Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02769/2017

THE IMMIGRATION ACTS

Heard at Liverpool
On 16 January 2018

Decision & Reasons Promulgated
On 24 January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

M E
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No appearance
For the Respondent: Mr. Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Estonia, born on [ ] 1962. She arrived in the UK on 20.11.10 and was a self-sufficient jobseeker until she commenced employment on 6.11.11. She ceased employment on 29.4.12 due to ill-health. On 16.12.16 she applied for confirmation of her right to permanent residence as an EEA national exercising Treaty rights in the UK, pursuant to regulation 15 of the Immigration (EEA) Regulations 2016. This application was refused on 28.2.17 and an appeal was lodged against that decision on 12.3.17.

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2. The appeal came before First tier Tribunal Judge Miles for consideration on the papers on 27.4.17. In a decision and reasons promulgated on 2.5.17 he dismissed the appeal, finding *inter alia* as follows at [14]:

> *"In my judgment a person who asserts that they are temporarily unable to work demonstrates that the period is a temporary one by returning to work and the notion that they are only temporarily unable to work for a period which is followed immediately by permanent incapacity simply does not accord with the meaning of the regulations in that regard."*

He was thus not satisfied that the Appellant had established on the balance of probabilities that she is entitled to confirmation of the right to reside permanently in the UK as an EEA national under the 2016 Regulations [15].

3. An application for permission to appeal to the Upper Tribunal was made by the Appellant herself, in time, on the basis that in light of the decision in *FMB (EEA Regulations – reg 6(2)(a) – temporarily unable to work)* Uganda [2010] UKUT 447 (IAC) it is not clear when temporary incapacity ends and permanent incapacity begins and that the FtTJ erred in regarding her incapacity as permanent rather than temporary. Consequently, she should have been considered as a worker under regulation 6(2)(a) rather than 5(2) of the 2006 EEA Regulations.

4. In a decision dated 7.11.17 permission to appeal was granted by DJ McCarthy in the following terms:

> *"6. Given the findings in [14] where Judge Miles clearly identifies there is no medical or other evidence to confirm the appellant is permanently incapacitated, it is arguable that he should have considered whether she continued to benefit from regulation 6(2)(a). If she did, and has been since 29 April 2012, it is also arguable that she will have resided for the requisite period of five years to entitle her to a permanent residence card."*
>
> *7. Because these issues have not been determined, the application is arguable and permission is granted."*

Hearing

5. At the hearing before me, there was no appearance by or on behalf of the Appellant. In light of the fact that the appeal had previously been heard on the papers and that the Appellant had been notified of the grant of permission to appeal and the hearing date and had written to the Upper Tribunal on 29.12.17 stating that her health may not permit her to attend in which case she wished for a decision to be made in her absence, I proceeded to hear the appeal in her absence, pursuant to rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

6. Mr Harrison, on behalf of the Respondent, helpfully accepted that there had been a material error of law in the decision of First tier Tribunal Judge Miles, for the reasons identified in the grounds of appeal and grant of permission to appeal.

Decision

7. In light of Mr Harrison's helpful concession I find a material error of law in the decision of First tier Tribunal Judge Miles, on the basis that he failed to consider whether the Appellant was temporarily incapacitated and thus remained a worker pursuant to regulation 6(2)(a) of the EEA Regulations 2006. I proceed to re-make the decision.

8. In *FMB (EEA Regulations – reg 6(2)(a) – temporarily unable to work)* Uganda [2010] UKUT 447 (IAC) the Upper Tribunal held *inter alia* as follows:

> *"20. For the Secretary of State, Mr Gulvin submitted that a temporary period of incapacity could not be as significant in length as four years, although he was not able to refer to any authority on the point. He acknowledged that if a person's incapacity was neither temporary nor permanent, then it was difficult to define it further.*
>
> *21. For the claimant, Mr Richardson submitted that if incapacity was not permanent, then in terms of the ordinary meaning of language, it was temporary. He put to us two further arguments. The first of these relied upon certain regulations where requirements were expressed as a finite period. In this regard he referred us by way of an example to reg 5(3)(b), which requires that the person who has ceased activity as a result of permanent incapacity to work has resided in the United Kingdom continuously for more than two years prior to the termination. Mr Richardson submitted that by contrast no period of time was specified in reg 6(2)(a) in relation to temporary inability to work. This omission should be regarded as deliberate.*
>
> *22. Secondly, Mr Richardson argued that when the EEA Regulations were read as a whole, reg 6(2)(a), relating to temporary inability to work, and reg 5(3)(b), relating to permanent cessation of activity, dove-tailed together in a manner implying that a person not permanently incapable of work was to be regarded as temporarily incapable of work.*
>
> *23. For our part we consider that there is considerable merit in the argument advanced on behalf of the claimant as to the meaning of the words "temporary" and "permanent", in the sense that if a person's inability or incapacity is not permanent, then it should be regarded as temporary. The definition of "permanent" in Collins English Dictionary (1991) is given as "1. Existing or intending to exist for an indefinite period" and "2. Not expected to change for an indefinite time; not temporary". The definition of "temporary"*

is given as "1. Not permanent; provisional" and then "2. Lasting only a short time; transitory". These definitions give strong support for the argument that a state of affairs which is not permanent is temporary although, reflecting Mr Gulvin's submission, temporary is also regarded as lasting only a short time. We note that reg 5(3)(a) refers to "permanent incapacity to work" while reg 6(2)(a) refers to a person who is "temporarily unable to work" but we do not consider that in this appeal anything material hinges on any distinction between being incapable of work or unable to work."

9. Regulation 5(3) of the Immigration (EEA) Regulations 2006 provides:

"Worker or self-employed person who has ceased activity"

5. *– (1) In these Regulations, "worker or self-employed person who has ceased activity" means an EEA national who satisfies the conditions in paragraph (2), (3), (4) or (5)…*

(3) 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; …

10. Regulation 6(2)(a) of the aforementioned Regulations provides:

"Qualified person"

6. *– (1) In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as –*

(a)a jobseeker;

(b)a worker;

(c)a self-employed person;

(d)a self-sufficient person; or

(e)a student.

(2) A person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if –

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

11. The Appellant's case as put before the First tier Tribunal is that she was temporarily incapable of work from 29 April 2012 to 29 May 2013 when she became permanently incapacitated. Judge Miles was not satisfied that the Appellant was permanently incapacitated as the medical evidence did not state as such in terms.

12. The Appellant has sent a letter dated 29.12.17 to the Tribunal, attaching a letter from Dr T. Elkin, her GP at the Mere Lane Group Practice dated 2.6.17 in which he states:

> *"I am* [ME]*'s GP. I can confirm that she suffers from chronic disabling pain and limb weakness, chronic back pain and depression with suicidal ideation. Given the persistence of* [ME]*'s chronic problems, both physical and mental health issues and failure of attempted treatments to improve her symptoms, I would consider it likely her illnesses are permanent. There is little optimism that her symptoms are to improve in any foreseeable timeframe."*

10. In her letter of 29.12.17 the Appellant states that the medical evidence previously submitted made reference to her illness being chronic and that "chronic" and "permanent" essentially have the same meaning in this context. Thus it is clear that both the Appellant and her GP now consider that her medical condition is permanent and I so find.

11. However, the key question requiring determination is at what point did the Appellant become permanently as opposed to temporarily incapacitated? I have considered the evidence on this issue, in particular:

(i) a report from Ms Delia Byng, an approved disability analyst, dated 20.3.13 which concluded that "*the overall evidence indicates that significant disability related to physical and mental function is unlikely*" and that work could be considered within 3 months;

(ii) a letter from Job Centre Plus in respect of the Appellant's entitlement to EASA (Employment & Support Allowance) dated 30.5.13 informing her that she is not entitled to EASA and had been assessed as capable of working at that time;

(iii) A letter from Dr Elson, associated specialist in Neurology dated 28.7.14 where he records that the Appellant has reported a gradual deterioration of her symptoms particularly over the last year and more specifically over the past week, which made food preparation difficult. The letter provides no conclusive diagnosis but does confirm that there was no evidence of demyelinating CNS disease such as MS;

(iv) a certificate from her GP dated 17.10.14 certifying her as not fit to work.

12. Whilst it is not clear from the evidence at what exact point in time the Appellant became permanently rather than temporarily incapacitated, it is tolerably clear it was still considered in May 2013 that the Appellant would be able to work or was capable of work at that time. Thus I find that the Appellant could be considered as temporarily incapacitated and thus fell within the definition of a qualified person, set out at regulation 6(2)(a) from

October 2010 when she was a job-seeker to at least May 2013 when she was still considered to be temporarily incapacitated.

13. It follows that the Appellant is entitled to permanent residence as she resided for more than 2 years prior to the termination of her employment on the basis that she was permanently incapacitated, pursuant to regulation 5(3) of the Immigration (EEA) Regulations 2006.

Decision

14. I find an error of law in the decision of First tier Tribunal Judge Mills. I re-make the decision allowing the appeal.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

22 January 2018