IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/16480/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 August 2015	**On 9 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

ARSHAD JAVED DAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Nazim of Counsel
For the Respondent: Mr Avery, a Home Office Presenting Officer

DECISION AND REASONS FOR FINDING NO ERROR OF LAW

Introduction

1. This is an appeal by the appellant against a decision of the First-tier Tribunal Judge Page ("the Immigration Judge") to dismiss his appeal against the decision made by the respondent to refuse the appellant a residence card under the EEA Regulations. The hearing took place on 8 January 2015 and was promulgated on 20th January 2015. Both sides were represented at that hearing.

2. As was observed by Judge Rintoul, when he granted permission to appeal to the Upper Tribunal, the grounds are very lengthy. It has been quite hard to ascertain the basis for the appeal from those grounds but I have been given much assistance by Mr Nazim, who made lengthy oral submissions to expand on the grounds. I also had the benefit of Mr Avery's submissions, which were helpful. As well as hearing the submissions before me I have had an opportunity to read the notes of the hearing before the Immigration Judge.

Discussion

3. The issue before the Upper Tribunal is: whether it was open to the Immigration Judge in the FTT to dismiss the appeal on the basis that the appellant did not comply with Regulation 10 of the EEA Regulations 2006 or whether the Immigration Judge ought to have gone on to consider whether the appellant had acquired a right to reside in the UK by virtue of Regulation 15 of those Regulations. In particular: could it be said that the appellant, who is not himself an EEA national, was a family member of an EEA national on the basis that he had resided in that capacity for a continuous period of five years prior to his application?

4. Upper Tribunal Judge Rintoul decided that it was at least arguable that the appellant had acquired a permanent right of residence in the UK by virtue of residing with and marriage to an Irish national, Mrs Byrne, who had been present in the UK exercising Treaty rights for a period of five years. The appellant and the sponsor had been married in 2003 and until they were finally divorced in 2013, having separated in 2007.

5. Mr Avery has drawn my attention to the fact that case was effectively presented before the Immigration Judge on the basis that the appellant satisfied Regulation 10, which gives a family member of an EEA national a retained right of residence in the UK in the circumstances set out in that regulation, not regulation 15. That would have been on the basis that he retained a right of residence in the UK by virtue of his former marriage to Ms Byrne and he ceased to be a family member with her on the termination of the marriage. This, combined with an earlier continuous period of residence with her of at least one year during a marriage that lasted at least three years, meant he was a family member with a right of residence for the purposes of regulation 10.

6. Regulation 10(5) provides that a person satisfies the conditions of that Regulation (i.e. has a retained right of residence) if he can satisfy one of the conditions set out in sub-paragraph (5). These include the requirement that for at least three years before the marriage ended the parties lived together and at least one year of those three years was present in the UK.

7. I have considered the cases of **PM** [2011] UKUT 89 and **OA** [2010] UKAIT 00003 to which my attention was drawn. These help to illuminate the relationship between the regulations 10 and 15.

(1) To rely on regulation 10 the applicant must show that the marriage lasted at least three years, of which at least one has been in the member state where he seeks permanent residence.

(2) If the couple separate, but do not divorce, no right of residence is retained but the separated spouse can apply under regulation 15 (1) (b) on the basis that he has resided continuously in the UK for a period of at least five years "in accordance with the regulations".

(3) Before the applicant can succeed in an application for permanent residence he must be the member of a family unit who satisfies certain requirements, e.g. that he is a worker within the meaning of the regulations, but PM makes it clear that they do not need to live together in the same household to qualify.

(4) The applicant must show that he has resided in the UK "in accordance with the regulations" in order to qualify under regulation 15 (1) (b) or (f).

8. The respondent says in her rule 24 response dated 20th July 2015, that even if the appeal is considered under regulation 15 the appellant still fails because his residence card was cancelled in 2006 and subsequent applications and appeals against this refusal to grant him a residence card were dismissed. This means that the appellant did not reside in the UK in accordance with the regulations for a period of at least five years.

9. Accordingly, if the respondent is correct, the appellant qualifies under neither regulation.

Conclusions

10. I can find no evidence in the notes of the hearing or in the decision itself which suggests that Regulation 15 was referred to in the course of submissions. It may have been referred to in the course of correspondence before the hearing and it appears to be intended to make a reference to it in the grounds. Both parties were represented at that hearing and it was open to the appellant's representative to put forward any argument that he considered appropriate.

11. The burden rested on the appellant to show that he fell within whichever Regulation he relied on and to show why there is said to have been an error of law on the part of the Immigration Judge.

12. When regulation 15 is considered it appears not to have been satisfied because the appellant cannot be shown to be in the UK for a continuous period of five years "in accordance with the regulations", his residence card having been cancelled in 2006. In addition the sponsor cannot be shown to have been a worker within the meaning of regulation 6 of the regulation as to be a "qualified person".

13. In the circumstances, I am not satisfied that there was a material error of law in the decision of the FTT.

14. Article 8 of the ECHR was considered by the Immigration Judge, but this has not been pursued before the Upper Tribunal and having regard to the extent of the grant of permission, argument has effectively limited to the appeal against the decision in relation to the residence card. In any event the Immigration Judge's reasons for refusing to allow the appellant to remain in the UK on human rights grounds appear comprehensive.

Notice of Decision

The decision of the First-tier Tribunal does not contain an error of law and this appeal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Hanbury

Fee award

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Hanbury