



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/04887/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 14<sup>th</sup> August 2018

Decision & Reasons Promulgated  
On 28<sup>th</sup> August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MR SAMIR MADACI  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms M Hodgson, Counsel  
For the Respondent: Mr S Kotas, Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellant appeals against the decision of First-tier Tribunal Judge Phull dismissing her appeal under Regulation 26 of the Immigration (European Economic Area) Regulations 2006 against the decision of the Secretary of State to refuse permanent residence. The Appellant was granted permission to appeal by First-tier Tribunal Judge Shimmin in the following terms:-

“It is arguable that the judge has made a perverse or rational finding on a matter that is material to the outcome, namely in respect of whether treaty rights were being exercised. Alternatively, it is arguable that the judge made a material misdirection of law on this matter. I grant permission to appeal.”

2. I was not provided with a Rule 24 response by the Respondent and was given the indication that the appeal was resisted.

### **Error of Law**

3. Having heard submissions from both representatives I do find there is a material error of law in the decision such that it should be set aside. My reasons for so finding are as follows.
4. In respect of the judge's assessment of the Sponsor's employment or self-employment or otherwise (for example as a worker or jobseeker for a five year period), according to paragraph 13, the judge's findings disclose that she was satisfied that the Sponsor was working from 2010 to 2012. The judge however notes that there were no contributions paid by the Sponsor from 2012-2013 and 2013-2014 and for that reason the Sponsor was not working. I have been taken to the Appellant's bundle by Ms Hodgson where she has highlighted that page H2 shows that national insurance contributions were in fact paid by the Sponsor in particular for the tax years 2010-2011 continuously until 2016-2017 and that there were "full views" of national insurance contributions for those years in question. This therefore covers the period where the judge has stated in her decision at paragraph 13 that no contributions were paid and represents a material mistake of fact as it formed part of the reason why the judge did not accept the evidence of being qualified for 2012-2013 and 2013-2014.
5. As an aside, I must say I have immense sympathy with the judge in terms of the evidence presented by the Appellant in the appeal before the First-tier Tribunal. Although there was a fairly full and large bundle, the evidence has not been presented in the most helpful manner to assist either the parties or the judge in knowing and understanding the Sponsor's basis of qualifying under the 2003 Regulations for any 10 year period. As such, I intend to make suggestions for the benefit of both parties when this appeal is remitted to the First-tier Tribunal in due course.
6. In respect of the other reason for not accepting the evidence of being qualified during this period, although the Sponsor claimed Jobseeker's Allowance for an unknown period, although her evidence was that this was for a period of three to four months, the judge could not be certain of the period in question. Confusingly, the judge finds there was in fact self-employment evidence present for the period 2013- 2014 however, goes on to find that because there is no 'certainty' regarding the date when the Sponsor claimed Jobseeker's Allowance and became pregnant and took maternity leave, she cannot know for certain whether the Sponsor remained qualified during that period in that sense according to the 2003 Regulations. In that respect, Ms Hodgson has taken me to the headnote in the Upper Tribunal's decision of *Weldemichael and Another (St Prix C-507/12; effect)* [2015] UKUT 540 (IAC) wherein a respected panel of the Upper Tribunal found that an EEA national woman could retain continuous residence for the purposes of the 2006 Regulations for a period in which she was absent from work or jobseeking owing to the physical constraints of the late stages of pregnancy and the aftermath of childbirth if in line with the

decision of the CJEU in *Jessy St Prix*. Therefore, in that respect given that the First-tier Tribunal has not considered whether the Sponsor would have retained her qualification after leaving work, this is a material omission in terms of whether the Appellant would have retained her qualified status and in respect of whether she would have then also met the five year period of continuity of being a qualified person for the purposes of the Regulations. Although the judge could not achieve certainty in this regard, clear reasons would need to be given against the Upper Tribunal's decision (and CJEU jurisprudence) before this timeframe could be rejected (and to a standard less than certainty i.e. on balance).

7. Again, I stress that I have sympathy with the First-tier Judge in that she was not provided with the relevant dates in question which as she say hindered her from making the relevant findings.
8. In relation to the remaining submissions, I was taken to other extensive evidence by Ms Hodgson on behalf of the Appellant at Annex H which I will not rehearse here, save to say that it implied that the Sponsor was working for two companies for periods of time in 2012-2013 and 2013-2014. Although, that is not a matter for me to make findings upon, I do see that there is evidence there which could give flesh to the argument that the Sponsor *may* have held qualified status during the period in question as illustrated by the First-tier Judge generally noting there was evidence of self-employment during the 2012 to 2014 period in question.
9. Notwithstanding that, there is nothing remaining in the grounds which were sufficient to disclose any error of law in the judge's decision other than those already identified.
10. In light of the above findings I am satisfied that the decision of the First-tier Tribunal should be set aside in its entirety, albeit reluctantly.

### **Notice of Decision**

11. The appeal to the Upper Tribunal is allowed.
12. The appeal is to be remitted to the First-tier Tribunal to be heard by a differently constituted bench.

### **Directions**

13. I make the following directions for the further administration of this appeal upon remittal.
  - (a) The appeal is to be remitted to Birmingham for its remitted hearing.
  - (b) No interpreter is required.
  - (c) The Appellant and Sponsor are to give evidence.
  - (d) The time estimate is two hours.

- (e) No special directions are given, however, I make the emphatic suggestion and recommendation that the Appellant's representatives serve a reconstituted Appellant's bundle which should comprehensively and *chronologically* set out the Appellant's employment and self-employment and other history which would show she has been qualified from 2010 until date. The presentation of the evidence should make it extremely simple for the parties and the First-tier Tribunal to see precisely when and how the Sponsor has established her status as a qualified person for every month or so (for example) during the period in question which the Appellant seeks to rely upon in showing that the Sponsor was qualified for any five year period between 2010 till date.
- (f) I note finally that if there is no improvement in the Appellant's evidence I would not be surprised if the result of the remitted appeal were to be the same given that the judge was not presented with clear dates as to the qualification of the Sponsor.
- (g) No anonymity direction is made.

Signed

Date: 17 August 2018

Deputy Upper Tribunal Judge Saini