



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/07495/2018

THE IMMIGRATION ACTS

Heard at Field House
On 20 March 2019

Decision & Reasons Promulgated
On 28 March 2019

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS BENTE ELISABETH LOVELL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A Everett, Home Office Presenting Officer

For the Respondent: Unrepresented

DECISION AND REASONS

1. The Respondent is a citizen of Denmark. Her date of birth is 28 November 1959. I shall refer to the Respondent as the Appellant as she was before the First-tier Tribunal.
2. The Appellant made an application for a document certifying permanent residence under the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations). Her application was refused by the Secretary of State on 8 November 2018. The Appellant appealed. Her appeal was allowed by First-tier Tribunal Judge

Kaler in a decision that was promulgated on 29 January 2019 following the judge's determination of the appeal on the papers (at the request of the Appellant).

3. The Secretary of State was granted permission by First-tier Tribunal I D Boyes on 14 February 2019.

The decision of the FTT

4. The judge in her decision set out Regulation 9 of the 2016 Regulations:

"Family members of British citizens

9. – (1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member ("F") of a British citizen ("BC") as though the BC were an EEA national.

(2) The conditions are that –

(a) BC –

(i) is residing in an EEA State as a worker, self-employed person, self-sufficient person or a student, or so resided immediately before returning to the United Kingdom; or

(ii) has acquired the right of permanent residence in an EEA State;

(b) F and BC resided together in the EEA State; and

(c) F and BC's residence in the EEA State was genuine.

(3) Factors relevant to whether residence in the EEA State is or was genuine include –

(a) whether the centre of BC's life transferred to the EEA State;

(b) the length of F and BC's joint residence in the EEA State;

(c) the nature and quality of the F and BC's accommodation in the EEA State, and whether it is or was BC's principal residence;

(d) the degree of F and BC's integration in the EEA State;

(e) whether F's first lawful residence in the EU with BC was in the EEA State.

(4) This regulation does not apply –

(a) where the purpose of the residence in the EEA State was as a means for circumventing any immigration laws applying to non-EEA nationals to which F would otherwise be subject (such as any applicable requirement under the 1971 Act to have leave to enter or remain in the United Kingdom); or

(b) to a person who is only eligible to be treated as a family member as a result of regulation 7(3) (extended family members treated as family members).

- (5) Where these Regulations apply to F, BC is to be treated as holding a valid passport issued by an EEA State for the purposes of the application of these Regulations to F.
- (6) In paragraph (2)(a)(ii), BC is only to be treated as having acquired the right of permanent residence in the EEA State if such residence would have led to the acquisition of that right under regulation 15, had it taken place in the United Kingdom.
- (7) For the purposes of determining whether, when treating the BC as an EEA national under these Regulations in accordance with paragraph (1), BC would be a qualified person –
 - (a) any requirement to have comprehensive sickness insurance cover in the United Kingdom still applies, save that it does not require the cover to extend to BC;
 - (b) in assessing whether BC can continue to be treated as a worker under regulation 6(2)(b) or (c), BC is not required to satisfy condition A;
 - (c) in assessing whether BC can be treated as a jobseeker as defined in regulation 6(1), BC is not required to satisfy conditions A and, where it would otherwise be relevant, condition C.”

5. The judge made reference to what she described as various documents purporting to show that the Sponsor, the Appellant’s British citizen husband, worked in Denmark in 1991 and that they had lived together in Denmark. The judge stated that she had not been provided with the application and documents in support. She had before her the refusal letter, the notice of appeal and the documents submitted by the Appellant with the appeal. However, she went on to reach conclusions specifically at paragraphs 6 and 7 of the decision:

- “6. It is accepted that the Sponsor is a British citizen and is the Appellant’s husband. The documents provided by the Appellant. The documents are in Danish, but it is clear that they all relate to the year 1991. I am satisfied that they show the Sponsor worked in Denmark in 1991 and that he lived there with the Appellant in that year. The Sponsor was issued with a residence permit as an EEA citizen on 28/01/1991.
7. I am satisfied that the Sponsor was exercising treaty rights in Denmark and also that he and his wife lived there together. It would seem that the Appellant and the Sponsor have been residing together in the UK for more than 5 years.”

The grounds of appeal

6. The first ground is that it is unclear from the findings of the judge the basis on which the appeal was allowed and what documents the judge referred to. It is asserted in the second ground that the judge did not identify the relevant Regulations that the Appellant met and failed to show how the evidence before her could enable the Appellant to meet the requirements with reference to OB (EEA Regulations 2006 Article 9(2) Surinder Singh spouse) Morocco [2010] UKUT 420. That case establishes

there has to be a sufficient link between the exercise of treaty rights in the EEA State and return. The third ground asserts that the judge did not engage with whether the Sponsor was exercising treaty rights in the UK or on what basis the Appellant had established that she meets all the requirements of 15(1)(a) of the Regulations.

7. Having considered the decision of the judge it is clear that she allowed the appeal under Regulation 9. However, I accept that the judge did not give adequate reasons why she allowed the appeal with reference to documents submitted in support. I have some sympathy with the Secretary of State's grounds of appeal.
8. The Appellant attended the hearing before me. She was unrepresented. It became clear that the judge had before her certain documents that were submitted in support of the appeal in which the Secretary of State did not have and had not seen. These include a permanent residence card relating to the Sponsor, evidence of the Sponsor and the Appellant's tax returns showing that they lived at the same address and documents relating to the British citizen husband's employment. The documentation supported that the Sponsor was exercising treaty rights in 1991, he had permanent residence in Denmark and that they lived together there.
9. Ms Everett agreed to the Appellant giving evidence at the hearing before me. The Appellant explained the documentation that was before the First-tier Tribunal. Her evidence was that her British citizen husband was working in Denmark between 1985 and 1992. He was granted permanent residence, they were living there together and they had purchased a house together in Denmark. He continued to work there until 1992 when in autumn he returned to the UK where he has been working since.
10. There was no challenge by Ms Everett to the Appellant's evidence. The judge in my view did not adequately reason the decision. She made a reference to material that had been submitted on which she relied; however, it was not clear how this established that the Appellant met the requirements of the Regulations. Having considered the documentation and having heard the Appellant's evidence about it and her circumstances, there is in my view no need to interfere with the decision of the judge to allow the appeal. The documentation that the judge had before her and the Appellant's evidence establishes that the Sponsor was exercising treaty rights in Denmark between 1985 and 1992 (when he returned to the UK), he had permanent residence there, he and the Appellant lived together in Denmark and their residence was genuine and he continues to work here.
11. There is no need for me to interfere with the decision of the FTT to allow the appeal under Regulation 9. It is not clear whether the judge found that the Appellant's appeal is allowed under Regulation 15. It was conceded by Ms Everett that if the Appellant's unchallenged evidence was accepted her appeal should be allowed under Regulation 15(1) (b) of the 2016 Regulations on the basis that she is entitled to permanent residence. I agree and allow her appeal on this basis.

Notice of Decision

The Secretary of State's is dismissed.

The Appellant's appeal is allowed under the 2016 Regulations.

No anonymity direction is made.

Signed

Joanna McWilliam

Date 25 March 2019

Upper Tribunal Judge McWilliam