Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/07324/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 July 2019	**On 08 August 2019**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MR RANJIT SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Bellara, Counsel, instructed by Waterfords Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Trevaskis ("the judge"), promulgated on 15 April 2019, in which he dismissed the Appellant's appeal against a decision of the Respondent, dated 29 October 2018, refusing to issue the Appellant with a permanent residence card pursuant to the Immigration (European Economic Area) Regulations 2016 ("the Regulations").

2. By way of brief background, the Appellant, an Indian national, had married a Polish national, DK ("the Sponsor") on 20 January 2012. At that point the Appellant became the Sponsor's family member within the meaning of the Citizens' Directive and Regulations. Prior to this, the Appellant asserted that he had been in a relationship

with the Sponsor since 2009. Following the marriage and upon application, the Respondent issued the Appellant with a residence card valid from 29 July 2012 until 29 July 2017. The couple separated in early 2013 and divorce proceedings were initiated on 24 November 2017.

3. For reasons that are unclear to me, the divorce has not yet been finalised and therefore at all material times the Appellant and Sponsor have remained married. The application for a permanent residence card was made on 10 August 2018. In refusing that application, the Respondent noted that the Appellant remained married to the Sponsor and therefore he could not have a retained right of residence pursuant to Regulation 10(5) of the Regulations. In addition, the Respondent concluded that there was insufficient evidence to show that the Sponsor had been exercising her Treaty rights for a continuous period of five years. A point was also taken in respect of Regulation 21(5) in relation to an alleged a failure to have produced documentation relating to the Sponsor's identity.

The judge's decision

4. On appeal, the judge found in favour of the Appellant in respect of Regulation 21(5) (see para. 24). At para. 25 the judge correctly concluded that the Appellant did not have a retained right of residence as he remained married to the Sponsor. At para. 27 the judge noted that the Appellant had only lived with the Sponsor for just under two years following the marriage in 2012. In his view this meant that the Appellant could not satisfy the requirements of Regulation 15(1)(b) of the Regulations and therefore could not have acquired a right of permanent residence in the United Kingdom. On this basis alone, the appeal was dismissed.

The grounds of appeal and grant of permission

5. The grounds of appeal assert that the judge was wrong in para. 27 to have imposed a requirement that the Appellant actually reside with the Sponsor at all material times. The decision of the Upper Tribunal in PM (EEA - spouse – 'residing with') Turkey [2011] UKUT 89 (IAC) is cited in support of the challenge.

6. Permission to appeal was granted by Upper Tribunal Judge Blum on 26 June 2019.

The hearing

7. At the hearing before me Ms Cunha quite properly conceded that the judge had erred by effectively imposing a cohabitation requirement in this case. PM is clear: there is no such requirement.

Decision on error of law

8. I conclude that the judge has materially erred in law as set out in the grounds and as accepted by Ms Cunha before me. The judge simply misdirected himself as to the law on the issue of whether the Appellant continued to be a family member of the Sponsor.

9. I therefore set the judge's decision aside.

Re-making the decision

10. Both representatives were agreed that I could and should remake the decision based on the evidence before me, and this I now do.

11. I have before me: the Respondent's original appeal bundle; what is called a supplementary bundle for the Appellant, indexed and paginated 1 – 445 (from which Mr Bellara has helpfully provided relevant extracts comprising pages 185 – 220); a separate witness statement from the Appellant that was before the First-tier Tribunal; and evidence obtained by the Respondent from HMRC as regards the Sponsor's work history in the United Kingdom.

12. The following matters are not in dispute and the facts are as follows. The Appellant had been in a relationship with the Sponsor prior to his marriage on 20 January 2012. Prior to him becoming her family member on the occurrence of the marriage, he had not been issued with a residence card as an extended family member (on the evidence before me, there had never any application for documentation). The Appellant separated from the Sponsor in January 2013. Divorce proceedings were initiated in November 2017, but the couple remain married to date.

13. The nature of the Sponsor's work history in this country is disputed. On the evidence before me it is more likely than not that the Sponsor derived earnings from activity as a cleaner in the following sums and during the following periods:

    i. 2009 – 2010, with a turnover of £1,590;

    ii. 2010 – 2011, with a turnover of £7,864 and a taxable profit of £6,566;

    iii. 2011 – 2012, with a profit of £3,046;

    iv. 2012 – 2013, with a profit of £5,977;

    v. 2013 – 2014, with a profit of £2,320;

    vi. 2016 – 2017, with a profit of £2,717;

    vii. 2017 – 2018, with a profit of £2,922.

14. I shall return to the years 2014 – 2015 and 2015 – 2016, below. In respect of the figures I have just cited, Ms Cunha submits that these do not show genuine and effective work, but only marginal and ancillary earnings.

15. With respect to the period 2009 until the end of the tax year ending 5 April 2013, a time when the Appellant was living together with the Sponsor, I disagree with Ms Cunha's position. I have considered relevant case-law relating to the definition of a "worker" under the Directive and Regulations. In summary, the term "worker" is to be interpreted broadly and with full regard to the need to provide effectiveness to the right of EEA nationals to exercise rights of free movement. In this regard, I have

been referred to the decision of the CJEU in Kempf [1986] EUECJ R-139/85, in particular at paras. 13 – 16:

> "13 THE COURT HAS CONSISTENTLY HELD THAT FREEDOM OF MOVEMENT FOR WORKERS FORMS ONE OF THE FOUNDATIONS OF THE COMMUNITY . THE PROVISIONS LAYING DOWN THAT FUNDAMENTAL FREEDOM AND , MORE PARTICULARLY , THE TERMS ' WORKER ' AND ' ACTIVITY AS AN EMPLOYED PERSON ' DEFINING THE SPHERE OF APPLICATION OF THOSE FREEDOMS MUST BE GIVEN A BROAD INTERPRETATION IN THAT REGARD , WHEREAS EXCEPTIONS TO AND DEROGATIONS FROM THE PRINCIPLE OF FREEDOM OF MOVEMENT FOR WORKERS MUST BE INTERPRETED STRICTLY .
>
> 14 IT FOLLOWS THAT THE RULES ON THIS TOPIC MUST BE INTERPRETED AS MEANING THAT A PERSON IN EFFECTIVE AND GENUINE PART-TIME EMPLOYMENT CANNOT BE EXCLUDED FROM THEIR SPHERE OF APPLICATION MERELY BECAUSE THE REMUNERATION HE DERIVES FROM IT IS BELOW THE LEVEL OF THE MINIMUM MEANS OF SUBSISTENCE AND HE SEEKS TO SUPPLEMENT IT BY OTHER LAWFUL MEANS OF SUBSISTENCE . IN THAT REGARD IT IS IRRELEVANT WHETHER THOSE SUPPLEMENTARY MEANS OF SUBSISTENCE ARE DERIVED FROM PROPERTY OR FROM THE EMPLOYMENT OF A MEMBER OF HIS FAMILY , AS WAS THE CASE IN LEVIN , OR WHETHER , AS IN THIS INSTANCE , THEY ARE OBTAINED FROM FINANCIAL ASSISTANCE DRAWN FROM THE PUBLIC FUNDS OF THE MEMBER STATE IN WHICH HE RESIDES , PROVIDED THAT THE EFFECTIVE AND GENUINE NATURE OF HIS WORK IS ESTABLISHED .
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> 15 THAT CONCLUSION IS , INDEED , CORROBORATED BY THE FACT THAT , AS THE COURT HELD MOST RECENTLY IN LEVIN , THE TERMS ' WORKER ' AND ' ACTIVITY AS AN EMPLOYED PERSON ' FOR THE PURPOSES OF COMMUNITY LAW MAY NOT BE DEFINED BY REFERENCE TO THE NATIONAL LAWS OF THE MEMBER STATES BUT HAVE A MEANING SPECIFIC TO COMMUNITY LAW . THEIR EFFECT WOULD BE JEOPARDIZED IF THE ENJOYMENT OF RIGHTS CONFERRED UNDER THE PRINCIPLE OF FREEDOM OF MOVEMENT FOR WORKERS COULD BE PRECLUDED BY THE FACT THAT THE PERSON CONCERNED HAS HAD RECOURSE TO BENEFITS CHARGEABLE TO PUBLIC FUNDS AND CREATED BY THE DOMESTIC LEGISLATION OF THE HOST STATE."

16. In light of what is said in Kempf, I am willing to accept that the Sponsor's earnings, whilst certainly very low, must be seen in the context that she was living with her then-partner, who was himself working (of this there is no dispute). Thus, the Sponsor was in all likelihood deriving remuneration from a member of her family (interpreting this term broadly), namely the Appellant. This reliance does not, in my

view, preclude her from having been a "worker" when seen in the overall context of her circumstances at that time. I conclude that her work was not marginal and ancillary.

17. However, the Appellant and Sponsor separated in early 2013. From that point onwards, it cannot be said that the Sponsor was able to rely on any earnings from the Appellant. Her earnings, as evidenced by the HMRC document, were £2,320 for the tax year 2013 – 2014. In the absence of any additional evidence (and I do not criticise the Appellant for this, given the circumstances) I am unable to conclude that she was supplementing her minimal (if not negligible) earnings as a cleaner with other sources. There is no evidence that she claimed any benefits, or that there are any other undisclosed sources of income, or that she was receiving money from relatives or indeed a new partner. I conclude that the earnings during this period were so minimal as to be ancillary and marginal, and her activity did not represent genuine and meaningful work. I have not been referred to evidence which shows that the birth of the Sponsor's child had the effect of her retaining the previous status as a "worker". Nor is there any evidence that she was a "jobseeker" or "self-sufficient".

18. I acknowledge that the Appellant asserts in his witness statement that he believes the Sponsor has worked throughout. He cannot, however, know this to be the case following their separation.

19. I now turn to the two tax years 2014 – 2015 and 2015 – 2016. There is a nil figure contained in the HMRC evidence for both these years. Mr Bellara has submitted that there may be a number of reasons for why this nil figure is stated and that it may not necessarily represent a true reflection of the Sponsor's financial circumstances during this period. With respect, this submission is wholly speculative. Whilst it is possible that the Sponsor was, for example, earning money in one way or another but not declaring it to HMRC, this, in my view, is too remote a scenario for me to be satisfied that it represents the likely state of affairs at that time. There are of course many other possibilities including the Sponsor having relied on friends and/or relatives for support.

20. Ultimately, I conclude that the Sponsor was not economically active in any material form between 2013 – 2016, nor was she a qualified person in any other category during this period.

21. What are the consequences of this?

22. The Appellant became the family member of the Sponsor upon his marriage on 20 January 2012. He cannot rely on a period prior to him acquiring that status for the purposes of the accrual of time going to a right of permanent residence (see Kunwar (EFM - calculating periods of residence) [2019] UKUT 63 (IAC)). The Appellant can rely as his status as a family member of the Sponsor only from the point of his marriage onwards.

23. Two questions then arise. First, had the Sponsor acquired a permanent right of residence prior to the marriage? On my findings, she had not. There iois no evidence at all to suggest that she had been exercising Treaty rights earlier than 2009.

Whilst she was exercising Treaty rights between 2009 and 2013, this did not amount to a five-year continuous period. In consequence, the Appellant cannot rely on any permanent right of residence acquired by the Sponsor prior to the marriage.

24. The second question then is whether, as the family member of the Sponsor, he can rely on the Sponsor having exercised Treaty rights for a five-year period since the marriage. Again, on my findings, he cannot do so. There has been no continuous five-year 'block' on the Sponsor's part.

25. Mr Bellra has relied on the decision in Samsam (EEA: revocation and retained rights) Syria [2011] UKUT 00165 (IAC). This does not materially assist the Appellant. The Respondent did accept that the Sponsor was exercising Treaty rights when the application for a residence card was granted in 2012. However, this is not a case in which there is no independent evidence of the EAA national's activities post-separation: HMRC has provided relevant information and I have found this to be relaible.

26. Adopting a 'belt-and-braces' approach, I have considered whether the Appellant has an extended right of residence under Regulation 14. He does not. This is because, on the evidence before me, the Sponsor has not acquired a permanent right of residence and, although I acknowledge that the HMRC evidence shows some earnings in the 2017/2018 tax year, there is nothing to show that she is currently exercising Treaty rights in the United Kingdom.

27. In light of the above, the Appellant's appeal must fail.

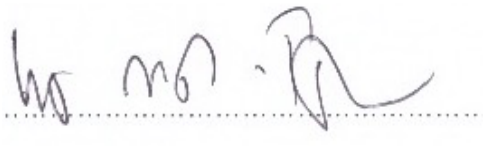
Notice of Decision

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

I set aside the decision of the First-tier Tribunal.

I re-make the decision by dismissing the Appellant's appeal.

No anonymity direction is made.

Signed  Date: 31 July 2019

Upper Tribunal Judge Norton-Taylor