Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06390/2015

THE IMMIGRATION ACTS

Heard at: Manchester
On 18th November 2015

Decision and Reasons Promulgated
On 26th January 2016

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Aland Abdulla
(no anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Hussain, Lei Dat & Baig Solicitors
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Iraq born on the 20th January 1985. He appeals with permission[1] the decision of the First-tier Tribunal (Judge Heynes) to dismiss his appeal against the Respondent's decision to refuse to vary his leave to remain and to remove him from the United Kingdom pursuant to s47 of the Immigration Asylum and Nationality Act 2006.

[1] Permission granted by First-tier Tribunal Judge Hodgkinson on the 20th October 2015

2. The Appellant had previously had Discretionary Leave to remain in the United Kingdom so that he could act as the primary carer for his brother, who suffers from serious mental illness. On the 21st May 2014 he made an application to vary that leave so as to extend it. He relied on the relationship with his brother, but also his relationship with Polish national Ms Patricia Barbara Korkec.

3. The Respondent refused that application, *inter alia* because the Appellant was no longer the primary carer for his brother, his brother having been convicted of a criminal offence and sent to prison. As to the relationship with Ms Korkec, the Respondent was not satisfied that this was a genuine and subsisting relationship, nor that she was 'settled' in the United Kingdom. It was not accepted that she had acquired a right of permanent residence having resided in the UK in accordance with the Regulations[2] for a period of five years or more. Even if her status could be established as settled, the Respondent reasoned, the Appellant had not demonstrated that the relationship could not continue elsewhere. There was therefore no interference with any family life that might exist.

4. When the matter came before the First-tier Tribunal both the Appellant and Ms Korkec gave oral evidence. Having heard that evidence the Respondent's representative, the HOPO Mr N. Richardson, accepted that this is a genuine and subsisting relationship and that Ms Korkec is in fact the Appellant's partner. The First-tier Tribunal appeared to have accepted this concession was well made: see paragraph 18. The matter in issue thereafter was framed, at paragraph 10 of the determination, as whether Ms Korkec had acquired a permanent right of residence under Regulation 15.

5. In respect of that issue the First-tier Tribunal properly directed itself to the matter of continuity of residence, noting at paragraph 12 of the determination that continuity is not broken by absences of up to 12 months "for an important reason including study". The Tribunal then records that Ms Korkec was absent from the United Kingdom for more than 6 months in 2010/11 and that "there is no evidence that she undertook study in the sense of completing a course of study" during that break: "there is no evidence as to how the EEA national passed the seven months of her absence or to what extent, if at all, the absence can be attributed to an important reason in the context of the Regulations". The Tribunal therefore concluded that Ms Korkec had not acquired a permanent right of residence, nor had the Appellant, and the Regulations were of "no assistance" to his case. Turning to Article 8 the Tribunal noted that the Appellant's leave was precarious when he embarked on the relationship with Ms Korkec, and that he did not have a choice about where his family life could be conducted. Whilst "some degree of hardship would ensue" in them both returning to Iraq there was nothing to prevent them both going to live there.

[2] The Immigration (European Economic Area) Regulations 2006

6. The Appellant now has permission to appeal on the ground that the First-tier Tribunal misdirected itself to the applicable law, the determination contains errors of fact and there was a failure to consider material evidence.

7. In her Rule 24 response of the 29th October 2015 the Respondent opposed the appeal on all grounds but before me Mr Harrison took a more realistic view, accepting that there was material evidence which did not appear to have been considered by the Tribunal, namely that Ms Korkec had returned to Poland in 2010/11 in order to take her final nursing exams, and that she had been employed ever since, latterly as a nurse in the NHS, having now specialised in neurosurgery.

Error of Law

'EEA' Grounds

8. The Tribunal, and indeed the Respondent, accepted that a) Ms Korkec is an EEA national currently exercising treaty rights and b) that the Appellant is in a durable relationship with her. Those facts as found should have led to a declaration that the Appellant is an 'extended family member' under Regulation 8. The appeal should therefore have been allowed to the extent that the matter is remitted to the Respondent in order that she exercise her discretion under Regulation 17(4). There is no indication that the Tribunal considered this. The Appellant had clearly raised EEA grounds in both his application and his grounds of appeal and the failure to address this matter was the first error of law.

9. For the avoidance of doubt there was good documentary evidence of Ms Korkec's consistent, and current, employment, in the form of payslips, correspondence from her employers, her own credible evidence and the statement from HMRC showing that she has been economically active in the UK for the last five years, and that she earned well over £25,000 in the year preceding the appeal hearing. She is employed full time by the NHS as a specialist nurse in neurosurgery, and works additional hours as a bank nurse. The HOPO on the day conceded that this is a genuine relationship. I therefore find that the Appellant is an extended family member under Regulation 8 and that the Secretary of State must now consider issuing him with a residence card.

10. It was perhaps because this was first and foremost an Article 8 application and appeal that the Tribunal appears to have exclusively focussed its attention on the question of whether Ms Korkec was 'settled' in the UK by virtue of having acquired a permanent right of residence under the Regulations. I am satisfied that in reaching its findings on this matter the First-tier Tribunal erred in law in failing to take material evidence into account, and in making an error of fact. She was not absent from the United Kingdom for seven months. She left in October 2010 and returned in February 2011, a period of just over 4 months. The determination suggests that the Tribunal considered that the reason for this absence could not be "good" unless Ms Korkec could demonstrate that she was undertaking a course of study. That is a misdirection. She just needed to show good reason. The evidence was that she returned to Poland to take her final nursing exams. That is a perfectly good reason.

Having had regard to the HMRC statement, the wage slips and her statement dated 24th June 2015 I am satisfied that she has resided in the UK for a continuous period of five years in accordance with these Regulations and that she has therefore acquired a right of permanent residence.

11. Mr Hussain submitted that the Appellant could, in these circumstances, derive his own permanent right of residence under Regulation 15(1)(b):

> '15.—(1) The following persons shall acquire the right to reside in the United Kingdom permanently —
>
> (a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;
>
> (b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;
>
> …'

12. In recognition of the fact that as an unmarried partner the Appellant is not a 'family member' for the purpose of Regulation 7, Mr Hussain took me to Regulation 7(3):

> '(3) Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked.'

13. The Appellant has not, at this stage, been issued with a family permit. No EEA application has ever been made, and in fact Ms Korkec confirmed that she has never sought written confirmation of her right to reside in the UK. I am not satisfied that in these circumstances the Appellant is a 'family member' for the purposes of Regulation 15(1)(b). The Respondent is therefore under no obligation to grant him confirmation of a right of permanent residence under the Regulations.

Article 8

14. Returning to the Article 8 grounds I find that the First-tier Tribunal did err in law in its assessment that there was "nothing to prevent" this couple returning to Iraq. That conclusion was reached with no regard to FCO travel advice that had been submitted on behalf of the Appellant, which indicated *inter alia* that there is a high risk of terrorism including kidnapping in Iraq. That travel advice accords with current country guidance on Iraq: AA (Article 15(c)) CG [2015] UKUT 544 (IAC). I therefore set the decision on Article 8 aside.

15. Given my indication on the EEA grounds, Mr Hussain did not pursue the Article 8 grounds on remaking. In declining to make submissions on this matter he made no concessions as to whether there might be insurmountable obstacles to Ms Korkec re-

settling in Iraq. He has therefore kept his powder dry. No doubt the Respondent will give anxious scrutiny to the current security situation in Iraq when considering her discretion under Regulation 17(4).

Decisions

16. The decision of the First-tier Tribunal contains error of laws and it is set aside.

17. I re-make the decision as follows:

"The Appellant's appeal is allowed with reference to the Immigration (European Economic Area Regulations 2006"

18. I was not asked to make an order for anonymity and in the circumstances I see no reason to do so.

Upper Tribunal Judge Bruce
19th November 2015