



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/01438/2015

THE IMMIGRATION ACTS

Heard at Field House
On 7 June 2017

Decision & Reasons Promulgated
On 15 June 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS DORIS OWUSU-AMPONSAH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms Z Ahmad, Senior Home Office Presenting Officer
For the Respondent: Mr K Siaw, Solicitor from R Spio & Co Solicitors

DECISION AND REASONS

1. I shall refer to the parties as they were before the First-tier Tribunal. Therefore the Secretary of State is the Respondent and Mrs Owusu-Amponsah is once more the Appellant.
2. This is an appeal by the Respondent against the decision of First-tier Tribunal Judge Plumtre (the judge), promulgated on 14 November 2016, in which she allowed the Appellant's appeal against the Respondent's decision of 28 September 2015, refusing to issue a permanent residence card under the Immigration (European Economic

Area) Regulations 2006 (the Regulations). The Appellant has at all times been married to a Dutch national.

3. By an application made on 18 April 2015, the Appellant asserted that she had by that point acquired a permanent right of residence pursuant to Regulation 15 of the Regulations. In refusing the application the Respondent had asserted that there was no evidence that the Dutch national had been a qualified person within the meaning of Regulation 6 for the requisite period of five years.

The judge's decision

4. The judge found that the Dutch national had in fact worked from March 2009 to May 2010 (I will return to the end date of this employment, below). She found that he had been working since 27 November 2013 to the date of the hearing before her in October 2016. In relation to the interim period 2010 to 2013, the judge found that he had been claiming jobseeker's allowance. The judge found that the Dutch national had always intended to find employment after being made redundant from his previous job, and in order to enhance his prospects had undertaken a number of courses. The judge clearly found the Dutch national to be a credible witness. Having referred to various aspects of the evidence and relevant case law from the Administrative Appeals Chamber in relation to the meaning of the phrase "genuine chance of being engaged", the judge found that the Dutch national had satisfied the requirements of Regulation 6(2)(b) of the Regulations over the course of the requisite five year period. On this basis the Appellant's appeal was allowed.
5. Of significance in the appeal before me, paragraph 22 the judge states:

"In this appeal the Appellant's Sponsor was in receipt of jobseeker's allowance for three years and one month and the reality is that without considerable further training provided by the taxpayer the Appellant had little chance of being employed".
6. Then at paragraph 26 the judge stated, "absent any relevant evidence at all as to Mr Ampopo's efforts to obtain employment it is difficult to determine whether or not during this period of three years he had had genuine chance of being engaged."

The grounds of appeal and grant of permission

7. The Respondent's grounds of appeal assert that there is a material contradiction in the judge's findings as between what she says in paragraphs 22 and her ultimate conclusion that the Dutch national had been a qualified person throughout the period of unemployment.
8. Permission was granted by First-tier Tribunal Judge Grant-Hutchison on 4 May 2017.

The hearing before me

9. Ms Ahmad relied on the grounds of appeal and concentrated on what was said in paragraph 22 of the judge's decision. She submitted that before the advent of any training courses the Dutch national had had no real chance of being employed, and this is what in effect the judge has said in paragraph 22. The genuine chance test involved both subjective and objective elements to it.
10. Mr Siaw asked me to consider the judge's decision as a whole. She had found the Dutch national to be a credible witness. As a matter of fact he had been intent on finding employment throughout the relevant period and had in fact obtained a job in 2013. This was good evidence that his prospects of finding work prior to that had been genuine throughout the relevant period.

Decision on error of law

11. With some hesitation I find that the judge has materially erred in law by failing to provide clear reasons, and in certain respects failing to make relevant findings, on material issues.
12. Notwithstanding the judge's positive view of the Dutch national's overall credibility, she stated in paragraph 22 that without the further training courses undertaken, he had little chance of being employed. On the face of it that reads as though his chances of being engaged prior to undertaking the courses were less than genuine, applying both a subjective and objective test as stipulated by relevant case law from the Administrative Appeals Chamber. I appreciate what is said in paragraphs 25 and 29 of her decision, and bear in mind that of course the Dutch national ultimately found employment, although not until late 2013.
13. The uncertainty surrounding the judge's view of the genuine chance issue is really only compounded by what she says in the second sentence of paragraph 26. In my view there is either a failure to make a clear finding on a relevant issue or a failure to provide adequate reasons.
14. I have concluded that the errors are material albeit, as I will make clear below, my own conclusions when remaking the decision will be favourable to the Dutch national, and of course in turn to the Appellant herself. The threshold of what is or is not material is a somewhat grey area, but in my view the face of the decision itself needs to be sufficiently clear to allow both parties to understand why they have either won or lost. It is not the case with the judge's decision here.
15. I therefore set aside the judge's decision.

Remaking the decision

16. Both representatives were agreed that I could remake the decision on the evidence before me, and this I now do.

17. Having looked at the evidence for myself, and there being no dispute as to the reliability of either documentary evidence or that from the Appellant or Dutch national themselves, I find that the latter in fact worked between 2009 and October 2010. My finding on the end date differs slightly from that of the judge because of the evidence from HMRC at page 7 of the Appellant's bundle, in which it states the end date of that employment to be 22 October 2010, and not May of that year.
18. I find that very shortly thereafter the Dutch national claimed jobseeker's allowance. This is indicative of his desire to find further work as soon as possible. I have considered the various training certificates contained in the Appellant's bundle, beginning at page 19. These are certificates awarded after the successful completion of various courses. Certificates were awarded between July and December 2011. It follows, in my view, that the courses leading to the award of these certificates must have begun sometime previously. Although I have not been provided with specific evidence as to the particular duration of these courses, I draw the reasonable inference that they would have lasted for about six months at least. Working back from the award of most of the certificates (that being November and December 2011), I find that the Dutch national had undertaken relevant training courses to assist his chances of employment in early 2011. This was only a very short period after he was made unemployed from his previous work.
19. In turn, having regard to the relevant case law on the genuine chances test I find that the combination of the Dutch national's own intentions and the objective enhancement of his employment prospects created by the undertaking of the various courses, and the fact that he did obtain employment eventually, all go to show that his prospects of being engaged were indeed genuine throughout the relevant period.
20. It follows that he remained a qualified person under Regulation 6, having retained the worker status that he previously enjoyed. In turn, he had acquired a permanent right of residence in the United Kingdom. More importantly for the appeal before me, the Appellant, as his family member, also acquired such a right.
21. The appeal succeeds on this basis.
22. Alternatively, if there had been a break in the qualification status of the Dutch national prior to him undertaking the courses, I would nonetheless find that as at the end of 2011, once he had completed all of the various courses referred to in the Appellant's bundle his prospects of him being engaged were at the very latest, genuine by that stage. He was a jobseeker thereafter and eventually became a worker upon finding employment in November 2013. It follows from this that he has been a qualified person for a period in excess of the requisite five years in any event.
23. Therefore, on this alternative basis the Appellant herself has acquired a permanent right of residence.
24. The appeal is allowed on this alternative basis as well.

Notice of Decision

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 of the First-tier Tribunal.

I re-make the decision by allowing the appeal.

No anonymity direction is made.

Signed

Date: 13 June 2017

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of £140.00. The Appellant has succeeded on the basis upon which she applied to the Respondent.

Signed

Date: 13 June 2017

Deputy Upper Tribunal Judge Norton-Taylor