IN THE UPPER TRIBUNAL **Case No.** CPC/5346/2014
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

Decision: The claimant's appeal is dismissed.

REASONS FOR DECISION

1. This is an appeal, brought by the claimant with permission granted by the First-tier Tribunal, from a decision dated 4 June 2014 whereby the First-tier Tribunal dismissed the claimant's appeal against a decision of the Secretary of State dated 18 June 2013 to the effect that the claimant was not entitled to state pension credit because he did not have right to a reside in the United Kingdom or elsewhere in the Common Travel Area and so could not be treated as habitually resident in Great Britain and was to be treated as not in Great Britain for the purposes of section 1(2)(a) of the State Pension Credits Act 2002 (see regulation 2 of the State Pension Credit Regulations 2002 (SI 2002/1792), as amended).

2. The basic facts of the case are not in dispute. The claimant completed a claim form for state pension credit on 15 April 2013, when he was aged 62 and his wife was aged 55. He is a Cypriot national but has lived with his wife in the United Kingdom since 7 September 2000. She has been a British citizen since 31 May 2013 but previously held only a passport issued by the Turkish Republic of Northern Cyprus and was not recognised as a citizen of the European Union (see protocol 10 to the Treaty by which Cyprus acceded to the European Union). The claimant himself has never worked in the United Kingdom. The reason for that is not material but he has suffered from type 2 diabetes and chronic low back pain and also had long-standing mental health problems, having been diagnosed with psychotic depression in 2004 and also having a diagnosis of post-traumatic stress disorder secondary to alleged torture in Cyprus from where, he says, he came to the United Kingdom after receiving a threat to his life. Although living in the south of Cyprus, his family was part of the Turkish community and he says that they suffered at the time of the Turkish invasion of Northern Cyprus in 1974 and subsequently moved there where they experienced racial harassment because he and his siblings are black, his father being of African origin. He says that he intended to work when he arrived in the United Kingdom but he was unable to obtain work and became ill. It appears that, in November 2004, he was awarded income support on the ground of incapacity for work without the "right to reside test" that had been introduced from 30 April 2004 being applied as it should have been – it has not been suggested that he was entitled to income support on 30 April 2004 and so had transitional protection – but that award was terminated with effect from 6 March 2012 on the ground that the claimant no longer qualified because he would have reached pensionable age had he been a woman. He had been given an opportunity to claim state pension credit two months earlier but state pension credit was refused on the ground that he did not have a right of residence. On 11 March 2013, the Home Office issued the claimant with a "document certifying permanent residence" signifying a right to reside under regulation 15 of the Immigration (European Economic Area) Regulations 2006 (SI

2006/1003). It is, however, common ground that he did not in fact satisfy the conditions for a right of residence under that provision. Nonetheless, on the strength of that document, the claimant made the claim for state pension credit that is the subject of this appeal. The claim was rejected on 18 June 2013 and, after the claimant had unsuccessfully applied for a revision, he appealed.

3. Before the appeal was heard, the claimant secured the assistance of Mr Peter Thompson of St. James's Church Legal Centre in Muswell Hill, who has also represented him on the appeal to the Upper Tribunal. Mr Thomson submitted a skeleton argument to the First-tier Tribunal in which he conceded that

> "The only issue in this appeal is whether the applicant's claim to state pension credit, which was made a few weeks after the issue of the permanent residence card [sic], should be rejected because of the appellant's failure to prove that he had such a right except by production of his permanent residence card [sic]."

The Secretary of State submitted an additional response, maintaining his opposition to the appeal, relying on the decisions of the Court of Justice of the European Union in *Secretary of State for Work and Pensions v Dias* (Case C-325/09) [2011] ECR I-6387; [2012] AACR 36 and the earlier decision of Mr Commissioner Jacobs in CPC/3588/2006, as well as a decision of mine given between those two cases, *Secretary of State for Work and Pensions v EM* [2009] UKUT 44 (AAC).

4. The First-tier Tribunal considered itself bound by CPC/3588/2006 to decide the case against the claimant. It also referred to *Dias*, which it said "is very similar in certain respects to this case" and by which it said it was bound. Whether it meant by that that it accepted the argument of the Secretary of State to the effect that *Dias* was conclusive or whether it merely meant that the decision was binding as far as it went and that it did not determine whether it was conclusive is unclear. In any event, the claimant applied for permission to appeal, which was granted by the First-tier Tribunal.

5. On behalf of the claimant. Mr Thompson argues that the First-tier Tribunal failed to distinguish between the types of residence permit in issue in CPC/3588/2006 and *Dias* and the document certifying permanent residence in issue in the present case and that the latter was conclusive evidence of a right to reside unless it was revoked or it otherwise ceased to be valid. The Secretary of State, however, maintains his original position.

6. I accept that the permits in issue in CPC/3588/2006 and *Dias*, issued under respectively regulation 10 and regulation 15 of the Immigration (European Economic Area) Regulations 2000 (SI 2000/2326) are potentially distinguishable from a document certifying permanent residence issued under regulation 18 of the 2006 Regulations so that, although in those cases it was effectively held that the permits did not confer rights of residence, it does not necessarily follow from those decisions that a document certifying permanent residence does not do so. One must look at the language of the 2006 Regulations and Directive 2004//38/EC that the Regulations purport to implement.

7. In *EM*, I decided that a residence certificate issued under regulation 16 of the 2006 Regulations did not confer a right of residence and, indeed, I did so notwithstanding that at the time I wrongly understood that the residence permit issued to Ms Dias had conferred such a right as I had decided in her case (CIS/185/2008). (The reference to the Court of Justice of the European Union was made by the Court of Appeal on the appeal from my decision.) However, documents certifying permanent residence of the type in issue in the present case are issued under regulation 18 and so, again, different considerations may apply.

8. It is Article 19 of Directive 2004/38/EC that requires Member States to issue documents certifying permanent residence to Union citizens who have a right of permanent residence. It provides –

> "1. Upon application Member States shall issue Union citizens entitled to permanent residence, after having verified duration of residence, with a document certifying permanent residence.
>
> 2. The document certifying permanent residence shall be issued as soon as possible."

Article 25 further provides –

> "1. Possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.
>
> 2. All documents mentioned in paragraph 1 shall be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents."

9. At the time that the document certifying permanent residence was issued in this case, regulation 18 of the 2006 Regulations duly provided –

> "**18.**—(1) The Secretary of State must issue an EEA national with a permanent right of residence under regulation 15 with a document certifying permanent residence as soon as possible after an application for such a document and proof that the EEA national has such a right is submitted to the Secretary of State.
> (2) The Secretary of State must issue a person who is not an EEA national who has a permanent right of residence under regulation 15 with a permanent residence card no later than six months after the date on which an application for a permanent residence card and proof that the person has such a right is submitted to the Secretary of State.
> (3) Subject to paragraph (5), a permanent residence card shall be valid for ten years from the date of issue and must be renewed on application.
> (4) A document certifying permanent residence and a permanent residence card shall be issued free of charge.
> (5) A document certifying permanent residence and a permanent residence card shall cease to be valid if the holder ceases to have a right of permanent residence under regulation 15.

> (6) But this regulation is subject to regulation 20."

Paragraph (4) has since been revoked, but nothing turns on that. Regulation 20 provides for circumstances in which a document certifying permanent residence may be refused, revoked, not renewed or invalidated. In particular, regulation 20(3) provided at the time material to this case –

> "(3) The Secretary of State may revoke a document certifying permanent residence or a permanent residence card or refuse to renew a permanent residence card if the holder of the certificate or card has ceased to have a right of permanent residence under regulation 15."

From 1 January 2014, the words "or never had" were inserted after "ceased to have".

10. Of particular significance in Mr Thompson's arguments is regulation 2(1) of the 2006 Regulations, which provides –

> "In these Regulations –
> …
> "document certifying permanent residence" means a document issued to an EEA national, in accordance with regulation 18, as proof of the holder's permanent right of residence under regulation 15 as at the date of issue;
> …"

At first sight, that looks like a definition but it seems to me that the words following the comma in fact go further than a conventional definition and describe, or arguably make provision for, the effect of a document issued under regulation 18.

11. Mr Thompson submits that a document certifying permanent residence remains valid as proof of the holder's right of permanent residence for the ten years mentioned in regulation 18(3) unless revoked under regulation 20 or it simply ceases to have effect under regulation 18(5) because the claimant has been absent from the United Kingdom for two years. I accept that that is so, but the question that must be determined is: what is meant by "proof"? Does the word "proof" in regulation 2(1) mean conclusive proof or does it merely mean evidence that is capable of proving the right of permanent residence in the absence of clear objective evidence to the contrary?

12. I accept Mr Thompson's argument that the purpose of regulation 18 is that a document certifying permanent residence is intended to make it unnecessary for a claimant to provide evidence of such matters as his or her employment history every time he or she applies for a social advantage or service entitlement to which depends on the claimant having a right of permanent residence. That is clearly the purpose of Article 19 of the Directive.

13. However, there is nothing in the Directive that suggests that a document certifying permanent residence is to be *conclusive* evidence until it is revoked. The Directive is silent as to the effect of such a document, save that Article 25 makes it clear that a Member State cannot provide that such a document is the *only* means by which a person may prove a right of permanent residence. It is not necessary to

imply into Article 19 a requirement that a document certifying permanent residence should be conclusive. Such a document clearly has considerable value to a claimant and, indeed, to administrators if it is simply a document that may be relied upon in the absence of other evidence. Moreover, it is clear from Article 25 that a Member State is not entitled to make the administrative body responsible for issuing such documents the sole judge of whether a person has a right of permanent residence. Generally, such a right is provable on the basis of objectively verifiable facts. Although there are some cases where an element of judgment must be exercised, no exercise of discretion is required. Hence the language of certification rather than the use of the word "permit". Evidence of the facts necessary to show a right to permanent residence can be produced to any body providing social advantages or services where such a right must be proved.

14. It therefore cannot be said that principles of good administration require that, in the United Kingdom, the Home Office must revoke a document certifying permanent residence before the Secretary of State for Work and Pensions is entitled to find that the holder does not in fact have a right of permanent residence. On the contrary, where there is clear and uncontested evidence that a person does not have a right of permanent residence, it seems highly desirable that the Secretary of State for Work and Pensions should be able to determine entitlement to social security benefits on that basis notwithstanding the existence of a document certifying permanent residence that has, by necessary implication, been issued in error. Clearly the draftsman of the 2006 Regulations overlooked the possibility of a document being issued in error and at the time material to this case there was no express provision allowing a document wrongly issued under the Regulations from being revoked on that ground. Now there is such provision, but no express provision for the revocation to be retrospective. In these circumstances, it seems to me to be inconceivable that regulation 2(1) should be read as having the effect that a document certifying permanent residence is conclusive evidence of a right to permanent residence.

15. I am therefore satisfied that, as Mr Commissioner Jacobs put it in CPC/3588/2006 in relation to residence permits, a document certifying permanent residence "is only evidence and does not create a right to reside". It is capable of proving the right of permanent residence in the absence of adequate evidence to the contrary but it does not confer a right of permanent residence and was insufficient to prove such a right in the present case in the face of uncontested evidence that the claimant had not qualified for a right of permanent residence. Perhaps unsurprisingly, a document certifying permanent residence issued under regulation 18 therefore has a status similar to that of a residence certificate issued under regulation 16.

16. Nonetheless, I have some sympathy for the claimant, whose wife is now a British citizen and who has lived in the United Kingdom for many years and was arguably been given a degree of encouragement to continue doing so as a result of wrongly having been awarded income support for some seven years. When I first issued case management directions in this case, I referred to comments I had made in R(IS) 6/08 and *RM v Secretary of State for Work and Pensions (IS)* [2010] UKUT 238 (AAC) (subsequently upheld, without reference to anything I said, by the

Supreme Court in *Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1; [2016] 1 WLR 481) and asked whether immigration officers ever considered whether to give European Union citizens leave to remain in the United Kingdom under the Immigration Act 1971 and the Immigration Rules. I might have also referred to comments I had made in *EM* and to immigration officers' powers to give exceptional leave to remain outside the Immigration Rules. In any event, the Secretary of State obtained the following explicit statement from the Home Office –

> "EEA nationals who wish to apply for leave to remain under the UK Immigration rules, rather than rely on their rights under EU law, are entitled to do so. There is nothing in the Immigration Rules which would prevent an EEA national (or their family members) from making an application for leave, nor from being granted such leave, should the relevant requirements in the Immigration Rules be met. This was the position and has not changed since March 2013 and it remains the position currently."

17. A person who has been granted leave to enter or remain in the United Kingdom under the 1971 Act has a right of residence for social security purposes although, of course, leave to enter or remain may be made subject to conditions such as not having recourse to public funds. The point I have made in the earlier cases is that, unlike the position where rights of residence under European Union law are in issue, such rights of residence under domestic law can only be conferred by the immigration authorities, whose decisions are not retrospective, and so cannot independently be recognised by the social security authorities until they are conferred.

18. However, it is clearly accepted by the Home Office that European Union citizens may obtain rights of residence under domestic law where they do not have such rights under European Union law, albeit that they must make a specific application for that purpose The present claimant may wish to make such an application if he has not already done so, but I express no view as to the likely outcome.

Mark Rowland
7 July 2016