IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00541/2019**

THE IMMIGRATION ACTS

Heard at Edinburgh
On 6 July 2021
Extempore

Decision & Reasons Promulgated
On 05 August 2021

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

JULIJA PONOMARIOVA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: no appearance
For the Respondent: Mr M Diwnycz

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Bartlett promulgated on 5 March 2020. The appellant is a citizen of Lithuania born on 9 June 1984 and appealed against a decision made by the Secretary of State on 25 October 2019 to deport her and to reject her human rights claim. The Secretary of State decided to deport the appellant on the basis of her convictions for theft in 2018, a further conviction in March 2019 and a series of offences committed between June 2018 and September 2019 relating to shoplifting, possession of class A drugs –

heroin, possession of a knife blade, failing to surrender to custody and to which she was sentenced to a total of 21 months' imprisonment. The Secretary of State's case was that the appellant had not shown that she had acquired permanent right of residence and thus was not entitled to any enhanced protection pursuant to Regulation 27 of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

2. The appellant gave evidence before the judge explaining that she arrived in the United Kingdom in February 2012, had worked irregularly and then found work in a hotel which she did for two years from 2013. She went on maternity leave in June to May 2014, took seven months' maternity leave and then found a new flat having fled her boyfriend and started working for the hotel WGC Services in January 2015 again. In January 2015 the children went to live with the appellant's mother in Lithuania because of problems with Social Services and she had she said worked irregularly after that.

3. The judge noted the decision letter and concluded with regard to the EEA Regulations that:-

   (1) The appellant had earned minimal amounts of money, there being no year in which she had met the earnings threshold for tax and national insurance contributions;

   (2) even if it was accepted that she was a worker in the tax years 2012 to 2013, 2013 to 2014 and because she was a qualified person as being on maternity leave in 2014 to 2015, she could only show she had been exercising treaty rights for a period of three years, the remaining rights not establishing that she was a worker because of the minimal nature of the earnings;

   (3) the appellant was therefore not entitled to any enhanced protection under regulation 27 (3);

   (4) having had regard to the factors set out in paragraph [14] and the circumstances relating to the convictions, that is the drug taking, theft and other offences to support the drug habit, the appellant's deportation was justified under Regulation 27(5);

   (5) with regard to paragraph 276 ADE(1) of the Immigration Rules and the relevant factors as well as the possibility of rehabilitation, she found that the decision was proportionate.

4. The appellant appealed to the First-tier Tribunal on the grounds that the judge had erred, first in her assessment of whether the appellant had acquired permanent residence in that the judge had failed to consider Regulation 6(2) of the EEA Regulations, that is had failed to consider whether if she were no longer working that this might have been because she was unable to work as a result of illness or accident, and failed therefore to take into account the appellant's own evidence that there were periods which she did not work due to drugs and depression, and thus the decision was flawed.

5. The appellant also averred that the judge had applied an incorrect test in considering whether the activity of work was effective and genuine and not marginal and ancillary following Levin [1982] EUECJ R-53/81 The fact that she did not earn enough wages to pay tax and national insurance was not a proper ground for concluding that this test was not met, but had the test been met the judge would have concluded that the permanent right of residence had been acquired and accordingly the decision was flawed there being no proper basis on which it could be said that the threat the appellant poses was sufficiently serious, that she was not protected by the enhanced level of protection.

6. It is also argued following Nouazli [2016] UKSC 16 that the judge had erred in not taking proper account of the fact that the decision to deport the appellant interfered with her right of work and free movement which was a matter to be taken into account as well as her rights to private and family life.

7. Insofar as it is necessary I am satisfied that it is proper and correct to permit the appellant to rely on the additional grounds of appeal although it appears that there has been no formal decision on that issue.

8. The appellant did not appear at the previous hearing before my colleague Judge Macleman and she did not appear today. No reason has been advanced for her failure to attend, there is nothing on file to indicate that she has changed address and I am satisfied that the notice of hearing was sent to the last known address. I am in the circumstances satisfied that it would be appropriate and in the interests of justice to proceed to determine the appeal.

9. Turning to the first ground it is necessary to have regard to Regulation 6 of the EEA Regulations which specifies who are to be treated as qualified persons. Reg 6 provides, so far as is relevant:

> **6. "Qualified person"**
>
> (1) In these Regulations—
>
> "jobseeker" means an EEA national who satisfies conditions A, B and, where relevant, C;
>
> "qualified person" means a person who is an EEA national and in the United Kingdom as—
>
> (a) a jobseeker;
>
> (b) a worker;
>
> (c) …
>
> "relevant period" means—
>
> (a) in the case of a person retaining worker status under paragraph (2)(b) or self-employed person status under paragraph (4)(b)**]**[1] , a continuous period of six months;
>
> (b) in the case of a jobseeker, 91 days, minus the cumulative total of any days during which the person concerned previously enjoyed a right to

reside as a jobseeker, not including any days prior to a continuous absence from the United Kingdom of at least 12 months.

(2) A person who is no longer working must continue to be treated as a worker provided that the person—

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

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

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

(ii) satisfies conditions A and B;

(c) is in duly recorded involuntary unemployment after having been employed in the United Kingdom for less than one year, provided the person—

(i) has registered as a jobseeker with the relevant employment office; and(ii) satisfies conditions A and B;

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

(e) has voluntarily ceased working and has embarked on vocational training that is related to the person's previous employment.

(3) A person to whom paragraph (2)(c) applies may only retain worker status for a maximum of six months

…

10. It is important to note that a worker does not automatically cease to be a worker if they cease employment as is seen in Regulation 6(2).

11. In assessing the evidence I find that the judge did err in the direction at paragraph [11] when she found that the appellant's income was minimal. That is not the correct test which is that set out in Levin as noted in the grounds of appeal.

12. But, is that material? I consider that it is not for the following reasons. While it is evident from the material from HM Customs & Revenue that the appellant was earning in the tax years 2011 to 2012, 2012 to 2013 and 2013 to 2014 at a level of £7,963.76 and £6,920.48. Although that is below the National Insurance and Income Tax thresholds, it is nonetheless sufficient in my view to constitute genuine and effective work given that it appears to have been made under a contract for employment. I am satisfied also that there is a material misdirection in that there is a failure to take into account the 2014 to 2015 tax years in which there were 39 incapacity or sick benefit credits. That in my experience would relate to 39 weeks in which those were paid. Those would, given they are state benefits, appear to me to meet the requirements set out in Regulation 6(2)(a) indicating a temporary inability to work. That it was temporary is shown by the fact that she went back to work.

13. Following Weldemichael and another (St Prix [2014] EUECJ C-507/12; effect) [2015] UKUT 540 (IAC) , the time spent by the appellant on maternity leave does not break her continuity of residence. I consider that the appellant was a worker or otherwise a qualified person until the end of the tax year 2014 and indeed 2014/2015.

14. There is, however, little or no evidence relating to what she was doing in the tax year 2015 to 2016. She earned £432.96 and it is of note that in her evidence when asked she said that she could not remember if she was not working because she was too unwell.

15. Unlike the case of the earnings in the previous tax years there is therefore no evidence sufficient to show that she was temporarily incapacitated from work owing to illness or accident. The level of income is I consider so low when considered on a weekly basis as to amount to marginal or ancillary. While the grounds of appeal make reference to £50 a week being perhaps enough to live on if one does not have to meet accommodation costs, £432.96 is well below that figure and indeed is below £10 a week and is clearly marginal or ancillary.

16. Further, there is no evidence that she meets the requirements of Regulation 6(2)(b), (c), (d) or (e) and thus even though the judge appears to have materially misdirected herself with regard to earnings in 2016/2017 and 2017/2018 there is still a gap in the appellant being a worker in the tax year 2015/2016.

17. In order to acquire the right of permanent residence, an EEA national must, as required by Regulation 15, have accumulated five years *continuous* residence in accordance with the EEA Regulations. Here, there was a significant period – 2015/2016 when there is insufficient evidence to show that the appellant was a worker or otherwise a qualified person and on that basis, any error from the misdirection as to the relevant test was not material as, even taking the appellant's evidence at its highest, there is still a gap in which she was not a worker or otherwise a qualified person. For these reasons ground 1 is not made out.

18. Dealing with ground 2, I do not consider that on a proper application of Nouazli that it could be said that the judge did not have regard properly to the appellant's right to work being taken into account. As found, she had a chaotic lifestyle, there was no indication that she was now working and little or no evidence to show she had any prospect of work in the future despite her plans for the future. The judge did I consider note the appellant's intentions as is shown from the decision at paragraph 14, and equally I note that the judge gave good reasons set out at paragraph 18 as to why it was nonetheless proportionate for the appellant to be removed from the United Kingdom. It is also of note that the judge noted the appellant's rehabilitation was ongoing and rejected, which is unchallenged, the reasons that the appellant would earn more in the United Kingdom than in Lithuania. Accordingly, for these reasons, I find that the second ground is not made out.

19. For these reasons I consider that the appellant has failed to show that the decision of the First-tier Tribunal involved the making of an error of law and I uphold it.

Notice of Decision

1. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.
2. No anonymity direction is made.

Signed Date 22 July 2021

Jeremy K H Rintoul

Upper Tribunal Judge Rintoul