IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21637/2014

THE IMMIGRATION ACTS

Heard at Victoria Law Courts, Birmingham	**Decision & Reasons Promulgated**
On 19 January 2016	**On 1 April 2016**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

VRUTIN TARUNCHANDRA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No legal representative – Mr C Decker (McKenzie friend)
For the Respondent: Mr D Mills, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is now a Portuguese citizen, having formerly been a citizen of India. He was born on 2 June 1992.

2. On 14 March 2014 he made an application for a residence card confirming a permanent right of residence. His mother made the same application. Both applications were refused in decisions dated 28 April 2014.

3. The appellant and his mother appealed against those decisions and their appeals came before the First-tier Tribunal on 6 October 2014, whereby the appeals were dismissed.

4. The appellant's mother has now been issued with a permanent residence card and accordingly her appeal is not before me.

5. The appellant's appeal is predicated on the basis of the exercise of Treaty rights of his father, Tarunchandra Geichande, a citizen of Portugal. The respondent was not satisfied that the evidence established that he had acquired permanent residence by the exercise of Treaty rights. Accordingly, the appellant could not acquire permanent residence through him. The particular facts are best illustrated with reference to the decision of the First-tier Tribunal.

The First-tier Tribunal's Decision

6. At [11] the judge noted that the documentary evidence showed that the sponsor came to the UK in March 1998. He ceased work in January 2003 and had therefore been working for a period of just under five years. The claim on behalf of the appellant was that he was unable to continue working because of incapacity, having had an accident at work in 2003.

7. The judge went on to conclude however, that the evidence was inconsistent in terms of the sponsor's ability to work. She noted that in the application forms the appellant and his mother had said that the sponsor was permanently incapacitated. However, in her appeal the appellant's mother had said that he had had a temporary period of unemployment due to illness. At the hearing, the first appellant had said that his father had stopped work because of diabetes and hypertension, not because of an accident that had happened at work.

8. The First-tier judge concluded therefore, that not only was there inconsistent evidence as to whether the appellant's father's incapacity was permanent or not but also as to whether it was caused by an accident at work. She stated at [15] that it was reasonable to suppose that if he had medical conditions preventing him from working he would have sought medical assistance and therefore could have provided independent medical evidence to support the claim. She found that there was no such evidence before her. She decided therefore, that it had not been established that the sponsor was temporarily unable to work as the result of illness or accident, as required by regulation 6(2)(a) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations").

9. With reference to reg 5, she accepted that he had been working for at least 12 months, in fact nearly five years, before he stopped work and that

he had resided in the UK for more than three years prior to ceasing employment. She found that reg 5(2)(b) and (c) were satisfied. She went on to find at [17] however, that the sponsor did not satisfy the requirement of reg 5(3)(a) because the appellant had not discharged the burden of proof in terms of whether or not the incapacity was permanent. She did accept that he had lived in the UK for more than two years before he ceased employment (reg 5(3)(b)(i)).

10. At [18] the judge further concluded that because of the lack of evidence of the sponsor having comprehensive sickness insurance, the appeal failed on that basis also (presumably in terms of the requirement for the appellant as a student to have such insurance).

11. The judge accepted that the appellant's mother, the first appellant before her, had by the time of the hearing obtained Portuguese nationality and had thus acquired EU rights of her own as an EEA national. She declined however, to take that into account in terms of the appeal in relation to the appellant's mother.

Submissions

12. Mr Decker acted as a McKenzie friend for the appellant. He confirmed that he was indeed a friend of the appellant and was not being paid for his assistance. He said that he was not legally qualified, although was presently a law student. He said that he had never acted for anyone else in proceedings before a Tribunal. He had known the appellant for about two years. Mr Mills had no observations on Mr Decker being permitted to provide assistance to the appellant. The appellant confirmed his wish for Mr Decker to assist him. In the circumstances, I allowed Mr Decker to assist the appellant.

13. The original grounds seeking permission to appeal in relation to the decision of the First-tier Tribunal were refined in the renewed grounds, permission then being granted by a judge of the Upper Tribunal. Mr Decker explained that his arguments on behalf of the appellant could be further narrowed.

14. It was argued firstly that the First-tier Tribunal did not take into account material evidence, namely evidence of the appellant's father's national insurance payments as set out at D1 of the appellant's bundle. That record of his father's national insurance contributions shows that between 1998 and 2005 class 1 national insurance contributions were paid by his employer. The appellant's father had arrived in the UK in 1998 and had stopped work in 2003 as a result of illness. The national insurance contributions showed that he was nevertheless still classed as a worker.

15. Secondly, at [16] of the decision the judge was wrong to use the present tense in stating that it had not been established that the appellant's father "is temporarily unable to work as the result of an illness or accident" when the question should have been whether he was previously unable to work

as a result of illness or accident. That argument it was said related to reg 15(1)(b).

16. The appellant's father had acquired permanent residence in 2003. The appellant himself had been in the UK since January 2002. Accordingly, by 2007 he had acquired five years' residence in accordance with the EEA Regulations. He was aged 15 at the time and was therefore a dependent relative.

17. It was argued thirdly, that the judge at [17] had mistakenly concluded that it had to be established that reg 5(2) and (3) had to be satisfied, whereas those are not separate requirements. Having concluded that reg 5(2)(b) and (c) were satisfied, the judge had no need to go on to consider reg 5(3).

18. In terms of reg 5(2)(a)(ii), the appellant's father was entitled to take early retirement because of a medical condition. It followed, that reg 15(1)(c) was satisfied, the appellant's father having been a worker or self-employed person who had ceased activity.

19. Mr Mills accepted that the judge had made an error at [17] in apparently concluding that the regulations at 5(2) and (3), and so on, were conjunctive. The judge had accepted that reg 5(2)(b) and (c) were satisfied but wrongly thought that the appellant also needed to satisfy reg 5(3)(a). Having been satisfied as to reg 5(2)(b) and (c), all she needed to consider then was reg 5(2)(a)(ii) in terms of ceasing work to take early retirement. On that basis the appeal could have been allowed because the appellant's father had acquired permanent residence in 2003, and the appellant subsequently in 2007.

20. Mr Mills submitted that it was difficult to disagree with the argument that reg 5(2)(a) applied in his case. If the judge had considered reg (5)(2)(a)(ii) it is difficult to see that she would have come to any view other than that the appellant's father had taken early retirement. Accordingly, her findings in relation to the inconsistency in the evidence in terms of whether the appellant's father was permanently incapacitated or not, were not relevant.

21. Although it could be said that there was some room for an alternative view in terms of what amounts to "early retirement", there is no authority on the point. The fact is that he has not worked since 2003. If the judge had considered reg 5(2)(a) it could not be said that she would not have found in the appellant's favour. Accordingly, the appellant's father would have acquired permanent residence in 2003 and the appellant himself in 2007, by reason of his five years as a family member who had resided in the UK with his father for a continuous period of five years.

22. It was conceded therefore, that the First-tier Judge had made an error of law and that the decision should be set aside, being re-made, allowing the appeal under reg 15(a) and (b).

My conclusions

23. In the light of the concession on behalf of the respondent before me that there is an error of law in the judge's decision requiring the decision to be set aside, and that the decision should be re-made allowing the appeal, I can express my conclusions shortly.

24. Reg 5(1)-(3) provides as follows:

> **5.— "Worker or self-employed person who has ceased activity"**
>
> (1) In these Regulations, "worker or self-employed person who has ceased activity" means an EEA
> national who satisfies the conditions in paragraph (2), (3), (4) or (5).
>
> (2) A person satisfies the conditions in this paragraph if he—
> (a) terminates his activity as a worker or self-employed person and—
> (i) has reached the age at which he is entitled to a state pension on the date on which
> he terminates his activity; or
> (ii) in the case of a worker, ceases working to take early retirement;
> (b) pursued his activity as a worker or self-employed person in the United Kingdom for at least twelve months prior to the termination; and
> (c) resided in the United Kingdom continuously for more than three years prior to the
> termination.
>
> (3) A person satisfies the conditions in this paragraph if—
> (a) he terminates his activity in the United Kingdom as a worker or self-employed person as a result of a permanent incapacity to work; and
> (b) either—
> (i) he resided in the United Kingdom continuously for more than two years prior
> to the termination; or
> (ii) the incapacity is the result of an accident at work or an occupational disease that entitles him to a pension payable in full or in part by an institution in the United Kingdom.

25. Reg15(1)(a)-(d) provides as follows:

> **15.— Permanent right of residence**
>
> (1) The following persons shall acquire the right to reside in the United Kingdom permanently—
> (a) an EEA national who has resided in the United Kingdom in accordance with these
> Regulations for a continuous period of five years;
> (b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;
> (c) a worker or self-employed person who has ceased activity;
> (d) the family member of a worker or self-employed person who has ceased activity;

26. The First-tier Judge accepted that reg 5(2)(b) and (c) were satisfied in terms of the length of time that the appellant's father had been a worker or self-employed person in the UK (12 months), and that he had resided in the UK continuously for more than three years prior to the termination of his employment. The evidence before the judge was that, one way or another, the appellant's father had ceased employment in 2003.

27. Mr Mills conceded that the evidence suggested that in terms of reg 5(2)(a)(ii) he had ceased working, and it could not be said that his having done so did not amount to "early retirement", whether or not his ceasing to work was as a result of a temporary or permanent incapacity.

28. On that basis, it was conceded that the whole of reg 5(2) was met. That was sufficient to mean that the appellant's father was a worker or self-employed person who had ceased activity because the conditions specified in reg 5(1) relating to paragraphs (2), (3), (4) or (5), are alternatives.

29. The appellant's father therefore, had acquired permanent residence in 2003, when he ceased working, being under reg 15(a) an EEA national who had resided in the UK in accordance with the Regulations for a continuous period of five years. That was sufficient to mean that the appellant himself qualified for permanent residence under reg 15(1)(b), being the family member of an EEA national, not himself being an EEA national, who had resided in the UK with the EEA national in accordance with the Regulations for a continuous period of five years.

30. There was no dispute about the evidence that the appellant had resided with his father for that period of time, and that in the circumstances it was in accordance with the Regulations. The effect of that is that the appellant had himself acquired permanent residence in, or by, 2007.

31. "Family member" includes under reg 7(1)(b) direct descendants under the age of 21, which the appellant was in 2007.

32. In the alternative, the appellant is entitled to confirmation of a permanent right of residence under reg 15(1)(d) as the family member of a worker or self-employed person who had ceased activity, which the appellant's father had (reg 15(1)(c)). In that circumstance the appellant was not required to establish residence in accordance with the Regulations for a continuous period of five years.

33. As Mr Mills conceded, it does not matter whether the appellant's father's ceasing employment was as a result of temporary or permanent incapacity. In either case, the period by which he was short of five years' employment (by three months) was filled, having regard to the evidence that he had taken early retirement under reg 5(2)(a)(ii).

34. In these circumstances, I am satisfied that the First-tier Judge erred in law. I set aside her decision, and re-make the decision, allowing the appeal.

Decision

35. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the decision re-made, allowing the appeal

TO THE RESPONDENT
FEE AWARD

I was invited to make a fee award in favour of the appellant although no sum was specified by the appellant. As I have allowed the appeal, and on the assumption that a fee has been paid or is payable, I have considered making a fee award and have decided to make to make a fee award of any fee which has been paid or may be payable, but only in respect of the appellant that is the subject of the proceedings before the Upper Tribunal.

Upper Tribunal Judge Kopieczek 16/03/16