



**Upper Tribunal  
(Immigration and Asylum Chamber)  
EA/08770/2017**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Glasgow  
on 22<sup>nd</sup> February 2019**

**Decision & Reasons  
Promulgated  
On 19<sup>th</sup> March 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DEANS**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**MRS MARIANA BENYAKOVA  
(NO ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr S Winter, Advocate, instructed by Maguire, Solicitors

For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State against a decision by Judge of the First-tier Tribunal Peter Grant-Hutchison allowing an appeal by Mrs Mariana Benyakova (hereinafter referred to as “the claimant”).
2. The claimant appealed to the First-tier Tribunal against a decision of the Secretary of State refusing her permanent residence as an EEA national on the basis of exercising Treaty rights in the UK for a continuous period of five years. On the evidence before him the

Judge of the First-tier Tribunal was satisfied that this requirement was met for the period from 6<sup>th</sup> November 2012 until 6<sup>th</sup> November 2017.

3. The Secretary of State applied for permission to appeal in respect of the judge's decision covering the limited period of three months from 2<sup>nd</sup> September 2016 to 4<sup>th</sup> December 2016. It was acknowledged that the judge's findings and reasoning covered a period from March 2016 to 1<sup>st</sup> September 2016, during which period the claimant was in receipt of Jobseekers Allowance (JSA). The judge omitted to give findings and reasoning for the succeeding three months up to 4<sup>th</sup> December 2016, after which JSA was awarded. Permission was granted on this basis.

### **Submissions**

4. Before me Mr Winter referred to the skeleton argument for the claimant, which was before the Judge of the First-tier Tribunal and was referred to at paragraph 9 of the judge's decision. This showed that in the three month period up to 4<sup>th</sup> December 2016 the claimant was in receipt of Disability Living Allowance (DLA). Although there was no documentary evidence from the DWP to show payment of this, I was referred to payments of DLA on the claimant's bank statements on 4<sup>th</sup> October 2016, 1<sup>st</sup> November 2016, 23<sup>rd</sup> December 2016 and 31<sup>st</sup> January 2017. Mr Winter submitted that although this was a material point not expressly mentioned in the judge's decision it was clearly part of the evidence relied upon by the judge, who had accepted the skeleton argument.
5. For the Secretary of State, Mr Matthews emphasised that the claimant had to show five years' continuous residence while exercising Treaty rights. For this purpose findings of fact were required for the whole period and it was not enough to say that the position was covered by extrapolation of the judge's reasoning, or that the judge had accepted the reasoning in the skeleton argument. It was contended for the claimant that during the period in question the claimant was temporarily incapacitated for work but the award of DLA did not establish this. The HMRC records showed the claimant was claiming JSA during the same period. There was a letter from the claimant's GP saying she was incapable of work but this did not cover the whole of the disputed period. There were inconsistencies in the evidence as to whether the claimant was temporarily incapacitated during this period.

### **Discussion**

6. It is not disputed that during the three months up to 4<sup>th</sup> December 2016 the claimant was in receipt of DLA. This is not enough to allow her to succeed. She must also show that during this period she was unable to work owing to temporary incapacity, in terms of regulation 5(7) of the EEA Regulations 2016.

7. Mr Matthews referred to a letter dated 6<sup>th</sup> February 2018 from HMRC at pp 25-26 of the claimant's second bundle. The information in this letter includes the claimant's sources of income for the year ending 5<sup>th</sup> April 2017. The letter refers to JSA from 08/09/2016 to 27/11/2016 but no figure is given by way of payment. Mr Matthews acknowledged that this information was confusing and it would have been preferable if clarification had been obtained from the DWP.
8. To me the information in the HMRC letter of 6<sup>th</sup> February 2018 indicates that although a claim for JSA may have been made for the period from 8<sup>th</sup> September 2016 to 27<sup>th</sup> November 2016 no payment of benefit was made. This suggests that the claim was not accepted. It was pointed out at the hearing that not infrequently when a person claims benefits a dispute arises as to whether the person is incapable of work. The DWP may take a different view on this from a person's own doctor. A person may pursue a claim for benefits not knowing whether the claim will be accepted. The significant point is then not that a claim was made but whether a payment of benefit was made. It seems to be the case here that a claim was made but no benefit was paid. It does not necessarily follow from the reference in the HMRC letter to JSA for the period 8<sup>th</sup> September 2016 to 27<sup>th</sup> November 2016 that the claimant was in receipt of JSA for this period and was not temporarily incapable of work.
9. I was referred to a letter dated 18<sup>th</sup> April 2018 from the claimant's GP stating that between April 2016 and November 2016 the claimant sought treatment for low mood, poor sleep and anger problems. The GP states that the claimant was not fit for work during this period. Mr Matthews pointed out that for part of the period covered by this letter the claimant was in receipt of JSA, and therefore holding herself out as fit for work, but the letter did not cover the period from 28<sup>th</sup> November to 4<sup>th</sup> December 2016. This meant that even if the letter was accepted as evidence of incapacity, it did not cover all of the disputed period.
10. Certain observations may be made in response to this submission. The first is, as already mentioned, that the DWP may not take the same view as a claimant's GP about fitness to work. It may therefore be assumed that for the period up to 1st September 2016, when the applicant was in receipt of JSA, the DWP took the view that she was fit to work. The second observation, which was advanced by Mr Winter, is that the claimant need establish her case only on the balance of probabilities. The evidence for the period from 28<sup>th</sup> November 2016 to 4<sup>th</sup> December 2016 shows that the claimant was not working and was in receipt of DLA, and her GP's evidence shows that she was regarded as unfit for work up to the end of November. If, as appears to be the case, the claimant regarded herself as incapable of work from the end of November until 4<sup>th</sup> December 2016, then there is evidence, in the form of her

receipt of DLA and her GP's evidence as to her incapacity in the immediately preceding period, to support the claimant's contention, having regard to the ordinary civil standard of proof. The claimant's own perception of her capacity may be taken into account along with the other evidence.

11. Accordingly, I am satisfied on the basis of the evidence before the First-tier Tribunal that the claimant was temporarily incapacitated from working in the period from 2<sup>nd</sup> September to 4<sup>th</sup> December 2016. The Judge of the First-tier Tribunal erred by omitting to make a finding for this period. Nevertheless the findings and reasoning of the First-tier Tribunal for the remainder of the five year period up to 6<sup>th</sup> November 2017 have not been challenged and still stand.
12. The result is that I set aside the decision of the Judge of the First-tier Tribunal and amend the findings made for the period from 2<sup>nd</sup> September to 4<sup>th</sup> December 2016. In accordance with my findings and reasoning set out above, I am satisfied that the claimant was temporarily incapacitated for this period, in terms of regulation 5(7). The findings of the First-tier Tribunal for the rest of the five year period remain unchanged. The claimant therefore succeeds in showing that she was exercising Treaty rights for the five year period up to 6<sup>th</sup> November 2017 and is entitled to the document sought showing her entitlement to permanent residence.

### **Conclusions**

13. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
14. The decision is set aside.
15. The decision is re-made allowing the appeal.

### **Anonymity**

No direction for anonymity was made by the First-tier Tribunal. I have not been asked to make such direction and see no reason of substance for doing so.

### **Fee award**

(N.B. This is not part of the decision)

No fee has been paid or is payable so no fee award is made.

M E Deans  
13<sup>th</sup> March 2019  
Deputy Upper Tribunal Judge

