IAC-fH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34033/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 September 2014	**On 13 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR RASHID AMIN BUTT
(No Anonymity Direction)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Hopkin, Home Office Presenting Officer
For the Respondent: Ms A Jones, Counsel instructed by Farani Javid Taylor Solicitors

DECISION AND REASONS

1. The appellant is a national of Pakistan born on 6 July 1984 and he appeals against the decision of the Secretary of State dated 6 August 2013 to refuse, under the Immigration (European Economic Area) Regulations ((EEA) 2006, to issue him with a residence card as confirmation of his right of residence in the UK as the spouse of an EEA national exercising treaty rights in the UK.

2. Judge of the First-tier Tribunal P J Clarke allowed his appeal on 28 February 2014 but an error of law was found in that determination by Deputy Upper Tribunal Judge Grimes on 13 June 2014 on the basis that the judge erred in considering the circumstances of whether the appellant's wife was a jobseeker or a worker within Regulation 6 at the date of the appeal rather than at the date of the hearing.

3. Had the judge considered the circumstances at the date of the hearing that he was required to do he could not reasonably have found that the evidence from over a year previously could establish the appellant's wife seeking work at the date of the hearing. This was particularly the case in the light of the appellant's oral evidence that his wife was working for an agency in August or September 2013.

4. The Deputy Upper Tribunal Judge set aside the First-tier Tribunal Judge's decision but the parties agreed that the findings at paragraph 11, 12, 13 and the first three sentences of paragraph 14 should be preserved. These were as follows:

> "*11. I found the Appellant a credible witness. However, I have been hampered by the absence of evidence from the Sponsor, for understandable reasons. Since most of this appeal relates to her situation, I rely only on official documents which show what she has been doing in this country.*
>
> *12. He is seeking a residence card as evidence of his right to reside as a family member of an EEA national. I find, first, that the Appellant married Ms Jadach (an EEA national) in 2008 but that the couple have not lived together since 2009. However, they are still married, and the Appellant is thus a spouse: [1985]* ***Diatta v Land Berlin*** *[1985] ECR 567 at [20]. It is irrelevant that the marriage is no longer subsisting; and there is no suggestion that the marriage is or was one of convenience.*
>
> *13. The main issue before me is whether M Jadach is a qualified person. I am not satisfied that she is now a worker; the only evidence I have is the oral statement of the Appellant, unsupported by documents; and I do not consider that sufficient.*
>
> *14. The appeal was argued on the basis that Ms Jadach is a job-seeker, and satisfies the requirements of paragraph 6(2) of the regulations. The paragraph requires that she is [present tense] in duly recorded involuntary employment after having been employed in the UK. I am satisfied as to this: there is evidence that she registered as a jobseeker on 1st November 2012, and was still so registered on 17th December 2012. The Appellant's application was made on 18th January, 2013, therefore material after that date could not have been submitted. I also gain mild support from this view that Ms Jadach was to register at Northampton College for courses by 13th January 2013.*"

5. At the hearing before me, Mr Hopkin and Miss Jones both agreed that the one issue was a narrow issue as to whether the wife was a qualified person for the

purpose of the EEA Regulations as at the date of the hearing before me on 10 September 2014.

6. Ms Jones submitted that there was no further evidence.

7. The appellant had previously adopted his statement and stated that in examination-in-chief that the last time he had contact with his wife was via a text message on 28 August 2014 but she had not replied. When he gave evidence in Birmingham on 17 February she had told him that she was applying for jobs before the hearing date but he had not spoken to her since.

8. Ms Jones confirmed that the last document in relation to the appellant's wife at work was that of December 2012 and Mr Hopkins agreed that it was on 17 December 2012. He submitted that there was no clear evidence that she was in the UK and that she may or may not be seeking work.

9. The appellant had failed to discharge the burden of proof.

Conclusions

10. The appeal was argued on the basis that Ms Jadach the EEA national was a worker or a jobseeker.

11. The following documents were produced relating to Ms Jadach's employment and job-seeking:

    (a) P45 from Monitor Hygiene Services, Northfleet, showing her as leaving on 10th December 2007 with earnings of £8405 in that employment. [She states in her CV that she worked here from 10th January 2007 to 29th December 2007].

    (b) P45 from City Centre Restaurants UK, showing her leaving on 13th October 2008, with earnings of £4200. [In her CV she stated that she was working at the Bridge Bar from 8th May 2008 – 5th October 2008].

    (c) Employment and Support Allowance Claim dated 15th April 2009, showing that she received ESA until 2nd February 2009.

    (d) Accession State Worker Registration Scheme Registration Certificate dated 17th June 2010, showing her as employed at the Park Inn Hotel, Northampton. [Her CV shows her as working there from 16th March 2010 to 25th September 2010].

    (e) On 3rd December 2012 she had an interview at Northampton Jobcentre Plus; she was in receipt of jobseeker's allowance from 1st November 2012 "and ongoing". The documents showed she was seeking work for office work, bar work, restaurant; also that she was looking for jobs as a warehouse operative, picker/packer. She could work 40 hours a week, and was prepared to work between 9am and 10pm on any day (weekends

included) not more than 8 hours a day. On 17th December 2012, he stated in a document prepared by the Jobcentre that she would go to Northampton College to apply for an English, Maths and IT course, by 13th January 2013.

12. There is no evidence that Ms Jadach was working save for that evidence presented by the appellant at the former Tribunal that she had a job in August 2013. This was not supported by documentation.

13. The findings of Judge P J Clarke confirmed that the only evidence showing that the wife was a worker was the oral statement of the appellant and as this was unsupported by documents, it was not sufficient. I agree.

14. That the appellant was registered as a jobseeker on 1 November 2012 and was still so registered on 17 December 2012 does not assist the appellant in showing that she the sponsor, an EEA national is a qualified person.

15. The only documentation to suggest that the sponsor was a jobseeker related to December 2012 when the EEA national had an interview at the Northampton Jobcentre and was in receipt of Jobseekers allowance from 1 November 2012. On 17 December there was a document prepared by the Jobcentre that she would go to Northampton College to apply for an English Maths and IT course by 13 January 2013.

16. Further to Regulation 6(2) a person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph 6 but for clarification I will set out the relevant regulation below.

17. *6*

(2)

1(b) if –

"(a) He is temporarily unable to work as the result of an illness or accident;

(b) He is in duly recorded involuntary unemployment after having been employed in the United Kingdom for at least one year provided that he –

(i) has registered as a jobseeker with the relevant office; and

(ii) satisfies condition (A) and (B)."

….

(4) For the purpose of paragraph (1)(a), a "jobseeker" is a person who satisfies conditions A, B and, where relevant, C

(5) Condition A is that the person –

(a) entered the United Kingdom in order to seek employment; or

> *(b) is present in the United Kingdom seeking employment, immediately after enjoying a right to reside pursuant to paragraph (1)(b) to (e) (disregarding any period during which worker status was retained pursuant to paragraph (2)(b) or (ba)).*
>
> *(6) Condition B is that the person can provide evidence that he is seeking employment and has a genuine chance of being engaged.*
>
> *(7) A person may not retain the status of a worker pursuant to paragraph (2)(b), or jobseeker pursuant to paragraph (1)(a), for longer than the relevant period unless he can provide compelling evidence that he is continuing to seek employment and has a genuine chance of being engaged.*
>
> *(8) In paragraph (7), "the relevant period" means –*
>
> *(a) in the case of a person retaining worker status pursuant to paragraph (2)(b), a continuous period of six months;*
>
> *(b) in the case of a jobseeker, 182 days, minus the cumulative total of any days during which the person concerned previously enjoyed a right to reside as a jobseeker, not include any days prior to a continuous absence from the United Kingdom of at least 12 months.*

18. The appellant's sponsor is last recorded as working in documentary evidence, as opposed to the oral evidence which is insufficient, in September 2010 [Park Inn Hotel Northampton]. Even if the sponsor, and thus the appellant, is not caught by Condition A, whereby she may only retain worker status for a maximum of six months because she has been employed in the UK for less than a year, there was no evidence to show that she had fulfilled condition B such that she was still and at the relevant time seeking employment and had a genuine change of being engaged. The last documentary evidence in relation to the appellant's sponsor activity was that she was going onto a course in January 2013. The First Tier Tribunal Judge found she was a job seeker in January 2013 but this is not relevant to the date of the hearing. There was indeed no evidence that she was present in the UK contrary to Condition A and no evidence that she is continuing to seek work or that she had embarked on a vocational training course

19. There was no evidence, save for the appellant's oral evidence that he had understood the sponsor was working in the August 2013 and looking for a job in February 2014. I find there is unsatisfactory evidence to show that the sponsor was a jobseeker or that she was even in the country. There was no evidence as to how long she had been unemployed and as such I find the appellant cannot succeed on the appeal under the EEA Regulations.

20. I note that the appellant appealed further to Article 8. The appellant cannot comply with the Immigration Rules under Appendix FM as a family life had not been engaged, through a genuine and subsisting relationship as he no longer lives with his wife. The appellant and his ex-wife had not lived together since 2009 and although they planned to live together after 2011 they had not done so. There was no evidence of another girlfriend.

21. Nor can he comply with Paragraph 276ADE of the Immigration Rules. He has not lived in the United Kingdom for 20 years nor lived most of his life in the United Kingdom. He first entered the UK as a work permit holder in 2002 as a professional cricketer and returned in 2003 on a similar permit, when he was 19 years old. The appellant was then granted entry clearance as a student and further leave to remain until November 2008. He met the EEA sponsor in 2007 and they started living together in November 2007. They married on 8 March 2008. In January 2009 the appellant was arrested and was charged with having raped his wife and remanded in custody but at the Crown Court on 24 June 2009 the police offered no evidence. The appellant was further granted leave to remain as a student on 11 July 2012. He had entered the UK first in 2002 and then in 2003 has been living in the UK for nearly twelve years as at the date of the hearing.

22. On consideration of the facts, I do not consider that there are arguably good grounds for considering the matter outside the Immigration Rules but even if I am wrong about that I have considered the questions in **Razgar** [2004] UKHL 27, in line with **R(MM (Lebanon)) v SSHD** [2014] EWCA Civ 985. The appellant has established some private life, as described above, in the UK and I accept further to **AG (Eritrea) [2007] EWCA Civ 801** that the test for engagement of private life is not particularly high. He had studied in the UK obtaining various qualifications and has formed relationships and has been involved in the community activities, notably cricket.

23. I accept that the decision to refuse him a residence card is in accordance with the law and would be for a legitimate aim, namely the protection of rights and freedoms of others through effective immigration control. I am bound to have regard to Section 117 of the Nationality, Immigration and Asylum Act 2002 which identifies that "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2). There has been no decision to remove the appellant although his removal is contemplated in the refusal letter and his appeal was framed in relation to Article 8. I take into account that he has not previously breached Immigration Rules and has not been convicted of any offence although appears to have spent some time on remand for rape. Albeit he had spent the majority of the last thirteen years in the UK, appellant has continuously returned to Pakistan, notably in December 2009 and September 2011, and cannot have had any firm expectation of being able to remain in the UK. He came here to study and has done so.

24. The appellant stated that he had finished his diploma in business management and waiting for results and I find that he has improved his employment prospects by obtaining qualifications in the UK. There was no information placed before me to the effect that the appellant cannot renew his life in Pakistan. He speaks the language and was educated in his formative years in Pakistan.

25. **Huang v SSHD [2007] UKHL 11**

'In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality'.

26. I find that the decision to refuse his appeal has not seriously prejudiced any Article 8 rights the appellant may have and the appeal is dismissed under both the EEA Regulations and on human rights grounds.

Signed Date 23rd October 2014

Judge Rimington
Deputy Judge of the First-tier Tribunal

Fee Award: I have dismissed the appeal and therefore there can be no fee award.