



**Upper Tribunal
(Immigration and Asylum Chamber)**

Bali (Family member: 3 month visit) [2013] UKUT 00570 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

Determination Promulgated

3 October 2013

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Before

MR JUSTICE McCLOSKEY, PRESIDENT OF THE UPPER TRIBUNAL

and

UPPER TRIBUNAL JUDGE COKER

Between

ENTRY CLEARANCE OFFICER, BEIRUT

Appellant

and

MHD MUTASEM BALI

Respondent

A non - EEA national family member travelling to the United Kingdom accompanied by the EEA national family member concerned for the purpose of a visit of not more than three months' duration is entitled to enter, pursuant to regulations 11(2), 12(1) and 13(1) and (2) of the Immigration (European Economic Area) Regulations 2006, read together.

Representation :

For the Appellant: Mr G Saunders, Senior Home Office Presenting Officer

For the Respondent: Ms N Bali, Sponsor

DETERMINATION AND REASONS

[1] By a decision dated 30 November 2012, the Entry Clearance Officer for Beirut ("the ECO") refused Mr Bali's EEA family permit application in the following terms:-

"You have not provided satisfactory original evidence to show that you are related to an EEA national who is exercising their Treaty rights to live in the UK, nor that you are dependant upon them"

MHD Mutasem Bali (hereinafter "the Respondent") , who was the subject of this decision, exercised his right of appeal. By its determination promulgated on 19 July 2013, the First-tier Tribunal (" the Tribunal ") allowed the appeal finding that Mr Bali was entitled to a family permit. The ECO was

granted permission to appeal this decision on 15th August 2013 on the ground that it was arguable that the First-tier Tribunal judge had erred in law because Mr Bali was merely intending to visit and would therefore not be residing in the UK in accordance with the Regulations and his wife was not and would not on arrival be a qualified person.

[2] The material facts are uncontentious. The Respondent is a Syrian national. He resides there with his spouse who is an EEA National (being of German nationality). His daughter, also of German nationality, is an EEA National, resident in the United Kingdom. His application for permission to enter the United Kingdom was made and pursued by his daughter. She compiled and pursued the application on the basis and on the understanding that she was the relevant person for the purposes of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") . She confirmed that the Respondent was not and is not dependent upon her. The application for the grant of entry clearance to the Respondent contained two notable statements, or representations. The first was that the Respondent was intending to travel to the United Kingdom some four months later for the purpose of visiting his daughter and to remain there, pursuant to such purpose, for a period of two months. The second was that his spouse would be travelling with him. These are two of the key facts in the matrix.

[3] It is necessary to consider the application actually made to the ECO. It was made on behalf of the Respondent, it requested recognition of a right under the Regulations to enter the United Kingdom and it was based on the Respondent's status as the family member of an EEA National. It would appear that the ECO was unduly influenced, or distracted, by the factor of the Respondent's daughter. He evidently failed to appreciate that the relevant EEA National in the matrix was the Respondent's spouse. This failure generated a further failure, which was his inability to recognise that the husband and wife would be entering the United Kingdom together, thereby requiring consideration of regulations 11 and 13.

[4] Recourse to the EU Directive on which the EEA Regulations are based assists in the exercise of providing the correct answer to the net question of law which arises in this appeal. As emphasised in its recitals, Directive 2004/38/EC regulates the right of citizens of the Union and generally their family members to move and reside freely within the territory of the Member States. The Directive was designed to simplify and strengthen the right of free movement and residence of all EU citizens. One of the mechanisms devised for fulfilling this purpose was to grant the same right to family members, irrespective of their nationality. To this end, a definition of "family member" was formulated. Recital (9) states:

" Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice"

As appears from recital (10), an unqualified right of residence for EU citizens and their family members is confined to the initial period of three months. Upon the expiry of this period, the right is subject to conditions. This is in furtherance of the aim of avoiding the imposition of unreasonable burdens on the social assistance system of the host Member State. Permanent residence becomes possible upon the expiry of a continuous period of five years.

[5] The regime established by the Directive system promotes both the "feeling" of EU citizenship and social cohesion, which is one of the fundamental objectives of the EU, per recital (17). By Article 2, "family member" includes the spouse of an EU citizen. Article 6(1) provides:-

“Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member state, accompanying or joining the Union citizen”.

The right enjoyed by the Respondent’s spouse, as an EEA national, under the transposing EEA Regulations is expressed in regulation 11(1) thus:-

“An EEA National must be admitted to the United Kingdom if he produces on arrival a valid national identity card or passport issued by an EEA State”.

The right potentially enjoyed by the Respondent, being the husband [and, hence a “family member ”] of an EEA National, is contained in regulation 11(2):-

“A person who is not an EEA National must be admitted to the United Kingdom if he is a family member of an EEA National..... and produces on arrival -

(a)

a valid passport; and

(b) an EEA family permit, a residence card, a derivative residence card, or a permanent residence card”.

It is not suggested that the Respondent was at any material time capable of complying with the second of these “production” requirements. Accordingly, any right of entry to the United Kingdom enjoyed by him is not derived from Regulation 11(2). In order to identify any such right it is necessary to delve a little deeper into the Regulations.

[6] The outworkings of the right of admission to the United Kingdom conferred on the Respondent’s spouse as an EEA National, are found in regulation 13(1):-

“An EEA national is entitled to reside in the United Kingdom for a period not exceeding three months beginning on the date on which he is admitted to the United Kingdom provided that he holds a valid national identity card or passport issued by an EEA State”.

The related right which the Respondent can seek to invoke in the present case is expressed in the next succeeding paragraph, in regulation 13(2):-

“A family member of an EEA National or a family member who has retained the right of residence who is residing in the United Kingdom under paragraph (1) who is not himself an EEA National is entitled to reside in the United Kingdom provided that he holds a valid passport”.

We consider that the analysis applicable to the factual matrix of the present case is to be conducted in the following sequence:-

a) the Respondent’s spouse has a right of admission to the United Kingdom under regulation 13(1).

b) following admission, the Respondent’s spouse is entitled to reside there for a maximum period of three months, under regulation 13(1).

c) the Respondent thereby acquires an entitlement to reside in the United Kingdom also: per regulation 13(2).

[7] We consider it necessary to address the question of whether the Respondent's spouse is required to be already in the United Kingdom at the time he seeks entry.

Regulation 12(1) provides:-

"An Entry Clearance Officer must issue an EEA family permit to a person who applies for one if the person is a family member of an EEA National and -

a) the EEA National -

(i) is residing in the UK in accordance with these Regulations; or

(ii) will be travelling to the United Kingdom within six months of the date of the

application and will be an EEA National residing in the United Kingdom in

accordance with these Regulations on arrival in the United Kingdom; and

(iii) the family member will be accompanying the EEA National to the United

Kingdom or joining the EEA National there".

In the present case, the EEA national concerned, the Respondent's spouse, intimated in the entry clearance application an intention to travel to the United Kingdom within the following six months. Upon doing so, she would become "an EEA National residing in the United Kingdom in accordance with these Regulations" viz under regulation 11(1) and regulation 13(1). Furthermore, the Respondent was put forward in the application as "the family member [who] will be accompanying the EEA National to the United Kingdom...". Giving effect to the latter words, the meaning whereof we consider clear, we are satisfied that the Regulations do not require the Respondent's spouse to precede the Respondent, arriving in the United Kingdom before him. Thus the conditions for the grant of an EEA family permit were satisfied. This being so, the ECO has - and had - no discretion: he "must" issue an EEA family permit to the Respondent if he applies for one. The issue of such a permit unlocks the door to entry to the United Kingdom under regulation 11(2). Thus the ECO's failure to issue a family permit was erroneous in law.

[8] One issue further raised was the submission by Mr Saunders about the meaning of the word "residing" in regulation 12(1). It was argued that this requires permanence or, at least, an intention to permanently reside. In this case, the clearly expressed intention of the Respondent and his spouse was to visit the UK for two months. They proposed to undertake a simple, time limited family visit. We consider that the ECO's argument is confounded by the clear wording of Article 6(1) of the Directive (supra). We refer also to recitals (9) and (10) (supra). In short, the Directive plainly contemplates temporary residence. It therefore follows that the Respondent has at all material times satisfied the requirements of the Regulations, specifically regulations 12(1) (a) (ii) and 13(2).

[9] The First-tier Tribunal Judge, in a brief determination, referred to the assumed understanding of the ECO that the Respondent was seeking to come within the Regulations as a family member of his daughter. Having set out regulation 12, he concluded that the Respondent was intending to travel with, and was thus entitled to a family permit as, the spouse of his EEA national wife. He decided that the Respondent "fulfilled entirely the provisions of paragraph 12 of the EEA Regulations."

[10] We conclude that the First-tier Tribunal correctly allowed the appeal. While the Tribunal did not adopt the analytical approach set out above, we are satisfied that it reached the correct decision. Our decision is that a non - EEA national family member travelling to the United Kingdom accompanied by

the EEA national family member concerned, for the purpose of a visit of not more than three months' duration, is entitled to enter, pursuant to regulations 11(2), 12(1) and 13(1) and (2), read together.

Decision

[11] It follows that there was no error of law in the decision of the First-tier Tribunal. Accordingly we dismiss the ECO's appeal and the decision of the First-tier Tribunal is affirmed.

Signed :

The Hon Mr Justice McCloskey

President of the Upper Tribunal

Immigration and Asylum Chamber

Dated : 25 October 2013