



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/07009/2012

THE IMMIGRATION ACTS

Determined On the Papers at Field House
On 18 July 2013

Determination Promulgated
On 21 August 2013

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

MUHAMMAD SOHAIL

Appellant

and

ENTRY CLEARANCE OFFICER - WARSAW

Respondent

DETERMINATION AND REASONS

1. The appellant, a citizen of Pakistan, born on 30 November 1977, appeals against a decision of Judge of the First-tier Tribunal Kanagaratnam who in a determination promulgated on 30 November 20112 dismissed the appellant's appeal against a decision of the Entry Clearance Officer, Warsaw, made on 2 March 2012 to refuse the appellant leave to enter the United Kingdom as a family member of an EEA national exercising Treaty rights under the Immigration (European Economic Area) Regulations 2006.

2. The notice of refusal stated as follows:

"Your Application

You have applied for admission to the United Kingdom by virtue of European Community Law as the family member of a European Economic Area national who is exercising or wishes to exercise rights of free movement under the Treaty of Rome in the United Kingdom.

The Decision

You have provided a certificate to show you married a Lithuanian national, Ramune Rastenyte while being illegally present in the UK on 08/02/2010. However you have not provided any other evidence that you are in a genuine relationship e.g. photographs of you and your spouse together, evidence of how, where and when you met or further evidence of how you have kept in contact during any periods apart since your marriage.

You have not provided any evidence that you and your spouse are living together or intend on travelling to the UK together. There is no information before me to demonstrate you have lived together in the past either before or after your marriage. i.e. letters, cards, utility/other bills or bank/other statements addressed to you and/or your spouse showing the same address in Lithuania or elsewhere. The definition of 'spouse' in the Immigration (European Economic Area) Regulations 2006 does not include a party to a marriage of convenience. I am satisfied that you are party to a marriage of convenience and are therefore not the family member of an EEA national in accordance with Regulation 7 of the Immigration (European Economic Area) Regulations 2006.

Even if I were satisfied your marriage was not one of convenience, you made a conscious decision to be evasive in answering questions about your financial circumstances in Lithuania. You have not provided evidence of how you support yourself in Lithuania. You married your EEA spouse three months prior to leaving the UK and five months before making your first application to return to the UK, (Warsaw/603732). I am satisfied that your marriage to the EEA national facilitates your long-term presence in Member States and achieves your primary goal of securing entry to the UK.

It is also reasonable for Member States to be satisfied that EU citizens have sufficient resources for themselves and their families not to become a burden on the social assistance system of the host Member State. Sufficient resources also include comprehensive sickness insurance. Initial residence rights apply if I am satisfied that the EEA national has sufficient resources. The information before me indicates that you and the EEA national do not receive an income in Lithuania. The EEA national's source of income is unclear therefore it is likely to be some form of social assistance from the Lithuanian state. There is no information before me to show that the EEA national is otherwise self-sufficient. In the absence of satisfactory information to show that the EEA national and her family member will not be reliant on social assistance in the UK, during and after initial residence rights of three months (*sic*).

Therefore I am not satisfied that you qualify for an EEA Family Permit under Regulation 13 of EEA Regulations 2006. Furthermore given the lack of supporting evidence before me surrounding your relationship and your spouse's circumstances I refuse your EEA family permit application because I am not satisfied that you meet all of the requirements of Regulation 12 of the Immigration (European Economic Area) Regulations 2006."

3. The appellant's grounds of appeal were lengthy and give details of how he met his wife, their marriage in Britain and the basis of the appellant's stay here. He emphasised that theirs was a genuine marriage, that he did not consider that he had been evasive in any way and at paragraph 40 of the grounds of appeal he stated:

"40. - As ECO pointed out first ECO family permit application submitted 27 August 2010 (EV.14), there was nothing any intention except celebrate annual religious festival with relatives/friends who were there as there were less opportunities to celebrate here, as on Christmas time everybody loves celebrate time with family/friends and sit together. My wife was delayed to travel due to her university exam but we are all family members decided to celebrate the festival in the UK that time. Secondly my intention was to sort out my finances (EV.15, 16) from two English families, I help then not only on Christmas time but other times when they were in trouble in 2005 - 2007 they promised me to return my money within four months' time. Unfortunately I am still waiting for my money, I trust them, and help from my pocket even if I was a student."

He went on to say that on that occasion he had intended to go to Britain for two weeks.

4. He then referred to the terms of "EEA Immigration Act 2006 Article 12", but was clearly referring to Regulation 12 of the Immigration (EEA) Regulations 2006, and to Directive 2004/38/EC. He stated that he had the right to travel to Britain with his wife.
5. In paragraph 49 he stated:

"We already provide sufficient bank statements (EV.7) just for ten days, so there is not any reason just to give a hypothetical statement and refuse family permit applications. If it was the case we decided to go more than three months then definitely we show all financial statements to prove we will not become any unreasonable burden on the UK social system."

6. He then argued that an EEA national need only show that he or she is exercising Treaty rights after they have been in the country for 3 months stating that it was at that point the appellant could be required to be exercising Treaty rights. Finally he referred to the issue of his rights under Article 8 of the ECHR.
7. In his determination the judge referred to the relevant Rules relating to the issue of an EEA family permit which stated that a family permit should be issued to an EEA

national who was either residing in Britain in accordance with the Regulations or be travelling to Britain within six months of the date of application and would then reside in Britain under the Regulations.

8. In paragraph 5 of the determination the judge stated that:

“The burden of proof is on the appellant and the standard of proof is on the balance of probabilities. In this instance, the appellant would have to establish, on the balance of probabilities that the EEA sponsor is resident in the United Kingdom or accompanying the appellant within 6 months of the date of the application. Although there is a photocopy of the residence card on file there is no recent statement from the EEA national as to her whereabouts. The EEA national was also not present at the hearing to confirm that she is present in the United Kingdom or supporting the application as may be expected. There is also no evidence that she is currently exercising Treaty rights and for all of these reasons the requirements of the relevant paragraph are not met.”

9. The application was considered in the First-tier by Judge of the First-tier Tribunal Brunnen who refused the application in paragraph 4 of his decision. He stated:

“The application for a residence card is fundamentally misconceived. It is apparent from the evidence submitted, in particular the letters from the appellant's wife, that they lived together in Lithuania and their only wish concerning the UK is to be able to come here to visit relatives and friends. In this situation the appellant should be applying for a visitor's visa and not a residence card. It is clear that the appellant's wife (the relevant EEA national) is not a qualified valid person for the purposes of Regulation 6.

The judge found that there was no evidence that the appellant's wife was exercising treaty rights in the UK and that accordingly the appellant had not established that he was entitled to a residence card. The grounds do not identify any arguable error in that decision.”

10. The appellant then submitted renewed grounds of appeal which stated that the application was for an EEA family permit and not for a residence card and that there was a mix-up between a residence card which was issued by virtue of Regulation 17 and the EEA family permit which was issued by virtue of Regulation 12.

11. He asserted that all he needed to show was that he was a family member of an EEA national in order to obtain a family permit and that all that was required would be that he did not fall for exclusion from the UK on the grounds of public policy, public security or public health under Regulation 21. He stated that there was no requirement for an EEA national to be a qualified person on arrival. He stated that:-

“I am an overseas applicant, submitting an application for an EEA family permit to accompany an immediate EEA national family member on a visit to the United Kingdom. Regulation 12 as opposed to Regulation 17 therefore applies. An overseas application for an EEA family permit does not equal to an application for a residence card.”

12. Having referred to the comments of Judge Brunnen which I have set out above, he stated that the judge's interpretation of the Regulations was fundamentally incorrect and that he had applied for an EEA family permit under the provisions of Regulation 12. He asserted that Judge Brunnen was wrong when he stated that that the appellant should be applying for a visitor's visa instead of an EEA family permit as There was no need for the EEA national to be a qualified person on arrival.
13. Having quoted from Regulation 13, which related to the situation where an EEA national becomes an unreasonable burden on the social assistance system in the United Kingdom and therefore ceases to have rights, he then referred to the fact that his wife was supporting his application and he, his wife and their child were living together.
14. On these grounds Upper Tribunal Judge Spencer granted permission in the following terms:

"In my view the application has sufficient merit that permission to appeal should be granted. It is arguable that the First-tier Tribunal Judge failed to correctly apply Regulation 12(i) of the Immigration (European Economic Area) Regulations 2006. Moreover it does not appear that the First-tier Tribunal Judge dealt adequately with the reasons why the respondent refused the application."
15. The facts of this case appear to be relatively simple. The appellant came to Britain as a student and achieved various academic qualifications here. Having received a Certificate of Approval he married his Lithuanian wife and they left Britain. They have a son. There is nothing to indicate that this is not a genuine, subsisting marriage. There is evidence that the appellant is working in Lithuania as a lecturer at the University of Applied Social Sciences and that his wife has funds in her bank account. There is also a letter of support from his wife who states that he, she and their child would be travelling to Britain together. The evidence provided shows that the concerns of the Entry Clearance Officer about the marriage and the finances of the appellant and his ability to support himself have been met.
16. It is clear from what the appellant has written in the grounds of appeal and indeed from his wife's statement that they wished to visit Britain for a short period of time. It is not asserted by them and there is no indication that it is the case that the appellant's wife sought to find work here: she is not a worker as defined by Regulation 4. She did not wish to come to work or reside in Britain.
17. However, it is the case that the appellant's wife is an EEA national. Regulation 13 of the Immigration (European Economic Area) Regulations 2006 states:

13 (1) An EEA national is entitled to reside in the United Kingdom for a period not exceeding three months beginning on the date on which he is admitted to the United Kingdom provided that he holds a valid national identity card or passport issued by an EEA State.

- (2) A family member of an EEA national residing in the United Kingdom under paragraph (1) who is not himself an EEA national is entitled to reside in the United Kingdom provided that he holds a valid passport”.

It is of note that the Regulation 13 does not specify that the EEA national should be coming to the United Kingdom to work or look for work but merely coming to Britain to reside.

18. Regulation 12 deals with the issue of a family permit for a family member of an EEA national who is residing in Britain or coming to Britain in accordance with the Regulations. An EEA national who comes to Britain for 3 months is such a person as they come in accordance with regulation 13.
19. I therefore consider that the appellant is entitled to be considered for the issue of a family permit under Regulation 12. Clearly he would have to show that he had a valid passport, but it has not been argued by the respondent that he has not. Moreover, of course, for him to use the family permit he would have to show that he was accompanying his wife: that he met the requirements in Regulation 12 (1) (b) - I note that that is what the appellant's wife said she would be doing in her letter of 15 December 2012 which echoed her letter to the ECO of 12 February 2012.
21. I therefore find that there is a material error of law in the determination of the First-tier Tribunal Judge when he dealt with the appeal solely on the basis that the appellant's wife was not coming to Britain to work. I therefore remake the decision and for the reasons set out above allow the appeal.

Signed

Date

Upper Tribunal Judge McGeachy