



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/52919/2013

THE IMMIGRATION ACTS

Heard at Field House

**Decision and Reasons
Promulgated**

On 17th March 2015

On 23rd March 2015

Prepared on 17th March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**MR MUHAMMAD WAQAS
(No anonymity order made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Skyner, Counsel, instructed by Arshed & Co Solicitors

For the Respondent: Miss E Savage, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Pakistan born on 1st March 1983. He appeals with leave against the decision of Judge of the First-tier Tribunal R G Walters sitting at Taylor House on 4th November 2014 in which the Judge dismissed the Appellant's appeal against the decision of the Respondent dated 6th December 2013. That decision was to refuse the Appellant's

admission to the United Kingdom pursuant to Regulation 11 of the Immigration (European Economic Area) Regulations 2006 (“the 2006 Regulations”). The Appellant's case was that he was the family member of Dora Patricia Pereira Mendes, a Portuguese national and he held a residence permit issued by the Respondent on 14th October 2009 (since revoked).

Immigration Law and Rules relevant to the Appellant

2. Regulation 11 of the 2006 Regulations provides that an EEA national must be admitted to the United Kingdom if he produces on arrival a valid national identity card or passport issued by an EEA national state. A person who is not an EEA national must be admitted if he is a family member of an EEA national and produces a valid document provided that the conditions in Regulation 19(2)(a) are met. These are that the non-EEA national must be accompanying the EEA national or joining the EEA national in the United Kingdom and the EEA national must have a right to reside in the United Kingdom under the 2006 Regulations. Regulation 11(2)(b) applies where the family member of the EEA national has retained the right of residence or meets the criteria in Regulation 11(5) or has a permanent right of residence under Regulation 15. The burden of proof of establishing that the requirements of the Regulations are met rests on the Appellant and the standard of proof is the usual civil standard of the balance of probabilities.

Explanation for Refusal

3. The Respondent was not satisfied that the Appellant was seeking to join an EEA national in the United Kingdom who had a right to reside here under the 2006 Regulations and therefore refused the Appellant admission under Regulation 11. The Respondent wrote:

“You have stated your wife left the United Kingdom six months ago. You have stated she left her job in the UK approximately three years ago. You are unable to account for how your wife spent her time since then. You claim to have been living with her until 6 months ago. However you have no current contact number for her and she has, according to you, returned to Portugal because she wants to live in Portugal and is not exercising her treaty rights. You do not know basic details about your wife such as her parents' names or whether she uses the social media, indicating that you may not have lived with her for a significant time. You claimed on arrival that you spoke to your wife yesterday but you now admit you have not spoken to her in any form for at least six months and that she is not in the UK.”

4. The Respondent then went on to revoke the residence permit issued to the Appellant and refused the Appellant admission. Directions were given for the Appellant's removal on 23 December to Pakistan but the Appellant appealed against the Respondent's decision arguing that the Respondent had not given proper consideration to the evidence before her and the

decision would breach Article 8. The Appellant had no criminal record and neither he nor his partner were in receipt of any kind of public funds.

The Proceedings at First Instance

5. The appeal came before Judge Walters on 4th November 2014 when the Appellant was represented by Counsel but no one attended on behalf of the Respondent. The Judge noted that no record of interview had been produced and thus the immigration decision rested on assertions by the Immigration Officer as to what the Appellant had said by way of admissions. At paragraph 12 the Judge recorded the Appellant's evidence that his wife, Ms Mendes, was in the United Kingdom and was currently working. She had not attended the hearing because she was unable to get time off from work, otherwise she would have done. The Judge noted that the case had been adjourned once already (on 22nd July 2014) and that the Appellant had had three months' notice of the hearing and yet it appeared no application had been made for the wife to have time off work until some two weeks prior to the hearing
6. The Judge was unimpressed by the documentary evidence produced by the Appellant to show that his wife had been working. The Judge did not accept the P60s for the tax years 2012 to 2014 as being reliable documents nor the three payslips said to cover the months April to June 2014. The Appellant's brother also gave evidence and he too confirmed that the Appellant's wife was presently in the United Kingdom and working. At paragraph 24 the Judge wrote:

"I did not find that either the Appellant or his brother had given credible evidence on this point. The fundamental reason for the Appellant being refused admission was the Immigration Officer not accepting that [the Appellant's] wife was in the UK exercising treaty rights. I simply do not accept that the Appellant's wife if told about the importance of this case for her husband would have failed to attend. I find that the reason that she did is that she is not presently in the United Kingdom."

He dismissed the appeal under the 2006 Regulations.

The Onward Appeal

7. The Appellant appealed against that decision arguing that the issue under Regulation 11 should have been whether the Appellant was a family member of an EEA national. The Appellant should therefore have been admitted to the United Kingdom if he produced the relevant documents: his passport endorsed with a residence card. If there was evidence to suggest that Ms Mendes, the EEA national, was no longer exercising treaty rights then the Respondent should have used her powers of refusal under Regulation 20 of the 2006 Regulations (which deals with a refusal to issue or renew a revocation of residence documentation). It was not clear on the face of the determination whether in fact this was done and the Respondent's decision if made under Regulation 11 alone was arguably not in accordance with the law.

8. The proper issue to be determined was an issue under Regulation 20(2) of the Regulations which provides that the Respondent may revoke a residence card if the holder of the card has ceased to have or never had a right to reside under the 2006 Regulations. Alternatively an adequate explanation for the Appellant's wife's absence had been given by the Appellant and his brother. In rejecting the P60s the Judge had entered the arena as an expert and had given inadequate reasons for his rejection of the documentary evidence which confirmed that the Appellant's spouse was working.

9. The application for permission to appeal came on the papers before First-tier Tribunal Judge Cruthers on 21st January 2015. In granting permission to appeal Judge Cruthers first noted that there was no onward appeal against the dismissal of the Article 8 appeal. He found it arguable that the Judge had failed to give adequate reasons for his findings pursuant to **R (Iran) [2005] EWCA Civ 982**. However, having granted permission the Judge added the following rider:

“The Appellant should not take this grant of permission as any indication that the appeal will ultimately be successful. When one looks at the history of this matter (as summarised in the decision under consideration) it seems unlikely that the Appellant has any proper base for remaining in this country. That is because:

- The probability appears to be that the Appellant's Portuguese wife is no longer in this country and in any event is unlikely to be exercising treaty rights in this country, and
- Even if the Appellant's wife is still in the United Kingdom, from the history of this matter it would appear that she does not support the Appellant's efforts to remain in the United Kingdom.
- The Appellant should take the above points into account when deciding whether or not to persist with this appeal in the Upper Tribunal.”

10. The Respondent replied to the grant of permission by letter dated 27th January 2015 indicating her opposition to the onward appeal. The Respondent wrote:

“The First-tier Tribunal Judge outlined his concerns as to the EEA national's spouse non attendance at the hearing. ... The Judge was entitled to find adversely against the Appellant at paragraphs 20 and 21 where he did not accept the reliability of the evidence submitted in the form of the P60s and wage slips. The Judge was entitled to find on the basis of the paucity of evidence that the EEA national was not exercising treaty rights in the UK. Therefore as the Appellant had failed to show his wife was in the United Kingdom and exercising treaty rights the Judge was entitled to find that the refusal was correct in respect of Regulation 11.”

The Hearing before Me

11. In consequence of the grant of permission the matter came before me to decide in the first instance whether there was an error of law such that the determination fell to be set aside and the decision remade. If there was

not, then the decision of the First-tier Tribunal would stand. In oral submissions Counsel indicated he could not go any further than the grounds drafted by different Counsel but could confirm that the Appellant's wife was out of the country and divorce proceedings between the couple were ongoing. For the Respondent reliance was placed on the Rule 24 response to the grant of permission. The First-tier had determined the matter correctly.

Findings

12. The first thing the Appellant had to show in this case was that he had a mandatory right to admission under the 2006 Regulations by reason of being a family member of an EEA national and could thereafter meet the necessary requirements. The difficulty for the Appellant was that he could not get over that initial hurdle. He was not the family member of Ms Mendes. Their relationship had clearly broken down because at the date of the revocation of his residence permit she had left the country and he had little if any information as to her work history. Ms Mendes remains outside the United Kingdom and divorce proceedings are now under way. The Appellant was unable to clear the first hurdle to show that he was a family member of an EEA national.
13. In his determination Judge Walters was not satisfied that the Appellant could show that his wife had been exercising treaty rights and rejected the documentation said to prove employment. The Appellant's argument on that point is in my view a mere disagreement with the adverse findings. I do not agree with the decision to grant permission to appeal which found it arguable that the Judge had given inadequate reasons for his decision. The Judge gave adequate reasons why he rejected the Appellant's claim that the Appellant's wife was in the United Kingdom but had been unable to come to court that day to give evidence. With the benefit of hindsight it can be seen that the Judge was clearly right to come to the view that he did since the Appellant's wife is indeed outside the United Kingdom. The Appellant did not give truthful evidence to the first instance Judge about the whereabouts of his wife. That inevitably undermined the credibility of the application as a whole.
14. The Appellant's witness did not assist the Appellant because, perhaps out a sense of mistaken family loyalty, he too (wrongly) claimed that the Appellant's wife was in the United Kingdom. The Judge had before him a clear divergence between what the Appellant was recorded as having told the Immigration Officers and what the Appellant was now saying in his oral evidence to the Tribunal. It is clear that what the Appellant told the Immigration Officers was correct and that what the Appellant told the Judge was not. It was a matter for the Judge to place such weight as he saw fit on the documentation put before him to show that the Appellant's wife had been working. He did not accept the documentation and gave a reason which, whilst brief, was nevertheless adequate. The Judge found that the Appellant's wife was not present in the United Kingdom and

exercising treaty rights. That was the conclusion which was open to him on the evidence. Having reached that conclusion there was no alternative but to dismiss the appeal under the 2006 Regulations. The argument made in the grounds of onward appeal that the Respondent should have considered an alternative Regulation to base the revocation upon is without foundation. The case did not reach that far because the Appellant was not a family member of a qualified person. It follows that there was no error of law in the decision of the First-tier and I dismiss the Appellant's onward appeal against the First-tier decision.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the First-tier Tribunal's decision to dismiss the Appellant's appeal.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 23rd day of March 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As the appeal has been dismissed there can be no fee award.

Signed this 23rd day of March 2015

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Deputy Upper Tribunal Judge Woodcraft