Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04796/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House (by remote video means)	**Decision & Reasons Promulgated**
On 26th July 2021	**On 17th August 2021**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

CHAIWAT BUPPASIRIKUL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr A Burrett of Counsel, instructed by Wick & Co Solicitors

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no audio or visual difficulties during the course of the hearing. A face to face hearing was not held to take precautions against the spread of Covid-19 and as all issues could be determined by remote means. The file contained all of the papers in hard copy.

2. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Taylor promulgated on 3 February 2020, in which Mr Buppasirikul's appeal against the decision to refuse his application for an EEA permanent residence card dated 30 August 2019 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Mr Buppasirikul as the Appellant and the Secretary of State as the Respondent.

3. The Appellant is a national of Thailand, born on 22 June 1987, who entered the United Kingdom with leave as a student on 6 May 2010 and having married an EEA national (the "Sponsor") on 16 September 2011, applied for and was then issued with an EEA Residence Card as her spouse on 8 December 2011. On 21 June 2019, the Appellant applied for an EEA Residence Card on the basis that he had acquired a permanent right to reside in the United Kingdom following the termination of his marriage (with divorce proceedings commencing on 11 May 2015 and a decree absolute issued on 7 September 2016).

4. The Respondent refused the application the basis that the Sponsor was not a qualified person as defined in the Immigration (European Economic Area) Regulations 2016 (the "EEA Regulations") at either the commencement or conclusion of divorce proceedings. The Sponsor was not employed, nor was she a jobseeker as her award of Jobseeker's Allowance ("JSA") had ended prior to the date of commencement of divorce proceedings and in any event she had exceeded the 91 day period for the same. The Sponsor's later receipt of Employment Support Allowance ("ESA") was not evidence that the Sponsor was exercising treaty rights in the United Kingdom.

5. Judge Taylor allowed the appeal in a decision promulgated on 3 February 2020. The First-tier Tribunal recorded that the only issue in the appeal was the status of the Sponsor at the date of divorce. It was found that the Sponsor was not a jobseeker at the relevant time, her JSA having ended prior to the commencement of divorce proceedings; had exceeded the time limit of 91 days and there was no evidence that the Sponsor was looking for work. There was no suggestion before the First-tier Tribunal that the Sponsor was a worker at the relevant time, nor even that she had retained worker status. The Tribunal went on to find as follows:

> *"11. The DWP records show that the sponsor was receiving benefits for the tax years ending April 2016 and April 2017, and the letter dated 14th June 2019 from the DWP confirms that she was receiving ESA from 25th June 2015 to date. On the basis of this evidence I am satisfied that the sponsor was receiving ESA very shortly after the application for the divorce and was still receiving ESA at the date of the decree absolute on 7th September 2016. … On the basis that the respondent has not raised an issue that the marriage was genuine and lasted for three years in accordance with the Regulations, I find that the sponsor has a history of working in the UK, which is supported by the HMRC statement. In order to qualify for benefits the*

sponsor must have shown that she had qualified status to remain in the UK. ESA is a benefit for people who are unable to work due to illness or injury, this Tribunal has not been told which level of the benefit the sponsor has received. On the basis that the sponsor has been on the benefit since June 2015, I am satisfied that the sponsor has been through an assessment process and been found to qualify for the benefit, both in terms of her status in the UK and the level of her disability. Depending on her level of disability she would either have to show that she was available for work related activity, or so severely disabled that she would be exempt.

12. Although the Tribunal may now consider the position as at the date of the application for divorce, the position remains that the Tribunal may consider the position as at the date of the decree absolute. I am satisfied that the sponsor was in receipt of ESA as at the date of the decree absolute, which demonstrates she had immigration status in the UK and would have been available for work but for her disability. No evidence was available as to the state of the sponsor's benefits for the period 6th May to 25th June 2015, but given the long term nature of the sponsor's receipt of benefits, I am satisfied that there was no material change of circumstances from the date of the application for divorce until the state of ESA a few weeks later."

6. Finally, the Tribunal noted that it is a matter for the Respondent whether the Sponsor had acquired permanent residence to decide on the basis of that information whether the Appellant qualified for permanent status or otherwise. It was further noted that in any event the Appellant is in a new relationship with a different EEA national and therefore has an alternative method of obtaining an EEA Residence Card in the United Kingdom.

The appeal

7. The Respondent appeals on the basis that the First-tier Tribunal misdirected itself in law, in particular in its approach to the Sponsor being in receipt of ESA. In the written grounds of appeal, it was stated that a person could only qualify under the EEA Regulations as someone who is temporarily unable to work if they are in receipt of income-related ESA, but there was no evidence before the First-tier Tribunal of which type of ESA the Sponsor was in receipt of and therefore a speculative finding was made. At the hearing, Ms Everrett was unable to explain further the significance of income-related ESA as opposed to contributions based ESA for the purposes of this type of appeal.

8. At the hearing, I raised a concern with the parties more broadly that the First-tier Tribunal did not appear to assess on what basis the Sponsor was a qualified person for the purposes of regulation 6 of the EEA Regulations, nor make any specific finding that she was such a person (apart from the finding that she was not a jobseeker and there was no suggestion that she was a worker either). Although not strictly within the detail of the

grounds, this was a *Robinson* obvious point. The issue goes beyond the question of which type of ESA the Sponsor was in receipt of, although that may still be relevant due to the different conditions applicable to each type of ESA.

9. Mr Burnett submitted that the Sponsor being in receipt of ESA showed as an initial first step that she was in the United Kingdom, but was unable to identify any basis upon which receipt of the benefit meant that the Sponsor was also a qualified person at the requisite time. In particular, if ESA was relied upon by the First-tier Tribunal as evidence of incapacity to work, that in itself would not be sufficient as that could only be relevant to whether a person retains status as a worker or self-employed person under regulations 5 or 6 of the EEA Regulations and on the facts of this case, there is no suggestion that the Sponsor was either.

10. The parties agreed that the failure of the First-tier Tribunal to identify the basis upon which the Sponsor was a qualified person at the relevant time was a material error of law such that the decision must be set aside and further, neither were able to identify any basis upon which an award of ESA (of either type) would demonstrate that a person was at that time a qualified person. In these circumstances, the parties further agreed that the appeal should be remade dismissing the appeal.

11. Mr Burnett raised one further concern that the Respondent had still not disclosed whether the Sponsor had acquired permanent residence in the United Kingdom which would be an alternative way in which the Appellant could satisfy the requirements for his own application.

Findings and reasons

12. For the reasons agreed by the parties, the First-tier Tribunal materially erred in law in failing to assess or make any clear finding that the Sponsor was, at the requisite time of divorce, a qualified person for the purposes of the EEA Regulations or a person with permanent residence as required for the Appellant's own application for a residence card under regulation 10 of the EEA Regulations.

13. As quoted above, in paragraph 11 of the decision, the First-tier Tribunal found that in order to qualify for benefits the Sponsor must have shown that she had qualified status to remain in the UK and ESA is for those who are unable to work due to illness or injury. As the Sponsor has been through an assessment process, she must have been found to qualify for the benefit in terms of her status in the UK and the level of her disability. Further, in paragraph 12, the First-tier Tribunal found that the Sponsor's receipt of ESA demonstrated that she had immigration status in the UK. The latter is not necessarily the same as being a qualified person or a person with permanent residence, but may be on the evidence.

14. The difficulty with these findings is that the basis for them is entirely unexplained by reference to the specific eligibility conditions for ESA or

otherwise, and has no regard to the different conditions applicable for the two different types of ESA in 2015. Social security benefits (including different components of the same benefit such as the two types of ESA) have different requirements in relation to residence, presence and immigration status and the parties have not been able to identify that the Sponsor was in receipt of a benefit for which she had to satisfy a condition that equated to her being a qualified person (or had permanent residence, but the appeal was not argued on that basis as there was no positive evidence that the Sponsor had acquired this).

15. The basis for the finding could not have come from the Appellant's case as put to the Tribunal, as that was that the disclosure from DWP indicating the Sponsor was in receipt of ESA showed that during this period she was a qualified person because ESA is paid to supplement an income, such that she must have been employed. The difficulty with that is that there was no evidence from HMRC or otherwise of any employment at the relevant time and that is contrary to the First-tier Tribunal's reference to the benefit being for those who are unable to work due to illness or injury, which has not been disputed by the parties at the hearing before me.

16. In these circumstances, and specifically without any evidence of the type of ESA that the Sponsor was in receipt or, nor identification of the relevant eligibility criteria for the same that would equate to her being a qualified person for the purposes of the EEA Regulations; the First-tier Tribunal erred in law in finding that receipt of one or other type of ESA was sufficient to find that the Sponsor had 'status' or 'immigration status' in the United Kingdom such that the Sponsor was residing in accordance with the requirements of the EEA Regulations at the time of divorce. The decision of the First-tier Tribunal must therefore be set aside and for essentially the same reasons, on the evidence that is available, the appeal must be dismissed.

17. There is possibly still an issue of whether the Sponsor had, at the requisite time of divorce, acquired permanent residence in the United Kingdom which is a matter which should be within the information that the Respondent holds if the Sponsor had made an application for the same from which a Residence Card was issued. However, it is not compulsory for any such application to have been made by the Sponsor and if no such application was made, the information which the Respondent holds may go no further than what was before the First-tier Tribunal in this appeal. On the basis of that information, it is difficult to see how it could be established that the Sponsor had exercised treaty rights continuously for the requisite five year period and there is nothing to suggest any such submission was made on this evidence to the First-tier Tribunal on behalf of the Appellant. Overall, this is a matter upon which the Respondent should satisfy herself on the basis of information held about the Sponsor outside of the strict confines of this appeal.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and re-make it as follows:

The appeal is dismissed under the Immigration (European Economic Area) Regulations 2016.

No anonymity direction is made.

Signed G Jackson Date 1st August 2021

Upper Tribunal Judge Jackson