IAC-AH-LR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31774/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd August 2015	**On 17th August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR CHINENYE JAMES OBIOHA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Islam (Counsel)
For the Respondent: Mr N Bramble (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge N M K Lawrence, promulgated on 12th February 2015, following a hearing at Hatton Cross on 30th January 2015. In the determination, the judge dismissed the appeal of Chinenye James Obioha. The Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male. He is a citizen of Nigeria. He was born on 19th March 1978. He applied on 3rd June 2014 for a permanent residence card under Regulation 15 of the Immigration (European Economic Area) Regulations 2006. The basis of his claim is his relationship with his claimed spouse, namely, Mrs Caroline Cairns, who is an Irish national, and who claims to be exercising treaty rights in the UK. The judge observed that, "in support of the application the Appellant provided Mrs Cairns' payslips from 2009 to 2011. On the evidence submitted, the Respondent was not satisfied that Mrs Cairns is exercising treaty rights in the UK. The application was refused" (at paragraph 1).

The Appellant's Claim

3. The Appellant's claim is that his sponsoring wife, Mrs Cairns, is no longer working in the UK. It is said that, "she is an alcoholic and has been granted Personal Indemnity Payment since September 2013 until 5th November 2019. She also suffers from depression". (See paragraph 5 of the determination). This has naturally meant that she has been unable to work continuously since coming to the UK.

The Judge's Findings

4. The judge had expressed regard to Regulation 5 of the 2006 Regulations and quoted it by observing that, as far as the Appellant was concerned, "she has ceased activity in the UK as a worker, 'as a result of a permanent incapacity to work and either … she resided in the UK continuously for more than two years prior to termination or the incapacity is the result of an accident at work …'" (see paragraph 5 of the determination).

5. Before the judge, the Home Office Presenting Officer, Mr Grennan, submitted that

> "… alcoholism is self-induced and cannot amount to incapacity. … even if it does amount to incapacity for the purposes of Regulation 5, the second point raised by Mr Grennan is that there is no evidence that incapacity due to alcoholism is 'permanent'. Similarly, there is no evidence before me that the depression suffered by Mrs Cairns is permanent." (See paragraph 6 of the determination).

6. The judge went on to hold that in the instant case, "Mrs Cairns' termination of work is due to her alcoholism and not due to any work-related accident". He explained that she had been in the UK for more than two years. The judge had before him medical evidence from the East London NHS Foundation Trust that Mrs Cairns was being treated for depression and alcoholism.

7. The judge went on to note, that, "however, there is nothing to indicate that either condition is 'permanent '. Consequently, I find that Regulation 5 of the 2006 (sic) is not engaged" (see paragraph 7). The appeal was dismissed.

Grounds of Application

8. The Grounds of Appeal state that the judge erred fundamentally in failing to have regard to Regulation 6(2) of the 2006 Regulations because if it was the case that the Appellant's spouse was only temporarily incapacitated then under that provision the appeal could have been allowed. This was important because the Appellant's case was that his EEA national had been exercising treaty rights as a qualified wife from 2009 to 2011 for a full two years. She had only ceased work due to anxiety and depression, and partly alcoholism. During this time she had remained a qualified person and was in receipt of benefit.

9. On 23rd June 2015, permission to appeal was granted by the Upper Tribunal on the basis that, whilst it was open to the judge to reach the conclusion that the Appellant could not demonstrate the permanent incapacity of his spouse, the issue in relation as to whether she had ceased work as a result of temporary incapacity to work, and whether there was a break in the continuity of residence, was an issue that was not dealt with and it was one that was required to be resolved on the evidence, both documentary and oral.

10. On 1st July 2015, a Rule 24 response was entered by the Respondent Secretary of State on the basis that the Record of Proceedings needed to be analysed because this would show whether the EEA Sponsor had ceased work as a result of temporary incapacity to work and whether there was a break in the continuity of residence. The judge's determination was silent on this issue. Reference was made also to the case of **FMB (EEA reg 6(2)(a) – "temporarily unable to work" Uganda [2010] UKUT 447**.

Submissions

11. In his submissions before me Mr Islam, appearing on behalf of the Appellant, submitted that since the judge had plainly accepted himself that, "similarly, there is no evidence before me that the depression suffered by Mrs Cairns is permanent" (see paragraph 6 of the determination), this must mean that her depression was temporary. If so, then Regulation 6(2) plainly applied. If it applied, then the appeal stood to be allowed. The judge had erred in failing to allow the appeal. In fact, the judge had failed in not even considering Regulation 6.

12. For his part, Mr Bramble submitted that, whilst it was accepted that the determination was poorly crafted, it was important to give consideration as to whether the Appellant's sponsoring wife, Mrs Cairns, had actually been working as an EEA national as required for the purposes of the Regulations, because without that being made clear, no question would arise as to whether the Sponsor was incapacitated on a only temporary, as opposed to a permanent, basis. Unfortunately, submitted Mr Bramble, he

did not have the previous Presenting Officer's notes, and the bundle did not make this clear. Mr Islam interrupted to say that he also was unable to help in this respect.

13. Second, submitted Mr Bramble, one had to consider whether Counsel for the Appellant actually did present evidence in relation to the employment history of the sponsoring spouse. If this evidence was not presented, then again there was no question as to the capacity in which the Sponsor was unwell, whether temporary or permanent.

Error of Law

14. I am satisfied that the making of the decision by the judge involved a making of an error on a point of law (see Section 12(1) of TCEA [2007] such that I should set aside the decision and remake the decision (see Section 12(2) of TCEA [2007]). My reasons are as follows.

15. First, the Appellant's bundle shows (at page 51) that the evidence before the judge included three P60s for 2010, 2011, and 2013. Furthermore, there were wage slips between 27th December 2008 and 19th September 2011. Indeed, the judge at the outset makes it clear that the evidence relied upon by Mrs Cairns included payslips from 2009 to 2011 (see paragraph 11).

16. Second, this therefore raises the question as to whether the spouse was permanently incapacitated. The judge observed that, "there is no evidence before me that the depression suffered by Mrs Cairns is permanent" (paragraph 6). If this is the case, then the natural inference is that the depression was temporary.

17. There is a distinction between a worker who is temporarily unable to work as a result of illness or accident, and remains a worker under Regulation 6(2)(a), and a worker who has ceased activity because of permanent incapacity to work in terms of Regulation 5(3)(a). A worker who is temporarily unable to work remains a qualified person under Regulation 6.

18. However, a person who terminates his activity as a worker as a result of permanent incapacity to work is not a qualified person under Regulation 6. Such a person may be a worker who has ceased activity under Regulation 5(3) provided the conditions in that regard are satisfied. If those conditions are satisfied then the worker who has ceased activity will require a permanent right of residence under Regulation 15(1)(c).

19. The judge in the circumstances, should have given specific consideration to Regulation 6, which describes a "qualified person" as a "worker". Under Regulation 6(2)(a) the person "is temporarily unable to work as a result of an illness or accident" is still a worker.

20. In the case of **FMB (EEA reg 6(2)(a) – "temporarily unable to work") Uganda [2010] UKUT 447,** the Tribunal made it clear that,

> "… we consider that there is considerable merit in the argument advanced on behalf of the claimant as to the meaning of the word 'temporary' and 'permanent', in the sense that if a person's inability or incapacity is not permanent, then it should be regarded as temporary" (see paragraph 23).

The judge's failure to consider this incapacity as temporary is an error of law because it would have gone directly to the application of Regulation 6(2).

Remaking the Decision

21. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the following reasons. Given what I have said above, namely, the existence of evidence before the judge in the Appellant's bundle, it is clear that Regulation 6(2) ought to have been considered and that the Appellant stood the chance of being described as a "worker". There is evidence before me now, indeed, in the latest bundle of the Appellant dated 28th July 2015, that shows that there is an offer of employment from "Safer Care Community Services" dated 1st June 2015, whereby the Sponsor is to work as a care assistant on a zero contract basis, and this evidence has to be taken in conjunction with the evidence already before the First-tier Tribunal, namely, of a period of work amounting to more than two years since 2008, by the sponsoring wife in this case. The Appellant, accordingly, succeeds in this appeal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 12th August 2015