IAC-AH- -V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07665/2014

THE IMMIGRATION ACTS

Heard at FIELD HOUSE	**Decision & Reasons Promulgated**
On 27 JANUARY 2015	**On 11 FEBRUARY 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL
MS GA BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

APPELLANT

And

MR RAPHAEL OKHAI OFORI
(ANONYMITY DIRECTION NOT MADE)

CLAIMANT

Representation:
For the Appellant: Mr E Tufan (Home Office Presenting Officer)
For the Respondent: Mr F Habtemariam (Legal representative)

DECISION AND REASONS

1. For ease of reference I shall refer to the parties as the "Secretary of State" who is the Appellant in these proceedings and to the Respondent as the "Claimant". This is the Secretary of State's appeal against a decision by the First-tier Tribunal (Judge S Taylor) who allowed the Claimant's appeal for confirmation of a right of residence as the family member of an EEA citizen exercising Treaty Rights in the UK, pursuant to

Regulation 15 Immigration (EEA) Regulations 2006 ("EEA Regs"). The decision was promulgated on 5th November 2014.

2. The definition of a "qualified person" is found in reg 6. In terms of reg 6(1) a "qualified person" means a person who is an EEA national and in the United Kingdom as –

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

Regulation 6(2) sets out circumstances in which a person who is no longer working does not cease to be treated as a worker for the purpose of reg 6(1)(b). These circumstances include, at reg 6(2)(a), that the person "is temporarily unable to work as the result of an illness or accident".

Regulation 15(1)(c) refers to a permanent right of residence being acquired by a worker or self-employed person who has ceased activity. This term is defined in reg 5, which includes at reg 5(3) the following definition of a worker or self-employed person who has ceased activity:

"(3) A person satisfies the conditions in this paragraph if –
(a) he terminates his activities in the United Kingdom as a worker or self-employed person as a result of permanent incapacity to work; and
(b) either –
(i) he resided in the United Kingdom continuously for more than two years prior to the termination; or
(ii) the incapacity is the result of an accident at work or an occupational disease that entitles him to a pension payable in full or in part by an institution in the United Kingdom."

Background

3. The Claimant is a citizen of Nigeria and his date of birth is 1st December 1974. He is married to an EEA Polish wife and they have three children aged 5, 3 and a young baby. She has a history of suffering from a medical condition whereby there is a risk of miscarriage at a late stage of pregnancy. She was also diagnosed with a serious liver disease. The Sponsor worked for two years in the UK until she became pregnant with their second child, a son born on 5th June 2010. She went on maternity leave in March 2010 to which she was entitled until March 2011. Thereafter she remained out of work because of illness, and claimed Jobseekers allowance from October 2011 until April 2012. She then became pregnant again and gave birth to their third child on 5th January 2014. This was followed by a period of further illness. There was evidence of the sponsor having attended two job interviews in 2012. There was evidence of a letter dated 8th October 2014 to show she was registered at the job centre.

4. In a reasons for refusal letter it was accepted that the Sponsor was an EEA citizen and that she was a worker from 2008 – 2010. Reference was made to Regulation 6(2) EEA Regs. which defines persons no longer working but who retain the status of a worker, which includes job seekers and persons temporarily incapacitated. It was not accepted that she was a qualified person as either a worker or a job seeker. It was not accepted that the sponsor was seeking work whilst also claiming that she was temporarily incapacitated from illness.

5. The Secretary of State sought evidence of qualification as a worker from March 2010 and from October 2011. The refusal letter acknowledged that a claim for Jobseeker allowance was made in October 2011 and expected evidence of being a job seeker since that date. The Secretary of State did not accept the letter of interview as evidence of actively seeking work, under the Regulations relevant to jobseekers.

6. At the hearing before the First-tier Tribunal neither the Claimant nor the Secretary of State were represented. The Claimant and his wife attended in person. The Tribunal found that the Claimants' wife (the sponsor) was a qualified person as a worker having retained that status either as a person who was unable to work as she was incapacitated under Regulation 5(3) Immigration EEA Regulations 2006 or in the alternative she was a job seeker. The Tribunal concluded that the sponsor was living in the UK for a continuous period of 5 years as a qualified person. The Tribunal found that the sponsor was employed from 2008 – 2010. It further found that, "It was then accepted, on further evidence that the sponsor could be treated as a worker until October 2011."[12] It found that she was exercising Treaty rights from May 2008 until October 2011 and there after was a job seeker until April 2012. The Tribunal found that there was a further period of illness, a miscarriage and birth of a child in January 2014, and that the sponsor was registered for work in late 2014. The Tribunal found no inconsistency in the claim that the sponsor was incapacitated by reason of ill heath and yet she was available for work, albeit not all forms of employment.

Grounds

7. The Secretary of State argued that the Tribunal erred by concluding that the Claimant met Regulation 5(3) EEA Regs. as there was no evidence that the Claimant was permanently incapacitated. Further it was unclear how the Tribunal calculated its alternative conclusion that the Sponsor was a worker/jobseeker between 2010 -2014. The Tribunal did not engage with whether or not the sponsor had a genuine chance of being engaged for work.

Permission to appeal

8. First-tier Tribunal Judge Saffer granted permission for the "reasons identified in the grounds of appeal".

Error of law hearing

9. Mr Tufan expanded on the grounds and submitted that there was no finding of permanent incapacity as required in Regulation 5(3). There were inadequate reasons for finding that the sponsor had established status as a qualified person from 2010-2014[12]. The evidence of the two letters of interview were inadequate to meet the requirements in Regulation 6.

10. Mr Habtemariam responded that the Tribunal found evidence that the Sponsor had covered the period from May 2008 – October 2011 when she was a worker and on maternity leave. In the alternative there was no challenge to the finding that the sponsor was a job seeker from October 2011 until April 2012. Further the Tribunal's finding that it was possible to be incapacitated for some but not all types of work was a finding that was open to it to make.

Discussion and decision

11. It was common ground that the parties were married and that the Claimant was granted a residence card in May 2008 and that he had been employed in the UK throughout. The issue was whether the Claimant could show that his wife was a qualified person exercising Treaty Rights for a continuous period of 5 years from May 2008. The Tribunal found, and it was not challenged in the grounds, that four years had been established by the sponsor, as a worker and/or a jobseeker. The material facts were that she was employed from May 2008 and in March 2010 she went on maternity leave to which she was entitled until March 2011. Their son was born on 5th June 2010. She was then awarded Jobseekers allowance from October 2011 until April 2012. She became pregnant again in April 2012 and was unable to work because of pregnancy and illness. There followed a further claim for jobseekers allowance and the sponsor produced two letters of interview for jobs. She had another child in January 2014 and thereafter claimed job seekers allowance. The Claimant adduced medical evidence that the sponsor suffered medical difficulties leading to risk of late miscarriage and that she also suffered from Hepatitis B, which was not challenged before the Tribunal. At the hearing before me the Claimant produced a letter offering the sponsor a job.

12. At the error of law hearing before me both representatives focused their submissions on the issue raised in the grounds with reference to Regulation 5(3), it being argued that that the Tribunal erred in failing to make a finding as to "permanent" incapacity. Having further considered the material and with particular reference to the reasons for refusal letter dated 22 January 2014, it is clear to me that the Secretary of State considered and applied Regulation 6(2) and not Regulation 5(3). Accordingly I am satisfied that arguments pursued at the initial hearing were based on a misunderstanding of an error on the part of the Tribunal in referring to Regulation 5(3) rather than Regulation 6(2). That does not mean that there was no error but that the grounds followed on from the Tribunal's reference to the wrong Regulation. As such the grounds pursued are not made out as the relevant Regulation required no consideration of permanent incapacity

13. Regulation 5(3) requires that the incapacity to work is permanent. There was no evidence before the Tribunal that the incapacity was permanent and indeed no finding was made to that effect. Regulation 6(2) is worded in terms of.. " he is temporarily unable to work as a result of illness or accident". This is the regulation that was considered in the refusal letter. As a consequence I find that there was an error of law by the Tribunal in deciding the appeal with reference to the wrong regulation. I now consider if that error was a material error of law.

14. The Tribunal found that the sponsor was incapacitated for work by reason of illness associated with liver disease and pregnancy. Regulation 6 provides no period of time for a person to have ceased activity on a temporary basis. Whilst the Tribunal acknowledged that the sponsor's GP was not asked if the incapacity was permanent or temporary, it nonetheless found that she was incapacitated since 2010 because of liver condition and her pregnancy related condition. I am satisfied that this was a finding that the Tribunal was entitled to make on the objective evidence and also having regard to the actual state of affairs which existed.

15. I find no inconsistency in the finding made by the Tribunal that on the one hand the sponsor was incapacitated for work and on the other was available and seeking work and in receipt of Jobseekers allowance. The Tribunal acknowledged that the sponsor's condition was such that she would not be able to do all forms of employment because of her illnesses but that she was a jobseeker who had been awarded Job seekers allowance. She was seeking work of a type that she was able to do given the restrictions imposed by her health difficulties. The Tribunal decided that the reality of her situation objectively was that she was incapacitated from work. [12] In my view it needed to have gone no further given its findings amounted to an acceptance that that there was a realistic prospect of the sponsor being able to return to some form of work and remain engaged with the labour market.

16. As to the alternative position adopted by the Tribunal, I am equally satisfied that the finding that she was a job seeker during the year 2011-2012 and thereafter, was sustainable. Clearly she was in receipt of jobseekers allowance in excess of the 6 month limitation, but the Tribunal found that she was actively seeking work (Regulation 6(2)(b) with reference to Condition B) and had a genuine chance of employment, as evidenced by the two letters of interview. The Secretary of States objection to this amounts simply to a disagreement with that finding and has no merit as a ground of appeal.

17. Overall I am satisfied that the approach adopted by the Tribunal was entirely in keeping with a purposive interpretation of Regulation 6 which is intended to reflect the UK's obligations to be performed under the Workers Residence Directive 2004 with reference to Articles 16 and 17, and as decided in **FMB (EEA Reg.6(2)(a) temporarily unable to work) Uganda [2012] UKUT 447 IAC**. Further it is compatible with the anti discriminatory approach in EEA law, where a woman is deemed temporarily unable to work because of the late stages of pregnancy she retains the status of a worker until such time as it was reasonable to return to work. Although

there was an error of law by reference to Regulation 5(3), it was not material as the findings of the Tribunal are such that Regulation 6(2) is met.

Notice of Decision

I find no material error of law in the determination. The decision shall stand save that I substitute the decision made allowing the appeal under Regulation 6(2)(a) of the Immigration EEA Regulations 2006.

No anonymity direction is made.

Signed Date 3.2.2015

Judge GA Black
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a partial fee award of £ 50.00. Some further consideration of evidence was required at the Tribunal.

Signed Date 3.2.2015

Judge GA BLACK
Deputy Judge of the Upper Tribunal