Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/03818/2015**

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 7 March 2016	**On 26 April 2016**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

SAI KRISHNA BANDARI
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

IMMIGRATION OFFICER (MANCHESTER AIRPORT)

Respondent

Representation:

For the Appellant: Miss Deborah Revill, Counsel
For the Respondent: Mr Phil Mangion, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

2. The appellant appeals against the decision of the First-tier Tribunal (Judge Cope) dismissing the appellant's appeal against a decision taken on 20

January 2015 to revoke the appellant's EEA residence card and to give directions for his removal to Italy.

Introduction

3. The appellant is a citizen of India born in 1988 who originally came to the UK as a student and had leave to remain as a student until 31 July 2014. The EEA sponsor, CC, is a citizen of Italy born in 1979. The parties have been in a relationship since August 2013 and were married on 21 March 2014 in London. The appellant was issued with an EEA residence card on 14 May 2014 which was valid for a period of five years. CC worked in the UK until the end of July 2014 when she returned to Italy because he father had suffered a stroke. CC has since returned to the UK every month for a few days at a time. In October 2014 the appellant took up employment in Carlisle and the household moved there. In January 2015 the appellant visited CC in Italy and was not admitted to the UK upon his return to Manchester Airport. He was granted temporary admission. Following interviews the respondent decided to revoke the EEA residence card. CC claims that she has now returned to the UK and works as an art restorer.

4. The respondent decided that CC was not in the UK, having left for Italy in July 2014. The appellant was not therefore seeking to join an EEA national in the UK who had a right to reside there and had no right to be admitted under regulation 11 of the Immigration (European Economic Area) Regulations 2006 ("the Regulations"). The respondent was also not satisfied that the marriage was not one of convenience only.

The Appeal

5. The appellant appealed to the First-tier Tribunal and attended an oral hearing at North Shields on 23 April 2015. He was not represented. The respondent conceded that refusal of entry on the grounds of not accompanying or joining CC was unsustainable given that CC was physically present at the hearing. The First-tier Tribunal also found that the marriage was not one of convenience. However, the appeal was dismissed because the judge was not satisfied that CC was exercising treaty rights and had not done so since 30 July 2014. The respondent was therefore entitled to revoke the EEA residence card because it had not been shown that CC was exercising treaty rights on any basis in the UK.

The Appeal to the Upper Tribunal

6. The appellant sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law.

7. Permission to appeal was granted by Upper Tribunal Judge Grubb on 9 December 2015 on the basis that it was arguable that the judge had wrongly placed the burden of proof upon the appellant in a revocation case, the judge should have considered the appellant's right to reside as an EEA family member as at the date of hearing and the judge failed properly to consider Article 8 outside the Immigration Rules and the Regulations.

8. In a rule 24 response dated 5 January 2016 the respondent submitted that in order to justify revocation it was only necessary to show a change of circumstances as per paragraph 27 of Samsam (EEA: revocation and retained rights) Syria [2011] UKUT 00165 (IAC).

9. Thus, the appeal came before me

Discussion

10. Miss Revill submitted that the judge had incorrectly placed the burden of proof upon the appellant and the respondent had to prove that the grounds applied. The legal burden remained on the respondent. There is nothing in Samsam that suggests that the burden of proof in a revocation case shifts back to an appellant. The respondent must prove a change of circumstances and that the change of circumstances has removed the right of residence.

11. In relation to the second ground, Ms Revill submitted that under Boodhoo and another (EEA Regs: relevant evidence) [2013] UKUT 00346 (IAC), the relevant date for determination of the right of residence was the date of hearing rather than the date of decision and therefore the judge was wrong to conclude at paragraph 105 of the decision that the respondent was entitle to revoke the EEA residence card because it had not been shown that CC was then exercising treaty rights. Regulation 13 permits residence for an EEA national for three months. CC re-entered the UK on 28 January 2015 and the appeal was heard on 23 April 2015, less than three months later.

12. In relation to the third ground, Ms Revill submitted that the judge was obliged to consider whether the appellant's private and family life were adequately considered by the Rules or whether there was a gap requiring a Razgar assessment. The conclusion at paragraphs 148-149 of the decision that there was no basis for further consideration of Article 8 was not sustainable. The judge accepted that the relationship was genuine and the Rules do not cover a relationship with an EEA partner who is not settled in the UK.

13. Mr Mangion submitted that the effect of paragraphs 26-27 of Samsam is that the burden of proof shifted back to the appellant because of the change in CC's circumstances. The burden of proof does transfer in some cases such as marriages of convenience. There were two elements to the revocation decision – the marriage and the exercise of treaty rights. There was a dispute as to whether the evidential burden existed for both or only a single head. Samsam does not directly address that issue. The judge did consider the facts as at the date of hearing, as shown by paragraph 106 of the decision. The judge referred to obstacles at paragraph 144 of the decision and there was nothing to suggest that there was an arguable Article 8 case. Removal was not imminent and the appellant could make any future application under Article 8 or the Regulations. The first ground was the nub of the issue.

14. Miss Revill submitted in response that the legal burden is on the respondent throughout in marriage of convenience cases. The notice of decision served on the appellant was based upon him not accompanying or joining the sponsor in the UK. It was not specifically alleged that CC was not exercising treaty rights. The removal decision requires the appellant to leave the UK and Article 8 was engaged. The Article 8 question was whether removal as at the date of hearing would breach Article 8. Interference in protected rights must be justified. The judge failed to recognise that CC and the appellant had a right of residence under regulation 13. The judge failed to consider private and family life in the UK.

15. I have considered Samsam and Ewulo (effect of family permit – OFM) [2012] UKUT 00238. From Samsam, loss of the right of residence during the currency of the EEA residence card would entitle the respondent to revoke the card. Where the sole issue in an appeal is whether the respondent has lawfully revoked residence documentation on the ground of lack of qualification then the onus to justify such cancellation is on the revoking authority. It would be sufficient to justify such revocation if there had been a change of circumstances since issue that removes the right of residence. The position was summarised in Ewulo as being that it is for the respondent to raise and substantiate a ground that the permit was not validly or properly issued and should be revoked. I accept Miss Revill's submission that there is nothing in the cited authorities to justify the proposition that the burden of proof shifts to the appellant at any point in a revocation case.

16. The relevant authorities were not cited to the judge. The judge stated at paragraph 77 of the decision that the burden of proof in relation to the exercise of treaty rights was upon the appellant and at paragraph 102 found that the appellant had to prove on balance of probabilities that CC was self-employed undertaking art and furniture restoration. At paragraph 106, the judge found that it had not been shown that since CC had returned to the UK she had been exercising treaty rights as a qualified person. I am satisfied that the judge thereby materially erred in law by placing the burden of proof on the appellant in a revocation case.

17. The judge correctly found against the respondent on the two matters relied upon in the notice of decision dated 20 January 2015 (set out at paragraph 4 above). In my judgment, that should have been an end to the matter. The respondent did not state in the notice of decision that CC was no longer exercising treaty rights and did not point to any evidence to support such a conclusion. There was no need to do so – either CC did not return to the UK by the date of hearing in which case the revocation would be justified on the ground that the appellant was not seeking to join CC in the UK or she did return and could claim the benefit of regulation 13.

18. It is of course open to the Secretary of State to make a fresh decision revoke the appellant's EEA residence card. Any such decision should be fully explained in the notice of decision and evidence based; given that the burden of proof in any subsequent appeal would rest upon the Secretary of State. The appellant has submitted a 176 page bundle of evidence to

the Upper Tribunal which should be carefully considered by the Secretary of State before any fresh revocation decision is taken.

19. Thus, the First-tier Tribunal's decision to dismiss the appellant's appeal involved the making of an error of law and its decision cannot stand. I have not found it necessary to consider the remaining grounds of appeal.

Decision

20. Consequently, I set aside the decision of the First-tier Tribunal. I remake the decision by;

    (1) Allowing the appellant's appeal against the revocation of the appellant's EEA residence card.

    (2) Declaring that the EEA residence card remains valid unless and until revoked.

Signed  Date 20 April 2016

Judge Archer

Deputy Judge of the Upper Tribunal