Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01560/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 January 2018	**On 31 January 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EVANGLE [F]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Respondent

Representation:
For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondent: Mr M Adophy, Solicitor, Rana & Co Solicitors

DECISION AND REASONS

1. The appeal concerns a challenge brought by the appellant (hereafter the Secretary of State or SSHD) to the decision of Judge Walters of the First-tier Tribunal (FtT) sent on 12 May 2017 allowing the appeal of the respondent (hereafter the claimant) against the decision of the SSHD refusing to grant him a permanent residence card. The judge's analysis and conclusions are set out briefly at paras 2-9, as follows:-

"**Substantive Issues under Appeal**

2. This appeal is under the Nationality, Immigration and Asylum Act 2002, against a decision to refuse to issue a Residence Card under Regulation 15(1)(f) and 10(5) of the Immigration (EEA) Regulations 2006 ("the 2006 Regulations"). The Decision was made by the Respondent on 27.1.16.

3. The basis for the Decision was that the Respondent was not satisfied that the Appellant had provided satisfactory evidence that he had resided in the United Kingdom with his former EEA national family member in accordance with the Regulations for a continuous period of five years.

4. In his closing speech Mr. Adophy mentioned that the Appellant had stated at paragraph 8.3 of his application form that he had access rights to a child of the Sponsor, namely [RE] (dob {] 2008) who is a French citizen. That access has been ordered by a court in the U.K. and as at the date of application the Appellant had had those access rights for one year.

5. The Respondent's reasons for refusal dated 27.1.16 makes no reference to that child.

6. Mr Eaton accepted that there is no evidence that the Respondent had considered the Appellant's access rights to that child.

7. I concluded, therefore, that the appeal must be allowed as the Respondent's decision is not in accordance with the law, following the case of Greenwood (No. 2) (para 398 considered) [2015] UKUT 00629 IAC.

8. As the appeal is indivisible, I have deliberately refrained from making any findings of fact on its other aspect which is whether or not the Appellant and his former family member have resided in accordance with the 2006 Regulations for a continuous period of five years.

NOTICE OF DECISION

9. The appeal is allowed under the 2006 Regulations as being not in accordance with the law."

2. The SSHD's first ground of appeal is that the judge should have recognised that the court order for access to a child was immaterial as the claimant was held to meet the alternative regulation 10(5)(d)(i). The SSHD's second ground is that the judge erred in failing to address the fact that 'the requirements to cease to be a family member due to the termination of a marriage still apply as do the requirements of regulation 10(6). The claimant had also to show that he and his former EEA national family member resided for a continuous period of five years'.

3. A Rule 24 response was submitted by those representing the claimant and I heard submissions from both Mr Avery and Mr Adophy.

4. I do not find the SSHD's grounds or the claimant's Rule 24 response to be models of lucidity and the oral submissions were of limited help to me.

5. The SSHD's first ground is broadly correct as it stands insofar as the refusal decision did accept that the claimant had produced evidence to show that his marriage lasted for more than 5 years, from 2008 to 2015. It did not expressly state that it was accepted that he and his former spouse resided in the UK for at least 1 year during their marriage but it can be inferred from the refusal letter read as a whole that that too was accepted. Hence although the refusal letter made no mention of regulation 10(5)(d)(i) it can be inferred from its text that the SSHD accepted this requirement was met and that, accordingly, it was immaterial whether 10(5)(d)(iii) – which is an alternative limb – was also met. But this ground of appeal in itself does not explain why this feature of the judge's decision rendered erroneous his decision to find it not in accordance with the law.

6. That presumably is the rationale behind the second ground which effectively maintains that the judge should have grasped that the claimant could not succeed under the Regulations because meeting the requirements of regulation 10(5)(d) was insufficient on its own to establish permanent residence. Albeit this ground is cryptically drafted, I consider it made out. There was no basis for the judge deciding that the decision was not in accordance with the law if that decision on its face contained a correct assessment of a failure on the part of the claimant to meet at least one essential requirement of the 2006 Regulations governing the right to permanent residence. The judge's decision entirely fails to address the SSHD's reasons for considering that the claimant had not shown he had 5 years' continuous residence.

7. Accordingly, the judge was not entitled to allow the appeal on the basis it was not in accordance with the law. The only reason he gave for doing so was not a material one. The decision is vitiated by legal error necessitating that I set aside the decision.

8. Given the wholesale failure of the judge to make any finding in relation to the material issues I shall remit the case to be heard afresh by a FtT judge other than Judge Walters.

9. Whilst it will be for the parties to identify the relevant issues, it seems to me that in broad terms the SSHD's decision letter correctly identifies them.

10. If the claimant could demonstrate that his spouse was exercising Treaty rights for 5 continuous years during their marriage, he could succeed without recourse to regulation 10. The claimant's Rule 24 response does not mount any argument or produce any evidence to demonstrate there was such a period of continuous residence.

11. If the claimant's spouse was not working at the date of divorce, then he cannot bring himself within the material scope of regulation 10, as he would not have a right capable of retention. The SSHD's refusal letter does not accept that the spouse has produced sufficient evidence to show

this, albeit it is accepted that the claimant was able to produce a photocopy of an HMRC employee history letter indicating she was employed at Comptoir Gourmand Ltd at the time of divorce. It should be within the power of the claimant to produce the original of this letter and if he does that, that might then bring him within the material scope of regulation 10.

12. Assuming the claimant is able to do that, then he would have to show that he met the requirements of regulation 10(b) by demonstrating that he himself had been a worker for a period which, when taken together with the period (short of 5 years) for which his spouse was working prior to their divorce, amounted to 5 years.

13. If he can do that then he would be in a position to establish he had acquired permanent residence.

14. For the above reasons:

    The decision of the FtT judge is set aside for material error of law.

    The case is remitted to the FtT before a judge other than Judge Walters.

Signed:  Date: 31 January 2018

Dr H H Storey
Judge of the Upper Tribunal