



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/13861/2014

THE IMMIGRATION ACTS

Heard at Field House
On 30th January 2015

Decision & Reasons Promulgated
On 6th February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR SAJID MUNIR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Shilliday, Home Office Presenting Officer
For the Respondent: Ms B Smith, Counsel instructed by MNS Solicitors

DECISION AND REASONS

Introduction

1. Although this is an appeal by the Secretary of State I will refer to the parties as they were before the First-tier Tribunal.
2. The appellant is a citizen of Pakistan born on 13th March 1986. In 2011 he was working in Cyprus and met his future wife, Mrs Lisa Munir nee Warren. He married his wife on 12th March 2012 in Cyprus. He applied for a visit visa to come to the UK

to see his wife and her family but this was refused. On 18th May 2012 she moved to Cyprus to join him there leaving her job with the Department of Work and Pensions in the UK. They were both issued with EU residence cards by the Cypriot authorities, but then the economy of Cyprus crashed and the appellant was made redundant.

3. On 13th February 2013 the appellant and Mrs Munir moved to Ireland. Between June and November 2013 the appellant's wife worked in a take-away (the Village Takeaway) and for a foreign exchange company (Aftab) and the appellant also had employment. They were both issued with EU residence cards by the Irish authorities.
4. On 5th December 2013 the couple moved to the UK as the appellant's wife was pregnant and unwell. He applied for an EU residence card in the UK on 7th January 2014. This application was refused on 7th March 2014, and he appealed on 20th March 2014. On 26th June 2014 the couple's baby, Ayshah Jenna Munir was born. His appeal was allowed under the Immigration (EEA) Regulations 2006 (henceforth the EEA Regulations) and on human rights ground in a determination of Judge of the First-tier Tribunal Majid promulgated on 31st October 2014.
5. On 15th December 2014 Judge of the First-tier Tribunal Pooler found that there was an arguable error of law because the determination of Judge Majid failed to identify the issues under appeal and to give adequate reasoning for his findings. It was also arguable that he took into account immaterial information and failed to make clear whether he was allowing the appeal on asylum or EEA grounds or both.
6. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

7. Mr Shilliday submitted that the determination was fundamentally flawed, and that he had seen the same determination issued by Judge Majid in six other cases. As set out in the grounds of appeal Judge Majid does not set out what the issues in the appeal are or the reasons for allowing the appeal.
8. More specifically the determination errs in law as it is inadequate to say the appellant had not lost her qualified status on moving from Ireland for the reasons set out in the appellant's skeleton argument as is done at paragraphs 10(b) and 12. No reason is given why medical treatment prevents suspension of qualified worker status.
9. At paragraph 15, 16(c) and (d) Judge Majid sets out irrelevant material of an overtly political nature; paragraphs 18 and 16(b) are unclear in their meaning; and paragraphs 10(a) & (c), 12 and 18 all indicate that Judge Majid did not understand paragraph 117B of the Nationality, Immigration and Asylum Act 2002 and the public interest in maintaining immigration control.
10. Mr Shilliday said that the irregularities in the determination were so grotesque that in fact neither party had been given a fair hearing in the First-tier Tribunal and so the matter should be remitted for a de novo hearing.

11. I indicated to Ms Smith I was inclined to find that the determination was too confused and failed to set out and determine the issues under appeal with adequate reasons subject to any submissions she wished to make. I asked if she would like to take instructions from the appellant as to whether he would like to go with the suggestion of Mr Shilliday, or whether she wished to continue and defend the determination of Judge Majid. Ms Smith took instructions.
12. Ms Smith then said she recognised that there were difficulties with the determination. After taking further instructions from the appellant and his wife she said that the appellant conceded the Judge Majid had erred in law in the determination of the appeal and that the determination would have to be set aside, but that she wished the matter to be re-made in the Upper Tribunal as the appellant's wife was unwell and the couple wanted the matter resolved as soon as possible.
13. I told the parties that the determination of Judge Majid would be set aside in its entirety as it disclosed multiple errors of law, as set out below, and that I would remake the appeal in the Upper Tribunal. I had regard to the Senior President's Practice Statement on Remittals at paragraph 7.2. Whilst the determination did contain a large number of legal errors both parties had had the opportunity to put their case in the First-tier; the extent of the judicial fact-finding to re-make was not great; and in all the circumstances it was right to follow the normal course of remaking in the Upper Tribunal.

Conclusions – Error of Law

14. The primary issue under appeal was the entitlement of the appellant to an EU residence card under Regulation 17 of the EEA Regulations, with reference to Regulation 9 of the EEA Regulations and "Surinder Singh" principles. Also of relevance is Regulation 6(2)(a) of the EEA Regulations (as the appellant's wife is unwell), the case of Minister voor Vereemdelingenzaken en Integratie v Eind C-291/05 as the appellant's wife is not working and the case of Jessy Saint Prix v Secretary of State for Work and Pensions C-507/12 as the appellant's wife was pregnant and is now on maternity leave. These cases and Regulations were all set out in the appellant's skeleton argument but there is no reference to any of them in the determination. It was not possible to determine this appeal without reference to this framework and making findings of fact in relation to these issues: as a result Judge Majid erred in law by failing to do so.
15. The conclusion of Judge Majid at paragraph 19 that the appellant can benefit from the EEA Regulations errs in law for want of any relevant reasoning relating to the framework in EU law and its enactment in the EEA Regulations.
16. Mr Shilliday has rightly pointed out that there is a large amount of irrelevant material apparently considered in relation to human rights. One example is as follows. The appellant has made no claim that his removal from the UK would breach Article 3 ECHR and yet paragraph 15 of the determination concerns the case of Chahal v UK [1996] ECHR 54.

17. The analysis under Article 8 ECHR is confused with references to the EEA Regulations and consists largely of an attempt to discuss the introduction of Immigration Rules relating to Article 8 ECHR and s.117B of the Nationality, Immigration and Asylum Act 2002. There is no analysis of the appellant's facts applying the new Rules or following a Razgar analysis. I therefore find that Judge Majid errs in law in relation to his finding that the appellant succeeds under Article 8 ECHR due to lack of reference to the legal framework and the failure to make relevant findings of fact supporting this conclusion.
18. The determination of Judge Majid is set aside in its entirety.

Evidence & Submissions - Remaking

19. The appellant attended the Tribunal and gave evidence. He confirmed his two statements are true and correct and his evidence to the Tribunal. In summary in addition to the material set out in the introduction he says that he and Mrs Munir live with their daughter at his in-laws place. His wife is still recovering from her caesarean section. They are able to live from the rental income from Mrs Munir's flat. They are intending to release some equity from this flat and set up a restaurant in the UK as he has studied hotel and restaurant management, and worked in restaurants in Cyprus and Ireland. He is very keen to be able to work and support his family. They are all settled here with friends and close relationships with Mrs Munir's parents.
20. In answer to questions the appellant explained that he and his wife had EU residence cards in Cyprus because his wife had shown she was a job-seeker by getting a job offer from his boss (although she actually did not take up the work as she decided to take a holiday) and because she showed evidence that she had an income from the flat she owned and rented out in the UK. She rented the flat in the UK for £625 a month, which gave her about 800 Euros, which was a reasonable amount to live on in Cyprus.
21. The appellant also explained that his wife was currently unable to work as she had a hip problem and needed a hip operation. She was in agony and unable to work until she received this treatment.
22. Both parties agreed that there was no need for any further evidence, but both Mrs Munir and her father Mr Warren confirmed that their statements were true and correct, and their evidence to the Tribunal.
23. Mr Shilliday submitted that he accepted that Mrs Munir had exercised Treaty rights in Ireland. He said he was satisfied that she was an EU worker there particularly as she had also exercised Treaty rights prior to this in Cyprus. The only issue, which he did not concede was whether she was still exercising Treaty rights in the UK. He relied upon the reasons for refusal letter in relation to this issue, and noted the possible relevance of the case of St Prix. The refusal letter states that the appellant had not supplied sufficient evidence to show that his wife is exercising Treaty rights in the UK, and particularly had not shown she was an incapacitated worker in

accordance with Regulation 5(3) of the EEA Regulations as there was no medical evidence that Mrs Munir was permanently incapacitated and no evidence she had resided in the UK for a period of two years prior to becoming incapacitated.

24. Mr Shilliday submitted that it was not appropriate for me to continue and determine the appeal under Article 8 ECHR.
25. Ms Smith relied upon her skeleton argument. Ms Smith argued that the appellant's wife was exercising Treaty rights in the UK in accordance with St Prix and Eind. The appellant's wife was still within the one year maternity leave period permitted in the UK and it was clear she had given up work due to her pregnancy. It was clear that the appellant and Mrs Munir had had the centre of their lives firstly in Cyprus and then in Ireland. Under Regulation 13 there is no further requirement that the appellant's wife be exercising Treaty rights in the UK to be admitted with her family member. The appellant has never claimed to be permanently incapacitated so this is irrelevant. If it were a requirement that the appellant's wife be currently a worker, she could qualify as she is temporarily unable to work due to her ill-health in accordance with Regulation 6(2)(a) of the EEA Regulations.
26. Ms Smith submitted that it was appropriate for me to continue on and determine the matter under Article 8 ECHR even if I allowed the appeal under the EEA Regulations as otherwise an appeal under the EEA Regulations might leave the appellant with no leave rather than with discretionary leave (if the Article 8 ECHR determination were unchallenged) and thus prolong the period the appellant was unable to work. She submitted that the appellant could meet the requirements of the ten year route under Appendix FM of the Immigration Rules. There would be insurmountable obstacles to family life taking place in Pakistan given societal attitudes to women and it would not be reasonable to expect her to relocate there with her baby. The appellant was entitled to succeed in accordance with s.117B of the Nationality, Immigration and Asylum Act 2002.

Conclusions - Remaking

27. It is accepted by Mr Shilliday that Mrs Munir resided in two EU states prior to returning to the UK, and that she was a worker in the Republic of Ireland. I am satisfied that she was granted a residence certificate in Cyprus on the basis of being a jobseeker and a self-sufficient person: I have seen documentation regarding the income she received from the rented flat she owns in the UK. She was granted a residence certificate and the appellant was granted a residence card as her spouse, and copies of the Cypriot EEA residence documentation are in the bundle. Mrs Munir was also granted a residence certificate in the Republic of Ireland and worked there for two different employers. She has provided evidence both of her work in the Republic of Ireland (certificate of pay, tax etc for year ending 31st December 2013, letter of employment, P45, employment contract, payslips), and her Irish residence certificate, and the appellant's Irish residence card.
28. I therefore find that Mrs Munir can satisfy Regulation 9(2)(a) of the EEA Regulations as she was residing in an EEA state as a worker before returning to the UK.

29. I also find that the appellant can satisfy Regulation 9(2)(b) of the EEA Regulations as it is not contested that he is the spouse of Mrs Munir. I am satisfied that they lived together in Cyprus and Ireland before travelling to the UK and that they had the centre of their life in these countries before returning to the UK given the evidence of the appellant and Mrs Munir, and the supporting documentation set out below.
30. The appellant has supplied evidence of his regular work in both countries in the form of payslips; joint bank statements show many transactions for matters such as shopping and eating out and payments of salary; there is evidence of their having rented accommodation in both countries in the form of rental agreements; there are also utility bills and identity numbers enabling them to access Irish government services. It is the evidence of the appellant and Mrs Munir that they went to live permanently in Cyprus and only moved to Ireland due to the economic crash there; and then only left Ireland due to the medical complications of Mrs Munir's pregnancy which meant she needed the assistance of her parents as a result of her pre-existing scoliosis. There are medical letters from Mrs Munir's GP from the time of her return to the UK which confirm she was temporarily incapacitated as a result of her scoliosis which has been aggravated by her pregnancy and for which she was receiving physiotherapy and that she needed the support of her family.
31. As such it is therefore clear that the appellant and Mrs Munir were entitled to be treated as an EEA national and spouse under Regulation 13 (initial right of residence) on their return to the UK as set out at Regulation 9(4) of the EEA Regulations.
32. The question then arises as to whether Mrs Munir is currently exercising Treaty rights so as to be a qualified person under Regulation 6 of the EEA Regulations. I find that Mrs Munir only gave up her work in Ireland due to her pregnancy related ill-health. This is her credible evidence which is supported by GP letters. As these letters and she state she became temporarily incapacitated as a result of her underlying scoliosis and her pregnancy. Later letters from Benenden Hospital Trust refer to Mrs Munir needing a hip replacement following the birth of her daughter and in the context of her scoliosis, and state that until this is done she is unable to take up employment due to her painful arthritis. In her latest statement Mrs Munir says she is still recovering from her caesarean section and that she will look for work once she is well and her baby a little older (Ayshah is currently 7 months old). Her parents have agreed to look after Ayshah whilst she works when she is ready to return to work. There is documentary evidence before me that Mrs Munir had previously worked for the Department of Work and Pensions in the UK in the form of payslips, P45 and P60 and certificate commending her on her ten years' service ending in April 2012 together with a glowing reference.
33. I am satisfied on the evidence before me that Mrs Munir is currently temporarily unable to work due to ill-health, and thus qualifies to be seen as a worker under Regulation 6(1)(b) of the EEA Regulations by virtue of Regulation 6(2)(a).
34. My opinion that Mrs Munir continues to be treated as a worker is further supported by the fact that in the European Court of Justice ruled in St Prix that: "a woman who

gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of worker, within the mean of that Article, provided she returns to work or finds another job within a reasonable period after the birth of her child.”

35. I find that Mrs Munir is within the reasonable period after the birth of her child as maternity leave in the UK allows for a break of 52 weeks with 4 weeks prior to the expected date of birth of the child counting towards this 52 week break if the mother is off sick with pregnancy related illnesses (information from Gov.UK website). Mrs Munir’s maternity leave would therefore continue until approximately the 26th May 2015, and I find that she continues to be a worker up until this time in all the circumstances of her case particularly given her intention to return to work when well, her arrangements for childcare and her history of employment.
36. Ms Smith has also drawn my attention to the fact that the European Court of Justice in Eind has also held that where an EU national exercises Treaty rights as a worker in another community state and then returns to her home member state that she is entitled to install third country national family members whether or not she is economically active on her return. This is particularly clear from the second conclusion and from paragraph 38 of the judgement which states: “Miss Eind (a national of Surinam) has the right to install herself with her father, Mr Eind, in the Netherlands, even if the latter is not economically active.”
37. I thus conclude that the appellant is entitled to a residence card under Regulation 17(1) of the EEA Regulations as Mrs Munir is a qualified person under Regulation 6(1)(b) of the EEA Regulations and he is her spouse under Regulation 7(1)(a) of the EEA Regulations.
38. I make it clear I am more than satisfied that the appellant and Mrs Munir have family life together; and that any removal would interfere with that family life; and if I am right in my above analysis of EU law, and the appellant is entitled to a residence card, that any removal would not be in accordance with the law and thus a breach of Article 8 ECHR.
39. However in considering Article 8 ECHR as a separate ground of appeal I must first consider this matter under the Immigration Rules relating to family life under Article 8 ECHR at Appendix FM and with s.117B of the Nationality, Immigration and Asylum Act 2002. I find that I have insufficient material before me to conclude that the appellant can meet the requirements at EX 1 of Appendix FM that it would not be reasonable for the appellant’s child to relocate to Pakistan or that there would be insurmountable obstacles to family life with Mrs Munir continuing in Pakistan. This is because I have no information about the appellant’s family circumstances in Pakistan. Whilst I appreciate that Mrs Munir is significantly unwell and has never been to Pakistan I have no detailed information setting out what the family situation would be in that country or setting out details of her access to medical treatment there.

40. I appreciate that it can be appropriate to look at the general law relating to Article 8 ECHR outside of the Immigration Rules however the outcome would not be different as in assessing the proportionality of any interference with the appellant's family life I would once again need to understand the situation to which they would be going in Pakistan in order to find it was not reasonable to expect family life to take place in that country.

Decision

1. The First-tier Tribunal erred in law.
2. The determination of the First-tier Tribunal is set aside.
3. The appeal is remade allowing the appeal under the EEA Regulations.
4. The appeal on human rights grounds is dismissed.

No anonymity direction is made.

Signed

Date 3rd February 2015

Judge Lindsley
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of £140 for the following reason. The respondent was supplied with all key documentation to support the appellant's case to remain under the EEA Regulations with the application.

Signed

Date 3rd February 2015

Judge Lindsley
Deputy Upper Tribunal Judge