Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/42299/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 February 2016	**On 29 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MS MARIA ISABEL QUEIROS RIBEIRO
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Appellant: Ms Fijiwala, Specialist Appeals Team
For the Respondent/Claimant: Ms K McCarthy, Counsel instructed by M Reale Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Page sitting at Columbus House, Newport on 2 April 2015) allowing the claimant's appeal against the decision by the Secretary of State to refuse to issue her with a permanent residence card

as confirmation that she met the requirements of Regulations 15(1)(b) of the EEA Regulations 2006 as the family member of an EEA national who has resided in the United Kingdom in accordance with the Regulations for a continuous period of five years. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant requires anonymity for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal

2. On 15 June 2015 First-tier Tribunal Judge Levin granted permission to appeal for the following reasons:

> It is arguable that the judge's failure to identify the relevant five year period and to make a finding with reference thereto renders the judge's decision materially flawed.

Relevant Background

3. On 1 February 2013 the Secretary of State gave her reasons for refusing the claimant's application for a permanent residence card as the family member of Laszlo Kovacs, a Hungarian national. In her application, she stated that her EEA national sponsor (the husband of her daughter) had been employed for a continuous period of five years. She had provided two P60s to support this claim. She had not provided evidence of how her EEA sponsor had been exercising treaty rights in the United Kingdom from 2008 to the present day, with the result that she was unable to establish that her EEA national sponsor had been exercising treaty rights in the United Kingdom for a continuous period of five years whilst employed.

4. The claimant's appeal against the decision came before Judge Ghaffar sitting at Sheldon Court in Birmingham on 19 June 2014. Both parties were legally represented. The evidence was that the claimant had entered the United Kingdom on 5 March 2007 to live with her daughter and son-in-law. She had been issued with a five year residence card on 13 September 2007. In January 2010, her daughter had separated from her husband. Notwithstanding the separation, on 15 March 2011 her daughter had been issued with a permanent residence card.

5. In his subsequent decision, the judge found there was nothing to suggest that Mr Kovacs had ceased exercising his treaty rights since the claimant was first granted a residence card or indeed since her daughter was granted permanent residence. Accordingly, he found that Mr Kovacs had continued to exercise his treaty rights in the UK since the claimant's daughter had been granted permanent residence, and still continued to exercise his treaty rights in the UK. However, he dismissed the appeal because he held (wrongly) that the wording of Regulation 15 required the claimant to be living with Mr Kovacs or required that her daughter and Mr Kovacs had got a divorce before she could claim permanent residence.

6. The decision of Judge Ghaffar was set aside by Upper Tribunal Judge Poole sitting in the Upper Tribunal at Newport on 26 November 2014. Judge Poole said it was common ground between the parties that Judge Ghaffar had made an error of law in his decision of 2 July 2014. Judge Poole found

that the Secretary of State was correct to say that the claimant had to demonstrate on the balance of probabilities that her daughter's husband was exercising treaty rights. The lack of evidence that he was not exercising treaty rights was inadequate to demonstrate that he was. The judge had wrongly used the lack of evidence to establish a precedent fact and this was wrong in law.

The Hearing Before, and the Decision of, the First-tier Tribunal on Remittal

7. Judge Poole remitted the appeal for a hearing de novo. Ms McCarthy of Counsel appeared on behalf of the claimant before Judge Page, but there was no appearance on behalf of the Secretary of State. The judge received oral evidence from the claimant, and took into account the documents contained in her bundle for the hearing, which she listed at paragraph [11].

8. At paragraph [22] of her decision, she recorded the submissions that Ms McCarthy made at the end of the hearing. Ms McCarthy accepted that the claimant had to prove that Laszlo Kovacs was a qualified person, and she submitted that the evidence on this issue had to be assessed as at the date of the hearing. She submitted that the emails and text messages in the bundle, and in particular a Halifax form completed on 6 March 2015, were sufficient to prove on the balance of probabilities that Laszlo Kovacs was working and exercising treaty rights. She submitted that in the event that the judge was satisfied that Laszlo Kovacs was working at the date of the hearing, the claimant should succeed in her appeal.

9. At paragraph [23] the judge expressed agreement with the submissions made by Ms McCarthy. She directed herself that the remaining issue in the appeal was a narrow one, which was whether Mr Kovacs "remains" a qualified person in the UK. She found that the evidence provided by way of appeal was conclusive evidence that Mr Kovacs "is" a qualified person, working full-time as a chef. He was certainly due to work as a chef on 3 April 2015 which was Good Friday because he told the appellant's daughter this in a text message which she had read. She was also satisfied Mr Kovacs was exercising treaty rights on the day of the hearing on 2 April 2015. She was therefore allowing this appeal and she trusted the claimant could now be granted a permanent residence card as confirmation of her permanent right to reside in the UK.

The Application for Permission to Appeal

10. The Secretary of State applied for permission to appeal, arguing that the judge had erred in law by only finding that Mr Kovacs "remains" a qualified person, rather than identifying the relevant period of five years over which he has continuously exercised his treaty rights.

The Hearing in the Upper Tribunal

11. At the hearing before me to determine whether an error of law was made out, Ms McCarthy directed my attention to the supplementary bundle for

the appeal hearing on 2 April 2015 which she relied on as providing adequate evidence to show that Mr Kovacs had been continuously exercising treaty rights since the claimant's daughter was granted a permanent residence card. So even if, which she did not accept, the judge had not given adequate reasons for finding that the claimant was entitled to be issued with a permanent residence card, the documentary evidence provided to the First-tier Tribunal showed that the error was not material.

12. In reply, Ms Fijiwala submitted that the judge had not asked herself the correct question. It was apparent from the decision of Upper Tribunal Judge Poole that it was not enough simply to establish that Mr Kovacs was exercising treaty rights at the date of the hearing before the First-tier Tribunal. There was nothing in the documentary evidence going to the period between 2011 and 2012, and there was simply not the necessary evidence available for a decision on an entitlement to permanent residence to be made, or remade, in the claimant's favour.

Discussion

13. I find that Judge Page clearly addresses the wrong question. In order to qualify for a permanent residence card in accordance with Regulation 15, the claimant needed to identify a five year period during which Mr Kovacs had been continuously exercising treaty rights. She could not rely on the same five year period as that successfully relied upon by her daughter, as she had not joined her daughter and son-in-law in the United Kingdom until 2007. So the earliest potential end date of a qualifying five year period was going to be sometime in 2012. Alternatively, the claimant could rely on a later end date, such as the date of the hearing before Judge Page. But either way, there was an evidential black hole for at least a one year period (2011-2012) following the grant of a permanent residence card to her daughter.

14. The judge gave adequate reasons for finding that Mr Kovacs was currently exercising treaty rights, and there is no error of law challenge to this finding. The judge did not make any findings about the exercise of treaty rights by Mr Kovacs between 2011 and 2015. So her finding that the claimant qualified for a permanent residence card is plainly erroneous in law.

The Remaking of the Decision

15. I am unable to remake the decision in the claimant's favour on the evidence that was placed before the First-tier Tribunal. Ms McCarthy is in effect inviting me to commit the same error as that made by Judge Ghaffar. Just because there is evidence of Mr Kovacs exercising treaty rights in 2015, it does not follow that he was exercising treaty rights in, for example, 2012.

16. I accept that under the Regulations 2006 Mr Kovacs could have had periods of voluntary or involuntary unemployment which would not have the legal consequence of him ceasing to be a qualified person. But where there is no evidence one way or the other, I cannot simply assume the

facts in the claimant's favour, particularly when the burden of proof rests with her, not with the Secretary of State.

17. It is arguable that Mr Kovacs is likely to have been in employment in 2013 and 2014, as otherwise he would not have been able to pay for his son to go on holiday with him in 2013 and 2014. But the money for this expenditure could have come from savings or from extended family members in his home country. In any event, I do not consider that evidence of this nature (emails passing between the estranged spouses about arrangements for the child to join his father on holiday) is sufficient to discharge the burden of proof. Furthermore, there is no equivalent evidence for the earlier period (2011-2012) following the grant of a permanent residence card to the claimant's daughter.

18. As the claimant has discharged the burden of proving that Mr Kovacs is currently exercising treaty rights in the UK, she has an extended right of residence in the United Kingdom pursuant to Regulation 14. She has not however shown that she qualifies for the issue of a permanent residence card under Regulation 15.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant's appeal is dismissed under Regulation 15, but allowed under Regulation 14 of the Immigration (EEA) Regulations 2006.

No anonymity direction is made.

TO THE RESPONDENT
FEE AWARD

In the light of my decision to re-make the decision in the appeal by allowing it in part, I have considered whether to make a fee award.

I make no fee award.

Reasons:
The appellant has failed to achieve her primary objective, which was to prove that she was entitled to a permanent residence card.

Signed Date

Deputy Upper Tribunal Judge Monson