



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/18198/2013

THE IMMIGRATION ACTS

Heard at Field House

On 7th November 2014

Determination

Promulgated

On 17th December 2014

Before

**UPPER TRIBUNAL JUDGE RINTOUL
DEPUTY UPPER TRIBUNAL JUDGE LINDSLEY**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MS SANDRA DAWN SIDEY
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr R Palmer, Counsel instructed by the Secretary of State

For the Respondent: Mr T Buley, Counsel, instructed by Bates Wells and Braithwaite Solicitors

DETERMINATION AND REASONS

Introduction

1. Although this is an appeal by the Secretary of State we will refer to the parties as they were before the First-tier Tribunal.
2. The appellant is a citizen of Canada born on 29th September 1981. She started a relationship with a German citizen, called Mr Goetz

Schrader, in December 2005 in Canada. In January 2006 she moved to Germany to be with Mr Schrader.

3. On 11th September 2007 they both came to the UK. The appellant entered with a visit visa. She was then able to switch to remain in the UK as a working holiday-maker, with leave valid until 29th January 2010. On 8th October 2009 the appellant was granted an EU residence card as the durable partner of Mr Schrader. On 22nd December 2010 the appellant's relationship with Mr Schrader broke down due to domestic violence. He then left the UK although he returned briefly in January 2011 for his trial at the Old Bailey. He was convicted of assault occasioning actual bodily harm on 8th August 2013 and was sentenced to 12 months imprisonment suspended for 24 months.
4. On 15th August 2011 the appellant made an application outside of the Immigration Rules which was refused. On 18th November 2011 she applied for an EU permanent residence card on the basis of a retained right of residence. On 2nd March 2012 this application was refused and her existing residence card was revoked. On 3rd April 2012 the appellant appealed against this decision.
5. Her appeal against the decision was allowed to the extent that the matter was remitted to the Secretary of State by First-tier Tribunal Judge Ruth in a determination promulgated on the 12th June 2012. In that determination, Judge Ruth found that Article 7(2) of Regulation 492/2011 provided a social advantage such that the appellant was entitled to potentially use paragraph 289A of the Immigration Rules. That finding was not challenged by the Secretary of State, and it is accepted by both parties that, for the purposes of this appeal only, that finding is binding on us and on the Secretary of State.
6. Judge Ruth did not allow the appeal outright but directed that the Secretary of State should make a fresh decision on the basis of his findings and on the basis that the decision of 2nd March 2012 has not been in accordance with the law.
7. The appellant applied for permission to appeal to the Upper Tribunal but this was refused in a determination of Upper Tribunal Judge Eshun and Deputy Upper Tribunal Judge E Grant dated 23rd October 2012. Applications to the Upper Tribunal and Court of Appeal to obtain permission to appeal further were refused.
8. On 7th May 2013 the Secretary of State made a new decision refusing the appellant's application for a permanent residence card; and on 21st May 2013 the appellant appealed once again to the First-tier Tribunal. A further supplemental reasons for refusal letter was issued on 2nd July 2013. The appeal was allowed by First-tier Tribunal Judge Crawford in a determination promulgated on 31st March 2014.

9. The Secretary of State sought permission to appeal on the grounds that Judge Crawford erred:
 - i. in finding that Regulation 492/2011 applies to the appellant
 - ii. in considering the appellant to have been anything other than a temporary migrant at the material times
 - iii. by allowing the appeal under the immigration rules
 - iv. in concluding that the respondent should have exercised her discretion in the appellant's favour
 - v. in failing when assessing proportionality under article 8 to have any or adequate regard to the public interest in firm immigration control
 - vi. in failing expressly to weigh the competing interests or give adequate reasons for concluding that the appellant's removal would be disproportionate
10. Permission to appeal against the determination of Judge Crawford was granted by First-tier Tribunal Judge PJG White on 14th May 2014 on all grounds. The respondent does not, however, now pursue ground (i).
11. The matter came before us to determine whether the First-tier Tribunal had erred in law. It was accepted by both parties that there were two substantive issues. Firstly whether there was an error of law in allowing the appeal under EU law (with reference to paragraph 289A of the Immigration Rules by way of the non-discrimination provisions Article 7(2) of Regulation 492/2011) and secondly whether there was an error of law in allowing the appeal under Article 8 ECHR.
12. It was agreed that to the extent Judge Crawford had allowed the appeal simply under the Immigration Rules or on the basis that discretion should have been exercised to grant the appellant indefinite leave to remain outside of the Immigration Rules this was in error, although the appellant maintained any such legal errors were immaterial as she was entitled to succeed under EU law (as outlined above) and under Article 8 ECHR.

Submissions

13. Mr Palmer set out his submission in a skeleton argument and in oral submissions. In summary he argues as follows.
14. As a matter of principle it had not been right for the First-tier Tribunal to allow the appellant's appeal because there was no right of permanent residence provided to a durable partner under any EU regulation or directive; because it would mean that the appellant had a more secure status than Mr Schrader held or had ever achieved in

circumstances where she was deriving her status from him; and because the appellant would be getting a better right than a third country national spouse of an EU national who was the victim of domestic violence would achieve under Article 13(2) of the Directive 2004/38/EC. These issues all indicate that the outcome of the determination of Judge Crawford cannot be right.

15. It was accepted that in this instance (and in this case only as it would be the intention of the Secretary of State to strongly oppose any similar finding being made in the future) we must start from the finding of Judge Ruth that Article 7(2) of Regulation 492/2011 did provide a social advantage such that the appellant was entitled to potentially use paragraph 289A of the Immigration Rules. Mr Palmer submitted that it is notable that efforts by the appellant to persuade the higher courts that the First-tier Tribunal ought to have determined whether the appellant did in fact qualify under paragraph 289A rather than remit the matter to the Secretary of State were unsuccessful. To this extent there must be some discretion to be exercised by the Secretary of State in the application of paragraph 289A of the Immigration Rules otherwise the Upper Tribunal and/or Court of Appeal would have allowed the appellant's appeal on this point.
16. Further it is to be noted that the idea of equal treatment and non-discrimination in Community law is to put the EU worker in the same position as a British citizen worker whilst they are in the UK. Such a worker will however never be the same position in terms of residence rights as British citizens because British citizens can never be deported. In this sense it is not a provision that can give or equalise residence rights.
17. Mr Palmer submitted that while Judge Crawford's finding that the appellant and Mr Schrader had intended to remain permanently in the UK was open to him, he erred in law when he found that this was sufficient to say that the appellant qualified under paragraph 289A of the Immigration Rules. Mr Schrader did not have the legal status of permanent residence in EU law so should not have been seen as equivalent to a person present and settled here. The appeal could not succeed under the Immigration Rules in these circumstances.
18. Mr Palmer did, however accept, that references to specific periods of leave within 298A would have necessarily to be adapted to give the provision meaning in the context of EU law.
19. Mr Palmer argued further that Mr Schrader's EU residence permit did not give him the same status as a person with indefinite leave to remain who was settled in the UK. Those with indefinite leave to remain will always be allowed to remain bar proceedings to deport them. Mr Schrader might have been someone who intended to qualify for permanent residence but he had not got to that point. To get to the point of an expectation of permanent residence the appellant would

have had to remain the partner of Mr Schrader for five years and he would have had to have remained in the UK exercising Treaty rights for this period. This might thus have never been achieved as Mr Schrader's plans might have changed: he might have returned to Germany for instance. As a result the appellant, as Mr Schrader's partner, did not have the same quality of expectation as the spouse or partner of someone with indefinite leave to remain who expects an entitlement to remain in the UK. It was this quality of expectation which led to the Secretary of State formulating the domestic violence immigration rule at paragraph 289A.

20. Other temporary migrants do not get indefinite leave under the Immigration Rules if their marriages break down for reasons of domestic violence for this policy reason. They know that they will not remain in the UK if their relationship breaks down, and so do not have the same quality of expectation to be settled in the UK. The appellant's situation was comparable to those of other temporary migrants. It cannot be said that it was discriminatory or indirectly discriminatory that Mr Schrader did not get permanent residence immediately as this is simply part of the scheme of EU law.
21. Mr Buley argued that the consequence of the finding of a social advantage is that the Secretary of State should have approached the case on the basis that paragraph 298A was to be applied by analogy as though the appellant was the partner of a British Citizen, and that it was incorrect to submit that the proper comparison was to treat the appellant as though she was the partner of a third country person settled here. He submitted that the correct force of Article 7(2) of Regulation 492/2011 is to ensure that the EU national has the same social advantages as a British citizen. This was what was done by the ECJ in Netherlands v Reed Case 59/85. The comparison in Netherlands v Reed is between the treatment of the national of the home EU state and the national of the other member state of the EU (see Netherlands v Reed at [7]).
22. Mr Buley's central argument leading to the conclusion that the appellant was entitled under paragraph 289A of the Immigration Rules was that the proper comparator was an ordinarily resident British citizen worker. As Mr Schrader did not plan to leave immediately and was here for the meanwhile, as was found factually to be the case by Judge Crawford, then he was in the comparable position of such a British citizen. Mr Schrader was entitled to bring his unmarried partner to the UK as was a British citizen worker, and was also entitled to the same protections to remain in the UK for that spouse in circumstances of domestic violence via Article 7(2) of Regulation 492/2011.
23. In reply Mr Palmer, submitted that paragraph 298A does not apply to all British citizen workers; for example those employed by UK based employers but seconded to work for a number of years in Dubai. On that

basis, there would be no discrimination in not applying the provision to the appellant.

Discussion

24. The parameters within which this appeal is to be considered are somewhat artificial. They flow from the finding of Judge Ruth in the First-tier that there was a social advantage for the appellant's former partner, Mr Schrader such that she is entitled to the application to her of paragraph 289A of the Immigration Rules.
25. Article 7 (2) of Regulation No 492/2011 provides that a worker who is a national of a Member state shall enjoy the same social and tax advantages as national workers. It is not in doubt that at the relevant time, Mr Schrader was a worker or that in this case the social advantage is the applicability of paragraph 289A to the partner of a British Citizen, or more correctly, a person "present and settled here".
26. The essential difference between the parties in relation to the application of EU law is the question of the correct comparator for Mr Schrader. Two alternatives are proposed:
- (i) Mr Schrader's position must be compared with that of a foreign national who has indefinite leave to remain (the Secretary of State's position); and
 - (ii) Mr Schrader's position must be compared with a national of the home EU state, that is, the UK and thus a British citizen (the appellant's position).
27. Paragraph 289A applies to the partners of those "present and settled in the United Kingdom" a category which is not limited to British citizens. The phrase is defined in paragraph 6 of the Immigration Rules as follows:-
- "present and settled in the UK" means that the person concerned is settled in the United Kingdom and, at the time that an application under these Rules is made, is physically present here or is coming here with or to join the applicant and intends to make the UK their home with the applicant if the application is successful.
28. "Settled" in this context is defined in section 33 (2A) of the Immigration Act 1971 which provides that:
- Subject to section 8(5) above, references to a person being settled in the United Kingdom are references to his being *ordinarily resident* [emphasis added]there without being subject under the immigration laws to any restriction on the period for which he may remain
29. "Settled" therefore does not equate with having indefinite leave to remain. When applied to a British citizen, it means only that that person is ordinarily resident in the UK. On that basis the cohort of individuals

who are “present and settled” includes probably most (but not all) British Citizens, and a number of nationals of other states, including those EEA nationals entitled to permanent residence.

30. It follows from the qualification of being “ordinarily resident” that a British Citizen who, in Mr Palmer’s example, lives and works in Dubai, and who comes here for a holiday with a non-British (or EU) spouse would not fall to be treated as present and settled here. It is possible that such a person, if employed by a business established in London is a worker under British and EU law, but not ordinarily resident here. To that extent, Mr Palmer is correct in stating that not all British workers would benefit from paragraph 289A’s applicability. But that is not the issue under Regulation 492/2011; it would not be a comparison of like with like and, such a submission is not properly compatible with the finding of a social advantage. It is not in doubt that Mr Schrader was a worker and ordinarily resident here, and thus the comparator is a British Citizen worker in the same situation of residence.
31. We accept that “settled” in the context of an EU national means having permanent residence, but to restrict the social advantage of the applicability of paragraphs 289A to those who hold that status would be to impose an additional requirement which would not apply to a British worker in the same position as Mr Schrader; that is, ordinarily resident within the territory of the UK. We note also that “ordinary residence” does not connote any specific length of time.
32. The Upper Tribunal who considered this issue on appeal from Judge Ruth had, like him, decided it was appropriate for the Secretary of State as primary decision-maker to consider the matter prior to an appeal as there had been absolutely no consideration of an entitlement under paragraph 289A of the Immigration Rules in accordance with Article 7(2) of Regulation 492/2011 at that point. The only question for the Secretary of State in this reconsideration was whether the status of the appellant’s partner entitled her to the benefit of paragraph 289A of the Immigration Rules in the light of this being deemed a social advantage to which a German worker, like a British worker, was entitled: there was no additional issue of a discretion.
33. For the reasons set out above, we consider that the appellant is entitled to the benefit of paragraphs 289A as though she had been the partner of British citizen worker present and settled in the UK. This is because she is someone who meets, in essence, all the requirements of a person seeking indefinite leave to remain in the United Kingdom as a victim of domestic violence under this provision. The question then arises as to the extent of the respondent’s discretion flowing from the use of the word “may” in paragraph 289B, which states that the Secretary of State may grant indefinite if all the requirements at paragraph 289A are met.

34. The appellant does not, fall within the provisions of the Immigration Rules as she is entitled simply to an equivalent “social advantage”. Any issue of the discretion flowing from 289B of the Rules is not a matter on which we can make a decision as the Secretary of State must in any case consider what equivalent leave to grant the appellant, in accordance with her rights under EU law as established above. In considering what permission to remain to grant, the Secretary of State is constrained by the fact that the provisions of 289A are, for the reasons set out above, met. In a case of “social advantage it must always be for the Secretary of State to consider how ultimately to comply with EU law and thereby provide an equivalent social advantage to the EU worker.

Conclusions - Error of Law & Remaking

35. In light of the above, we agree that Judge Crawford did err in law in allowing the appeal under the Immigration Rules in his decision. Clearly the appellant did not qualify on a domestic law application of the Immigration Rules. The matter was either to be allowed or dismissed under EU law on the basis that the decision breached the appellant’s rights under the Community Treaties or because it would be a breach of the UK’s obligations under Article 8 ECHR if the appellant is removed from the UK.
36. Further, to the extent that Judge Crawford suggested at paragraph 32 of his determination that he was allowing the appeal as discretion should have been exercised differently outside of the Immigration Rules and EU law then he was acting beyond his jurisdiction, and erred in law
37. Judge Crawford correctly starts the “Findings and Reasons” section of his determination with the un-appealed finding of Judge Ruth in the First-tier Tribunal that paragraph 289A of the Immigration Rules confers a social advantage which Mr Schrader was entitled to by application of the principle of equal treatment at Article 7(2) of Regulation 492/2011. Whilst this might seem initially to be a surprising conclusion it is accepted by all to be the starting point for this appeal, and we do not investigate its merits.
38. Paragraph 289A(ii) of the Immigration Rules allows for an unmarried partner to be granted indefinite leave to remain if she is the victim of domestic violence; and if she has been granted an extension of stay for a period of 2 years as an unmarried partner; and if she is the partner of a person present and settled. The Secretary of State accepts that the appellant is able to meet all the requirements bar that her partner is present and settled.
39. We find that the correct approach is to compare Mr Schrader, a settled and present EU worker who is getting the benefit of the “social advantage” of domestic violence protection for his unmarried partner, with a settled and present British citizen worker because this is what is

said must happen at Article 7 of Regulation 492/2011. According to this provision Mr Schrader: “shall enjoy the same social and tax advantages as national workers.” It follows logically from this that Mr Schrader gets this social advantage as a settled and present worker because a settled and present working British citizen would undoubtedly have this protection for his unmarried third country national partner who had been granted permission to remain in the UK as such by the Secretary of State. Issues of the equivalence of Mr Schrader and third country nationals with indefinite leave to remain then simply do not arise as EU law does not require him to be put in the same position as such a person.

40. Mr Palmer has argued that the Secretary of State has some extra element of discretion in the application of paragraph 289A of the Immigration Rules which was acknowledged by Judge Ruth in the First-tier Tribunal, the Upper Tribunal and the Court of Appeal in their finding that the matter should return for a decision applying paragraph 289A to the facts of this case prior (should that be necessary) to the Tribunal determining the matter.
41. We find that whilst member states have a discretion in the facilitation of the entry of other family members in accordance with Article 3(2) of directive 2004/38/EC this does not mean that they are not to be treated equally in terms of non-discrimination provisions once they have been found to be entitled to a residence card by a member state (as happened with this appellant) or (as here) have been found to be entitled to a social advantage and thus are placed within the ambit of EU law.
42. The Upper Tribunal who considered Judge Ruth’s decision found it procedurally correct for the matter to be first considered by the Secretary of State as no decision had been taken on this issue whatsoever on an application of UKUS (discretion when reviewable) [2012] UKUT 000307. The Court of Appeal did not find it appropriate to grant permission to appeal on this point: Rt. Hon. Sir Stanley Burnton said in the Court of Appeal in refusing permission to appeal on 29th January 2013 it was not unarguable that the First-tier or Upper Tribunal should have considered the application of the appellant’s facts to paragraph 289A of the Immigration Rules rather than remitting it back but there was no point of principle or practice or compelling reason to do this rather than obtain a new decision from the Secretary of State.
43. As with the application of Article 7(2) of Regulation 492/2011 to the appellant’s facts it is not the task before us to go back into the merits of the decision to remit to the Secretary of State rather than for the First-tier Tribunal to have proceeded with applying the facts to paragraph 289A without first having the benefit of the Secretary of State’s decision on the matter.

44. The Secretary of State now concedes that, for the purpose of this case, and contrary to the case she put in the Refusal Letter, that the claimant is entitled to the benefit of the social advantage as found by Judge Ruth. In light of this, and on consideration of this background and the issue of discretion that this raises we do not find that it was open to the Secretary of State on reconsideration of this matter to refuse to grant the appellant leave equivalent to indefinite leave to remain given her ability to meet the essential requirements of paragraph 289A of the Immigration Rules.
45. The appellant can show that she can meet all the essential requirements of that paragraph and no general grounds for refusal are made out. There would therefore appear to be no rational basis for the Secretary of State not to grant equivalent residence to that offered by the Immigration Rules unless there is further policy guidance relevant to the applicability of paragraph 289A which has not been drawn to our attention. It is however for the Secretary of State ultimately to decide what equivalent leave to grant the appellant.
46. As Mr Buley has indicated the fact that the Directive 2004/38/EC provides at Article 13(2) married partners with a protection which is not the equivalent to settlement does not make this outcome incorrect. If Judge Ruth is right about the interpretation of domestic violence protection being a social advantage, which the respondent says is not accepted for future cases and so will presumably be litigated further in the future, then this will apply equally to married partners and there will be no differential impact for these two groups. In any event, the rights granted by the Directive do not preclude greater rights being granted by the effect of domestic law.
47. If the appellant obtains leave equivalent to indefinite leave to remain via this route earlier than Mr Schrader could have obtained permanent residence in EU law then this is simply by operation of a provision which in almost all cases foreshortens the route to settlement of the unmarried partner. In almost all cases the partner who has been a victim of domestic violence will get settlement sooner than they had reason to expect by the misfortune of being a victim of domestic violence. This does not contravene the principle that EU nationals should get at least equal rights with others as the fact of the appellant getting permission to remain, which may be indefinite or permanent, in this way has been deemed to be a social advantage to Mr Schrader, the EU national. Mr Schrader is in no way disadvantaged by this but chose, as the British citizen worker might have done to leave the UK and work elsewhere. Like the British citizen worker he is also free to return and acquire permanent residence if he so wishes.
48. We have concerns at the way in which Judge Crawford dealt with Article 8 ECHR in his analysis of the public interest and proportionality but in the light of our finding that the appellant was entitled to succeed in her appeal under EU law we find that any legal errors were ultimately

not material and thus that the decision need not be remade although it has been set aside.

Decision

1. The decision of the First-tier Tribunal involved the making of a material error on a point of law.
2. The decision of the First-tier Tribunal is set aside.
3. The appeal is remade allowing the appeal under EU law as the decision of the Secretary of State breached the rights of the appellant under the Community Treaties.

Deputy Upper Tribunal Judge Lindsley
15th December 2014