Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/29024/2015

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice, Belfast	**Decision & Reasons Promulgated**
On 13 February 2020	**On 2 March 2020**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MRS KARINA SOUSA PINHEIRO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Helena Wilson, BL
For the Respondent: Mr A Govan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Karina Sousa Pinheiro, is a citizen of Brazil born on 27 May 1985. She appeals against a decision of Designated Judge of the First-tier Tribunal Murray promulgated on 12 May 2017 dismissing her appeal against a decision of the respondent dated 13 August 2015 refusing to grant her a permanent residence card as the family member of an EEA national. The appellant was originally refused permission to appeal by Designated Judge Woodcraft of the First-tier Tribunal and by Upper Tribunal Judge Finch. On 27 September 2019, Mrs Justice Keegan sitting in the High Court of Justice in Northern Ireland, quashed Judge Finch's

decision, on grounds which I shall outline below, remitting the permission decision back to the Upper Tribunal. On 6 November 2019, Mr CMG Ockelton, Vice President, granted permission to appeal.

Factual background

2. The appellant married her dual British-Irish husband, Paul Jenkins, on 20 July 2008. He is the sponsor in these proceedings. Shortly after their marriage, the appellant was issued with a residence card under regulation 17 of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"), which would have been valid for five years.

3. On 16 March 2015, the appellant applied for a permanent residence card on the basis that she had resided in the United Kingdom for a continuous period of five years. The respondent refused the application because she considered there to have been no evidence that the sponsor had been exercising Treaty rights for a continuous period of five years. The term "exercising Treaty rights" is a shorthand description for a person who meets the requirement to be a "qualified person" contained in regulation 6 of the 2006 Regulations, which reflects the rights enjoyed by EEA nationals under the EU Treaties to work and reside across the EU. The appellant appealed against the refusal to Judge Murray, and it is that decision which is under consideration in these proceedings.

4. By the time of the hearing before Judge Murray, the appellant had been absent from the United Kingdom for over two years. That does not seem to have been a point taken against the appellant by the respondent, and nor does it appear to have been problematic under the 2006 Regulations. Their successor regulations, the 2016 Regulations, now feature a residence requirement for those seeking residence documentation: see regulation 21(3). In view of the decision I have reached, I need not say more about the appellant's absence from the United Kingdom.

The decision of the First-tier Tribunal

5. It was common ground at the hearing below, and before me, that the appellant had not provided evidence that the sponsor had been a "qualified person" for a continuous five year period. The judge was therefore invited to allow the appeal on the basis that, even if the appellant could not demonstrate five years' continuous residence, there was sufficient evidence to demonstrate that, at that time, she nevertheless enjoyed an extended right to reside under regulation 14 of the 2006 Regulations. That submission was based on MDB and others (Article 12, 1612/68) Italy [2010] UKUT 161 (IAC) which said at paragraph (v) of the Headnote:

> "In a case concerned with an EEA decision the tribunal judge is obliged by s.84(1)(d) of the Nationality, Immigration and Asylum Act 2002 to decide whether the decision breaches any of the appellants' rights under the Community Treaties in respect of their entry to or residence in the United Kingdom (emphasis added); see also s.109(3). Where the decision is a refusal to issue a permanent residence card that may

> necessitate, in the event that refusal is found correct, considering whether the appellant was entitled nonetheless to an extended right of residence."

6. In relation to that submission, the judge made the following operative findings, at [26]:

> "I have considered… MDB and others when reaching my decision. A new application for a residence card will have to be made is the question of the sponsor exercising treaty rights for five years is still an issue. The sponsor told the tribunal that he has been self-employed for over five years but the only real evidence of this is at page 81 of the appellant's first bundle, being the national insurance document and there is also the sponsor's and the second witness's oral evidence it is puzzling that if this is the case he did not bring them to this hearing. This issue was made plain in the refusal letter and the sponsor knew that this was an issue, however if a new application is made for a residence card, under the EEA regulations 2006, all his relevant documents can be submitted with that application."

Permission to appeal

7. When refusing permission to appeal, both the First-tier Tribunal and the Upper Tribunal considered that the judge had considered and applied MDB unarguably correctly and that no arguable error of law arose from the manner in which she did so. By contrast, Keegan J held that the First-tier Tribunal had erred on that basis; at [19]:

> "In my view it is blatantly clear from a reading of the decision [of the First-tier Tribunal] that having accepted that an alternative of extended residence arose and having considered the case of MDB the [First-tier Tribunal] failed to apply the law properly to determine the application."

8. Mrs Justice Keegan considered that the operative reasoning of the judge was focused on, and restricted to, the issue of whether the sponsor could demonstrate that he had been exercising Treaty rights for a continuous period of five years, rather than a discrete assessment of whether the appellant met the requirement for a residence card at the date of the hearing. She added at [21]:

> "I cannot see that the judge actually considered the requirements for an extended residence card or that there was an explanation given for rejecting it contrary to the requirement to provide reasons…"

9. At [23], Mrs Justice Keegan concluded by holding that there was an arguable error of law in the decision of the First-tier Tribunal, quashed the decision of Judge Finch, and remitted the matter back to the Upper Tribunal for reconsideration of the application for permission to appeal. The Vice President granted permission to appeal in these terms:

> "Permission to appeal is now granted on the ground submitted to the Upper Tribunal on 21 November 2017. Reasons: Permission is granted in light of the comments of Keegan J. The parties are reminded that the Upper Tribunal's task is that set out in section 12 of the [Tribunals, Courts and Enforcement Act 2007]."

10. Although the 2006 Regulations were amended to reflect the decision of the Court of Justice in McCarthy Case C-434/09, the sponsor enjoyed the protection of the transitional provisions made when the Regulations were amended on account of when the appellant was first issued with a residence card. McCarthy held that in certain circumstances dual citizens of the host Member State and another Member State would not enjoy free movement rights under the EU free movement regime.

Discussion

11. Ms Wilson provided a helpful skeleton argument. The respondent did not provide a rule 24 notice.

12. The essential issue for my consideration is whether the First-tier Tribunal erred by not conducting a contemporaneous assessment of whether the sponsor was exercising Treaty rights, by reference to the position as at the date of the hearing. I accept that there is a degree of confusion at [25] where the judge states that the appellant will have to make a new application for a "residence card" (as opposed to a *permanent* residence card) "as the question of the sponsor exercising treaty rights for five years is still an issue." The reason this sentence lacks clarity is because, by definition, it is not necessary for there to be five years' continuous residence in accordance with the Regulations in order for a person to be issued with a residence card. All that is required is evidence that, at the time of the application, the sponsor is exercising Treaty rights.

13. However, read as a whole, the paragraph does not disclose an error of law.

14. As Ms Wilson realistically accepted at the hearing, the judge *did* conduct a contemporaneous assessment of the sort necessary for a normal residence card. The judge said, again at [25]:

> "The sponsor told the Tribunal that he has the required documents to prove that he **is** self-employed and has been for over 5 years and **is** and has been exercising Treaty rights. It is puzzling that if this is the case, he did not bring them to this hearing…" (emphasis added)

15. The words emboldened in the above extract demonstrate that the judge was concerned both with the historical position over the previous five years, and with the contemporaneous position at the date of the hearing. The references to the sponsors evidence being that he "is" exercising Treaty rights can only be to the present position. That is reinforced when one looks at the opening words to [25], which specifically concerned the MDB point, that is to say whether there is a "fallback" position that a residence card should have been issued, rather than a permanent residence card.

16. In the same paragraph, the judge re-summarised the presenting officer's submissions (which she had already outlined at [15]) that there was no documentary evidence to demonstrate where the sponsor's claimed national insurance payments, which had been submitted in support of his

contention that he was exercising Treaty rights, came from. She noted that the sponsor's evidence had been that he had the full range of documents to support his case on behalf of the appellant that he was exercising treaty rights, but that he had not brought them to the hearing. The judge described this as "puzzling". Mrs Justice Keegan also considered that omission to be strange: see [8] of her decision. The overall context in which the judge was addressing the absence of documentation going to the Treaty rights issue was, in this paragraph, when considering the MDB point.

17. Properly understood, therefore, at [25] the judge was considering the alternative submission advanced on behalf of the appellant, namely that she was entitled to a residence card because the sponsor was, at that time (c.f. "is") a qualified person. She found that he was not. There was a puzzling absence of documentation concerning that very issue, even though the sponsor and appellant had been on notice since the refusal decision that those very issues were due to be considered. Contrary to what is stated in the grounds of appeal, the judge *did* conduct a contemporaneous assessment, and found that the appellant was not entitled to a residence card.

18. It follows that, although Mrs Justice Keegan, and the Vice President, identified an *arguable* error of law, pursuant to the analysis I have conducted there was no actual error of law. This appeal must, therefore, be dismissed.

Postscript

19. In pre-hearing directions, I invited the parties to address me on whether MDB remains good law, in light of the amendments made to the appeals regime in the Nationality, Immigration and Asylum Act 2002 by the Immigration Act 2014, as applied to the 2006 Regulations. I am grateful to the parties for their submissions on these points. However, it is not necessary for me to make any findings on those issues as, even assuming that MDB is good law, the judge below gave sound reasons for dismissing the appeal on MDB-compliant grounds.

Notice of Decision

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

This appeal is dismissed.

No anonymity direction is made.

Signed *Stephen H Smith* Date 13 February 2020

Upper Tribunal Judge Stephen Smith