



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/22741/2015

THE IMMIGRATION ACTS

Heard at Field House
On 24th April 2017

Decision & Reasons Promulgated
On 15 May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

MR KENDRA SHEKHAR DHAKAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Coleman, Counsel instructed by Paul John and Co Solicitors
For the Respondent: Ms J Isherwood, Senior Presenting Officer

DECISION AND REASONS

1. This is an appeal from the decision of First-tier Tribunal Judge Emerton, sitting at Taylor House, who in a decision promulgated on 4th October 2016 dismissed Mr Kendra Shekhar Dhakal's appeal against refusal of his application for an EEA residence card in recognition of a retained right of residence.
2. The brief background facts are that the Appellant, who is a citizen of Nepal, was formerly married to [SP] who is a Latvian national. They have a son together, [SD],

who was born in the UK on [] 2007. Their marriage was dissolved on 8th October 2012.

3. At the relevant time, the requirements for retaining a right of residence following dissolution of a marriage to an EEA national were contained within Regulation 10 of the Immigration (European Economic Area) Regulations 2006. The only issue in the appeal before Judge Emerton was whether, at the time of the dissolution of their marriage, the Appellant's former wife had been exercising treaty rights within the United Kingdom, either as a worker, a self-employed person, a self-sufficient person or as a student.
4. The primary facts in the appeal were not really in dispute. Relevantly, [SP] had become a full-time student nurse studying at the London South Bank University on a course that she was due to complete in 2014; that is to say, some eighteen months after the dissolution of the marriage. On the face of it, therefore, it could not have been plainer that she was exercising treaty rights as a student. This was acknowledged by the judge at paragraph 20 of his decision:

“The key initial point is whether the ex-spouse was exercising EEA treaty rights at the date of the termination of the marriage namely on 8th October 2012”. Regulation 10(5)(b) effectively requires that she be a qualified person under Regulation 6 as a jobseeker, worker, self-employed person, self-sufficient person or a student. Although self-evidently a “student” in the broader sense it is accepted that the ex-spouse could not fulfil the specific requirements of Regulation 4(1)(d) and therefore could not be a qualified person for that reason”. [The reference to Regulation 4(1)(d) being presumably a reference to sub-Regulation 4(1)(d) of Regulation 10].

5. No clue is given in the decision as to why it was acknowledged that the appellant's former wife did not so qualify as a student. However, I have been told today that the reason is that although she met the threshold definition for a student (that is to say, she was following a course of study which included vocational training) she did not meet - or, perhaps more accurately, there was no evidence that she met - the additional requirement of having comprehensive sickness insurance cover in the United Kingdom. It was for this reason that, rather than pursuing the more obvious course of arguing that appellant's former wife had been a “student”, it was argued instead that she was a “worker”.
6. The argument that the appellant's former wife was a “worker” rested principally upon the fact that she was at all material times in receipt of a significant National Health Service bursary. During the academic year ending in 2011, this amounted to £9,767.50. In the following year it rose to £15, 435.68. It was thus argued that the bursary represented payment for her work, an argument that Mr Coleman says the judge was wrong to reject.
7. In rejecting the argument that [SP] qualified as a “worker”, the judge referred to a number of documents each of which referred to her as a “student”. Amongst those documents was a student exemption certificate in respect of Council Tax. This document referred to the fact [SP] was taking an advanced diploma in adult nursing

between 14th March 2011 and 7th March 2014. Another document was a university prospectus for her course. Under the heading 'Placements', this documents contains the following passage:

"As an adult nursing student you will spend approximately 50% of your course on clinical placements learning from qualifying and experienced practitioners. These exciting learning experiences will provide you with the skills and experience to become a safe and proficient adult nurse ...".

8. In his submissions before me today, Mr Coleman pressed the argument that the bursary was recognition by way of payment for the practical work that [SP] had been undertaking in a hospital at the time of dissolution of the marriage. However, the difficulty with this argument is that the definitions of a 'bursary' in the various dictionaries to which I have been referred, describe it as a 'gift' or a 'grant' that is made for the purpose of enabling study rather than consideration for work. The fact that a person who is required to undertake vocational training also receives a bursary does not in my view alter his status from 'student' to 'worker'. This is expressly recognised within the definition of a student in Regulation 10(4)(d), which defines a student as, "a person who is enrolled for the principle purpose of following a course of study (including vocational training) at a public or private establishment". That is precisely what [SP] was doing at the date of the dissolution of the marriage. The fact that she received a bursary in order to do so does not change the nature of category of "qualified person" into which she fell.
9. The above analysis represents my view of the law having heard the able submissions of Mr Coleman. It is similar if not identical to the reasoning of the First-tier Tribunal judge. Thus, at paragraph 28 of his decision, Judge Emmerton said this:

I do not consider that the information about the ex-spouse receiving an NHS bursary makes her in some way a "worker". The bursary is clearly designed to encourage and enable people to study to become nurses not to reimburse them for what would otherwise be unpaid NHS work. The placement is clearly part of the study not some sort of method of getting a worker on the cheap. Ms Reid [who was then representing the Appellant] has put together an interesting and not entirely fanciful argument but ultimately I agree with Mr Deshraj [the Presenting Officer at the hearing] that the ex-spouse was not exercising treaty rights as a qualified person at the relevant time.
10. It follows that the judge did not make an error of law in finding that [SP] was not "a worker" at the time of the dissolution of the marriage. I canvassed with the parties whether the judge may alternatively have made an error of law in not holding that [SP] was a student at the material time. However, in the absence of any evidence that she had comprehensive sickness insurance whilst she was studying as a student nurse, I am satisfied that this did not amount to a discrete error of law.
11. The appeal therefore is dismissed.

Notice of Decision

The appeal is dismissed

No anonymity direction is made.

Signed

Date: 12th May 2017

Deputy Upper Tribunal Judge Kelly