Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01230/2015

THE IMMIGRATION ACTS

Heard at: Birmingham Civil Justice Centre
On: 22nd February 2019

Decision & Reasons Promulgated
On: 21st March 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

EDGAR [A]
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: **Ms D. Dhaliwal, Counsel instructed by direct access**
For the Respondent: **Mrs H. Aboni, Senior Home Office Presenting Officer**

DECISION and REASONS

1. The Appellant is a national of Nigeria born on the 15th November 1798. He appeals with permission the decision of the First-tier Tribunal (Judge Young-Harry) to dismiss his appeal under the Immigration (European Economic Area) Regulations 2006[1].

[1] The application was lodged on the 10th April 2015 and it is not therefore in dispute that these were the applicable Regulations

2. It was the Appellant's case before the First-tier Tribunal that he qualified for a resident's permit pursuant to Regulation 15:

> **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;
>
> (d) the family member of a worker or self-employed person who has ceased activity;
>
> (e) a person who was the family member of a worker or self-employed person where—
>
> (i) the 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).

3. Before the Tribunal the Appellant provided the following chronology in respect of his wife VA:

31st December 2007	The couple entered the United Kingdom from EIRE and VA commenced looking for employment
14th January 2008	VA is employed by Kelly Services, this being accepted by the Respondent at the time who had issued VA a

	Registration Certificate[2] as a result
1st August 2008	VA starts work for Birmingham City Council
12th September 2009	The Appellant and VA are married
27th September 2011	Couple's son born
March 2012	VA ceases working for Birmingham City Council
April 2012	VA engaged in working for the Appellant's business (book-keeping and office management)
17th January 2013	VA claims jobseekers allowance
22nd July 2015	Couple's daughter born
June 2017	The relationship came to an end
12th July 2017	The divorce petition was filed
10th December 2017	The decree absolute was granted

4. The determination begins by identifying the matter in issue between the parties. The Respondent had refused to recognise that the Appellant had any retained right of residence on the grounds that it had not been shown that VA was employed between 2013 and 2014. If she was not then a qualifying person, the Appellant could not meet the requirement of Regulation 15 (1)(b) that his EEA spouse had been residing "in accordance with the Regulations". The First-tier Tribunal accepted this analysis, finding as fact that the Appellant had failed to demonstrate that his wife had been in continuous employment for a five-year period. If the five-year period was, as identified at the hearing, from 2008 to 2013, it could not be shown that she had been in employment after she left Birmingham City Council in March 2012. The Tribunal further found several inconsistencies in the Appellant's evidence and as a result rejected his evidence that during 2012-13 his wife had been working in the family business as a book-keeper/ accountant. The appeal was thereby dismissed.

5. Permission was granted in limited terms by First-tier Tribunal Judge Dineen on the 5th April 2018. Judge Dineen considered it arguable that the inconsistencies identified by Judge Young-Harry were based on a misunderstanding of the evidence. Upon renewed application Upper Tribunal Judge Kekic granted permission to appeal in respect of the remaining grounds on the 16th August 2018: she considered it arguable that the First-tier Tribunal had erred in failing to precisely identify the start and end point of the five-year period. Permission was also granted on a legal interpretation point arising from the operation of transitional provisions, to which I return below.

[2] Accession State Worker Registration Scheme Registration Certificate issued on the 3rd March 2008

6. The grounds contend that the Appellant could rely on two alternative periods of 'five years continual residence' to make good his claim under the Regulations.

7. The first was the 14th January 2008 to the 14th January 2013. The grounds complain that the determination failed to identify those specific dates, and so its assessment of the facts must be flawed. Before me Ms Dhaliwal conceded that this period could not in fact be relied upon, since the Appellant and his wife were not married until the 12th September 2009. There was no evidence before the Tribunal to indicate that prior to that date he had been granted a residence permit as an "extended family member". The Secretary of State had not therefore exercised his discretion to treat him as a 'family member' during that period and so it could not be counted towards the five years required by Regulation 15(1)(b): Macastena v Secretary of State for the Home Department [2018] EWCA Civ 1558. Ground 1 was therefore abandoned on that basis.

8. The alternative five-year period ran from the date of marriage, on the 12th September 2009, to the 12th September 2014. The evidence in respect of this period demonstrated that VA was employed from the outset by Birmingham City Council. She left that job in March 2012. In January 2013 she started claiming Job Seekers Allowance; this ended in July 2013. It will be observed that this five-year period contains two significant gaps: from March 2012 to January 2013, and from July 2013 to September 2014.

9. Ms Dhaliwal had, before the First-tier Tribunal, made a specific submission about the relevance of those gaps, which the determination neither acknowledges or resolves. Before me she accepted that this omission would only amount to an error of law if her submission was correct.

10. The provision relied upon by Ms Dhaliwal is to be found in Schedule 3 to the Immigration (European Economic Area) (Amendment) (No 2) Regulations 2013/3032. It is important, she submits, because it goes some way to meeting the Respondent's concern that VA was unemployed for more than 6 months during the qualifying period. Ms Dhaliwal submits that the effect of the provision is that any period of unemployment prior to the commencement date identified in the Amendment Regulations – the 7th April 2014 – is to be disregarded for the purpose of calculating whether her five years continual residence was "in accordance with the Regulations". Paragraph 1 of Schedule 3 reads:

> '**1.** For the purposes of paragraph 3(b) to (e) of Schedule 1—
>
> (a) any period of employment in the United Kingdom before the coming into force of these Regulations is to be treated as a period of employment under regulation 6 of the 2006 Regulations as amended by these Regulations; and
>
> (b) **any period—**
>
> **(i) of duly recorded involuntary unemployment; or**

(ii) during which a person was a jobseeker for the purposes of regulation 6(1)(a) of the 2006 Regulations,

before the coming into force of these Regulations is to be disregarded. '

11. Paragraph 3 of schedule 1 reads:

'**3.** In regulation 6—

(a) in paragraph (2), for "regulation 7A(4)" substitute " regulations 7A(4) and 7B(4)";

(b) for paragraph (2)(b), substitute—

"(b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom for at least one year, provided that he—

(i) has registered as a jobseeker with the relevant employment office; and

(ii) satisfies conditions A and B;";

(c) after paragraph (2)(b), insert—

"(ba) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom for less than one year, provided that he—

(i) has registered as a jobseeker with the relevant employment office; and

(ii) satisfies conditions A and B;";

(d) after paragraph (2), insert—

"(2A) A person to whom paragraph (2)(ba) applies may only retain worker status for a maximum of six months.";

(e) for paragraph (4), substitute—

"(4) For the purpose of paragraph (1)(a), a "jobseeker" is a person who satisfies conditions A and B.

(5) **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)).

> **(6) Condition B is that the person can provide evidence that he is seeking employment and has a genuine chance of being engaged**.
>
> (7) A person may not retain the status of a worker pursuant to paragraph (2)(b), or jobseeker pursuant to paragraph (1)(a), for longer than six months unless he can provide compelling evidence that he is continuing to seek employment and has a genuine chance of being engaged.".'

12. I am unable to accept that these provisions offer any assistance to the Appellant in establishing that his wife was a qualified person throughout the relevant period. That is because there was no evidence produced to demonstrate that in either of the gaps identified (March 2012-January 2013 and July 2013 to September 2014) VA was "duly recorded" as having been involuntarily unemployed. There was therefore no material error in the Tribunal failing to address this submission.

13. That leaves the argument about whether VA was a qualified person by virtue of the work she did in the family business. The determination records at paragraph 12:

> "The appellant on one hand argues in his witness statement that although the sponsor was unemployed after March 2012 and claiming job seeker's allowance, she did not lose her status as a worker, thus she remained a qualified person. However in contrast, during the hearing the appellant claimed that his wife began working for him as his bookkeeper in a self-employed capacity in March 2012"

14. Ms Dhaliwal submits that there was in fact no "contrast" in the evidence. The Appellant's witness statement[3] explains that he is a qualified gas safety engineer and that he has his own business, called 'Evgas Services', established as a limited company in 2010. He writes "My wife plays an important role in the business and permits me to concentrate exclusively on my building projects….I have worked throughout our marriage and my bank statements and returns confirm that my business is developing with the help of my wife undertaking the administrative side". I accept that VA's work in the family business is in fact mentioned in the Appellant's witness statement, and as Judge Dineen identified in granting permission on this point, the Tribunal's adverse conclusions to the contrary do not appear to be justified. I would also note that regardless of whether and where the evidence appeared the contradictions identified in the passage cited are not necessarily contradictions at all: it would be perfectly possible for VA to have been doing bookkeeping work for the family business whilst at the same time looking for other employment.

15. Mrs Aboni submits that the error is immaterial. She points out that VA was never formally paid for her work, and did not therefore pay National Insurance contributions or tax. Her submissions reflect the Secretary of State published

[3] Signed on the 25th February 2017, hence the present tense.

policy 'European Economic Area nationals: qualified persons', the material part of which reads:

> "While there is no minimum amount of hours which an EEA national must be employed for in order to qualify as a worker, the employment must be genuine and effective and not marginal or supplementary. Effective work may have no formal contract but should have:
>
> - something that is recognisably a labour contract
> - an employer
> - agreement between employer and employee that the worker will perform certain tasks
> - confirmation the employer will pay or offer services (such as free accommodation) or goods for the tasks performed Marginal means the work involves so little time and money that it is unrelated to the lifestyle of the worker. It is supplementary because the worker is clearly spending most of their time on something else, not work".

16. Mrs Aboni submits that since there was no discernible labour contract the work undertaken by VA in the running of the family business was not capable of qualifying her as living "in accordance with" the Regulations.

17. In Steymann v Staatssecretetaris van Justitie (Case 196/87) [1988] ECR 6159 the Court of Justice considered the case of a German national who moved to Holland to live in a commune as part of the 'Bhagwan Rajneeshi' cult. He was a trained plumber and whilst living in the commune he undertook plumbing and maintenance work in the buildings used by the members. He was not formally employed, had no contract for labour, and received no direct remuneration, but argued that he received 'payment in kind' for his labour, including shelter, food and 'pocket money'. The Court directed itself to the test in Levin v Staatssecretaris van Justitie (Case 53/81) (1982) ECR 1035 that the work performed must be "genuine and effective", that is not to be regarded as marginal or incidental, and held that Article 2 of the EEA Treaty must be interpreted as meaning that activities performed as part of a community, as part of the commercial activities of that community, will constitute 'economic activity' as long as the individual concerned receives services or benefits amounting to an "indirect quid pro quo" for his genuine and effective work.

18. The evidence here is that in the periods where she was not formally employed VA was helping the Appellant run the business that was generating the entire family income. She was, from April 2012, acting as the Evgas Services book-keeper. The Appellant states:

> "We were financially self-sufficient during this period. My tax returns for the period of 1.1.2011 to 30.11.2012 show that I had an annual turnover of £57, 245. The only way I was able to generate this level of income was to have my

wife as my book-keeper. She dealt with all the financial side including issuing invoices"

Although she did not have a contract, and was not directly paid, this was the only money coming into the household. She directly benefitted from it, and as the Appellant's statement illustrates, she was directly contributing towards its generation. I am satisfied that this kind of day-to day involvement in the family business could not be characterised as marginal or incidental. It was genuine and effective economic activity. Like the applicant in Steymann, VA was receiving quid pro quo benefits in kind for her contribution, in the form of housing, food etc.

19. I am therefore satisfied that the First-tier Tribunal erred in misrepresenting the evidence in respect of the work undertaken by the Appellant's wife. There was no contradiction in his evidence, which remained consistent between his detailed witness statements and his oral evidence. I am further satisfied that as a matter of law, the activity undertaken by VA was genuine and effective economic activity such that she was living in accordance with the Regulations.

20. It follows that the appeal must be allowed. VA arrived in this country in December 2007 and in the five years that followed, she was continually economically active, first as a temp with Kelly Services, then as a salaried employee of Birmingham City Council, then from April 2012 on as the book-keeper and office manager for the family business. She acquired a permanent right to reside at the end of that five year period in December 2017 and from that point on was residing 'in accordance with the Regulations' regardless of whether she was economically active or not. It follows from this that the Appellant, as her family member, had also acquired such a permanent right of residence in accordance with Regulation 15 (1)(b).

Decision

21. The decision of the First-tier Tribunal is set aside.

22. The appeal is allowed with reference to the Immigration (European Economic Area) Regulations 2006.

23. There is no order for anonymity.

Upper Tribunal Judge Bruce
18th March 2019