Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04341/2017

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination & Reasons Promulgated**
On 1st April 2019	**On 29th April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS KAREN BURRI BECHER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No legal representation
For the Respondent: Mrs H Aboni (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Borsada, promulgated on 19th July 2017, following a hearing "on the papers" in Birmingham. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matters comes before me.

The Appellant

2. The Appellant is a citizen of the United States of America, was born on 6th August 1963, and is a female. She appealed against the decision of the Secretary of State dated 19th April 2016, refusing her application for a permanent residence card, as confirmation of her right to residence in the UK as an EEA family member. The judge determined the matter without an oral hearing on 10th July 2017.

The Appellant's Claim

3. It is a feature of this appeal that the Appellant has already been granted indefinite leave to remain. This was on the basis of the status of her EEA national husband, who is a citizen of Germany, and who had been living in the UK since 1999, and was granted British citizenship himself in 2006, so that he is now a dual national with German nationality as well. In an appeal before Judge Borsada, the Appellant had asked this particular aspect of her circumstances to be taken into account. Judge Borsada noted that "evidence of joint residency and employment and self-employed had previously been supplied to the Respondent and was the basis of the previous grant of leave" (paragraph 4(i)). It was the Appellant's argument that, given that the grant of indefinite leave to remain in the UK in 2004, was made to her, before her husband's naturalisation as a British citizen in 2006, her husband's subsequent British citizen status, should have no affect under EU treaty law, on her right to claim a permanent residence card.

4. The judge observed that,

> "The Appellant argued that she had completed more than five years' continuous residence in the UK from February 2000 with her husband, as a German citizen exercising his treaty rights before he was naturalised and that right had not been lost as she had not left the country" (paragraph 4(i)).

5. Accordingly, the position in the Tribunal below was that, "the Appellant argued that all she was doing was replacing or renewing her previous grant and the only evidence required was the evidence of the previous grant as well as evidence of continued residence in the UK" (paragraph 4(ii)).

The Judge's Findings

6. The judge went on to conclude that the Appellant had obtained indefinite leave to remain (ILR) in the UK by way of a grant made by the Respondent Secretary of State on 17th September 2004. Indeed, the Appellant had provided a letter from the Respondent which confirmed this. The purpose of the present application, as the judge recognised, was that "she applied for a permanent residence card in order to have a more recent document showing her the existing residence status which had been previously documented by way of a stamp in her own US passport". However, the judge went on to conclude with respect to this that, "it is not clear why in renewing her passport she did not ask the Respondent for a stamp to be provided in her new passport confirming her pre-existing ILR".

7. The position now before the judge was that the Appellant's husband had been naturalised in 2000. It was the case that

> "The Appellant asserts her continued residence and continued employment in the UK but has provided no evidence to this Tribunal in support of the claim and without this I can make no findings of fact and the appeal therefore must fail on EEA grounds" (paragraph 6).

8. The judge went on to also add that it was difficult to understand why this application was being made, or was ever necessary "as there is no evidence to indicate that the Appellant has been outside the UK for more than two years" (paragraph 6).

9. The appeal was dismissed.

The Grounds of Application

10. The grounds of application are extensive. They state that the application by the Appellant on form EEA(PR), Section 4, was for a renewal of a residence document which had already been issued to the Appellant as a non-EEA national under the EEA Regulations 2000. This stated that the Appellant stayed in the UK indefinitely. The Appellant presented valid reasons for her request to renew the 2004 document. There were three reasons she gave.

11. First, that from her practical experience she knew that airline staff and non-UK border control forces do not always consider a passport stamp which states that, "at present there is no time limit on the holder's stay in the United Kingdom" as sufficient proof of the right to travel to the UK.

12. Secondly, the long period of time since the Home Office document of 2004, had seen several changes in immigration legislation being introduced, and the Appellant wanted to be absolutely clear about her existing status.

13. Third, there was "the changed political environment in the UK that creates a practical necessity for a foreigner to have a recent, unambiguous immigration status document" to prove their legal residence in this country. The Appellant in the grounds goes on to deal with the judge's wonder as to why the Appellant wishes to make this application given that she had not been out of the UK for more than two years and had not lost her permanent residence.

14. The Appellant states that:

> "This statement ignores and completely misrepresents the nature of my application for a permanent residence card on form EEA(PR) based on the existence of a permanent residence right. As Section 4 of the form says: 'Only complete this section if you have a permanent right of residence'."

15. On 22nd December 2017 permission to appeal was granted by Judge Easterman. He observed that "this does not appear to me to be a straightforward matter" because the Appellant already had indefinite leave to remain in the UK, which had been

granted as long ago as 2004, and which took the form of a letter and a stamp in out of date US passport. The Appellant states that this was granted on the basis of the 2000 EEA Regulations, given her marriage to her husband, who was a German national at the time. He was exercising treaty rights. Since then he has acquired British nationality while still retaining his German nationality.

16. Judge Easterman observed that the Appellant was clear that, although she did not need a permanent residence card in order to remain in this country, as a matter of convenience, she would like to have one and she claimed she was entitled to the issue of one on the basis of the Rules. If that was the case, then this application was entirely arguable because the Appellant would have been entitled as of right to a permanent residence card. Permission was granted.

17. There was no Rule 24 response.

Submissions

18. At the hearing before me, the Appellant appeared in person. She had submitted that her case number was linked to that of her husband's case number. He had arrived in the UK in 1999. He had taken British nationality in 2006. She had been granted indefinite leave to remain on the basis of his having exercised treaty rights prior to the grant to him of British nationality status. That happened in 2006. Her rights were granted in 2004. She wished to make sure that her rights continued. She relied upon her grounds of application.

19. For her part, Ms Aboni submitted that there was no error of law in Judge Borsada's determination. She was aware that there was now a recent Grand Chamber decision in the case of **Toufik Lounes (Case C-165/16)** which confirmed that the fact that a spouse acquires dual nationality, still retained intact for his dependant, the rights which would accrue as an EEA national. That decision was recent, however. It was dated 14th November 2017. Even so, the Appellant had been granted indefinite leave to remain under domestic law. If she wished to acquire a permanent residence card under EEA law, she had to furnish documentation demonstrating that her husband exercised EEA rights over five years. Judge Borsada did not have the necessary evidence. He was clear that "the Appellant asserts a continued residence and continued employment in the UK but has provided no evidence to this Tribunal in support of the claim…" (paragraph 6). There was no error of law.

Error of Law

20. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows. This is a case which the Appellant herself did not come prepared to deal with at the hearing. However, if one looks at the Appellant's bundle (which is available from the hearing below) it is clear that the Appellant stands to succeed on the basis of her pre-existing position.

21. There is a letter from the IND addressed to the Appellant on 18th May 2000. It states that her passport is being returned with the endorsement that she has the right to reside in the UK with Klaus Jurgen Becher "who is a European Economic Area national exercising a treaty right in the United Kingdom under the treaty of Rome" and that she is "free to take employment or to engage in business or a profession while your husband continues to exercise a treaty right".

22. There is then a letter from the Home Office on 17th September 2004, which the Appellant has specifically relied upon in the hearing before me today, which states that, "I am writing to say there are no longer any restrictions on the period for which you may remain in the United Kingdom". If she leaves the UK, she will normally be readmitted for settlement as a returning resident so long as "you have not been away for longer than two years".

23. There is then, most importantly, the EEA(PR) "guidance notes" (version 2.0 of December 2015). This makes it clear that it relates to an application "for a document certifying permanent residence or a permanent residence card". It states that the Appellant must pay a specified fee and give her biometric information. It has a specific section, which the Appellant in this case actually relied upon, to deal with the situation. What is stated at "Section 4: replace or renew your permanent residence document" is that, in order to proceed on this basis, the Appellant must provide proof of her status of "your previous document certifying permanent residence". She must also send evidence that she has not spent more than two years outside the UK, which is not the case here. She has to show the stamps in her passport.

24. With respect to her residence in the UK, there is Section 5 which is headed "Residence and Previous Documentation" and which states that it is recommended that "you submit at least two documents for each year of residence". In this respect, the examples that are given are that the Appellant furnish HM Revenue & Customs' documentation, together with Department for Work & Pensions' documentation, the DVLA and TV licencing information, and bank statements, together with council tax bills, as well as electricity and gas bills, plus water rates bills, and a tenancy agreement. The document ends by stating that "previous passports, travel documents or national identity cards you have held since living in the UK".

25. It is clear that the Appellant has availed herself of this particular provision which enables her to simply apply in order to renew her permanent residence document. This is clear because the Appellant states in a letter dated 31st October 2016, addressed to the Home Office, that she has complied with all the conditions that were set out in the grant of indefinite leave to remain on 17th September 2014. She has been continuously settled in the UK with her husband and family. Moreover, "I have continuously been in business in the UK as a managing partner of our jointly owned family firm, Knowledge and Analysis LLP, a limited liability partnership, resident in England and Wales, registration number OC303170". It does not appear that the judge, in what was a "paper" hearing, expressly referred to this information.

This does show that both the Appellant and her dual national partner, have been continuously in business for the time that they have been living in the UK.

26. In her application of 31st October 2016, on the same page, the Appellant goes on to then explain also why she wants to have a renewal of her permanent residence card. She gives in particular two reasons. First, that "it is awkward to always have to refer to the 'no time limit stamp' in my old US passport when travelling". Second, that "the long period of time since your letter of 2004 in combination with regulatory changes since then and the current political debates about immigration create a sense of uncertainty about the permanence of my residency status". The letter that the Appellant wrote ends with the statement that, "I have completed the form EEA(PR) insofar as it applies to my case and I am enclosing the required original supporting documents, biometric information form and £65 fee."

27. In the circumstances therefore, it is not correct to say that the Appellant "has provided no evidence to this Tribunal in support of the claim" (paragraph 6), because this is what the Tribunal had properly set out to do, and had succeeded in doing so.

28. The Appellant had also given entirely sensible and reasonable reasons for why she wished to replace or renew her permanent residence document. All she had at the moment was by way of a stamp in her old US passport, and even that simply said "no time limit". If the Appellant has a legal right to apply for a permanent residence card, on the basis of a previously granted status, then she is entitled to exercise that right. I accordingly make a finding of an error of law for these reasons.

29. I have remade the decision on the basis of the findings by the previous judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the reasons I have already given.

Decision

30. The decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision of the previous judge. I remake the decision as follows. This appeal is allowed.

31. No anonymity direction is made.

32. This appeal is allowed.

Signed Dated

Deputy Upper Tribunal Judge Juss 25th April 2019

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have made a fee award of any fee which has been paid or may be payable.

Signed	Dated
Deputy Upper Tribunal Judge Juss	25th April 2019