Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/10975/2016

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, Belfast	**Decision & Reasons Promulgated**
On 5 June 2019	**On 2 August 2019**

Before

PRESIDENT, THE HONOURABLE MR JUSTICE LANE
UPPER TRIBUNAL JUDGE RINTOUL

Between

MR EMMANUEL KWAME OKAI-KWAI ARUAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Dornan, instructed by Fisher Law
For the Respondent: Miss Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge S Gillespie promulgated on 10 September 2018, dismissing his appeal against a decision made on 31 May 2016 to refuse to issue him a residence card as confirmation of his right of residence as the spouse of an EEA national exercising Treaty rights in the United Kingdom. The application and the subsequent appeal were determined under the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). As the date of decision was prior to the entry into force of the

Immigration (European Economic Area) Regulations 2016, the Immigration (European Economic Area) Regulations 2006 continue to have effect by operation of Section 3 of Schedule 3 to the 2016 Regulations.

2. The decision in this case is expressed as a decision to remove the appellant pursuant to section 10 of the Immigration and Asylum Act 1999, which applies by virtue of regulation 19(3)(a) pursuant to Regulation 21B(2) and 24(2) of the 2006 EEA Regulations.

3. The appellant's wife has dual British and Irish nationality. The couple were married in Ghana on 30 June 2009 and the appellant was issued with a residence card on 20 December 2010, valid until 20 December 2015. Although the appellant's wife is a dual national and so is not an EEA national as now defined in the EEA Regulations, as the appellant had the right to reside in the United Kingdom under the 2006 Regulations as at 16 July 2012 and on 16 October 2012 held a valid residence card issued under the 2016 Regulations, his wife falls to be regarded as an EEA national for the purposes of the 2006 Regulations (see Schedule 3 to the Immigration (European Economic Area) (Amendment) Regulations 2012).

4. The appellant's case, as set out in the submissions made to the First-tier Tribunal, are that his wife had been employed from October 2012 to October 2015 as a repackaging employee at a creamery (which appears to be an error for the reasons we set out below)and that she was required to stop working in 2013 following a diagnosis of osteoporosis. It is also said that the appellant is the primary carer for his spouse who suffers from coeliac disease.

5. It was also submitted that the appellant had acquired the right of permanent residence on the basis that the appellant's spouse, as an Irish citizen entitled to dual nationality, is settled with the right of abode under section 1 of the British Nationality Act 2002 and pursuant to regulation 15(b) of the 2006 Regulations and the fact that the appellant's wife is now self-employed and had commenced a new business venture indicated that her incapacity had been temporary. Alternatively, it was submitted that as the spouse of a worker who had permanently ceased activity at the time, he was also entitled to permanent residence. Finally, it was submitted that the appellant was not subject to removal as his wife cannot be removed.

6. The judge noted [6] the respondent's case that the appellant had not submitted evidence to show that his spouse had been employed for a year or more before becoming temporarily incapacitated as he had not provided evidence with his application that she had started receiving employment support allowance from May 2013, there being no evidence from employment prior to that date, no other details of her current illness and the time during which she had been unable to work.

7. The judged noted also that the appellant's spouse was not present at the hearing, as she had gone to Spain to visit a friend on holiday. The judge found that:-

   (i) the appellant had not shown that his spouse had been working for a year prior to stopping given lack of evidence thereof [22] and thus she could not meet regulation 6(2)(b);

(ii) there was no evidence as to the likely duration of the illness, GP notes not providing an indication as to what impact her various illnesses would have on her fitness to work or when she could be expected to return;

(iii) there was no evidence to show that the appellant's spouse is registered as self-employed [24];

(iv) there was no medical evidence to show that the appellant's spouse was permanently incapacitated, which was inconsistent with the assertion that she had recently registered as self-employed and had travelled to Spain to live with a friend for a month [25];

(v) there was doubt over the appellant's evidence generally as medical documents indicating the marriage broke down in 2012, when the spouse discovered that the appellant had secretly married in Ghana; that a letter in the medical records describes her as a right hand dominant 62 year old hairdresser and a letter from a gastroenterologist in May 2015 describes her as living alone; and, that this evidence put in question the appellant's reliability as a witness as to his wife's condition, employment capability and employment record; and

(vi) limited weight could be attached to the wife's unsigned draft statement, in light of her absence at the hearing.

8. The appellant sought permission to appeal on the basis that the judge had erred:

Ground 1:

In his approach to what the appellant required to prove to demonstrate an entitlement to permanent residence:

(i) By not noting that, as the appellant's spouse had already acquired permanent residence, the appellant must be automatically entitled to derivative permanent residence status as the spouse of an EEA national under Directive 2004/38 read in light of Article 7 of the European Charter of Fundamental Rights as, properly understood, the Directive only required that the appellant's spouse had resided legally in the United Kingdom for any continuous period of five years;

(ii) In failing to note that article 16(1) of the Directive did not require the appellant's wife to show that she was exercising Treaty rights under regulation 6 of the 2006 Regulations (although it was accepted that to have "resided legally" meant a period in residence which complied with the conditions stated in the Directive and that a period of residence under section 1 of the British Nationality Act 1981 did not satisfy these conditions); and,

(iii) In not noting that the appellant's grant of residence was made under the 2006 Regulations, and that the appellant's spouse, as a long-term worker or jobseeker who has lived in the United Kingdom for her entire life had long since acquired permanent residence and thus, he had no need to show that he had lived in the United Kingdom with his spouse for a continuous period of five years;

Ground 2:

In failing to consider that the appellant had demonstrated an entitlement to permanent residence as a family member of a worker or a self-employed person who had ceased activity, it following from the fact that he had not shown she was temporarily incapacitated that she must be deemed to have ceased activity permanently, given the appellant's testimony;

Ground 3:

In failing to consider the legality of the decision to remove the appellant from the United Kingdom as, given the appellant's spouse had been a dual Irish/British national, she could not be removed from the UK and accordingly he cannot be removed under the Regulations otherwise as, following article 14(4)(a) of the Directive, EU nationals and their family members may not be expelled so long as the Union citizen can provide evidence of continuing to seek employment and they have a genuine chance of being engaged, the judge erring in failing to address the failure of the Home Office to remove or detain the appellant in consequence of its refusal to grant him status;

Ground 4:

In the alternative, it is claimed that there is a need for a preliminary reference to the European Court of Justice.

9. We heard submissions from Mr Dornan who submitted that there was no dispute that the appellant and his spouse were resident in the territory of the United Kingdom for the qualifying period.

10. Miss Cunha accepted that ground 1 did involve the making of an error in that the judge had not approached the law correctly as he had not considered whether the appellant's wife had acquired permanent residence and that the appeal should be re-made on that basis.

11. Mr Dornan accepted there was no evidence of activity on the part of the appellant or his wife prior to 2010 and that this ought to be inferred or in the alternative, that the appellant's spouse had ceased work owing to ill health and that she was either temporarily incapacitated or, if not, permanently incapacitated. He accepted that there was no evidence of her being duly recorded as in receipt of employment.

12. Mr Dornan submitted also that the Tribunal had erred in not finding that the evidence of the illness resulted in permanent incapacity and, relying on regulation 5(3)(a) and 5(6) in the interests of equivalency, this should apply to the appellant's wife as she is also a British citizen.

13. Miss Cunha submitted that the appellant had not provided sufficient evidence and, in this case, in addition to the lack of evidence of capacity to work, there was insufficient evidence to show that the appellant's wife was in genuine and effective work, this falling below £4,000 in 2011, demonstrating that the work was marginal and ancillary. She accepted that regulation 6(5) applied but there was insufficient evidence to show temporary or permanent incapacity as the wife appeared still to be

able to work as a hairdresser. Miss Cunha submitted that the applicant could not meet the requirements of regulation 15 as he could not show that he was a spouse or a person who had been exercising treaty rights for five years or is a self-employed person who had ceased activity.

14. In reply, Mr Dornan said that he was not relying on regulation 15(1)(f). He submitted that it could be inferred the spouse had been employed prior to 2009 as shown by the P60s and thus she had been economically active before that period.

15. We turn to the grounds of appeal in turn.

Ground 1

16. Given Miss Cunha's concession, it is unnecessary for us to consider in detail ground 1 of the grounds of appeal at this stage. The concession is, however, limited to whether the judge had failed to consider whether at any point the appellant's spouse had acquired the permanent right of residence. That is an issue on which we need to re-make the decision in the light of the evidence. We do not, however, consider that this is an acceptance that, as the grounds aver at [1(xii)] the appellant's wife is to be deemed to be permanently resident; that would be a concession as to the law which is not permissible.

Ground 2

17. We do not accept that the judge erred in respect to the findings as to permanent incapacity. The judge was entitled to find that there was insufficient evidence to show incapacity to work, temporary or otherwise, from the medical notes. Further, what evidence that the appellant was able to give was not accepted by the judge. His reasons for doing so - that the appellant and his wife appeared not to be living together, this being recorded in the medical evidence which is not challenged in the grounds - are adequate and sustainable. The judge was manifestly entitled to attach little weight to an unsigned witness statement from a witness who was not present to be cross-examined.

18. Whilst it may the case that somebody who is not temporarily incapacitated may be permanently incapacitated if there is no evidence that they cannot get any work, that is not the case here. What is in issue here is whether the wife ceased her activity and, while she appears to have set up as a self-employed hairdresser, more to the point there was insufficient evidence to show that she was incapacitated or has ceased work due to illness as opposed to some other reason.

Ground 3

19. It is not arguable that the Secretary of State acted unlawfully in seeking to remove the appellant. He was not seeking to remove the appellant's wife. Regulation 19(3) permits the Secretary of State to remove the appellant if has ceased to have a right to reside under the Regulations. That is clearly so if it is shown that his spouse is not exercising Treaty rights or does not otherwise have a right to remain under the Regulations. As the appellant concedes in the grounds, the spouse's right to remain

under British domestic law is not in issue and does not mean that she is living under the Regulations. The reference to Article 14(4)(a) of the Directive is not of assistance as the appellant has failed to provide evidence that his wife is a worker or a self-employed person whose economic activities are genuine and effective. He has not shown that there is any evidence that she has a genuine chance of being engaged.

Re-making the Decision

The law

20. For the reasons set out at [1] above, the relevant law is set out in the 2006 Regulations which, so far as is relevant to this appeal, provide:

> 5. - "Worker or self-employed person who has ceased activity"
>
> (1) In these Regulations, "worker or self-employed person who has ceased activity" means an EEA national who satisfies the conditions in paragraph (2), (3), (4) or (5).
>
> (2) A person satisfies the conditions in this paragraph if he—
>
> (a) terminates his activity as a worker or self-employed person and—
>
> (i) has reached the age at which he is entitled to a state pension on the date on which he terminates his activity; or
>
> (ii) in the case of a worker, ceases working to take early retirement;
>
> (b) pursued his activity as a worker or self-employed person in the United Kingdom for at least twelve months prior to the termination; and
>
> (c) resided in the United Kingdom continuously for more than three years prior to the termination.
>
> (3) A person satisfies the conditions in this paragraph if—
>
> (a) he terminates his activity in the United Kingdom as a worker or self-employed person as a result of a permanent incapacity to work; and
>
> (b) either—
>
> (i) he resided in the United Kingdom continuously for more than two years prior to the termination; or
>
> (ii) the incapacity is the result of an accident at work or an occupational disease that entitles him to a pension payable in full or in part by an institution in the United Kingdom.
>
> 6. - "Qualified person"
>
> (1) In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as—

(a) a jobseeker;

(b) a worker;

(c) a self-employed person;

(d) a self-sufficient person; or

(e) a student.

(2) Subject to regulations 7A(4) and 7B(4), a person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if—

(a) he is temporarily unable to work as the result of an illness or accident;

(b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom for at least one year, provided that he—

(i) has registered as a jobseeker with the relevant employment office; and

(ii) satisfies conditions A and B;

(ba) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom for less than one year, provided that he—

(i) has registered as a jobseeker with the relevant employment office; and

(ii) satisfies conditions A and B;

(c) he is involuntarily unemployed and has embarked on vocational training; or

(d) he has voluntarily ceased working and embarked on vocational training that is related to his previous employment.

(2A) A person to whom paragraph (2)(ba) applies may only retain worker status for a maximum of six months.

(3) A person who is no longer in self-employment shall not cease to be treated as a self-employed person for the purpose of paragraph (1)(c) if he is temporarily unable to pursue his activity as a self-employed person as the result of an illness or accident.

15. - Permanent right of residence

(1) The following persons shall acquire the right to reside in the United Kingdom permanently—

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

> (b) a family member of an EEA national who is not himself 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) a worker or self-employed person who has ceased activity;
>
> (d) the family member of a worker or self-employed person who has ceased activity;
>
> (e) a person who was the family member of a worker or self-employed person where—
>
> …
>
> (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 that period, a family member who has retained the right of residence.

21. The first issue which we must address is whether the appellant's wife had acquired the right of permanent residence. In this case, that issue is complicated by two factors: first, she is a dual British and Irish national; and second, the transitional provisions set out in Schedule 3 to the Immigration (European Economic Area) (Amendment) Regulations 2012.

22. It is important to note that in McCarthy [2011] EUECJ C-434/09 the Court of Justice ruled that:

> "1. Article 3(1) of Directive 2004/38/EC … must be interpreted as meaning that that directive is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.
>
> 2. Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States."

23. It is not submitted that the appellant's wife has exercised free-movement rights, and so it follows that, as a matter of European Law, she has no rights under the Directive or pursuant to Article 21, TFEU. As the decision of the CJEU declares what the legal position has always been, she has never had those rights.

24. As the appellant's wife has no rights under EU law, then the appellant has no rights under EU law; his rights under the TFEU or the Directive can only be derived from his wife's rights as an EU national.

25. The position under the 2006 Regulations is different. That is because prior to McCarthy, the respondent's position as reflected in the Regulations was to grant residence documents to family members of dual British/EEA nationals. That is permissible as Article 37 of the Directive permits a member state to give greater rights than those conferred by the Directive, but that does not give them rights under EU law – see Ziolkowski v Land Berlin [2011] EUECJ C-424/10 at [47] to [50]

26. As EU law is not engaged, there is no basis on which it can be said that Article 7 of the Charter of Fundamental Rights and Freedoms is engaged and so there is no legal basis for arguing that the appellant's wife's settled status as an Irish national under domestic law can be read over into to her automatically having acquired a permanent right of residence, something that can be acquired only by operation of the Directive.

27. It therefore follows that the only basis on which the appellant can show he is entitled to a permanent right of residence is under the 2006 Regulations.

28. We therefore turn to the Regulations and the different possible routes by which the appellant could have acquired a permanent right of residence. This requires us to consider first the position of his wife on whose status his rights inevitably depend.

29. We recall that it is only necessary for the appellant to show that he has resided within the United Kingdom for a continuous period of five years during which his wife was either a qualified person or had acquired a permanent right of residence.

30. As Mr Dornan accepted, he was asking the Tribunal to infer that the appellant's wife had acquired permanent residence through working on the basis of the fact she was born and had lived in the United Kingdom ever since. That is not something which we can do. We accept that she was born in the United Kingdom but there is no reliable evidence as to her work activity prior to 2009. Whilst we have P60s for the tax years 2009/10 and 2010/11 these are insufficient to show that she had been a worker prior to that. Her own witness statement is silent on the point which, it might be thought surprising, in light of the detailed submissions to the effect that she had acquired permanent residence through working. Indeed, the witness statement refers to the husband as working for a creamery not her. All she says is at paragraph 8 is:

> "I was compelled to stop working in 2013 following a diagnosis of osteoporosis. I also suffer from coeliac disease for which I require medication, a heart condition which depletes my energy, and ongoing anxiety issues for which I have been receiving treatment."

31. There are then further details of her medical conditions and she accepts disclosing that her marriage had broken down in 2012.

32. Whilst there is significant material relating to the wife's health, there is little mention about employment other than an observation from the Primary Mental Healthcare Service (page 76) that she hopes to return to paid employment soon.

33. There is also, we accept, reference in the fracture clinic letter of 10 October 2016 to her being a hairdresser but viewing the evidence as a whole we are not satisfied she is permanently incapable of work, either through her coeliac disease or otherwise. There is limited evidence from the wife herself beyond a letter of 16 August 2016 in which she says that she is dependent on the appellant due to her ill health but there is no letter or other document issued by a doctor or other health professional stating the appellant's wife is unable to work, beyond a letter of 14 December 2015 which says only this:

> "To Whom It May Concern
>
> This letter is to confirm that this lady is not fit for work at present. I hope this information is useful to you."

34. This letter is inadequate in that it fails to say when the wife ceased to be fit for work or whether this is temporary. Similarly, a letter dated 15 December 2015 confirming that she is in receipt of Employment and Support Allowance again is inadequate as it simply fails to say from when this was paid.

35. In summary, there is simply insufficient evidence also to show on balance that that the appellant's wife is permanently incapacitated or has exercised Treaty rights for a continuous period of five years.

36. In the light of this evidence, we make the following findings.

    (i) The appellant has not shown that his wife had acquired the permanent right of residence through the continuous exercise of Treaty Rights prior to 2009 due to the lack of evidence to support that claim;

    (ii) There is insufficient evidence to show that the appellant's wife had retained continuity of residence as a qualified person for any five-year period, given the lack of evidence of her working, or otherwise being a qualified person;

    (iii) There is insufficient evidence to show when the appellant's wife ceased working or that this was as a result of her either being temporarily unable to work owing to illness or, in the alternative, that she met the conditions set out in any of regulation 6 (2) (b), (ba), (c) or (d) owing to the lack of evidence of her being duly recorded as unemployed or having taken any training;

    (iv) The appellant's wife has not reached retirement age, nor is there sufficient evidence to show that she has terminated activity due to permanent incapacity, and so she does not meet the requirement of regulation 5;

    (v) Accordingly, the appellant has not shown that his wife has exercised her rights continuously, and so his residence here has not been lawfully for a period of five years (regulation. 15 (1)(b)). Nor has he shown that he is the family member of a person who has ceased activity (regulation 15(1)(d)).

    (vi) As the appellant is still married to his wife, he cannot be a person who has retained the right of residence, and so he cannot meet the requirements of regulation 15(1)(f).

37. Accordingly, for these reasons, in re-making the decision we are not satisfied that the requirements of the EEA Regulations were met. For these reasons, we find that the appellant has failed to satisfy that he meets the requirements of the EEA Regulations and we re-make the appeal by dismissing it.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

2. We remake the decision by dismissing the appeal.

Signed Date 26 July 2019

Upper Tribunal Judge Rintoul