



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/00105/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 17th January 2018

**Decision & Reasons
Promulgated**

On 12th February 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR ABISHANKAR SIVAKUMAR
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer

For the Respondent: Mr E Waheed, Counsel, instructed by Ratna & co, Solicitors

DECISION AND REASONS

1. For ease of reading I shall continue to refer to Mr Sivakumar as the Appellant; he is a citizen of Sri Lanka who appealed against a decision of the Secretary of State refusing to grant him a residence card. His appeal was heard by First-tier Tribunal Judge Bird who in a decision promulgated on 19th April 2017 allowed the appeal under the EEA Regulations as well as Section 82 of the 2002 Act on EEA grounds.
2. The Secretary of State sought permission to appeal. It was submitted that the judge had erred in law by finding that the Appellant's Sponsor, a German national, who had also acquired British citizenship was an EEA national for the purposes of the 2006 Regulations. It was submitted that

the judge's finding overlooked the definition of "EEA national" in Regulation 2 namely "*a national of an EEA state who is not also a British citizen*".

3. Permission to appeal was granted and thus the appeal came before me on the above date. A Rule 24 notice was lodged on behalf of the Appellant indicating that the decision disclosed no legal error in the light of the European Court of Justice decision in **Toufik Lounes v SSHD C-165/16 (14th November 2017)** the Appellant's case being "on all fours" with the ratio decidendi in **Lounes** mutatis mutandis.
4. Before me Ms Everett relied on the grounds but indicated that the Secretary of State might be in some difficulty having regard to the latest jurisprudence.
5. For the Appellant reliance was placed on the case of **Lounes** referred to above.
6. Having heard (brief) oral submissions from both parties I reserved my decision.

Conclusions

7. In her decision Judge Bird found that there had been freedom of movement by the Appellant's Sponsor who was a German national and continued to be one. He had entered the United Kingdom exercising his right of free movement and commenced employment which he retained. Much of the discussion before the Judge seems to have centred around the interpretation to be drawn from the case of **McCarthy v The UK (C3434/09)** but as the judge correctly pointed out Mrs McCarthy had never exercised freedom of movement rights which was different to the position to the appeal before her where the Sponsor continued to be a German citizen and continued to exercise Treaty rights. The Judge went on to allow the appeal for the reasons she gave concluding that the Appellant was entitled to a residence card.
8. It is unclear to what extent the Regulation 2 point was canvassed before the Judge but the factual matrix of **Lounes** is very similar to the facts of this case. Ms Ormazabal, a Spanish national moved to the United Kingdom and became a naturalised British citizen and later on married Mr Lounes an Algerian national. He went on to apply for a residence card which application was refused. He appealed that decision. It is not necessary to do more than record the Grand Chamber's conclusion that he was eligible for a derived right of residence under Article 21 (1) TFEU on conditions which are set out in that decision.
9. As indicated Ms Everett said that when the point was taken on Regulation 2 it did seem to be a good point on behalf of the Secretary of State but events had proved otherwise.
10. In these circumstances it can be said that there is no error of law in the judge's decision which must stand.

Notice of Decision

11. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
12. I do not set aside the decision.
13. I was not asked to continue the anonymity order and see no need to do so.

Signed *JG Macdonald*
Deputy Upper Tribunal Judge J G Macdonald

Date 8th February 2018