Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA084802016

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 5th June 2017	**On 21st June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

MALERSELLVI SARAVANABABAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No legal representation
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against the decision of Judge M A Khan of the First-tier Tribunal (the FTT) promulgated on 5th October 2016.

2. The Appellant is a female Sri Lankan citizen born 25th July 1975, who on 4th January 2016 applied for a permanent residence card as the spouse of a German citizen, who had been exercising Treaty rights for a continuous period of five years in the United Kingdom, in accordance with The Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations).

3. The Appellant explained in her application that she and her husband, to whom I shall refer as the Sponsor, entered the United Kingdom in February 2009. They have three children who are also German citizens. The Sponsor had been in employment since arriving in the United Kingdom and therefore had been exercising Treaty rights as a worker.

4. The Appellant had been issued with residence documentation on 4th February 2011, valid until 4th February 2016, as the family member of an EEA national.

5. The application was refused on 28th June 2016 with reference to regulation 15(1)(b) and regulation 6 of the 2006 Regulations.

6. In order to satisfy regulation 15(1)(b) the Appellant must prove that she is the family member of an EEA national who has resided in the United Kingdom with the EEA national in accordance with the 2006 Regulations for a continuous period of five years. The Respondent noted that the Appellant claimed that the Sponsor had been a qualified person as defined by regulation 6, and therefore had been exercising Treaty rights as a worker and had submitted documentary evidence in support. The Respondent noted that there was a letter from HMRC dated 20th January 2015 confirming the Sponsor's employment history for the tax years 2010 – 2011, 2011 – 2012, 2012 – 2013 and 2013 – 2014. In addition the Appellant had submitted a P60 tax form for the Sponsor for the tax year ending April 2014, and payslips for months ending October and November 2015.

7. The Respondent referred to HM Revenue & Customs (HMRC) Primary Earnings Threshold (PET) which is the point at which employees must pay class 1 national insurance contributions. The Respondent followed guidance known as the European Modernised Guidance which is guidance issued to caseworkers dealing with the EEA Regulations and EEA residence applications. This indicated that if an EEA national was earning below the PET, further enquiries must be made as to whether the employment relied upon is genuine and effective.

8. In order to be classed as a worker, the employment must be genuine and effective and not marginal or supplementary.

9. The Respondent noted that the Sponsor's earnings were below the PET for the tax years 2011 – 2012 and 2012 – 2013. The Sponsor's earnings were £5,824 and £7,171 respectively.

10. In the absence of any other evidence, the Respondent's view was that the Sponsor's claimed employment for these years, was marginal and auxiliary or supplementary, and therefore the Sponsor could not be considered to be a worker for those years,

which meant that he had not accrued a continuous period of five years exercising Treaty rights.

11. The Respondent noted that the burden of proof was on the Appellant, and contended that the burden had not been discharged.

12. The Appellant appealed to the FTT, requesting that the appeal be decided on the papers without an oral hearing.

13. The FTT considered the appeal on the papers as requested and issued a decision dated 25th September 2016, which was promulgated on 5th October 2016, allowing the appeal.

14. The Appellant did not appreciate that the appeal had been allowed and applied for permission to appeal to the Upper Tribunal.

15. Permission to appeal was granted by Judge Nightingale of the FTT and I set out below in part, the grant of permission which summarises the Appellant's grounds;

> "2. The 'grounds' are a letter from the Appellant simply stating that she leaves matters in the hands of the Tribunal and that she is entitled to a permanent residence card.
>
> 3. The judge considered the Appellant's case and noted some gaps in the evidence at paragraph 21. At paragraph 19 the judge states that the Appellant has not shown she has resided for a continuous period of five years, yet at paragraph 23 says that she has met the requirements of regulation 15(1)(b). The judge does not appear to accept that the spouse's periods of study are to be taken into consideration, and also notes the evidence does not cover the required period (at paragraph 21). The findings of the judge are entirely unclear, and the basis upon which this appeal was allowed is equally unclear. Whilst there are no arguable errors arising on the Appellant's Grounds of Appeal, I find there to be obvious errors arising on the face of the judge's decision and permission is granted on this basis."

16. Following the grant of permission the Respondent submitted a response pursuant to Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, agreeing with the grant of permission. The Respondent confessed to misunderstanding the FTT decision, believing the appeal to have been dismissed, commenting that this was indicative of a lack of clarity within the FTT decision.

17. Directions were issued making provision for there to be a hearing before the Upper Tribunal to ascertain whether the FTT decision contained an error of law such that it should be set aside.

Error of Law

18. The Appellant attended without legal representation. I established that there was no difficulty in communication between the Appellant and interpreter in Tamil. The Appellant indicated that she was content to proceed without legal representation.

19. I explained the procedure that would be adopted. The Appellant indicated that she had applied for permission to appeal, as she had not understood the FTT decision.

20. The Appellant had seen the grant of permission and understood that the Respondent believed that the FTT had made an error of law. The Appellant did not wish to comment further upon the FTT decision.

21. Mrs Aboni relied upon the Rule 24 response, submitting that the FTT had materially erred in law. The findings are unclear and contradictory.

22. I set aside the decision of the FTT. The decision contains material errors of law. At paragraph 19 the FTT finds that the Appellant has not shown that she has resided in the United Kingdom for a continuous period of five years in accordance with the 2006 Regulations. This conflicts with the conclusion at paragraph 21 that "the Appellant has provided more than sufficient evidence to show that her EEA national family member is exercising Treaty rights in the UK." At paragraph 22 the FTT finds that the Appellant "has not provided evidence of insurance and medical cover. The Appellant also falls short in the time period required, from 2010 until 2015." This finding is unclear. The FTT makes reference to the Appellant having been studying with the Open University. The Appellant at the Upper Tribunal indicated that it was her daughter who had been studying with the Open University.

23. Paragraph 23 contains another conflicting finding, in this paragraph the FTT makes a finding that the Appellant has established that she satisfies the requirement of regulation 15(1)(b) of the 2006 Regulations.

24. I set aside the decision of the FTT with no findings preserved, I was asked by the Appellant and Mrs Aboni to re-make the decision.

Re-Making the Decision

25. Mrs Aboni submitted that the decision should be re-made and the appeal dismissed for the reasons given in the Respondent's reasons for refusal letter dated 28th June 2016.

26. The Appellant explained that she and the Sponsor came to the United Kingdom on 11th February 2009. The Sponsor is a German citizen. They have three children who are also German citizens, a daughter age 21, a daughter age 12, and a son age 10.

27. The Sponsor had employment in excess of five years after arriving in the United Kingdom. He is currently working for the Appellant who has opened a restaurant. This business started in February 2016.

28. The Appellant confirmed that the Sponsor had worked continuously since coming to the United Kingdom, working for approximately twelve months in a shop, and the remainder of the time in a petrol station. The Appellant requested that she be granted permanent residence on the basis that she had a residence card valid

between 4th February 2011 and 4th February 2016, and the Sponsor had been in continuous employment for over five years.

29. I reserved my decision.

My Conclusions and Reasons

30. In re-making the decision I have taken into account the documentation placed before the FTT. This comprises the Respondent's bundle with Annexes A – G, together with the Appellant's Notice of Appeal.

31. The burden of proof is on the Appellant and the standard of proof a balance of probabilities. I find as a fact that the Appellant and her family have resided in the United Kingdom since February 2009. I have seen a copy of her residence documentation which was valid between 4th February 2011 and 4th February 2016.

32. It is common ground that the Sponsor is a German citizen.

33. The evidence produced to the Respondent to prove the Sponsor's employment is a letter from HMRC dated 20 January 2015 which confirms his employment for a period of four years, those being the tax years 2010 – 2011, 2011 – 2012, 2012 – 2013, and 2013 – 2014. In addition payslips for the months October 2015 and November 2015 were produced, showing that the Sponsor's employment continued as his annual income shown on the payslip dated 30th November 2015 was £4,846.60.

34. The Sponsor's annual income could fairly be described as low. The application form submitted by the Appellant in connection with her permanent residence application confirms the Sponsor receives housing benefit in the sum of £360 per month, and tax credits of £710 per month. This is has not been disputed by the Respondent.

35. The Respondent's reasons for refusal letter does not dispute that the Sponsor has been in employment, but contends that in two years, those being 2011 – 2012, and 2012 – 2013 his earnings were below the PET. On that basis his employment was deemed to be marginal and auxiliary or supplementary for those years, and it was not accepted that he had employment which made him a qualified person.

36. The Respondent in the refusal letter referred to Levin v Staatssecretaris van Justitie [1982] EUECJ R-53/8 which provides a definition of employment. In summary it was found that part-time work counts as employment, provided the work is genuine and provides an effective means for a person to earn a living even if needs to be supplemented from public funds.

37. In Lawrie-Blum v Land Baden-Wurttemberg Case 66/85 [1986] ECR 2121 it was found that the essential characteristic of the employment relationship is the fact that during a given time one person provides services for and under the direction of another in return for remuneration.

38. The case law indicates that remuneration appears to be the key, but payment need not be enough to live on, or it may be in kind rather than a formal wage. In Kempf v Staatssecretaris van Justitie Case 139/85 [1986] ECL 1741, it was found that a person may still be a worker even if their pay is so low that he or she needs to supplement it with unemployment benefit or has to apply for sickness benefit during a period of illness, provided that the effectiveness and genuineness of the activities of the person are established.

39. If the work is genuine and effective, and not purely marginal and incidental therefore, it can be considered an economic activity.

40. It is accepted that the Sponsor has been in employment. It is clear that his income has been supplemented by tax credits. I accept that the Sponsor's wage was used to support himself and his family. In the circumstances I do not find that his employment can be described as purely marginal and incidental, and I accept that it has been proved that the employment is genuine and effective, even though lowly paid.

41. I therefore find that the Appellant has proved that she is a family member of an EEA national who has resided in the United Kingdom with the EEA national in accordance with the 2006 Regulations for a continuous period of five years. The requirements of regulation 15(1)(b) are satisfied and the appeal is allowed. The Appellant is entitled to permanent residence in the United Kingdom.

Notice of Decision

The decision of the FTT contained material errors of law and was set aside. I substitute a fresh decision. The appeal is allowed pursuant to the 2006 Regulations.

Anonymity

There has been no request for anonymity and I see no need to make an anonymity order.

Signed Date

Deputy Upper Tribunal Judge M A Hall 9th June 2017

TO THE RESPONDENT
FEE AWARD

Because the appeal is allowed I have considered whether to make a fee award. In my view sufficient information was provided to the Respondent with the application. I therefore make a fee award in the sum of £80.

Signed Date

Deputy Upper Tribunal Judge M A Hall 9th June 2017