Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09877/2014

THE IMMIGRATION ACTS

Heard at Birmingham Employment Centre	**Decision Promulgated**
On 3 March 2015	**On 26 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EVAN JAMES SZYMANSKI

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Appellant in person

DECISION AND REASONS

1. The background to this appeal is set out in my decision of 12 January 2015. I found that the determination of First-tier Tribunal Judge Thorne contained an error on a point of law and had to be set aside. A copy of my decision is annexed hereto for convenience.

2. Because I was unable to remake the decision on 6 January 2014, a resumed hearing was arranged. At the end of the resumed hearing I announced that I would remake the decision of the First-tier Tribunal to allow the original appeal against the EEA decision of 11 February 2014 refusing to issue a residence card. I reserved my reasons, which I now give.

3. As indicated in my earlier decision, the appellant could succeed only by showing that his wife was a qualified person at some point since she arrived in the UK. This was necessary because, without proving she was, the appellant was not able to show that he derived a right of residence as a family member.

4. At the resumed hearing the appellant produced cogent evidence that his wife had established in business and that she was therefore a qualified person. The evidence showed that the appellant's wife had established an online business providing images and associated graphic design work. She had received income from her business. She had registered as self employed with HMRC.

5. Mr Mills accepted that the evidence was clear and cogent. Although it had not been submitted in accordance with directions he informed me he had no basis on which he could ask for it to be excluded since its content and relevance was obvious. Mr Mills accepted that the appellant's wife was self employed and therefore was a qualified person from whom the appellant derived a right of residence. Although the basis for this was wholly different to the original application, Mr Mills conceded that the appellant was entitled to a residence card confirming his right of residence.

6. I am satisfied that this is correct in law. Irrespective of the appellant's immigration history, when remaking the decision I have to consider the facts as at the date of hearing. Being self employed, the appellant's wife satisfies regulation 4(1)(b) of the 2006 EEA Regulations. As such she is a qualified person for the purposes of regulation 6. It follows from regulation 7 that the appellant has a right of residence and is entitled to have that confirmed by the issuance of residence documentation as per regulation 14.

Decision

The Secretary of State’s appeal to the Upper Tribunal is allowed to the extent that there was an error on a point of law that required the decision of the First-tier Tribunal to be set aside and remade.

When remaking the decision, the appeal against the EEA decision refusing to issue a residence card is allowed.

Signed Date

Deputy Judge of the Upper Tribunal

ANNEX:

Decision of 12 January 2015 on there being an error on a point of law and to set aside the First-Tier Tribunal's determination

Date of hearing 6 January 2015

Representation:
For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Ms R Manning , instructed by Sabz Solicitors, Birmingham

1. The Secretary of State appeals to the Upper Tribunal against the determination of First-tier Tribunal Judge Thorne that was promulgated on 23 September 2014. Judge Thorne allowed Mr Szymanski's appeal against the EEA decision of 11 February 2014 refusing to issue a residence card.

2. Mr Szymanski was born on 14 November 1980 and is a citizen of the USA. He arrived in the UK on 29 December 2012 with his wife and then two children. At that time Mr Szymanski held an EEA family permit that had been issued to him on 9 November 2012 and which was valid until 9 May 2013. Since arriving in the UK, the couple have had a third child.

3. Mr Szymanski applied for a residence card on 6 December 2013 on the basis that his wife, a French national, was a qualified person for the purposes of the Immigration (European Economic Area) Regulations 2006 as a self-sufficient person. On 11 February 2014, the Secretary of State refused to issue the requested document because insufficient evidence had been provided to show that Mrs Szymanski was a self-sufficient person.

4. On appeal, Judge Thorne came to the following conclusions (see paragraphs 22 to 25 of his determination).

   a. Mr Szymanski, his wife and their three children were covered by comprehensive sickness insurance.

   b. Mr Szymanski earnings of over £31,000 per year was more than sufficient to support the family group and were sufficient to ensure that family would not become a burden on the UK's social assistance system.

   c. Mr Szymanski derived a right of residence from his wife who as a self sufficient person was a qualified person in the UK.

5. The Secretary of State's appeal against this decision is on the grounds that it was not open to Judge Thorne to find that an EEA national is a self-sufficient person on the basis of earnings from a third country national. The Secretary of State relied on the reported decision, MA and others (EU national; self-sufficiency; lawful employment) Bangladesh [2006] UKAIT 00090.

6. The Secretary of State commented, *"It is submitted that the EEA national sponsor must first exercise her treaty rights to enable the appellant to derive his rights."* It is argued that such an approach is necessary to prevent a circular argument where Mr Szymanski relies on his wife being a qualified person in order to derive a right of residence and thereby his right to work in the UK, the earnings from such employment being the basis on which his wife is able to establish her right of residence.

7. Mr Mills relied on these grounds. He supplemented them by saying that Mr Szymanski had not established that his wife had ever established a right of residence prior to him taking employment. Although there was some evidence that she had funds of her own, they were insufficient to show she had a right of residence because they were not substantial savings.

8. Ms Manning relied on her rule 24 response in which she asserted simply that Judge Thorne had correctly determined that Mrs Szymanski was a self sufficient person under the Regulations. She reminded me that the evidence before the First-tier Tribunal had been that Mrs Szymanski had intended to work in the UK but had been prevented from so doing because she was pregnant, the couple's third child being born in the UK on 21 September 2013. In paragraph 4 of her skeleton argument, Ms Manning comments that Mrs Szymanski is working although no evidence of that has been provided.

9. Ms Manning also relied on Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs) [2013] UKUT 89 (IAC) on the grounds that if Mr Szymanski was not allowed to remain in the UK, then the whole family would be forced to return to the USA.

10. Both representatives referred to article 8 of the human rights convention and mounted opposing views as to how the EEA decision would or would not interfere with the family's private and family life rights.

11. At the end of the hearing I indicated that I would have to review the case law and consider whether the determination contained an error on a point of law. I not consider that issue.

12. I begin by rejecting the arguments presented by Ms Manning in relation to article 8 and the points raised in Ahmed. As confirmed by Mr Mills, it has never been the Secretary of State's case that Judge Thorne's determination was defective because he failed to deal with these issues. It is evident that there has been no cross appeal and therefore Ms Manning cannot introduce these issues at this stage although I acknowledge they may be relevant to remaking the decision if I were to find there had been an error on a point of law.

13. I move on to consider the substance of the Secretary of State's grounds. Although I was not referred to either of the following reported decisions, I have had regard to both: Seye (Chen children; employment) [2013] UKUT 178 (IAC) and Boodoo and another (EEA Regs; relevant evidence) [2013] UKUT 346 (IAC). The first reviews the Tribunal's view of whether the income of a third country national can establish that an EEA national is a self-sufficient person, and after examining its earlier case law together with jurisprudence from the Court of Appeal and Court of Justice of the European Union concludes that the negative propositions in MA and others and related cases must be regarded as doubtful. The second case serves as a reminder that in an appeal against an EEA decision, post-decision evidence can be taken into account if it is material to the decision, the relevant date being the date of hearing.

14. Although the decision in Seye undermines the Secretary of State's ground of appeal relying on MA and others it does not disturb the principle argument, *"It is submitted that the EEA national sponsor must first exercise her treaty rights to enable the appellant to derive his rights."*

15. The fact Judge Thorne failed to engage with this question, and at no point identifies when or on what basis Mrs Szymanski established her right of residence in the UK other than by reference to Mr Szymanski's employment, means the determination is vitiated by an error on a point of law. This is because if Mrs Szymanski has never had a right of residence in the UK then Mr Szymanski could not have derived such a right and therefore he has not had permission to work in the UK. It is trite law that an EEA national cannot derive a right of residence as a self sufficient person from illegal earnings.

16. In reaching this conclusion I have considered whether the evidence rejected by the Secretary of State was in fact sufficient to show that Mrs Szymanski was a self sufficient person prior to her husband finding employment. A simple answer to this is found in the date when the family obtained "comprehensive sickness insurance". The evidence from BUPA shows that such cover was provided from 31 October 2013. At that time the couple accept that they relied on Mr Szymanski's earnings. Even if the family had been reliant on Mr Szymanski's

savings in the first half of 2013 (and I remind myself that the statements from Redstone Federal Credit Union have the American date format), the absence of evidence of comprehensive sickness insurance at that time means the requirements for Mrs Szymanski to be regarded as a self sufficient person were not met.

17. I add that it would appear that Mr Szymanski was working prior to his employment with Gateway College. The HSBC bank statements show fairly regular income from KPPES Ltd from 19 April 2013 onwards. Although no documentary evidence has been provided, I presume these entries refer to payments relating to supply teaching, since that is Mr Szymanski's profession and since it is accepted that Mrs Szymanski was not working at that time because she was pregnant. It is evident from the outgoings displayed in the bank statements that the couple supported themselves from this income from April 2013 onwards, which undermines any notion that the family was supported by Mrs Szymanski's savings at that time.

18. The fact that the evidence was not considered in respect of the relevant question that had to be decided means that I must set aside the determination.

Issues to be determined at the resumed hearing

19. It will be necessary to resume the hearing to deal with the above issue and any other matters that might be relevant given that Judge Thorne did not deal with all the grounds of appeal that were raised before the First-tier Tribunal.

20. For convenience I set out the issues that will have to be covered at the resumed hearing.

21. The relevant date for evidence will be the date of the resumed hearing.

22. Mrs Szymanski's right of residence as a self sufficient person cannot be established on the basis of Mr Szymanski's income unless it is shown that Mr Szymanski had derived a right of residence from her which entitled him to work in the UK under EU law.

23. It will be for Mr Szymanski to show when and how his wife established a right of residence as a self sufficient person in the UK meeting the requirements of regulation 4(c) of the 2006 EEA Regulations.

24. If the above cannot be established, then it will be for Mr Szymanski to pursue the other grounds of appeal raised before the First-tier Tribunal, with the following exception: he cannot rely on any argument that the decision was not in accordance with the immigration rules or that discretion exercisable under those rules should have been exercised differently. Those grounds (being the grounds specified in sections 84(1)(a) and (f) of the Nationality, Immigration and Asylum Act 2002) are precluded by paragraph 1 of schedule 1 to the 2006 EEA Regulations.

25. In the alternative, as mentioned in paragraph 8 above, there are assertions that Mrs Szymanski was intending to work when she arrived in the UK in December 2012 and that she is currently working. No evidence to substantiate either assertion has been provided to date. I am aware that the application to the Secretary of State was not made on this basis and the issues appear to have been introduced at the appeal stage. It would also appear that these points were not pursued before the First-tier Tribunal.

26. Mr Szymanski cannot assume that evidence on such issues will be admitted. If he provides evidence relating to these issues, I will consider whether to admit it and in so doing I will take into consideration objections from the Secretary of State, if any, and whether it would be more appropriate for a fresh application to be made rather than to consider novel issues in an appeal to the Upper Tribunal.

27. In respect of issues relating to private and family life, I add that the parties might refer to the Court of Justice's decision in Dereci & Ors (case no C-256/11) [2011] EUECJ C-256/11; [2012]

Imm AR 230 and are reminded that the issues might be taken in respect of article 8 of the human rights convention or article 7 of the Charter of Fundamental Rights.

Directions

28. In light of the above issues, it is appropriate to give directions.

29. The parties must file with the Upper Tribunal and serve on each other any additional documents, on which they will seek to rely, at least 14 calendar days before the resumed hearing. Failure to do so may result in such evidence not being admitted.

30. The parties must file with the Upper Tribunal and serve on each other skeleton arguments dealing with the above issues no later than seven calendar days before the resumed hearing.

Decision

The determination of First-tier Tribunal Judge Thorne contains an error on a point of law and is set aside.

The Upper Tribunal will arrange a resumed hearing to remake the decision.