



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/04001/2013

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent
On 3rd July 2014

Determination Promulgated
On 5th August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE COATES

Between

MS ARMINE MASHADIAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Jesurum instructed by Howe & Co
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Russia born on 13th February 1971.
2. On 22nd January 2013 the Respondent refused to issue a residence card to the Appellant as confirmation of a right of residence as the family member of a British citizen who was previously working or self-employed in another member state. The

refusal was under Regulation 9(2)(b) of the Immigration (European Economic Area) Regulations 2006.

3. The Appellant exercised her right of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 and Regulation 26 of the Immigration (European Economic Area) Regulations 2006. Her appeal was dismissed by Judge of the First-tier Tribunal Tully on 22nd March 2013.
4. An application for permission to appeal was held to be out of time, and not admitted, by Judge of the First-tier Tribunal Fisher on 20th May 2013. The reasons for decision refer to the application being out of time by one day. However there was no explanation for the delay nor any application to extend time. On that basis the application was not admitted. It seems to me that, in view of the fact that the application was out of time, no reasons for lateness were given and there was no application to extend time, the First-tier Judge had little option but to refuse to admit the application.
5. Nevertheless, a renewed application for permission to appeal was granted in the Upper Tribunal by Upper Tribunal Judge Taylor on 26th June 2013. Judge Taylor was satisfied that time ought to be extended since the delay in making the application was short. Little prejudice was caused and she considered that the grounds had merit. Judge Taylor further noted that the grounds challenged the First-tier Judge's interpretation of the proper approach to be taken when considering Regulation 9 of the 2006 Regulations and she considered that the arguments should be explored further, if possible before a panel of Upper Tribunal Judges.
6. Thus the matter came before me in the Upper Tribunal on 4th March 2014. On that occasion the Appellant was represented by Mr Jesurum. The Respondent was represented by Miss C Johnstone, Senior Home Office Presenting Officer.
7. A number of preliminary issues were raised. The first was a query by letter from the Appellant's representative as to whether the matter was listed for a substantive hearing or whether it was in fact a Case Management Review. I noted from the file that directions to that effect had been given on 29th November 2013 by Deputy Upper Tribunal Judge McClure. The file was endorsed by Judge McClure with a direction for a further CMR to be listed at the beginning of February 2014. This was to await the judgment of the European Court on two cases which are said to be relevant to the issue in this appeal. It was unclear to me whether Judge McClure's direction was overlooked or whether someone else had directed that a further CMR was not necessary.
8. Mr Jesurum, for the Appellant, said that he was in a position to deal with the error of law issue because, even though the European Court had not issued the judgments, an opinion of the Advocate General had been issued which Mr Jesurum said was sufficient for his purposes. He handed in a copy of the Advocate General's opinion together with an undated skeleton argument. However, Miss Johnstone, for the Respondent, was not ready to deal with the error of law. She said that she had come to the hearing on the basis that it was going to be a Case Management Review and she was not prepared to deal with the error of law issue.

9. A further point which concerned me was Upper Tribunal Judge Taylor's grant of permission dated 26th June 2013. I have already noted that Judge Taylor indicated in the grant of permission that the matter should, if possible, be listed before a panel of Upper Tribunal Judges and I shared Judge Taylor's opinion in that respect. It seemed to me that the matter was complicated and Counsel's skeleton argument referred to the provisions of EU law overriding national legislation. It was further argued that a compatible interpretation should be deployed so as to give EU Directives their required result.
10. Eventually, with the agreement of both advocates, I decided that the appropriate course was for the matter to be adjourned and re-listed, at Field House if possible, before a panel of the Upper Tribunal.
11. However, that did not happen because directions were given on 19th May 2014 by Principal Resident Judge Latta who directed that the appeal should be listed for hearing before any Upper Tribunal Judge or Deputy Upper Tribunal Judge on the first available date.
12. An application for an adjournment was refused in the Upper Tribunal on 2nd July 2014. The reasons for refusal state that Principal Resident Judge Latta gave instructions, in full knowledge of the history, that this matter was to be listed for hearing and it has been listed accordingly. The request for transfer to Field House and effectively for an adjournment was refused. Notice of hearing was sent to the parties on 28th May 2014. No explanation has been forthcoming for the extremely late request put forward for transfer to Field House. The Upper Tribunal directed that the hearing could proceed but in the circumstances would be limited to error of law only.
13. Thus the matter came before me in the Upper Tribunal for an error of law hearing on 3rd July 2014. Representation was as mentioned above. The Appellant was not present.
14. The factual background to this appeal is not disputed. The Appellant met the Sponsor, Mr Alan Hawkes, in France in 2009. The Appellant was in the country as an asylum seeker. The Sponsor was in France exercising treaty rights and had been living there for a number of years. The Sponsor and the Appellant began to cohabit in February 2010. The Appellant's asylum claim was subsequently refused.
15. It appears that the Sponsor decided to return to the United Kingdom alone. On 26th May 2011 the Appellant entered the UK illegally (and without the knowledge of the Sponsor) and made an application for leave as the partner of an EEA national on the basis that the Sponsor was a returning national who had been exercising treaty rights in a member state. Her application was refused on 30th August 2011 and an appeal against that refusal was dismissed on 2nd November 2011. Permission to appeal was refused.
16. On 4th May 2012 the Appellant and the Sponsor were married in Nottingham and on 23rd May 2012 the Appellant made an application for a residence card as the spouse of an EEA national. The Appellant and the Sponsor have a son who was born in the UK in September 2012. Her fresh application for a residence card was refused on 22nd January 2013. It was the Appellant's case that she was entitled to be granted

leave as the spouse of a British citizen returning to the UK after exercising treaty rights in accordance with Regulation 9 of the 2006 Regulations. The application was refused because the Respondent was not satisfied that the Appellant met the criteria for Regulation 9 in that the Respondent was not satisfied that the Sponsor was a worker or self-employed person at the date when he returned to the UK. Nor was the Respondent satisfied that the parties had been married whilst living in France.

17. Judge Tully records in her determination that at the commencement of the hearing the Presenting Officer conceded that the Appellant and the Sponsor were married and it was further accepted that the Appellant had a child who was born in the UK and that the Sponsor was the child's father.
18. Notwithstanding the Appellant's actions in entering the UK illegally in the back of a lorry, Judge Tully made positive credibility findings. She found both the Appellant and the Sponsor to be credible and consistent within their evidence. She accepted that the Appellant entered the UK illegally but did not accept that this necessarily means that her evidence was not credible in general. Judge Tully found it telling that since the previous decision the Appellant had married the Sponsor and they had a child together. The judge found that the Appellant and the Sponsor met in 2009 and had lived together since early 2010 as claimed. She accepted that the Sponsor returned to the UK in 2011 and that the Appellant followed him and they have lived together as a couple ever since.
19. The determination then discloses a correct application of the well-known Devaseelan guidance in taking the previous appeal decision as the starting point for consideration of the same or similar issues. Judge Tully accepted, as did the previous judge, that the Sponsor was exercising treaty rights when he left France in 2011 but he had not established that he was a worker or was self-employed. He did not therefore comply with the strict wording of Regulation 9 which requires that he must be one or the other in order to benefit from that provision.
20. The determination then refers to a submission by Mr Jesurum that the Appellant falls within the provisions of Regulation 15A as the primary carer of a British citizen child. Counsel submitted that the Appellant's circumstances as a whole were relevant to her application and that included the existence of her child. The Presenting Officer objected to this line of argument. She said that the matter was not raised in the application, not discussed in the decision or raised in the Grounds of Appeal. The first time that issue was raised was in the skeleton argument produced by Mr Jesurum on the day of the hearing. Judge Tully found that it would not be reasonable, fair or in the interests of justice to expect the Respondent to deal with this entirely difficult claim to a right to a residence card at the appeal hearing without prior warning. The Appellant was not facing removal and it would be open to her to make a fresh application on those grounds.
21. Dealing briefly with Article 8, Judge Tully noted that the Appellant entered the UK illegally in the back of a lorry. She did not accept a submission from Mr Jesurum that, as a person who had no status, the Appellant would be committing a criminal offence unless she leaves the UK. Judge Tully did not accept as credible, given the Appellant's immigration history, that refusal would result in her feeling compelled to leave the UK. The judge did not accept that Article 8 was engaged.

22. In submissions before me, Mr Jesurum relied upon a revised skeleton argument dated 1st July 2014. The arguments put forward are technically complex but may be summarised as follows.
23. The first ground alleges a failure on the part of the First-tier Tribunal to apply the guidance given in OB (Morocco). It is argued that there is no requirement that the Sponsor has been a worker or self-employed person at the date of his return. A broad approach must be applied to Regulation 9 and it is satisfied if there is a link between the employment and the return: OB (EEA Regulations 2006 – Article 9(2) – Surinder Singh spouse) Morocco [2010] UKUT 420.
24. The term “was so residing” for the purposes of Regulation 9(2)(a) does not have to be immediately before returning to the United Kingdom. It is sufficient that there be “some link between the exercise of treaty rights” in the host member state and the return of the spouse to the United Kingdom.
25. The grounds argue that Regulation 9(2)(b) is contrary to European Union law and is of no effect. The provisions of EU law override national legislation. Compatible interpretation should be deployed so as to give EU Directives their required result.
26. Mr Jesurum’s second ground alleges reverse discrimination. It is argued that the right to freedom of movement for those exercising EU treaty rights must be broadly construed. If Regulation 9 is limited to those who were workers or self-employed, then returning nationals would be disadvantaged compared to EEA nationals who now enjoy greater scope as to the exercise of treaty rights under the Citizenship Directive.
27. Counsel’s third and final ground refers to Article 7 CFREU. It is submitted that the First-tier Judge erred in considering Article 7 of the Charter of Fundamental Rights of the European Union not to be engaged. The decision is one which requires the Appellant to leave the United Kingdom (severing her family life with her husband British citizen child). Article 7 of the Charter (and Article 8 of the Convention) protect positive as well as negative obligations. There is no logical difference between an application for a family permit and the instant application. The effect on the free movement rights of the persons affected must be taken into account.
28. Mr Jesurum’s conclusion is that the determination of the First-tier Tribunal is vitiated by error of law and the Upper Tribunal is invited to remake the decision. Should the Tribunal find that the scope of the application of OB to the present cases unclear then the Tribunal is respectfully invited to refer three questions which follow to the President of the Upper Tribunal so that they may be referred to the Court of Justice of the European Union.
29. After the appeal hearing had been concluded, Mr Jesurum kindly submitted to me an application to the Upper Tribunal to refer questions to the Court of Justice. This consists of an introduction, law and procedure and the proposed questions in a document dated 4th July 2014.
30. Mr McVeety began his submission by taking a materiality point. He said that the decision in Surinder Singh is of no application to non-family members. A family

member should be contrasted with extended family members, which includes unmarried partners.

31. Turning to the three grounds raised by Mr Jesurum in his skeleton argument, Mr McVeety pointed out that in OB (Morocco) the period since the returning residents had ceased working was eight weeks. In the instant case it was three years since the Sponsor had ceased employment in France and therefore there was no longer any significant link. Nowhere in the decision is there any reference to Surinder Singh having been wrongly decided.
32. Mr McVeety accepted that Article 8 had not been considered in detail by the First-tier Judge but he submitted that any error was not material. The fact that the Sponsor and the Appellant were now married was not relevant. They were not married at the time when he had been exercising treaty rights in France. In conclusion, Mr McVeety suggested that the grounds submitted by Mr Jesurum were an attempt to unnecessarily over complicate the matter.
33. Having given the matter careful thought, I am not persuaded that the First-tier Tribunal's determination discloses any material error of law. The wording of Regulation 9 is, in my view, clear and unambiguous. There is nothing which needs to be referred to the European Court in order to decide the issues raised in this appeal. I therefore decline to make any such reference.

DECISION

The making of the decision by the First-tier Tribunal did not involve the making of an error on a point of law. I uphold the determination and dismiss the appeal.

No anonymity direction is made.

Signed

Date 30th July 2014

Deputy Upper Tribunal Judge Coates