



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/25541/2014

THE IMMIGRATION ACTS

**Heard at Glasgow
On 28 April 2015**

**Determination issued
On 1 May 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

M A KANIA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C McGinley, of Gray & Co, Solicitors

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

DETERMINATION AND REASONS

1. The appellant is a citizen of Poland, born on 1 February 1982. She applied for a registration certificate under the Immigration (European Economic Area) Regulations 2006 as confirmation of a right of residence as a qualified person in terms of regulation 6. On 5 June 2014 the respondent issued a notice of refusal of that application, accompanied by a reasons for refusal letter. The respondent found that the appellant failed to provide sufficient evidence that she was currently a qualified person as a student, or that she was exercising her free movement rights as a job seeker, having been in that capacity for a period in excess of 6 months.

2. Designated First-tier Tribunal Judge Murray dismissed the appellant's appeal by determination promulgated on 27 August 2014.
3. The appellant sought permission to appeal to the Upper Tribunal on the following grounds:

"The judge accepted that regulation 6(2)(b)(i) has been satisfied; and that regulation 6(2)(b)(ii) cannot be satisfied "but there is an alternative". The judge accepted (at paragraph 32 of the determination) that the appellant has been seeking employment in the United Kingdom, and therefore the issue to be decided was "whether she has a genuine chance of being engaged in employment". ... the judge has erred in finding that this appellant is not a qualified person under regulation 6(2)(b). ... the judge accepted that the appellant has been regularly applying for jobs but she has been unsuccessful (paragraph 32), and that "the more courses she does, the better her chances are of getting employment" (paragraph 31). The judge was aware that the appellant is registered to attend a 10 week course through Jobs and Business Glasgow in September 2014.

In all the circumstances, on a balance of probabilities ... the judge erred in finding that there is no genuine chance of the appellant being employed. "

4. Permission having been refused by FtT Judge French, the appellant renewed her application on the following grounds:

"... the judge materially erred in law in finding that the appellant does not have a genuine chance of finding employment. ... given that the appellant provided evidence of having applied for various jobs, and that she has been registered to attend a 10 week course through Jobs and Business Glasgow, then on a balance of probabilities ... the appellant is a "qualified person" under regulation 6(2)(b), and ... there is a genuine change of the appellant being employed."

5. On 8 January 2015 UT Judge Jordan granted permission, for the following reasons:

"1 In paragraph 33, the judge recorded that the appellant had last worked in 2010 and there was not a genuine chance of her finding work. That would have been a good point to make if the appellant had been unemployed in the preceding 4 years. However, after leaving work in 2010, she had been studying up until June 2014 and had commenced a further short course in September 2010⁴ apparently related to office work which had been arranged under the auspices of Jobs and Business Glasgow. There was evidence of job applications. There was a past record of her finding work. There was no evidence that the jobs she was looking for were unrealistic bearing in mind her qualifications, skills or circumstances.

2 In such circumstances, it is arguable that the judge had to have some reason for concluding there was not a genuine chance of her finding work. She has a son who was born on 27 August 2009 but he did not prevent her from working until 2010 or studying from 2010 to 2014. Short of a finding of fact that she did not have the ability to work or did not have a genuine intention to work, (that she was a malingerer?) the judge's decision suggests that employment prospects are so poor for a woman able and willing to work at a level commensurate with her

capabilities that she cannot establish there is a genuine chance of finding work. There was no evidence of a high unemployment rate. Even if the unemployment rate (for a person in her circumstances) was as high as 75%, there would be a 25% prospect of finding work and, arguably, that is enough for there to be a “genuine chance” - note this is not assessed on balance of probabilities. Arguably, the conclusion reached by the judge was not adequately supported before her.”

6. The Secretary of State filed a response to the grounds of appeal under Rule 24.

“... ”

- 1 The judge made a careful and detailed consideration of the facts of the appellant’s case. The appellant had not worked for over 5 years. The appellant had limited her availability to particular hours. The appellant has applied for jobs at a relatively low level and yet is not successful.
- 2 The wording of the regulation gives the judge a significant degree of flexibility.
- 3 The appellant was young, fit and without any significant impairment yet for over 5 years did not seem able to find any employment in a recovering economy. If the appellant was wholly unsuccessful in that period it was fully open to the judge to conclude that there was, for whatever reason, no genuine chance of employment.”

7. Mr McGinley’s submissions were along the lines of the grounds. He adopted the terms of the grant of permission, although he accepted the observation that the general rate of employment does not necessarily correlate to an individual chance of finding work. He founded upon the appellant’s past work history and on her willingness to take posts at a suitable level.

8. Mr Matthews pointed out the appellant was employed in the UK from 2008 until May 2010, but then unemployed from June 2010 until August 2012, over 2 years. She appeared to have been a full time student until May 2013 and since then attending part time courses while also registered as unemployed. Since last being employed she has had a child, and she restricts her hours of availability for employment to 10 am to 4 pm. With that history and restricted availability in mind, the judge was entitled to find that she did not establish “a genuine chance of being engaged”, the question of fact which was agreed to be the critical issue.

9. Mr Matthews also pointed out that although the case had so far been approached on the basis that the appellant had to show only “a genuine chance of being engaged”, the Regulations rather appear to impose a test that she should produce “compelling evidence that she is seeking employment and has a genuine chance of being engaged.” (The regulation may conveniently be found in *Phelan and Gillespie*, 9th ed., pp 1355-6.) That appeared to be a higher test. The appellant, who was present, acknowledged through her representative that she has still not found work. Mr Matthews said that it would be difficult for any remaking of the decision to go in her favour.

10. I reserved my determination.
11. It may be that the criterion in the Regulations has been wrongly applied. I would not find that to be an error in the determination, because that is how the criterion is cited in the decision under appeal and that was the approach taken by both parties in the First-tier Tribunal.
12. The challenge is to a factual finding. The judge was bound to resolve the issue one way or the other. In my opinion, the appellant's grounds and submissions do not amount to more than re-argument of the case she put. They do not show that the determination is legally flawed as an explanation to the appellant of why the judge resolved the point as she did. The factors which she took into account were relevant and sufficient to support the conclusion reached.
13. In any event, if the decision were to be remade, the correct legal criterion as now identified is a rather higher one, while the appellant's position on the facts has become rather weaker, further time having gone by without finding a job. It is practically inevitable that any fresh decision would be adverse to her.
14. The determination of the First-tier Tribunal shall stand.

A handwritten signature in black ink, reading "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

28 April 2015
Upper Tribunal Judge Macleman