



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/10904/2016

THE IMMIGRATION ACTS

Heard at Field House
On 14 August 2018

Decision & Reasons Promulgated
On 31 August 2018

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR FOUAD BELHADJ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Sowerby, instructed by O A Solicitors
For the Respondent: Mr David Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Oxlade promulgated on 12 January 2018 in which she dismissed his appeal under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") against the decision of the respondent to refuse to issue him with a document as evidence of his right of permanent residence as a family member who had retained the right of residence.
2. It is necessary to set out in some detail the history of the appellant. He was married in August 2003, entering the United Kingdom shortly thereafter, his then wife being a French national. They were granted residence cards in 2004 and after that, they had three children born in 2004, 2008 and 2011. There was an appeal in 2010 after which

the appellant was granted a residence card by the respondent valid from 23 March 2011 to 3 March 2016 on the basis that his wife an EEA national was exercising treaty rights through her being self-sufficient, that is, dependent on him.

3. I pause at that point to observe that although this was not the case put, it may well be that the former wife had acquired permanent residence at some point after 2008. It is evident that she was working at some point from her arrival in 2003 and it may well be that she continued to be a worker either due to the circumstances in her ceasing work or it may also be that she was entitled to benefit from St Prix (see Weldemichael and another (St Prix [2014] EUECJ C-507/12; effect) [2015] UKUT 540 (IAC).
4. It is also to be noted that in 2010 the European Court of Justice had not yet clarified that time spent in the United Kingdom or indeed any other Member State prior to 2006 of the entry into force of Directive 2004/38/EC (“the Citizenship Directive”), that time spent prior to that date could be counted towards the acquisition of permanent residence. As I have said these are not relevant to the facts of this case as it is not the case that was put to the judge but it does not mean that on the basis of further investigations a further application could not be made taking into account all of those factors.
5. Returning to this appeal the divorce petition was lodged in 2014 and the decree absolute was granted on 26 February 2015. On 9 March 2016 the appellant made an application for a permanent right of residence on the basis of his retained rights. It is evident that he in that application relied firstly on having been entitled to residence in the United Kingdom under the EEA Regulations on the basis that he was the spouse and therefore a family member of a qualified person that is his wife who through being self-sufficient was a qualified person for the purposes of the Regulations. The applicant also says that he has retained the right of residence since that as by virtue of Regulation 10(6) he would other than the fact that he is not an EEA national would be a qualified person through being self-employed.
6. The judge did not accept the account of the appellant’s former wife being self-sufficient nor did she accept that the wife had been the holder of a comprehensive sickness policy at the time of the decree absolute, the judge noting at 23 that the wife had taken all her paperwork with her. The judge did however accept that although there was no court order requiring access and that thus the Appellant could not meet Regulation 10(5)(d)(iii) there was nonetheless an agreed contact order.
7. The thrust of the appeal is on the basis that the judge had erred in failing properly to take into account the applicant’s earnings and second had failed properly to take into account the evidence of sickness insurance. Insofar as there is any error in the judge’s approach to the income, I do not consider that this is material. That is because although his income is in the region of £30,000 that figure is relatively recent and does not relate to the period in which his wife was self-sufficient on the basis of his earnings. It is a requirement of the EEA Regulations that the wife had been self-sufficient or otherwise a qualified person up to at least the date on which she petitioned for divorce. There is, and Mr Sowerby did not seek to persuade me to the contrary, insufficient evidence to show that there was sufficient income such that the wife would be self-

sufficient given the relatively low level of money certainly in the early years looking at the profit and loss account for the year ended 5 April 2012 onwards.

8. Equally there is no evidence that the wife had comprehensive sickness insurance so that even if she had been self-sufficient on the basis of the income of her husband, she would not have met the requirement under the EEA Regulations to have comprehensive sickness insurance and thus it cannot be shown that she was a qualified person. There is thus at the very least a significant and major gap in the continuity of the wife being a qualified person on the evidence as provided and on that basis it cannot be said that any error on the part of the judge was material.
9. I do not consider that the judge could be said to have made any error with regard to the approach to the sickness insurance on the basis that the sickness insurance policy question relates to the appellant and his children and postdates the divorce by a significant period. There is no requirement on the Appellant himself to have sickness insurance if as he appears he is self-employed and would otherwise meet the requirements of Regulation 10(6).
10. Turning to the matter of the children, the difficulty that arises here is again under either the Citizenship Directive or the Regulations s the appellant again needs to have shown the fact that the wife was a qualified person. That is a requirement set out in Regulation 10(5)(a) and is the requirement which applies to all the sub-categories in (d)(i) through to (iii). Thus, if it cannot be shown that the mother was a qualified person, it cannot be argued that the children meet the requirements of the regulations.
11. Further, whilst it may appear that the Citizenship Directive is more generous, that is only if one looks solely at Article 13. The difficulty is that as Mr Sowerby in effect conceded, article 13 is predicated on the basis that the person in question who has a right of residence is dependent on that person having been, in terms of English law, a "qualified person". In short, they would need to show that they had an extended right of residence under the Directive which cannot be shown as the EEA national – the wife – has not been shown to have been either a qualified person, or to have retained an extended right of residence.
12. For these reasons I do not consider that the decision involved any making of any material law capable of affecting the outcome and accordingly on that basis I dismiss the appeal. I should however add that for the reasons I have already given there are clearly steps which ought to be taken by the appellant as he may have acquired permanent residence in the past. Further consideration probably also needs to be given to provisions British Nationality Law as at the date of the birth of at least one of the children, who although a French citizen may at the very least be entitled to registration as a British citizen.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

No anonymity direction is made.

Signed

Date: 21 August 2018

A handwritten signature in black ink, appearing to read 'James Rintoul'. The signature is written in a cursive, flowing style with a prominent initial 'J'.

Upper Tribunal Judge Rintoul