IN THE UPPER TRIBUNAL **Case No** CE/2356/2019
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting at Manchester on 23 August 2019 under reference SC946/18/01348 involved the making of an error on a point of law and is set aside.

Acting under s.12(2)(b) of the Tribunals Courts and Enforcement Act 2007 I remake the decision in the following terms:

The claimant's appeal against the decision of 8 February 2018 is allowed. The claimant did have a right to reside for the purpose of his claim for ESA made with effect from 22 January 2018. The Secretary of State must now proceed to determine the remaining aspects of his claim.

REASONS FOR DECISION

1. Both the claimant's representative and the representative of the Secretary of State have expressed the view that the decision of the tribunal involved the making of an error on a point of law and have agreed to the decision being remade on the terms above. That makes it unnecessary to set out the history of the case or to analyse the whole of the evidence or arguments in detail. I need only deal with the reason why I am setting aside the tribunal's decision.

2. The claimant is an Algerian national. He had previously been married to a Portuguese national, but they had divorced in (as found by the FtT) 2012. On 9 July 2012 he was issued by the Home Office with a permanent residence card.

3. His appeal was rejected by the FtT on the ground (put shortly) that reg 10(5) and (6) of the Immigration (European Economic Area) Regulations 2016 required him, as the non-EEA national former spouse of an EEA national, to continue to hold worker (or other qualifying) status, which on the evidence he was unable to do. The FtT's decision was wrong in law for the following reasons.

4. When the appellant claimed ESA with effect from 22 January 2018 the issue arose whether he was a "person from abroad" within reg 70 of the Employment and Support Allowance Regulations 2008. It is odd that, given that the Immigration (European Economic Area) Regulations 2016 were in force from 1 February 2017, the statutory references in the ESA Regulations appear not to have caught up until later, but I do not consider that what I go on to say would be any different if reg 70 had at the date of decision referred to the equivalent provisions in the 2016 Regulations.

5. Reg 70, as in force at the date of the DWP's decision provided, so far as relevant, that

> "(1) *Person from abroad"* means, subject to the following provisions of this regulation, a claimant who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.
>
> (2) A claimant must not be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland unless the claimant has a right to reside in (as the case may be) the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland other than a right to reside which falls within paragraph (3).
>
> (3) A right to reside falls within this paragraph if it is one which exists by virtue of, or in accordance with, one or more of the following—
> (a) regulation 13 of the Immigration (European Economic Area) Regulations 2006;
> (b) regulation 14 of those Regulations, but only in a case where the right exists under that regulation because the claimant is—
> (i) a jobseeker for the purpose of the definition of "qualified person" in regulation 6(1) of those Regulations; or
> (ii) a family member (within the meaning of regulation 7 of those Regulations) of such a jobseeker;
> (bb) regulation 15A(1) of those Regulations, but only in a case where the right exists under that regulation because the claimant satisfies the criteria in regulation 15A(4A) of those Regulations;
> (c) Article 6 of Council Directive No. 2004/38/EC;
> (d) Article 45 of the Treaty on the Functioning of the European Union (in a case where the claimant is a person seeking work in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland); or
> (e) Article 20 of the Treaty on the Functioning of the European Union (in a case where the right to reside arises because a British citizen would otherwise be deprived of the genuine enjoyment of the substance of their rights as a European Union citizen).
>
> (4) A claimant is not a person from abroad if the claimant is—
> …
> (zc) a person who has a right to reside permanently in the United Kingdom by virtue of regulation 15(1)(c), (d) or (e) of those Regulations."

6. The appellant had to be treated as not habitually resident if he did not have a qualifying right to reside: reg 70(2). Did he have such a right?

7. The appellant had been granted a permanent residence card on 9 July 2012. It is in evidence at page 22. It is a permanent residence card under Article 20 of Directive 2004/38, not a residence card under Article 10. Given

that the appellant was previously married to a Portuguese national, the Home Office must be taken to have been satisfied that he had legally resided with her in the UK for a continuous period of five years (Article 16(2)). Such a right of residence is not subject to the conditions provided for in Chapter III: Art 16(2), read together with Art 16(1). It is Chapter III which includes the Art 7 conditions and the Art 13 rules under which, following divorce a family member may need to work or otherwise fall within Art 7 to continue to have a right of residence and which reg 10 of the 2016 Regulations seeks to implement.

8. A right of permanent residence could only be lost through absence from the UK for a period exceeding two consecutive years (Art 16(4)). I have not seen any evidence suggesting such absence and p25 suggests otherwise.

9. The right to reside conferred by Art 16(2) is not among the list of non-qualifying rights in reg 70(3) (I have taken into account that that provision often refers to the equivalent domestic legislation.)

10. That right does not however figure on the list in reg 70(4). That refers to people with rights under reg 15(1)(c) (d) or (e), whereas the appellant fell within either (b) or (f). People falling within (c) (d) or (e) simply "are not a person from abroad" and that is the end of the matter so far as they are concerned. People such as the present appellant with rights which escape reg 70(3), but are not within reg 70(4), are not caught by reg 70(2). The consequence is that the remaining issue is whether they are in fact habitually resident in the UK (etc.) under reg 70(1). That would be a matter of evidence but I have seen none to suggest otherwise.

11. The judge of the FtT was in error in requiring reg 10(5) and (6) of the 2016 Regulations to be fulfilled. Reg 10(9) (correctly in my view given what is said about Chapter III above) provides for a right of permanent residence under reg 15 to prevail over the reg 10 requirements.

(signed)

C.G.Ward
Judge of the Upper Tribunal
22 July 2020