



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

Appeal Number: IA/39522/2014

THE IMMIGRATION ACTS

Heard at North Shields

**Decision & Reasons
Promulgated**

On 13 May 2015

On 10 June 2015

Prepared on 22 May 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE HOLMES

Between

**KALTOUMA TCHETCHERE DEM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Rogers, Immigration Advice Centre Limited

For the Respondent: Ms Rackstraw, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Liberia and of France, born on 3 April 1982.
2. The Appellant says that she entered the UK on 25 January 2003 using her French passport to do so, and that she has remained in the UK ever since.
3. The date the Appellant's husband, Mr Abdul-Kader Dem, entered the UK is unknown, but on 30 December 2002 he claimed asylum, which was

refused. On 17 February 2007 he applied for a residence card which was issued to him on 10 December 2007, valid for five years. On 25 June 2009 he applied again for a residence card which was issued to him on 29 June 2009, valid for five years. An application for a travel document that he made on 24 July 2009 was refused on 12 August 2009.

4. The Appellant applied for a document certifying a right of permanent residence on 23 May 2013, but this was refused on 22 October 2013. It is accepted before me that there was no appeal against that decision. On instructions Ms Rogers was able to say that the Appellant believed she had been misled by her previous advisers as to whether any appeal had been lodged by them against this decision. It was said to be the discovery of her true position that led to her making a second application of that type on 27 August 2014, which was in turn refused on 18 September 2014. The Appellant appealed that refusal decision, and her appeal was heard and allowed by Immigration Judge Birkby in a decision promulgated on 8 January 2015.
5. The Respondent sought permission to appeal that decision to the Upper Tribunal which was granted by the First Tier Tribunal by way of decision of Judge Hollingworth of 19 February 2015. The Judge had arguably failed to demonstrate that he had applied regulation 6(7) to the chronology given by the Appellant, and he had arguably erred in finding that just because JSA had been paid to her by the DWP this meant that she was a "jobseeker" for the purpose of the EEA Regulations in any relevant period.
6. The Appellant served a Rule 24 response to the grounds of appeal on 1 April 2015 in which she asserted that the "compelling evidence" test formed no part of the EEA Regulations at the material time, and was thus irrelevant to her circumstances.
7. Thus the matter comes before me.

Regulation 15

8. The Appellant relied upon regulation 15(a) of the EEA Regulations in her assertion that she had qualified for a right to reside in the UK permanently, and asserted that she had resided in the UK in accordance with the regulations for a continuous period of five years. It was therefore her case that she had been a "qualified person" under regulation 6 for the requisite period of time, and it was argued before the Judge that she had accrued the necessary five year period by December 2008.
9. The evidence placed before the Tribunal did not explain the reasons for the refusal of the Appellant's May 2013 application. Nor did it explain the basis upon which her husband had made his application in either 2007 or 2009 for a residence card. Those decisions do rather beg the question of whether the Respondent accepted in 2007 and 2009 that

the Appellant was then a “qualified person” and thus able to sponsor her husband’s application.

Regulation 6

10. Regulation 6(7) to the EEA Regulations in their current form provides that;

‘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’

11. On the Appellant’s own case she was unemployed and claiming job seekers allowance between January 2004 and May 2005 (15 months) and again between February 2007 and October 2007 (8 months) and again between April 2009 and June 2010 (14 months) and again between December 2011 and August 2012 (8 months). There were other shorter periods too, but they did not pass the critical six month threshold of regulation 6(7). Accordingly, as the Appellant concedes, if regulation 6(7) applied to her, then as at the date of the hearing she had failed to demonstrate that she had accrued a continuous period of five years employment unbroken by periods of unemployment.

12. Whilst the Appellant accepts that regulation 6(7) was in force at the date that she made her application on 27 August 2014, and at the date of the hearing before the Tribunal, she argues in her Rule 24 Notice that regulation 6(7) was not in force throughout the period of five years that she relies upon, and thus argues that it has no application to her. Regulation 6(4-7) was introduced in place of the preceding regulation 6(4) with effect from 1 January 2014 by the Immigration (European Economic Area) (Amendment) (No 2) Regulations 2013/3032; paragraph 2(1) and Schedule 1 paragraph 3 (e). According to paragraph 6 thereof, transitional provisions are as set out in Schedule 3 thereto. Schedule 3 paragraph 1 reads as follows;

‘For the purposes of paragraph 3(b) to (e) of Schedule 1 -

(a) any period of employment in the UK 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’

13. When the appeal was called on for hearing before me Ms Rackstraw acknowledged that she had failed to appreciate the nature of the argument that was raised in the Rule 24 Notice, and had not considered the effect of 2013/3032. I stood the appeal down in order that she might do so.

The resumed hearing

14. When the hearing resumed Ms Rogers clarified that she argued that the Appellant had demonstrated that she met the requirements of regulation 6(2)(b)(iii) by December 2008. Thus simply because the Appellant was no longer working at any given date, and had been unemployed for an interval of greater than six months in the 2003-2008 period, she should not cease to be treated as a worker (and thus a qualified person) if she could provide evidence that was seeking employment and had a genuine chance of being engaged. Ms Rogers argued that this was precisely the test that the DWP employed when ascertaining whether the Appellant should receive JSA, and that it would be perverse for the Respondent to refuse to accept the DWP's judgement on such an issue. , even though the residence card issued to her in 2007 would have remained valid at that date. Nonetheless it is common ground before me that the Judge's starting point in this appeal should have been that the Appellant had demonstrated to the Respondent's satisfaction in both December 2007 and again in June 2009 that she was then a "qualified person". If she did not then enjoy that status, then no residence card would have been issued to her. Since the Respondent did not assert that there had been any deception in the course of those applications, it was not appropriate for the Respondent to take any other stance. An analogy could be drawn with the guidance of the Upper Tribunal in Ewulo (effect of family permit - OFM) [2012] UKUT 238 as to how past decisions of the Respondent should be treated.
15. For the Respondent Ms Rackstraw argued that the requisite five year period could only start to run in the Appellant's favour after April 2003 when she had claimed to have commenced employment. Since the Judge did not have evidence before him that directly addressed the issue of whether she was actively seeking work for which she had a genuine chance of being engaged in the period February to October 2007 the Appellant had failed to demonstrate the requisite five year period, because its continuity was terminated in February 2007. She could not add together two periods of employment separated by a period of more than six months unemployment, in order to demonstrate the requisite five year period, at any time.

Error of Law?

16. The first ground of challenge relied upon by the Respondent refers to the EEA Regulations as amended by 2013/3032, and complains that the Appellant could not meet the requirements of regulation 6(7). As such

this takes no account of the transitional provisions to be found in Schedule 1 thereto, and it is in my judgement misconceived. Ms Rackstraw did not seek to persuade me to the contrary.

17. The second ground of challenge complained that there was no direct evidence placed before the Judge to show that during any period of unemployment the Appellant was actively seeking work for which she stood a genuine chance of being engaged. Again, in my judgement, this challenge is misconceived. There was evidence before the Tribunal to the effect that this was the situation. It was in two forms; the Appellant's own evidence to that effect, and, the documentary evidence that indicated that the DWP had accepted that this was the case at the time. The Respondent placed no evidence before the Tribunal to rebut the evidence relied upon by the Appellant, or to indicate that she had misled the DWP, or to establish that the DWP had been mistaken in its contemporaneous assessment of the situation.
18. In the circumstances there was no error of law in the approach that the Judge took to the evidence. He was entitled to conclude on the balance of probabilities, as he did, that the DWP had accepted the Appellant as a jobseeker in the period February to October 2007, and that the DWP had as a result made payment to her of JSA, during that period. He was entitled to conclude that the Appellant was a "qualified person" for the whole of the five year period prior to December 2008. It follows that the Judge was correct to conclude that the Appellant had demonstrated that the requisite five year period was made out, and that it was made out by the end of December 2008 [21].

Decision

The decision promulgated on 8 January 2015 did not involve the making of an error of law in the approach taken by the Judge to the evidence relied upon by the Appellant sufficient to require the decision upon the appeal to be set aside and remade, and that decision is accordingly confirmed.

Direction regarding anonymity - Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity direction is required, or was sought in the First Tier Tribunal. I decline to make such a direction of my own motion since there would appear to be no need for one, and it would serve no useful purpose.

Deputy Judge of the Upper Tribunal JM Holmes
Dated 22 May 2015