



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

Appeal Number OA/19519/2013

THE IMMIGRATION ACTS

Heard at Centre City Tower
On 29th June 2015

Decision and Reasons Promulgated
17th July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

PASCALIA McCARTHY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bussenius (Sponsor)

For the Respondent: Mr I Richards (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant applied for entry to the UK as the spouse of an EEA national. The application was refused and the appeal dismissed. There was an issue with regard to the Sponsor's legal ability to marry which has been addressed and is no longer relevant. The appeal was dismissed by First-tier Tribunal Judge Whiting in a decision promulgated on the 28th of May 2014.
2. The Appellant's application for permission to appeal to the Upper Tribunal was refused. It was renewed by the Sponsor and granted by Upper Tribunal Judge Eshun on the 23rd of September 2014. This was on the basis

that the Sponsor had been granted a residence permit in 2011 and it was arguable that the findings at paragraphs 14, 15 and 17 might not have been open to her.

3. The findings at paragraphs 14, 15 and 17 relate to whether the Sponsor was a qualified person within the meaning of the EEA Regulations and whether the evidence of his receiving DLA was evidence of permanent incapacity. The Secretary of State maintains that the decision was open to the Judge on the evidence that was provided.
4. The Sponsor's EEA residence card is contained within the papers and shows that it was issued to the Sponsor on the 24th of March 2011 at Liverpool. The stamp also indicates that it was a renewal. That is evidence that the Sponsor was in the UK as a qualified EEA national, it has to be taken that his residence card would not have been renewed if it had not been accepted by the Secretary of State that he was a qualified persons. This is supported by medical evidence that his incapacity to work was brought about by a degenerative condition clearly that is not something that would get better, at best it might stabilise.
5. Simply put the Judge erred in failing to consider that the issue of the residence card to the Sponsor in 2011 was itself evidence of his being a qualified person. In the absence of subsequent evidence to contradict what the Secretary of State had previously accepted to be the case it was not open to the Judge to find that the Appellant had not discharged the burden of proof in that regard.
6. The decision contains an error with regard to the Sponsor being a qualified person and as that is central the Appellant's case the error is clearly material. Given the evidence that is within the papers that the Sponsor is a qualified person I set aside the decision of Judge Whiting and remake the decision allowing the appeal of the Appellant. For the avoidance of doubt I find that the Sponsor is a qualified person within the meaning of the EEA Regulations.

CONCLUSIONS

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

I set aside the decision.

I re-make the decision in the appeal allowing the appeal of Pascalia McCarthy.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

Fee Award

In the light of the decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

In allowing the appeal I make a whole fee award.

Signed:

Deputy Judge of the Upper Tribunal (IAC)

Dated: 16th July 2015