Upper Tribunal
(Immigration and Asylum Chamber) **Appeals Number: EA/03466/2015**

EA/03468/2015

EA/03470/2015

EA/03473/2015

THE IMMIGRATION ACTS

Heard at Glasgow **Determination issued**
On 2 August 2017 **On 24 August 2017**

Before

MR C M G OCKELTON, VICE-PRESIDENT
DEPUTY JUDGE OF THE UPPER TRIBUNAL DEANS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS SHAHANA ANWAR
MR AHMAD WALID
MR AHMED SALEH
MR ABDUL RAFEH

Respondents

Representation:

For the Appellant: Mr M Diwnycz, Senior Home Office Presenting Officer
For the Respondents: Mr H Ndbuisi, Drummond Miller LLP, Solicitors

DECISION AND REASONS

CROWN COPYRIGHT 2017

1. This is an appeal by the Secretary of State against a decision by Judge of the First-tier Tribunal Sweeney allowing appeals against the refusal of residence cards. The appellants before the First-tier Tribunal are hereinafter referred to as "the claimants".

2. The first claimant is the mother of the other three claimants. The outcome for all the claimants depends upon the success of the first claimant in these proceedings.

3. The first claimant is a national of Pakistan. She applied for a permanent residence card on the basis of a retained right of residence upon her divorce from an EEA national, in terms of regulation 10 of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). The marriage broke down in consequence of domestic violence perpetrated by the first claimant's husband against her and decree of divorce was granted on 14 November 2014. In order to succeed under reg. 10 the first claimant had to show that both she and her former spouse were exercising Treaty rights on that date and, in respect of the first claimant, that she continued to exercise Treaty rights from that date until 31 March 2015. It seems to have been accepted that the first claimant was a worker after 31 March 2015, having commenced employment on 1 April.

4. The Judge of the First-tier Tribunal found that the first claimant's former spouse was exercising Treaty rights on 14 November 2014 as he was in receipt of Jobseeker's Allowance ("JSA"), having previously been in employment. As far as the first claimant herself was concerned, the judge found that she was in employment at the date of her application, 20 May 2015. At the date of the divorce, 14 November 2014, she was also in receipt of JSA. The judge accepted that the first claimant was a worker at the relative times. On the basis of this finding her appeal succeeded before the First-tier Tribunal.

5. Permission to appeal was granted by the Upper Tribunal on the grounds that the judge arguably erred by accepting that the first claimant and her former spouse were to be regarded as workers exercising treaty rights at a time when they were each in receipt of JSA. In terms of regs. 5 and 6 it was only in specific circumstances that a person in receipt of JSA was to be considered a worker. It was arguable that the judge's findings were based on a material error of law in respect of both a misdirection as to the requirements of the EEA Regulations and a failure to give adequate reasons.

6. Before us it quickly became clear that the first claimant's former spouse was a worker at the date of divorce in terms of reg. 6. There was evidence from the Department of Work and Pensions to show that he was in receipt of JSA and in addition he met the requirements of reg. 6 to continue to be treated as a worker. Unlike the first claimant, he was not required to satisfy the additional requirement of reg. 10(6).

7. In terms of reg. 10(6)(a) of the EEA Regulations the first claimant had to show that from the date of the divorce she would, if she were an EEA national, have been a worker, a self-employed person or a self-sufficient person under reg.6. In setting out the definition of a "qualified person" reg. 6 differentiates between a worker and a jobseeker. Under reg. 6 a person who is no longer working may continue to be treated as a worker provided a number of conditions are satisfied. These conditions include the requirement that the person has already been employed in the UK and either that the person entered the UK to seek employment or is present in the UK seeking employment after having a right to reside as a worker, self-employed person, self-sufficient person or student but not as a jobseeker. A person who meets these conditions but has been employed in the UK for less than a year will only retain worker status for a maximum of 6 months, in terms of reg. 6(2A).

8. Accordingly it was not enough for the first claimant to show that she was in receipt of JSA at the date of divorce. In order to satisfy reg. 10(6)(a) she had also to show that she had been a worker less than 6 months before the date of divorce so that she retained the status of a worker on that date. (There is no suggestion that the first claimant would have satisfied the requirement of reg. 10(6)(a) as a self-employed or self-sufficient person.)

9. It should be noted out of fairness to Mr Ndbuisi that it did not become clear until during the course of the hearing that the outcome of the appeal would turn upon this precise point. Nevertheless, the point was encompassed within the grounds upon which permission to appeal was granted and we considered it appropriate to proceed to address it.

10. We therefore sought to ascertain whether there was any evidence before the First-tier Tribunal which would have established that the first claimant was in employment less than 6 months before the date of the divorce. Mr Ndbuisi was unable to direct us to any such evidence. There was evidence of employment from April 2015 but not before this. Evidence from HMRC indicated that the first claimant had no earnings from employment in 2014-15, that is to say between 6 April 2014 and 5 April 2015. Accordingly it was not possible for the first claimant to show that she was in employment less than 6 months before the date of the divorce.

11. We conclude therefore that the Judge of the First-tier Tribunal erred in law by finding the first claimant was a worker at the date of divorce on the basis of a misdirection as to the meaning of a "worker" in reg. 6. On the evidence before the Tribunal the only decision the judge could have reached was that the first claimant did not meet the requirements to show that she was a worker at the date of decision. On this basis the appeal should have been dismissed.

12. We therefore set aside the decision of the First-tier Tribunal and re-make the decision by dismissing the appeals.

13. A further issue raised before the First-tier Tribunal on behalf of the claimants was whether the first claimant had a derivative right of residence. This was, however, not part of the decision of the First-tier Tribunal. The issue was not argued before us and accordingly we do not consider it necessary to address it. If the first claimant seeks to claim a derivative right of residence this may form the subject of a separate application.

Conclusions

The making of the decision of the First-tier Tribunal involved the making of an error of law.

We set aside the decision.

We re-make the decision by dismissing the appeals.

Anonymity

The First-tier Tribunal did not make an anonymity direction. We have not been asked to make such a direction and see no reason of substance for doing so.

Fee Award (NB. This is not part of the decision)

The First-tier Tribunal made a fee award. As we have re-made the decision by dismissing the appeal, no fee award can be made.

Deputy Judge of the Upper Tribunal Deans 23 August 2017