Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13748/2015

THE IMMIGRATION ACTS

Heard at Field House
On 27 June 2017

Decision & Reasons Promulgated
On 11 July 2017

Before

MR JUSTICE JEREMY BAKER
and
DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS PEACE ADJOA NYEMASEM
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:
For the appellant: Mr Jarvis, Senior Home Office Presenting Officer
For the Respondent/Claimant: Mr Corswell, Thadavna Consulting

DECISION AND REASONS

1. The Secretary of State appeals from the decision of the First-tier Tribunal (Judge R L Walker, sitting at Hatton Cross on 10 November 2016) purporting to allow under the Regulations 2006 the claimant's appeal against the Secretary of State to refuse to grant her ILR under the Immigration Rules on the grounds of continuous lawful residence . The First-tier Tribunal did not make an anonymity direction, and we do

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not consider that the claimant requires anonymity for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal

2. On 3 May 2017 the First-tier Tribunal Judge Kelly granted the Secretary of State permission to appeal for the following reasons:

> "It is arguable that, given that the [claimant] had made an application for leave to remain under the Immigration Rules, with the consequence that there was an "EEA decision" before the Tribunal, it constituted a material error in law to allow the appeal "under the Regulations". That is not to say whether the claimant's partner had been residing in the UK as a "Qualified Person" under the Regulations was wholly immaterial to the issues that were in fact before the Tribunal, given their relevance to the question of whether the claimant had been residing in the United Kingdom "lawfully" for the purposes of the Immigration Rules with the consequence weight attaching thereto and the assessment of her rights under Article 8 of the 1950 European Convention of the Protection of Human Rights and Fundamental Freedoms. Nevertheless, the arguable error of law identified in the grounds may well have been material to the eventual outcome of the appeal where permission to appeal to the Upper Tribunal is accordingly granted."

Relevant Background Facts

3. The claimant is a national of Ghana. She entered the UK on 19 August 2005 with entry clearance as a student valid until 30 November 2006. The claimant extended her leave as a student on three subsequent occasions, with the consequence that she had continuous leave as a student until 31 October 2009. On 20 October 2009 the claimant applied for further leave to remain as a Tier 4 (Student) migrant, and the application was refused on 12 August 2010. The claimant appealed on 27 August 2010, and her appeal was dismissed by the First-tier Tribunal on 23 November 2010. The claimant became appeal rights-exhausted on 3 December 2010.

4. On 20 March 2011 the claimant applied for a residence card under the Regulations 2006 as a spouse of an EEA national exercising Treaty rights here. She was issued with a residence permit valid from 14 July 2011 until 14 July 2016.

5. On 13 August 2015 the claimant applied for indefinite leave to remain on the ground that she had accrued ten years' lawful residence in the United Kingdom. On her application form, she said that she had married her EEA national sponsor on 14 September 2010, while she had section 3C leave under the 1971 Act on account of her having a pending appeal against the refusal of her in-time application for further leave to remain as a student. She said her EEA national sponsor had been exercising Treaty rights since the date of their marriage on 14 September 2010, and so her lawful residence had remained unbroken.

6. She was asked, at section D15 of the application form, to state on what basis the EEA national was exercising Treaty rights. She said that from 14 September 2010 until the present day, he had been exercising Treaty rights as a Worker for an employer called Proclense Valeting Services in Welwyn, Hertfordshire.

7. She said that she had been living in Moniton Court, Stanley Park Road, Wallington in Surrey from 10 August 2008 to 13 March 2013, and then at Widcote Court, Widcote Road, Wallington, Surrey from 13 March 2013 to the present day.

8. By a letter dated 4 November 2015 addressed to the claimant at the address which she gave in her application form, a Case Worker for the Managed Migration Department in Liverpool requested the claimant to provide evidence that her EEA national sponsor had been exercising Treaty rights continuously in the UK throughout the period from 31 October 2009 until the current date. The documentary evidence that she might wish to present for any relevant category might typically be:

   A Worker: wage slips; pay advices; bank statements; P60s and correspondence from HMRC.

   A self-employed person*:* audited accounts; invoices and receipts; business bank statements; evidence of national insurance contributions and correspondence from HMRC pertaining to tax payments.

9. The claimant was asked to respond to the request within 14 days. If she failed to provide the required documents, the application would be considered on the basis of documents she had already provided. This might result in her application being refused in accordance with paragraph 322(9) of the Rules.

10. On 3 December 2015, the Secretary of State gave her reasons for refusing the claimant's application. She acknowledged that, under her discretionary policy, the time spent in the UK as a lawful resident by an EU or EEA national (or their family members) exercising their Treaty rights counted towards lawful residence where sufficient evidence had been provided to demonstrate, "*that the applicant has been exercising Treaty rights through any period that they are seeking to rely on for the purposes of meeting the long residence Rules.*"

11. At the time of the issuance to her of her EEA residence card on 14 July 2011, the claimant had a right to reside under such Regulations 2006 as her partner was exercising Treaty rights at that time. However, she had been unable to provide evidence to demonstrate that her EEA national partner had since continued to reside in the United Kingdom in accordance with the Regulations. So the period upon which she relied in her current application was not accepted to contribute towards the ten year legal leave period as a whole. She had been unable to demonstrate that she had resided in accordance with the Regulations, and therefore it was deemed that she had no basis of stay in the United Kingdom. The SSHD was not prepared to exercise discretion in her circumstances.

12. Furthermore, the department had written to her on 4 November 2015 requesting further evidence, but to date no response had been received. So, her application was also refused under paragraph 322(9).

The Hearing Before, and the Decision of, the First-tier Tribunal

13. The grounds of appeal were settled by the claimant's current representatives. They pleaded that the decision was not in accordance with the law as the SSHD had erred in not fully examining the immigration history of their client. If she had done so, the SSHD would have found that the claimant had met the requirements of ten years' lawful residence in the UK so as to be granted ILR.

14. The grounds of appeal did not comment on the asserted failure to respond to a request for further evidence, or the refusal under paragraph 322(9).

15. In compliance with directions made by the Tribunal, at the end of October 2016 the claimant's representatives served on the Tribunal and on the Home Office Presenting Officer's Unit the bundle of the documents upon which the claimant proposed to rely at the forthcoming hearing. The bundle contained a witness statement from the claimant dated 10 November 2016. In her statement, she said that she had not received the letter requesting proof that her husband had been continuously exercising Treaty rights, and thus she was unable to respond to it. Her husband used to work with Proclense Valeting Services. His contract with them had then come to an end. At the time of her application for ILR, he was exercising Treaty rights as a self-employed mechanic. In March 2016 he had got a job as a driver.

16. At the hearing before Judge Walker, the claimant was represented by Mr Jafar of Counsel, and there was no appearance by a Presenting Officer on behalf of the Secretary of State.

17. In his subsequent decision, the Judge summarised the reasons given for refusal by the Secretary of State at paragraph [15], and he set out the claimant's case at paragraphs [16] to [18]. Her case was that her husband had been working either as self-employed or employed at all times since she was first granted a residence permit. She said that her husband had at all times resided in the UK in accordance with the Regulations 2006 "*and since 14 July 2011*".

18. The Judge made findings of fact and credibility at paragraphs [22]-[27] of his decision. He observed at paragraph [24] that, as there had been no Presenting Officer, there had been no cross-examination and so no testing of the claimant's case. At paragraphs [25]-[26], the Judge made extensive reference to a decision of Judge Keith in an appeal heard at Hatton Cross on 13 April 2016. The appeal concerned the claimant's daughter. She successfully appealed against the decision by the SSHD to refuse to issue her with a residence card as the step-daughter of Mr Menezes, the claimant's husband. Judge Keith found that Mr Menezes was exercising Treaty rights as a Worker at the date of the hearing before him (13 April 2016). Judge Walker continued in paragraph [27]:

> "The decision shows that Mr Menezes was and has been exercising his Treaty rights in the UK. The [claimant's] bundle provided in today's appeal includes *some information* (our emphasis) about his work - past and present - and with payslips that go up to August of this year. This is evidence that has not been questioned by the [Secretary of State]. I find this sufficient to show on the balance of probabilities that Mr Menezes has been properly exercising Treaty rights throughout the relevant period."

19. The Judge went on to allow the appeal under the Regulations 2006.

The Hearing in the Upper Tribunal

20. At the hearing before us to determine whether an error of law was made out, Mr Jarvis referred us to the skeleton argument which he prepared for hearing and in which he developed the arguments advanced in the permission application. On behalf of the claimant, Mr Corswell mounted a robust defence of the decision of the First-tier Tribunal Judge. He submitted that there was no material error, as it was reasonably clear that the Judge had found in the claimant's favour on the issue which was properly before him, namely whether she had accrued ten years' continuous lawful residence through a combination of student leave, section 3C leave and right of residence as the spouse of an EEA national exercising Treaty rights here. If the decision was read with the contents of the letter of 4 November 2015, it was reasonably clear that what the Judge had in mind when he said that Mr Menezes had been properly exercising his Treaty rights *"throughout the relevant period"* was that he had continuously exercised Treaty rights from 31 October 2009 and/or from the date of his marriage to the claimant in September 2010.

Discussion

21. The claimant's appeal is governed by the new statutory regime introduced from 6 April 2015. In refusing to grant her ILR, the Secretary of State decided to refuse a human rights claim. Under section 84(2) of the 2002 Act, as amended by the Immigration Act 2014, an appeal under section 82(1)(b) - where the Secretary of State has decided to refuse a human rights claim - must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

22. Section 85(5) of the 2002 Act provides that a Tribunal must not consider a new matter on appeal unless the Secretary of State has given the Tribunal consent to do so.

23. On the case advanced before Judge Walker, it would have been open to the claimant to have applied for a permanent residence card under the Regulations 2006 instead of going down the route of applying for indefinite leave to remain on the grounds of ten years' continuous lawful residence. She chose not to go down this route, and so the only matter which was properly before Judge Walker was whether she qualified for indefinite leave to remain under the Rules; or, failing that, whether she should be granted Article 8 relief outside the Rules. The First-tier Tribunal had no jurisdiction to allow the claimant's appeal under the Regulations 2006.

24. We consider that the Judge's error goes deeper than allowing the appeal on a ground that it is not permitted by statute. The Judge also failed to engage with the general ground of refusal under paragraph 322(9). Moreover, the Judge failed to make clear findings on the question of whether the claimant had discharged the burden of proving that she was continuously lawfully resident as the family member of an EEA national from 31 October 2009, and/or from September 2010, until 19 August 2015.

25. The fact that there was no Presenting Officer present, and so the claimant's evidence could not be tested in cross-examination, did not relieve the Judge of the obligation to consider the evidence bearing upon the claimant's asserted failure to respond to a request for information letter which was purportedly sent to the correct address (which was also the address to which the refusal letter was sent to and apparently received by the claimant a month later) and to make a reasoned finding as to whether or not he accepted that the letter had not reached the claimant.

26. The Judge also needed to make a clear finding as to (a) the point at which the claimant began to have lawful residence as the family member of an EEA national exercising Treaty rights here; and (b) as to whether the claimant had demonstrated a continuous exercise of Treaty rights by her EEA national spouse so as to qualify for ILR under a combination of the Rules and the policy concession.

27. Accordingly, we are in no doubt that the decision of the First-tier Tribunal is vitiated by a material error of law, such that it must be set aside in its entirety and re-made. Mr Corswell invited us to re-make the decision on the documentary evidence that was put before the First-tier Tribunal Judge. We decline to do so for two reasons. Firstly, we consider that the Secretary of State has been deprived of a fair hearing in the First-tier Tribunal on the issues that were properly before the First-tier Tribunal. Secondly, we consider that the extent of judicial fact-finding that would be required is such that it is more appropriate for the First-tier Tribunal to hear the appeal *de novo*. We are reinforced in this view by Mr Menezes' national insurance record which was downloaded from a Government website on 6 June 2017 and shown to us by Mr Colswell. Mr Menezes does not have a *"full year"* insurance record for the following tax years: 2011-2012, 2012-2013, 2013-2014 and 2014-2015. In the tax year 2011-2012 his contributions from paid employment were only £46.47. This is in stark contrast to the previous tax year, where he accumulated 38 weeks of National Insurance credits and he paid contributions from paid employment amounting to £275.59.

Notice of Decision

28. The decision of the First-tier Tribunal contained an error of law, such that the decision must be set aside and remade.

Directions

29. **This appeal is remitted to the First-tier Tribunal at Hatton Cross for a *de novo* hearing (Judge Walker incompatible).**

We make no anonymity direction.

Signed   Date 10 July 2017

Judge Monson
Deputy Upper Tribunal Judge