IAC-AH-PC-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42169/2014

THE IMMIGRATION ACTS

Heard at Field House
On 24th April 2015

Decision & Reasons Promulgated
On 21st July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR MANJEET SINGH
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Hashmi, Counsel
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of India born on 5th July 1986. The Appellant's immigration history was that he had applied for leave to remain in the United Kingdom in 2004 based on a contention of a ten year family and private life in the UK. That application was refused and on 5th August 2014 the Appellant made a fresh application seeking a residence card as a confirmation of a right to reside in the UK. That application was refused by the Secretary of State by way of Notice of Refusal dated 10th October 2014.

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2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Colyer sitting at Nottingham on 16th January 2015. In a determination promulgated on 22nd January the Appellant's appeal was allowed under the Immigration (European Economic Area) Regulations 2006.

3. On 29th January 2015 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. The Grounds of Appeal noted that the judge had concluded that the Appellant was entitled to permanent residence under Regulation 15(1)(b) of the 2006 Regulations. They pointed out that in order for the Appellant to benefit from Regulation (1) the Appellant would have had to have resided in the UK with the EEA national in accordance with the Regulations for a continuous period of five years. Given that the Appellant had only met the EEA national in August 2013 it was submitted that the judge had erred in finding that the Appellant was entitled to permanent residence. Further at paragraph 44 the judge had found that the Appellant's wife had been exercising her treaty rights in the United Kingdom for at least five years. The grounds note that whilst the judge referred to evidence that the Appellant's wife was in work there was no reference to any evidence that established the Appellant's wife had been exercising her treaty rights for the requisite period.

4. On 2nd March 2013 First-tier Tribunal Judge Holmes granted permission to appeal, those grounds noted that even on his own case the Appellant did not meet the requirements of Regulation 15(1)(b) on the basis that he had not known the Sponsor for more than two years and certainly not five years. Nor was the evidence before the Tribunal sufficient to allow the judge to find that the Sponsor was entitled to permanent residence under Regulation 15(1)(a) and that even if the Sponsor was a "qualified person" at the date of the hearing, arguably the furthest the judge could properly go would be to make that finding and leave the question of the exercise of the discretion under Regulation 17(4) to the Respondent. The exercise of that discretion would still have permitted the Respondent to revisit the true nature of the couple's relationship.

5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. Although this is an appeal by the Secretary of State for the benefit of continuity within the proceedings the Secretary of State is referred to in this decision as the Respondent and Mr Singh as the Appellant. The Appellant appears by his instructed Counsel Ms Hashmi. The Secretary of State appears by her Home Office Presenting Officer Ms Everett.

Submissions/Discussion

6. Ms Everett relies on the Grounds of Appeal and submits that the First-tier Tribunal Judge has given insufficient reasons for his findings that Sponsor had exercised treaty rights for the requisite period. She points out that the Appellant only met the Sponsor in August 2013 and therefore the

Appellant cannot succeed under the Immigration Rules as they have not been together for the minimum required period of two years. Ms Everett is very critical of paragraph 44 of the decision, this being the conclusion that the Appellant's wife has been exercising her treaty rights in the United Kingdom for at least five years and considers that the evidence provided referred to at paragraph 25 is completely insufficient. Ms Everett refers me to the wage slip evidence produced before the First-tier Tribunal.

7. Ms Hashmi asked me to preserve the findings of fact made at paragraphs 16, 18, 22 and 24 of the First-tier Judge's determination and points out that if the matter is remitted to the First-tier for rehearing then by the time it comes to be reheard the parties will have been together for two years.

8. It is pointed out by Ms Everett that she is not on the Secretary of State's behalf attacking the credibility findings and accepts that the Appellant's partner Ivanka Dimitrova is exercising her treaty rights and that her marriage to the Appellant is not a marriage of convenience. She consequently accepts under the 2006 Regulations that the Appellant will be entitled to a residence document but not to permanent residence.

The Law

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

11. The concession made in this matter by Ms Everett on behalf of the Secretary of State is most helpful, however there is an insufficiency of reasons given by the First-tier Tribunal Judge and the judge has made a wrong conclusion which is effectively conceded by Ms Hashmi that the Appellant can benefit from Regulation 15(1) of the 2006 Regulations. Further the evidence provided in the bundle shows abundantly clearly that the Appellant's spouse has not been exercising her treaty rights for the period of five years and indeed there is clear documentary evidence stating that she arrived from Bulgaria in 2013. Such information is to be found on her family and obstetric history within the Appellant's original bundle. In such circumstances there is clearly a material error of law but due to the concession made quite properly by Ms Everett the correct approach is to find a material error of law, to set aside the decision of the First-tier Tribunal Judge and to remake the decision allowing the Appellant to be granted not permanent residence but a five year residence card pursuant to the 2006 EEA Regulations.

Notice of Decision

The decision of the First-tier Tribunal contained a material error of law and is set aside. The decision is remade allowing the Appellant's appeal under the Immigration (European Economic Area) Regulations 2006 to the extent the Appellant is entitled to a five year residence card.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No fee award.

Signed Date

Deputy Upper Tribunal Judge D N Harris