



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/20687/2013

THE IMMIGRATION ACTS

Heard at Field House
On 18 June 2014

Determination Promulgated
On 4 July 2014

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MR DESMOND BOAKYE
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mrs H Gure of Counsel

For the respondent: Ms J Isherwood, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of the Ghana born on 4 August 1986. He appealed to the First-tier Tribunal against the decision of the respondent dated 17 May 2013 to refuse to issue him with a permanent residence card as an extended family member of an EEA national pursuant to regulation 15 (1) (b) of the Immigration (European Economic Area) Regulations 2006 (the '2006 Regulations') because he has failed to demonstrate that he has resided for a continuous period of five years in accordance with the 2006 Regulations. In a decision of 7 October 2011, First tier Judge P. J. G. White granted the appellant permission to appeal to the Upper Tribunal stating that it is arguable that the First-tier Tribunal Judge erred because he gave inadequate reasons for finding that the sponsor had not been in

continuous employment in the United Kingdom since 6 April 2009 given that at paragraph 5 and 6 of the determination, the Judge accepted that the sponsor had been earning an income in all the relevant tax years.

2. Thus the appeal came before me for hearing on 18 June 2014.

Findings of the first-tier Tribunal

3. The main issues in the proceedings before the First-tier Tribunal were whether the appellant's sister was a qualified person exercising her treaty rights continuously for five years in the United Kingdom due to a perceived gap in her employment. The Judge found that the evidence submitted in support of the appeal was very short on detail and nowhere in the sponsor's witness statement has the very substantial falling of income been explained. The sponsor in the course of oral evidence said that she has always worked since she arrived in the United Kingdom apart from one period between April 2010 and August 2010. This is reflected in the start dates given for the sources of income for the tax years ending in 5 April 2010 and 2011. The sponsor said that she was looking for work during this period. There is no evidence to support this claim. She confirmed also that the letter from HM Revenue and Customs contained an accurate summary of all work done. However, she said also the pay slips at pages 88 to 93 of the appellant's bundle would not be reflected in the summary, for reasons which she was unable to explain. The Judge concluded that in light of all the evidence, he was not satisfied that the appellant's EEA national sponsor had been in continuous employment from 6 April 2009 to date and accordingly found that the appellant does not satisfy the requirements of paragraph 15 (1) (b) of the 2006 Regulations.

The grounds of appeal

4. The appellant's grounds of appeal argue as follows. The refusal is against the weight of evidence as the Secretary of State ignored the sponsor's overall active employment from 2006-2012. The decision is not in accordance with the law as it ignores the appellant's continuous presence and employment throughout the relevant five years. The decision is an unlawful interference with the appellant and sponsor's family life. The decision is unlawful interference with the appellant's private life and the Tribunal is invited to allow this appeal.

The respondent's Rule 24 response

5. The respondent's response to the grounds of appeal state the following. The respondent opposes the appellant's appeal and will submit that the Judge of the First-tier Tribunal directed himself appropriately. The determination at paragraph 7 indicates that the evidence was "very short on detail". The Judge's findings that no explanation has been given in the sponsor's witness statement for the very substantial falling off in income in his findings finding in that regard were entirely open to the Judge to make. The Judge said that there was no evidence to support the claim that the appellant was looking for work and why the HM Revenue and Customs summary did not reflect the sponsor's payslips.

Error of law hearing

6. At the hearing I heard submissions from both parties as to whether there was an error of law in the determination. There was no dispute that the appellant and his sponsor have been in this country for at least five years as they have been here since 2007.
7. Miss Gure made the following submissions. The Judge fell into material error when he stated in his determination that the appellant has not provided evidence that she has been working continuously "from 6 April 2009 to date". The appellant does not have to prove that she has been in employment to date but only for the five years. As the Secretary of State was not represented at the hearing before the first-Tier Tribunal, there was no cross examination of the sponsor and therefore no credibility issues were raised so therefore the Judge should have accepted the sponsor's evidence. The sponsor was not in employment for four months and she explained in her statement she was looking for work. That in itself does not disqualify her from being treated as a worker in accordance with the 2006 Regulations.
8. Miss Isherwood in her submissions stated the following which I summarise. There is no material error of law in the determination. Paragraph 8 of the determination acknowledges the period of time that has to be covered. The Judge was aware of the respondent's position even if there was no cross examination at the hearing of the First-tier Tribunal. The Judge did not have to accept the sponsor's evidence. There is a shortfall in income for which no explanation has been given.
9. Miss Gure in reply said that the Judge referred to pages 88-93 of the appellant's bundle of documents which was not in the summary of the tax and revenue letter. It was not up to the sponsor to explain why the Inland Revenue did not put this evidence into their summary. The Judge did not consider the further evidence provided at the hearing which was a letter from the Inland Revenue stating the appellant's earnings. The gap of four months has been explained by the sponsor which is that she was looking for work.

Error of law decision

10. I find that there is an error of law in the determination of Judge White in relation to the application of the 2006 Regulations. The Judge did not give clear reasons for why he dismissed the appellant's appeal. He appears to make contradictory findings as to whether the appellant sponsor was in full-time employment for five years. He also said at paragraph 8 that the appellant sponsor has not been in continuous employment "from 6 April 2009 to date". The respondent's case was that the sponsor ceased to be a qualified person from July 2009 until September 2010 a gap of some 14 months and there was no suggestion that she is not currently employed.

11. As I have found an error of law, it was agreed between the parties that the appeal be reheard by way of submission.

Rehearing of appeal by way of submissions

12. It was agreed between the parties that the issues in the rehearing were whether the appellant's EEA national family member remained a qualified person in accordance with the 2006 Regulations in the gap of employment in this country. There was no dispute that the appellant sponsor is currently working in this country and exercising her treaty rights. I also take into account that I have to consider evidence as of the date of the hearing.
13. Miss Gure and Miss Isherwood however disagreed as to how long this gap consisted of. Miss Gure said that the gap was only for four months while Miss Isherwood said that the gap in employment was from July 2009 until September 2010 a gap of some 14 months.
14. Miss Gure made the following submissions. The appellant has provided sufficient evidence from the HM Revenue and Customs which states that she has been in employment every year since she has been in this country. The refusal letter gives the gap from 2009-2011. The first page of the HM Revenue and Customs summary letter for the appellant's income states that the appellant has worked from April 2008 until April 2010.
15. The appellant's explanation for why she could not work from August 2010-September 2010 was that she was employed at the Commercial Limited although it does not show the end date of the employment. The evidence from HM Revenue and Customs shows that the sponsor was in employment. The sponsor's witness statement explained at paragraph 2 that the sponsor worked for an agency from October 2010 until March 2011. The documents which were submitted to the respondent did not include evidence HM Revenue and Customs which the Judge has ignored.
16. Miss Isherwood said that I should dismiss the appeal HM Revenue and Customs documents show that there is a gap from April 2009 until August 2010 which is for about 13 months. The appellant's income dropped to £430.10 and applying the case of **Begum** this cannot be considered to be genuine economic activity because it is at such a small scale and marginal. Therefore the appellant was not a worker when she was earning this minimum amount. The sponsor's witness statement is of extremely limited value as she does not explain why she ceased working. There is no evidence to support the sponsor's evidence that she was looking for work and therefore does not satisfy regulation 6 (2) of the 2006 regulations. All the sponsor says is that she is looking for employment but the gap was for more than six months and therefore she ceased to be a qualified person because there was a break in the five years continuous residence as a qualified worker.
17. Miss Gure in reply stated the following. The sponsor was working from 2012 and 2013 and therefore the refusal letter with states that sponsor has to leave the

country as he has no basis to remain is incorrect. Miss Isherwood is only referring to the income from one job which started on 13 September and which does not show an end date. The sponsor gave an explanation that she worked for an agency which is not reflected in the HM Revenue and Customs summary of her employment. The appellant sponsor has a history of working and has explained her true position. The last job which she was earning £30,000 was discontinued and that is why she was looking for additional work and was earning a low income.

Findings

18. The relevant provisions of the 2006 Regulations are the following:

"Permanent right of residence

15. - (1) The following persons shall acquire the right to reside in the United Kingdom permanently -

- (a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;
- (b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;
- (c) a worker or self-employed person who has ceased activity a worker or self-employed person who has ceased activity;
- (d) is the family member of a worker or self-employed person;
- (e) a person who was the family member of a worker or self-employed where-
 - (worker or self-employed person has died;
 - (ii) the family member resided with him immediately before his death; and
 - (iii) the worker or self-employed person had resided continuously in the United Kingdom for at least the two years immediately before his death or the death was the result of an accident at work or an occupational disease;
- (f) a person who -

- (i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and
 - (ii) was, at the end of that period, a family member who has retained the right of residence.
- (2) Once acquired, the right of permanent residence under this regulation shall be lost only through absence from the United Kingdom for a period exceeding two consecutive years.
- (3) But this regulation is subject to regulation 19(3)(b).

19. Regulation 6 sets out who is a 'qualified person' for the purposes of the 2006 Regulations. It states:

6. (1) In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as

- (a) a jobseeker;
- (b) a worker;
- (c) a self-employed person;
- (d) a self-sufficient person; or
- (e) a student.

(2) A person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if:

(a) he is temporarily unable to work as the result of an illness or accident;

(b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom, provided that he has registered as a jobseeker with the relevant employment office and

(i) he was employed for one year or more before becoming unemployed;

(ii) he has been unemployed for no more than six months; or

(iii) he can provide evidence that he is seeking employment in the United Kingdom and has a genuine chance of being engaged;

(c) he is involuntarily unemployed and has embarked on vocational training; or

(d) he has voluntarily ceased working and embarked on vocational training that is related to his previous employment.

(3) A person who is no longer in self-employment shall not cease to be treated as a self employed person for the purpose of paragraph (1)(c) if he is temporarily unable to pursue his activity as a self-employed person as the result of an illness or accident.

(4) For the purpose of paragraph (1)(a), "jobseeker" means a person who enters the United Kingdom in order to seek employment and can provide evidence that he is seeking employment and has a genuine chance of being engaged.

20. There is no dispute as to the following facts. The appellant's sponsor is a national of Netherlands and came to this country in 2007 and was exercising her treaty rights as a worker. The respondent granted the appellant leave to remain as the family member of his sister, an EEA national in accordance with the 2006 regulations. There is no issue between the parties that the appellant has been physically present in the United Kingdom for five years.
21. Regulation 15 states that the appellant can only be granted permanent residence if he can demonstrate that his EEA national sponsor has been exercising treaty rights in the United Kingdom for a continuous period of five years whilst being employed in the United Kingdom.
22. The respondent's case is that there is a gap in the sponsor's employment from 6 April 2009-5 April 2011 and therefore she has not demonstrated that his sponsor was exercising treaty rights as a qualified person during this period. The respondent was also concerned the appellant's sponsor's P45 dated 6 September 2010 indicates she was earning £430.10 for the 2011 tax year and these small earnings do not reflect continuous employment for 12 months from 6 April 2010 to 5 April 2011.
23. I will first decide whether the sponsor has continuously been in employment in the United Kingdom. The sponsor in her witness statement states that her old employment with Sodexo stopped on 13 May 2009. She claims that she continued to work part time at Temple Security until 15 April 2010. She claims that she continued to look for work and had a temporary job in August 2010 until 6 September 2010. She claims that she also did agency work from October 2010 until March 2011 with Nature Care Ltd. She states that the only gaps in her employment was for about three months after she stopped working with Temple Security between April 2010 and August 2010.
24. I have considered the letter from HM Revenue and Customs dated 14 November 2013 setting out the sponsor's employment history. The sponsor worked at Temple Security Ltd from 6 April 2008 2/5 of April 2010. She worked for Industrial Cleaning UK Ltd from 25 February 2008 to 8 May 2008. She worked for

as Odexo Ltd from 13 May 2009 to 13 May 2009. She worked for GSS Support Services Ltd from 23 August 2010 to 6 September 2010. She worked for Servest from 1 of the September 2011 and no end date is given but she was still working for that company in the tax year ending 5 April 2013. She worked for Comprehensive Cleaning Services Leisure Ltd from 5 March 2012 to 5 October 2012. There is therefore a gap between because 5 April 2010 and 23 August 2010 which is four months gap. There is also a gap from 6 September 2010 to 1 September 2011 which is a gap of about one year for which there is no credible explanation. The sponsor said that she continued to work part time but the letter from HM revenue and Customs states that they have no taxable income for the sponsor as a self-employed individual.

25. I find that the appellant has not demonstrated that his sponsor has continuously been in employment for five years and as such was a worker in accordance with the 2006 Regulations for the full five years that she has been in this country.
26. For the tax year ending 5 April 2011 the sponsor worked from 23 August 2010 until 6 September 2010 and earned £430 for the tax year. The a sponsor's P 45 dated 6 September 2010 shows her earnings were £430.10 for a 12 month period.
27. I take into account the case of **Begum (EEA worker- jobseeker) Pakistan [2011] UKUT 275 (IAC)** referred to me by the respondent. It states in the headnote the following. (1) "When deciding whether an EEA national is a worker for the purposes of the EEA regulations regard must be had to the fact that the term has a meaning in EU law, that it must be interpreted broadly and that it is not conditioned by the type of employment or the amount of income derived. But a person who does not pursue effective in genuine activities, or pursue activities on such a small scale as to be regarded as purely marginal and ancillary or which have no economic value to an employer, is not a worker. In this context, regard must be given to the nature of the employment relationship and the rights and duties of the person concerned to decide if work activities are effective and genuine. (2) When considering whether an EEA national is a jobseeker for the purposes of EU law, regard must be had to whether the person entered the United Kingdom to seek employment and, if so, whether that person can provide evidence that they have a genuine chance of being engaged. If a person does not or cannot provide relevant evidence, then an appeal is bound to fail on this ground.
28. The case further stated paragraph 23 "EU law provides for jobseekers into two distinct situations. Provisions have been made in relation to union citizens moved to another member state to look for work but who have never worked in the host Member State. The other provisions related to union citizens who are seeking work after previously working in the Host Member state. It states that the provision relating to union citizens in the second category, are much more robust than those in the former since the second situation, union citizens will often retain their right of residence already secured. The strength of these provisions can be seen by examining article 7 (3) (b) and (c) of the Citizens Directive (2004/38/EC) as discussed by the Court of Appeal in **Tilianu v Secretary of State for work and pensions [2010] EWCA Civ 1397**.

29. The appellant in this case falls within the second category as his sponsor is a union citizen who has previously worked in the Host Member State and therefore the appellant has to demonstrate that the EEA national on whom his application is dependent, has been economically active in the United Kingdom for the full five year period.
30. I find that the appellant economic activity was on such a small scale as to be regarded as purely marginal and ancillary and which had no economic value to an employer. She has also not demonstrated effective and genuine activities during this period. I find that the appellant was not a worker according to the 2006 Regulations when she earned £430 for the full tax year ended 5 April 2011 as she only worked from 23 August 2010 until 6 September 2010 and earned £430.
31. The appellant claims that the sponsor was looking for work during this period. She has however not demonstrated by cogent evidence that she was looking for work during the periods she was not working or working at very low wage.
32. I find that considering all the evidence in the round, I find that the appellant has not demonstrated, on a balance of probabilities, that he is entitled to a right of permanent residence in the United Kingdom as an extended EEA family member of a Qualified person under Regulation 6 and 15(1)(b) of the 2006 Regulations.

DECISION

I dismiss the appeal under the 2006 Regulations.

Signed by, a Deputy Judge of the Upper Tribunal

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Dated this 1st day of July 2014

Mrs S Chana