



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/12025/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 20<sup>th</sup> September 2018

Decision & Reasons Promulgated  
On 25 September 2018

Before

UPPER TRIBUNAL JUDGE COKER

Between

PEARL ALLISON FERNANDEZ DIZ

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms K Turner, Direct Access counsel

For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. First-tier Tribunal Judge Bartlett dismissed the appellant's appeal against the respondent's refusal to issue her with a permanent residence card as the spouse of an EU national with permanent residence. The judge found that her husband had not acquired permanent residence and therefore she did not qualify. Permission to appeal was sought on the grounds, inter alia, that it was arguable that it was a material error of law for the judge to place no weight at all on the letter from DWP stating that her husband had a right to reside and was habitually resident.
2. The respondent in his Rule 24 response stated that he did not oppose the appellant's application for permission and invited the Upper Tribunal to

determine the appeal at a continuance hearing to determine whether the appellant had acquired permanent residence. Ms Turner filed, late and without having made a prior request for leave to file additional documents, a bundle of documents which the appellant sought to rely upon. Mr Lindsay did not express an objection to the late filing although he had not been aware that the respondent accepted the First-tier Tribunal judge had made a material error of law. He did not have a copy of the bundle of documents filed for the appeal before me – whether that was because they had not been served on the respondent or they had not reached his file, I do not know. He was provided with a copy. After time to consider the documents filed, he was ready to proceed and I heard submissions from both Ms Turner and Mr Lindsay. I did not hear oral evidence from either the appellant or her husband, it being agreed that this appeal turned on documentary evidence.

3. I have some concerns whether, having been instructed through Direct Access, Ms Turner has strayed into the role of conducting litigation by filing documents personally. Ms Turner also asked to be sent a copy of my decision direct. She is not on the record and I expressed my doubts that she could go on the record because she has been instructed through Direct Access. These are of course matters for her but she may wish to make the appropriate enquires to ensure she does not breach the Bar Standards Code.
4. Although referred to in her skeleton argument, Ms Turner accepted that she could not rely on Mr Fernandez Diz's claims as a job seeker and evidence of actively seeking work, as supporting his claim to have been permanently resident. She was correct to so accept. Mr Fernandez, although claiming job seeker's allowance for a number of years, has not produced evidence as to why he became unemployed and he is not a Qualifying Person under the Regulations because of those claims, without more.
5. The respondent does not seek to challenge the validity, genuineness or subsistence of the appellant's marriage to Mr Fernandez Diz – the issue in this appeal is solely on whether Mr Fernandez Diz has permanent residence.
6. Ms Turner submitted that the respondent had set too high a burden and standard of proof upon the appellant: the guidance issued by the respondent in connection with claims for residence stated that evidence of such residence could be provided by HMRC records, payslips and evidence of NICS; the appellant had provided her husband's NIC contribution records and had the respondent required more than he could and should have requested this; to now rely on a lack of additional evidence was indicative of too high a standard of proof. This submission is misconceived. Firstly, the evidence that was provided to the respondent when the original application was made was very sparse. The burden of proof is upon an applicant. It is not for the respondent to trawl through the evidence that has been submitted and make a request for evidence which may or may not exist in order to sustain an applicant's claim. Although the guidance refers to HMRC and NICS records, those are examples of possibly supportive evidence. The burden remains on an applicant to prove, on a balance of probabilities, that s/he has been continuously employed for the requisite period of time or otherwise meets the criteria of being a Qualified Person.

7. The appeal is now before me. The appellant is aware why her appeal before the First-tier Tribunal was dismissed, that dismissal including the finding that there was inadequate evidence to sustain a finding that Mr Fernandez Diz had acquired permanent residence. She has sought and obtained the services of counsel through Direct Access who prepared and submitted a bundle of documents on her behalf, having advised her of the nature of the evidence required to prove continuous residence for the requisite period. It is disingenuous to now submit that the respondent should have requested additional documents, particularly since it seems that the respondent was not served with bundle of documents relied upon in the hearing before me.
8. The evidence now filed in support of the claim to have been exercising Treaty Rights for five years consisted of:
- A letter with print out from HMRC of Mr Fernandez Diz's primary paid earnings records for the period after 1975; primary paid earnings are, as I understand it, earnings upon which national insurance contributions become payable.
  - Letters concerning Job Seekers Allowance (no longer relied upon to establish continuous residence as a qualified person).
  - Work history schedule provided by Mr Fernandez Diz.
  - Letter from HMRC dated 4<sup>th</sup> April 2018 providing information on employers from 1971 to 1975 and NI contributions from 1971 to 2015/16.
  - Letter from DWP dated 17<sup>th</sup> October 2014.
9. Other documents were in the bundle relating to tenancy, Credit Union, copy status documents, job seeker allowance, pension calculations but these are not relevant to the assessment of whether Mr Fernandez Diz has acquired permanent residence.
10. HMRC confirm primary paid earnings as follows:

Tax year	primary paid earnings	NICs	Employer
1975/76	£1327.27	£115.33	(employer DAV TR)
	£770.91		(employer MET PO)
1976/77	£2662.61	£153.04	(employer TRUNKI)
1977/78	£212.17	£226.90	(employer DAV TR)
	£3733.91		(employer KIC)
1978/79	£196.92	£247.07	(employer SAN PR)
	£1955.38		(employer CREWBE)
	£839.62		(employer KIC)
	£1412.69		(employer PUL KE)
1979/80	£351	18 credits	
	£1798.46	£158.51	(employer SAN PR)
	£641.54		(employer CREWBE)
1980/81	£3360	£226.80	(employer CREWBE)
1981/82	nil	nil	
1982/83	nil	nil	
1983/84	nil	nil	
1984/85	£1088	32 credits	
1985/86	£142	4 credits	
1986/87	nil	nil	

1987/88	nil	nil
1988/89	nil	nil
1989/90	no record provided	nil
1990/91	£1380	30 credits
1991/92	no record provided	43 credits
1992/93	no record provided	26 credits
1993 - 1997	no record provided	nil
1997/98	no record provided	34 credits
1998/99	no record provided	52 credits
1999/00	no record provided	52 credits
2000/01	no record provided	1 credit
2001 - 2006	no record provided	nil
2006/07	no record provided	£689 due but not paid
2007/08	no record provided	£689 due but not paid
2008/09	no record provided	£636 due but not paid
		4 credits
2009/10	no record provided	52 credits
2010/11	no record provided	52 credits
2011/12	no record provided	53 credits
2012/13	no record provided	52 credits
2013/14	no record provided	52 credits
2014/15	no record provided	81 credits
2015/16	no record provided	52 credits

11. Mr Fernandez Diz was employed each financial year between April 6<sup>th</sup> 1975 and April 5<sup>th</sup> 1981. His earnings during each of those years exceeded the minimum required before National Insurance contributions become payable. He has not provided, either in his own work history schedule or from other sources, the date he ceased employment in 1975 as a cook assistant with the Metropolitan Police. Nor has he provided evidence of when he started employment with Davis Trunking as an electrical draughtsman. There is no evidence what his earnings were either hourly, weekly or monthly in either those jobs or the jobs that came after that (piping design draughtsman, consultant piping designer).
12. Continuous employment requires employment to be continuous – with allowance for holidays, sickness, compassionate leave and similar. I have no evidence before me whether Mr Fernandez Diz earned the sums he did over a few weeks and then did not work for months or whether his earnings reflect work done every week. If I had been provided with evidence of average earnings doing the jobs he did then it would have been possible to conclude whether those earnings were from short bursts of employment or were in fact from continuous employment no matter what the level of earnings. As it is, on the evidence before me, the earnings figures produced do not, on the balance of probabilities, enable a conclusion to be drawn that he has worked each week or month during the five year period. I do not know what the average earnings were for a person doing the jobs Mr Fernandez Diz was doing and am unable to find that the level of his earnings on which he is paying NI during those years is reflective of continuous work or bursts of work.
13. In reaching that conclusion I have taken into account the letter from the DWP. That letter summarises the facts before them which they state includes

that he has worked for a period of 5 years and has not been out of the country for a continuous period of over 2 years. There is no reference in the letter to the detailed evidence that was before the DWP on reaching that decision which states that he

“has a right to reside in the UK and can be treated as habitually resident from 26/9/14 because he has attained a right of permanent residence as defined by regulation 15(1)...”

14. The wording of the letter is strange because it refers to 26/9/14 as the date from which he acquired habitual residence because he had attained permanent residence. Yet as can be seen from the table of earnings above he was not working in the five years prior to 26/9/14 and there is no evidence to prove that, although receiving Job Seekers Allowance, he was doing so in the context of the Regulations such that he was a qualified person. Habitual residence is not the same as permanent residence. I of course accept that he has been working during a five year period but working during a five year period does not equate with working continuously for five years. I was not provided with a copy of the State Pension Credit Regulations 2002 but Ms Turner said that they did not refer to permanent residence but to habitual residence. Although the decision by the DWP refers to permanent residence I cannot be satisfied on a balance of probabilities that they either have evidence that shows that Mr Fernandez Diz does meet the requirements for permanent residence under the Regulations or whether they were simply satisfied that he met their habitual residence test.
15. It may be that the DWP had evidence which enabled them to conclude that Mr Fernandez Diz met the 2006 Regulations; that evidence was not before me and given the odd phrases in the DWP letter I cannot be satisfied that they applied their minds to the test that is required to show permanent residence. In accordance with the 2006 Regulations.
16. It is of course open to the appellant to make a further application “filling in” the gaps in the evidence but as the evidence stands before me I find that Mr Fernandez Diz does not meet the criteria for permanent residence and therefore the appeal of Mrs Fernandez Diz must be dismissed.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision

I re-make the decision in the appeal by dismissing it.

Date 21<sup>st</sup> September 2018



Upper Tribunal Judge Coker