Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/02300/2016**

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent	**Decision & Reasons Promulgated**
On 8th December 2017	**On 11th January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR S A H
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms V Brankovic (Counsel)
For the Respondent: Mr C Bates (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge E. M. M. Smith, promulgated on 29th March 2017, following a hearing at Bennett House, Stoke-on-Trent on 22nd March 2017. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Denmark, and was born on 4th March 1963. He appealed against the decision of the Respondent Secretary of State dated 6th January 2016, refusing his application for a residence card, as confirmation of his right to reside in the UK under Regulation 5 of the Immigration (European Economic Area) Regulations 2006.

The Appellant's Claim

3. The Appellant's claim is that he has been a worker in the UK since 30th July 2014, which made him a qualified person as defined by Regulation 6. The fact that he has subsequently been in receipt of a carer's allowance for the purposes of looking after his wife does not disqualify him from the status of being a worker. The Respondent has claimed that the Appellant has not established that for the preceding five years he was a worker such as to satisfy the provisions of Regulation 15(1)(a) of the 2006 Regulations. The Respondent also asserts that the Appellant has not provided any evidence to establish that he was exercising treaty rights from the 20th March 2009 to 2nd March 2015. It was accepted that from 30th July 2014 the Appellant was established as a worker. The sole issue before Judge Smith in the appeal that was heard on 22nd March 2017 was whether being in receipt of a carer's allowance entitles one to be treated as a worker for the purposes of the Regulations.

The Judge's Findings

4. There was no authority on the specific question of whether being in receipt of a carer's allowance disqualifies one from being a worker that Judge Smith could rely upon. Account was had to the fact that the carer's allowance requires the recipient to spend at least 35 hours a week caring for someone, not be in full-time education, not be studying for 21 hours a week or more, and not earning more than £110 a week after taxes.

5. The judge had regard also to the fact that for the purposes of Appendix FM of the Immigration Rules, paragraph E-ECP3.3 accepts that being in receipt of a carer's allowance for the purposes of financial requirements of paragraph E-ECP.3.1 does not require one to demonstrate that one has income of £18,600 per annum as is normally the case.

6. The definition of a worker was set out in the well-known case of **Genc v Land Berlin [C-14/09]** where the court held that the concept of a worker must not be interpreted narrowly and that "any person who pursues activities which are real and genuine to the exclusion of activities on such a small scale as to be purely marginal and ancillary, must be regarded as a 'worker'". It was also confirmed in **D. M. Levin v Staatssecretaris van Justice (C-53/81)** that "the activity as an employed person may not be defined by reference to the national laws of member states but have a community meaning".

7. The judge was concerned by the fact that there is a requirement of working at least 35 hours a week to be committed to care with a maximum weekly wage of £62.10, but

this was less than the national minimum wage of £7.50 per hour, and it therefore raised the question whether being in receipt of a carer's allowance can be regarded as a reward for employment, in cases where of the national minimum wage will not be applicable.

8. The judge concluded that the Appellant qualified as a "worker". This was because although there were cases, such as **SS Works and Pensions v Dias [2009] EWCA Civ 807**, which involved a citizen of Portugal, who had given up her work, when she became pregnant, in order to take maternity leave and then to receive income support, which resulted in her disqualifying herself from the status of a "worker", this was not applicable in a case such as the present, where the Appellant had given up work in order to care for an adult, and was receiving, not income support, but a carer's allowance. The judge resolved that the instant case was different because in that case a voluntary decision to care for her child instead of working had been made by the applicant and accordingly she had not retained her worker status for the relevant period. As the judge explained, that in the instant case, where the Appellant was looking after his wife, as an adult, "the alternative would I presume be that the DWP would need to pay for a carer to attend upon the Appellant's wife in his absence. If for example that carer employed by the DWP was an EEA citizen, then that citizen would qualify as a worker" (paragraph 34).

9. The appeal was allowed.

Grounds of Application

10. In the grounds of application, it is said that the judge erred in law when it was concluded that the Appellant was a worker for the purposes of the Regulations by virtue of his role as a carer for his wife for which he received carer's allowance from the DWP.

11. On 20th September 2017, permission to appeal was granted.

Submissions

12. At the hearing before me on 8th December 2017, Mr Bates, appearing on behalf of the Respondent Secretary of State, made the following submissions. First, that the Department of Work and Pensions was not an employer of people. Therefore there could not have been an employment relationship, however loosely constructed, between the DWP's payment of a carer's allowance, and the Appellant performing the activities that he did for his wife. All that the DWP was doing was providing a benefit. Just being in receipt of a carer's allowance was therefore not enough. Second, the judge had referred to the fact (at paragraph 25) that the carer's allowance requires a recipient to "earn no more than £110 a week". The reference to "must earn" suggested that the Appellant had to have at least a part-time job if he was to be a worker. It did not matter how much he earned provided that he did earn an amount that was less than £110 a week. Not earning anything at all did not qualify him as a worker if he was in receipt of a carer's allowance. Third, whereas it is the case that the judge refers (at paragraph 26) to the fact that Appendix FM of the Immigration Rules states at paragraph E-ECP3.3 that being in receipt of a carer's

allowance does not require one to demonstrate an income threshold of £18,600, this was a matter with respect to any entirely different immigration consideration, whereas the community law requirements are different. The judge needed to demonstrate how what was said in the Immigration Rules was a material factor to the interpretation of the community law provisions here. Fourth, the judge had referred to the case of **Land Berlin [C-14/09]** but it still needed to be demonstrated what the relationship between the employer and the employee was in this case and the judge had not explained that. It was not clear what types of services were being provided in this type of activity. The DWP was not an employer. It was not viewing the Appellant as an employee.

13. Fifth, the judge introduced her artificial distinction (at paragraph 34) in stating that there was a difference between voluntarily giving up one's work, as the women did in a series of cases, such as **Dias [2009] EWCA Civ 807**, in order to look after their children, and a case such as the present where the Appellant was also giving up his work in order to look after his adult wife. Distinction was artificial because if the Appellant's wife needed caring, the local authority could move in and provide a level of services which could not be ruled out in a case such as the present. The judge had not explored that.

14. Finally, the Appellant here was a benefit recipient who was entirely dependent upon public funds. The EEA Regulations at Section 39(3)(a) state that one must be a person who "accepts offers of employment actually made", and the Appellant was in no position to be able to demonstrate this. Although the judge had referred to the correct case law (at paragraph 33) this particular aspect had been overlooked.

15. For her part, Ms Brankovic submitted that there was no error of law. The judge had recognised that there was no binding authority and had to make a decision. The judge carried out his own research. He focused on the issue correctly at the outset. He addressed the issue. He noted how under ECP3.3 being in receipt of a carer's allowance is an exemption whereby one does not have to demonstrate income of £18,600. (See paragraph 26). The judge considered the case of **Land Berlin [C-14/09]** and noted how European Union law required that the activities engaged in "are real and genuine" and this was the case here. The judge considered whether the requirement of working 35 hours a week less than a national minimum wage of £7.50 changed the situation and concluded that it did not. The EEA Regulations do not stipulate at paragraph 3(a) that because there is no former offer of a job that this does not continue to make one a worker if one is rendering real and genuine services. Finally, the distinction between being in receipt of "income support" in order to look after one's child and being given a "carer's allowance" in order to attend to one's wife was properly made because in the case of the former, a mother who was in receipt of income support could still leave the child with somebody else and go and work elsewhere, which was not the case with being in receipt of a "carer's allowance".

16. Ms Brankovic submitted that there was no error of law.

No Error of Law

17. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons were as follows. First, whereas it is the case that there is no binding authority that falls precisely on this point, it is not the case that there is no guidance available. Guidance was given by the Upper Tribunal itself in the case of **Begum (EEA – worker – jobseeker) Pakistan [2011] UKUT 00275**. This confirmed that whether an EEA national is a worker for the purposes of the EEA Regulations must be construed within the meaning of EU law. It must not be interpreted narrowly but broadly. It is not conditioned by the type of employment or the amount of income derived. A person who does not pursue effective and genuine activities, or pursue activities on such a small scale as to be regarded as purely marginal, and ancillary, or which have no economic value to an employer, is not a worker. The judge referred to this decision at paragraph 31 of the determination. The judge also referred to the case of **Mohammed Barry [2008] EWCA Civ 1440** which established that a person might be a worker even though he worked for less than the minimum wage. This was also referred to by the judge at paragraph 31.

18. Accordingly, this was a case where the Appellant was pursuing activities "which are real and genuine to the exclusion of activities on such a small scale as to be purely marginal and ancillary". He was in receipt of a carer's allowance which is expressly accepted as an exemption under E-ECP.3.1 to the requirement in Appendix FM that a person must be in receipt of the £18,600 income threshold. The fact that domestic law has so stated is not an irrelevant consideration. Whereas there is a Rule that the community law provisions must not be interpreted narrowly, there is no Rule that they must not be interpreted broadly in the domestic context. Finally the decision between a person who, takes income support, after voluntarily giving up a job, in order to provide parental care for her child, is a valid distinction as against a person such as the Appellant who is in receipt of a carer's allowance from the DWP in order to care for his wife. The judge was not wrong in stating that care would have to be provided in some form or another, and if the Appellant could not provide it then payment would have to be made for somebody else to provide such a service. The important thing was that this was a "real and genuine" service and not ancillary to other activities. There is, accordingly, no error of law.

Notice of Decision

19. There is no material error of law in the original judge's decision. The determination shall stand.

20. An anonymity direction is made.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Dated

Deputy Upper Tribunal Judge Juss 9th January 2018