



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

Appeal Number: IA246202015

THE IMMIGRATION ACTS

Heard at Field House

On 15th June 2017

**Decision & Reasons
Promulgated
On 27th June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MR YOUNIS BHUDURKHAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Fitzsimons (Counsel)

For the Respondent: Mr P Singh (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Metzger, promulgated on 3rd October 2016, dismissing the appeal of the Appellant against the refusal of his application for an EEA residence card, as a family member (spouse) of an EEA national with a permanent right of residence in the United Kingdom. The Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Malawi, who was born on 24th May 1969. He appealed against the decision of the Respondent dated 20th June 2015 refusing to grant him a right to a permanent residence card.

The Judge's Findings

3. The judge, in what was a short determination, stated that he accepted that the Appellant had found it difficult to acquire the relevant evidence from his wife to demonstrate that she had been exercising treaty rights for the five years' continuous residence period owing to the breakdown of their marriage. Nevertheless, the Appellant had not been able to provide pay slips for any of the relevant period and the P60s did not cover the sole period of the four years when the Appellant maintains that his wife was working for Shaw Healthcare. The judge also added that there was a further missing period from April 2011 to March 2012 when the Appellant's wife's employment with Shaw Healthcare had apparently ceased, which could not be accounted for. He also held that the Appellant could not take advantage of Regulation 6(iii) in satisfying the judge that his wife had been unemployed for greater than six months and she had a genuine chance of being engaged in vocational training or in work.
4. The appeal was dismissed.

Grounds of Application

5. The grounds of application state that the judge had been both factually wrong as well as had erred in law in relation to the distinction between Regulation 6(iii) and Regulation 6(c).
6. On 2nd May 2017, permission to appeal was granted by the Tribunal on the basis that the reference to the constituent parts of Regulation 6(2) is a reference to the subparagraphs at (a) to (d) and these are alternatives, and if this is so, then the Tribunal erred in law in appearing to treat them as cumulative requirements, and thus failing to consider them on an individual basis.

Submissions

7. At the hearing before me on 15th June 2017, the Appellant was represented by Ms Fitzsimons, of Counsel, and she submitted that there were two basic factual errors in the Tribunal's determination. First, there was the employment of the Appellant's former spouse, and although the judge referred to the fact that "she did have a job offer to commence work in October 2008, there is no evidence of her commencing that work before April 2009" (paragraph 8). This was quite simply wrong because she had commenced work. Second, the reference by the Tribunal to there being "a further missing period from April 2011 to March 2012 when her employment with Shaw Healthcare apparently ceased" (paragraph 8) was also factually incorrect, because the Appellant's bundle shows that at page

119 (paragraph 60) there are the end of year P60s for 2009 to 2010. At page 20 there is another P60 for 2010 to 2011. Moreover, at page 121 there is a P45 showing that the Appellant's wife left her job on 31st March 2012. Plainly, therefore, she had started work earlier and continued.

8. As far as the legal errors are concerned in the determination, Ms Fitzsimons submitted that when they get to paragraph 9 of the determination, it is clear that the judge is confused because the different parts of Regulation 6 are meant to be in the alternative, and yet the Judge applies them cumulatively. Given that the Appellant's wife had been employed until 31st March 2012, whereafter she engaged in nine months of job seeking from April 2012 until December 2012, she would have benefited from Regulation 6(2)(b) because she would have retained her worker status. Ms Fitzsimons submitted that the evidence at pages 122 to 142 shows that the Appellant's wife was registered as a jobseeker, so that under the Regulations she would have managed to retain her status as a worker for nine months. The evidence particularly at pages 136 to 138 is so detailed that it shows that with her registration at the Jobcentre she was looking for a job actively and would have been able to satisfy the "compelling" test after six months of unemployment. The conclusion of Judge Metzger at paragraph 9 was therefore erroneous.
9. In reply, Mr P Singh submitted on behalf of the Respondent that he would agree that there were material errors and that the appropriate course of action here was for the appeal to be remitted back to the First-tier Tribunal so that it could be heard again.

Error of Law

10. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law such that under Section 12(1) of TCEA 2007 the determination should be set aside. Moreover, under Practice Statement 7.2(b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be re-made is such that having regard to the overriding objective in Rule 2, it is appropriate, I find, that this matter be remitted to the First-tier Tribunal, to be determined by a judge other than Judge Metzger.

Notice of Decision

11. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is remitted back to the First-tier Tribunal under Practice Statement 7.2(a) to be determined by a judge other than Judge Metzger.
12. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

26th July 2017