



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA428882014

THE IMMIGRATION ACTS

Heard at: Field House
On: 19th May 2016

Decision Promulgated
On: 25th May 2016

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Keren Oaknin
(no anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr A. Seelhoff , A. Seelhoff Solicitors
For the Respondent: Ms Brocklesby-Weller , Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is an Israeli national born on the 22nd February 1983.
2. On the 2nd October 2016 the First-tier Tribunal (Judge Thorne) dismissed her appeal against a decision to refuse to issue her with a residence card confirming her right of residence as the family member (spouse) of an EEA national

exercising treaty rights in the UK. At the date of the appeal before Judge Thorne the Appellant had separated, but not divorced, from her Hungarian husband. Their relationship had been placed under considerable strain by the fact that in 2012 he was diagnosed with significant mental health problems, which had also left him unable to work. Judge Thorne considered the Appellant's husband's position, and so her own, with reference to Regulation 6 (2) and (3) of the Immigration (European Economic Area) Regulations 2006:

(2) A person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if –

(a) he is temporarily unable to work as the result of an illness or accident;

(b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom, provided that he has registered as a jobseeker with the relevant employment office and –

(i) he was employed for one year or more before becoming unemployed;

(ii) he has been unemployed for no more than six months; or

(iii) he can provide evidence that he is seeking employment in the United Kingdom and has a genuine chance of being engaged;

(c) he is involuntarily unemployed and has embarked on vocational training; or

(d) he has voluntarily ceased working and embarked on vocational training that is related to his previous employment.

(3) A person who is no longer in self-employment shall not cease to be treated as a self-employed person for the purpose of paragraph (1)(c) if he is temporarily unable to pursue his activity as a self-employed person as the result of an illness or accident.

3. The Tribunal directed itself to this Regulation because that is the one referred to in the Respondent's reasons for refusal letter. The Appellant was not legally represented.
4. The Tribunal found as fact that the illness of the Appellant's husband was not a temporary incapacity: Reg 6(2) did not therefore apply. There was a long term inability to work. Nor could it be established that he had been recorded as being involuntarily unemployed. The appeal was thereby dismissed.
5. The grounds of appeal are that the First-tier Tribunal erred in failing to consider a) whether the Appellant's husband, and so the Appellant, had already acquired a permanent right of residence and b) whether any period of residence accrued in accordance with Regulation 5(1) and (3) would assist.
6. Regulation 15 sets out the means by which EEA nationals and their family members can acquire a permanent right of residence in the UK:

15. – (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;

7. Regulation 5 makes provision for the preservation of ‘qualified person’ status in circumstances of incapacity:

5. – (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).

...

(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.

8. Mr Seelhoff submitted that under Regulation 15(1)(b) the Appellant would be entitled to proof of a permanent right of residence if she could establish, on a balance of probabilities, that she had lived in the United Kingdom for a continuous period of five years in accordance with the Regulations. It is not in issue that the Appellant and her husband have lived in the UK since 2007. As a family member of an EEA national she had to demonstrate that her husband had been exercising treaty rights for a continuous five-year period following her arrival. If he had been living in the UK in accordance with the Regulations, it would follow that so had she and she would acquire a permanent right of residence.

9. Before me Ms Brocklesby-Weller agreed that this was so. She and Mr Seelhoff very helpfully took the time to check the loose bundle of HMRC correspondence, bank statements, payslips and accounts which the Appellant had handed in to the First-tier Tribunal. Having done so they were in agreement that these documents demonstrated that the Appellant’s husband had been in continuous employment for in excess of a five year period, from 2007 until he stopped work in 2012. He had therefore acquired a permanent right of residence, and applying Reg 15(1)(b), so had she. There was therefore no need to examine Regulation 5(3), although on the face of it the First-tier

Tribunal's findings as to his permanent incapacity to work would have allowed the Appellant to rely on any period after he stopped work due to illness, had that been necessary.

Decisions

10. The determination of the First-tier Tribunal contains an error of law (the omission to consider Regulation 15) and it is set aside.
11. The appeal is allowed with reference to the Immigration (European Economic Area Regulations) 2006
12. I was not asked to make a direction for anonymity and in the circumstances I see no reason to do so.

Upper Tribunal Judge Bruce
20th May 2016