Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/00593/2017
EA/00705/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 3rd of January 2018	**On 26 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MRS ADELINA BORISOVA – 1st Appellant
MS YANA YANA VALENTINOVA – 2nd Appellant
(Anonymity order not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: The Appellants appeared in person
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The Appellants are both citizens of Bulgaria. The first Appellant who was born on 1st of July 1972 is the mother of the 2nd Appellant who was born on 31st of October 1992. They appealed against a decision of the Respondent dated 30th of December 2016 to refuse to grant them a document certifying permanent residence pursuant

to Regulation 15 (1) (a) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). They asked for their appeals to be determined on the papers. Unfortunately, their appeals became separated in the Tribunal system which resulted in their appeals being determined on the papers by two separately constituted Tribunals.

2. The 2nd Appellant's appeal was allowed by Judge of the First-tier Tribunal Beg on 20th of April 2017. The 1st Appellant's appeal was dismissed by Judge of the First-tier Tribunal Cox on 2nd of March 2017. She has appealed that decision and the Respondent has appealed the decision to allow the 2nd Appellant's appeal. For the reasons which I set out below, I have set aside the decision to dismiss the 1st Appellant's appeal and upheld the decision to allow the 2nd Appellant's appeal. I will therefore refer to the parties as they were known at first instance for the sake of convenience.

The Appellants' Case

3. On 19th of October 2007 the first Appellant was issued with an "A2 exempt from accession worker scheme card". On 7th of October 2016 she applied for a document certifying permanent residence under the 2006 Regulations. She had been working in this country for more than 10 years and 6 months at the date of her application and wished to continue to work in this country.

4. The 2nd Appellant graduated from Ellington School for girls in Ramsgate in 2009. She graduated from the University of Creative Arts in Canterbury in 2011 and from the University of Brighton in 2016. She is currently in full-time work. She had been in the United Kingdom for over 10 years and considered this country her home. She wished to make a career here.

The Explanations for Refusal

5. The Respondent refused the 1st Appellant's application because insufficient information had been given to her by the 1st Appellant in the application form. The 1st Appellant had not declared how she had exercised her treaty rights for a continuous period of 5 years as required by the Regulations. It was unknown whether she had been employed, self-employed or otherwise. There was no evidence of dependency on her by the 2nd Appellant during the 5 years the 1st Appellant could have been exercising treaty rights. The Respondent refused the 2nd Appellant's application on a similar basis that is that insufficient evidence had been provided with the application form. In their respective appeals both Appellants gave substantially more documentation to support their claims than they had in their applications to the Respondent.

The Decisions at First Instance

6. Judge Cox refused the 1st Appellant's appeal because although he was satisfied that she had now shown that she had been working for at least five years in the United

Kingdom she could not demonstrate that she had been working continuously. She needed to show that she had not been absent from the United Kingdom in any year for more than 6 months in total. The Appellant had produced her P 60s with her notice of appeal and the Judge at [11] had summarised the amounts the 1st Appellant had earned in the respective years. The difficulty was that the P60 for the tax year ending 6th of April 2014 showed that she had only earned £7,236.66p which the Judge stated was less than half of the income for the previous two tax years and the following tax year.

7. The 1st Appellant had not provided any information explaining why her income was significantly less for that year. The Judge accepted that it could be for an entirely neutral reason for example that the 1st Appellant had reduced her weekly working hours for a period. On the other hand, it could also be because the 1st Appellant had left the United Kingdom and did not return for more than 6 months. As the case was being determined on the papers he was not in a position to know. He therefore found that the Appellant had failed to discharge the burden upon her that she had been continuously working in this country for five years. He dismissed the appeal.

8. In her determination Judge Beg noted that she had been supplied with a letter from the Ellington School for girls which referred to the 2nd Appellant's GCSE results. There was also a GCSE certificate and a national diploma from the University for Creative Arts which was awarded in June 2011. There was a certificate from the University of Brighton to show that the 2nd Appellant had been awarded a BA degree in textiles and business studies on 22nd of June 2015. There was also a P60 for the year ending 5th of April 2016 showing that the 2nd Appellant had had employment in this country in the previous 12 months. Judge Beg concluded at [5] that the 2nd Appellant could demonstrate she was in full-time education in this country through secondary school and further education. She met the requirements for permanent residence. She had lived continuously in this country for at least 5 years and exercised treaty rights as a student. The appeal was allowed.

The Onward Appeals

9. The Respondent appealed Judge Beg's decision on the grounds that the 1st Appellant's appeal had been dismissed in March 2017 a month before Judge Beg had dealt with the 2nd Appellant's case. The dismissal of the 1st Appellant's appeal meant that the 1st Appellant was not qualified under the 2006 Regulations and by association the 2nd Appellant as her dependent could not satisfy the Regulations either. The Respondent pointed to the fact that this was a combined application and jointly refused.
10. Permission to appeal was granted by Judge of the First-tier Tribunal Grant-Hutchison on 8th of November 2017 on the basis that it was arguable that Judge Beg was aware that the appeals of the two Appellants were inextricably linked but had failed to consider the evidence as a whole specifically that the 1st Appellant's appeal had been dismissed.

11. The 1st Appellant appealed the dismissal of her appeal arguing she had not been absent from the United Kingdom for six months. She submitted two more P60 forms for the relevant periods which showed that she had worked in two care homes but only one of them had been referred to by the Tribunal in dismissing her appeal.

12. Her application for permission to appeal came on the papers before Judge of the First-tier Tribunal Gillespie on 29 September 2017. He found that it was arguably an error of law, on the grounds of procedural unfairness, to raise against the 1st Appellant that she had been absent from the United Kingdom for more than 6 months when she had had no notice of any such issue and no opportunity to address it. The Judge's conclusion had been a speculative allegation or inference not raised by the Respondent of a potential absence such as to interrupt continuity of residence. He granted permission to appeal.

13. The Respondent replied to the grant of permission by letter dated 8th of November 2017 arguing that because it was a requirement of the Regulations that there should not be any periods of absence exceeding 6 months the Judge was entitled to consider whether the first Appellant had been continuously resident and working in the United Kingdom.

The Hearing Before Me

14. Both Appellants attended the hearing. I heard brief evidence and submissions. The 1st Appellant stated that she had had 2 jobs at the same time in the tax year ending April 2014 but one of the P60s was missing. She had not travelled to Bulgaria or anywhere else for 6 months or more during that time. She was a bank nurse working in various care homes. She had a P 45 from one of the companies she worked for in the tax year ending April 2014. She had lost that P60 but the P45 was evidence that she had been working at the relevant time.

15. At the conclusion of the hearing I announced that I would allow the 1st Appellant's appeal and dismiss the Respondent's appeal against the 2nd Appellant's decision. I indicated that I would give my reasons in writing which I now do.

Findings

16. The principal issue in the case before me was whether the 1st Appellant could demonstrate that she had been continuously working in the United Kingdom for at least 5 years. Regulation 15 (1) (a) of the 2006 Regulations provides that a person who can demonstrate that they have resided in the United Kingdom in accordance with the Regulations for a continuous period of five years shall acquire the right to reside permanently here. Regulation 4 defines a student as someone who has been enrolled for the principal purpose of pursuing a course of study at a public or private establishment.

17. The difficulty in the case was that the initial applications made by the Appellants to the Respondent were clearly inadequate. It was not surprising that the Respondent came to the decision she did on both applications given the very sparse information provided on the forms. I can only assume that neither Appellant took advice before submitting the application forms and were not fully aware of the requirements in the forms (notwithstanding that the Respondent publishes guidance on how to complete the forms). As a result, both Appellants were very much the authors of their own misfortune in receiving decisions from the Respondent refusing their respective applications.

18. However, I remind myself that these are applications under the 2006 Regulations and that matters have to be decided by the Tribunal on appeal at the date of hearing. Thus, it was open to both Appellants to provide further information with their notices of appeal which they duly did. This resulted in the 2nd Appellant's appeal being allowed by Judge Beg. Given the evidence which was before Judge Beg which clearly showed that the 2nd Appellant had been studying at appropriate institutions she was entitled to come to the decision she did that the 2nd Appellant had been exercising treaty rights as a student for a period exceeding 5 years.

19. However, the 2nd Appellant could only succeed on that ground if the 1st Appellant could succeed on the basis that she had been working continuously for 5 years since the 2nd Appellant was dependent upon the first Appellant's appeal. The issue before me is whether the 1st Appellant is able to show that she has worked continuously for at least 5 years. I agree with the point made by Judge Gillespie in granting permission to appeal against the decision of Judge Cox that the 1st Appellant had no notice of the issue that would be taken against her.

20. The Respondent had refused the 1st Appellant's application because the first Appellant had provided no information beyond the bare assertion that she had been working in the United Kingdom for at least 10 years. By the time of the hearing before Judge Cox there was evidence before him that the 1st Appellant had been working for the requisite period of 5 years and earning a substantial amount. Although the 1st Appellant's earnings for the tax year ending April 2014 were less than the 2 years preceding that period and the 2 years following it, the first Appellant was still earning more than a nominal amount having earned £7236.66 p in the year ending April 2014.

21. Was the difference in earnings sufficient by itself to justify finding that the 1st Appellant could not show that she had been in the United Kingdom throughout the period of 12 months ending in April 2014? I have considerable sympathy with the position the Judge found himself in given that the first Appellant had only asked for her appeal to be determined on the papers. I have no doubt that if the matter had been listed for an oral hearing (and the 1st Appellant had paid the appropriate fee), she would have been able to produce evidence to Judge Cox to show that she

had been continuously employed in this country and the need for an onward appeal would not have arisen.

22. That said I can only set aside the First-tier's decision if I find a material error of law in it. That the 1st Appellant has further evidence not before the First-tier Tribunal does not demonstrate a material error of law. I have to look at the determination itself to establish whether there was a material error of law. At [18] the Judge took the point against the 1st Appellant that there was insufficient information explaining why her income was significantly less for the relevant year. If the Judge wished to hold against the 1st Appellant that a reduction in earnings meant she could not have been in the United Kingdom for more than 6 months the correct course would have been to have made a direction that the 1st Appellant should answer the point. It need not have been by way of an oral hearing, written submissions could have sufficed.

23. As that was not done I am satisfied there was a material error of law for the reasons given by Judge Gillespie and I set the decision of the First-tier aside. As I remake the decision in this case I am able to take into account further evidence that was not before Judge Cox at first instance. Specifically, the 1st Appellant produced to me a further document which had not been for the First-tier Tribunal. This was a P45 indicating that she had left her employment with a company called Mayday Direct on 23rd of May 2014. This was shortly after the end of the relevant financial year and indicated that the first Appellant had earned £2,145 to the date of leaving. It was clear that the 1st Appellant had other employment besides that shown on the P60 for the tax year ending April 2014 before the First-tier Tribunal. That P60 showed she had been working for a different company altogether called Guild Care.

24. The pattern of the 1st Appellant's employment was that she had worked for a number of care companies. This explained the irregularity in the amounts that she earned. There were wide discrepancies from year to year in her P60s reflecting the fact that she moved from employer to employer depending on the availability of work. Her own oral testimony which I accept is that she did not return to Bulgaria or otherwise travel outside the United Kingdom during the tax year ending April 2014 and that the reason why her earnings for the tax year ending 2014 were lower was because she only submitted one P60 when there had been other employments during that period. This is confirmed by the fact that the work she did for Mayday Direct does not appear on the P60 for the tax year ending April 2015. That only shows the income she earned working for a company called Guild Care in Worthing.

25. As I have indicated the 1st Appellant's failure to submit proper documentation on time has caused her a great deal of inconvenience but I must look at the situation as it is now. I find that the 1st Appellant can demonstrate that she worked continuously in the United Kingdom for at least a 5-year period and that there were no unexplained absences of 6 months or more. She is therefore entitled to permanent residence under Regulation 15. As I find that she succeeds so I find that the 2nd Appellant, her

daughter also succeeds. It was an error not to refer to the 1st Appellant's situation in the 2nd Appellant's appeal but as the 1st Appellant was entitled to succeed it was not a material error. I uphold the decision to allow the 2nd Appellant's appeal.

Notice of Decision

The decision of the First-tier Tribunal in the case of the 1st Appellant involved the making of a material error of law and I have set it aside. I remake the decision by allowing the 1st Appellant's appeal against the Respondent's decision.

The decision of the First-tier Tribunal did not involve the making of an error of law in relation to the 2nd Appellant's appeal and I uphold the decision of the First-tier Tribunal to allow the 2nd Appellant's appeal. I therefore dismiss the Respondent's onward appeal.

The 1st Appellant's appeal is allowed.

The Respondent's appeal against the 2nd Appellant's decision is dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 23rd of January 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

A full fee award was made in relation to the 2nd Appellant's appeal. As I have upheld that decision I do not disturb that fee award.
In relation to the first Appellant's appeal, although I have set aside the decision of the First-tier dismissing her appeal, I do not disturb the decision not to make a fee award since I have only allowed the first Appellant's appeal on the basis of evidence produced after the Respondent's decision.

Signed this 23rd of January 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge