



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: EA/01043/2017

EA/01042/2017

THE IMMIGRATION ACTS

Heard at Manchester

On February 26, 2018

**Decision &
Promulgated**

On March 01, 2018

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

**MRS ANDREA NAGYNE CSOKE
MR VIJAY KUMAR
(NO ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Not in attendance

For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I do not make an anonymity order.
2. The appellants are Hungarian and Indian nationals respectively. The first-named appellant entered the United Kingdom on July 28, 2012 as a EEA national. They married on October 22, 2012 and the second-named appellant was issued with a residence card on December 13, 2013.

3. On July 15, 2016 they applied for a document certifying permanent residence under Regulation 15 of the Immigration (European Economic Area) Regulations 2006. The respondent refused their applications on January 17, 2017 on the basis they had not provided evidence that the first-named appellant had resided in accordance with the Regulations for a continuous period of five years (Regulation 15(1)(a) of the 2006 Regulations).
4. The appellant lodged grounds of appeal on January 27, 2017 under Regulation 26 of the Immigration (European Economic Area) Regulations 2006 and Section 82(1) of the Nationality, Immigration and Asylum Act 2002.
5. Their appeals came before Judge of the First-tier Tribunal Manyarara (hereinafter called “the Judge”) as a paper case on August 21, 2017.
6. The appellants’ original grounds of appeal made it clear that the applications were based on Regulations 15(1)(c) and (d) and Regulation 5(3) and 5(7)(b) of the 2006 Regulations but in dismissing the appellants’ appeals the Judge erred by only considering the appeals under Regulation 15(1)(a) of the 2006 Regulations and by failing to consider the appeals under the aforementioned provisions.
7. On December 11, 2017 I set aside the Judge’s decision and adjourned the hearing for evidence of the first-named appellant’s inability to work.
8. Further evidence was served on January 18, 2018 when the following evidence was served:
 - (a) Letter from Salford Royal NHS Trust dated January 3, 2018.
 - (b) Letter from Job Centre Plus dated November 22, 2017.
 - (c) Evidence of payments being made to first-named appellant dated October 3, 2017.
 - (d) Decision confirming continued entitlement to Employment Support Allowance dated February 1, 2016.
 - (e) Decision confirming entitlement to Personal Independence Allowance dated November 23, 2015
 - (f) Decision confirming entitlement to Employment Support Allowance dated October 2, 2015.
9. The two decisions dated October 2, 2015 and November 23, 2015 confirmed the appellant’s entitlement to the aforementioned benefits. The decision dated February 1, 2016 confirmed that the first-named appellant had a “limited capability for work” and was entitled to Employment and Support Allowance payments.
10. The medical report confirmed the first-named appellant had a diagnosis of relapsing and remitting multiple sclerosis, depression and left Achilles tendinitis. These impacted on her ability to work and as a result of these problems she was unable to work in a bar, her previous employment, or

stand on her feet all day. She also had been diagnosed with fatigue which impacted on her ability to function.

11. The evidence indicated that her Personal Independence Payment (PIP) is currently payable until September 30, 2021 and the earliest that this is reviewable is September 30, 2020.
12. In summary, the evidence pointed to the fact that since August 2015 the first-named appellant (and the second-named appellant) had been unable to work and had been receiving sickness and mobility benefits.
13. There was nothing contained within the medical report or other documents that suggested any return to work. Mr Bates accepted that the evidence appeared to show that since August 2015 the appellant had been unable to work and was entitled to the sickness benefits being paid until at least September 20121.
14. Regulation 5(3) of the 2006 Regulations states-
 - “A person satisfies the conditions in this paragraph if—
 - (a) he terminates his activity in the United Kingdom as a worker or self-employed person as a result of a permanent incapacity to work; and
 - (b) either—
 - (i) he resided in the United Kingdom continuously for more than two years prior to the termination; or
 - (ii) the incapacity is the result of an accident at work or an occupational disease that entitles him to a pension payable in full or in part by an institution in the United Kingdom.”
15. Regulation 5(7)(b) of the 2006 Regulations states:
 - “Subject to regulations 6(2), 7A(3) or 7B(3), 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 officeshall be treated as periods of activity as a worker or self-employed person, as the case may be.”
16. Regulations 15(1) of the 2006 Regulations states the following persons shall acquire the right to reside in the United Kingdom permanently-
 - “(c) a worker or self-employed person who has ceased activity.
 - (d) the family member of a worker or self-employed person who has ceased activity”
17. Regulation 15 (1) of the 2006 regulations makes it clear that a worker who has ceased activity (and their family member) is entitled to permanent

residence as long as other requirements in the Regulations are met. The first-named appellant had resided continuously for more than two years. The only real issue was whether the first-named appellant's inability to work was as a result of permanent incapacity to work.


18. The Regulations are silent as to what amounts to a "permanent incapacity" to work but I am assisted to an extent by case law.
19. In FMB (EEA reg 6(2)(a) - 'temporarily unable to work') Uganda [2010] UKUT 447 (IAC) the Tribunal held that a state of affairs is 'temporary' if it is not permanent. Accordingly, for the purposes of Regulation 6(2)(a) of the 2006 Regulations, a person whose inability to work as a result of illness or accident is not permanent is temporarily unable to work. The phrase "terminates his activity in the UK as a worker" in the context of regulation 5(3)(a) did not require a subjective decision by the worker to terminate his employment on the grounds of permanent incapacity. Although a worker's understanding of his own situation might be relevant to the objective decision whether his absence from work was temporary or amounted to a termination as a result of permanent incapacity, the ultimate decision was an objective one. The determining factor was not the worker's statement of his intention and reasons but the objective state of affairs which existed at the relevant times.
20. In De Brito and De Noronha v Secretary of State for the Home Department [2012] EWCA Civ 709 Court of Appeal made it clear that the question the Tribunal needs to consider is whether based on all the available evidence there were realistic prospects of his being able to return to work and therefore remaining engaged with the labour market.
21. The significance of the above case law is that if the appellant is permanently unable to work and has accrued sufficient time in the United Kingdom to engage Regulation 15 then that person must succeed under Regulation 15 of the 2006 Regulations.
22. Having considered the evidence that was now before the Tribunal Mr Bates accepted that the appellants were therefore entitled to permanent residence.
23. In light of that acceptance and taking into account the facts of this case I agree with Mr Bates's position and in those circumstances I do allow the appellants' appeals.

DECISION

24. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
25. I have set aside the original decision and I remake the decision by allowing both appeals.

Signed

Date 26/02/2018



Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I do not make a fee award because I have allowed this appeal based on the evidence that was submitted following the error of law hearing.

Signed

Date 26/02/2018



Deputy Upper Tribunal Judge Alis