Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07923/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 June 2018	**On 11 September 2018**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

STEPHEN [M]

[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms Althea Radford, Counsel instructed by Greater London Solicitors Ltd

For the respondent: Mr Ian Jarvis, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse him a permanent right of residence pursuant to Regulations 5, 6 and 15 of the Immigration (European Economic Area) Regulations 2016. The appellant is a citizen of Ghana.

2. The appellant's application is based on his marriage to a Swedish citizen said to be exercising Treaty rights in the United Kingdom at the material times. The parties have two children, born on 15 September 2011 and 18 March 2013. Both children have sickle cell anaemia. The sponsor's mother is also in the United Kingdom and helps with their care.

Background

3. The appellant entered the United Kingdom as a working holidaymaker, from June 2004 to June 2006. His exact date of entry was not known. When his working holidaymaker visa expired, he did not return to Ghana, but instead remained in the United Kingdom. He made two unsuccessful applications for leave to remain in 2008, but was not removed.

4. In 2010, the appellant made an application under the EEA Regulations for a residence card as the extended family member of his partner, to whom he was not then married. A residence card was issued, valid till 23 November 2015.

5. On 18 November 2015, the appellant applied for a permanent right of residence on the basis that he had now married his partner; that she had been exercising Treaty rights in the United Kingdom continuously for a period of 5 years; and that they had been a couple for at least 3 years.

6. The evidence produced by the appellant as to his wife's exercise of Treaty rights was considered inadequate. The respondent was concerned that the evidence did not show that the sponsor had been working, studying, or pregnant/on maternity leave from September 2012 to January 2013, or from December 2013 to August 2014. The respondent was not satisfied that the appellant's wife had been exercising her Treaty rights for a continuous period of 5 years, and refused to recognise a permanent right of residence for the appellant.

7. The parties separated in or around August 2016; the sponsor was back at work by January 2017 and divorce proceedings were begun on an unspecified date between August 2016 and the hearing of the appeal on 6 December 2017, by which time decree nisi had been granted to the parties to the marriage. Decree absolute was pronounced on 14 May 2018.

Sponsor's work history

8. The chronology sponsor was already in the United Kingdom in 2004, when she met the appellant, who had come here as a working holidaymaker. In August 2009, they had a traditional marriage and began to live together; in the same month, the sponsor began

working for Simply Better Services Ltd. She changed jobs in December 2009, working for Four Seasons Healthcare.

9. In August 2010, the appellant began to work and has continued to do so thereafter. On 15 September 2011, the couple's son was born, with sickle cell disease. The sponsor continued to work for Four Seasons.

10. On 9 June 2012, the parties went through a civil marriage. Six months later in December 2012, the sponsor lost her job as she had not returned from her maternity leave; it was not possible for her to continue to work because of her baby's health problems. The parties' second child, a daughter, was born on 18 March 2013 and also has sickle cell disease.

11. In June 2014, the appellant claims that the sponsor began to study for an NVQ in learning support. The evidence of that study was not before the First-tier Tribunal and the appellant accepted that the sponsor was not working from June – August 2014, the fifth anniversary of her beginning to work here.

12. In November 2015, the appellant applied for a permanent residence card.

13. At some time in 2016, the parties separated. It is not known when the divorce proceedings began. In May 2016, the respondent refused the appellant's application for a residence card, and in August 2016, the children moved to live with the sponsor. The appellant had staying access for alternate weekends and half the school holidays. There is no evidence from the family proceedings before me and the Family Court protocol has not been invoked.

First-tier Tribunal decision

14. For the First-tier Tribunal, the appellant provided further documents, which narrowed the period in dispute to June-August 2014. The sponsor did not attend the hearing.

15. The appellant sought an adjournment, saying that he wanted to postpone the hearing until decree absolute. Decree nisi had been pronounced. The appellant said that he would then wish to claim a retained right of residence pursuant to Regulation 10(5) of the 2016 Regulations. That was not the claim on which the respondent had made a decision: it remains open to the appellant to make that claim if he wishes.

16. First-tier Judge Telford refused to adjourn the hearing: the same question as to the five years' exercise of Treaty rights by the sponsor would arise, whichever analysis was used. He found as a fact that at least for the 2 months between June and August 2014, the appellant's wife could not show that she had been exercising Treaty rights in the United Kingdom and recorded that the appellant had conceded that such was the position.

17. The Judge recorded that the payslip evidence the appellant had produced was 'not entirely continuous' and that periods before the 11-week pre-natal maternity leave period were not completely accounted for in relation to the sponsor's work. The appellant had not sought an adjournment to improve that evidence.

18. The appellant asserted that the sponsor had been undertaking an NVQ during that period, but the Judge found that this study was not established, to the standard of balance of probabilities, and that in any event, to undertake an NVQ alongside the claimed work would not improve the position on whether the sponsor was during that period a qualified person for the purposes of the Regulations.

19. The appellant argued that the children's ill health was a reason 'not of the sponsor's own making' for her non-attendance, with regard to Regulation 6(2)(a) or 5(7)(b) of the 2016 Regulations. The Judge did not accept that: his core findings are at [18]-[19] of the decision:

> "18. The appellant and the sponsor had the assistance of the mother of the sponsor. The appellant was able to help. I note the children still have this condition and the sponsor worked before and after the period of time off. There was nothing to indicate that the reason for non-work was the children. Furthermore, the Regulations are tightly drawn so that simply not working is not considered legitimate unless covered by stated exceptions. There is no case law referred to which is on the point. I find that there is nothing in the Regulations under 5(7)(a) which allows the appellant to choose to take time off when in fact there was help by close family members and help from the United Kingdom state in terms of medical and social care assistance, which entitles her to also claim that she was unable to work for a lawful reason and therefore the time gap should not be taken into consideration when considering whether she exercised Treaty rights continuously for 5 years.
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> 19. When considering the respondent's submissions, on the other periods of non-work and non-qualifying activity, of September 2012 and January 2013 and 30 December 2013 and August 2014, I have already noted that June 2014 to August 2014 was effectively ceded by the appellant but sought to be explained in terms of the children's condition necessitating the sponsor not working. …"

The reference in [18] to the appellant choosing to take time off must, in context, be to the sponsor.

20. The appellant appealed to the Upper Tribunal.

Permission to appeal

21. The grounds of appeal, settled by Paul Turner of Imperium Chambers, set out all the relevant provisions of the Regulations and contend that the requirement in Regulation 6(2)(a) for a person to be treated as a worker when they are 'temporarily unable to work as the result of an illness or accident' is not, properly understood, restricted to the illness of the EEA worker, but also to their family members, which under Regulation 7, includes their children.

22. Mr Turner's grounds submit, in conclusion, as follows:

> "23. It is submitted that the person who falls ill is not restricted to the worker otherwise it would exclude the partner as well as the child. The issue is whether or not it is permanent. In this case it was for two relatively short periods of time.

> 24. It is submitted that the First-tier Judge has restrictively approached the EEA Regulations in force, with the effect that the interpretation of the non-period of working and its reasons was not properly considered.
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> 25. It is submitted that the First-tier Judge's interpretation is unlawful and that the conclusions drawn from it and the dismissal of the appeal [are] unlawful.
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> 26. A purposive approach to the decision would have led to the appeal succeeding, or at the very least, the two periods not being held against the couple and their two sick children. It is submitted that their sick children have not been factored into the First-tier Judge's reasoning, further undermining it."

23. Permission to appeal was granted by First-tier Judge Kelly on the basis that:

> "2. It is arguable that a person does not cease to be a 'qualified person' under Regulation 6(2)(a) where he or she is 'temporarily unable to work as the result of *an* [rather than 'his or her own'] illness or accident' and that the Tribunal accordingly erred in holding that this provision did not extend to the temporary inability of an EEA national to work due to the illness of a child of whom he or she is the primary carer. …"

Rule 24 Reply

24. There was no Rule 24 Reply by the respondent to the grant of permission to appeal.

25. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

26. Ms Radford represented the appellant at the hearing and I have the benefit of her skeleton argument, which cited the decision of the Court of Justice of the European Union in *Saint Prix v Secretary of State for Work and Pensions* (Aire Centre, intervening) [2015] 1 CMLR 5 (Case C-507/12), that a woman who was temporarily unable to work because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth did not cease to be a worker, so long as she returned to work within 'a reasonable period after the birth of her child'. In *Saint Prix,* the Court of Justice envisaged an extensive, fact sensitive evaluation as to whether a woman had really left the labour market. The appellant contended that the Judge had not carried out such an evaluation.

27. The appellant also relied on the decision of the Upper Tribunal in *Secretary of State for Work and Pensions v SFF and others* [2015] UKUT 502 (AAC), to the effect that a reasonable period is normally 52 weeks, but that there may be unusual circumstances such that the reasonable period is longer. In this case, the appellant contends that the illness of their children constitutes such circumstances.

28. Ms Radford maintained that the children's illness was an illness within the meaning of Regulation 6(7)(b) of the 2016 Regulations and Article 7(3) of the Citizens' Directive 2004/38/ENTRY CLEARANCE. The illness of the children was not of the sponsor's own making and was the reason for her not returning to work or study before August

2017, pursuant to Regulation 6(7)(a). The Judge's self-direction, that such illness must be that of the worker, undermined the effectiveness of the fundamental right protected by Article 45 of the TFEU.

29. An argument that the sponsor should have been treated as a self-sufficient person while she was not working, applying *Kuldip Singh and others v Minister for Justice and Equality* (Case C-218/14) was not relied upon at the hearing. Ms Radford accepted that this was an error.

30. In her oral submissions, Ms Radford expanded on the skeleton argument. The real question, she submitted, was whether a person remained a member of the workforce. She accepted that the sponsor had not worked again after the birth of her second child, but maintained that she had pursued vocational training from June – September 2014.

31. For the respondent, Mr Jarvis said that the *Saint Prix* argument was entirely new and that the Tribunal should not admit it. He was unable to deal with the argument without having had notice of it before the hearing.

32. The appeal had not been argued in that way before the First-tier Tribunal and in the *Weldemichael* decision, this complex argument was never made. If the Tribunal were minded to admit the *Saint Prix* argument, the respondent would have to admit that the Judge had not dealt with it and the decision would have to be set aside and remade.

33. The appellant was seeking to raise for the first time a new interpretation of the TFEU, extending Article 7 of the TFEU beyond the worker themselves and straining the natural meaning of the language used in both the TFEU and the Regulations.

Discussion

34. The provision relevant to this appeal is Regulation 6(2):

> "6…(2). A person who is no longer working must continue to be treated as a worker provided that the person—(a) is temporarily unable to work as the result of an illness or accident;"

35. Regulation 7 does indeed define family member to include children. However, there is no decided authority in United Kingdom law to the effect for which the appellant argues, that the natural meaning of the language in Regulation 6(2) should be treated as inclusive of persons other than the worker. The sponsor's failure to return to work after the birth of her first child extended well beyond the maternity leave period, which is why she lost her job. The evidence before the First-tier Tribunal was not such as to indicate that the sponsor herself was ill as a result of her pregnancy.

36. Unless the *Saint Prix* line of cases is of assistance, this appeal cannot succeed. The *Saint Prix* argument was not put to the First-tier Judge and did not form part of the grounds of challenge of the First-tier Tribunal decision. My primary finding is that it cannot be an error of law for the First-tier Judge to have failed to deal with an argument which was not put to him, and which as now advanced is novel and certainly not obvious.

37. The decision in *Saint Prix* has been considered by the Upper Tribunal in *Weldemichael and another* (St Prix C-507/12; effect) [2015] UKUT 540 (IAC) and in *Gauswami* (Retained right of residence, Jobseekers) [2018] UKUT 275 (IAC). In *Weldemichael,* the Upper Tribunal found that a woman was entitled to continue to be treated as a worker provided that her absence from work did not extend beyond 52 weeks, beginning no earlier than the 11th week before her expected date of confinement, and that she returned to work.

38. The facts in this case, as set out in Ms Radford's skeleton argument, are that the sponsor stopped working in December 2012, having had her first child in September 2011 (more than 52 weeks earlier) and that she did not return to work until late 2016, some 5 years after the birth of her first child and over three years after the birth of her second child. Even if she studied for part of 2014 (which the Judge did not accept to be true), the *Saint Prix/Weldemichael* extension does not avail her.

39. I have the advantage of a very full consideration of *Saint Prix* by the President of this Tribunal, Mr Justice Lane, in *Gauswami*. Nowhere in the *Saint Prix* judgment, nor in *Weldemichael* or *Gauswami* is there any reference to the illness of any person other than the sponsor themselves being relevant to whether the sponsor is a worker, or any suggestion that this is the correct analysis. The First-tier Judge cannot be criticised for failing to deal with such a speculative extension of the jurisprudence.

40. *Saint Prix* holds that a woman remains a worker for a reasonable period of absence caused by the 'physical constraints of the late stages of pregnancy (and the aftermath of childbirth)'. The natural meaning of that language, as used in the *Saint Prix* decision and in *Weldemichael* and *Gauswami* relates to the effect on the sponsor's body of the pregnancy and the birth. Pregnancy is not an illness: the illness of the sponsor's child cannot reasonably be regarded as 'the aftermath of childbirth' and I decline to extend the definition in *Saint Prix* beyond the natural language used by the Court of Justice.

41. The arguments advanced on behalf of the appellant do not succeed. There was an interruption in the period of the sponsor's worker status, as conceded by the appellant, between June and August 2014 and the First-tier Judge did not err in so concluding.

42. The appeal is therefore dismissed.

DECISION

43. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Date: 3 September 2018 Signed *Judith AJC Gleeson*

Upper Tribunal Judge Gleeson