



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/01294/2013

THE IMMIGRATION ACTS

Heard at Field House
On 7 April 2014

Determination Promulgated
On 17 April 2014
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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR HARNAULT HOSPICE KASSI

Claimant

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr C Jacobs, Counsel, instructed by BMAP

DETERMINATION AND REASONS

1. The Secretary of State appeals with permission against the determination of the First-tier Tribunal (First-tier Tribunal Judge Dineen and Mr D R Bremmer JP sitting as a

panel) promulgated on 22 January 2014 allowing Mr Kassi's appeal against the decision of the respondent made on 18 June 2013 to make a deportation order against him pursuant to Regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). For the sake of clarity, I refer to Mr Kassi as the claimant.

2. The claimant arrived in the United Kingdom in March 2002 and in 2004 married Ms Etien, a Belgian national. He was later issued with a residence card on the basis that he was the spouse of an EEA national exercising treaty rights. That card was issued on 6 February 2006 and was renewed on 26 July 2006 for a period of five years.
3. The claimant's marriage to Ms Etien failed in 2008 and they were divorced in 2009. The claimant had by then been in employment with the Post Office from April 2008; that continued until 2011.
4. During the first marriage the claimant had a relationship with Ms Mandeng, a French national, and they had a child who was born in France on 12 August 2004. The claimant began to live with Ms Mandeng in the United Kingdom in 2008; they were married on 20 November 2010 and had a second child, born 5 January 2011.
5. On 31 May 2012 the claimant was convicted of conspiracy to steal and three counts relating to the possession of identity documents in connection with the conspiracy and was on 26 September 2012 sentenced to a period of two years and nine months' imprisonment. The offences were committed while he was an employed by the Royal Mail as a van driver responsible for delivering high value postal items.
6. It is the claimant's case that he had acquired the permanent right of residence in the United Kingdom through a combination of residence as the spouse of an EEA national exercising treaty rights (whilst married to Ms Etien) and as a person who had retained right of residence subsequent to his divorce by virtue of Regulations 10(5) and 10(6) of the EEA Regulations. It is not in dispute that Ms Mandeng is a qualified person and thus at the date of decision the claimant was (and continues to be) the spouse of an EEA national.
7. The Secretary of State did not accept that the claimant was entitled to the enhanced level of protection applicable to those who have acquired the permanent right of residence given the lack of evidence that the claimant had so done. She concluded that his removal was proportionate and would be so, even were he to have acquired the right of permanent residence.
8. On appeal the First-tier Tribunal found:-
 - (i) that the claimant's marriage to his first wife had lasted for at least three years prior to divorce proceedings; that they had resided in the UK for at least one year during the duration of that marriage; and, accordingly [37] that the claimant had resided in the United Kingdom as a family member in accordance with the EEA Regulations as at the date of termination of the first marriage [38];

- (ii) the claimant met the requirements of Regulations 10(5) and (6) of the EEA Regulations and is therefore a family member who had retained the right of residence [39]; fulfilled the requirements of Regulation 15(1)(f); and was thus entitled to a permanent right of residence;
 - (iii) that accordingly, a decision to remove him could not be taken except on serious grounds of public policy or public security; and
 - (iv) that there was a low risk of him reoffending, that he was of previous good character and was unlikely to fall under the bad influence of others in future; that a previous conviction does not in itself justify a decision to remove him;
 - (v) that taking into account the claimant's family and economic situation, it was his best interests that his children remain in the United Kingdom; that it would not be in their interest that they relocate to the Ivory Coast; that there was a genuine and substantial relationship between them;
 - (vi) that the claimant had lived in the United Kingdom for a significant period of time, had been employed and was socially and culturally integrated in the country; that he had limited ties to Côte d'Ivoire [43]; and, accordingly, it would not be proportionate to remove him particularly in view of the low risk of his reoffending; and,
 - (vii) that [46] they would reach the same conclusion if the claimant did not have the permanent right of residence;
 - (viii) removing the claimant would be in breach of Article 8 of the European Convention on Human Rights.
9. The Secretary of State sought permission to appeal against this decision on the grounds that the Tribunal had failed to give any adequate reasons for findings on a material matter in that they had:-
- (i) failed to make any findings of whether the claimant had met the requirements of Regulation 10(5), as he could only have retained a right of residence if he could demonstrate that he was pursuing an activity which would make him a worker or self-employed were he an EEA national; was a self-sufficient person; or was the family member of a person who is a worker;
 - (ii) failed to make any or adequate findings that claimant's deportation was in accordance with the law;
 - (iii) erred in concluding that the claimant's deportation would be contrary to regulation 21 (5) that even if the claimant did not have permanent residency, as his offence involves a serious breach of trust in his role and the Tribunal had failed to engage with the severity of his offending; and
 - (iv) failed to make reasoned findings in respect of Article 8.

10. Permission to appeal was granted on 12 February 2014 by First-tier tribunal Judge P J M Hollingworth.

Submissions

11. Mr Avery submitted for the Secretary of State that although there was evidence before the Tribunal that the claimant had been employed continuously since before his first marriage was dissolved until 2011, there was insufficient evidence that the first wife had been exercising treaty rights at all material times and that while it was clear that she had at times been working, this was not sufficient to show continuity.
12. Mr Avery submitted also that the Tribunal had failed to take into account the seriousness of the offence when assessing proportionality although he did accept there was no challenge to the finding of fact that the appellant presented a serious threat.
13. For the claimant, Mr Jacobs submitted that there was sufficient material before the Tribunal to allow it to conclude that the claimant had been the spouse of a qualified person up to the point of his divorce; that there was sufficient material to show he met the requirements of paragraph 10 (6) of the 2006 Regulations and thus had been entitled to conclude that he had acquired a permanent right of residence.
14. Mr Jacobs submitted also that the Tribunal had given adequate consideration to the various factors in the claimant's favour and even on the less stringent test, had given adequate reasons for why it was disproportionate to remove the claimant.

The Law

15. The powers of the Secretary of State to deport (or exclude) an individual who is (or is a family member of) an EEA national are set out in the EEA Regulations which, so far as they are relevant, provide:

19. ...

(3) Subject to paragraphs (4) and (5), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom under these Regulations may be removed if –

(a) that person does not have or ceases to have a right to reside under these Regulations; or

(b) the Secretary of State has decided that the person's removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.

...

21. (1) In this regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.

...

(3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security.

16. The claimant's case is that he had acquired permanent residence, an applicant must meet the requirements of Regulation 15 of the 2006 regulations which provides, as is relevant here:

15. – Permanent right of residence

- (1) The following persons shall acquire the right to reside in the United Kingdom permanently –

...

- (f) a person who –
(i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and
(ii) was, at the end of that period, a family member who has retained the right of residence

17. The retention of the right of residence is governed by regulation 10 which, so far as is relevant, provides:

10. ,,,

- (5) A person satisfies the conditions in this paragraph if –
(a) he ceased to be a family member of a qualified person or of an EEA national with a permanent right of residence on the termination of the marriage or civil partnership of that person;
(b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;
(c) he satisfies the condition in paragraph (6); and
(d) either –
(i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

Discussion

18. The claimant's case is that during his marriage to Ms Etien, he had been the spouse of a qualified person; and, after his divorce, that he was a family member who had retained the right of residence; that both periods were in accordance with the EEA Regulations; and, accordingly, at the end of the five year period commencing with his marriage to Ms Etien, he had acquired permanent residence.

19. The effect of the EEA Regulations is that the claimant needed to show that his residence here had, until the point of divorce, been in accordance with the regulations which requires him to show that she had been at all material times a qualified person by exercising Treaty Rights. Further, he also needed to show that he was a person who had retained the right of residence as defined in regulation 10.
20. Mr Jacobs was unable to direct me towards any material relating to the continuity of Ms Etien's employment up to the date of divorce. I accept that the respondent must at several points have been satisfied, as was the Immigration Appellate Authority on an earlier occasion, that the claimant's first wife had been a qualified person, but that is not, without more, a sufficient basis for concluding that the requirements of the EEA Regulations had been met.
21. Further, all of the requirements in regulation 10 (5) (a) to (d) had to be met in order for him to be treated as a person who had retained the right of residence. While there is no challenge to the Tribunal's finding that the claimant met the requirements of regulation 10 (5) (d) and there is substantial evidence from Royal Mail that the claimant did fulfil the requirements of paragraph 10(6) of the EEA Regulations, there claimant also needed to show that he met the requirements of regulations 10 (5) (a) to (c). There is no indication that the Tribunal considered these requirements, nor is there evidence that Ms Etien was a qualified person up until their divorce
22. There is there is nowhere in the material before me evidence relating to the whole of the period prior to the divorce nor is it explained in the determination how the Tribunal concluded that the requirements of paragraph 10(5) (b) in respect of the continued exercise of treaty rights by Ms Etien had been shown.
23. It was therefore not open to the Tribunal to conclude that the claimant had acquired a right or permanent residence. That is not, however, a sufficient basis to set aside the determination, given that the Tribunal found that they would have allowed the appeal in any event, had they had to consider the appeal on the stricter test applicable to those who had not acquired
24. In this case there is no challenge by the respondent to the Tribunal's finding that the appellant presented a low risk of reoffending which is a significant finding with respect to the question of whether the appellant presents a "genuine present and sufficiently serious threat to the interests of public policy". Further, there is no real challenge to the Tribunal's finding that the appellant is of previous good character, that he would be unlikely to fall under the bad influence of others in the future and that it would not be in his children's best interests either for them to be removed to Ivory Coast or for them to be separated from him. These were all considered to be significant factors weighing in his favour. The Tribunal gave adequate and sustainable reasons for these findings.
25. It is clear from the determination that the Tribunal were aware of the sentencing remarks and the basis on which the claimant he had been convicted [12] that they were aware of the seriousness of the offence. The submission that the seriousness of

the offence, or the fact that it involved an abuse of trust should be taken into account is without merit; these are not relevant considerations within Regulation 21(5) or (6).

26. While Mr Avery submitted they are factors to be taken into account in assessing likelihood of re-offending, that is not what was pleaded in the grounds of appeal; there was no challenge to the Tribunal's finding on that matter.
27. There is no challenge to the Tribunal's findings of fact that the appellant has spent a significant period of time in the United Kingdom, had been in employment here, and is socially and culturally integrated into the country. I am satisfied that the Tribunal gave adequate reasons for reaching their conclusion that, particularly in light of their unchallenged assessment of the low risk of reoffending, the claimant's appeal fell to be allowed under the EEA Regulations, even on the lower test applicable to those who had not acquired permanent residence.

Conclusion

28. Accordingly, although the Tribunal erred in finding that the appellant had acquired the permanent right of residence, that error was not material as they gave sufficient, adequate and comprehensible reasons for concluding why, on the lower test applicable to those who are family member of EEA nationals who are qualified persons, it was disproportionate to remove the appellant having had regards to the provisions of Regulations 21(5) and (6) of the 2006 Regulations. For these reasons I uphold the decision of the First-tier Tribunal.

Summary of Conclusions

- (1) The determination of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed

Date

Upper Tribunal Judge Rintoul