Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/29187/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination sent**
On 3 June 2013	**On 7 June 2013**
	.....

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

MR BLEDAR SELCETAJ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms O Taiwo, Legal Representative
For the Respondent: Ms H Horsley, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Albania born 4 November 1981. On 16 July 2012 he applied for a EEA permanent residence card, pursuant to Regulation 15 of the Immigration (European Economic Area) Regulations 2006. By way of a decision dated the 5 December 2012 the Secretary of State refused to grant the appellant such a residence card, giving the following reasons for doing so:

> "You have applied as the non European Economic Area (EEA) national family member of a Portuguese national claiming to have exercised treaty rights for a continuous period of five years in the United Kingdom in accordance with the European Regulations 2006.

In support of your application you submitted a number of documents including your Albania (sic) passports, your EEA sponsor's Portugal (sic) passport, your Albania (sic) marriage certificate, evidence of your EEA sponsor exercising treaty rights over the last five years.

According to Regulation 15(1)(b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years shall acquire the right to reside in the United Kingdom permanently.

In your EEA4 application form section 6.1 and 6.3 regarding the details of your EEA sponsor exercising treaty rights for five years, you state your EEA sponsor was employed with Barnes Textile and Laundry Services from 2002 to 25 August 2007 and then you state your EEA sponsor has been employed by St James Dry Cleaners from 28 August 2007 until your application date of 16 July 2012.

With regard to each employer and the evidence you have provided to support how long your EEA sponsor was employed by that employer, it is noted that no evidence has been provided for the employment with Barnes Textile and Laundry Services and as such this claimed (sic) is not accepted.

With regard to employment with St James Dry Cleaners your EEA sponsor has provided employment contracts dated 28 August 2007 and two payslips for October 2008 and November 2008. Unfortunately the evidence provided is insufficient to establish employment for your EEA sponsor for the period stated 28 August 2007 to present as there is no evidence at all for the years 2008 to the present.

Based on the evidence provided this department is unable to establish whether your EEA sponsor has been exercising treaty rights in the United Kingdom for a continuous period of five years as there is insufficient evidence to establish whether or not your EEA sponsor was exercising treaty rights continuously over the period before 28 August 2007 and from 2008 to the present time. On that basis you have failed to provide evidence your EEA sponsor has resided in the United Kingdom in accordance with these Regulations for a continuous of five years."

2. The appellant appealed this decision to the First-tier Tribunal and requested that his appeal be determined on the papers. It came before First-tier Tribunal Judge Powell, sitting at the Newport Hearing Centre, on 13 February 2013 and was dismissed in a determination promulgated on 14 February 2013. The First-tier Tribunal's concluding paragraphs read as follows:

> "22. The only evidence I have shows that Maria De Rocha has been employed since 28 August 2007. I accept this.
>
> 23. There is no evidence before me to show how the appellant is related to Maria De Rocha and no evidence before me to show that the appellant has resided with her for a period of five years.

> 24. It is the appellant's responsibility to show that he met all of the requirements of the relevant Immigration Rule and not limit his evidence in this appeal to the matters specifically raised by the respondent against him. I am not permitted to assume that the respondent accepts that the appellant met each and every requirement of the relevant Rule unless the respondent so concedes. In this I follow RM (Kwok On Tong: HC 395 at para 320) India [2006] UKIAT 0039.
>
> 25. Accordingly, the appellant has failed to show that he met the requirements of Regulation 15(1)(b) of the Regulations.
>
> 26. I dismiss the appeal."

3. On 24 April 2013 I granted the appellant permission to appeal in the following terms:

> "It is arguable that the First-tier Tribunal erred (i) by misapplying the decision in RM (Kwok On Tong) and (ii) by finding against the appellant on matters which were not raised without giving the appellant any proper opportunity to address such matters."

4. Thus the appeal came before me.

5. At the hearing before the Upper Tribunal Ms Horsley conceded that the First-tier Tribunal had erred in law. She was plainly right to have done so. The decision of the Secretary of State of 5 December 2012 takes one issue against the appellant that being that he had failed to satisfy the Secretary of State that his sponsor Ms De Rocha had been exercising her treaty rights for the requisite five year period. No mention is made within that letter of the Secretary of State taking issue with the fact that the appellant is married to Ms De Rocha, neither is it suggested within that letter that it was not accepted that the appellant did not reside with Ms De Rocha for the requisite period of time (although of course, contrary to the First-tier Tribunal's determination this is in any event entirely irrelevant to the question of whether the appellant is entitled to permanent residence, as to which see the decision of the Upper Tribunal in PM (EEA – spouse – "residing with") Turkey [2011] UKUT 89 (IAC)).

6. Whilst the Tribunal noted in RM (Kwok On Tong) that an Immigration Judge cannot allow an appeal on the ground that the decision was not in accordance with the Immigration Rules unless satisfied that all of the requirements of the relevant Immigration Rule were met, it also makes clear in paragraph 10 of its decision that "if new elements of the Immigration Rules come into play they are to be dealt with on the appeal, and the parties must be allowed any appropriate adjournment in order to avoid the injustice of being taken by surprise".

7. In my conclusion it is plain that if only one issue is taken against an appellant in the Secretary of State's refusal letter and the Tribunal wishes to take other issues of its own volition then it ought to adjourn the determination of the appeal so as to give the appellant adequate

opportunity to bring evidence to resolve those matters which are belatedly put in issue. Although the instant appeal was determined on the papers, there was nevertheless a requirement on the First-tier Tribunal to adhere to the principles of natural justice. I conclude that the First-tier Tribunal in the instant appeal did not do so. The consequence of this is that its determination must be set aside. As I have indicated above, Ms Horsley correctly conceded that this was the appropriate course.

8. I now turn to the remaking the decision. Ms Horsley accepted that the only matter the Secretary of State put in issue in her refusal letter was the failure of the appellant to provide sufficient evidence to demonstrate that Ms De Rocha had been exercising her treaty rights for the relevant period of time. She confirmed that the Secretary of State did not, and still does not, take issue with any other requirement of Regulation 15 of the EEA Regulations 2006. She further accepted that Judge Powell had concluded that Ms De Rocha had been employed since 28 August 2007 and that this point is not the subject of challenge by the Secretary of State before the Upper Tribunal.

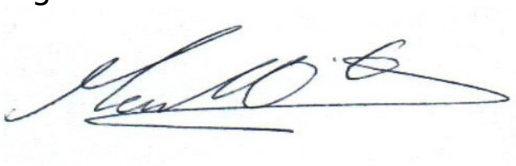
9. As a consequence it is clear that the appellant has satisfied the only matter which the Secretary of State puts in issue in this appeal. I therefore find that the appellant meets the requirements of Regulation 15(1)(b) of the Immigration (European Economic Area) Regulations 2006 and his appeal must be accordingly allowed.

Decision

For the reasons given above the First-tier Tribunal's determination contains an error on a point of law capable of affecting the outcome of the appeal and it is consequently set aside.

Upon remaking the decision I allow the appellant's appeal on the basis that the Secretary of State's decision to refuse to grant him an EEA permanent residence card breaches his rights under the Community Treaties.

Signed:



Upper Tribunal Judge O'Connor
Date: 6 June 2013