



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/04986/2018

THE IMMIGRATION ACTS

Heard at Field House
On 15 February 2019

Decision & Reasons Promulgated
On 8 March 2019

Before

THE HONOURABLE MRS JUSTICE MAY DBE
UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AUXILIADORA DOMENICA RODRIGUES
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin instructed by Home Office Presenting Officer
For the Respondent: In person

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Judge allowing the claimant's appeal against his decision to refuse her a permanent right of residence pursuant to the Immigration (European Economic Area) Regulations 2016, in particular Regulation 15(1)(d), which deals with family members of persons exercising Treaty rights in the United Kingdom as a worker who has ceased activity.
2. The claimant appeared in person at the Upper Tribunal hearing, accompanied by her daughter who acted as her McKenzie friend and where needed, her interpreter as the claimant is a Portuguese speaker.

3. The claimant, a Brazilian citizen, has lived in the United Kingdom with her husband, a Spanish citizen and therefore an EEA national. The parties married on 9 October 2010 and from that date, the appellant became a family member of the sponsor's family within the meaning of Regulation 7(1)(a). The sponsor came to the United Kingdom in 2009 and retired on 22 October 2010, a little under a fortnight after they married.
4. They are still living together and at the date of decision had been doing so for over 7 years. The Secretary of State refused a permanent right of residence because he considered that the sponsor could not show that he was exercising Treaty rights during any 5-year period of the marriage, nor that he could bring himself within the Regulation 5(2) exception for workers or self-employed persons who had ceased activity. If the sponsor could not bring himself within that exception, then time did not run for the 5-year period for his wife, the claimant, and she was not entitled to claim permanent residence.
5. The claimant appealed to the First-tier Tribunal, which allowed her appeal.

First-tier Tribunal decision

6. The key reasoning in the First-tier Tribunal decision is at [19]-[20]:

"19. However, although the [claimant] has provided considerable documentation to show residence in the United Kingdom with the sponsor for the last five years she has not addressed the second limb of the reason for refusal namely the need to provide evidence of residence of at least three years prior to the termination of her sponsor's employment. A person is only a worker or self-employed person who has ceased activity if Regulation 5 is satisfied and in particular Regulation 5(2)(c)."

20. That said the [claimant] is entitled to succeed under Regulation 15(b) because she is a family member of an EEA national. She herself is not an EEA national. She has produced evidence which on the balance of probabilities shows that she has resided in the United Kingdom with her sponsor in accordance with the Regulations for a continuous period of five years."

7. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

8. Permission to appeal was granted on the basis that the First-tier Tribunal had arguably made conflicting findings in [19] and [20] and that, if Regulation 5 was not met, the First-tier Judge erred in law in finding that Regulation 15 was applicable.
9. That is the basis on which this appeal came before me.

The Immigration (European Economic Area) Regulations 2016

10. The claimant's application for a Regulation 17 residence card is based on Regulation 15(d) with Regulation 5(2) of the 2016 Regulations. So far as material, the provisions of those Regulations are as follows:

"Worker or self-employed person who has ceased activity'

5. – (1) In these Regulations, ‘worker or self-employed person who has ceased activity’ means an EEA national who satisfies a condition in paragraph (2), (3), (4) or (5).
- (2) The condition in this paragraph is that the person –
- (a) terminates activity as a worker or self-employed person and –
 - (i) had reached the age of entitlement to a state pension on terminating that activity; or
 - (ii) in the case of a worker, ceases working to take early retirement;
 - (b) pursued activity as a worker or self-employed person in the United Kingdom for at least 12 months prior to the termination; and
 - (c) *resided in the United Kingdom continuously for more than three years prior to the termination. ...*

Right of permanent residence

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

- (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; ...”

[*Emphasis added*]

Analysis

11. On the facts in this appeal, the sponsor cannot qualify as a ‘worker who has ceased activity’ pursuant to Regulation 5(2)(c) because he only arrived in the United Kingdom in 2009 and retired in 2010. He had not resided in the United Kingdom continuously for more than three years before terminating his activity. The First-tier Judge did not err in so finding at [19] in his decision.
12. However, at [20] the Judge fell into error of law. If the sponsor is not a ‘worker who has ceased activity’ as defined in Regulation 5(2)(c) then Regulation 15(d)(i) and (ii) cannot avail her. While she was indeed his family member when he ceased activity and enjoyed her right to reside in the United Kingdom on that basis, if he cannot meet the Regulation 5(2)(c) requirements this exception does not apply, and the appeal cannot succeed.

DECISION

13. For the foregoing reasons, our decision is as follows:
The making of the previous decision involved the making of an error on a point of law.
We set aside the previous decision. We remake the decision by dismissing the claimant’s appeal.

Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson

Date: 5 March 2019