



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: OA/02805/2013

THE IMMIGRATION ACTS

Heard at Laganside Courts Centre, Belfast  
On 13<sup>th</sup> January 2014

Determination Promulgated  
On 21<sup>st</sup> January 2014

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Before

The Hon. Mr Justice McCloskey, President

Between

MATTHEW THATTIL

Appellant

and

THE ENTRY CLEARANCE OFFICER FOR INDIA AT CHENNAI

Respondent

Representation:

For the Appellant: Mr Barr of Creighton and Co, Solicitors

For the Respondent: Mrs O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal has its origins in a decision of the Entry Clearance Officer (*"the ECO"*), dated 12<sup>th</sup> December 2012, refusing the application of Matthew Chattil (*"the Appellant"*) for admission to the United Kingdom as the family member of a EEA national exercising, or proposing to exercise, Treaty rights. The application was made and determined under the Immigration (European Economic Area)

Regulations 2006 (*“the EEA Regulations”*). The gravamen of the ECO’s decision is encapsulated in the following passage:

*“Your sponsor has provided no evidence that she has ever exercised her treaty rights as a qualified person in that there is no evidence that she has ever worked in the UK ..... In interview she stated that she was not capable and would not be returning to employment. I therefore consider that you have failed to provide evidence that your EEA national family member is a qualified person in accordance with Regulation 6 .....*”

The ECO also determined that the refusal of the application would not infringe the Applicant’s rights under Article 8 ECHR.

2. The Appellant is of Indian nationality and is aged 53 years. The sponsor holds dual British and Irish nationality. The decision of the ECO was affirmed, on internal appeal, by the Entry Clearance Manager. This further decision is dated 29<sup>th</sup> April 2013. Its essence is ascertainable from the following passages:

*“I have noted the sponsor’s answers at interview. She is not working and has not worked since 1990 in a Spar. She has not worked since then as she has not been well, suffering from depression. Her only income is from benefits .....*

*Even where I to accept that she had worked at the Spar between 1990 and 1995, the fact remains that she has not worked for at least 16 years .....*

*Given her employment history, I consider it unlikely that she intends to seek employment in the future .....*

*She has not demonstrated that she is temporarily unemployed due to incapacity or involuntary unemployment or that she has ceased employment due to permanent incapacity. As such, I am not satisfied that the sponsor is a qualified person and am satisfied that the decision to refuse was correct.”*

3. The ensuing appeal to the First-Tier Tribunal (*“the FtT”*) was unsuccessful. In dismissing the appeal, the Judge reasoned and concluded as follows:

- The sponsor is not residing in the United Kingdom in the exercise of Treaty Rights, has resided there all her life and is not a beneficiary within the meaning of Article 3 of the Directive. As an Irish citizen she has at all times been a settled person in the United Kingdom.
- She is not a qualified person under regulation 6(1) of the EEA Regulations.
- She has not been economically active but has been a burden on the United Kingdom’s social assistance scheme.

- As she is not residing in accordance with Regulation 14, she has no derived right.

Finally, the Judge dismissed the Appellant's claim under Article 8 ECHR, noting that when the parties married they were aware that the Appellant had no right to reside in the United Kingdom and that the sponsor had been able to spend extensive periods in India. The Judge stated:

*"Applying the sequential guidance in Razgar I I find the decision is proportionate."*

4. It is appropriate to highlight one particular passage in the grounds of appeal to the FTT:

*"The ECO should have referenced Regulation 12 ..... [and] .... has confused the requirement focusing on Regulation 6. However, Regulation 13 is applicable to this application which satisfies an entitlement to reside for an initial period of three months without requiring exercise of Treaty Rights."*

This passage serves to illuminate the grant of permission to appeal to this Tribunal, which focused on Regulation 13 and stated, in material part:

*"... The sponsor ... is nonetheless entitled to the initial right of residence under Regulation 13(1) and the Appellant is similarly entitled under Regulation 13(2) of the 2006 Regulations, following her entry to the United Kingdom as an EEA national holding a passport issued by an EEA State (Ireland). She is not required to show that she is a qualified person."*

5. The factual matrix in the recent decision of the Upper Tribunal in Bali (Family Member: three month visit) [2013] UKUT 570 (IAC) was not dissimilar. In paragraph [5], this Tribunal considered the regime established by Directive 2004/38/EC:

*"[5] The regime established by the Directive system promotes both the "feeling" of EU citizenship and social cohesion, which is one of the fundamental objectives of the EU, per recital (17). By Article 2, "family member" includes the spouse of an EU citizen. Article 6(1) provides:-*

*"Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member state, accompanying or joining the Union citizen"*.

*The right enjoyed by the Respondent's spouse, as an EEA national, under the transposing EEA Regulations is expressed in regulation 11(1) thus:-*

*“An EEA National must be admitted to the United Kingdom if he produces on arrival a valid national identity card or passport issued by an EEA State”.*

*The right potentially enjoyed by the Respondent, being the husband [and, hence a “family member”] of an EEA National, is contained in regulation 11(2):-*

*“A person who is not an EEA National must be admitted to the United Kingdom if he is a family member of an EEA National..... and produces on arrival –*

- (a) a valid passport; and*
- (b) an EEA family permit, a residence card, a derivative residence card, or a permanent residence card”.*

*It is not suggested that the Respondent was at any material time capable of complying with the second of these “production” requirements. Accordingly, any right of entry to the United Kingdom enjoyed by him is not derived from Regulation 11(2). In order to identify any such right it is necessary to delve a little deeper into the Regulations.”*

[Emphasis added]

The judgment continues:

*“[6] The outworkings of the right of admission to the United Kingdom conferred on the Respondent’s spouse as an EEA National, are found in regulation 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”.*

*The related right which the Respondent can seek to invoke in the present case is expressed in the next succeeding paragraph, in regulation 13(2):-*

*“A family member of an EEA National or a family member who has retained the right of residence who is 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”.*

*We consider that the analysis applicable to the factual matrix of the present case is to be conducted in the following sequence:-*

- a) the Respondent’s spouse has a right of admission to the United Kingdom under regulation 13(1).*

- b) *following admission, the Respondent's spouse is entitled to reside there for a maximum period of three months, under regulation 13(1).*
- c) *the Respondent thereby acquires an entitlement to reside in the United Kingdom also: per regulation 13(2).*

Next, this Tribunal addressed the question of whether the relevant EEA national was required to be already in the United Kingdom at the time of the Respondent's proposed entry. The terms of Regulation 12(1) were noted:

*"[12] (1)*

*An Entry Clearance Officer must issue an EEA family permit to a person who applies for one if the person is a family member of an EEA National and –*

- a) *the EEA National –*
  - (i) *is residing in the UK in accordance with these Regulations; or*
  - (ii) *will be travelling to the United Kingdom within six months of the date of the application and will be an EEA National residing in the United Kingdom in accordance with these Regulations on arrival in the United Kingdom; and*
  - (iii) *the family member will be accompanying the EEA National to the United Kingdom or joining the EEA National there".*

This Tribunal reasoned and concluded thus:

*"... we are satisfied that the Regulations do not require the Respondent's spouse to precede the Respondent, arriving in the United Kingdom before him. Thus the conditions for the grant of an EEA family permit were satisfied. This being so, the ECO has – and had - no discretion: he "must" issue an EEA family permit to the Respondent if he applies for one. The issue of such a permit unlocks the door to entry to the United Kingdom under regulation 11(2). Thus the ECO's failure to issue a family permit was erroneous in law."*

- 6. The gravamen of the decision in Bali is expressed in paragraph [10] of the text in the following terms:

*"Our decision is that a non-EEA national family member travelling to the United Kingdom accompanied by the EEA national family member concerned, for the purposes of a visit of not more than three months duration, is entitled to enter pursuant to Regulations 11(2), 12(1) and 13(1) and (2) read together."*

Upon the hearing of this appeal, the Appellant relied on the decision in Bali, and on behalf of the Respondent, Mrs O'Brien realistically acknowledged that the two cases are materially indistinguishable. I consider that this reasoning and conclusion apply

fully to the matrix of the present case. It follows that the Determination of the FTT must be set aside.

### REMAKING THE DECISION

7. The parties agreed with the suggestion that the decision should be remade in the forum of this Tribunal. This gives rise to the inevitable outcome that the appeal is allowed. No separate consideration of Article 8 ECHR is necessary in these circumstances.
8. In passing, Mr Barr (on behalf of the Appellant) indicated that a successful outcome to this appeal for his client would, predictably, result in a further and future application to the Secretary of State under the EEA regulations.

### DECISION

9. This appeal is determined as follows:
  - (i) The decision of the FTT is set aside.
  - (ii) The remade decision of the Upper Tribunal is that the appeal against the refusal decision of the ECO is allowed.

It follows that the Appellant's application for a family permit must be granted.

*Seamus McCloskey*

THE HON. MR JUSTICE MCCLOSKEY  
PRESIDENT OF THE UPPER TRIBUNAL  
IMMIGRATION AND ASYLUM CHAMBER

Dated: 20 January 2014