IAC-PE-AW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16664/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 24th November 2014	**On 22nd December 2014**

Before
DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MR MUHAMMAD SOHAIL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr O'Ryan of Counsel
For the Respondent: Mr McVeety

DECISION AND REASONS

Introduction

1. The Appellant born on 9th April 1973 is a citizen of Pakistan. The Appellant had made application for entry clearance as a family member of an EEA national exercising treaty rights under the 2006 EEA Regulations. The Respondent had refused that application on 19th July 2013. The Appellant had appealed that decision and his appeal was heard by Judge of the First-tier Tribunal Lambert sitting at Manchester on 21st May 2014. She had

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dismissed his appeal both under the 2006 Regulations and under Article 8 of the ECHR.

2. Application for permission to appeal had been made on the Appellant's behalf with Grounds of Appeal dated 6th June 2014. Permission to appeal had been granted by Judge Easterman on 18th July 2014. Permission to appeal was granted on the basis that the case of **O v The Netherlands C-456-12** arguably should have been given precedence than the Regulations and permission was granted on all grounds.

Submissions on Behalf of the Appellant

3. Mr O'Ryan referred me to the comprehensive Grounds of Appeal. Essentially and in brief summary it was submitted that the Appellant was married to a British national who had been exercising treaty rights in Denmark as a worker for a three year period between 2003 and 2006. The Appellant had obtained a Danish permanent residence card in 2008 and in 2009 had acquired the right to permanently reside in Denmark after completing five years' residence as the non-EEA family member of an EEA national. The Appellant's wife had then returned to the UK in 2010 due to family circumstances. It was submitted that it was a material error of law for the judge to have preferred the 2006 Regulations rather than the EU case of **O v The Netherlands** whilst conceding that currently the Regulations in that case are incompatible. Nevertheless it was submitted that primary legislation should be disapplied where the substantive rights at issue are within the material scope of EU law as a result of the Treaty of Lisbon in December 2009.

Submissions on Behalf of the Respondent

4. Mr McVeety whilst conceding this was not an easy decision referred to the Respondent's response in this matter dated 25th July 2014. At the conclusion I reserved my decision on whether or not an error of law had been made and now provide that decision with my reasons.

Decision and Reasons

5. The judge noted at paragraph 4.3 that there was no dispute of facts before her. It was noted that the Appellant had been removed from the United Kingdom in 2002 having overstayed as a visitor since 1999. His wife, the Sponsor, had moved to live in Denmark in 2003 and worked there until 31st October 2006. The Appellant and Sponsor had married in Pakistan in February 2004 and the Appellant had joined his wife in Denmark in June 2004. He subsequently obtained an EEA permanent residence card in Denmark in 2008. The couple have two children born in July 2005 and March 2007 and there is a further child namely the Sponsor's 16 year old daughter from her previous marriage. The Sponsor had returned to the United Kingdom from Denmark with her three children on 8th December 2010.

6. The Appellant had initially applied for entry clearance to the United Kingdom as a spouse under paragraph 281 of the Immigration Rules but that application had been dismissed on 28th June 2012 as the evidence before the Immigration Judge on that occasion demonstrated he could neither meet the language nor the income requirement of the Rules. It was also noted that on that previous occasion the judge had described the Appellant's previous convictions as "a sequence of extremely grave offences" and concluded that his exclusion from the United Kingdom was conducive to the public good under paragraph 320(19).

7. The judge had noted in line with the case of **Devaseelan** that the previous Immigration Judge had made no findings as to the Appellant's position under the EEA Regulations which was the matter that was essentially before her. The Respondent's principal argument was that the Sponsor had not been economically active in exercising treaty rights prior to her return to the United Kingdom in 2010 and accordingly the Appellant failed to satisfy Regulation 9(2)(a) of the 2006 Regulations which was designed to incorporate into UK law the decision in **Surindher Singh**.

8. The judge had been referred to the case of **O v The Netherlands C-456-12** which essentially extended the principal in **Surindher Singh** and was a decision of the European Court. The Immigration Judge conceded at paragraph 4.8 that having read that decision it was a matter that could be argued in support of the Appellant's case but took the view that her role was to determine whether the Respondent's decision was in accordance with the United Kingdom law as set out in 2006 Regulations.

9. The first matter is whether there is an incompatibility between the 2006 Regulations and the decision in **O v The Netherlands** a judgment handed down on 12th March 2014. In summary at paragraph 61 of that judgment the court stated that Article 21(1) the TFEU must be interpreted as meaning that where a Union citizen has created or strengthened a family life with a third country national during genuine residence pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004-38, in a Member State other than that of which he is a national the provisions of that Directive applied by analogy where that Union citizens returns with the family member in question to his Member State of origin. It seems therefore that a key to the court's judgment is whether the Union citizen had been conforming with the condition set out in Article 7(1) and (2) in the Member State other than that to which they are a national. The court referred to Article 7(1) and (2) of the 2004/38 Directive at paragraph 7 of that same judgment. That Article provided that all Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

   (a) are workers or self-employed persons in the host Member State; or

   (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host

Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) are enrolled at a private or public establishment accredited or financed by the host Member State on the basis of its legislation or administrative practice for the principal purpose of following a course of study including vocational training and have comprehensive sickness insurance cover;

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

10. The facts of the case before the First-tier Judge indicated that the Sponsor British spouse had been in employment in Denmark for a three year period between 2003 and 2006 and therefore was exercising treaty rights within the terms of Article 7(1)(a) as referred to above. However it would appear that since 2006 the Sponsor spouse had not worked in Denmark and had been receiving disability living allowance in Denmark prior to her arrival in the UK in 2010. It would appear therefore that the Sponsor spouse had between the period of 2006 and 2010 not been a worker within the terms of Article 7(1)(a) nor is there evidence that she had fulfilled the criteria within Article 7(1)(b) or 7(1)(c). It also follows therefore that the Appellant as a family member did not satisfy Article 7(1) or (2) because his wife did not fall within the criteria of Article 7(1)(a), (b) or (c). Accordingly when looking at the judgment of **O v The Netherlands** and in particular the conclusion paragraph at 61 the Union citizen, namely the Appellant's wife, had not during that period of residence in Denmark in the previous four years been pursuing that residence in conformity with the conditions set out in Article 7(1) and (2) and to that extent it could not be said by analogy that the provisions within Directive 2004/38 applied where the Appellant's wife returned from Denmark to the United Kingdom. On the face of it therefore, and I accept this is not an easy matter, the specific facts of the case before the First-tier Tribunal Judge did not necessarily demonstrate that the Appellant and his wife could rely upon the judgment in **O v The Netherlands** because the Appellant's wife did not appear to have fulfilled the criteria within Article 7(1) an (2) which appears to be a requirement for the operation of the exercise of movement by the third party national envisaged within the case of **O v The Netherlands**.

11. Secondly even if there had been some incompatibility between that case handed down in March 2014 and the 2006 EEA Regulations any declaration of incompatibility was not something that could be done at the level of the First-tier Tribunal and the judge was not wrong therefore to have followed and complied with the 2006 Regulations.

12. In the sense that I am being asked as to whether an error of law was made by the First-tier Tribunal, firstly it does not appear that in the specific facts of this case there was necessarily any incompatibility between the judgment in **O v The Netherlands** and the 2006 Regulations referred to by the First-tier Judge. Secondly even if there was or potentially an

incompatibility it was not within the terms of the First-tier Tribunal Judge to make a declaration of incompatibility or do anything other than follow the 2006 Regulations which was the decision taken.

13. Accordingly therefore there was no error of law made by the First-tier Tribunal in this case. If a genuine incompatibility does exist within the facts of this specific case as between the European Court judgment in **O** and the current 2006 Regulations a declaration of incompatibility or a remedy for such incompatibility would lie with a higher court seized of that matter.

Notice of Decision

There was no error of law made by the judge in this case and I uphold the decision of the First-tier Tribunal.

No anonymity direction is made.

Signed Date **22nd December 2014**

Deputy Upper Tribunal Judge Lever