



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

Appeal Number: IA/00003/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 4th November 2014**

**Decision & Reasons
Promulgated
On 3rd December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE E B GRANT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**TOCHUKWU EJIKE DOMINIC MMUO
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Presenting Officer
For the Respondent: Mr Krushner of Counsel

DECISION AND REASONS

The Background to this Application

1. The respondent, who was the appellant in earlier proceedings before the Tribunal is a citizen of Nigeria and is the spouse of the sponsor Paulina Bladycz a citizen of Poland.

2. On 10th December 2013 the appellant, the Secretary of State, refused to issue a residence card as confirmation of a right of residence under European Community Law as the spouse of an EEA national exercising treaty rights in the United Kingdom. The respondent appealed that decision and his appeal was heard by FTTJ Mr A J Parker and in a determination promulgated on 19th August 2014 the respondent succeeded in his appeal.
3. The appellant sought permission to appeal on the following grounds:

"Introduction

1. *The determination allows the appeal against the Secretary of State's decision to refuse residence card as a confirmation of a right to reside in the United Kingdom as the spouse of an EEA national exercising treaty rights.*
2. *It is considered that the Immigration Judge has erred in the consideration of the case in the following ways:*

Ground one: Material misdirection of law

3. *At [15] the Judge finds that the sponsor is on a zero hours contract and considers that this is sufficient to establish her as a 'worker' for the purposes of the EEA regulations.*
4. *At [18] the Judge finds that the sponsor is exercising treaty rights at the date of the Hearing (01.08.2014).*
5. *By her own admission, the sponsor has not worked since June 2014 [10].*
6. *It is submitted that whilst the sponsor may have a zero hours contract, she was not in remunerative employment at the date of the Hearing, and has not been since June 2014.*
7. *In Boodhoo and another (EEA Regs: relevant evidence) [2013] UKUT 00346 (IAC) the UTT found that the relevant date for an in country appeal in respect of the 2006 regulations is the date of hearing.*
8. *The sponsor has not shown she is working at the date of the Hearing and does not therefore meet the requirements of Regulation 6.*
9. *Consequently the appellant cannot qualify for a residence card.*
10. *For the above reasons, it is submitted that the Immigration Judge has erred in his findings.*
11. *Permission to appeal is respectfully sought.*
12. *An oral hearing is requested."*

4. Following receipt of the application for permission to appeal on 29th September 2014 FTTJ Grimmett made an order in the following terms:

"REASONS FOR DECISION (including any decision on extending time)

1. *The Respondent seeks permission to appeal, in time, against the decision of First-tier Tribunal Judge Parker promulgated on 19th August 2014 to allow the Appellant's appeal against the Respondent's decision on 10th December 2013 to refuse to issue a residence card as the spouse of an EEA national exercising treaty rights.*
 2. *The Respondent asserts that the Judge erred in concluding that the Appellant's wife was exercising treaty rights as she was not working at the date of decision. It is said that she was on a zero hours contract, although it is not clear that such a contract was produced, which does not show she was been in remunerative employment.*
 3. *It is arguable that the Judge erred as it does not appear that the Appellant's wife was in paid employment in the UK between the end of June 2014 and the date of the hearing.*
 4. *All grounds are arguable."*
5. Thus the matter came before me to determine whether the decision of the FTTJ contains an error of law.

Submissions

6. Ms Isherwood relied on the grounds provided. It was accepted at the hearing of the appeal by the sponsor that she was not working and therefore she was not exercising treaty rights. At the time of the hearing of the appeal she was not exercising treaty rights and therefore the respondent could not succeed in his appeal.
7. Ms Isherwood relied on the case of **Begum (EEA - worker - jobseeker) Pakistan [2011] UKUT 00275 (IAC)** and relied upon the headnote at paragraph (1) which is in the following terms:

“(1) When deciding whether an EEA national is a worker for the purposes of the EEA Regulations, regard must be had to the fact that the term has a meaning in EU law, that it must be interpreted broadly and that it is not conditioned by the type of employment or the amount of income derived. But a person who does not pursue effective and genuine activities, or pursues activities on such a small scale as to be regarded as purely marginal and ancillary or which have no economic value to an employer, is not a worker. In this context, regard must be given to the nature of the employment relationship and the rights and duties of the person concerned to decide if work activities are effective and genuine.”
8. Mr Krushner for the respondent opposed the application and submitted that if the sponsor had produced her contract of employment (it was not produced before the First-tier Tribunal Judge) she could still have taken the holiday to Poland and still be a worker. Four weeks out of work does not determine that she is not a worker. The fact that she takes holiday and might not be paid does not mean she has stopped being on the agent's books and there was evidence she was on the books of the agency and that she worked in 2013 for at least eight weeks (there were two payslips for 2014 and there was an original letter updating the letter of 2013 confirming employment over that period).

9. Mr Krushner submitted the judge did not accept everything uncritically, he had sight of bank statements and the sponsor was paid in cash but cash activity was shown in her bank account. The judge accepted evidence about Victory College and Victory Care Services and was showed a linked in entry which shows that the Director of both companies is a real person and linked to those companies in that entry. The judge looked at the evidence in the round which is what he was entitled to do and gave full reasons for his findings. He acknowledges there were mistakes on the payslips as to whether she was paid in cash or by BACS and acknowledges though there were some inconsistencies in the evidence but was satisfied they were honest witnesses and accepted what the sponsor had to say about her work dates and when she had leave from work. The fact she is called a student on her marriage certificate does not mean she was not a worker. Mr Krushner relied on the case of **Deborah Lawrie-Blum v Land Baden-Wuerttemberg [1986] EUECJ R-66/85** (3rd July 1986). Whether she is a worker is something that can be decided on a practical common sense level. Of course if the sponsor had performed badly for the agency they would strike her off the books but this was not the case. The judge acted properly and there is nothing approaching a mistake of law in the decision. The fact that someone does not have a written contract of employment and cannot be found to be a worker is plain wrong. Indeed even at Appendix FM-SE what is required by the Secretary of State when a person is to show they are working includes a contract to be produced if it is available. A written contract is not always a mandatory matter.
10. The judge did accept the oral testimony and gave reasons for his findings and on that basis there is no error of law
11. Finally a zero hours contract can be the basis of an EEA worker's contract. Anyone on a zero hours contract will not be paid whilst not at work for example on holiday for a few weeks.
12. In reply Ms Isherwood stated that the zero hours contract was not the basis of the challenge. If at the time of the hearing the sponsor was a worker she could have put in the August payslip but they had not done so and the EEA national in evidence accepted she had not worked since June. The hearing was at the beginning of August. On any basis she was not exercising treaty rights at the date of the hearing consequently the judge erred in law in allowing the appeal.
13. Mr Krushner wished to reply to the points about the August payslip stating that it was not known at the date of the hearing if the August payslip was due at the time of the hearing.

Decision

14. I have read the Record of Proceedings. The FtJ was not assisted by the failure of the parties to draw his attention to the well established caselaw of **Begum**. He was mindful that he should make findings based on the

date of the hearing before him following **Boodhoo and another (EEA Regs: Relevant evidence)** [2013] UKUT 00346.

15. Having taken into account the evidence of the sponsor before the FtTJ, I have concluded, following **Begum** that there was insufficient evidence before the FtTJ for him to find that the sponsor was exercising treaty rights in the United Kingdom at the date of the hearing before the FtTJ. The arguments about the zero hours contract and its significance are immaterial to the issue before the FtTJ which was whether the sponsor was a qualified person. The nature of employment to establish treaty rights is properly described by the Tribunal in **Begum**. The evidence before the FtTJ arguably established that the sponsor's exercise of treaty rights had been minimal and that she had not exercised treaty rights since June 2014.
16. In failing to apply his mind to guidance of the Tribunal in **Begum**, I find that the judge erred in law and his decision must be set aside to be remade at a rehearing before the First-tier Tribunal. No findings are preserved.

Decision

The FtTJ erred in law.

I set aside the decision.

The matter will be remitted for a rehearing before the First-tier Tribunal on a date to be fixed.

Directions

Any further evidence to be filed and served no later than 14 days before the date fixed for rehearing.

Signed

Deputy Upper Tribunal Judge Grant