



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

Appeal Number: IA/21016/2012

THE IMMIGRATION ACTS

**Heard at Field House
On 22 May 2013
Prepared 22 May 2013**

**Determination
Promulgated
On 28 June 2013**

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALEKSANDRAS LIESYS

Respondent

Representation:

For the Appellant: none

For the Respondent: Mr. P Deller, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal Tootell who in a determination promulgated on 21 December 2012 allowed the appeal of Mr Aleksandras Liesys against decisions of the Secretary of State made on 20 September 2012 to refuse leave to remain on the basis that that he did not have or had ceased to

have a right to reside in Britain under the Immigration (EEA) Regulations 2006 and to make removal directions under Section 10 of the Immigration and Asylum Act 1999.

2. Although the Secretary of State is the appellant in this appeal, I will refer to her in this determination as the respondent as she was the respondent before the First-tier Tribunal. Similarly, although Mr Aleksandras Liesys is the respondent in the appeal before me I will refer to him as the appellant before the First-tier Tribunal.
3. At the hearing of the appeal there was no appearance by or on behalf of the appellant. I am satisfied that the appellant had been properly served with the notice of hearing. The notice had been served at the only two addresses of which the Tribunal was aware as well as by fax at the fax number which the appellant had given when he had written to the Tribunal (sending the letter by fax) after the last hearing, stating that he was no longer at either of the addresses on file but requesting that the notice of hearing be sent to him at the fax number given. I therefore considered that it was appropriate for me to hear and determine the appeal taking account of the brief submissions made by Mr Deller.
4. The appellant is a citizen of Lithuania born on 28 May 1969. The decisions against which he appealed, made on 20 September 2009 stated that he did not have a right of residence under the Regulations giving the reasons that:-

“You are specifically considered a person who has failed to provide satisfactory evidence that you are exercising your EEA Treaty Rights. By this you have failed to supply evidence that you are (a) someone who is full-time or part-time employment which is genuine and effective; (b) a jobseeker and have a genuine chance of being employed; (c) a self-employed person; (d) a student; (e) self-sufficient; (f) have been resident in the UK for less than 3 months; (g) have a permanent residency; (h) are a family member of an EEA national who is exercising their Treaty Rights.”
5. The grounds of appeal lodged by the appellant stated that an appointment had been made for him to attend Wisbech Police Station in respect of a failure to provide satisfactory evidence that he was exercising treaty rights but, on that date, he had been in Kings Lynn Police Station and unable to attend. He stated that he was awaiting a new date. He asserted that he was a jobseeker and had a genuine chance of employment and that he was receiving Jobseeker allowance and was actively seeking work. He had subsequently broken his leg and was receiving statutory sick pay. He stated that the plaster cast was now being removed and that he was available for work and would then be in receipt of Jobseeker’s allowance until he found work. He stated that he attached documents which might assist.
6. These documents included a letter from Jobcentre Plus about an application for a payment from the social fund, a note from his doctor

stating that he was to be off work for one month from 7 August 2012 and evidence that he had been in receipt of housing benefit.

7. The appellant's appeal was determined on the papers before the First-tier Judge. Judge Tootell set out the relevant sections of the Immigration (EEA Regulations 2006) namely Regulations 19, 24 and 5. Regulation 19 deals with those who are not entitled to be admitted by virtue of Regulation 11 if their exclusion is justified on grounds of public policy, public security or public health in accordance with Regulation 21. Regulation 24 deals with the removal of those whom it has been decided should be removed in accordance with Regulation 19. Regulation 5 deals with the definition of a worker or a self-employed person who has ceased activity. Those provisions include EEA nationals who have reached the age at which they are entitled to a state pension on the date they cease work or if they have taken early retirement or if they have pursued activities as a worker or self-employed person for twelve months prior to the determination. A further requirement is that they should have resided in the United Kingdom for more than three years prior to the termination of work.
8. Regulation 6 defines a worker but states in subparagraph (2) that a person who is no longer working shall not cease to be treated as a worker if they are temporarily unable to work as the result of illness or accident, or is duly recorded as being in involuntary unemployment after having been employed in the United Kingdom provided he has registered as a jobseeker with the relevant employment office, that he had been employed for one year or more before becoming unemployed, had been unemployed for no more than six months, or can provide evidence that they were seeking employment in the United Kingdom and had a genuine chance of being engaged.
9. Judge Tootell stated that she considered all the documents before her, noting the appellant's evidence that he had broken his foot and that he was not fit for work. She noted that the appellant had been receiving public funds and said that there was a reference to previous payslips being forwarded to the Tribunal although those did not appear from the Tribunal file. She stated that given the evidence which she had been provided she accepted on the balance of probabilities that the appellant had been employed in the United Kingdom in the past. She therefore stated that she accepted that he was currently unemployed solely due to his injuries which had temporarily incapacitated him. She therefore concluded that the appellant met the requirements of the Regulations and that he had not ceased to exercise Treaty rights. She therefore allowed the appeal.
10. The grounds of appeal referred to the finding of the Judge that the appellant had not ceased to be a worker and went on to say that "it is submitted is it arguable that, on the evidence provided by the appellant, this was a finding open to the Judge." Mr Deller asked to amend the grounds to insert the word "not" before "finding". I accepted that there was clearly a typing error in the grounds and I accepted that amendment.

The grounds went on to say that the judge had recorded that there was evidence that the appellant had been in receipt of various public funds prior to his accident but that it was arguable that being in receipt of public funds, including jobseeker's allowance, was not in itself evidence that the appellant had been working in the past. It was argued that that was a material issue and that it was an error of law for the judge not to have resolved that issue before allowing the appeal.

11. Permission to appeal was granted by Designated Judge Shaerf on 25 January 2013 and on 25 April 2013 Upper Tribunal Judge Gill directed that the hearing be limited as the issue as to whether or not there was a material error of law. She also ordered that if the appellant did not attend the hearing the Upper Tribunal might proceed to determine the appeal in his absence.
12. I have considered the file. There is no evidence therein that the appellant has worked in Britain nor is there anything to indicate that he could fall into the description of worker under the Regulations. It was a an error for the judge to state that the she accepted that the appellant was a worker when there was no evidence that he had worked here. She states that evidence had been sent but that she had not seen it. She was wrong to make a finding of fact on the basis of evidence which was not before her and I consider that that is a material error of law and I set aside her determination.
13. I now go on to remake the decision. The reality is that, on the evidence there is nothing to indicate that the appellant meets the requirements of the Regulations to be treated as a worker. I therefore find that this appeal must be dismissed on immigration grounds. Although it has not been argued, I also dismiss this appeal on human rights grounds.

Decision.

This appeal is dismissed on immigration grounds under the Immigration (EEA) Regulations 2006.

This appeal is dismissed on human rights grounds.

Signed

Date:

Upper Tribunal Judge McGeachy