



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/35185/2014

THE IMMIGRATION ACTS

Heard at Field House

On 26 March 2015

Determination

Promulgated

On 31 March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

**NARAK MARDANYAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Cole of Counsel instructed by Sterling & Law Associates LLP

For the Respondent: Mr T Wilding of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Armenia born on 12 April 1991. On 13 August 2012 he entered with leave as a student, expiring on 5 November 2014. On 23 January 2014 he married Saida Zukova, a Latvian national born on

20 September 1986 and exercising Treaty rights here as a worker. She has two children by a previous marriage aged about 9 and 4.

2. On 12 March 2014 the Appellant lodged an application for a Residence Card as the husband of an EEA national exercising treaty rights pursuant to Regulation 7 of the Immigration (EEA) Regulations 2006 as amended (the 2006 Regs).

The Decision and Appeal

3. On 22 August 2014 the Respondent refused to issue a Residence Card to the Appellant for reasons given in a letter of the same date (the reasons letter). The Respondent noted the Appellant's wife had stopped working in about July 2014 and was no longer in the United Kingdom. The Appellant had been unable to produce evidence that she had arranged to return to the United Kingdom and concluded she had not shown she was a qualified person within the meaning of Reg.6 of the 2006 Regs, exercising Treaty rights as a worker and refused the application.
4. On 5 September 2014 the Appellant lodged notice of appeal under Reg.26 of the 2006 Regs and Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds of appeal assert the Appellant's wife was temporarily absent from the United Kingdom and continues to be resident in the United Kingdom exercising Treaty rights. A claim was also asserted based on Article 8 of the European Convention that the decision was a disproportionate interference with the Appellant's private and family life.

The First-tier Tribunal's Decision

5. By a decision promulgated on 4 December 2014 Judge of the First-tier Tribunal I F Taylor dismissed the appeal under the 2006 Regs and on human rights grounds. He found the Appellant's wife had not produced sufficient evidence to discharge the burden of proof to show that she was exercising Treaty rights in the United Kingdom as a worker. He went on to consider the claim under Article 8 and found the Respondent's decision did not interfere with the Appellant's rights protected under Article 8 because there was no apparent impediment to his wife returning to the United Kingdom with or without her children.
6. On 12 December 2014 the Appellant sought permission to appeal, asserting that his wife had returned to the United Kingdom on 14 September 2014 and resumed her employment and so continued to exercise Treaty rights as a worker. Additionally, the Appellant asserted the Judge had erred in concluding his wife had not shown she was exercising Treaty rights because such a finding was contrary to the evidence before him. He had erred in expecting to see visa stamps in her passport evidencing her departure from and return to the United Kingdom and had erred in his treatment of the claim under Article 8, in particular in relation to the consideration of the public interest factors referred to in

Sections 117A-117D of the 2002 Act. The grounds also asserted that the decision was “*Wednesbury*” unreasonable.

The Upper Tribunal Hearing

7. The Appellant attended with his wife. After I had explained the purpose of the hearing and the procedure to be adopted in connection with the part of the hearing relating to the finding whether the Judge’s decision contained a material error of law, Mr Cole handed up a skeleton argument which I considered. I adjourned the hearing into Chambers to discuss certain procedural issues.
8. On resuming the hearing, Mr Cole submitted that there was an error of law because the Judge’s findings were against the weight of evidence and that the Appellant’s wife had been and was exercising Treaty rights in the United Kingdom at all material times. He had a copy of her zero hours employment contract dated 18 November 2010 with her employer’s letter confirming her continuing employment, as well as a bank statement showing a salary payment on 30 September 2014. The Appellant’s bundle also included evidence from various friends of her return to London. The Judge should have approached his assessment of the evidence on the basis of the wife’s continued presence in the United Kingdom.
9. The Judge was in error to have expected to have seen the exit or entry stamps in the passport of the Appellant’s wife. She was an EEA national and it was not usual for stamps to be put in an EEA national’s passport whether on arrival or departure. There was nothing to suggest the Appellant’s wife had not been present in the United Kingdom at the date of the Judge’s decision and the finding she was not in the United Kingdom was irrational. The Judge had failed to look in the round at the evidence before him.
10. Turning to the Judge’s treatment of the claim under Article 8, Mr Cole submitted the Judge had erred in considering Sections 117A-117D of the 2002 Act because the decision under appeal was under the 2006 Regs and consequently his findings in this regard were unsafe.
11. Further, the Judge had erred in finding the Appellant’s residential status in the United Kingdom was precarious at the date of his marriage. He was able at the hearing before me to produce a biometric card issued on 16 October 2003 which confirmed the Appellant had leave at the date of his marriage and indeed subsequently. The finding that the Appellant’s position in the United Kingdom was precarious at the date of his marriage was against the evidence. Mr Cole submitted the Upper Tribunal had a discretion where there was a residual error made by the First-tier Tribunal to correct that error and the weight of evidence before the Judge was that the Appellant’s wife had returned to the United Kingdom and the Judge’s finding to the contrary was irrational.

12. For the Respondent, Mr Wilding submitted the Appellant had not established there was a material error of law in the Judge's decision. Whether the Appellant's wife was present in the United Kingdom at the date of the consideration of the appeal or not was not the core issue. The core issue was whether she had shown she was a qualifying person within the meaning of Reg.6 of the 2006 Regs. The Appellant had asserted the Judge's decision was irrational which amounted to a charge of perversity. For this to succeed the Appellant had to show that no other Judge would have come to a similar conclusion.
13. At paragraph 13 of the Judge's decision he had referred to the evidence and was entitled on the evidence before him to come to the conclusion that the Appellant had not shown his wife was exercising Treaty rights in the United Kingdom as a worker. There was nothing in this paragraph which pointed to an irrational or perverse conclusion.
14. The evidence of various friends referred to in paragraph 13 of the decision did not greatly assist the Appellant. There was no explanation in the letters to show on what basis the writers knew the Appellant's wife was in the United Kingdom and exercising her Treaty rights as a worker.
15. Even if the point about the absence of stamps in the passport of the Appellant's wife was not well taken by the Judge it was not material. The issue before him which he correctly identified was whether she was exercising Treaty rights as a worker.
16. In the light of the report before the Judge from an Immigration Officer on a visit to the Appellant's home on 20 August 2014 the Judge had reasons to reject the Appellant's claim that his wife had only left the country for a month. On the information before him the Judge was entitled to reach that conclusion and he had been entitled to take into account the matters referred to in the last sentence of paragraph 40 of his decision.
17. The conclusions the Judge reached at paragraph 15 of his decision were adequately supported by evidence and sufficiently reasoned. They could not in the remotest sense be considered to be irrational or perverse.
18. Turning to the Judge's treatment of the Appellant's claim under Article 8 of the European Convention, Mr Wilding submitted the Judge had considered the Article 8 claim on the basis that the Appellant had failed to show he was entitled to a Residence Card by way of reference to Reg.7 of the 2006 Regs. Consequently there was no error made when the Judge referred to Sections 117A-117D of the 2002 Act. There had been no challenge by the Appellant to the Judge's findings of fact at paragraph 17 of his decision and the matter of Sections 117A-117D was addressed at paragraph 18 of the decision. However the findings in paragraph 17 had not been challenged which in the event meant that paragraph 18 mentioning the Appellant had not shown that he had had status in the United Kingdom when he married had little relevance.

19. The Respondent had not required the Appellant to make a statement under Section 120 of the 2002 Act and had not made or proposed any removal directions in the notice of decision under appeal. In those circumstances it was arguable there was no need for the Judge to consider the claim under Article 8. The skeleton argument submitted to the First-tier Tribunal gave little substantive details of the nature of the Appellant's private and family life in the United Kingdom. The interference to his private and family life caused by the decision which was to refuse to issue a Residence Card was not sufficient interference to engage the United Kingdom's obligations under Article 8 of the European Convention. He repeated that the Respondent had neither made nor proposed any directions for the removal of the Appellant. In such circumstances the Appellant's challenge to the Judge's treatment of Sections 117A-117D of the 2002 Act was of little weight. On the other hand, if the Appellant fell outside the scope of the 2006 Regs then Sections 117A-117D would be relevant.
20. The Judge had gone on to conduct an assessment of the proportionality of the Respondent's decision at paragraph 19 of his decision and on the basis of his findings was fully entitled to find that if there was an interference which engaged the United Kingdom's obligations such interference would be proportionate to a legitimate public end identified in Article 8(2) of the European Convention. This was particularly so, as appeared to be the case, because the Appellant without leaving the United Kingdom could easily make a further application under the 2006 Regs on the same basis as leading to the decision presently under appeal. In short, there was no material error of law in the Judge's decision which should stand.

Findings and Consideration

21. The Appellant requested his appeal be determined without a hearing on the papers in the Tribunal file. He was therefore reliant on all the relevant information being in adequate documentary form and before the Judge.
22. At paragraph 11 of his decision the Judge identified the issue he had to decide, whether the Appellant's wife was exercising Treaty rights as a worker. In paragraph 12 and in the first half of paragraph 13 he reviewed the evidence and was entitled to come to his conclusion at paragraph 15 that she had not shown she was exercising Treaty rights.
23. The Judge erred in expecting the passport of the Appellant's wife to show stamps evidencing her departure and return. Nevertheless on rest of the evidence before him to which he referred in the second half of paragraph 13 and paragraph 14 was entitled to come to the conclusion that it had not been shown that she was in the United Kingdom. That she was in the United Kingdom is immaterial to the finding that it had not been shown she was exercising Treaty rights for reasons given in paragraph 12 and the first half of paragraph 13. Even if she was in the United Kingdom it had still not been shown that she was exercising Treaty rights.

24. Mr Cole suggested the Judge's findings in paragraph 15 were irrational but I do not consider that on the evidence before the Judge he came to a conclusion which no other reasonable Judge would have reached: see for instance *MN (Sri Lanka) v SSHD [2015] EWCA Civ.1601*. The Appellant has therefore not made out the complaint of perversity or irrationality.
25. At paragraphs 17 and 18 the Judge considered the claim under Article 8 of the European Convention. As already mentioned even if it was not the fact that the Appellant's wife was out of the United Kingdom at the time it had still not been shown that she was exercising Treaty rights and accordingly that she had any right under the Citizens Directive to be in the United Kingdom other than as a visitor. With this in mind, the claim under Article 8 had to fail because there was no evidence before the Judge to show the decision under appeal would result in an interference to the private and family life of the Appellant and his family which would be of sufficient gravity to engage the United Kingdom's obligations to respect the private and family life of the Appellant and his family. Consequently there was no need for the Judge to consider, although he did, the factors identified in Sections 117A-117D of the 2002 Act. That part of his decision was therefore not germane to the issues before him and so an error of law, if there is one, would not be relevant or material.
26. I conclude the First-tier Tribunal's decision does not contain any material error of law such that it should be set aside and re-made.

Anonymity

27. There was no request for an anonymity direction and having heard the appeal consider none is required.

NOTICE OF DECISION

The First-tier Tribunal's decision did not contain an error of law and shall stand.

No anonymity direction is made.

Signed/Official Crest

Date 31. iii. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

