and could no longer be considered to be permanently resident in the UK for that reason, she needed to say so clearly and to identify the evidence on which she relied for such a finding. She also needed to consider the length of the period during which the Sponsor had relocated to Germany in order to determine whether permanent residence had thereby been lost.
20. I turn finally to ground three. Although, as I observed when granting permission, the Second and Third Appellants can only succeed if the First Appellant succeeds as they are her children and not those of the Sponsor, the converse is not necessarily true.
21. Both the Second and Third Appellants are aged (well) over twenty-one years. One is thirty-two and the other just under thirty. As such, they have to show not only that they are residing with the Sponsor in the UK (which as I have said is only a requirement that he is living in the UK) but also that they are dependants of the Sponsor or the First Appellant.
22. Mr Talaechi submitted that the error in this regard is the failure by the Judge to make any finding. As Mr Melvin pointed out, there does not appear to be any assertion by the Appellants that they are dependent on the Sponsor and no evidence to that effect. Accordingly, he submitted, it was not incumbent on the Judge to make a finding.
23. I am however satisfied that there is also an error made out on ground three. To some extent, this is unnecessary given what I have said about ground two. The finding at [35] of the Decision that the Sponsor is not living with the Second and Third Appellants is equally tainted by the error to recognise what was the issue in that regard.
24. There is however a further error made in relation to the Second and Third Appellants because, even if the First Appellant succeeds in showing that she has resided with the Sponsor, a finding will still be required whether the Second and Third Appellants are family members under Regulation 7 of the 2006 Regulations which itself requires that the Judge consider whether they are dependants of the Sponsor or the First Appellant. That is the basis on which they claim to be entitled to remain and they are entitled to expect reasoned findings on that issue.

25. At the end of the hearing, I reserved my decision whether there is an error of law. I discussed with the parties whether it was appropriate to remit the appeals or whether the decision could be re-taken in this Tribunal. Mr Talaechi submitted that the appeals should be remitted because the errors turn on the failure by the Judge to make reasoned findings in relation to what are the central issues in these appeals.
26. I have had regard to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows:
“[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party’s case to be put to and considered by the First-tier Tribunal; or
(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.”
27. In this case, in light of what I say above about the lack of findings relevant to the central issues, it is appropriate to remit the appeals in order that those findings can be made first by that Tribunal. I therefore remit the appeals to the First-tier Tribunal for a fresh hearing before a Judge other than Obhi.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Obhi promulgated on 24 August 2017 is set aside. The appeal is remitted to the First-tier Tribunal for re-hearing before a different Judge.

Signed



Upper Tribunal Judge Smith

Dated: 24 July 2018