Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03127/2016

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 15 June 2018	**On 9 July 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

NOXOLO [M]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr L. Greer, counsel instructed by Broudie Jackson Canter
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

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DECISION AND REASONS

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1. The Appellant is a national of South Africa, born on 21 July 1969. On 9 September 2009, she married [JM], an Irish national who was exercising treaty rights in the United Kingdom. On 5 October 2010, she was provided with a residence card as the family member of an EEA national, valid for 5 years to 5

October 2015. She subsequently separated from her husband in March 2012 and he sadly died of metastatic lung cancer on 23 April 2013.

2. On 3 October 2015, an application was made on the Appellant's behalf for a permanent residence card as confirmation of her right to reside in the United Kingdom, on the basis of a retained right of residence. This application was refused in a decision dated 4 March 2016, on the basis that the Appellant had not provided evidence to confirm her EEA family member was a qualified person in the United Kingdom and exercising free movement rights immediately prior to his death or that he was an EEA national with the permanent right of residence. Thus the application was refused with reference to regulation 10(3) and 15(1)(f) of the Immigration (EEA) Regulations 2006.

3. The Appellant appealed and her appeal came before Judge of the First tier Tribunal Ransley for hearing on 18 August 2017. In a decision and reasons promulgated on 29 August 2017, the appeal was dismissed. Permission to appeal to the Upper Tribunal was sought in time, on the basis that the Judge had erred in law:

> (i) in reaching irreconciliable findings in respect of the Appellant's EEA family member's status at the time of his death, it was agreed that [JM] was previously a worker and was forced to stop working due to an accident at work, thus the only conclusion open to the Judge was that he fell within regulation 5(3) and acquired permanent residence;
>
> (ii) by improperly imposing a requirement that the Appellant and her EEA family member occupy the same house when no such requirement exists in law.

4. Permission to appeal was granted by Upper Tribunal Judge Kebede in a decision dated 7 March 2018 on the basis that:

> *"There is arguable merit in the assertion in the grounds that the judge erred in in her consideration of whether the appellant's deceased spouse had acquired a right of permanent residence and erred in imposing a requirement of cohabitation. The grounds are arguable."*

5. In a rule 24 response dated 5 April 2018, the Respondent opposed the appeal.

Hearing

6. At the hearing before me, Mr Bates for the Respondent conceded the second ground of appeal, in light of the jurisprudence *viz* Diatta C/267/83 at [17] and PM (EEA-spouse – residing with) Turkey [2011] UKUT 89 (IAC).

7. Mr Greer, on behalf of the Appellant submitted that [JM] must have acquired permanent residence under the Immigration (EEA) Regulations 2006. This was because the Appellant, significantly, was granted a residence

card on 5 October 2010 at a time when [JM] was out of work, therefore, either he had a right of residence having attained permanent residence or regulation 5(3) applied. He sought to rely upon evidence of various periods of work set out at AB 23-24, which is a record of national insurance contributions made since 1975, which was before the Regulations came into existence, but he also worked after the Regulations came into force for over 2 years.

8. Mr Greer submitted with reference to AB 51 that [JM] falls within the remit of regulation 5(3)(a) due to an accident at work and that he terminated his activity in the UK as a result of a permanent incapacity to work. [JM] was diagnosed with COPD in 2009 (which eventually killed him) and falls within this category. In light of the evidence before the First tier Tribunal and given that it was conceded at [5] of the grounds of appeal that [JM] had obtained permanent residence before the Appellant's residence card was issued. He submitted that now that the second point is conceded ie. that there was no requirement to reside together in the same household, the Appellant must qualify for permanent residence and Judge Ransley misunderstood the Regulations at [14] in that [JM] was not granted but acquires permanent residence, whether or not this is recognized by the Secretary of State.

9. In his submissions, Mr Bates sought to argue that no application for permanent residence had been made by the Appellant's husband. In terms of his medical history, this shows he has had significant injuries in the past but returned back to work: his accident at work had taken place 14 years prior to his death. Mr Bates submitted that it does not follow because he was not working that he was permanently incapacitated at the time the residence card application was made and he could have been temporarily unavailable for work. He drew attention to AB 48 which showed that the Appellant's husband had been refused EASA on 18 July 2012 on the basis that he is capable of work and that this does not support a conclusion that he is permanently incapacitated.

10. In respect of the fact that at AB 50 a medical note dated 19 November 2012 which found he was not fit for work, whilst this was provided by the doctors it is not reliable because neither the doctor nor the patient have signed it and it simply shows that he was signed off for 2 months. Mr Bates submitted that the Appellant or her representatives should have approached the DWP and obtained evidence of any benefits claimed, which would have established whether he had been off sick and that the Appellant would be eligible to do this as his widow, given that they were not divorced.

11. Mr Bates submitted that AB 53 shows that he was receiving Incapacity Benefit towards a return to work. In respect of the national insurance payments, the record shows that in the years 2003-2004 and 2005-2006 very low amounts were paid. He submitted that, on the evidence the Sponsor provided, it was not sufficient for the Judge to be satisfied that a person who had periods of work was permanently incapacitated or out of work for 5

years. He submitted that it remains open to the Appellant to make a further application and approach the DWP and obtain records to confirm her late husband's benefit history. It follows that the decision was open to the Judge for the reasons given eg at [15] that the evidence before him was not sufficient to discharge the burden of proof. Still concerns as to whether or not he was permanently incapacitated.

12. In reply, Mr Greer submitted that Mr Bates had sought to re-argue the case, contrary to [11] of the decision of the First tier Tribunal and the concessions by the Presenting Officer at that hearing. The facts of the case were not in dispute. The issue was whether the Appellant fell within the Regulations. There is no dispute that [JM] went back to work between 2003 and 2009 and was then forced to leave due to injury. He submitted that it was a *Daniel Blake* type of case in that at AB 48 the EASA found him to be fit for work but his doctor in November signed him off sick and he died in April 2013 of COPD: AB 24. He clarified that so long as the end point of his employment is after 1 June 2006, then his prior employment is counted and he worked from 2003- 2010 therefore, the only rational view is that he qualified. Mr Greer also reminded me that the Secretary of State accepted in 2010 that the Appellant was entitled to a residence card.

13. I reserved my decision, which I now give with my reasons.

Findings

14. I have carefully considered the decision and reasons of the First tier Tribunal Judge, the grounds of appeal and the submissions made to me at the hearing.

15. I have also considered the evidence in Appellant's bundle, in particular:

(i) AB 24, HMRC records showing payment of national insurance contributions from 1975 to 1996 (with a gap in 1987/88) and from 2003 to 2008;

(ii) AB 28, a letter from Gladstone Medical Centre dated 2.8.17, confirming that the Appellant and her former husband were registered patients from 2009 to 2012, during which time they lived in two consecutive addresses in Birkenhead;

(iii) AB 34-36, a discharge summary from Liverpool Heart & Chest hospital dated 18.11.11 regarding the emergency admission of [JM] on 17.10.11 following a heart attack due to coronary artery disease;

(iv) AB 48, a DWP refusal of EASA dated 18.7.12 on the basis that [JM] is capable of work;

(v) AB 50, a certificate relating to fitness for work from Devaney Medical centre dated 19.11.12 which found that [JM] was not fit to work. However, as Mr Bates pointed out it is unsigned;

(vi) AB 51, a letter from Mr Anderson, colorectal and general surgeon dated 23.9.09, which noted [JM]'s past medical history as including a crush injury to the pelvis leading to a right total hip replacement and the fact he suffers from COPD;

(vii) AB 52, a letter from the Cardiothoracic Centre in Liverpool dated 8.11.07, which found changes in the right apex consequent to a works accident 14 years previously, which caused his lung to collapse;

(viii) AB 53, a letter from the NHS condition management programme dated 20.2.08 to the then GP stating [JM] has volunteered to be involved in the CMP which aims to support individuals in receipt of Incapacity Benefit towards a return to work.

(ix) AB 58, a letter from Christies Care dated 4.8.15 confirming Appellant has been worked for them since 4.1.13.

16. Regulation 10 of the Immigration (EEA) Regulations 2006, as amended by the 2016 Regulations provides:

"Family member who has retained the right of residence"

10. *– (1) In these Regulations, "family member who has retained the right of residence" means, subject to paragraphs (8) and (9), a person who satisfies a condition in paragraph (2), (3), (4) or (5).*

(2) The condition in this paragraph is that the person –

(a) was a family member of a qualified person or of an EEA national with a right of permanent residence when the qualified person or the EEA national with the right of permanent residence died;

(b) resided in the United Kingdom in accordance with these Regulations for at least the year immediately before the death of the qualified person or the EEA national with a right of permanent residence; and

(c) satisfies the condition in paragraph (6).

(3) The condition in this paragraph is that the person –

(a) is the direct descendant of –

(i) a qualified person or an EEA national with a right of permanent residence who has died;

(ii) a person who ceased to be a qualified person on ceasing to reside in the United Kingdom;

(iii) the spouse or civil partner of the qualified person or EEA national described in sub-paragraph (i) immediately preceding that qualified person or EEA national's death; or

(iv) the spouse or civil partner of the person described in sub-paragraph (ii); and

(b) was attending an educational course in the United Kingdom immediately before the qualified person or the EEA national with a right of permanent residence died, or ceased to be a qualified person, and continues to attend such a course…

(6) The condition in this paragraph is that the person –

(a) is not an EEA national but would, if the person were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; or

(b) is the family member of a person who falls within paragraph (a).

17. Regulation 15(d) of the Immigration (EEA) Regulations 2006, as amended by the 2016 Regulations provides:

Right of permanent residence

15. *– (1) The following persons acquire the right to reside in the United Kingdom permanently –*

(a) …

(b) a family member of an EEA national who is not 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) …

(d) the family member of a worker or self-employed person who has ceased activity, provided –

(i) the person was the family member of the worker or self-employed person at the point the worker or self-employed person ceased activity; and

(ii) at that point, the family member enjoyed a right to reside on the basis of being the family member of that worker or self-employed person;

(e) a person who was the family member of a worker or self-employed person where –

(i) the worker or self-employed person has died;

(ii) the family member resided with the worker or self-employed person immediately before the death; and

(iii) the worker or self-employed person had resided continuously in the United Kingdom for at least two years immediately before dying or the death was the result of an accident at work or an occupational disease;

(f) a person who –

> *(i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and*
>
> *(ii) was, at the end of the period, a family member who has retained the right of residence.*
>
> *(2) Residence in the United Kingdom as a result of a derivative right to reside does not constitute residence for the purpose of this regulation.*
>
> *(3) The right of permanent residence under this regulation is lost through absence from the United Kingdom for a period exceeding two years.*
>
> *(4) A person who satisfies the criteria in this regulation is not entitled to a right to permanent residence in the United Kingdom where the Secretary of State or an immigration officer has made a decision under regulation 23(6)(b), 24(1), 25(1), 26(3) or 31(1), unless that decision is set aside or otherwise no longer has effect.*

18. I find in light of the evidence in the Appellant's bundle that [JM] had permanent residence in the United Kingdom. It is clear that he resided in the United Kingdom since at least 1975 and whilst there is some variation in the amounts of national insurance paid, I accept Mr Greer's argument that at the latest he was entitled to permanent residence in 2008, having worked and made NI contributions for 5 years and the Regulations having come into force in June 2006. It follows that I find that the First tier Tribunal Judge erred in law at [15] in finding that the national insurance contributions were insufficient evidence to show that [JM] had acquired the right of permanent residence. This is because the national insurance records are definitive evidence of working in the United Kingdom and it was not argued by either Mr Bates or the Presenting Officer at the hearing before the First tier Tribunal that they could not be relied upon. Further, given that [JM] had effectively retired due to ill health at the time the Appellant was provided with a residence card on 5 October 2010, the Secretary of State recognized at that time that he had acquired permanent residence.

19. It follows that the Appellant entitled to permanent residence under regulation 15(e) because, whilst she separated from her husband in 2012 she remained his spouse and was thus the family member of a worker who has died and had resided continuously in the United Kingdom for at least two years before dying. In light of the decision in PM (EEA-spouse – residing with) Turkey [2011] UKUT 89 (IAC) at [21] that it is not necessary for her to show that she was living in the same household at the time of death, a point that was expressly conceded by Mr Bates. For the avoidance of doubt, whilst it would appear from the evidence that [JM]'s early death was connected to an accident at work which caused his lung to collape [15(vii) above] and he was subsequently diagnosed with COPD, it is also clear from the medical evidence that he smoked for many years, thus I cannot find definitively that his death was the direct result of an accident at work or occupational disease.

20. In the alternative, I find on the evidence that the Appellant has worked since January 2013 and has retained a right of residence pursuant to regulation 10(2) of the Regulations. Thus she has resided in accordance with the Regulations for 5 years and acquired permanent residence from 9 September 2014, in accordance with regulation 15(1)(f) of the Regulations.

Decision

21. I find material errors of law in the decision of the First tier Tribunal. I substitute a decision allowing the appeal.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman 5 July 2018