Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/13958/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 November 2017	**On 20 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

GABRIELA ESPASANDIN PONCE DE LEON
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: None
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. This is the Secretary of State's appeal against a decision of Judge of the First-tier Tribunal Caswell (hereinafter "the FtTJ"), who in a decision promulgated on 16 February 2017 allowed the appeal of Ms Gabriela Espasandin Ponce De Leon, against her decision of 22 November 2016 to refuse to grant a Permanent Residence Card. I shall refer below to the parties as they were before the First-tier Tribunal.

2. The appellant is a national of Spain who claims that she entered the UK in 2010 with an intention to establish herself in employment. She was granted Jobseeker's Allowance (JSA) from May 2010, which she received

for a continuous period of five years and five months and this continued following her self-employment from 7 October 2015, as she was working for less than sixteen hours per week. On 5 September 2016 she started working full-time as a Teaching Assistant at [ ].

3. On 22 July 2016 the appellant applied for a Permanent Residence Card on the basis of her having completed five years' residence in the United Kingdom under the Immigration (EEA) Regulations 2006 ("the EEA Regulations"). Her application was refused for reasons set out in a decision letter dated 22 November 2016 and a Notice of Immigration Decision was issued on the same date.

4. The appellant appealed to the IAC. The appeal was determined on the papers on the appellant's request and allowed by the FtTJ for reasons set out in her decision. Essentially, the FtTJ noted with reference to regulation 6(4) that in order to rely on her status as a jobseeker, the appellant was required to show that she entered the United Kingdom in order to seek employment; could provide evidence that she had been seeking employment and had a genuine chance of being engaged. Essentially, the FtTJ found that the award of JSA demonstrated that the Department for Work and Pensions was satisfied that the appellant intended to work and had "a genuine prospect" of working [8]. In consequence, the FtTJ found that as the appellant received JSA without interruption for a continuous period of five and a half years from 1 May 2010, in addition to the translation work she undertook from October 2015, which led her to securing full-time employment in September 2016, she was entitled to a Permanent Residence Card. Accordingly, the FtTJ allowed the appeal.

5. The Secretary of State now seeks to challenge the conclusions of the FtTJ with permission granted by the First-tier Tribunal on 4 September 2017.

6. The Respondent contends that the FtTJ erred in respect of the application of regulation 6(4) of the EEA Regulations in that she misconstrued the regulations by failing to consider adequately or at all the requirements therein in accordance with the two-fold test in Antonissen; EC Commission v Belgium Case C-344/95 [1997] 2 CMLR 187.

7. At the hearing, there was no appearance by or on behalf of the appellant. A Notice of Hearing informing the parties of the date, time and venue of the hearing was effectively served on the parties. I thus proceeded to hear the appeal in the appellant's absence. I heard brief submissions from Mr Walker who, in reliance on the grounds, submitted that the FtTJ failed to adequately apply the Antonissen (supra) test and, in particular, the second limb thereof.

Consideration

8. The key issue before the FtTJ was whether or not the appellant had been a qualified person within the meaning of regulation 6 of the EEA Regulations for a continuous period of five years.

9. The FtTJ received no oral evidence from the appellant as the appeal was heard on the papers. The FtTJ summarised the evidential materials in her decision at [5] to [6] and the contra case at [7]. The determinative reasoning and findings of the FtTJ are set out at [8] to [10]. The FtTJ identified that the appellant was seeking to principally rely on her status as a jobseeker to meet the requirements for permanent residence and she summarised the provisions of regulation 6(4) of the EEA Regulations at [7].

10. Regulation 6(4) provides:

> "For the purpose of paragraph (1)(a), a 'jobseeker' is a person who satisfies conditions A and B and where relevant C."

11. There appears to be no dispute that condition C is not relevant. What is put in issue is condition A and B. Condition A and B is defined in Regulation 6(5) and 6(6) in the following terms respectively:

> "Condition A is that the person – (a) entered the United Kingdom in order to seek employment; or
>
> (b) is present in the United Kingdom seeking employment, immediately after enjoying a right to reside pursuant to paragraph (1)(b) to (e) (disregarding any period during which worker status was retained pursuant to paragraph (2)(b) or (ba))."
>
> "Condition B is that the person can provide evidence that he is seeking employment and has a genuine chance of being engaged."

12. In this context the focus necessarily was on the period of time prior to the appellant's employment in October 2015 and, in particular, she would need to demonstrate a period of being a jobseeker from May 2010 and meet the definition of the same as set out above.

13. Essentially, while the FtTJ did not expressly say so, it is apparent that she was satisfied that Condition A and B were met because she found that the award of JSA over a five-year period showed that *"she was willing to work and had a genuine prospect of working"* [8]. Accordingly, the FtTJ was satisfied that the appellant was entitled to permanent residence in the United Kingdom.

14. The Secretary of State argues: firstly, that there was no adequate evidential basis for the FtTJ to conclude that the appellant satisfied Condition A and B and, in particular, that the FtTJ did not adequately engage with the second limb of regulation 6(6), that of *"a genuine chance of being engaged"* in accordance with the test laid down in Antonissen.

15. I consider that the FtTJ materially erred in law for the central reasons advanced by the Respondent in the grounds.

16. Essentially, the FtTJ found that the award of JSA was sufficient to meet Condition A and B. That, in my view, does not adequately engage with the

requirements of the EEA Regulations or the test set out in Antonissen. In particular, the FtTJ does not engage with or make any findings on the appellant's claim that she entered the United Kingdom intending to work and could provide evidence that she has been seeking employment, and there is no analysis of the facts and how they fulfil the second limb of the test in Antonissen for the relevant period. It is plain from the tribunal's decision in Shabani (EEA - jobseekers; nursery education) [2013] UKUT 00315 (IAC) that an award of JSA is not sufficient without more to meet the applicable requirements of the EEA Regulations. I thus find an error of law in this regard and set aside the decision of the FtTJ.

Remaking the Decision

17. As this appeal was heard on the papers, there is no reason why I should not proceed to remake the decision on the evidence before me. I have borne in mind that the burden is on the appellant to prove that she meets the requirements for permanent residence under the EEA Regulations on a balance of probabilities at the date of hearing.

18. There is little detail and supportive evidence of the appellant's background. In the grounds of appeal to the First-tier Tribunal the appellant asserts that she entered the UK in 2010 as she wished to enrol on an *"NLP course to help children with different abilities in their learning skills. For this purpose I came two or three times to London to check on the labour market opportunities and to have an interview with the Director of the centre where I was going to attend the course. I considered that I had plenty of opportunities to find work at that time, and I thought my previous success as a language teacher was going to be beneficial for this. Unfortunately, I was unable to find work at that time as soon as I needed and I had to stop attending the course. I was rejected for a few jobs, but the truth is that most of the jobs I applied for did not even respond. Therefore, I kept on requesting help for training at the Jobcentre but I was sent to workshops that were of no use or benefit to me."*

19. The limited evidence filed by the appellant does not relate to this background. There is no supportive evidence of the appellant's JSA record of her searches for employment or of her making regular and frequent attempts to find a job. While she states that she entered the United Kingdom in order to seek employment and had a genuine chance of being engaged throughout the time she was in receipt of JSA, there is insufficient evidence to support such a contention. I am thus not satisfied that the appellant meets Condition A and I am also not persuaded that she can be said to meet Condition B or the second limb of regulation 6(4) (the Antonissen test), which requires an applicant to still have a genuine chance of finding employment.

20. What might be meant by a *'genuine chance of being engaged'* is not defined but it seems to me that *'a genuine chance'* means that the prospects of employment must be more than merely fanciful or theoretical, but must in some way be reasonable or realistic.

21. Further to this, some contextual assistance is, in my judgement to be gleaned from the case of AG and others (EEA job seeker self-sufficient person - proof) Germany [2007] UKAIT 00075 at paragraph 28 :

> *"We are aware that some commentators have seen the court in **Antonissen** as having settled definitively that there is a six months' time limit after which a jobseeker ceases to be a worker. We think that goes too far: there is no specific timeframe. The court in **Antonissen** only settled that a member state is entitled to treat such a time limit as a being generally a reasonable one. Furthermore, it is clear that the court considers that what is a reasonable period will depend ultimately on the particular circumstances of the person concerned."*

22. In my judgement the evaluation of a *'reasonable period of time'* will generally necessitate inclusion of consideration of the particular circumstance of the concerned person's prospect of being engaged. There is an interrelationship between the concept of having a genuine chance of finding employment and the reasonableness of the period of time for which an individual is looking.

23. The appellant was in receipt of JSA in excess of five years. This is a considerable period. There is insufficient evidence to support the appellant's account of her search for work. It is not entirely clear why she was unsuccessful in securing employment over a period of five years; her explanation is lacking in detail and her claims are in any event unsupported. I find that the evidence is insufficient to support a conclusion that there was a realistic prospect of finding employment and that a reasonable period had not been surpassed or that the reasonable period extended throughout the period of searching. I conclude that the appellant has not established on the evidence that she was indeed a person with a genuine chance of being engaged relevant to the period in question.

24. Accordingly, I find in all the circumstances that the appellant has not established that she did not exceed a reasonable period in seeking employment or that there was a realistic chance of finding such employment during that search throughout the relevant period.

25. I find therefore that the appellant does not meet the essential requirements of regulation 6(1)(a) and 6(4). In reaching these conclusions I have borne in mind that the appellant found employment in October 2015, but this is not material given my findings above and, in any event, the appellant relies on her status as a jobseeker to meet the requirements of permanent residence. The fact that she is now working, as Mr Walker rightly submits, should be the subject of another application.

Notice of Decision

26. The decision of the First-tier Tribunal contained a material error of law and is set aside.

27. The appeal of the Secretary of State is allowed. I remake the decision dismissing the appellant's appeal under the EEA Regulations.

No anonymity order is sought or made.

Signed Date 20 January 2018

Deputy Upper Tribunal Judge Bagral