Upper Tribunal
(Immigration and Asylum Chamber)

Oksuzoglu (EEA appeal – "new matter") [2018] UKUT 00385 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 9 October 2018

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

ANNA OKSUZOGLU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Farhat, Gulbenkian Andonian Solicitors
For the respondent: Ms Everett, Senior Home Office Presenting Officer

(1) By virtue of schedule 2(1) of the Immigration (EEA) Regulations 2016 ('the 2016 Regs') a "new matter" in section 85(6) of the Nationality, Immigration and Asylum Act 2002 includes not only a ground of appeal of a kind listed in section 84 but also an EEA ground of appeal.

(2) The effect of the transitory and transitional provisions at schedules 5 and 6 of the 2016 Regs is as follows:

(a) All decisions made on or after 1 February 2017 are to be treated as having been made under the 2016 Regs, whatever the date of the application;
(b) Regulation 9 of the 2016 Regs applies (through the medium of the transitory provisions) to all decisions made on or after 25 November 2016 whatever the date of the application;

(c) In all other respects the Immigration (EEA) Regulations 2006 apply if (i) the application was made before 25 November 2016 and (ii) the decision was made before 1 February 2017.

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Ukraine. She is married to a British citizen ('the sponsor').

2. On 9 September 2016, the appellant applied for a residence card on the sole basis that she was a family member of a British citizen who has exercised his Treaty rights by genuinely living in Cyprus, an EEA state.

3. On 26 April 2017, the respondent refused the appellant's application because he was not satisfied that the parties' residence in Cyprus was genuine.

The appeal to the First-tier Tribunal

4. The appellant appealed to the First-tier Tribunal ('FTT') solely contending that the sponsor was a British citizen who had properly exercised his Treaty rights and as such the respondent should have exercised his discretion in his favour. FTT Judge Mill dismissed the appellant's appeal in a decision dated 22 May 2018.

5. The FTT considered detailed documentary and oral evidence from both the appellant and the sponsor and made the following factual findings, inter alia:

    (i) the sponsor was working in Cyprus between February and June 2016;
    (ii) the couple resided together in Cyprus between December 2015 and June 2016 before returning to live in the UK;
    (iii) the sponsor did not acquire permanent residence in Cyprus;
    (iv) the period of residence was not genuine for the purposes of regulation 9(3) of the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regs').

The appeal to the Upper Tribunal

6. The appellant sought permission to appeal to the Upper Tribunal relying upon two grounds of appeal: (i) the FTT erred in law in applying the 2016 Regs when the Immigration (European Economic Area) Regulations 2006 ('the 2006 Regs') applied; (ii) alternatively the FTT failed to consider that the sponsor was in fact a Cypriot and therefore EEA citizen.

7. On 17 August 2018, the FTT (Judge Grant-Hutchinson) granted the appellant permission to appeal observing both grounds to be arguable.

8. At the hearing before me Mr Farhat relied upon the grounds of appeal that he had drafted for the purposes of the permission application. I refer to his oral submissions in more detail below.

9. Ms Everett submitted that the FTT decision was adequately reasoned and contains no error of law.

10. After hearing from both representatives, I reserved my decision which I now provide with reasons.

Discussion

Ground 2 – Cypriot citizenship

11. As I observed at the hearing, the claim that the appellant is entitled to a residence card based upon the fact that her spouse is a Cypriot citizen, who has exercised Treaty rights in the UK, is prima facie more straightforward than the claim that her spouse, who is also a British citizen, exercised his right to freedom of movement in Cyprus before returning to reside in the UK and the appellant is entitled to a residence card on the basis of the principles established in R v IAT and Surinder Singh (C-370/90) [1992] ECR I-04265. If the appellant was entitled to be treated as the spouse of an EEA citizen working in the UK, then there was no need to consider the route relied upon in her application i.e. the approach set out in Surinder Singh. Given this, I address ground 2 first.

12. Mr Farhat was compelled to accept that reliance upon the sponsor's Cypriot citizenship before the FTT was a "new matter" if section 85 of the Nationality, Immigration and Asylum Act 2002, as amended ('the 2002 Act') applied to EEA appeals. As set out above, the application for a residence card made no reference to the sponsor's Cypriot citizenship, and as such the respondent's decision only addressed the Surinder Singh route. The grounds of appeal to the FTT also made no reference to the sponsor's Cypriot citizenship. This was raised for the first time in a document submitted at the FTT hearing described as a 'brief note'.

13. However, Mr Farhat submitted that section 85(5) of the 2002 Act did not apply to EEA appeals. No authority was cited for this assertion in the grounds of appeal and no reference was made to the 2016 Regs in this regard. I invited Mr Farhat to address Schedule 2 of the 2016 Regs, which states as follows:

> "**1.** The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal against a decision of the Secretary of State under section 82(1) of the 2002 Act (right of appeal to the Tribunal)—
>
> > section 84 (grounds of appeal), as though the sole permitted grounds of appeal were that the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom ("an EU ground of appeal");
> >
> > section 85 (matters to be considered), as though—
> > (a) the references to a statement under section 120 of the 2002 Act include, but are not limited to, a statement under that section as applied by paragraph 2; and

(b) a "matter" in subsection (2) and a "new matter" in subsection (6) include a ground of appeal of a kind listed in section 84 of the 2002 Act and an EU ground of appeal;…"

14. It is abundantly clear from this provision that a "new matter" in section 85(6) of the 2002 Act includes not only a ground of appeal of a kind listed in section 84 but also an EU ground of appeal. Mr Farhat submitted that the grounds of appeal based upon domestic legislation should be distinguished from EU grounds of appeal. He did not explain why section 85(6) did not apply to EU grounds of appeal given the clear wording of schedule 2(1) of the 2016 Regs.

15. The claim that the appellant should benefit from being the family member of a Cypriot citizen exercising Treaty rights in the UK relied upon a factual matrix that had not been previously considered by the respondent – see [31] of – see Mahmud (s.85 NIAA 2002 – 'new matters') [2017] UKUT 488 (IAC). This is a factually and legally distinct matter from that previously raised by the appellant. It was therefore a "new matter" and the FTT only had jurisdiction to consider it if the respondent consented to it – see section 85(5) of the 2002 Act. There was no such consent, either express or implied. I note that the record of proceedings makes no reference to the claim based upon the sponsor's Cypriot citizenship. This is consistent with the FTT decision itself which focuses upon regulation 9 of the 2016 Regs. Mr Farhat explained that he placed reliance on his 'brief note' during the course of his oral submissions and these argued the Cypriot citizenship-based claim in the alternative. Mere reference to written submissions during the course of oral submissions in response to the respondent's submissions can on no analysis give rise to any form of consent on the part of the respondent.

16. It follows that there was no error of law involved in the FTT's failure to address the alternative claim based upon the sponsor's Cypriot citizenship because the FTT had no jurisdiction to consider the "new matter" relied upon.

Ground 1 - 2016 or 2006 Regulations?

17. Mr Farhat contended that the FTT erred in law in applying the 2016 Regs when the 2006 Regs applied, given the timing of the application.

18. Regulation 1 of the 2016 Regs deals with commencement as follows:

> **"Citation and commencement**
> **1.**—(1) These Regulations may be cited as the Immigration (European Economic Area) Regulations 2016.
> (2) These Regulations come into force—
> (a)for the purposes of this regulation, regulation 44 and Schedule 5 (transitory provisions), on 25th November 2016;
> (b)for all other purposes, on 1st February 2017."

19. Schedule 5 provides for transitory provisions relating to regulation 9 as follows:

> **"Substitution of regulation 9 of the 2006 Regulations**

1. For regulation 9 of the 2006 Regulations substitute—

"**Regulation 9 (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."

Outstanding applications

2. Between the coming into force of the provisions covered by regulation 1(2)(a) and the coming into force of the remaining provisions covered by regulation 1(2)(b) an application under the 2006 Regulations for—

(a)an EEA family permit;
(b)a registration certificate;
(c)a residence card;
(d)a document certifying permanent residence;
(e)a permanent residence card; or
(f)a derivative residence card;

made but not determined before 25th November 2016 is to be treated as having been made under the 2006 Regulations, as amended by paragraph 1 of this Schedule."

20. Mr Farhat submitted that schedule 5, para 2 of the 2016 Regs supports his submission that as the application was made but not determined before 25 November 2016, it should be treated as having been made under the 2006 Regulations. This argument is misconceived.

21. First, the submission overlooks the fact that these provisions are transitory, and only address outstanding applications for the period between 25 November 2016 and 1 February 2017. The appellant's application was not decided during this period but on 26 April 2017. The transitory provisions are therefore not relevant and Mr Farhat erroneously placed reliance on these.

22. Second and in any event, even if I am wrong about this and the transitory provisions applied, no meaningful assistance can be derived from them. This is because if the 2006 Regs applied, they applied "as amended by paragraph 1 of this Schedule". Mr Farhat's submission therefore ignores the important final phrase in schedule 5, para 2. Even if the application is to be treated as having been made under the 2006 Regs, it is those Regs "as amended by paragraph 1 of this Schedule." Schedule 5 therefore clearly requires the application of the amended regulation 9 for the purposes of the relevant transitory period. That amended regulation 9 in the 2006 Regs is the same as regulation 9 of the 2016 Regs. That this is so is unsurprising and consistent with the origins of regulation 9. Regulation 9 finds its genesis not from the relevant Directive but in Surinder Singh, a case which involved the return to the UK with her third country spouse of a British national who had exercised her right of free movement by working and living in Germany, with her husband, for a period of almost three years. In other words, in order to make the right of free movement effective, such ancillary rights are required to be implied on return to the national's country of origin, whereby the national retained the right to be accompanied by his or her spouse. The relevant principles established by Surinder Singh as applied in O and B v Minister von Immigratie [2014] 3 WLR 799 have therefore been transposed into regulation 9.

23. Third, Mr Farhat entirely ignored the importance of the transitional provisions at schedule 6 of the 2016 Regs, which state as follows:

"Outstanding applications
4.—(1) An application for—
(a)an EEA family permit;
(b)a registration certificate;
(c)a residence card;
(d)a document certifying permanent residence;

(e)a permanent residence card;
(f)a derivative residence card; or
(g)permission to be temporarily admitted in order to make submissions in person;

made but not determined before 1st February 2017 is to be treated as having been made under these Regulations.

(2) But regulation 21 and the words in parentheses in paragraph (b) of the definition of an EEA decision in regulation 2(1) are of no application to such an application made before 1st February 2017."

24. In this case, the application for a residence card was made but not determined before 1 February 2017 and as such fell to be treated as having been made under the 2016 Regs.

25. The FTT was required to carry out a qualitative assessment of the evidence by reference to regulation 9 of the 2016 Regs. Mr Farhat did not criticise the findings of fact in support of the FTT's conclusion that the couple's residence in Cyprus was not genuinely meant to be permanent at [13] to [14] of the decision and focused his attention upon the alleged error in applying the 2016 Regs. For the reasons I have provided there was no error of law in applying the 2016 Regs and ground 1 has therefore not been made out.

Final points

26. Mr Farhat submitted a copy of the sponsor's recently obtained Cypriot passport issued on 30 July 2018. This together with the evidence that the sponsor has been exercising Treaty rights in the UK should be sufficient to enable the appellant to make a straightforward fresh application for a residence card. It is difficult to see why this was not done initially. If there were difficulties in obtaining documentation, that no longer seems to be the case.

Decision

27. The decision of the FTT to dismiss the appellant's appeal did not involve the making of an error of law. That decision stands.

28. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed
M. Plimmer

Dated
10 October 2018

Melanie Plimmer
Judge of the Upper Tribunal