



IAC-FH-NL-V1

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

Appeal Number: IA/38491/2014

**THE IMMIGRATION ACTS**

**Heard at Birmingham  
On 2 March 2016**

**Decision & Reasons Promulgated  
On 21 March 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN**

**Between**

**SAEED MUZAFFAR  
(ANONYMITY DIRECTION NOT MADE)**

**Appellant**

**and**

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

**Respondent**

**Representation:**

For the Appellant: Miss. L. Marshall-Bain, Counsel instructed by Gull Law Chambers  
For the Respondent: Miss. C. Johnstone, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Kirvan, promulgated on 5 May 2015, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse to grant a residence card as confirmation of his right to reside in the United Kingdom under the Immigration (European Economic Area) Regulations 2006 (the "Regulations").

2. Permission to appeal was granted as follows:

“The grounds point to use of an IS96 where the Respondent suspects a marriage of convenience and argue failure to take account of regulation 5(7)(a) 2006 Regulations which treat an EEA national as continuing to exercise Treaty rights where periods of inactivity are for reasons not of the person’s own making. Although there is no record in the judge’s notes of this having been argued in terms at the hearing, the point is arguable and material. However no clear findings are made in paragraph 65 on the issues raised by the Respondent regarding evidence of the Sponsor’s previous employment, which may mean that the whole issue of employment needs to be redecided.”

3. At the hearing I heard oral submissions from both representatives, following which I reserved my decision.

#### Submissions

4. Miss. Marshall-Bain relied on the grounds of appeal and the skeleton submissions. The judge had failed to take into account regulation 5(7)(a). However she accepted that this point had not been raised at the hearing in the First-tier Tribunal. She further submitted that the judge had considered whether the Sponsor had been exercising Treaty rights at the wrong date: the relevant date was not the date of the hearing but the date of the application. It had been conceded at the hearing by the Appellant’s representative that the Sponsor was not exercising Treaty rights at the date of the hearing (paragraph [29]). This point had not been raised either in the grounds of appeal or in the skeleton submissions. Miss. Johnstone objected to anything being added to the grounds of appeal. I asked Miss. Marshall-Bain whether she was seeking to amend the grounds of appeal, and she stated that there was no reason why this point had not been raised earlier. I stated that I was going to proceed with the grounds of appeal as they were and would not be taking any new grounds.
5. Miss. Marshall-Bain accepted that Article 8 was not relevant, although this is referred to in the grounds of appeal and in the skeleton submissions.
6. In relation to whether regulation 5(7)(a) should have been applied, Miss. Marshall-Bain submitted that the rights of member citizens should be protected and that in order to do this it was necessary to go back to the Directive itself. It was unfair that the Sponsor could not work on the basis that the Respondent considered the marriage to be a marriage of convenience. The rights of the Sponsor as at the date of the application should continue uninterrupted.
7. Miss. Johnstone relied on the Rule 24 response. Regulation 5(7)(a) was not a stand-alone provision. It had not been argued before the First-tier Tribunal that regulation

5(7)(a) was relevant. I was referred to the grounds of appeal before the First-tier Tribunal. She submitted that therefore it could not be a material error of law. It had been conceded that the Sponsor was not exercising Treaty rights at the date of the hearing.

8. Miss. Marshall-Bain submitted in response that in paragraph [64] the judge should have considered whether or not the Appellant met the requirements of regulation 5(7)(a) as being the true and correct position. That was where “worker” was defined. She submitted that the error of law was in paragraph [64] where the judge found that the Sponsor had not established that she was a worker exercising Treaty rights but without referring back to the specific regulation.

#### Error of law

9. In paragraph [29] the judge states:

“At the commencement of the hearing it was conceded that at the date of the hearing the Appellant’s EEA Sponsor, Mrs Ruta Janutyte, could not qualify as a person who was exercising Treaty rights by working in the United Kingdom because on 6<sup>th</sup> March she had been served with a document by Home Office Immigration Enforcement with a notification of temporary admission to a person liable to be detained. It appears that this document was issued following the interview that is referred to above. It was a condition that she did not work.”

10. In paragraph [64] the judge states:

“However, the Appeal as at today’s date cannot succeed because the Appellant’s EEA Sponsor, Ruta Janutyte, has not been working in fact since the time of the marriage interview because she was put on temporary admission restrictions which included a condition that she should not work or engage in business. Consequently, at the date of the hearing I have to find that the Appellant has not established that she is a worker exercising Treaty rights in the United Kingdom.”

11. It was accepted at the hearing that it had not been put to the judge that regulation 5(7)(a) was relevant. This regulation is entitled “Worker or self-employed person who has ceased activity”. Regulation 5(1) provides that “in these Regulations, “worker or self-employed person who has ceased activity” means an EEA national who satisfies the conditions in paragraph (2), (3), (4) or (5).” It has not been submitted that the Sponsor satisfies the conditions in any of these paragraphs.
12. It was submitted that the judge should have applied regulation 5(7)(a) despite the fact that it was not brought to his attention, nor submitted that the Appellant was exercising Treaty rights through the application of this regulation. It provides as follows:

“(7) For the purposes of this regulation –

- (a) periods of inactivity for reasons not of the person's own making;
- (b) periods of inactivity due to illness or accident; and
- (c) in the case of a worker, periods of involuntary unemployment duly recorded by the relevant employment office,

shall be treated as periods of activity as a worker or self-employed person, as the case may be."

13. It is clear from the wording at the start of regulation 5(7) that it is only applicable for the purposes of regulation 5. It is not a stand-alone provision. Therefore in order for the Appellant to rely on regulation 5(7), he must submit that the Sponsor meets one of regulation 5(2), (3), (4) or (5), but it has not been submitted that this is the case.
14. It was not submitted either at the First-tier Tribunal, or at the hearing before me, that the Sponsor was a "worker or self-employed person who has ceased activity" by reference to regulation 5. From the evidence provided, the Sponsor does not meet any of the requirements in regulation 5(2), (3), (4) or (5). These apply when a person has retired, when he has a permanent incapacity to work, and where he is active in another EEA state but returns to the United Kingdom as a rule at least once a week. There was no suggestion that the Sponsor fitted any of these descriptions.
15. It was not put to the judge that regulation 5(7)(a) was relevant. I find that it is not a stand-alone provision, and has no application to the Appellant's appeal. I find that the decision does not involve the making of an error of law.

### **Notice of Decision**

The decision does not involve the making of an error of law and I do not set it aside.

The decision of the First-tier Tribunal stands.

Signed

Date 14 March 2016

Deputy Upper Tribunal Judge Chamberlain