



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

Appeal Number: IA/45228/2013

THE IMMIGRATION ACTS

Heard at Field House

On 25th June 2014

Determination

Promulgated

On 23rd July 2014

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

MR KASTURI LAL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Awan, Solicitor from Mayfair Solicitors

For the Respondent: Ms A Everett, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Wiseman made following a hearing at Hatton Cross on 14th March 2014.

Background

2. The Appellant is a citizen of India born on 10th February 1981.

3. On 7th June 2005 he married Thraso Elia, a citizen of Cyprus. On 13th April 2007 he was granted an EEA family permit and came to the UK. He was subsequently issued with a residence document under Regulation 17 from 10th April 2008 to 10th April 2013.
4. On 3rd April 2013 he applied for a permanent residence card but was refused on 12th October 2013. His wife's registration certificate, which had been issued on 4th October 2007, was revoked.
5. The Secretary of State refused to issue a permanent residence card because she was not satisfied that the Appellant had established that his EEA Sponsor had been exercising treaty rights in the UK for a continuous period of five years as a self-sufficient person. The Appellant's case was that he was entitled to rely on his own earnings and resources to establish his EEA national wife's self-sufficiency.
6. The issue before the judge was whether the decision to refuse a residence card was in accordance with the law and the Regulations, which required a decision to be made as to whether the Sponsor had been exercising treaty rights for a period of five years as a self-sufficient person.
7. Unfortunately the judge made no clear decision as to whether she was or was not.
8. The Appellant sought permission to appeal on the grounds that the judge had failed to make relevant findings, failed to make any findings in relation to Article 8, failed to make a fee award and had improperly failed to call upon the representative to make oral submissions. He had said that he was content to rely upon the written submissions but then complained in the determination that there were a number of matters which required clarification which could have been determined had a representative been present.
9. Permission to appeal was granted by Judge Nicholson on 7th May 2014.
10. At the hearing both parties accepted that the judge had erred in law and that the decision would have to be remade.

The Hearing

11. Mr Awan submitted that the Appellant's EEA national wife had been exercising treaty rights as a self-sufficient person for the relevant period. It had been accepted that the Appellant had comprehensive sickness cover. It was also accepted that the Appellant had been working and that he had been continuously employed in the UK since 2007. He was entitled to rely on Regulation 4(2) which states that:

"For the purposes of paragraph 1(c) where family members of the person concerned reside in the UK and their right to reside is dependent upon there being family members of that person -

- (a) the requirement for that person to have sufficient resources not to become a burden on the social assistance system of the UK during his period of residence shall only be satisfied if his resources and those of the family members are sufficient to avoid him and the family members becoming such a burden;
- (b) the requirement for that person to have comprehensive sickness insurance cover in the UK shall only be satisfied if he and his family members have such cover.

4(3) For the purposes of paragraph 1(d) where family members of the person concerned reside in the UK and their right to reside is dependent upon there being family members of that person, the requirement for that person to assure the Secretary of State that he has sufficient resources not to become a burden on the social assistance system of the UK during his period of residence shall only be satisfied if he assures the Secretary of State that his resources and those of his family members are sufficient to avoid him and his family members becoming such a burden.

4(4) For the purposes of paragraphs 1(c) and (d) and paragraphs 2 and 3 the resources of the person concerned and, where applicable, any family members, are to be regarded as sufficient if –

- (a) they exceed the maximum level of resources which a British citizen and his family members may possess if he is to be come eligible for social assistance under the UK benefit system; or
- (b) paragraph (a) does not apply but, taking into account the personal situation of the person concerned and, where applicable, any family members, it appears to the decision maker that the resources of the person or persons concerned should be regarded as sufficient.”

- 12. Mr Awan pointed to the resident stamp in the Appellant’s passport which said that employment and business activities were allowed. He had therefore been working in the UK lawfully and his EEA spouse was entitled, as his family member, to rely upon those earnings to establish her self-sufficiency.
- 13. Furthermore removal would be a disproportionate interference with his private life since he had been employed here consistently since his arrival, had relatives here and had always anticipated making his home here.
- 14. Ms Everett relied on the cases of AG & Others (EEA jobseeker self-sufficient person proof) Germany [2007] UKAIT 00075 and GM & AM (EU national; establishing self-sufficiency) France [2006] UKAIT 00059 and

submitted that the Appellant was not entitled to rely upon his own earnings in order to establish his wife's self-sufficiency.

15. With respect to Article 8, the Appellant had come to the UK on the basis of his wife's ability to exercise treaty rights, which was essentially a temporary purpose, and the refusal to issue a permanent residence card is not disproportionate.

Findings and Conclusions

16. The cases relied on by Ms Everett make the position clear.
17. In AG & Others the Tribunal held that, to satisfy the self-sufficiency requirement of the EEA Regulations under Regulation 4(4), the resources of a family member cannot be aggregated with those of the EEA national where those resources are derived from past employment of that family member.
18. The Tribunal said

“Neither this judgment nor the judgment in Chen can be taken to support the quite different proposition that self-sufficiency can be established by income earned by the family member of a Union citizen – irrespective of whether that income was earned lawfully and on the basis of an independent right to work (see GM & AM at 52).”

And again at paragraph 82

“That does not assist a family member whose employment is only legal if the right to reside of the Union citizen has been shown to exist on the basis of his/her personal self-sufficiency.”

19. GM & AM was concerned with the rights of a EU national child. At paragraph 63 the Tribunal wrote

“What is being said in this case is quite different. Here it is said that the parent/carer is entitled to be in the UK and work because only then will the child be self-sufficient and hence establish her EU right of residence. Thus the family members' presence in the UK (and a right to work) is relied upon not in order to avoid a “clog” or “chill” on the exercise of the right of the EU national child but rather in order to create that very right itself – the right from which the family member then seeks to derive his own right to reside as her carer/parent. Only if the parent/carer resides in the UK with the EU national child can it be said that the child has an EU right at all. The argument is then exposed for what it is – entirely circular. Even more problematically it is a circular argument that begins in the wrong place because it begins with a person who has no right to begin with, unlike in Chen. There is nothing in the Court of Justice's jurisprudence, in particular in Chen or anything in principle which should cause us to decide that a non-EU family member should be able to reside in the UK with a EU

national child (not to allow it to exercise an existing right but rather) in order to establish the right in the first place. Any right of the family member must be derived from an existing right of the EU national which he or she has individually and separately. That is simply not the case.”

20. Here the Appellant is attempting to use his own work in order to create his right to work on the basis of his EU wife’s self-sufficiency, but his wife has not individually and separately established personal self-sufficiency. The Appellant’s rights are derived from hers.
21. Accordingly, since he cannot show that his EEA national spouse has been exercising treaty rights for a period of five years, the Appellant is not entitled to a permanent right of residence in the UK.
22. The Appellant is not of course facing removal since no removal decision has yet been made. However there is nothing in the evidence which establishes that it would be a disproportionate interference with his private life. No evidence of that private life, save for his work, has been adduced. There are no children of the marriage. He has no independent right to remain in the UK, save as a dependant of his wife and there is no evidence that she is exercising treaty rights in the UK.
23. Mr Awan accepted that the Upper Tribunal has no jurisdiction to consider the issue of fee awards.
24. The issue of procedural irregularity as pleaded in the grounds was not pursued because the decision has been set aside on other grounds.

Decision

25. The judge erred in law. His decision is set aside. The appeal is dismissed.

Signed

Date

Upper Tribunal Judge Taylor