Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04224/2016

THE IMMIGRATION ACTS

Heard at Manchester	**Decision and Reasons Promulgated**
On 7 December 2017	**On 19 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

BILAL DIONE
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Chopra, of Cohesion Legal Services Centre
For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1 This is an appeal against the decision of Judge of the First-tier Tribunal Alty, dated 31 January 2017, in which the Judge had dismissed the Appellant's appeal against the Respondent's decision of 11 April 2016 refusing the Appellant a card confirming a permanent right of residence under Regs 15(1)(b) and 18(2) of the Immigration (European Economic Area) Regulations 2006.

2 The Appellant had applied for such a residence card on the basis of his marriage to his EEA national spouse Ms Katarzyna Helena Dione ('the Sponsor'), a Polish national. The Sponsor had been present in United Kingdom prior to Appellant, and there is evidence that she had been economically active from 2008 onwards. I return to the exact nature of that evidence below.

3 The Appellant entered the United Kingdom on 1 December 2009 in possession of an EEA family permit granted to him for the purposes of joining the Sponsor in the UK as her non-EEA national spouse. It is clear then that the Appellant has resided in the United Kingdom in accordance with the 2006 regulations from that date, 1 December 2009.

4 In or around 2013, the couple separated, but have never divorced. They are therefore still to be treated as spouses for the purposes of EEA law.

5 In or around October 2015 the Appellant made an application for a card confirming a right of permanent residence but that application was refused by the Respondent on 11 April 2016 on the basis that the Appellant had not provided sufficient evidence with his application of the Sponsor's economic activity for a continuous period of five years. The Appellant appealed.

6 The matter came before the Judge on 16 January 2017. The Judge held that there was evidence before her of economic activity of the Sponsor up to August 2013 (paragraph 25). However, she was not prepared to consider any evidence relating to the Sponsor's economic activity prior to 1 December 2009, being the date on which the Appellant arrived in United Kingdom. The Judge held that the relevant five-year period for the Appellant to demonstrate his right of permanent residence could only start from 1 December 2009 onwards, and that the Sponsor needed to demonstrate economic activity from that point onwards. However, no reliable evidence existed post dating August 2013. For those reasons, the Judge dismissed the appeal.

7 In an application for permission to appeal to the Upper Tribunal the Appellant argues that: "There was no continuous obligation to start exercising treaty rights for another five years before any relative can be granted resident status".

8 In a decision granting permission to appeal dated 25 September 2017, Upper Tribunal Judge Kebede observed as follows:

> "There is arguable merit in the assertion in the grounds that the relevant five-year period stated in regulation 15 (1)(b) included residence with the EEA national after her acquisition of permanent residence and the Judge arguably erred in concluding otherwise at para 25."

9 In a Rule 24 response from the Respondent dated 11 October 2017, prepared by David Clarke, Specialist Appeals Team, the Respondent stated as follows:

> "2. It is submitted that the Appellant applied for a permanent residence card having entered the UK on 1 December 2009. The issue raised in the refusal letter was that the Appellant failed to evidence that the Sponsor had exercised treaty rights for five years. As noted by the FTTJ at paragraph 20 the Appellant and Sponsor whilst separated were still married. Therefore the issue fell to be decided under regulations 15(1)(b) and 7.
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> 3. It is accepted that once the Sponsor obtained a permanent right of residence, provided she was not absent from the UK for two years, she would no longer need to demonstrate that she was a worker. The FTTJ was clearly in error at paragraph 25 in failing to take into account the period prior to the Appellant's entry into the UK in assessing whether the Sponsor had acquired permanent residence.
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> 4 . The Respondent therefore concedes that the issue of whether the Sponsor acquired permanent residence or subsequently lost it through absence are live issues that remain to be determined."

10 At the commencement of the hearing, I drew to the attention of the parties the reported case of PM (EEA - spouse - 'residing with') Turkey [2011] UKUT 89 (IAC), the head note of which is as follows:

> "Regulation 15(1)(b) of the Immigration (European Economic Area) Regulations 2006 applies to those who entered a genuine marriage where both parties have resided in the United Kingdom for five years since the marriage; the EEA national's spouse has resided as the family member of a qualified person or otherwise in accordance with the Regulations and the marriage has not been dissolved. The "residing with" requirement relates to presence in the UK; it does not require living in a common family home."

11 In discussion, the parties agreed with me that the Judge had erred in law. It would be possible for the Sponsor in the present case to have gained a right of a permanent residence after five years economic activity. That period of economic activity need not coincide with the Appellant's presence in the United Kingdom. In the present case, the Judge had found that the last evidence that existed for the Sponsor having been economically active in the United Kingdom was August 2013. If, therefore, the Appellant could demonstrate that the Sponsor had been economically active from August 2008 to August 2013, it would be established that the Sponsor would have a right of permanent residence from August 2013 onwards. She could accurately be described as residing in United Kingdom 'in accordance with' the 2006 regulations both during the five-year period of qualification to gain a permanent right of residence, and afterwards. The whole of her residence would be in accordance with the 2006 regulations. There is no evidence that she has been absent from United for two or more years.

12 PM establishes that so long as the Appellant has resided with (meaning being present in United Kingdom, not necessarily living in a common family home with the Sponsor) for a period of five years, then he will have gained a right of permanent residence himself.

13 There was some dispute as to what evidence was actually before the First tier Judge regarding the economic activity of the Sponsor. Mr Chopra for the Appellant asserted that in addition to a substantial bundle of documents which had been filed with the First-tier, additional evidence comprising a number of P60 forms, from the year ending 5 April 2009, to the year ending 5 April 2013, had also been filed with the First-tier under cover of a letter dated 9 January 2017. On the court file, I could find such a covering letter, but not the evidence referred to within it. For his part, Mr Harisson could find neither the letter nor the evidence. There remains some doubt therefore whether this P60 documentation was actually before the First tier.

14 However, the Appellant's representatives have filed with the Upper Tribunal an additional bundle of documents under cover of 20 October 2017.

15 I pause at this point and make the following observations. Unfortunately, Mr Chopra and a colleague who sat next to him during the hearing were themselves very confused about this bundle. At one stage they appeared not have it themselves, notwithstanding that a copy had been filed with the Tribunal and the Respondent by their firm. Neither appeared to be familiar with the contents of it even once it was confirmed that it was in fact in their possession. They stated that it had been prepared by a colleague of theirs Mr Lawson.

16 When I asked them to perform the relatively straightforward task of identifying for the Tribunal what financial evidence contained within that bundle the Appellant actually relied upon, they were able to do so for some considerable period of time during the hearing, and were only able to do so after the matter had been stood down for the luncheon adjournment. At my direction a handwritten schedule of references within the bundle was prepared and filed when the matter resumed at 2 pm.

17 Upon the matter resuming, the Appellant representatives were able to identify the P60 documents referred to above, at pages 3T, 3U, 3V, and 3W of the new bundle. For the avoidance of doubt, I confirm that I permitted this material to be submitted to the Tribunal under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. It was clear that the Appellant had intended to provide that evidence to the First tier, and there was no objection from Mr Harrison on the Appellant now relying upon this evidence for the purposes of remaking the decision in this matter.

18 There were also contained within the bundle a series of payslips, the most relevant of which were dated 30 January 2009, 28 February 2009, and 30 March 2009.

19 There are two P60's for the period ending 5 April 2009; one from an employer, Joanna Teresa Brookes, ILF Accounts, providing that the Sponsor had earned £1,818 in the tax year ending April 2009 (page 3T), and a further P60 from an employer Tracy Lindsay confirming that the Sponsor had earned £13,409.55 during the tax year ending 5 April 2009.

20 Those P60's, considered alongside the payslips from January to March 2009, establish that the Sponsor had earned some £15,200 at some point during the tax year ending April 2009. However, it was not possible to confirm precisely what period within the tax year April 08 - April 09 those sums had been earned. However, based on the fact that the Sponsor was a care worker earning relatively modest sums week to week, Mr Harrison, for the Respondent was prepared to accept that it was more likely than not that the £15,200 earned in the tax year April 08- April 09 was likely to have been earned from August 08, or earlier, running up to April 09. I agree that that was a sensible concession to make in the circumstances.

21 I am therefore able to remake the decision in this matter as follows.

22 I find that the Sponsor was economically active as a qualified person from at least August 2008. The Judge had previously accepted that the Sponsor had continued to be economically active up until August 2013. On the basis of my finding, with the retained finding of the Judge, I find that the Sponsor obtained a permanent right residence from August 2013 onwards.

23 As recorded above, it is perfectly possible to describe the Sponsor as living in the United Kingdom in accordance with the 2006 regulations not only during the five years from August 2008 to August 2013, but also from August 2013 onwards, residing in the UK with a right of permanent residence in accordance with the 2006 regulations.

24 Therefore, with the Appellant being married to the Sponsor, and he himself being present in United Kingdom from 1 December 2009 onwards, it can be held that the Appellant obtained a right of permanent residence from 1 December 2014 onwards.

25 However, Mr Harrison pointed out that the Appellant had originally been issued with a residence card on 20 July 2010 valid until 20 July 2015, and queried whether the Appellant could have gained a right of permanent residence prior to 20 July 2015. However, that card will have been issued in the light of certain evidence that had been submitted with that particular application. Further, it is to be noted that initial 5 years residence cards issued under Reg 17 of the 2006 Regulations are not backdated by the Respondent, even if evidence is provided of economic activity by the qualified person going back some time prior to the application.

26 However, an application under Reg 18 of the 2006 Regulations for a card confirming a permanent right of residence might be supported by different evidence than the initial application, and the Respondent must necessarily consider

that evidence going backwards from the present time. Mr Harrison had accepted in the present case that it was more likely than not that the evidence in the appeal established that the Sponsor had been economically active in the UK from August 2008 onwards.

27 Thus, I conform that I am satisfied that the Appellant gained a right of permanent residence from 1 December 2014.

28 I consider as an aside only an argument which was advanced to me by Mr Chopra on behalf the Appellant today, although not argued in the First tier below. This was that the child of the Appellant and Sponsor, born in the United Kingdom on 25 April 2010, had a British passport issued to him on 15 March 2012. It was argued that in order for this child to be recognised as a British citizen, he must have been British at birth, or by registration thereafter, and in either case, on the basis that the child's mother, the Sponsor, must have had a permanent right residence either when the child was born, or some later time. Therefore, it was argued that by 15 March 2012 at the latest (when the passport was issued), the Sponsor must have had a permanent right residence, and that this will have been established by financial documentation that had been provided to the UK Passport Office when applying for a passport for the child.

29 I do not take this argument into account in determining present appeal. Although it is possible that the Appellant's son may have gained British citizenship by reason of the Sponsor persuading the Passport Office that she had right of permanent residence, there may have been other reasons why the child had been recognised as a British citizen.

30 For reasons I have outlined above, I find that the Appellant has a right of residence from 1 December 2014 onwards, and is entitled to have his appeal allowed.

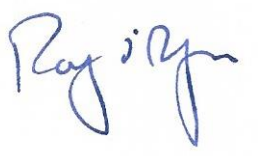
Decision

The making of the decision by the Judge involved the making of a material error of law.

I set aside the Judge's decision.

I remake the decision, allowing the Appellant's appeal under the EEA Regulations 2006.

Signed: Date: 17.1.18



Deputy Upper Tribunal Judge O'Ryan