Neutral Citation No: [2019] NIQB 87	*Ref:*	**KEE11063**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**27/09/2019**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY KARINA SOUSA PINHEIRO JENKINS FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF 15 JANUARY 2018

KEEGAN J

[1] In this case the applicant challenges a decision of the Upper Tribunal (Immigration and Asylum Chamber) ("UT") dated 15 January 2018 whereby her application for leave to appeal a decision of the First Tier Tribunal ("FtT") was refused. The substance of the challenge is the refusal by the FtT to grant the applicant a residence card pursuant to the Immigration (EEA) Regulations 2006 ("the Regulations").

[2] Leave was granted for judicial review on 11 May 2018 on two grounds namely irrationality and an alleged breach of Article 47 of the Charter of Fundamental Rights ("CFR").

[3] In this hearing Mr McCartan BL appeared for the applicant. Neither of the identified respondents namely the Home Office or Her Majesty's Court Service ("HMCtS") appeared or offered any submissions to the court. This was confirmed by letter of 19 September 2019 from Mr Lee Hatton BL of the Crown Solicitor's Office. In previous correspondence Mr Hatton also referred to guidance from the Senior President of Tribunals setting out that the position of the Tribunal in judicial review claims is not to contest proceedings other than in exceptional circumstances.

[4] The facts of the case may be summarised as follows. The applicant is a Brazilian national currently living in Brazil. She married her husband Mr Paul Jenkins on 20 July 2008. He is an Irish citizen living in Northern Ireland. He is self-employed as an architectural technician. The applicant therefore relies upon him (as a sponsor) to found her case under the Regulations as an EEA national exercising Treaty rights within the United Kingdom.

[5] Shortly after the marriage in 2008 the applicant was granted an EEA Residence Card under Regulation 17 of the Regulations on the basis of her marriage. On 16 March 2015 she then applied for permanent residence pursuant to Regulation 15 of the Regulations. It is accepted that there was insufficient evidence in respect of the qualified person's employment to satisfy the test for permanent residence. The application was refused by the Secretary of State for the Home Department ("SSHD") and then appealed to the FtT.

[6] By the stage of the FtT hearing the applicant had been living outside the United Kingdom for over two years. The applicant left Northern Ireland in 2014 due to serious mental health difficulties which required a period of recuperation. As such she argued that whilst the ingredients for permanent residence were not satisfied that she should be granted an extended residence card. It was argued that such an application may be granted for the reasons set out in *MDB and others* [2010] UKUT 161 and by virtue of the relevant Home Office guidance referring to the FtT having the power to grant such an application in the alternative.

[7] The requirements contained in the Regulations differ between Regulation 14 and 15 as follows;

Regulation 15: right of permanent residence

15(1) The following persons acquire the right to reside in the United Kingdom permanently-

(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.

Regulation 14: extended right of residence

14(2) A family member of a qualified person residing in the United Kingdom under paragraph 1 or of an EEA national with a right of residence under regulation 15 is entitled to remain in the United Kingdom for so long as he remains the family member of that person or EEA national.

Qualified Person is defined in Regulation 6 as a person who is an EEA national and in the United Kingdom as –

(a) a jobseeker;
(b) a worker;
(c) a self-employed person;
(d) a self-sufficient person; or
(e) a student.

[8] In this case the applicant's husband has filed evidence which contains details of his employment as an architectural technician. He gave evidence before the FtT. A witness was also called on behalf of the applicant who confirmed that he employed Mr Jenkins on occasions. I note in the FtT judgment that the judge was surprised that documentary evidence was not provided of 5 years' employment. I also find that strange however it is important to state that the judge did not find that this man was not exercising treaty rights *per se*, she simply decided that there was insufficient evidence of 5 years' self-employment.

[9] This point is relevant given that the FtT was not being asked to grant permanent residence but rather extended residence. That alternative course is validated by the *MDB* decision which at point (v) in the summary of reasons states that:

> "In a case concerned with an EEA decision the tribunal judge is obliged by s 84(i)(d) of the Nationality and Asylum Act 2002 to decide whether the decision, breaches any of the appellants' rights under the Community Treaties in respect of their entry to or residence in the United Kingdom (emphasis added); see also s.109(3). Where the decision is a refusal to issue a permanent residence card that may necessitate, in the event that refusal is found correct, considering whether the appellant was entitled nonetheless to an extended right of residence."

Paragraph 44 of the judgment of the FtT from which this emanates also refers to the fact that Regulation 14 implements Article 7 of the Citizens Directive.

[10] The FtT was clearly aware of these issues. In the decision the FtT acknowledged the submissions made by the applicant that the matter for determination was not a permanent residence card but an extended residence card. It is clear that the FtT also considered the case of *MDB and others*. Having done so, the FtT determined that a new application for a residence card would have to be made under the 2006 Regulations as the issue of a sponsor exercising treaty rights for 5 years was still at issue.

[11] Mr McCartan argued that there has been material error of law for three reasons:

(i) Firstly, he pointed out that under Regulation 14(2), the question of exercising treaty rights is still an issue, but not for a period of 5 years. Mr McCartan argued that the FtT misdirected itself by treating the question of the length of time the treaty rights were being exercised as a relevant consideration for a Regulation 14 application (extended residence card), when in law the period

of 5 years only applies to a Regulation 15 application under Regulation 15(1)(b) (permanent residence card).

(ii) Mr Mc Cartan relied upon *MDB and others* at paragraph 44 which states;

> "In the event a refusal to issue a permanent residence card is found to be correct, it may be necessary to consider entitlement to a residence card."

As such he contended that the FtT erred in not considering this application accordingly.

(iii) Finally, Mr McCartan argued that the applicant could not make a new application under the 2006 Regulations in May 2017 as they were repealed by the 2016 Regulations, which came into force on 1 February 2017. He argued that if the reference to the 2006 Regulations is a typographical error an application could also not be made under the 2016 Regulations as the applicant would not be eligible as she was not at the time resident in the United Kingdom. As such he maintained that the applicant was left with no effective remedy.

[12] Drawing from his written submissions Mr McCartan's case crystallised into the following core propositions. Firstly, he made the case that the FtT had clearly misapplied the law when considering the alternative of an extended residence card to a permanent residence card. Secondly, he made the point that the UT has failed in refusing leave to appeal to offer any effective remedy to this applicant. As such Mr McCartan argued that the decision of 15 January 2018 was irrational and unlawful. He enjoined the court to quash the decision and require the UT to look again at the application for leave to appeal. Mr McCartan also pointed out that under the transitory provisions in Schedule 5 of the 2016 Regulations, the applicant's application for permanent residence, submitted on 16 March 2015 and not having been determined before 25 November 2016 is to be treated as having been made under the 2006 Regulations.

[13] In answer to some questions by the court about the background facts of this case Mr McCartan also reiterated that while some queries were raised about the validity of the marriage at one stage, evidence was provided in relation to this and that this should not prejudice the applicant's position as the FtT did not decide that the marriage was other than valid. He also referred to the affidavit evidence filed by the applicant's husband comprised in an affidavit of 13 April 2018 which sets out the sponsor's work history and the previous evidence filed in this case.

[14] The applicant has exhausted her means to appeal and so judicial review is her only remaining option. Any review of a decision of the UT refusing leave to appeal is governed by the case of *R (Cart) v Upper Tribunal*; *R (Pakistan) FC v Upper Tribunal (Immigration and Asylum Chamber)* [2011] UKSC 28 and the related case of *EBA v*

Advocate General of Scotland [2011] UKSC 29. It is clear that judicial review is subject to restraint in this area. This stems from recognition that the Tribunal system is specialist and structured. There is a residual jurisdiction to allow appeals to progress in cases where the law has been misapplied or where some clear error has been made out which cries out for consideration by the court if the UT refuses to do so (see para 131 of *Cart*).

[15] There are two distinct limbs to the *Cart* test as Maguire J discussed in *Re Wu's Application* [2016] NIQB 34 as follows:

> "[19] These criteria are now well established. They derive from the decision of the Supreme Court in the case of *R (Cart) v Upper Tribunal (Secretary of State for Justice) and other interested parties) [2011] UKSC 28*. They are tailor made to meet cases such as this where there has been a decision by the decision making authority which has already been the subject of an unsuccessful appeal to the Lower Tier Tribunal and where leave to appeal to the Upper Tier Tribunal has been refused by both the Lower and Upper Tiers. In such cases, according to the decision in Cart, what are described as `the second tier appeal's criteria' apply. What this means when translated to the issue now before the court is that there cannot be a judicial review of the refusal of leave unless:
>
> (a) the proposed judicial review raises some important point of principle or practice; or
>
> (b) there is some other compelling reason for the court to hear the judicial review."

[16] Whilst Mr McCartan referred to the first limb of the *Cart* test, he acknowledged that he faced some difficulties in satisfying these requirements. That assessment is undoubtedly correct as this case cannot be said to raise a point of importance or practice in the *Cart* sense. Realistically, Mr McCartan focused on the second limb, namely that there is a compelling reason in this case to quash the decision of the UT not to give leave for appeal.

[17] In *PR (Sri Lanka) v Secretary of State for the Home Department* [2011] EWCA 988 Carnwath LJ looked at the principles that emerged from *Cart* and *Eba*. In particular at paragraph 35 of that case he referred to the issue of "compelling reasons" and that aspect of the test where he stated that:

> "In other words, compelling means legally compelling, rather than compelling perhaps from a political or

> emotional point of view, although such considerations may exceptionally add weight to the legal arguments."

[18] In *JD (Congo)* [2012] EWCA Civ 327 the Court of Appeal considered the second tier appeals test and Sullivan LJ at paragraph 23 said that:

> "While the compelling reasons test is a stringent one, it is sufficiently flexible to take account of the particular circumstances of the case."

[19] I have considered the written decision of the FtT and having done so I am persuaded by Mr McCartan's argument in relation to the material error of law in this case. In my view it is patently clear from a reading of the decision that having accepted that an alternative of extended residence arose and having considered the case of *MDB* the FtT failed to apply the law properly to determine the application.

[20] The Designated FtT judge refused leave to appeal on the basis of paragraph [25] of the judgment because it "makes clear that adequate evidence was not supplied at the hearing." In my view Mr McCartan is correct when he says this is a misinterpretation of the reasons given, because the evidential deficit clearly related to the proof required for the permanent residence application. That is what the judgment says.

[21] The UT decision refusing leave states that there was "insufficient evidence to show that the applicant was entitled to an extended leave in the alternative" and that "evidence of the applicant's husband exercising treaty rights was very limited." Again, I consider that this assessment of the FtT decision does not reflect the FtT's actual reasoning which was directed to rejecting the permanent residence application on the basis of lack of proof. Specifically, I cannot see that the judge actually considered the requirements for an extended residence card or that there was an explanation given for rejecting it contrary to the requirement to provide reasons see *MK (duty to give reasons) Pakistan* 2013 UKUT 00641 (IAC).

[22] I also accept the argument made by Mr McCartan that this decision effectively leaves the applicant with no other effective alternative remedy as she cannot simply reapply given her circumstances and the changes to the regulatory structure. That represents a significant consequence for this applicant which to my mind is a compelling reason why leave to appeal requires to be reconsidered in this particular case.

[23] In summary, it is my view that there is an arguable error of law in the original decision and the UT has consequently erred in refusing leave to appeal. Also, in all of the circumstances of this case I am persuaded that the applicant satisfies the *Cart* criteria in that there are compelling reasons which should enable the court to examine an arguable error of law in a decision of the FtT.

[24] Accordingly I will make an order quashing the decision of the UT refusing leave to appeal and the application should thereafter be reconsidered.