IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30554/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 December 2014	**On 13 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MS FOLASADE SAKIRAT RAJI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Aborisade (Solicitor)
For the Respondent: Mr C Avery (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant's appeal against a decision to remove her from the United Kingdom under Regulation 19 of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") was dismissed by First-tier Tribunal Judge Hopkins ("the judge") in a determination promulgated on 30 September 2014. The appeal was determined on the basis of the documentary evidence, in the

light of the appellant's indication in her notice of appeal that she did not require a hearing.

2. The removal decision was made in the light of the Secretary of State's finding that the EEA family member she relied upon, her Portuguese spouse, was not a "qualified person", falling within Regulation 6 of the 2006 Regulations. In her grounds of appeal to the First-tier Tribunal, the appellant contended that her spouse was a qualified person, as a jobseeker. Moreover, the Secretary of State had failed to consider Article 8 of the Human Rights Convention.

3. The judge found that there was a paucity of evidence before him. He took into account documents submitted in support of the contention that the appellant's spouse was a qualified person, as a jobseeker. He applied Regulation 6 of the 2006 Regulations, and in particular sub-paragraph (iv) and also considered whether the spouse fell within Regulation 6(ii) as a person who was no longer working but who did not cease to be treated as a worker for the purposes of the 2006 Regulations. He found that the spouse had been in receipt of jobseeker's allowance in the past, although there was no evidence showing when he entered the United Kingdom to seek employment and, indeed, no evidence that he had ever been in employment. His bank statement showed that he received jobseeker's allowance from at least February 2014 and continued to receive that benefit, until August 2014, when he began to receive employment support allowance ("ESA"). This was generally paid to those with an illness or disability affecting their ability to work but there was no evidence regarding the extent to which the spouse's ability to work had been affected. Overall, the judge concluded that the appellant had not shown that her spouse fell to be treated as a worker or as a jobseeker and that the evidence did not show that he was a qualified person. It followed that the appellant's right to reside had ceased.

4. The judge made an Article 8 assessment, noting again the paucity of evidence and assessed the appellant's claim that the respondent had failed to act in accordance with natural justice. The judge concluded that neither ground of appeal was made out in this context.

5. An application was made for permission to appeal. The appellant's solicitors contended that the judge erred in seeking to "go behind" the decision of the Department of Works and Pensions that the appellant's spouse was entitled to jobseeker's allowance and ought to be classified as a jobseeker. It was also contended that the sponsor's receipt of ESA due to illness did not show that he had ceased to be treated as a worker, in the light of Regulation 6(ii)(a). The judge erred in failing to properly consider the witness

statements made by the appellant and her husband, particularly at paragraph 11 of the former's statement and paragraph 3 of the latter's. Both referred to the husband's illness.

6. Permission to appeal was granted on 13 November 2014. The judge granting permission found that although the judge's factual findings may have been justified, the judge did not apply the up-to-date version of Regulation 6, as amended with effect from 1 January 2014. It was arguable that the parties were entitled to a decision made under the version of the 2006 Regulations currently in force, even though the appellant's prospects of success might be no better.

Submissions on error of law

7. Mr Aborisade said that the judge erred in law by ignoring paragraph 3 of the appellant's husband's witness statement. The explanation appeared there that he had not collected jobseeker's allowance for one month because he was ill. He was temporarily unable to work through illness. His bank statement showed that he was collecting the allowance from February 2014 and his property was visited by an Immigration Officer in July 2014 and so he had been in receipt of the benefit for less than six months at that point. Although direct evidence of illness may have been absent, some evidence accompanied the application for permission to appeal, as the judge had made an adverse finding in this context. The judge did not believe the sponsor and so more evidence was required to complement what had been provided earlier. The judge failed to take into account the witness statement made by the husband and also overlooked paragraph 11 of the appellant's witness statement, contained in the appellant's bundle before the First-tier Tribunal. All of this showed that there was an error of law and inadequate fact-finding. The decision should be set aside and remitted to the First-tier Tribunal.

8. Mr Avery said that the decision contained no material error of law. The judge had made findings on key issues, which were sound and well-reasoned. The case was put to the judge that the sponsor might fall within Regulation 6 as a jobseeker or as a worker who was temporarily unable to work as the result of illness. The case was also put on the basis that the sponsor received ESA. The witness statements related to only one break, in July 2014 and that related to jobseeker's allowance and not ESA.

9. The real difficulty for the appellant was the absence of reliable evidence regarding all aspects of the claim that her husband fell within Regulation 6 and was a qualified person. In the grounds, it was asserted that the judge should have relied on the DWP assessment but this was not sustainable. The judge was required

to make his own assessment in the light of the evidence, which might include the DWP's own assessment. At paragraph 22 of the determination, the judge mentioned Regulation 6 without specifying which part of it he had in mind but the following paragraphs contained cogent findings which showed that he had properly engaged with the case. Even if it were the case that an up-to-date version of Regulation 6 was not applied, this would make no material difference.

10. Mr Aborisade said in a brief response that the determination had produced unfairness and the decision should be set aside and remitted to the First-tier Tribunal, to be remade there.

Conclusion on error of law

11. Mr Aborisade kindly handed up a copy of Regulation 6 but this was in the unamended form which did not take into account the changes introduced with effect from 1 January 2014 by virtue of the Immigration (European Economic Area) (Amendment) (No.2) Regulations 2013. Regulation 6 was substantially amended, particularly in relation to a person seeking to show that he or she is a qualified person as a jobseeker, with the substitution of a wholly new sub-paragraph (iv). Regulation 6(ii)(a), regarding a person not ceasing to be treated as a worker if he or she is temporarily unable to work as the result of an illness or accident is unamended but sub-paragraph (ii)(b) is amended and a new sub-sub-paragraph (ba) inserted.

12. I deal first with Mr Aborisade's contention that the judge overlooked or failed to properly take into account paragraph 3 of the spouse's witness statement and paragraph 11 of the appellant's statement, regarding the former's inability to collect jobseeker's allowance in July 2014, by reason of illness. In fact, the determination, which is well-reasoned, shows that the judge had this aspect of the case clearly in mind. He refers expressly to the claim that the benefit was not received in July 2014 in paragraph 7 and to the two witness statements before him in paragraph 10 of the determination. At paragraph 12, he refers again to the period in which the benefit was not received, in July 2014. No error of law has been shown here.

13. So far as the assessment by the DWP is concerned, I accept Mr Avery's submission that the judge was required to make his own assessment and that he was not, in fact, seeking to "go behind" the DWP's treatment of the appellant's spouse as a person entitled to jobseeker's allowance and, subsequently, to ESA. The judge's task was to assess the case that the appellant was the family member of a qualified person, meaning here someone falling within Regulation 6 of the 2002 Regulations. The judge properly

concluded that the case advanced on the appellant's behalf was simply not made out. His findings of fact in this context were open to him on the evidence. He was entitled to find that there was uncertainty regarding when, precisely, the appellant's husband entered the United Kingdom seeking work and he was entitled to find that there was no evidence before him showing that the husband had ever been in employment in the United Kingdom. Indeed, that finding is fully consistent with the husband's witness statement, in which he himself refers to his presence in the United Kingdom as a jobseeker (in paragraph 3). A similar claim appears in the appellant's own statement and neither witness statement contains anything to show that the husband has ever worked here.

14. Does the failure to apply the amended version of Regulation 6 make a material difference? I conclude that it does not. As Mr Avery submitted, there were two possible routes available to the appellant to show that her husband was a qualified person falling within Regulation 6, notwithstanding his apparent inability to work through illness. The first was as a jobseeker, under Regulation 6(1)(a). The difficulty here is that the amended sub-paragraph (iv) requires a person seeking to show that he or she is a jobseeker to satisfy conditions A and B. Condition A is that the person entered the United Kingdom in order to seek employment; or is present here seeking employment, immediately after enjoying a right to reside pursuant to paragraph (1)(b) to (e). The judge's clear findings of fact show that the husband cannot meet the alternative condition but let us assume that he did enter the United Kingdom to seek employment. He must also show that condition B is met. This requires "evidence that he is seeking employment and has a genuine chance of being engaged." The documentary evidence before the judge, including the two witness statements, falls very far short of showing this. The husband moved from jobseekers allowance to ESA in about August 2014 but there is nothing to show that he is continuing to seek employment and has a genuine chance of being engaged. Again, neither witness statement comes remotely close to demonstrating that he has any real prospects of securing employment.

15. The alternative route was under Regulation 6(1)(b) and (2)(a), as a person no longer working and temporarily unable to work as the result of an illness or accident. The difficulty here is that the evidence was manifestly insufficient to show that the husband was "a person who is no longer working". At paragraph 24, the judge found that there was no evidence that the sponsor had ever been a worker for the purposes of the 2006 Regulations and nothing to show that the description of him in his marriage certificate as a retail assistant related to employment in the United Kingdom, let alone that it was current at the time of the marriage. There was also no evidence before the Tribunal as to the nature of any illness

or accident preventing employment and nothing to show whether any illness or accident was temporary or permanent. The adverse findings were, again, clearly open to the judge.

16. In summary, the judge did not overlook the witness statements before him and the decision shows that he had in mind all the salient features of the case. His findings of fact were open to him on the limited evidence available. Although he erred in failing to apply the amended Regulation 6, no material error of law resulted. The application of Regulation 6 in its amended form would have led to the same conclusion and outcome.

17. The application for permission to appeal contained no challenge to the judge's findings in relation to the "breach of natural justice" ground of appeal or to his Article 8 assessment and no submissions were made on the appellant's behalf on these matters.

18. The decision of the First-tier Tribunal contains no material error of law and shall stand.

DECISION

19. The decision of the First-tier Tribunal, containing no material error of law, shall stand.

Signed Date **23 December 2014**

Deputy Upper Tribunal Judge R C Campbell

ANONYMITY

No application for anonymity has been made in these proceedings and I make no order on this occasion.

Signed Date **23 December 2014**

Deputy Upper Tribunal Judge R C Campbell