



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/13104/2016

THE IMMIGRATION ACTS

Heard at Field House
On 31 August 2018

Decision & Reasons Promulgated
On 11 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS ANASTACIA APPIAH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms Z Kiss, Home Office Presenting Officer

For the Respondent: Mr C Okech, a legal representative

DECISION AND REASONS

Introduction and background

1. The appellant is a citizen of Ghana who was born on 6 January 1970. She applied for a permanent right of residence in the UK as an unmarried partner of a Mr [D], who is an EEA national of Dutch nationality. He came to the UK some years previously. The parties began a relationship, it seems in 2010, and have had three children together, all of whom are Dutch nationals.

2. The appellant was originally given a five-year residence card in 2011 but following or immediately before the expiry of that residence card applied to the respondent for permanent residence in the UK which would be recognised by means of a permanent residence card. When the respondent considered the application on 27 October 2016 she decided not to accept that the appellant had necessarily been resident for five years, nor did she accept that Mr [D] was exercising Treaty rights and the application was therefore rejected.
3. There was subsequently an appeal to the First-tier Tribunal. That appeal came before First-tier Tribunal Judge Lal (the Immigration Judge) on 5 March 2018. Judge Lal, having considered the application and the evidence before him, decided to accept, i.e. accede to, the appeal and he directed the respondent to issue the appellant with a permanent residence card. No anonymity direction was made and according to the decision, the judge also directed there to be a fee award in the appellant's favour.

The appeal before the Upper Tribunal

4. The current appeal is against the Immigration Judge's decision by the respondent. Nevertheless, I will continue to refer to the parties henceforth by their classification before the FTT. The respondent appeals to the Upper Tribunal with the permission of First-tier Tribunal Judge David Kelly, who considered the application for permission to appeal on 17 July 2018. Judge Kelly pointed out that the reference to regulation 15 of the Immigration (EEA) Regulations 2006 (2006 Regulations) had clearly been a reference to regulation 10. This was because Regulation 10 dealt with the "retained" right of residence of a "family member" of a "qualified person or of an EEA national" whereas Regulation 15 dealt with the persons who would acquire the right to reside in the UK permanently including a family member of a worker but who has resided in the UK in accordance with the regulations for five years.
5. At the appeal hearing the respondent, represented by Ms Kiss, submitted that the Immigration Judge had applied the wrong Regulations, referring erroneously to Regulation 15 rather than to Regulation 10. Regulation 15 applies to a person who is a family member of an EEA national who is not himself an EEA national but who has resided in the UK with an EEA national in accordance with the Regulations for a continuous period of five years or is the family member of a worker or self-employed person who has ceased that activity.
6. Regulation 10 deals with family members who have retained rights of residence by virtue of satisfying certain conditions in subparagraph (2) of that Regulation including where he is a family member of an EEA national with a permanent right of residence when that person has died, or he has resided in the United Kingdom in accordance with the Regulations for at least the year immediately before the death of that person. There are various conditions that would need to be met before that Regulation could be satisfied but the Immigration Judge had made no, or no adequate, findings.
7. The position here was that Mr [D] was originally married to another person and the exercise of treaty rights by Mr [D] was disputed by the respondent. Proof was put forward, but it did not cover the whole five-year period. It seems that Mr [D] at some

point stopped working and he may have been incapacitated but there was no attempt in the evidence presented before the Tribunal, or at least based on the evidence as recorded by the Immigration Judge in his decision, to indicate what evidence he found satisfied the five-year period during which the appellant was supposed to be exercising treaty rights if regulation 15 was to be found to apply. There was no evidence as to his incapacity as such. It was merely asserted that he had been in employment and had subsequently become unemployed.

8. The respondent in the course of her submissions also referred to Regulation 5 of the 2006 Regulations, which refers to the "worker or self-employed person" exercising Treaty rights under the Regulations who has ceased that activity. There are a number of technical requirements which must be fulfilled before one can bring oneself within that Regulation.
9. Mr Okech accepted on behalf of the appellant that the Immigration Judge had referred to the wrong Regulations. He also accepted, after I reminded him of the reference in the decision to the late lodging of documents by the appellant, that an appellant's bundle was submitted on the morning of the hearing in breach of the directions that would have been given. That bundle has been provided to the Upper Tribunal. It contains a witness statement from Mr [D] as well as other documents which may have been relevant to the decision, such as the applicant's own witness statement. There seemed to be no agreement between the parties before the Upper Tribunal as to whether the respondent was represented. It is noteworthy that there is no reference to the respondent's representatives in the Immigration Judge's decision or in his notes of the hearing and Ms Kiss had no reference on her file to any respondent's representative attending the FTT.
10. However, Mr Okech, having taken instructions from his client, recalled "someone" for the respondent being present the FTT. I expressed some surprise that Mr Okech did not have an attendance file note for the hearing before the FTT or any notes from that hearing. Had he done so it would have been clear whether the Home Office were represented or not. However, on balance, it seems unlikely the Home Office was represented, given the lack of any record of any submissions or any cross-examination by the respondent in the decision.
11. There may, therefore, be criticisms of both sides in this case; the appellant for submitting a bundle late and the respondent for not drawing the Immigration Judge's attention to the key issues in the case by attending and making oral submissions or submitting a written argument to the Immigration Judge which could have been considered by him. It is incumbent on represented parties to prepare properly for hearings and present all their arguments at the first opportunity. Nevertheless, it was also incumbent on the Immigration Judge to consider and apply the law correctly to the facts of the case as he found them to be.

Conclusion

12. There is clearly a material error of law in the decision of the FTT for the purposes of section 12 (1) of the Tribunals, Courts and Enforcement Act 2007.

13. Ordinarily, the finding of a material error of law would result in the Upper Tribunal considering whether it is necessary to remake the decision and if it is to re-make that decision. No oral evidence is likely to be required. However, having reminded myself of the Practice Statements: Immigration and Asylum Chamber of the FT and U T dated 13 November 2014 at paragraph 7.2 discussed in McDonald's Immigration Law at 21.15, it is necessary to look at the extent of any fact findings made by the FTT and where they are inadequate, consider whether, if it is appropriate having regard to the overriding objective of trying cases justly, to remit the matter to the FTT.
14. Here, the fact findings were so inadequate that the Upper Tribunal considers it necessary to do so. It is impossible for the Upper Tribunal to proceed to decide this appeal without making primary findings of fact. It is not appropriate to proceed in that manner, as both parties agreed.
15. Therefore, having found a material error of law, but a lack of fact findings, and having applied the correct test, I have decided that the appropriate course is to set aside the original decision and remit the matter to the FTT. There will need to be a further hearing of the appeal *de novo*. On balance, I have decided that the hearing should take place before a different judge, given that the criticisms of the Immigration Judge in the manner that he approached this case.
13. In terms of such findings of fact that were made, they do not appear to be substantial but in any event should not be allowed to stand. There is therefore no need to preserve any findings. Accordingly, the decision of the First-tier Tribunal is set aside in its entirety and I direct that there be a fresh hearing in the First-tier Tribunal in due course.
14. There appears to be no requirement for an interpreter in this case but all further directions in this case will be made by the First-tier Tribunal.

Notice of Decision

The respondent's appeal is allowed. The decision of the First-tier Tribunal is set aside. The appeal is remitted to the First-tier Tribunal for a *de novo* hearing before a different judge. All further directions are to be made by the First-tier Tribunal.

No anonymity direction is made.

Signed

Date 5 September 2018

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

As I have allowed the respondent's appeal I set aside the fee award of the First-tier Tribunal.

Signed

Date 5 September 2018

Deputy Upper Tribunal Judge Hanbury