



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

Appeal Number: IA/42299/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport

On 26th November 2014

**Determination
Promulgated**

On 5th December 2014

Before

UPPER TRIBUNAL JUDGE POOLE

Between

**MS MARIA ISABEL QUEIROS RIBEIRO
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K McCarthy, Counsel

For the Respondent: Mr Irwin Richards, Home Office Presenting Officer

REMITTAL AND REASONS

1. The appellant is a citizen of Brazil, born 14 October 1954. She applied for a permanent residence card as confirmation of a right to reside in the United Kingdom as the extended family member of a Hungarian national. The application was refused and the appellant appealed that decision.

The appeal came before Judge of the First-Tier Tribunal Ghaffar sitting at Birmingham on 19 June 2014. An oral hearing was held. The appellant gave evidence and each party was represented.

2. In a determination dated 2 July 2014, Judge Ghaffar dismissed the appeal finding that the appellant could not benefit from “any retained rights” given that her daughter (with whom she lived) had separated from her Hungarian husband.
3. At paragraph 17 of the determination the judge found that the Hungarian national was exercising treaty rights based on the contention that there was nothing to suggest that he was not.
4. The appellant sought leave to appeal alleging that the judge had failed to consider that the appellant remained dependent upon her daughter and the judge had failed to apply Regulation 7(1)(c) of the EEA Regulations 2006.
5. In granting leave to appeal another judge of the First-Tier Tribunal gave the following as reasons:

“1. Permission to appeal is sought by a female national of Brazil against the decision of First-Tier Tribunal Judge Ghaffar sitting at Birmingham to dismiss her appeal against the refusal of her application for a residence card of confirmation of the right of residence in the United Kingdom as the family member of an EEA (Hungarian) national. The appellant arrived in the United Kingdom from Brazil in 2007 to live with her daughter and her daughter’s then husband, the Hungarian national, Mr Kovacs. The three of them lived together until 2009 or 2010 until the marriage broke down. Since then the appellant had lived with her daughter, and the daughter’s children, but not with Mr Kovacs. The application was refused under Regulation 15(1)(b) of the Immigration (EEA) Regulations 2006 because the respondent was not satisfied that the EEA sponsor had been exercising treaty rights for a continuous period of five years. Although the application was also refused under Article 8, the appeal was not advanced on that basis because removal directions had not been given. Judge Ghaffar found that the EEA national had been exercising treaty rights but that the appellant could not benefit from any retained rights. The appellant’s daughter and the Hungarian national were not divorced. The wording of Regulation 15 required the appellant to be living with the EEA national or there to have been a divorce.

2. Permission to appeal is now sought on the basis that the appellant was a family member in the ascending line of the spouse of an EEA national by virtue of Regulation 7(1)(c). Reference is made to a case of **Moneke and Others (EEA - OFMs)** (no citation given) which contrasts the position of family members and other family members and says that dependent family members may be dependent on either the union citizen or (as here) the spouse/partner of such a citizen. It is arguable that in

not considering the appeal on that basis the judge fell into a material error of law. I can see no reason why an anonymity direction might be appropriate and no such direction is made”.

6. Following the grant of leave the respondent produced a Rule 24 response in the following terms:

“1. The respondent to this appeal is the Secretary of State for the Home Department. Documents relating to this appeal should be sent to the Secretary of State for the Home Department, at the above address.

2. The respondent considers that the appellant may well be entitled to a permanent residence card if her daughter is still married to her husband and he is still exercising treaty rights.

3. However in light of the 2008 Procedure Rule 24(3)e the respondent does not accept that the finding of the judge at paragraph 17 is adequate in establishing that the appellant’s daughter’s husband is exercising treaty rights. The judge has misdirected himself in concluding that what is required is evidence that the appellant’s husband is not exercising treaty rights.

4. It is clear that the appellant must demonstrate to the balance of probabilities that the appellant’s daughter’s husband was exercising treaty rights. The lack of evidence that he is not exercising treaty rights is simply inadequate to demonstrate that he is. The judge is using a lack of evidence to establish a precedent fact and this is simply wrong.

5. This issue is particularly pertinent since there is clearly an ongoing contact with him via his son. Paragraph 8 refers”.

7. Hence the matter came before me in the Upper Tribunal.
8. In her oral submission Ms McCarthy emphasised that Regulations 15 and 7 of the 2006 Regulations had been pleaded in the original grounds of appeal. Ms McCarthy explained that the EEA national, Mr Kovacs had moved out of the house. There is still contact between him and the child of the family. It is believed therefore that he is still in the United Kingdom. He is contributing to the mortgage and the inference is that he is therefore working, and continuing to exercise Treaty rights. Ms McCarthy relied on the grounds seeking leave. The appeal should be allowed by reason of Regulation 7.
9. Mr Richards relied upon the Rule 24 response and indicated that the judge had not made findings. He acknowledged that there was an error of law contained in the determination by reason of paragraph 17 of the decision. The question was whether or not that error was material.

10. Ms McCarthy responded in that it was difficult to obtain information and evidence because Mr Kovacs did not cooperate. It was not incumbent upon the judge to list every piece of evidence. He had clearly taken into account what was contained in the bundle and had found the sponsor to be credible (and indeed the appellant).
11. At the end of the hearing I reserved my decision. Ms McCarthy requested that the Upper Tribunal remake the decision.
12. It is common ground between the parties that the judge made an error of law in the determination of 2 July 2014. The respondent is perfectly correct in paragraph 4 of the Rule 24 letter. The onus is upon the appellant to demonstrate to the balance of probabilities that the Hungarian national is exercising treaty rights at the appropriate time. The lack of evidence that he is not exercising such rights is "simply inadequate". The judge was clearly wrong to reach a conclusion by that route.
13. In addition the appellant contends that the judge was wrong in law with regard to the Regulations to be applied once facts had been established. Paragraphs 2 and 5 of the Rule 24 response offer some support to that contention.
14. I therefore reached the conclusion that the errors contained in the determination are clearly material by reason of the fact that they go directly to the issue and therefore the determination cannot stand, and must be set aside.
15. Although finding the witness is credible the judge has, with respect, made very little in the way of findings of fact. This may well have been difficult because of the refusal by Mr Kovacs to cooperate.
16. Be that as it may attempts must be made to establish facts and reach conclusions. I consider that is a matter that falls within the Senior President's direction and is therefore appropriate for this matter to be remitted back to the First-Tier Tribunal to be heard de novo by a judge other than Judge Ghaffar.

Signed

Date

Upper Tribunal Judge Poole