Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00526/2017

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 17th April 2018	**On 10th May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

SASIKUMAR [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Holt, Counsel instructed by Law Lane Solicitors
For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a citizen of Malaysia (born [ ] 1972), appeals with permission against the decision of a First-tier Tribunal (Judge Myers) dismissing his appeal against the Respondent's decision of 1st January 2017 revoking his residence card as a family member of an EEA national and refusing him entry to the UK.

2. The relevant facts of this matter are well-known to both parties and for the purposes of this decision the following summary will suffice. The Appellant entered the UK

on 13th June 2003 with leave valid to October 2006. In 2005 he met [MH] "the Sponsor", a Czech national born [ ] 1975. She was exercising treaty rights in the UK.

3. The Appellant and Sponsor married on 22nd December 2007 and on 29th September 2008 he was issued with a residence card valid until 29th September 2013. On [ ] 2008 the Sponsor gave birth to the couple's twin children.

4. On 14th April 2014 the Appellant was issued with a further residence card, valid until 14th April 2018. In October 2015 however, the Sponsor and the children left the UK and travelled. The Sponsor was required to look after her parents both of whom had fallen ill. The Appellant remained in the UK. His wife returned to the UK on occasion with the children in order to see him, albeit briefly, and he also undertook visits to his wife and children in the Czech Republic.

5. On his return from such a visit to the Czech Republic, the Appellant was detained at Manchester Airport when seeking re-entry on 31st December 2016, following which his residence card was revoked on 1st January 2017.

6. The Respondent set out one ground for revoking the Appellant's residence card; she was not satisfied that the Appellant was seeking entry as the family member of an EEA national exercising treaty rights. The Appellant's wife had returned to the Czech Republic in 2015, to look after her parents and had no plans at that point to return to the UK. The Respondent therefore decided to revoke the Appellant's EEA family permit although he was granted temporary admission.

First-tier Tribunal Hearing

7. The Appellant appealed against the revocation decision to the First-tier Tribunal. There were two main challenges raised before the FtT. Additionally an Article 8 challenge was raised but that does not feature in the present proceedings.

8. It was said before the FtT, that the Respondent's decision was incorrect because:

    i. the Sponsor could be said to still be exercising treaty rights, with reference to Article 7(3) of Directive 2004/38/EC

    ii. following on from that, although it was accepted that there was a gap in the documentary evidence provided for the period July 2009 – 2012, nevertheless the Sponsor had exercised treaty rights from 2005. Therefore, the Sponsor had acquired a right to permanent residence on account of five years lawful residence. Thus the Appellant, as her dependent spouse, had acquired the same right. The Appellant's case was set out in his witness statement.

9. The FtTJ under a heading "Findings and Reasons" set out at [10], the EEA Regulations in relation to Article 7(3) of Directive 2004/38/EC. She then said the following at [11]:

> "I accept the submission made on behalf of the Appellant that the illness referred to in 7 (a) [of the above directive] does not have to be illness of the Sponsor, because there could be circumstances where a Sponsor is unable to work because it is necessary to look after a sick child or other relative. The difficulty though that I have with the application of 7 (3) in the Appellant's situation is in finding that the Sponsor is temporarily unable to work. ..... I cannot find that his wife has only temporarily ceased work in the UK, and therefore I find that she is no longer exercising Treaty Rights."

She followed this by saying at [12]:

> "It was further submitted that although the Appellant accepts that there is a gap in the documentation between July 2009 and 2012 showing his wife's exercise of Treaty Rights in the UK, she had in fact done so from 2005, as set out in paragraph 19 of his witness statement. It was therefore the case that they could both have made an application for permanent residence, but he had failed to do so because of poor legal advice. *It is possible that had he applied, he would have been granted permanent residence, but I cannot comment on that; and the fact remains that he did not do so* [my italics]. In my judgment this is not something which can be granted retrospectively after his wife has returned to the Czech Republic."

10. Thereafter she dismissed the appeal. The Appellant sought and was granted permission to appeal.

11. Permission to appeal was granted in the First-tier by Judge Dineen, on one ground only. The relevant part of the grant reads as follows:

> "It is complained that at [12] the judge erred in law in treating entitlement to permanent residence as acquired by grant rather than being acquired as a matter of fact. This is an arguable material error of law."

12. The Respondent served a Rule 24 response, the relevant part of which reads as follows:

> "Whilst the judge may well have erred in terms of the consideration of the permanent residence of the EEA sponsor based on the facts, it is submitted that the error is not material given the appellant's concession that there was no evidence of the EEA national exercising treaty rights between July 2009 and 2012 (determination ¶12)."

Thus, the matter comes before me to determine whether the decision of the FtTJ contained such error of law that it should be set aside for material error and the decision remade.

Error of Law Hearing

13. Before me Mr Holt appeared for the Appellant, Mrs Pettersen for the Respondent. At the outset of the hearing Mr Holt sought permission to adduce fresh evidence under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. This further evidence was in the form of documentary evidence outlining the Appellant's son's medical history. Mr Holt asked that this evidence be admitted as it was evidence

supporting the claim that the Sponsor came within the ambit of Article 7(3), in that she was temporarily unable to work, as a result of looking after her ill child. It was accepted that this evidence was not before the First-tier Tribunal, the reason being that the Appellant had only recently been able to obtain it following, what Mr Holt termed, a reconciliation with the Sponsor. Nevertheless it was evidence which was in existence at the date of decision and which was material to the Appellant's case.

14. Unfortunately, Mrs Pettersen had not had an opportunity to see this evidence. She raised no objection to the application however. The evidence in question is clearly relevant to the materiality of the issues before me and therefore the evidence was admitted under Rule 15 above.

15. Mr Holt's submissions continued by saying that the FtTJ had clearly erred in her finding at [12] when she said that permanent residence was a form of status requiring a grant, rather than a form of status acquired automatically on completion of five years' lawful residence. This finding meant that the FtTJ's approach was erroneous. She had turned away from the question of deciding whether the Appellant had shown in fact that his wife was lawfully exercising treaty rights for the relevant five year period. It had always been the Appellant's claim that his wife was exercising treaty rights. Following the birth of the children she had taken maternity leave and had then set up work as a self-employed hairdresser. There was a lack of documentary evidence relating to her self-employment because, as shown by the Appellant's witness statement reinforced by the fresh evidence submitted under Rule 15, she had had to take time off in order to look after her young child who was ill.

16. Finally the Appellant had not made a concession in the terms categorised in the Rule 24 response. The Respondent asserted that, "there was no evidence of the EEA national exercising treaty rights between July 2009 and 2012." In fact there was evidence in the form of the medical documentation and the Appellant's witness statement. The lack of consideration of material evidence for whatever reason amounts to an error sufficient to mean that the decision should be set aside.

17. Mrs Pettersen in addition to relying on the Rule 24 response submitted that the Article 7(3) point had been addressed by the judge. The judge had said that she had difficulty "in finding that the Sponsor is temporarily unable to work." The medical evidence was not before the judge and therefore the judge could not be criticised for not referring to evidence which was not before her. She accepted the principle that the judge had erred in stating that permanent residence was acquired by grant rather than by fact. At this point Mrs Pettersen brought a further matter to my attention. I will deal with this below following my consideration of the Error of Law submissions.

18. At the end of submissions, I reserved my decision, which I now give with reasons.

Consideration

19. I am satisfied, after hearing submissions from the parties that the decision of the FtT must be set aside for material error.

20. The FtTJ's misdirection in treating entitlement to permanent residence as acquired by grant rather than as a matter of fact means that the opportunity for material evidence to be considered was overlooked and therefore the wrong approach to the evidence was taken. The Respondent argues that had the judge taken the right approach it would have made no material difference because the evidence was not sufficient to show that the Appellant's wife was exercising treaty rights. That sounds an attractive argument but the difficulty with it is that before me there is available evidence which is capable of showing that the Appellant's wife was exercising Treaty Rights.

21. I find therefore I am satisfied that the decision must be set aside for material error and must be remade at a fresh hearing. This is on the basis that there have been no findings of fact on whether the Sponsor is lawfully entitled to permanent residence (thus entitling the Appellant to the same right and rendering the Revocation decision unlawful). The fresh evidence admitted for the purpose of this hearing will need to be properly evaluated.

22. During the course of submissions I canvassed with the parties the appropriate forum for the remaking of the decision in the event that I found material error. Mr Holt's view was that it was appropriate to remit the matter to the FtT as the fact-finding Tribunal.

23. Mrs Pettersen was also of the view that remittal to the FtT was appropriate but for a different reason to that outlined by Mr Holt. I return to the matter referred to by her in paragraph 17 above. She informed the parties that the Appellant had now made an application to the Secretary of State for Permanent Residence on account of five years' continuous lawful residence, based on the same factors which are the subject of the instant appeal. The Permanent Residence application had now been considered by the Secretary of State and refused. The Appellant has now exercised his right of appeal against that refusal. There is therefore an outstanding appeal which is yet to make its way through the First-tier Tribunal. The reference for the appeal is EA/00153/2018. She submitted that the sensible course would be to remit the instant matter to the First-tier Tribunal and consideration should be given to linking the two appeals to be heard together. The evidence for both matters is clearly the same for the most part, and it would be invidious to have two separate hearings.

24. Mr Holt on hearing this agreed that this would be a proper course to adopt.

25. I agree with the views of the parties. I am satisfied that in these circumstances, remittal to the FtT for a fresh hearing on the appeal before me is the proper course. Consideration can then be given to linking this appeal with reference EA/00153/2018.

Notice of Decision

26. The decision of the First-tier Tribunal, promulgated on 7th December 2017 is hereby set aside for material error. The matter will now be remitted to the First-tier Tribunal for a fresh hearing with nothing being preserved from the original decision. The fresh hearing should be before a judge other than Judge Myers.

27. No anonymity direction is made.

Signed C E Roberts Date 06 May 2018

Deputy Upper Tribunal Judge Roberts