Upper Tribunal (Immigration and Asylum Chamber)

Appeal Numbers: EA/00568/2019
EA/00570/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 August 2021	**On 14 October 2021**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

DOROTHY ANGELA MONTEITH
LEON ANTHONY CHIN
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Jegarajah of counsel, instructed directly
For the Respondent: Ms Cunha, Senior Presenting Officer

DECISION AND REASONS

1. The appellants are Jamaican nationals who were born on 9 September 1970 and 29 December 1989 respectively. They are mother and son. They appeal, with permission granted by Upper Tribunal Judge Pitt, against a decision of the First-tier Tribunal ("FtT") by which their appeals against the respondent's decision to refuse their applications for Permanent Residence Cards were dismissed.

Background

2. The date on which the appellants entered the UK is unclear. On 3 August 2010, they were granted Residence Cards under the Immigration (European Economic Area) Regulations 2006 as the extended family members of a Polish national called Patryk Jerzy Salamon, who was born on 1 July 1983. The cards had the usual five-year validity period.

3. The appellants subsequently applied for Permanent Residence Cards. Their applications were refused on 8 October 2015. They appealed to the FtT and their appeals were heard by Judge Gillespie on 21 September 2017. In his reserved decision, Judge Gillespie found that the appellants did not qualify for permanent residence. He found that there was inadequate evidence of the duration of the relationship between the first appellant and Mr Salamon and, therefore, that it could not be shown that the appellants had been in the UK in accordance with the Regulations for five years or more.

4. The appellants made a second application for Permanent Residence Cards ("PRC") on 4 December 2018. They gave their details and those of Mr Salamon. They stated that the relationship between the first appellant and Mr Salamon had started in 2005 after they had met in Enfield in January 2005. At question 5.10 of the application form, they stated that the first appellant and Mr Salamon had separated in 2013. The applications were supported by copies of the appellants' passports and Mr Salamon's passport.

5. There were also copies of documents relating to Mr Salamon's status under the Access State Worker Registration Scheme and some documents which were adduced to establish cohabitation and economic activity on the part of the first appellant and Mr Salamon. There was also a copy of Judge Gillespie's decision and a letter to Her Majesty's Revenue and Customs ("HMRC") dated 20 September 2018. In that letter, the first appellant requested HMRC to provide evidence of Mr Salamon's economic activity between the years 2005 and 2013. The letter was supported by a Statutory Declaration made on 24 September 2018.

6. The respondent refused the applications on 17 January 2019. She considered the evidence which had been submitted and the conclusions of Judge Gillespie. Having done so, the respondent noted that the relationship between the first appellant and Mr Salamon was only accepted at the point of issue of the Residence Cards (3 August 2010); that there was no evidence of a durable relationship beyond that date; and that the evidence produced was dated 2006 and 2007. The respondent did not consider that she should make any checks with HMRC about Mr Salamon's employment history because the relationship had ended in 2013 and any such checks would be 'redundant'.

The Appeals to the First-tier Tribunal

7. The appellants appealed. They were representing themselves at this stage, as they were throughout the appeal in the FtT. Amongst the documents submitted with their notice of appeal was a letter from

HMRC to the appellants, stating that they could not provide any documents relating to Mr Salamon as a result of data protection considerations.

8. The appellants wrote to the FtT on 6 August 2019, seeking an adjournment of the hearing which was listed later that month. The first appellant stated that she had managed to find Mr Salamon and that she was hopeful that she would – with his assistance – be able to persuade HMRC to provide details of his economic activity. The appeal was adjourned on this basis.

9. The appeal then came before Judge Shamash, sitting at Taylor House, on 13 January 2020. The respondent was unrepresented. The appellants were representing themselves. The appellants had been unsuccessful in their enquiries with HMRC and they sought an adjournment and what has become known as an "Amos direction", that is to say a direction to the respondent that she should ask HMRC to provide details of a third party's economic activity in the UK. The direction is so-called as a result of what was said by Stanley Burnton LJ at [40] of Amos v SSHD [2011] EWCA Civ 552; [2011] Imm AR 600.

10. Judge Shamash was persuaded to adjourn and to issue directions in the following terms to the respondent:

> The respondent to make enquiries under s40 of the UKBA relating to the employment position of Patryk Salamon and whether there are tax returns between 2007 and end of 2013.
>
> This is a case that should be listed for a CMR with a PO.

11. The judge's Record of Proceedings records what happened at the hearing in the following terms, which I have set out *verbatim*:

> This is a complicated appeal where it remains unclear whether the appellant meets the Rules. I have given the appellant the citations for Macestena [2018] EWCA Civ 1587, Kunwar [2019] UKUT 63 (IAC) and Aibangbee [2019] EWCA Civ 339.
>
> The issue which concerns me is whether even with an Amos direction she can meet the requirements for PR as date may only run from date of residence card not even from date they started to cohabit.
>
> There is the case of Banger which states discrimination to treat unmarried p diff to married partner.
>
> Also son's position needs to be considered.

12. The judge went on to note that she had ordered there to be a case management review ("CMR") hearing in 8 weeks as there was no Presenting Officer before her to confirm that the Amos direction would be complied with.

13. The respondent wrote to the FtT on 2 and 13 March, stating that she had been unable to comply with the directions and asking for further time in which to do so.

14. The pandemic then set in and the CMR which had been listed on 21 April 2020 in accordance with the judge's directions was adjourned. On 1 July 2020, the first appellant wrote again to the FtT, seeking assistance in ensuring that the respondent complied with the directions. It seems that this letter went unanswered.

15. The appeal was then listed remotely before First-tier Tribunal Judge Beg ("the judge") on 11 January 2021. The appellants were unrepresented, as before. The respondent was represented by counsel, Mr Mughal. It seems that none of the procedural steps I have summarised above were known to the judge or highlighted to her by either party. I assume, although I cannot know, that this was because this experienced and meticulous judge was working remotely and that the paper file (on which the directions and the correspondence were retained) was not before her. The judge proceeded to hear oral evidence from the appellants and a submission from Mr Mughal and the appellants before reserving her decision.

16. In her reserved decision, the judge took Judge Gillespie's decision as her starting point, in accordance with Devaseelan [2003] Imm AR 1. She found that there was no additional evidence to confirm that the first appellant and Mr Salamon were in a durable relationship as unmarried partners for a period of five years: [18]. The judge was concerned that the first appellant had given evidence that the relationship had broken down in 2014, whereas she had stated in her application form that the relationship broke down in 2013. There had also been inconsistent evidence about the extent to which he supported her. The judge did not accept it to be credible that the EEA national had continued to support the first appellant two years after their relationship had ended, as the first appellant had claimed in evidence: [19].

17. At [22], the judge noted that there had been some mention before her of an Amos direction but she found that Mr Salamon's economic activity in the UK was not the only issue in the appeal. She did not accept that the first appellant had been in a relationship with the EEA national for a period of five years. For reasons she gave at [23]-[24], the judge decided that she would be unwilling to make an Amos direction because there was insufficient evidence to show that the appellants had taken the necessary steps to obtain the evidence for themselves. The judge continued as follows:

> Even if I accept that both appellants have verbally requested such information from Mr Salamon and he has refused to provide it, nonetheless his employment history would not assist the first appellant in light of the fact that she is not in a durable relationship with him any longer. Her relationship with him ended many years ago. Nor has it been accepted by the respondent that she was in a relationship with him in

> the past for a period of five years. The previous judge also concluded that there was insufficient evidence of a 5 year relationship.

18. So it was that the judge dismissed the appeals.

The Appeal to the Upper Tribunal

19. Permission to appeal having been refused by the FtT, the appellants renewed their applications to the Upper Tribunal. The sole ground of appeal (written by the first appellant) was that the judge had erred in overlooking the fact that an Amos direction had previously been made and had not been complied with.

20. Having extended time due to the pandemic, Judge Pitt granted permission for the following reasons:

> Without wishing to give the appellants too much hope, it is arguable that the First-tier Tribunal took an incorrect approach to the fact of an earlier First-tier Tribunal Judge issuing a direction dated 13 January 2020 to the respondent to conduct enquiries (the "Amos direction") regarding the employment record of the claimed former partner of the first appellant. The first appellant has been clear throughout that she was waiting for the information produced as a result of those enquires and also waiting for the CMR directed by the earlier judge rather than the substantive hearing which took place on 11 January 2021.

21. In preparation for the hearing before me, the appellants filed a bundle which contained some of the material I have described above. What was missing, however, was the directions which were sent after the hearing before Judge Shamash. The appellants wrote a short letter to the Upper Tribunal, contained within this bundle, stating that they had instructed Ms Jegarajah of counsel directly and had been advised to obtain a copy of those directions.

22. At the outset of the hearing before me, I was able to provide the advocates with a copy of the directions which had been made by the FtT. Having heard briefly from Ms Cunha, I indicated to Ms Jegarajah that I was content to accept that there had been a procedural irregularity in the conduct of the appeal in the FtT, in that the judge had seemingly proceeded on the basis that no Amos direction had ever been made, thereby overlooking what had happened in this case shortly before the pandemic began.

23. I invited the advocates to consider the materiality of that error in a case such as this. I invited Ms Jegarajah to consider the fact that the appellants had been granted Residence Cards as extended family members in 2010 and that the relationship between the first appellant and Mr Salamon had broken down, on her own account, in either 2013 and 2014. I was, at that stage, unable to see any way in which it could possibly be said that the judge's error was material, given that the

appellants had not accrued five years' continuous residence in accordance with he regulations on the basis of their account.

24. Ms Jegarajah submitted, *firstly*, that the five year period was between 2005 and 2010 but she accepted, when pressed, that the period could not start (in an extended family member case) until a Residence Card had been granted. Ms Jegarajah submitted, *secondly*, that the existence of a procedural irregularity necessarily meant that the decision fell to be set aside and that the appeal had to be remitted to the FtT. I said that I would not set aside the decision of the FtT if it was clear to me that the error which had occurred in this case was immaterial to the outcome of the appeal. Ms Jegarajah asked for additional time, which I was content to give.

25. On my return, Ms Jegaraj submitted that the respondent was required by Article 10(1) of the Directive to make a decision on the appellants' Residence Card applications within 6 months. The applications had been made on 19 March 2008 but had not been decided within six months. Had they been decided within the proper period, the appellants would have accrued five years' residence in accordance with the regulations before the relationship had come to an end in 2013/2014. Ms Jegarajah noted that substantial damages had been granted by the Administrative Court for breach of that obligation in R (Zewdu) v SSHD [2015] EWHC 2148 (Admin). The proper course, Ms Jegarajah submitted, was to take September 2008 as the point at which the qualifying period for permanent residence began. On that basis, the procedural error into which the judge had fallen was arguably a material error and the decision fell to be set aside so that evidence could be obtained from HMRC.

26. In response, Ms Cunha submitted that the procedural obligation upon which Ms Jegarajah relied only applied in the case of a direct family member. There was no such obligation in the case of an extended family member and there was no reason, in those circumstances, to take any date other than the date of the Residence Cards as the starting point for the calculation of the five year period. In the event that she was wrong in that submission, Ms Cunha objected to an Amos direction being made (or continuing in force) in a case such as the present, as she was aware that HMRC did not retain the relevant records for more than six years. No purpose would be served by making such a direction. Ms Cunha had no evidence in support of this submission.

27. Ms Jegarajah replied, and sought initially to take me to some guidance issued by the respondent which she had been able to locate during the course of Ms Cunha's submissions. On reflection, however, she sought to make no submissions in reliance on this guidance, which she accepted made no reference to the timescale within which an application by an extended family member fell to be considered.

28. Ms Jegarajah found herself in some difficulty in meeting what she considered to be a new point and sought time in which to make written submissions. In fairness to the appellants, I acceded to that request. I directed that any further submissions from the appellants were to be

filed and served by 4pm on 3 September 2021 and that any response from the respondent was to be filed and served by 10 September 2021. A correspondence email address was provided to the advocates by my clerk.

29. It has been confirmed to me today that no further submissions have been received from either party.

Analysis

30. I am prepared to accept that the judge fell into procedural error in this appeal. For reasons which remain unclear, she seemingly proceeded on the basis that there had been no Amos direction made. As the first appellant explained in her grounds of appeal, she had assumed when she went to the hearing on 11 January 2021 that it would be the case management hearing which had been ordered months previously by Judge Shamash when the Amos direction was originally made. The appellants were therefore rather taken aback when the appeal proceeded substantively – without the respondent having undertaken any enquiries of HMRC – on that date. I am satisfied that the decision in the FtT involved the making of an error on a point of law.

31. That point having been reached, I may (but need not) set aside the decision of the FtT and order that the appeal be remitted to the FtT or remade in the Upper Tribunal: s12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 refers. The TCEA confers a broad discretion in this sub-section but justice requires that the decision be set aside unless I am satisfied that the error into which the FtT was immaterial, in the sense that the error of law could not have made a difference to the outcome: Degorce v HMRC [2017] EWCA Civ 1427; [2018] 4 WLR 79, at [95], per Henderson LJ, with whom Thirlwall and Longmore LJJ agreed.

32. It is quite clear to me that the appellants could not have hoped to succeed in this appeal, whether or not the Amos direction yielded all of the information they hoped for. In order to succeed in their claim for a PRC, the appellants needed to establish that they satisfied regulation 15(1)(b) of the Immigration (EEA) Regulations 2016, which provides that one of the categories of persons who acquire the right to reside permanently in the UK are:

> (b) a family member of an EEA national who is not an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

33. In the case of a spouse, the point at which a non-EEA national becomes a family member is the date of the marriage. But the first appellant and Ms Salamon were never married. They are said to have been in a relationship from 2005 onwards. But the first appellant did not become Mr Salamon's family member at that point. She only became his family member when the respondent approved her application for a Residence Card. That is clear from SSHD v Macastena

[2018] EWCA Civ 1558; [2019] Imm AR 28 and Kunwar [2019] UKUT 63 (IAC). As Judge Grubb explained in the latter decision, it is only after a residence card is issued to an extended family member that they are treated as a family member who begins to accrue residence which counts towards the acquisition of the right to reside permanently in the UK. In this case, therefore, the date on which the appellants began to accrue qualifying residence was 3 August 2010.

34. Ms Jegarajah sought to submit that an earlier date should be taken as the starting point. She relied on the obligation in Article 10(1) of the Citizens Directive (to issue a residence card within six months from the date of application) but, as Ms Cunha noted in her response, that obligation applies on its face to family members, and not to extended family members such as these appellants. There is no such temporal obligation in respect of extended family members; the respondent is merely required to undertake an extensive examination of their personal circumstances. There is, in truth, no basis for submitting that any date earlier than 3 August 2010 might properly be taken as the starting date for the accrual of qualifying residence.

35. The point at which qualifying residence stops accruing in the case of an extended family member is equally clear. At the point that they are granted a residence card, they are to be treated as a family member by reference to regulation 7(3) but they must continue to satisfy the definition of an extended family member in order to be so treated. As soon as they do not satisfy the definition of an extended family member, regulation 7(3) does not require them to be treated as a family member and they cannot continue to accrue qualifying residence for permanent residence. All of this is clear from the analysis of the Court of Appeal in SSHD v Aibangbee [2019] EWCA Civ 339; [2019] Imm AR 979, which considered what had been said by the Court of Justice in SSHD v Banger (Case C-89/17) [2019] 1 CMLR 6.

36. In the case of these appellants, therefore, they were no longer the extended family members of an EEA national when that relationship broke down in either 2013 or 2014. The breakdown of that relationship meant that they were no longer to be treated as Mr Salamon's family members under regulation 7(3) and that they could not continue to accrue residence in the UK which counted towards the acquisition of permanent residence. That was so whether or not Mr Salamon had worked in the UK throughout, because the only qualifying residence was between August 2010 and the ending of the relationship in 2013 or 2014. Even taking the later of those two dates, the appellants are unable to show that they resided in the UK in accordance with the regulations for a period of five years. They cannot, on any proper view, ever succeed in their claims for permanent residence.

37. Nor could they hope to succeed on the lesser basis that they somehow remain entitled to a right to reside in the UK. An extended family member, in contrast to a direct family member, cannot retain a right to reside in a host member state beyond the ending of the relationship in question. The entitlement to remain in the UK comes to an end at the same time as the relationship in the case of extended family members.

38. Nothing said by the CJEU in Banger alters any of the above. As Sir Stephen Richards said at [30]of Aibangbee, Banger does not support the contention that the substantive rights of residence conferred by the Directive on family members are also conferred on extended family members.

39. Whether in relation to permanent residence or the ordinary right of residence, therefore, these appellants could never have succeeded in their appeals. It is not clear to me why an Amos direction was ever issued and it is particularly peculiar that the judge took that step in circumstances in which she was demonstrably aware of the reported decisions which established quite clearly that the appeal was doomed to fail. I can only assume that she thought - wrongly – that Banger might be of assistance to the appellants but to think that was to overlook what had been said about that decision in Aibangbee, of which the judge was clearly aware. The result of that direction – as is clear from all that has happened subsequently – was to give the appellants false hope that their appeals might somehow succeed. Sadly, as a result of the pandemic, that false hope has been able to remain for some considerable time, with the result that this decision will no doubt be all the more difficult for the appellants to receive.

40. The appellants have been in the UK for some years and will no doubt have put down some roots. In the event that they wish to submit that they should be permitted to remain in the United Kingdom, the correct course is to make an application on human rights grounds. They have no basis for contending that they have a right to reside or a permanent right to reside under the EEA Regulations.

Notice of Decision

The appeals to the Upper Tribunal are dismissed. The decision of the FtT dismissing the appeals shall stand.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 September 2021