IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/03829/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20th January 2016	**On 19th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS HILLARY JOY CAMBRIDGE
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K Wass (Counsel)
For the Respondent: Mr E Tufan (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Gandhi, promulgated on 23rd July 2015, following a hearing at Hatton Cross "on the papers" on 2nd July 2015. In the determination, the judge allowed the appeal of Hillary Joy Cambridge, whereupon the Secretary of State applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Jamaica, who was born on 25th November 1963, and she appeals against the decision of the Respondent dated 7th January 2015, to refuse to grant permanent residence to her under the Immigration (European Economic Area) Regulations 2006, as confirmation of her right of residence under European Community law, as a family member, of her spouse, who is an EEA national.

The Appellant's Claim

3. The Appellant's claim is that she is married to Sevriano Fernandes, a Portuguese national, who has been exercising treaty rights for a continuous period of five years in the United Kingdom. She submitted three pay slips in the Sponsor's name dated January 2009, February 2010, and March 2011. The pay slips gave her Sponsor's address as [... Lane, London ...]. The Respondent has not accepted that the Appellant's spouse was exercising treaty rights for the requisite period of time. The Respondent has therefore refused to issue a permanent residence card as confirmation of the Appellant's right to reside with reference to Regulation 15(1)(b) of the Immigration (EEA) Regulations 2006.

The Judge's Findings

4. At the hearing before Judge Gandhi, the Appellant's spouse was not in attendance, but the Appellant gave evidence to say that she had reconciled with her husband, who has lived in the UK for twelve years, and has a family and private life here. The judge had regard to a letter of 27th March 2015, from the HMRC, which sets out the Sponsor's employment history. It shows that from 11th February 2008 to 6th October 2011, he was working. He then claimed a jobseeker's allowance (JSA) in the 2012 and 2013 tax years. For the 2013 to 2014 tax year, there was no record of any taxable income as an employed person. There were no records of him ever having been self-employed and paying tax as a self-employed person (see paragraph 6).

5. The judge considered the issues before him to be that, given that there was evidence that the Appellant claimed JSA (as confirmed by the letter of 27th March 2015 from HMRC), the issue was whether he was employed for one year or more before becoming unemployed. The judge held that the Appellant's husband had been employed since 2008 and became unemployed in 2011 (see paragraph 17). The judge went on to consider whether the Appellant could then show evidence that the husband was actively seeking employment, but given that he was registered at the Jobcentre, this provision was satisfied (see paragraph 19).

6. The more difficult question was in relation to the missing evidence. The judge went on to explain this matter as follows:

> "He was working from 11th February 2008 until 6th October 2011. He was then on JSA presumably from this time although the only information I have is that it was in the 2011-2012 tax year and again in the 2012-2013 tax year that he was on JSA" (see paragraph 20).

7. The judge allowed the appeal on this basis.

Grounds of Application

8. The grounds of application state that the judge erred in law in respect of Regulation 6(2)(b) because the judge had found that the Sponsor had claimed JSA and thereby satisfied the provision. However, no consideration was given to why the Sponsor was no longer working and that he had been made involuntarily unemployed. There was a letter from HMRC which confirmed that the Sponsor was claiming JSA until sometime in 2013. However, after this there is no employment recorded for him at all. The Respondent therefore submitted that, "... it is therefore difficult to see how he has shown he had a genuine chance of being engaged, when it appears he did not gain employment, nor in view of the fact that his JSA ceased, did he appear to continue looking for it". Furthermore the grounds continue to say that, "... the HMRC letter does not confirm that the Sponsor was a qualified person for a continuous period".

9. On 2nd November 2015, permission to appeal was granted.

10. At the hearing before me on 20th January 2016, Mr Tufan, appearing on behalf of the Respondent Secretary of State, submitted that the issue here was whether the Sponsor was qualified for the relevant period of five years from the date of the marriage. Mr Tufan relied upon the grounds of application. He submitted that the Appellant could not succeed under Regulation 6(7) because the Appellant's husband could not show that he had been looking for work for six months. The judge wrongly concluded that the six month period did not apply here. This was simply wrong.

11. Secondly, the fact was that the judge simply had no evidence about the Appellant's position during the relevant period that was missing. What the judge said (see paragraph 20) was that, "... he was then on JSA presumably from this time although the only information I have is that ...". The judge did not have the information here. It was not enough to simply assume a state of affairs. The onus was on the Appellant to show that he was actually actively looking for work. The Appellant's husband had not provided that evidence.

12. For her part, Ms Wass submitted that the judge had given an explanation at paragraph 12 specifically in relation to this provision. He had explained that prior to 1st January 2014 all that the judge had to be satisfied about was that under Regulation 6(2),

> "... a person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph 1(b) if –
>
> (b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom ...".

The judge had given due regard to the relevant legal provision. The reference to the HMRC letter confirmed that the position was as

maintained by the Appellant. At paragraph 19 of the determination the judge actually noted that a condition of being registered at the Jobcentre was that one was actively seeking employment. That being so, he had to be satisfied on a balance of probabilities that the Appellant was seeking employment. As for the judge's observations that, "the only information I have is that it was in the 2011-2012 tax year", this observation comes after the Appellant's husband has fulfilled the qualifying period. Therefore, there could be no error. The HMRC letter actually confirms that the Appellant was working for the relevant period.

13. In reply, Mr Tufan submitted that the Sponsor has to be exercising treaty rights for a full five year period continuously. This evidence was not available. The evidence that was provided was that the Appellant was working from 11th February 2008 until 6th October 2011. The judge expressly said that,

> "I have another letter under covering letter of 14th April 2015. This is a letter from the HMRC dated 27th March 2015 which sets out the Sponsor's employment history. In summary it shows that from 11th February 2008 to 6th October 2011 he was working" (see paragraph 6).

This was simply a period of three years. The Appellant had to show that he was actually exercising treaty rights for five years. As the judge himself went on to explain, "... he then claimed jobseeker's allowance (JSA) in the 2012 and 2013 tax years. For the 2013-2014 tax year there is no record of any taxable income as an employed person, there are no records of him ever having been self-employed ...".

Error of Law

14. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows. First, the established law is tolerably clear. The Upper Tribunal has confirmed in **Begum (Pakistan) [2011] UKUT 00275** that,

> "When considering whether an EEA national is a jobseeker for the purposes of EU law, regard must be had to whether the person entered the United Kingdom to seek employment and, if so, whether that person can provide evidence that they have a genuine chance of being engaged. If a person does not or cannot provide relevant evidence, then an appeal is bound to fail on this ground".

15. In the instant case the Appellant has to show under Regulation 6(2)(b) that, "... he is in duly recorded involuntary unemployment after having been employed in the United Kingdom". There is no explanation provided by the Appellant's husband as to why he was no longer working and whether he had been made involuntarily unemployed (see paragraph 16).

16. The same provision also goes on to say that the person concerned must be able to provide evidence "that he is seeking employment in the United Kingdom and has a genuine chance of being engaged". The Appellant's

husband provided no evidence to show that he "... has a genuine chance of being engaged", assuming that he is "...seeking employment in the United Kingdom".

17. Ms Wass has submitted that the Appellant succeeds in any event because the five year continuous exercise of treaty rights period has been demonstrated in any event. This is not so. The Appellant was claiming JSA until sometime in 2013, but after this period there is no employment recorded for him at all, and he is not able to demonstrate compliance with Regulation 6(2). These are all important considerations because as the decision in **AG and Others [2007] UKAIT 00075** has made clear, European Community law has confirmed that the concept of a "worker" includes a person who is a genuine jobseeker: see **Case C-292/89 Antonissen [1991] ECR I-745**. Accordingly there is an error of law.

Remaking the Decision

18. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am dismissing this appeal precisely for the reasons that I have given above. The onus is upon the Appellant to provide the necessary evidence to comply with the relevant Regulations. The appeal before the judge was a "paper" appeal. The sponsoring husband was not in attendance. He has not been in attendance today before me either. He has not been cross-examined on the evidence provided. Indeed, the evidence provided has been deficient in the respects that I have outlined above. Accordingly, the Appellant has failed to discharge the burden of proof that is upon her. The appeal must be dismissed.

Notice of Decision

19. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is dismissed.

20. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 13th February 2016