



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

Appeal Number: IA/07635/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision and Reasons  
Promulgated**

**On 13 July 2015**

**On 15 July 2015**

**Before**

**UPPER TRIBUNAL JUDGE KEKIC  
UPPER TRIBUNAL JUDGE SMITH**

**Between**

**MRS ELSA McCRORY  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms K Joshi, legal representative

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

No anonymity order was made by the First-tier Tribunal. We find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

**DECISION AND REASONS**

## **Background**

1. The appellant is a citizen of Brazil. She appeals under regulation 26 of the Immigration (European Economic Area) Regulations 2006 (“the EEA regulations”) against the respondent’s decision dated 28<sup>th</sup> January 2014 refusing to issue her a residence card as the family member of her EEA sponsor, Mr Patrick McCrory (“the sponsor”). The sponsor is a dual British/Irish national.
2. The appellant entered the UK on 6<sup>th</sup> April 2011 with 6 months’ leave to enter. On 13<sup>th</sup> December 2011, she was granted 6 months’ further leave. On 3<sup>rd</sup> March 2012, she applied for a residence card as the family member of the sponsor (“the first application”). The first application was not decided by the respondent until 13<sup>th</sup> March 2013 (“the first decision”). The first application was refused as the respondent was not satisfied that the sponsor was a qualified person because he had failed to provide sufficient evidence that he was actively trading as a self-employed person. Meanwhile, on 19<sup>th</sup> June 2012, the respondent amended the EEA Regulations by The Immigration (European Economic Area) (Amendment) Regulations 2012 (“the amending order”). The effect of the amending order which impacted on the appellant was that an EEA national was redefined to exclude a person who was also a UK national (paragraph 1(d) of Schedule 1). The amending order, though, contained, at Schedule 3, transitional provisions to which we return below (“the transitional provisions”).
3. The appellant did not appeal the first decision even though she was given the opportunity to do so. Instead, she made another application on 20<sup>th</sup> May 2013 (“the second application”). That application was refused on 28<sup>th</sup> January 2014 (“the second decision”). The second decision is the subject of this appeal but the timing of the first decision continues to have relevance to the appeal for reasons which we set out below.
4. The appellant’s appeal was dismissed by First-Tier Tribunal Judge Hollingworth in a Decision promulgated on 9<sup>th</sup> October 2014. The appellant sought permission to appeal on two grounds: -

### Ground 1

The respondent’s failure to make a decision on the application for a residence card within the 6 months prescribed by the EEA regulations rendered the second decision unlawful and the Judge erred by failing to find that the decision was not in accordance with the law (paragraph 17 of the Decision);

### Ground 2

The appellant was entitled to rely on the transitional provisions so that the respondent was wrong to find that she could not succeed under the EEA regulations because her sponsor was a

dual national who was no longer recognised as an EEA national by the date of the second decision (paragraphs 22-33 of the Decision).

5. Permission to appeal was granted by Deputy Upper Tribunal Judge Pickup on 17<sup>th</sup> February 2015 on Ground 2; permission was refused on Ground 1 on the basis that it was of little merit. The appellant did not pursue Ground 1 further. A rule 24 response was submitted by the respondent on 4<sup>th</sup> March 2015 accepting that there was an error of law in the Judge's Decision as the Judge had applied the wrong subparagraph of the transitional provisions. The respondent submitted however that the error was not material as the Judge would have dismissed the appeal by applying a different subparagraph of the transitional provisions.
6. The matter comes before the Upper Tribunal to determine whether the First-tier Tribunal decision involved the making of an error of law so that it should be set aside.

### **The transitional provisions**

7. The relevant paragraphs of the amending order are as follows:-

#### **Commencement**

2. (1) *Subject to paragraph (2) these Regulations will come into force on 16<sup>th</sup> July 2012*
- (2) *Paragraph 1(d) of Schedule 1 to these Regulations will come into force on 16<sup>th</sup> October 2012*

#### **Amendment of the Immigration (European Economic Area) Regulations 2006**

3. *The Immigration (European Economic Area) Regulations 2006 are amended as set out in Schedule 1*

#### **Consequential amendments and transitional provisions**

4. *Schedule 2 (consequential amendments) and Schedule 3 (transitional provisions) have effect.*

#### **SCHEDULE 1**

##### **Regulation 2 (general interpretation)**

*In regulation 2(1) -*

...

*(d) in the definition of "EEA national" after "a national of an EEA State" insert "who is not also a United Kingdom national"*

...

#### **SCHEDULE 3**

## *Transitional Provisions*

### ***Amendments to the definition of EEA national***

2. (1) *Where the right of a family member ("F") to be admitted to, or reside in, the United Kingdom pursuant to the 2006 Regulations depends on the fact that a person ("P") is an EEA national, P will, notwithstanding the effect of paragraph 1(d) of Schedule 1 to these Regulations, continue to be regarded as an EEA national for the purpose of the 2006 Regulations where the criteria in subparagraph (2), (3) or (4) are met and for as long as they remain satisfied in accordance with subparagraph (5).*

...

(3) *The criteria in this subparagraph are met where F -*

(a) *was on the 16<sup>th</sup> July 2012 a person with a right to reside in the United Kingdom under the 2006 Regulations; and*

(b) *on the 16<sup>th</sup> October 2012 -*

(i) *held a valid registration certificate or residence card issued under the 2006 Regulations;*

(ii) *had made an application under the 2006 Regulations for a registration certificate or residence card which had not been determined; or*

(iii) *had made an application under the 2006 Regulations for a registration certificate or residence card which had been refused and in respect of which an appeal under regulation 26 could be brought while the appellant is in the United Kingdom (excluding the possibility of an appeal out of time with permission) or was pending (within the meaning of section 104 of the Nationality, Immigration and Asylum Act 2002)*

...

(5) *Where met, the criteria in subparagraph (2), (3) and (4) remain satisfied until the occurrence of the earliest of the following events -*

(a) *the date six months after an EEA family permit has been issued if F has not within that period been admitted to the United Kingdom;*

(b) *the date on which an appeal against a decision referred to in subparagraph (3)(b)(iii) or (4)(b) can no longer be brought (ignoring the possibility of an*

*appeal out of time with permission) where no such appeal has been brought;*

- (c) the date on which any appeal against a decision referred to in subparagraph 3(b)(iii) or (4)(b) is finally determined, is withdrawn or is abandoned (within the meaning of section 104 of the 2002 Act) (save where the outcome of the appeal process is that the document in question falls to be granted;*
- (d) the date on which F ceases to be the family member of an EEA national; or*
- (e) the date on which a right of permanent residence under regulation 15 of the 2006 Regulations is lost in accordance with regulation 15(2) of those Regulations*

8. It appears that the purpose of the transitional provisions is to allow a person who is a family member of a person who would, before the changes, have fallen within the definition of an EEA national to have the opportunity to preserve that status and not to be refused a further residence card on the ground that the dual citizen is no longer to be treated as an EEA national. As stated in the Explanatory Notes, the purpose of the transitional provisions is *“to address the position of persons who have acted in reliance on the previous definition”*. To benefit from the transitional provisions, the family member must have the right to reside under the EEA regulations as at 16<sup>th</sup> July 2012 when the EEA regulations were amended and continue to be able to rely on their status as the family member of the dual national at 16<sup>th</sup> October 2012. The issue of when the transitional provisions cease to apply (sub-paragraph 2(5) of Schedule 3) is at the heart of this appeal.

### **Submissions**

9. There is a substantial agreement between the parties on the issue which we are required to determine. It is accepted by the respondent that the transitional provisions applied to the first application and first decision directly. It is accepted that the relevant criteria in sub-paragraph 2(3)(a) and (b) applied to the appellant as at 16<sup>th</sup> July 2012 and 16<sup>th</sup> October 2012 respectively. It is agreed that the appellant fell specifically within sub-paragraph 2(3)(b)(ii) as, on 16<sup>th</sup> October 2012, the first application had been made and the first decision was not made until 13<sup>th</sup> March 2013. It is accepted that sub-paragraph 2(3)(b)(ii) is an alternative to sub-paragraph 2(3)(b)(iii) at least so far as the specific criteria in that sub-paragraph apply. It is also accepted by the respondent that the issue of whether the transitional provisions apply continues to be relevant to the appeal against the second decision notwithstanding the transitional provisions cannot, on any view, apply to the second application and second decision directly.

10. Where the parties diverge is in relation to which of the sub-paragraphs apply in relation to the cessation of the transitional provisions (sub-paragraph 2(5) of Schedule 3). As noted at paragraph [5] above, the respondent accepts that the Judge fell into error when noting at [32] that the transitional provisions ceased to apply when the appeal against the first decision was determined so that sub-paragraph 2(5)(c) operated to bring to an end the appellant's reliance on the transitional provisions. It is common ground that the appellant did not appeal the first decision. The respondent submits however that sub-paragraph 2(5)(b) operated to bring the appellant within the transitional provisions once time had expired for the bringing of an in-time appeal. On any view, that was before the making of the second decision and the appeal against that decision so that the error of law was not material.
11. Ms Joshi for the appellant submits that neither sub-paragraph 2(5)(b) or 2(5)(c) (on which the Judge had relied) applied so that the earliest event which could occur to suspend the operation of the transitional provisions was the appellant ceasing to be the family member of the sponsor. That had not occurred at the time of the second application and therefore the appellant was entitled to rely on her relationship with the sponsor who would continue to be an EEA national for the purposes of the EEA regulations (as the transitional provisions would continue to apply). She submits therefore that the respondent could not refuse to issue a residence card on the basis that the sponsor was no longer an EEA national for the purposes of the EEA regulations. The Judge had therefore materially erred in law in dismissing the appeal on the basis that the transitional provisions ceased to apply.
12. Ms Joshi's submissions as to why sub-paragraph 2(5)(b) and 2(5)(c) cannot apply can be shortly stated. She draws attention to the reference in those sub-paragraphs to the words "*a decision referred to in sub-paragraph 3(b)(iii)*". On that basis, she submits that it is only where an applicant fell within sub-paragraph 3(b)(iii) as at 16<sup>th</sup> October 2012 that the transitional provisions would cease to operate by the bringing and determination of an appeal or a failure to appeal in time. She reinforces that submission by arguing that, if that were not the position, then sub-paragraph 2(5)(d) would be otiose as it could never apply. She also submits that the appellant only finds herself in the difficulties she now faces because the respondent did not take the first decision within the 6 months prescribed time limit. If a decision had been taken on the first application within the 6 month period, then sub-paragraph 2(3)(b) could not have been satisfied and the transitional provisions would not have applied at all.
13. Mr Bramble submits that the transitional provisions need to be applied in stages. The trigger for the transitional provisions to apply is whether one of the criteria in sub-paragraph 2(3)(b) is met as at 16<sup>th</sup> October 2012. When one comes to consider the point at which the transitional provisions cease to operate under paragraph 2(5),

however, the sub-paragraphs of 2(3)(b) need to be looked at as 3 stages in the process, rather than alternatives to each other. Once that is understood, then the relevant sub-paragraph bringing the transitional provisions to an end is when an in-time appeal could be brought but has not been (sub-paragraph 2(5)(b)) or when an appeal is brought but either determined, withdrawn or abandoned (sub-paragraph 2(5)(c)).

### **Decision and reasons**

14. Having considered the grounds of appeal and the submissions of the parties we are not satisfied that the First-tier Tribunal decision involved the making of a material error of law on the operation of the transitional provisions. The Judge clearly did make an error of law in finding that the operative sub-paragraph in relation to the cessation of the transitional provisions was sub-paragraph 2(5)(c) as the appellant did not exercise her right of appeal in relation to the first decision. However, we agree with the respondent that this was not a material error of law as sub-paragraph 2(5)(b) applied so that the transitional provisions ceased to apply once an appeal against the first decision could no longer be brought. Accordingly, by the time of the second application, the appellant could no longer rely on the transitional provisions and since the sponsor was a dual British/Irish national, he was no longer an EEA national for the purposes of the amended EEA regulations.
15. At first glance, it might appear that Ms Joshi has a good argument that sub-paragraphs 2(5)(b) and 2(5)(c) can only apply where sub-paragraph 3(b)(iii) applies and has no application to a case where, as here, sub-paragraph 3(b)(ii) is the relevant trigger. However, we consider that this argument is misconceived for the following reasons.
16. Firstly, the wording of sub-paragraph 5(b) and 5(c) refers to “*a decision referred to in sub-paragraph 3(b)(iii)*”. It does not use the wording “*the decision referred to in sub-paragraph 3(b)(iii)*” (our emphasis). We consider that the drafting of these sub-paragraphs is deliberate. It is only necessary to consider the implications of Ms Joshi’s argument to see why her construction cannot be correct. On her analysis, if a person has an application pending as at 16<sup>th</sup> October 2012 (as did the appellant), that application cannot be refused on the basis that the EEA national is a dual national and also a British citizen. It can however be refused on other grounds (as it was in the appellant’s case). However, on Ms Joshi’s analysis, that person would continue to have status as a family member of an EEA national for all future purposes (even if the family member appealed against any refusal and the appeal were dismissed) unless and until that person ceased to be a family member of the dual national or lost the right to permanent residence (applying sub-paragraphs 2(5)(d) or 2(5)(e)). Of course, if the pending application were decided in the family member’s favour, the family member could continue to rely on the

status derived from the EEA national who would continue as such for those purposes. However, on Ms Joshi's case, if a family member had already received a decision on an application by 16<sup>th</sup> October 2012 but was still within the period to appeal that decision, that family member would lose the ability to rely on the transitional provisions once time had expired for any appeal or the appeal had been brought and dismissed. There is no sensible reason to distinguish between those two scenarios in terms of when the transitional provisions cease to operate.

17. Secondly, we consider that the drafter of the transitional provisions has used the words "*a decision referred to in sub-paragraph 3(b)(iii)*" as shorthand for the relevant decision under appeal. We consider that the transitional provisions therefore fall to be analysed on the basis that the relevant criteria under sub-paragraph 2(3) have to be met at the relevant dates. However, when it comes to assessing the point at which the transitional provisions cease to have effect under sub-paragraph 2(5), the criteria at sub-paragraph 2(3)(b) have to be read as a continuing process. Thus, if a person has an extant application as at 16<sup>th</sup> October 2012 (sub-paragraph 2(3)(b)(ii)), that will lead to a decision (sub-paragraph 2(3)(b)(iii)). If that decision is to refuse to issue a residence card, then the transitional provisions continue until such time as an in-time appeal can be brought or until such time as that appeal is withdrawn, abandoned or determined.
18. Thirdly, we consider that this interpretation is in line with what we consider to be the purpose of the transitional provisions namely that applicants should not lose the benefit of existing status as the family member of a person who, until 16<sup>th</sup> October 2012, was considered to be an EEA national. The benefit is preserved by allowing persons who have that status to continue to rely on it in any outstanding application or appeal but, if that application or appeal is refused on some other basis, those persons have no continuing right to rely on the EEA regulations. If the application is granted, then the family member would only lose that status in the event that they cease to be a family member (so that sub-paragraph 2(5)(d) applies) or they lose the right to permanent residence (so that sub-paragraph 2(5)(e) applies). That is also the answer to Ms Joshi's submission that sub-paragraph 2(5)(d) is of no effect unless her submission is accepted.
19. We also disagree with Ms Joshi that the appellant finds herself in a difficult position because the respondent failed to make a decision within 6 months or due to the operation of the transitional provisions. In fact, the appellant's difficulties arise because she was unable to meet the EEA regulations in relation to her first application. If she had been able to demonstrate at that point in time that the sponsor was a qualified person who was exercising Treaty rights in the UK, the first decision would presumably have been to issue her with a residence card. That would have been the case whether the first decision was made before or after 16<sup>th</sup> October 2012. Thereafter, she could



continue to rely on her status as the family member of an EEA national unless and until she ceased to be a family member or lost a right to permanent residence. It was of course open to her to appeal the first decision but for whatever reason she did not do so. Thereafter, there is no reason why the amended EEA regulations should not apply to her in the same way as they would apply to a person who made an application after the amended EEA regulations came into force.

**DECISION**

20. The First-tier Tribunal decision did involve the making of an error on a point of law in relation to the finding that the transitional provisions were brought to an end by sub-paragraph 2(5)(c). However, we have found that the error is not one which necessitates the setting aside and remaking of the decision. Accordingly, we uphold the decision to dismiss the appeal.



Signed  
Upper Tribunal Judge Smith

Date 15 July 2015