



IAC-FH-NL-V1

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

Appeal Number: EA/00635/2016

THE IMMIGRATION ACTS

Heard at Field House

On 20 June 2017

**Decision & Reasons
Promulgated
On 23 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**MRS UZMA KHALID
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Butterworth, Counsel, instructed by Pegasus Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Burns (the judge), promulgated on 11 November 2016, in which he dismissed the Appellant's appeal. The appeal to the First-tier Tribunal had been against the Respondent's decision of 4 January 2016 refusing to issue her with a permanent residence card pursuant to the Immigration

(European Economic Area) Regulations 2006 (the Regulations), as amended.

2. At all material times the Appellant was married to a German national, Mr Rabbani, and was thus the family member of an EEA national. The Respondent had not been satisfied that Mr Rabbani had exercised Treaty rights in the United Kingdom for a continuous period of five years.

The judge's decision

3. The judge found that Mr Rabbani had been employed between 14 June 2010 and 31 July 2011. He then found that the Appellant had been in receipt of Jobseekers Allowance until November 2013. The judge also found that Mr Rabbani had been in receipt of Pension Credit from 15 August 2013, and then received a state pension from 30 December 2015.
4. The real issue before the judge was the nature of Mr Rabbani's status between losing his job in 2011 and June 2015 (that being the point at which the necessary five years block would have accrued). In examining Mr Rabbani's status the judge considered Regulation 6 of the Regulations, and in particular whether he had satisfied Condition A and the "genuine chance of being engaged" test. Although it makes no material difference in this case, the relevant period in respect of which the judge was making his assessment fell prior to the amendment to the 2006 Regulations which introduced Conditions A and B (that being on 1 January 2014). The judge finds that Mr Rabbani in fact ceased looking for work by 28 October 2013 at the very latest (paragraph 45).
5. In respect of the genuine chance of being engaged test the judge sets out his findings and reasons between paragraphs 46 and 54. He looks at what he describes as two phases on Mr Rabbani's efforts to find employment. The first phase involved applying for work as a geologist or in museums or libraries. In respect of this first phase the judge finds that there was no genuine change of Mr Rabbani being engaged in any of these fields.
6. In respect of the second phase, during which Mr Rabbani significantly broadened the scope of his attempts to find work, the judge notes that he had made about 500 applications and received only one interview, and even then was unsuccessful in securing the job on that occasion. He notes the Appellant's age, lack of fluency in English and the Jobcentre's own concerns about his inability to find work as all being relevant to the genuine chance of being engaged test. The judge concludes that Mr Rabbani had not retained his workers status in accordance with Regulation 6, nor was he a jobseeker. At paragraph 61 the judge notes Mr Rabbani's receipt of state Pension Credit but says that the issue had not been raised before him.

The grounds of appeal and grant of permission

7. There are four grounds of appeal. The first asserts that the judge had failed to take into account the fact that Mr Rabbani had received Pension Credit. It is said that this fact meant that the DWP had decided that Mr Rabbani did have a right to reside in the United Kingdom. This in turn was relevant to the judge's assessment of whether Mr Rabbani was a qualified person during the relevant period. Ground 2 asserts that Student Finance England had decided that Mr Rabbani's daughter was entitled to funding on the basis that he was an "EU migrant worker". The judge had failed to take this into account as well. Ground 3 asserts that the judge has failed to properly consider Mr Rabbani's previous employment experience. Ground 4 states that the judge failed to adequately address Mr Rabbani's evidence on how he had sought to improve his prospects of employment by way of voluntary work.
8. Permission to appeal was granted by an Upper Tribunal Judge on 4 May 2017 with particular reference to the pension credit issue.

The hearing before me

9. Mr Butterworth sought to rely on the grounds. He submitted that the Pension Credit point had been raised in oral submissions before the judge and I was referred to page 7 of his skeleton argument (which I accept was before the judge). He also submitted that the Student Finance point had been taken before the judge. I examined the Record of Proceedings and whilst I saw reference to the Pension Credit issue, there was nothing there to indicate that the Student Finance evidence had been brought to the judge's attention and/or that its significance had been an aspect of the submissions made on behalf of the Appellant. In light of this I informed Mr Butterworth that I did not consider the Student Finance point to be a live issue before me (there had been no witness statement from Mr Butterworth in support of his assertions made in ground 2).
10. On the Pension Credit point Mr Butterworth submitted that it appeared as though the benefit had been awarded on the basis that Mr Rabbani was a "qualified person" for the purposes of Regulation 6 of the Regulations. Even if it was founded upon Regulation 15A of the Regulations he submitted that the same question had been addressed by the DWP as was to be addressed by the judge, namely that Mr Rabbani was a qualified person. If this was the case the judge should have taken this into account and it was material to his decision even if he were not bound by the DWP's own assessment of his status.
11. In respect of the judge's assessment of the first phase of Mr Rabbani's attempts to find work, Mr Butterworth submitted that the judge had erred by failing to take into account previous work experience whilst in Pakistan, work in a library in Germany in the year 2000, and administrative experience whilst in the United Kingdom. In respect of the second phase the judge had erred in respect of the subjective element of the genuine chance of being engaged test. This rendered the assessment of the test as a whole to be flawed. In respect of the voluntary work, Mr Butterworth

submitted that this simply had not been taken into account. The voluntary work was relevant because it went to the improved prospects of finding employment. In respect of the Student Finance point, and (on the basis that I would consider it for the sake of completeness) Mr Butterworth submitted that its relevance was the same as in relation to the Pension Credit issue.

12. Mr Whitwell submitted that the Pension Credit issue was immaterial. The judge had provided adequate reasons in respect of the genuine chance of being engaged test. The judge may have overlooked the voluntary work undertaken by Mr Rabbani but this too was immaterial.
13. In response Mr Butterworth amended a previous submission by saying that the Student Finance award had been on a different basis than the decision to award Pension Credit. I was referred to pages 191 to 193 of the Appellant's bundle. The email at page 191 indicated that Mr Rabbani was an "EU migrant worker" and Mr Butterworth placed emphasis on that last term. If Mr Rabbani was a worker this must have been relevant to the judge's assessment of his status.

Decision on error of law

14. As I announced to the parties at the hearing I conclude that there are no material errors of law in the judge's decision. My reasons for this conclusion are as follows.
15. First, Mr Butterworth's reliance upon the Pension Credit issue is in my view misconceived. It is quite apparent from the award notice at page 134 of the Appellant's bundle that the basis upon which the DWP had decided that Mr Rabbani did have a right to reside in the United Kingdom was based squarely upon Regulation 15A of the Regulations, and not on Regulation 6. It is clearly stated in the award notice that Mr Rabbani was considered to be the primary carer of a child in education. Regulation 15A relates to a derivative right of residence and does not mean that the individual is a qualified person.
16. Having a right of residence under Regulation 15A would indeed have entitled Mr Rabbani to an award of Pension Credit as a matter of social security law. However two consequences flow from the basis of this right of residence. The first is that such residence could not count towards the accrual of permanent residence in the United Kingdom. Second, a derivative right of residence is not of course a right under the Qualification Directive (as transposed into Regulation 6 of the Regulations). Therefore the right of residence which the DWP found to exist had no bearing on the issues to be decided by the judge. It follows therefore that the judge's failure to specifically address the issue of whether the Pension Credit award was relevant is immaterial. I would add further that a decision of the DWP was not of course binding upon the judge in any way.

17. Second, as I indicated at the hearing the Student Finance issue is not before me because I am not satisfied that it was argued before the judge. It is not included in Mr Butterworth's skeleton argument and there is no indication of any relevant submission in the Record of Proceedings. I also note that there is no witness statement from Mr Butterworth in support of ground 2 of the grounds of appeal. In any event, and for the sake of completeness, even if the matter had been raised and it was a live issue before me, I conclude that the judge's failure to engage with the point is immaterial to the outcome of the appeal. As with the Pension Credit point, any determination by the DWP on Mr Rabbani's status was not binding upon the judge, and given his findings as a whole the single issue of the Student Finance award would not have had a material bearing on the judge's overall conclusions. Further, and having considered pages 191-193 of the Appellant's bundle, there was no actual evidence of materials submitted by Mr Rabbani or his daughter in support of the application for funding. Therefore the judge simply was not in a position to have regard to relevant evidence. It is true that the Student Finance did conclude that Mr Rabbani was, as they put it an "EU migrant worker" but it is unclear what was meant by this. There is no legal category of "EU migrant worker" as far as I am aware. It is unclear whether the Student Finance regarded Mr Rabbani as being a worker or a jobseeker, and in any event reading the judge's decision as a whole in combination with the fact that the Student Finance assessment was in no way binding upon him, in my view the omission in respect of the Student Finance point was immaterial.
18. Third, Mr Butterworth agreed that the genuine chance of being engaged test involves both a subjective element and an objective element. Thus an individual may genuinely believe that they could find employment in a certain sector and may be trying their best in this respect, but if on an objective view the chances were simply too low then a decision maker is entitled to find that the chance of being engaged was not a genuine one. In respect of the first phase of Mr Rabbani's attempts at finding work, in my view the judge was fully entitled to conclude that there was no genuine chance. With all due respect, Mr Butterworth's submissions on this point were somewhat optimistic. Whilst Mr Rabbani may have had some work experience in Pakistan between 1975 and 1979 it was wholly fanciful that this could create a genuine or realistic prospect of finding employment in the United Kingdom some 30 odd years later. In respect of Mr Rabbani's CV, it is to say the very least brief, as acknowledged by the judge at paragraph 47. There is a single line in the CV at page 102 of the Appellant's bundle stating that he was involved in training in the Mannheim Library in the year 2000. Quite apart from that being many, many years ago, no detail whatsoever is provided as to quite what this involved and how it could be relevant to the type of work Mr Rabbani was seeking during the period in question. In respect of the experience with administrative work in the United Kingdom the letter at page 21 of the Appellant's bundle relates to some employment at an estate agents. Frankly it is very very difficult to see how this could have had a material bearing on Mr Rabbani's attempts at finding work as a geologist or in

museums or libraries to the extent that it raised his prospects above the threshold of being genuine.

19. Fourth, in respect of phase 2, the judge acknowledges that Mr Rabbani then decided to consider a much wider variety of possible jobs. The judge was fully entitled however to find that some 500 applications had been made over the course of two years with only one interview arising out of these, and that even then Mr Rabbani was unsuccessful in securing the vacancy. The judge was fully entitled to take into account the concerns of the jobcentre. He was also fully entitled to take into account the matters set out in paragraph 53 of his decision. Mr Rabbani himself may have genuinely believed that he could find work but on the judge's findings of fact, which were clearly open to him, the objective position was very different. It is also to be noted that Mr Rabbani in fact ceased either looking for work once he was in receipt of Pension Credit and that of course he never found employment as a result of any of his jobseeking.
20. Fifth, it is right that the judge does not appear to have expressly addressed Mr Rabbani's voluntary work, although this was raised in evidence and noted at paragraph 21. In my view this omission is immaterial. Volunteering to undertake certain activities is clearly not the same as seeking paid employment. It is also a fact, as mentioned previously, that Mr Rabbani ceased looking for paid work in October 2013 at the very latest, and of course in fact had never secured any employment after 2011. Therefore and again applying the objective limb of the genuine chance of being engaged test, the voluntary work was simply not a material factor in the case.
21. In light of the above the decision of the First-tier Tribunal shall stand.

Notice of Decision

The First-tier Tribunal's decision does not contain any material errors of law.

The decision of the First-tier Tribunal stands.

The Appellant's appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed

Date: 22 June 2017

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date: 22 June 2017

Deputy Upper Tribunal Judge Norton-Taylor