



**Upper Tribunal
(Immigration and Asylum Chamber)**
Numbers: IA/13140/2014

Appeal

IA/15403/2014
IA/15413/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 4th March 2015**

**Decision and Reasons
Promulgated
On 10th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HARRIES

Between

**MRS HELEN ABIEGBE KOSIN
MISS FRANSISCA IRUARHO OMINIYODO
MR RAPHAEL EDIRI OMUNIYODO
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mrs B Asigo

For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The first appellant was born on 28th January 1961 and the second and third appellants are her children born respectively on 27th March 1988 and 3rd April 1994. They are all nationals of Nigeria. They appealed before First-tier Tribunal Judge Dineen (the Judge) at a hearing at Hatton Cross on 10th November 2014 against the decision of the respondent, made on 28th February 2014, to refuse to issue them with

residence cards as confirmation of a right to reside in the United Kingdom as family members of an EEA national under the Immigration (EEA) Regulations 2006. The Judge dismissed the appeals under the EEA Regulations and found no other basis on which they could succeed.

2. Permission to appeal to the Upper Tribunal was granted on 10th February 2015 by First-tier Tribunal Judge R A Cox for the following reasons:

“The grounds in essence contend that the Judge misdirected himself in law in finding that the husband was no longer a qualified person at the date of his death and that therefore the appellants had no retained right of residence, The arguments is based on a consideration of regulations 3(2) (c), 6(3) and 10(2) in combination. It seems to me that this is an unusual case and that the grounds may be arguable. It may, however, be critical to know on what date the husband left the UK for Germany for what is said to be for medical treatment and the actual date of death.”

3. The matter accordingly came before me to determine whether the making of the decision in the First-tier Tribunal involved the making of an error on a point of law. The relevant background is that the first appellant was issued with a residence card on 26th October 2010 valid for 5 years; her children had no such cards but all three of the appellants applied on 30th December 2013 for cards on the basis of a retained right of residence following the departure of the first appellant’s spouse from the United Kingdom. He was an EEA German national, Mr Kurt Kosin. The second and third appellants are not his children but come from their mother’s previous relationship.
4. The respondent noted the submission of a notice of proceedings from Wandsworth County Court dated 11th September 2013 but found no evidence of a decree absolute in support of the claim. The appellants were accordingly considered by the respondent in their capacity as the dependants of Mr Kosin but the applications were refused because of insufficient evidence of Mr Kosin’s economic activity in the United Kingdom to show him to have been exercising Treaty rights as a self-employed person under Regulation 6 of the EEA Regulations.
5. After the applications had been made but before the date of decision Mr Kosin unfortunately died in Germany on 26th January 2014. The first appellant halted the divorce proceedings she had instigated against him. The evidence before the Judge was that in January 2013 Mr Kosin had left the United Kingdom for Germany, his country of origin, because he was unwell with a heart condition. The appeals were therefore argued before the Judge on the basis of the first appellant being Mr Kosin’s widow and that she and her children were family members with a right of residence under Regulation 10(2) of the EEA Regulations as follows:

“Family member who has retained the right of residence”

10. (1) In these Regulations, “family member who has retained the right of residence” means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) 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 United Kingdom in accordance with these Regulations for at least the year immediately before the death of the qualified person or the EEA national with a permanent right of residence; and

(c) he satisfies the condition in paragraph (6).

6. The Judge directed himself at paragraph 10 of his determination that a person satisfies Regulation 10(2) if he was a family member of a qualified person when that person died; each appellant therefore had to show that at the time of Mr Kosin’s death he was a qualified person. Mr Kosin was submitted to be a qualified person under Regulation 6 by virtue of his status as a self-employed person. The Judge noted that Mr Kosin was at the time of his death not in the United Kingdom as required by Regulation 6(1) as follows:

“Qualified person”

6. (1) In these Regulations, “qualified person” means a person who is an EEA national and in the United Kingdom as—

(a) a jobseeker;

(b) a worker;

(c) a self-employed person;

(d) a self-sufficient person; or

(e) a student.

(2) Subject to regulations 7A(4) or 7B(4), a person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if—

(a) he is temporarily unable to work as the result of an illness or accident;

7. Mrs Asigo represented the appellants at the First-tier hearing as well as in the Upper Tribunal. The Judge records in his determination her submission for the appellants that Mr Kosin's absence from the United Kingdom was not of consequence because under Regulation 6(2) he would not cease to be treated as a worker if he was temporarily unable to work because of illness or accident. Mrs Kosin's evidence was that Mr Kosin was up to the time of his death temporarily unable to work as the result of illness. However, the Judge rejected the submission because he found that Regulation 6(1) clearly requires the qualified person to be in the United Kingdom, which Mr Kosin was not at the time of his death; the judge accordingly found Mr Kosin not to be a qualified person.
8. The Judge further found that Regulation 6(2) could not apply because it deals with a person who, at the moment the matter has to be considered, is a living person who happens no longer to be working; the judge found that Mr Kosin was clearly not within that category.
9. The grounds of appeal before me assert that the Judge misdirected himself in finding that Mr Kosin was not a qualified person when he died by reason of his absence from the United Kingdom; he had gone to his country of origin for a visit which did not mean that he was no longer a qualified person. There is submitted to have been evidence before the Judge to show that Mr Kosin travelled to Germany only to seek medical attention from his consultant there.
10. It is further submitted that the appellants benefit from Regulation 3(2) (c) as follows because Mr Kosin was entitled to be absent from the United Kingdom for up to 12 months because of his serious illness:

Continuity of residence

3. (1) This regulation applies for the purpose of calculating periods of continuous residence in the United Kingdom under regulation 5(1) and regulation 15.

(2) Continuity of residence is not affected by —

(a) periods of absence from the United Kingdom which do not exceed six months in total in any year;

(b) periods of absence from the United Kingdom on military service; or

(c) any one absence from the United Kingdom not exceeding twelve months for an important reason such as pregnancy and childbirth, serious illness, study or vocational training or an overseas posting.

(3) But continuity of residence is broken if a person is removed from the United Kingdom under these Regulations.

11. Mrs Asigo submits that Mr Kosin continued to be a qualified person despite his illness as he retained continuity of residence in the United Kingdom as there was no evidence that he did not intend to return to the United Kingdom when he went to Germany. Regulation 10(2) is submitted not to require the EEA national to be in the United Kingdom at the time of death. It is submitted that Mr Kosin could not return to the United Kingdom before his death as he was not well enough to travel.
12. In the skeleton argument submitted for the appellants before me it is further asserted that the judge failed to consider Regulation 5(7)(b) as follows:

“Worker or self-employed person who has ceased activity”

5. (1) In these Regulations, “worker or self-employed person who has ceased activity” means an EEA national who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the conditions in this paragraph if he—

(a) terminates his activity as a worker or self-employed person and—

(i) has reached the age at which he is entitled to a state pension on the date on which he terminates his activity; or

(ii) in the case of a worker, ceases working to take early retirement;

(b) pursued his activity as a worker or self-employed person in the United Kingdom for at least twelve months prior to the termination; and

(c) resided in the United Kingdom continuously for more than three years prior to the termination.

(3) A person satisfies the conditions in this paragraph if—

(a) he terminates his activity in the United Kingdom as a worker or self-employed person as a result of a permanent incapacity to work; and

(b) either—

(i) he resided in the United Kingdom continuously for more than two years prior to the termination; or

(ii) the incapacity is the result of an accident at work or an occupational disease that entitles him to a pension payable in full or in part by an institution in the United Kingdom.

(4) A person satisfies the conditions in this paragraph if—

(a) he is active as a worker or self-employed person in an EEA State but retains his place of residence in the United Kingdom, to which he returns as a rule at least once a week; and

(b) prior to becoming so active in that EEA State, he had been continuously resident and continuously active as a worker or self-employed person in the United Kingdom for at least three years.

(5) A person who satisfies the condition in paragraph (4)(a) but not the condition in paragraph (4)(b) shall, for the purposes of paragraphs (2) and (3), be treated as being active and resident in the United Kingdom during any period in which he is working or self-employed in the EEA State.

(6) The conditions in paragraphs (2) and (3) as to length of residence and activity as a worker or self-employed person shall not apply in relation to a person whose spouse or civil partner is a British citizen.

(7) Subject to regulations 6(2), 7A(3) or 7B(3), for the purposes of this regulation—

(a) periods of inactivity for reasons not of the person's own making;

(b) periods of inactivity due to illness or accident; and

(c) in the case of a worker, periods of involuntary unemployment duly recorded by the relevant employment office,

shall be treated as periods of activity as a worker or self-employed person, as the case may be.

13. Mrs Asigo submits that Mr Kosin was not out of the United Kingdom for more than 12 months and his period of inactivity was also not of his own making and the necessary Regulation is accordingly met by the appellants because Mr Kosin remained a qualified worker at the time of his death. The respondent's opposition to the appeal is set out in a Tribunal Procedure (Upper Tribunal) Rules 2008, Rule 24, response asserting that the Judge's decision is without error and should stand. Tufan made oral submissions accordingly for the respondent.

14. The Judge observed that Mrs Asigo did her best before him "with all the ingenuity that could be mustered in such a case". The basis of the applications made by the appellants has changed very significantly since they were made and throughout the proceedings. The submissions before me now cover the eventualities that the appeal should have succeeded on the basis of Mr Kosin's uninterrupted status as a self-employed person, his continuity of residence in the United Kingdom, his status as a worker or self-employed person who has

ceased activity or had periods of inactivity for reasons not of his own making. These submissions go beyond those made before the Judge in the First-tier Tribunal and in my finding beyond or counter to the evidence which was before him.

15. Having taken account of all the matters before me I find that the Judge's decision was without error for the following reasons. I am satisfied that he properly directed himself in relation to Regulations 10(2) and 6(2) and that the evidence before him did not show Mr Kosin to be a qualified person at his time of death. I find merit in Mr Tufan's submission firstly that, even if it applied to Mr Kosin's situation, Regulation 3(2)(c) does not assist the appellants because the evidence shows his absence from the United Kingdom to have exceeded 12 months.
16. In oral evidence the first appellant apparently told the Judge that Mr Kosin returned to Germany from the United Kingdom in January 2013 because he was unwell with a heart condition. There is no supporting documentary evidence of Mr Kosin's date of departure; the first appellant gave no specific day in January 2013 when he left and I note that all the application forms completed by the appellants state that Mr Kosin departed on an earlier date, namely in November 2012.
17. Mr Kosin is said to have had an operation in Germany on 28th January 2013 but the only certain date, with supporting evidence by way of a translated death certificate, is of Mr Kosin's death in Germany on 26th January 2014. The evidence therefore leaves open the possibility that Mr Kosin departed the United Kingdom more than a year before 26th January 2014 and the Judge could not have fallen into error by failing to apply Regulation 3(2)(c) requiring an absence from the United Kingdom not exceeding 12 months.
18. I consider the submission that the Judge erred by not applying Regulation 5 (7)(a) or (b) to enter the realms of speculation. The case was not apparently put before him on that basis and there was a lack of any supporting evidence of the timing or reasons for Mr Kosin's departure from the United Kingdom. The reality is that the first appellant was estranged from Mr Kosin. The news of his death was relayed to her by a third party and she did not at first believe it according to her first statement before the First-tier Tribunal, dated 19th May 2014. In this statement the first appellant makes no mention of the circumstances Mr Kosin's return to Germany or his inability to be active as a self-employed person.
19. In the first appellant's subsequent statement dated 6th November 2014 there is no supporting evidence of her claim that Mr Kosin was unable to travel for health reasons and there is no evidence to support the submission before me that Mr Kosin always intended to return to the United Kingdom after a visit to Germany. In all the circumstances I

find no error of law in the making of Judge's decision and it follows that his decision stands.

Decision

20. I find that the making of the previous decision did not involve the making of an error on a point of law. It follows that the Judge's decision stands and this appeal to the Upper Tribunal is dismissed.

Anonymity

The First-tier Tribunal made no anonymity order.

Signed: J Harries
Deputy Judge of the Upper Tribunal
March 2015

Dated: 31st

Fee Award

There is no fee award.

Signed: J Harries
Deputy Judge of the Upper Tribunal
31st March 2015

Dated: