



UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: IA/44360/2014

THE IMMIGRATION ACTS

Heard at: Field House
On 11 February 2016

Decision and Reasons Promulgated
On 24 March 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KHALIL AHMAD
NO ANONYMITY DIRECTION MADE

Respondent

Representation

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Ms Ofei Kwatia, counsel (instructed by S-K Solicitors)

DECISION AND REASONS

1. I shall refer to the appellant as “the secretary of state” and to the respondent as “the claimant.”
2. The claimant is a national of Pakistan born on 10 December 1962. His appeal against the decision of the secretary of state dated 15 November 2014 revoking his residence card which had been issued to him as an extended family member of an EEA national under the

2006 Regulations was allowed by the First-tier Tribunal Judge in a decision promulgated on 30 July 2015.

3. The background was as follows. The claimant had been granted a residence card valid until June 2016 as the family member of an EEA national exercising Treaty rights in the UK.
4. On returning from Pakistan on 15 November 2014 he was arrested and detained and was served with a notice of his intended removal from the UK on 30 November 2014. As noted, his leave was also curtailed.
5. The claimant was given an in country right of appeal under Regulation 26 of the 2006 Regulations. In due course he was granted bail and it is common ground that his sponsor stood surety for him. His EEA partner was a Polish national. She passed away in Poland on 5 April 2015. He had been granted his residence permit on the basis that he was in a durable relationship and his partner had been exercising Treaty rights [5].
6. The First-tier Tribunal allowed the appellant's appeal under Regulation 10(2) of the 2006 Regulations.
7. Regulation 10 sets out the requirements regarding a family member who has retained the right of residence. This means a person who satisfies the conditions in sub paragraph 2, 3, 4 or 5.
8. Regulation 10(2) provides that a person satisfies the conditions in this paragraph if:
 - (a) he was a family member of a qualified person or of an EEA national with a permanent right of residence when that person died;
 - (b) he resided in the UK in accordance with these Regulations for at least a year immediately prior to the death of the qualified person or the EEA national with a permanent right of residence; and
 - (c) he satisfies the condition in paragraph 10(6).
9. The appeal was presented on the basis that the claimant was a family member of a qualified person. It was also contended that he resided in the UK in accordance with the Regulations for at least the year immediately before the death of his partner. There is no dispute that he satisfied the conditions in paragraph 10(6).
10. In his findings of fact, the First-tier Tribunal Judge found that his EEA partner died in Poland on 5 April 2015 [8].

11. In considering whether the EEA sponsor was exercising Treaty rights in the UK, the judge had regard to the following evidence.
 - (a) He referred to the employment documents relating to the sponsor. These he set out in full at [8]. The claimant's sponsor asserted that she had been self employed at all relevant times.
 - (b) Documents were provided by HMRC showing the years in which she had been self employed.
 - (c) Insofar as the tax years 2009–10 to 2013–14 are concerned, she had been self employed carrying out cleaning services and her gross profit is set out in the statement of the HMRC officer. These are set out from pages 59 onwards of the appellant's bundle.
 - (d) There was also a letter from the sponsor's accountants dated 12 December 2014. This confirmed that Mrs Kierpiec (the sponsor) is self employed and trading as a cleaning service since 10 July 2009. She is registered with HMRC for self assessment and Class 2 National Insurance contributions. Her net income before Income Tax and Class 4 National Insurance for the year ended 5 April 2013 was £8,125 and for the year ended 5 April 2012, £7,185. On 12 December 2014, all the due income tax and National Insurance contributions were paid.
 - (e) They state that further to her visit to their offices on 21 November 2014, she informed them that she had resumed her self employment from 21 November 2014. She told them that she had not been working from the second week of June 2014 to 21 November 2014.
12. Based on that evidence, he accepted that the claimant's sponsor was exercising Treaty rights in the UK when the claimant returned to the UK. He had been out of the UK from August 2014 to November 2014 [8] and [10].
13. He accepted that a break from the UK would not necessarily mean that she is not exercising Treaty rights, having regard in particular to her history of self employment.
14. The Judge also noted that when the claimant was returning to the UK, he was not accompanying his sponsor and as she was not in the UK at the time, he was not joining her. Accordingly, he found that the secretary of state had not been obliged to allow the claimant to enter the UK with his residence card. Regulation 19(2) of the 2006 Regulations provides that a person is not entitled to be admitted to the UK as the family member of an EEA national under Regulation 11(2) unless, at the time of his arrival, he is accompanying the EEA national or joining him in the UK and the EEA national has a right to reside here under the 2006 Regulations.

15. He nevertheless went on to consider whether the claimant met the criteria for being a family member who has retained the right of residence under Regulation 10 of the 2006 Regulations, as set out above.
16. He found that the claimant is to be regarded as a family member once he was issued with a residence card [10].
17. He then considered whether the claimant resided in the UK in accordance with the Regulations for at least the year immediately before the death of the qualified person. She died on 5 April 2015. The claimant stated that he had lived with her since 2009 to the end of March 2015.
18. The Judge interpreted the phrase “he resided in the UK in accordance with these regulations for at least the year immediately before the death of the qualified person” to mean that the relevant period of time which the rules had in mind was between April 2014 and April 2015 [10]. He found that there was nothing in the 2006 Regulations which stated that normal continuity under the rules should not apply in this case. Accordingly he found that short breaks taken by either party away from the UK would not mean that they were not residing together in the UK in accordance with these regulations.
19. It appeared from the claimant’s interview with the Immigration Officer that his partner was out of the UK from July 2014 until November 2014. He was out of the country between August and November 2014 [10].
20. He considered whether that meant that both the claimant and sponsor had not resided in the UK in accordance with the 2006 Regulations because of the break in their stay here.
21. He found that the break was short; and bearing in mind the length of time that they had spent together between 2009 and 2015, including the fact that his sponsor had been a surety at the bail hearing, the break in their stay in the UK did not affect the year long residence required under Regulation 10(2)(b).
22. The claimant and his sponsor were in the UK together between April 2014 and July 2014 as well as between November 2014 until March 2015 [10].
23. He accordingly found that the claimant qualified as a family member who has retained the right of residence under Regulation 10(2) of the 2006 Regulations.
24. On 21 December 2015, the secretary of state was granted permission to appeal to the Upper Tribunal. In granting the appeal, First-tier Tribunal Judge Kelly stated that it is arguable that the admitted break in both the continuity of cohabitation and the employment of the EEA national in the UK for a period of several months during the 12 month period immediately preceding her death, resulted in the inability of the claimant to

meet the requirements for a retained right of residence under Regulation 10 of the 2006 Regulations.

25. There has been no Rule 24 response. Ms Ofei-Kwatia, who did not represent the claimant before the First-tier Tribunal noted that from the claimant's passport, that he went to Pakistan between October 2014 and November 2014 for a period of about six weeks. The stamps, she said, are in the passport. Despite asking the secretary of state for that passport, it has not been returned.
26. On behalf of the secretary of state, Mr Bramble submitted that on the plain meaning of Regulation 10(2)(b), the requirement is that the claimant must have resided in the UK in accordance with these regulations for at least the year immediately before the death of the qualified person. His "wife" died in Poland on 5 April 2015. During the preceding year, she spent four months in Poland. The claimant himself was absent between August to November 2014.
27. Accordingly, as stated in Ground 5 of the secretary of state's permission application, "the secretary of state does not therefore consider that the claimant and sponsor resided in the UK for the entire 12 month period in question." (I note that paragraph 10(2)(b) provides that a person satisfies the conditions in this paragraph if he resided in the UK in accordance with these Regulations for at least the year immediately before the death of the qualified person.)
28. Mr Bramble referred to Regulation 3 of the 2006 Regulations regarding the calculation of periods of continuous residence in the UK under Regulation 5(1) and Regulation 15. The continuity of residence is not affected by periods of absence not exceeding six months in total in any year or, for example, one absence from the UK not exceeding 12 months for an important reason such as pregnancy and childbirth, serious illness, study or vocational training or an overseas posting.
29. He submitted that this cannot apply to the claimant's situation.
30. He referred to the definition of "qualified person" under Regulation 6(c) relating to a self employed person to the effect that a person no longer in self employment shall not cease to be treated as a self employed person for the purpose of paragraph 1(c) if she is temporarily unable to pursue her activity as a self employed person as a result of an illness or accident. He submitted that that did not assist the claimant either.
31. He submitted that in this case the claimant's sponsor had simply stopped working. She was not deceased.

32. He also relied on Ground 3 of the secretary of state's permission application and submitted that the sponsor had been absent between July and November 2014. This is evident from [8] and [10] of the First-tier Tribunal Judge's decision.
33. On behalf of the claimant, Ms Ofei-Kwatia referred to Article 49 of the Directive. Freedom of establishment shall include the right to take up and pursue activities as self employed persons under the conditions laid down for its own national by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.
34. She submitted that taking a break from self employment does not result in the sponsor's not being recognised as "self employed" for the purpose of the regulations.
35. She referred to the documentation from HMRC that was produced. The secretary of state's contention that because she was away for four months, she did not remain a qualified person for the purpose of the regulations, is incorrect. The authorities have recognised her self employment as such. She has paid her national insurance.
36. Moreover, the claimant produced evidence of his own self employment including his self employed Class 2 National Insurance contributions which were due on 31 January 2015. His self assessment statements, National Insurance contributions and documentation relating to the sponsor has been produced. There is also the letter from the accountant at page 48 to which I have referred. She informed them that she had resumed her self employment from 21 November 2014. This confirmed that she was still self employed at the relevant time.
37. She accordingly submitted that she had remained self employed notwithstanding the absence in Poland for several months.
38. She referred to the second ground of appeal, namely that the sponsor had stopped working in the second week of June 2014 and did not resume self employment until November 2014. The secretary of state has contended this meant that there was a period of over five months during which she was not exercising Treaty rights. Accordingly, the claimant cannot be said to have been living in accordance with the regulations for the year immediately preceding her death.
39. Ms Ofei-Kwatia submitted that there is nothing in Regulation 10 requiring a continuity of cohabitation as implied in paragraph 5 of the grounds. That is not the wording of Regulation 10. She submitted with regard to the claimant, that his six week holiday in Pakistan did not break the continuity.

Assessment

40. The First-tier Tribunal Judge has undertaken a careful and detailed analysis of the facts relevant to the appeal. He has considered the relevant provisions of Regulation 10 of the 2006 Regulations. He accepted that the claimant's sponsor was exercising treaty rights in the UK when the claimant returned to the UK [8].
41. He concluded that for the purpose of Regulation 10(2)(b) short breaks from the UK did not preclude "residence" in the UK. He had regard to Regulation 10(2)(b) which refers to the claimant's residing in the UK in accordance with these regulations for at least the year immediately before the death of his sponsor.
42. I have had regard to the nature of residence required for the purpose of acquiring the right to reside in the UK set out in other paragraphs under the 2006 Regulations. Thus, the wording of Regulation 10(2)(b) making it a requirement that "... *he resided* in the UK... for at least the year immediately before the death of the qualified person" is to be contrasted with the requirement under other paragraphs of the 2006 Regulations which require *continuous residence* for the relevant period.
43. Regulation 5(3)(b)(i), which relates to a worker or self employed person who has ceased activity, provides that the relevant condition is satisfied if he has resided in the UK "continuously". The word "continuously" is also used in Regulation 5(4)(b).
44. Regulation 15 sets out the requirements to be met by persons applying for permanent residence. Accordingly, under Regulation 15(1)(a) an EEA national who has resided in the UK in accordance with these Regulations for a continuous period of five years' shall acquire such right. Regulation 15(1)(e)(iii) affords such right to the person who was the family member of a worker or self employed person, where such worker or self employed person had resided continuously in the UK for at least the two years immediately before his death.
45. Regulation 15(1)(f)(i) refers to a person who has resided here in accordance with these regulations for "a continuous period"¹.
46. The First-tier Tribunal Judge considered whether the claimant met the criteria of a family member who has retained the right of residence. The relevant period was between April

¹ The authors in McDonald's Immigration Law and Practice, 9th Edition, 4.15, note that for residence in the UK to be considered continuous, a person should not be absent from the UK for more than six months each year. Accordingly, even situations where continuous residence is a requirement under the particular regulation, an absence of six months each year will not necessarily destroy this continuity.

2014 and April 2015. In that respect he considered the claimant's evidence that he has resided with his partner in the UK between 2009 and 2015.

Unlike other Regulations which require that the residence must be 'continuous' for the relevant period, it is not a requirement under Regulation 10(2)(b) that he be in continuous residence in the UK for the year immediately before the death of his sponsor. As construed in its context the term resides refers to the place where he is normally or ordinarily resident. The requirement is that he must have resided in the UK for the relevant period. The evidence before the Judge was that the UK was the country that they adopted as part of the regular order of their life. They had been normally or ordinarily resident in the UK apart from temporary or occasional absences of short duration - Shah v Barnet London Borough Council [1983] 2 AC 309.

47. The evidence disclosed that the UK is the place where the claimant has his home and to where he and his sponsor returned after a short break. There is moreover the reference by the Judge at [10] to the fact that his sponsor acted as his surety at the bail hearing. The Judge found at [10] that they had been together in the UK between April 2014 and July 2014 as well as between November 2014 until March 2015. The Judge's assessment that his absence from the UK for a short period did not affect the year long residence required under the Regulations, was a finding to which he was entitled to come.
48. The Judge also set out in detail the evidence relating to the sponsor's self employment. She had been self employed and trading as Cleaning Services since 10 July 2009. He also found on the evidence that on returning to the UK, she resumed self employment from 21 November 2014. That is confirmed in the accountant's letter dated 12 December 2014. The accountants also confirmed that she is self- employed and trading as Cleaning Services, which she had been doing since 10 July 2009. She was employed at the time the claimant returned to the UK. The Judge accordingly accepted that a break from the UK would not necessarily mean that she is not exercising Treaty rights having regard to the history of her self- employment as well as the employment that she has [8].
49. During her evidence in support of the claimant's bail application, she confirmed that at the time of her return from Poland, she was on a short term visit to see family friends and receiving treatment for her eyesight in Poland - claimant's witness statement, paragraph 10. In the last week of March 2015, she went to Poland again for a follow up appointment for her eye treatment and to visit her family.
50. The conclusion by the Judge that the claimant qualified under the Regulations as a family member who has retained the right of residence under Regulation 10(2) of the 2006 Regulations is sustainable on the evidence.

Notice of Decision

The decision of the First-tier Tribunal Judge did not involve the making of any material error on a point of law. It shall accordingly stand.

No anonymity direction is made.

Deputy Upper Tribunal Judge Mailer

7 March 2016