Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33155/2013

THE IMMIGRATION ACTS

Heard at: Field House	**Determination Promulgated**
On 20 June 2014	**On 2 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ILIJA GACEV
(anonymity direction not made)

Respondent

Representation

For the Appellant: Mr S Kandala, Home Office Presenting Officer
For the Respondent: Ms V Targonska, Igor & Co, Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the determination of First-tier Tribunal Judge L Murray in which she allowed the appeal of the Claimant, a citizen of Macedonia, against the Secretary of State's decision to refuse to issue a Permanent Residence Card as confirmation of the Appellant's

right to reside in the United Kingdom. The Judge allowed the appeal on the basis that the decision was not in accordance with the law because the Respondent failed to consider the application under the Long Residence and Private Life policy. For convenience I will refer to the parties as they appeared before the First-tier Tribunal.

2. The Appellant's application for a Residence Card was refused by reference to regulations 15(1)(f), 15(1)(b) and 10(5) of the Immigration (EEA) Regulations 2006 (as amended) on 18 July 2013. The Appellant exercised his right of appeal to the First-tier Tribunal and at the appeal hearing accepted that he did not meet the requirements of the EEA regulations but asserted that the decision had not been made in accordance with the Respondent's policy. It was on this limited basis that the appeal was allowed. The Respondent applied for permission to appeal to the Upper Tribunal. The application was granted by First-tier Tribunal Judge Reed on 13 May 2014 on the basis that

> "The Grounds do disclose arguable errors of law because irrespective of whether or not the appellant had previously held a Residence Card, for the policy to apply, the appellant would have to show 10 years of lawful residence. This means during any period during which the appellant relied upon the EEA Regulations the relevant EEA national must have been exercising her treaty rights. The Judge has erred because he appears to have concluded that as the appellant had a Residence Card as the family member of an EEA national between February 2002 and February 2007 there was no need for him to demonstrate that the relevant EEA national was exercising her Treaty rights during this period. There is no reference in the determination to evidence that the EEA national was indeed exercising her Treaty rights throughout that period."

3. At the hearing before me the Appellant was represented by the Ms Targonska and Mr Kandala appeared to represent the Secretary of State. Ms Targonska submitted a copy of the Respondent's policy guidance 'Long Residence and Private Life' having previously submitted a copy of the determination in the Appellant's previous appeal (IA/18773/2007). Mr Kandala submitted a copy of the decision in Boodhoo and another (EEA Regs: relevant evidence) [2013] UKUT 00346 (IAC).

Submissions – Error of Law

4. On behalf the Secretary of State Mr Kandala relied on the grounds of appeal to the Upper Tribunal. The authority of Boodhoo (at paragraph 18) and previous authorities show that the issue of a Residence Card is not a status given but a confirmation of status and whether a person is a qualified person is a matter of fact. The Court of Justice took the same approach in Dias [2011] EUECJ C-325/09. It was conceded at the

First-tier Tribunal hearing that the Appellant did not meet the requirements of the regulations (paragraph 12). The chronology is referred to in paragraph 21 of the determination and the Judge notes that the Appellant held a Residence Card from 11 February 2002 until February 2007 and finds that he was therefore *"lawfully resident over this period"*. This does not automatically follow. The Judge goes on to note that his application for a Permanent Residence Card was refused on 24 October 2007 and his appeal against that refusal dismissed on 2 April 2008 and adds that before the time limit for appeal that decision had expired he was granted temporary admission. Temporary admission is not a grant of lawful residence and whereas a gap between certificates is not necessarily fatal it is a question of fact whether during any period a person is the family member of someone exercising treaty rights. The Respondent's Long Residence and Private Life Policy referred to in paragraph 22 is not applicable, if lawful residence cannot be shown under the regulations it cannot be shown under the policy.

5. For the Appellant Ms Targonska referred to KA (Afghanistan) and said that once an application has been refused the Secretary of State needs to consider all grounds put forward. The Long Residence and Private Life policy was raised in the application. It is accepted that the Appellant does not meet the requirements of the EEA regulations. However the issue of the Residence Card is proof that the appellant has been here lawfully. The policy should be looked at as a whole and the Judge was correct in her finding at paragraph 22. Despite the fact that the Appellant's former wife was not exercising her treaty continuously the Judge was correct in allowing the appeal. There would be no sense in having a policy outside the regulations if to meet the requirements of the policy a person needed to meet the requirements of the regulations. It all comes back to 10 years lawful residence and the only issue is whether the Appellant has completed this period.

6. Mr Kandala responded to say that the rationality of the policy could be the situation where a person has a mixture of lawful residence part being in accordance with the Immigration rules and part in accordance with the Regulations. Mr Targonska disagreed.

Decision

Error of law

7. The Appellant applied for a Permanent Residence Card as confirmation of a right to reside in the United Kingdom. His application was based upon a retained right of residence following his divorce from Marcia Regina Leites an EEA national. The application was refused because the Respondent was not satisfied that the Appellant had a retained right of residence in accordance with regulation 10 of the Immigration (European Economic Area) Regulations 2006. There were three prime reasons given. Firstly it was not accepted that his divorce, obtained in Macedonia was valid under English law. Secondly it was not accepted that the Appellant's former spouse was exercising treaty rights at the time of the divorce. Thirdly it was not accepted that the Appellant's former spouse had continuously exercised treaty rights up to the time of their divorce.

8. At the appeal hearing before the First-tier Tribunal the Appellant's representative accepted that the Appellant was not validly divorced and therefore could not rely on the EEA regulations and instead relied upon the Respondent's guidance on Long Residence and Private life. The argument put forward was that the Appellant had lived lawfully in the United Kingdom for more than 10 years and that although residing lawfully under the EEA regulations does not count as lawful residence under paragraph 276A of the Immigration Rules for family members of EEA nationals the Respondent's policy makes such provision. The Judge found (at paragraph 22) that the Appellant was lawfully resident in the United Kingdom *"under the EEA regulations, by virtue of statute due to appeal rights and by virtue of temporary admission"* from 11 February 2002 to 5 May 2014 and so met the requirements of the Respondent's policy. The Judge therefore dismissed the appeal under the EEA regulations but allowed it on the basis that the decision was not in accordance with the law because the Respondent failed to consider the application under the Long Residence and Private Life policy.

9. In my judgement the First-tier Tribunal erred in law in making the finding that the Appellant had been lawfully resident in the United Kingdom from 11 February 2002 to 5 May 2014. The error comes about firstly in the finding (paragraph 21) that the fact that the Appellant held a Residence Card from 11 February 2002 until February 2007 meant that he was lawfully resident during this period. It is trite law that the issue of a Residence Card is not a grant of leave to remain. The effect, as confirmed by Dias is that whether a person is a qualified person is a matter of fact.

10. Secondly the Judge finds that the Appellant's residence remained lawful due to his exercise of appeal rights. This is a further error of law. The exercise of appeal rights has the effect of extending existing leave to remain (section 3C Immigration Act 1971). The Appellant never held leave to remain, his appeal was against the decision to refuse to issue a Permanent Residence Card as confirmation of a right to remain. Whether he held a right to remain (as the spouse of an EEA national exercising treaty rights) was a matter of fact.

11. Thirdly the Judge errs by finding that temporary admission constitutes lawful residence. It does not. Section 276A(b)(ii) of the Immigration Rules states that temporary admission only qualifies as lawful residence if leave to enter or remain is subsequently granted. The Respondent's policy upon which the decision to allow this appeal was based specifically states (page 22 of 67)

> "Temporary admission only qualifies as lawful residence if leave to enter or leave to remain is later granted."

The Appellant has never had leave to enter or leave to remain.

12. Finally the finding that the Appellant's Residence Card granted from 5 May 2009 until 5 May 2014 means that the Appellant was lawfully residence during this period is an error of law. As with the previous Residence Card this is not a grant of leave to remain and whether the Appellant was entitled to residence as the spouse of an EEA national is a question of fact.

13. The errors of law identified are all fundamental to the Judge's decision to allow the appeal on the basis that the decision was not in accordance with the law because the Respondent failed to consider the application under the Long Residence Policy. It cannot render the decision unlawful because the Respondent failed to consider a policy that was not applicable. The decision in this respect is set aside.

Remaking the decision

14. In remaking the decision the conclusion that must be drawn follows from the above. In the first place the appeal was dismissed by virtue of the EEA regulations and that decision is not challenged and must stand. There is in my judgment no reason to reach the conclusion that the Respondent's decision was not in accordance with the law. It clearly was, the Appellant having made an application for a Permanent Residence Card in accordance with the EEA Regulations accepts that he did not meet the requirements of the Regulations because he was not

entitled to reside as the spouse or former spouse of a qualified person. The Appellant was not able to show, indeed for the reasons given above he could not show, that he had been lawfully resident either in accordance with the Immigration Rules or the EEA regulations for a continuous period of 10 years. He therefore did not meet the requirements of the Respondent's Long Residence Policy. The Respondent's decision was lawful and the appeal is dismissed.

Summary

15. The decision of the First-tier Tribunal to allow the appeal on the basis that the Respondent's decision was not in accordance with the law involved the making of a material error of law. I allow the Secretary of State's appeal against the decision of the First-tier Tribunal and set aside that decision.

16. My decision is that the Secretary of State's decision was in accordance with the law and the EEA Regulations. The Appellant's appeal is dismissed.

Signed: **Date:**

J F W Phillips
Deputy Judge of the Upper Tribunal