



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

Appeal Number: IA/01786/2014

THE IMMIGRATION ACTS

**Heard at Birmingham
On 19th August 2014**

**Determination
Promulgated
28th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

QAMAR UL ISLAM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person

For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Pakistan who is married to a citizen of Norway. Until very recently he had leave to remain as a Tier 1 (Post-Study Work) Migrant. He had applied to the Secretary of State for the grant of a residence card as confirmation of his right to residence under the Immigration (EEA) Regulations 2006. The application was completed on

the basis that his wife, as the EEA family member, was a job seeker (as indicated at section 9.2 of the application form). The application was made on 8th July 2013.

2. It was refused on 12th December 2013 on the basis it had not been shown that the EEA family member, the Appellant's wife, was a qualified person as referred to in Regulation 6 of the 2006 Regulations. No removal direction was made. In an accompanying letter of the same date it was made clear that the Secretary of State had considered the application under Regulation 6(2)(b) in which the first sub-paragraph refers to the qualified person having been employed for one year or more before becoming unemployed. The letter noted that no evidence had been produced that the Appellant's wife had been employed in the United Kingdom for one year and it was stated that she had not shown that she was a qualified person. The Appellant appealed under the Regulations, requesting that the appeal be dealt with on the papers. In the Grounds of Appeal the Appellant contended that the application should have been considered under Regulations 6(1)(a) and 6(4). Documents were sent supporting the contention that she was registered with a job centre and had been seeking work.
3. The Notice of Appeal was received by the Tribunal on 31st December 2013. The case was allocated for determination on 11th March 2014 and was considered by Judge of the First-tier Tribunal Iqbal. She agreed with the contention that the Respondent had considered the application under the wrong section of Regulation 6. The judge accepted that when the application was made the Appellant's wife was actively seeking employment (paragraph 22 of the determination) and she went on to find that the wife was well-qualified and had a genuine chance of being engaged. However she also found that no up-to-date evidence had been provided to show that the Appellant's wife remained a job seeker. On that basis the appeal was dismissed.
4. The Appellant applied for permission to appeal. He noted that the judge had found that his wife had been a qualified person as at the date of application. He contended that the appeal should have been allowed on that basis. He also went on to argue that he would also have qualified as his wife should be classed as a self-sufficient person.
5. Permission was initially refused on the basis that the relevant date was the date of hearing. The application was renewed to this Tribunal. On 2nd June 2014 Upper Tribunal Judge Macleman granted permission, stating as follows:

“The Respondent refused the Appellant's application for a residence card because he had not shown that his wife had been employed in the UK for a year before becoming a jobseeker. He appealed to the FTT on the grounds that it was sufficient to show that his wife was a jobseeker under Regulation 6(1)(a) and there was no obligation to show a year's prior employment. Judge Iqbal agreed with the

Appellant but dismissed the appeal for lack of evidence that his wife was still a job seeker at the date of the determination. Judge Appleyard refused permission to appeal to the UT on the view that Judge Iqbal was right about the relevant date for decision. However I think that there might arguably be error in dismissing the appeal when the Appellant succeeded on the point put in issue by the SSHD and had no reason to expect that his evidence would be tested about whether the state of affairs described was continuing.”

The Secretary of State put in a response under Upper Tribunal Procedure Rule 24 contending that Judge Iqbal directed herself appropriately.

6. At the hearing before me the Appellant, who speaks good English, attended in person but was also assisted by his friend Dr Abdul Aziz. I described the procedure to the Appellant and went through the history of the case and the issues. The essence of the grant of permission appeared to be based on procedural unfairness. Mr Smart for the Secretary of State did not agree with that view and he relied on the case of **Marghia (procedural fairness) [2014] UKUT 00366 (IAC)**. He submitted for there to be unfairness the **Wednesbury** test was applicable. He said there was a further issue in that the Regulations themselves had been amended with effect from 1st January 2014 and those amendments would have been binding on the judge. He agreed that the relevant date for consideration of the merits was the date of hearing and in that respect referred to the reported determination of **Boodhoo (EEA Regs: relevant evidence) Mauritius [2013] UKUT 346 (IAC)**. He said the judge was entitled to reach the decision she did and in doing so there had not been procedural unfairness in his view. He noted that there was no removal decision.
7. The Appellant said that the judge had agreed that his wife did qualify and that the Respondent had considered the matter on the wrong basis. He said that she was still a job seeker and the Regulations had not changed at the time the decision was made. At the date of the hearing it was still less than six months from the date of the decision and the new Regulations would not have had any impact. He also pointed out that the family had sickness insurance and income and were self-sufficient. However Mr Smart made the point, which is correct, that the application had not been made on that alternative basis.
8. Having considered the determination and the submissions I came to the view that there had been an error of law in the determination of Judge Iqbal such that it should be set aside. She dealt immaculately with the issue of whether the Appellant had been a job seeker when he appealed against the decision made by the Secretary of State and she found that the Appellant’s wife was well-educated and had a genuine chance of obtaining employment. Where I find that she erred is in dismissing the appeal on a basis which had not been put in issue by the Secretary of State and without giving the Appellant notice that she would be making a judgment on that point.

9. The Appellant was unrepresented. He had requested the matter be dealt with on the papers and can have had no knowledge as to when the appeal would be placed before a judge for determination. I have of course taken close note of the submissions made on behalf of the Secretary of State. I have read the case of **Marghia** which in fact relates to a judge's error in assessment of unfairness on the part of the Secretary of State, not in respect of procedural unfairness in connection with a hearing. Procedural fairness for a tribunal is not governed by the **Wednesbury** test – see **SH (Afghanistan) v SSHD [2011] EWCA Civ 1284 per Moses LJ**.
10. Whilst this appeal concerned the 2006 Regulations there are relevant analogies with appeals relating to the Immigration Rules. In **IO (“Points in Issue”) Nigeria [2004] UKIAT 00179** it was decided that unless a point had been put in issue an Appellant was entitled to assume that the matter would not be decided against him without putting him on notice of that possibility (see paragraph 8 of that determination). Whilst it is clear with regard to the Immigration Rules that an appeal is not necessarily limited to the issues raised in a Notice of Refusal, if new issues come into play then the parties must be able to deal with them. See **RM (Kwok On Tong: HC395 paragraph 320) India [2006] UKAIT 00039**. At paragraph 10 of that determination it was stated: “... if new elements of the Immigration Rules come into play they are to be dealt with on the appeal, and the parties must be allowed any appropriate adjournment in order to meet the injustice of being taken by surprise.”
11. I agree with the view expressed in the grant of permission by Upper Tribunal Judge Macleman that it was procedurally unfair of the judge of the first instance to take the point against the Appellant that there was no up-to-date evidence of his wife being a jobseeker when this was a matter being decided on papers and the Appellant had not been on notice that the point would be taken. It was open to the judge to issue a direction to the Appellant that the point was in issue or to adjourn the matter for an oral hearing giving him notice of the point.
12. In the circumstances I find that it has been shown that there was procedural unfairness and the judge's decision is set aside.
13. I have to remake the decision. The Appellant asked me to allow the appeal on the basis that his wife was a self-sufficient person but I found that there was force in Mr Smart's argument that this was not the application which had been made to the Secretary of State and the Secretary of State was entitled to know what application was made so the matter could be investigated. On the other hand the Secretary of State was clearly in error in deciding the original application without considering elements of Regulation 6 under which the Appellant was able to establish that his wife was a job seeker and was therefore a qualified person.
14. The appropriate course I find is for me to reach the conclusion that, the Secretary of State having considered the wrong elements of Regulation 6, the decision made was not in accordance with the law and therefore

remained outstanding to be decided. As was quite rightly pointed out to me the relevant dates under the Regulations are not historic. The Appellant is free to submit further information as to his wife being a job-seeker, if that is the case, and he may wish to seek to put in a further application or to amend his application on the basis of self-sufficiency. He should be aware however that the amended Regulations are now in force and will need to be complied with if he is to succeed.

Decision

15. The original determination contained a material error on a point of law and I have set it aside. I have remade the decision and this appeal is allowed as the decision made by the Secretary of State was not in accordance with the law and the application therefore remains outstanding. I make no fee award as the appellant has not proved his case.

Signed

Date 27 August 2014

Deputy Upper Tribunal Judge French