Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19101/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 15th December 2014	**On 17th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between
Rael Guerrero Miranda
(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Komusac, instructed by Igor & Co Solicitors.
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of Mexico born on 19th November 1977 and appeals against the decision of the Secretary of State dated 10th May 2013 to refuse to issue a permanent residence card to him as a family member of his spouse Ariadne Citlali Morillas Pantoja who is a dual Spanish and United Kingdom citizen.

2. In a determination dated 7th July 2014 Judge of the First Tier Tribunal Vaudin d'Imecourt refused the appellant's appeal as he stated that the

Immigration (European Economic Area) Regulations 2006 (EEA Regulations) did not apply as the sponsor was a UK citizen.

Application for Permission to Appeal

3. The application for permission to appeal made by the appellant asserted that the Judge did not refer to any EEA law nor any EU Directive nor any UK Regulations to show that the appellant's wife could not exercise her Treaty rights in the UK. The spouse had been residing for most of her life in Spain or in Mexico prior to her arrival in the United Kingdom. Further the judge did not make any finding of fact as to whether the spouse was moving within the EU as enunciated in Metock & Othrs [2008] ECR I-6241. The ECHR decision in **McCarthy v SSHD** Case C 434/09 was not applicable as the dual national had always lived in the UK. Permission to appeal was granted.

4. At the hearing before Mr Melvin drew my attention to the Rule 24 reply from the Secretary of State which conceded that EEA law had not been considered. Mr Komusac pointed out that the appellant had previously been issued with a residence card in November 2007 and the appellant's spouse produced her Spanish identity card. Indeed she had only lived in the UK for one month following her birth in 1981. The appellant's wife arrived in the UK in 2006 whilst her spouse arrived in 2007.

Conclusions

5. **McCarthy** referred to a case whereby the EU/British citizen had never moved to or within the territory of the European Union. This was not the case here as set out above. Further the respondent issued a residence card under the EEA regulations in 2007. Although the Rule 24 reply referred to Regulation 9 of the EEA Regulations, and thereby the restrictions on a British citizen being considered an EEA national, Schedule 3 of the Immigration (European Economic Area) (Amendment) (No 2) Regulations 2013 which came into force on 1st January 2014, provides transitional provisions such that the substitution of Regulation 9 by the revised Regulations has no effect where the family member of a British citizen held a valid registration certificate, residence card or EEA family permit issued under the 2006 Regulations. It would appear that that is the case here depending on the findings in relation to the spouse as indicated.

6. I find that Article 3(1) of the EU Directive 2004/38/EC regarding the right of citizens within the EU to move freely is applicable and should have been considered. It was incumbent upon the Judge to make findings as to whether the spouse moved within the European Union whereby she became a qualified person under Regulation 6 of the EEA Regulations 2006. Whether the appellant has resided in the UK for a continuous period of five years in accordance with the Regulations depends on findings in respect of the spouse and this fact finding exercise was not undertaken.

7. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (ii) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Signed Date 15th December 2014

Deputy Upper Tribunal Judge Rimington

Directions

All further evidence relied upon should be served on the other party and the First Tier Tribunal no later than fourteen days prior to the substantive hearing.