Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/07326/2018**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 20 June 2019 **On 25 June 2019**

Before

UPPER TRIBUNAL JUDGE DAWSON
UPPER TRIBUNAL JUDGE KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MR FARHAD ALI SHAIWE
Respondent

Representation:

For the Appellant: Mr D Clark, Home Office Presenting Officer
For the Respondent: Mr H Kannangara, Counsel instructed by Newland Solicitors

DECISION AND REASONS

1. The appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, we shall use the titles by which the parties were known before the First-tier Tribunal, with the Secretary of State referred to as "the respondent" and Mr Shaiwe as "the appellant".

The First-Tier Tribunal decision

2. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal before Judge Fowell (the 'FTT') promulgated on 11 April 2019. The FTT allowed the appellant's appeal against the respondent's decision of 26 October 2018, refusing his application for a permanent residence card under the Immigration (EEA) Regulations 2016 (the

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‘regulations’) as the spouse of a British national, Agnieszka Lucjan, (the ‘sponsor’), who asserts that she retains her Polish nationality, which was not lost by virtue of her naturalisation as a British citizen in March 2014.

3. By way of chronology, Mr Clark accepts that the sponsor was exercising her EU rights as a worker in the United Kingdom from 4 April 2009 until 3 April 2014, during which time she married the appellant on 23 March 2012.

4. Importantly, the FTT identified the narrowness of the issues in paragraph [4] of her decision, as follows:

> “4. This appeal came before me with witness statements from Mr Shaiwe and Mrs Lucjan, and a bundle containing her expired Polish ID card and a copy of her British passport. It was common ground that the only issue was whether or not she had retained her Polish nationality. That could have been demonstrated by renewing her ID card or Polish passport, but nothing of that sort had been done. It was not necessary for her to show that she had in fact got such a document, merely that she had not lost the legal right to acquire it, and since the appeal turned on this point – a point which ought to be readily ascertainable – I put the case back in the list for Mr Johal [the appellant’s representative] to make some enquiries.”

5. The sole issue that the FTT was asked to consider was whether the sponsor’s Polish nationality had been lost, by virtue of her naturalisation as a British citizen. The FFT found that the sponsor’s Polish citizenship had not been lost. In doing so, the FTT referred to evidence, the admission of which was not challenged by the respondent at the hearing, from the website of the Polish Embassy, recorded at paragraph [5] of the FTT decision:

> “5. …on the website of the Polish Embassy, under the heading ‘Consular Information and Citizenship’, it states that according to the Constitution a person cannot lose their Polish citizenship except at their own request, a request that has to be approved by the President of the country. This information had been shared with Mr Tasnim [the FTT Presenting Officer] before we resumed and she had been able to confirm that this information was indeed provided on the website.”

6. The FTT concluded at paragraph [9] of her decision:

> “9. Since this is the only issue, it follows that I simply have to decide on the balance of probabilities whether or not Mrs Lucjan has retained her Polish nationality. The evidence provided was indeed very last-minute, but there is no dispute as to the information provided by the Embassy and it seems to me most unlikely that they would get this wrong. The Home Office’s own guidance directs applicants to check the position with their Embassy and there is no obvious reason to obtain a letter from them to confirm what is in the public domain. I therefore accept that Mrs Lucjan retains her EEA nationality and so the appeal is allowed.”

The grounds of appeal

7. The respondent's grounds of appeal to this Tribunal raised wider issues. The first ground is that the FTT erred in assessing the Polish Embassy website evidence as sufficient to prove that the sponsor retained her Polish citizenship. It is that bare assertion alone that is contained within the grounds, without further explanation. The second ground is that:

> "The FTT has further erred in assessing that the appellant meets the requirements of the Regulations for a permanent right of residence when it is clear that in addition to the requirement outlined above, the appellant needed to demonstrate the spouse had been a qualified person for the precedent 5 year period. The FTT has not given any consideration to this issue in the determination, and this is clearly material as both conditions (nationality and being a qualified person) must be fulfilled."

Clarification of issues at the Upper Tribunal hearing

8. We concluded that Judge Scott-Baker, as Judge of the First-tier Tribunal, when granting permission to appeal to this Tribunal on 21 May 2019, did not seek to limit the scope of the appeal. We did not accept Mr Kannangara's submission that in commenting on the merits of the first ground, that Judge Scott-Baker was excluding that as a ground of appeal. Had she intended to grant permission on only limited grounds, she would have said so in the grant of permission.

9. On seeking clarification from Mr Clark on the second ground of appeal and the basis for the respondent disputed that the sponsor was a 'qualified person' for the 5 years prior to the application for permanent residence, he asserted that there was not sufficient evidence that the sponsor was present in the United Kingdom (the 'UK') after her naturalisation as a British citizen, so that the permanent residence that she had acquired during the period from 4 April 2009 until 3 April 2014, may have been lost by virtue of the sponsor's possible absence from the UK from 3 April 2014 until 2016.

Conclusion on the assertion of loss of permanent residence (the second ground of appeal)

10. We reject the assertion that the FTT erred in law, for 3 reasons. First, we do not accept that the issue of permanent residence was one which was raised in the respondent's refusal decision of 26 October 2018. In arguing this point, Mr Clark referred, at page [67] of our bundle, to a paragraph of the refusal decision which recited a list of required evidence, including that as the family member of a dual British national who is an EEA national, the appellant must provide evidence that the dual British-EEA national is a qualified person or a person with a right of permanent residence in the UK immediately before they became British; and the sponsor must continue to meet the definition of a qualified person who has not lost the right of permanent residence through absence from the United Kingdom; and retained their original EEA nationality. Mr Clark argued that it was implicit in the passage that the refusal decision had raised this as an issue. We do not accept that submission, which treats that passage in isolation and does not take into account the next paragraph in the refusal

decision, which states that the appellant has not provided adequate evidence that the sponsor has retained their original EEA nationality. Having recited a general list of requirements and identified the issue of concern, ie. retained EEA nationality, there is no reference in the refusal decision to the loss of permanent residence though absence from the UK.

11. Second, Mr Clark's assertion that the respondent's decision was based, in part, on a loss of permanent residence through absence from the UK between 2014 and 2016, was contradicted in a passage on the same page of the refusal decision, where it says:

> "We have considered the other documentary evidence provided with your application and accept that your sponsor has been exercising treaty rights for a period of five years. However in order for your application to be successful, you must provide adequate evidence to show that your sponsor has retained their original EEA nationality. Your application has been refused for this reason.".

12. The refusal decision was dated 26 October 2018. Assuming that the five-year period referred to relates to the period immediately preceding the letter, acceptance that the sponsor was exercising treaty rights in the five-year period between 2013 and October 2018 is not consistent with Mr Clark's assertion that the sponsor may have been absent in the period from April 2014 to 2016. Mr Clark's submission now made that the five years related to an earlier period was not specified in the refusal decision, and is not consistent with clear wording which states that the appellant's application was refused for 'this reason', ie, retention of EEA nationality.

13. Third, and most importantly, this was simply not raised as a live issue before the FTT and bearing in mind that we are an appellate Tribunal, the FTT cannot be said to have erred in law on an issue that she was never asked to consider.

Conclusion on the ground of retained Polish nationality (the first ground of appeal)

14. As we have already noted, this ground was merely a bare assertion that the FTT had erred in treating the Polish Embassy website evidence as sufficient to find retention of Polish nationality. The ground does not explain why this is an error of law. If the respondent asserts that a party has lost their nationality, it is for the respondent to explain the basis of that assertion, with any relevant evidence, beyond the bare assertion.

15. More important was the FTT's admission of website evidence, without any dispute as to its admission, in support of the sponsor's retention of Polish nationality. The ground merely suggests that such evidence was insufficient. We conclude that the FTT applied the correct standard of proof, in concluding at paragraph [9] of her decision that "*on the balance of probabilities*" the sponsor had retained her Polish nationality. She found it "*most unlikely that they [the Polish Embassy] would get this wrong.*" The FTT's conclusion discloses no error of law, in treating that evidence as sufficient. The contrary assertion was no more than that, a bare assertion,

without an explanation for what the error of law is said to be. The FTT applied the appropriate standard of proof and there is no error of law in the FTT's decision.

Postscript

16. Although not referred to either in the refusal decision or at the FTT stage of this appeal, the issue of derivative rights leading to permanent residence in the context of the case of Lounes v SSHD (Article 21 TEEU – Directive 2004/38/EC) Case C-165/16 may be an aspect that requires further consideration. The point was not raised in the decision letter or before the FtT. At paragraph [62], the CJEU stated:

> "… Directive 2004/38 must be interpreted as meaning that, in a situation in which a `Union citizen (i) has exercised his freedom of movement by moving to and residing in a Member State other than that of which he is a national, under Article 7(1) or Article 16(1) of that directive, (ii) has then acquired the nationality of that Member State, while also retaining his nationality of origin, and (iii) several years later, has married a third-country national with whom he continues to reside in that Member State, that third-country national does not have a derived right of residence in the Member State in question on the basis of Directive 2004/38. The third-country national is however eligible for a derived right of residence under Article 21(1) TFEU, on conditions which must not be stricter than those provided by Directive 2004/38 for the grant of such a right to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by settling in a Member State other than the Member State of which he is a national."

17. We should emphasise that this does not form part of our reasons for rejecting the respondent's appeal, and is added merely by way of assisting the parties when they consider the wider legal picture, for future reference. We express no view on the applicability of Lounes to the appellant's circumstances, and as it did not form part of this appeal, there is no need for us to do so.

Notice of Decision

The decision of the First-tier Tribunal did not involve an error of law, such that the decision must be set aside. The Secretary of State's appeal is dismissed.

Signed Date 21 June 2019

J Keith

Upper Tribunal Judge Keith