



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/25923/2014

THE IMMIGRATION ACTS

Heard at Field House
On 29th May 2015

Decision and Reasons Promulgated
On 22nd June 2015

Before

UPPER TRIBUNAL JUDGE FINCH

Between

CHRISTOPHER CARTER RANDALL

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. T. Melvin, Home Office Presenting Officer

For the Respondent: Mr. D. Neale, instructed by Peter Lock and Company Solicitors

DECISION AND REASONS

History of Appeal

1. The Appellant, who was born on 27th April 1970, is a citizen of the United States of America. He married Milena Chomova on 10th September 2011. She is a national of the Slovak Republic, who was born on 1st July 1976. On 5th November 2013 he was granted entry clearance to the United Kingdom as the family member of an EEA national and he entered the United Kingdom on 1st December 2013. He has also been previously granted entry clearance in the same category and during his earlier period of leave on 19th September 2013, he was offered employment as a Senior Manager:

Quality Integration on a salary of £75,000 per annum. He started this employment on 4th November 2013.

2. On 2nd May 2014, the Appellant applied for a residence card to confirm his right to reside in the United Kingdom. The Secretary of State for the Home Department refused his application on 12th June 2014 on the basis that there was insufficient evidence to establish that his wife was an EEA national who was financially self-sufficient. The Respondent relied on the case of AG and others (EEA - jobseeker, self-sufficient person - proof) Germany [2007] UKAIT 00075 and noted that the Appellant's wife's only source of income appeared to be his salary.
3. The Appellant appealed against this decision and in a determination with reasons, promulgated on 23rd September 2014, First-tier Tribunal Judge Colvin allowed his appeal. Firstly, she found that, as the Appellant was working here on a legal basis, his income could be taken into account to show that his wife was self-sufficient for the purposes of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). In the alternative, she found that the bank statements submitted for the appeal established that the Appellant's wife was a self-sufficient person for the purposes of the Regulations, even if the Appellant's income was disregarded.
4. The Secretary of State for the Home Department appealed on 26th September 2014 and First-tier Tribunal Judge Pooler found that the grounds were arguable insofar as they focus on the Judge's finding that the Appellant's income from employment in the United Kingdom could be taken into account when finding that his EEA national spouse was self-sufficient. But he also noted that the Judge had found in favour of the Appellant on the basis that she had otherwise found that the Appellant met the requirements of Regulation 4 on self-sufficiency. As a consequence, he found that the grounds did not demonstrate an arguable and material error of law.
5. On 20th November 2014 the Secretary of State for the Home Department renewed her appeal to the Upper Tribunal. She said that she continued to rely on the grounds submitted to the First-tier Tribunal but also asserted that the savings relied upon by First-tier Judge Colvin were inadequate to render the Appellant's wife self-sufficient and were, in any event, the product of the Appellant's employment. She added that it would be bizarre if the circularity argument which disqualifies the Appellant and his EEA spouse from relying on his earnings did not also apply to the savings that are the result of those earnings. On 20th February 2015 Deputy Upper Tribunal Judge Bruce found that the Secretary of State for the Home Department's grounds were arguable.

Error of Law Hearing

6. The Appellant's counsel submitted a skeleton argument and the case of Alokpa C-86/12 at the start of the hearing.
7. The Home Office Presenting Officer then made his submissions. He argued that guidance provided by the Home Office does not have the same legal status as statute and that there was no evidence before the First-Tier Tribunal paper hearing to show

that the Appellant's wife was exercising a Treaty right. He also asserted that their joint savings derived from the Appellant's husband's earnings.

8. The Appellant's counsel then stated that the Appellant's wife was now working four hours a week and submitted evidence, which confirmed that this was the case. It also revealed that she had been working since August 2014, which was prior to the First-tier Tribunal hearing.
9. The Appellant's counsel then made his oral submissions and confirmed that he was not arguing that AG and Others was not good law. But asserted that the Appellant could rely on the joint savings he held with his wife as they derived in part from her redundancy payment and in part from salary paid to the Appellant when he was working lawfully in the United Kingdom.
10. He also relied on the fact that the evidence, which was before First-tier Tribunal Judge Colvin, was sufficient to show that the Appellant's wife was self-sufficient.
11. In paragraph 14 of her determination with reasons First-tier Tribunal Judge Colvin said that she accepted that it was reasonable for the Appellant to interpret the wording of the Guidance note for applying for residence documentation as an EEA national or as the family member of an EEA national issued by the Home Office on 1 January 2014 and EEA application forms as permitting the income of the family member to show self-sufficiency. At the error of law hearing the Home Office Presenting Officer correctly pointed out that guidance does not have the force of statute. In addition, at paragraph 82 of AG and Others the Upper Tribunal found that it had to apply the EEA Regulations and that the IDIs, which are comparable to the Guidance, are at most an aid to the construction of the Regulations.
12. Regulation 4(4) of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") does state that for the purposes of the definition of a 'self-sufficient person' provided in regulation 1(1)(c) "the resources of the person concerned and, where applicable, any family members, are to be regarded as sufficient". However, I note that the phrase "where applicable" limits the utility of this statement.
13. Furthermore, I find that this subsection and also sub-section 4(2)(a), which again refers to the resources of an applicant and his family, must be viewed within the overall context of the EEA Regulations and the Citizens' Directive. When doing so, I have taken into account the fact that at paragraph 72 of AG and Others the Upper Tribunal found that "both the Regulations and the Citizens' Directive make very clear that the right to reside of family members is dependent upon their being family members of a Union citizen who can establish a right to reside in his or her own right". Then at paragraph 73 it found that "the right of residence of the family member is premised upon the Union citizen being able, separately, to satisfy the requirement of self-sufficiency".
14. Although there was discussion in the factual circumstances of AG and Others about whether the relevant income was earned lawfully, this did not mean that the

Appellant and his wife could rely on income he had lawfully earned if she was not exercising a right of free movement in the United Kingdom. Therefore, I find that First-tier Tribunal Judge Colvin did err in law when she found in paragraph 15 of her determination with reasons that “due to the fact that [her husband] is legally working in the UK as the family member of the EEA national under an EEA family permit his income [alone] may be taken into account in showing his wife’s self-sufficiency under the [EEA] Regulations”. As submitted by the Respondent in her grounds of appeal to the First-tier Tribunal “the EEA national sponsor must first exercise her treaty rights to enable the appellant to derive his rights”.

15. This approach was also adopted in Alokpa C-86/12 where the ECJ found at paragraph 25 that “it is clear from the case law of the Court that the status of ‘dependent’ family member of a Union citizen holding a right of residence is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence, so that, when the converse situation occurs and the holder of the right of residence occurs and the holder of the right of residence is dependent on a third country national, the third country national cannot rely on being a ‘dependent’ relative...”
16. However, in paragraph 16 of her determination with reasons First-tier Tribunal Judge Colvin also found that “even when disregarding the appellant’s income, the requirements of regulation 4 on self-sufficiency are shown”. She relied on the fact that there was a Lloyds Joint Easy Saver which had a balance of £36,000 on 26th June 2014 and that there was also an ending balance of US\$5303 (or approximately £3,255) in two joint accounts with Membership Savings and Desert Fusion Checking in May 2014.
17. These documents were contained in the very extensive bundle prepared for the First-tier Tribunal hearing. Annexe 12 contained statements from Classic Vantage joint account held by the Appellant and his wife at Lloyds Bank. Sheet 43 of 49 shows £16,751.27 being paid into their joint account on 7th May 2014 and the statement entries in Annexe 11 show this same sum being transferred on that same day into their joint Lloyds Easy Saver account. The same statement shows that no money had been transferred out of that account by the time of the hearing before First-tier Tribunal Judge Colvin.
18. The Appellant’s own bank statements show payments in for his salary and travel expenses but do not show any payment out of £16,751.27 or any ability to pay such a sum into their joint account on 7th May 2014. The grounds of appeal, which were before First-tier Tribunal Judge Colvin also clearly state that the £16,751.27 derived from a redundancy package awarded to the Appellant’s wife by DHL. In addition, there were statements showing that the Appellant and his wife held joint savings with the Desert Schools Federal Credit Union and that she had three additional bank accounts of her own in the Slovak Republic.

19. In the light of this evidence, it is clear that there was a lawful basis for First-tier Tribunal Judge Colvin to find that the Appellant's wife was self-sufficient at the date of the paper hearing before here.

Conclusion

1. The First-tier Tribunal Judge's determination with reasons, promulgated on 23rd September 2014, did not include a material error of law, as the evidence of the joint savings and accounts held by the Appellant and his wife confirmed that she had resources of her own, which indicated that she was self-sufficient for the purposes of the EEA Regulations at the date of the First-tier Tribunal hearing.
2. The Secretary of State for the Home Department's appeal to the Upper Tribunal is dismissed.
3. The First-tier Tribunal Judge's decision is upheld.



Upper Tribunal Judge Finch

Date 19th June 2015