Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01569/2016

THE IMMIGRATION ACTS

Heard at Bradford UT	**Decision & Reasons Promulgated**
On 13th November 2017	**On 30th November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

REBWAR DELZA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mrs R Pettersen, Senior Presenting Officer
For the Respondent: Mr Tettey of Counsel

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of a First-tier Tribunal (Judge T Jones) allowing the Respondent's appeal against the Secretary of State's refusal to grant him a permanent resident card under the EEA Regulations 2006.

2. For the sake of clarity and ease of reference, I shall hereafter refer to the Secretary of State as "the Respondent" and to Rebwar Delza as "the Appellant", reflecting their respective positions before the First-tier Tribunal.

Background

3. The Appellant is a citizen of Iraq (born 10th November 1985). He entered the UK in February 2004, claiming asylum on entry. That claim was refused but the Appellant remained illegally in the United Kingdom.

4. On 10th January 2009 he applied for a residence card as the partner of an EEA national, Ms Jagielska, a Polish national exercising treaty rights in the UK.

5. In July 2009 the Appellant and Ms Jagielska married and accordingly on 6th August 2010, the Appellant was issued with a residence card valid for five years.

6. On 16th September 2013 the Appellant and Ms Jagielska divorced. On 1st August 2015 prior to the expiry of the residence card dated 6th August 2010, the Appellant applied for a permanent residence card. That application forms the basis of the present appeal.

7. The application was refused by the Respondent originally on two counts:

   - The Appellant had not shown his ex-spouse was exercising treaty rights at the date of his divorce from her on 16th September 2013.
   - The Appellant had not demonstrated that he had resided under the Regulations for a continuous five year period.

8. So far as count 1 is concerned, prior to the hearing before the First-tier Tribunal, the Respondent confirmed that this was no longer in issue. Therefore the only issue before the First-tier Tribunal was the remaining one, namely whether the Appellant had demonstrated that he had resided within the EEA Regulation for a continuous five-year period under the terms of Regulation 6(2) of those Regulations.

The FtT Hearing

9. The Appellant attended the hearing before the FTT and relied upon a witness statement together with other documentary evidence noted by the judge at [4].

10. So far as the Appellant's evidence was concerned the judge noted at [7]:

> "The Appellant was cross-examined at the hearing. A note of the same can be seen in the Record of Proceedings. This largely revolved around the periods upon which the Appellant claimed Job Seekers Allowance on two occasions; 9th July 2013 to 8th August 2013 and 29th March 2014 to 8th May 2014. The Appellant explained that he had sought help from the Job Centre at these times, on the second occasion he felt embarrassed that there were people working in the Job Centre who were actually disabled. He is not. He felt it was wrong that he was getting benefits and he decided he really had to try harder to get work, seek friends work from friends (sic) and from what other source he could get it, rather than claim money from the State."

11. He then stated at [9]:

> "In re-examination, it was highlighted by the Appellant that when one has regards to the supplementary bundle, at pages 12 to 16, there is ample evidence of emails being received by the Appellant, and sent by him, in the period May to September of 2014 seeking work. The Appellant was open and he said that he did not have any such similar emails extract for the period of May to June of 2015, but he had approached agencies, spoke to friends and was looking for work before starting up his own employment with a hairdressing salon in July of 2015. He might also say, and did so, that he was preparing to open the salon and busy gathering help and advice as to how he should do this at the time."

12. The judge then noted under a heading entitled "**My Conclusions**" that the burden of proof was with the Appellant to the usual civil standard of a balance of probabilities. He said that he found that the Appellant had discharged the relevant burden and continued at [18]:

> "I make such finding because, applying the appropriate standard, I found the Appellant to be a credible witness, who was not prone to exaggeration; and indeed has clarified his evidence on one point as the hearing progressed without embellishment, or in circumstances which could make his account inconsistent. There is evidence before me, which I am prepared to accept against the appropriate standard, that the Appellant has been seeking employment though he was not registered with the Department for Work and Pensions for a short period as noted above in 2015 before starting his own business within two months. There is ample documentary evidence within the supplemental bundle at pages 12 to 14 in respect of the 2014 period, when he was seeking employment when not registered in this regard, which I accept as being credible."

He allowed the appeal.

Onward Appeal

13. The Respondent sought permission to appeal. The relevant part of the grant of permission is as follows.

> "The grounds assert that the judge erred in allowing the appeal because it was necessary for there to have been a former registration of job seeking to enable the Appellant to come within Regulation 6(2). It is argued that the issue was not merely whether the judge found the Appellant to be a credible witness. It is said that because the Appellant's accepted evidence was that he had not registered with the Department for Work and Pensions, then the formal registration of job seeking appeared to be lacking. This raises an arguable ground of appeal."

14. Thus the matter comes before me to decide if the decision of the First-tier Tribunal contains such error of law requiring it to be set aside and remade.

UT Error of Law Hearing

15. Before me Mr Tettey appeared for the Appellant and Mrs Pettersen for the Respondent. Mrs Pettersen in her submissions followed the lines of the grounds seeking permission. She outlined that at the hearing before the FtT two relevant periods of unemployment for the Appellant had been identified, in 2014 and 2015 respectively. She focused particularly on the latter period, during which the Appellant in his own evidence confirmed that he did not register with the Department for Work and Pensions. She submitted that as the Appellant had not formalised his job seeking with the relevant employment agency he could not bring himself within Regulation 6(2) of the EEA Regulations. The question is not whether the Appellant was a credible witness in his assertion that he was seeking employment at the relevant period, the issue was simply whether or not he had registered as a jobseeker with the relevant employment office. That is the requirement set out by the Regulations and, if the Appellant does not fulfil the Regulations, then he cannot show that he has been continuously employed for the relevant five-year period in order to qualify for a permanent residence card. None of the evidence that was before the First-tier Tribunal was challenged. She submitted in these circumstances the decision should be set aside and remade dismissing the Appellant's appeal.

16. Mr Tettey on behalf of the Appellant submitted that the critical issue was that there was evidence that the Appellant was looking for work. The judge accepted that evidence as being credible evidence. He submitted that it was a question of fairness. The periods in question were short periods and it would therefore be disproportionate to overturn the FtT's decision. The Appellant had now set up a business, evidence for which was submitted by Mr Tettey. In these circumstances the decision should be allowed to stand.

Consideration

17. I am satisfied that the decision of the FtT contains legal error requiring it to be set aside and remade. I now give my reasons for this finding.

18. There was one issue before the FtT which in terms is a relatively straightforward matter concerning Regulation 6(2) of the EEA Regulations.

19. An applicant for a permanent residence card is subject to the provisions of Regulation 6(2), the relevant part of which provides the following:

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

20. The evidence before the FtT showed that there were several periods of unemployment identified within the five-year period commencing 6th August 2010. The Appellant claimed Jobseeker's Allowance from 9th July 2013 to 8th August 2013 and again from 29th March 2014 to 8th May 2014. However during two subsequent periods, the first in 2014 and the second in 2015, he did not register as a jobseeker.

21. The judge considered the Appellant to be credible and therefore accepted that the Appellant had been seeking employment during the periods when he was not registered with the Department for Work and Pensions. So far as the 2014 period of unemployment without registration was concerned, he supported this conclusion by referring to "ample documentary evidence within the supplemental bundle at pages 12 to 14 in respect of the 2014 period, when he was seeking employment when not registered in this regard..."

22. This is not the case however so far as the second period is concerned. The judge was prepared to accept the Appellant's word on the point that he was looking for employment. That however is not what the Regulation requires. The Regulation plainly states that what is required in order to fulfil compliance with (b)(i) of Regulation 6(2) is that the Appellant "has registered as a jobseeker with the relevant employment office."

23. Whatever may have been the cause of the Appellant not doing so, the plain fact is that he did not register with the relevant employment office during periods of unemployment both in 2014 and 2015. That means that he is outwith the Regulation and therefore on the evidence before the FtT, was unable to show that he came within Regulation 6(2).

24. In allowing the appeal in these circumstances it follows that the FtT erred in its decision making and that the decision must therefore be set aside for legal error. I find on the evidence before me, which is unchallenged, that I am in a position to remake the decision. I do so stating that the Secretary of State's appeal to the Upper Tribunal is allowed. I remake the FtT's decision by dismissing the appeal of Rebwar Delza against the Secretary of State's refusal to grant him a permanent residence card.

Notice of Decision

The decision of the First-tier Tribunal allowing the appeal of Rebwar Delza is hereby set aside. The appeal of Rebwar Delza against the Secretary of State's decision to refuse a permanent residence card is dismissed.

No anonymity direction is made.

Signed C E Roberts Date 29 November 2017

Deputy Upper Tribunal Judge Roberts

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal there is no fee award.

Signed C E Roberts Date 29 November 2017

Deputy Upper Tribunal Judge Roberts