



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/08217/2016

THE IMMIGRATION ACTS

Heard at Field House
On 7 August 2018

Decision & Reasons Promulgated
On 06 September 2018

Before

UPPER TRIBUNAL JUDGE PITT

Between

HAGAR [B]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Syed-Ali, Counsel on Direct Access

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision issued on 22 November 2017 of First-tier Tribunal Judge Birk which refused the appellant's application for a residence card showing retained rights of residence.
2. The appellant is a citizen of Ghana, born on 29 October 1963.
3. The background to this matter is that the appellant claims to have entered the UK on 26 March 2008, although there is no documentary evidence confirming that to be so.

On 22 August 2007 she sought a residence card on the basis of her marriage to a Dutch national, Mr [B]. The residence card was granted on 27 September 2007 valid until 27 September 2012.

4. On 1 August 2012 the appellant sought permanent residence under Regulation 10 of the EEA Regulations 2015. She applied on the basis of retained right of residence as the spouse of a deceased EEA national, Mr [B] having, sadly, died on 24 November 2008. That application was refused by the respondent on 14 March 2013.
5. The appellant applied again on 20 November 2015, leading to the decision under challenge here made on 19 May 2016.
6. In support of the application put to the respondent, the appellant provided only one payslip in support of her claim that her EEA national husband had either worked for five years in the UK or was working at the time of his death in 2008. The respondent did not consider that this evidence was sufficient.
7. By the time of the hearing before the First-Tier Tribunal the respondent had obtained evidence from HMRC which showed Mr [B]'s declared earnings for the tax years from 2004/2005 until 2008/2009. The document was produced at the hearing before First-tier Tribunal Judge Birk and was something which the appellant had been asking for over a period of time. Nothing suggests that at the hearing there was any objection to this document being admitted as evidence or that an application for an adjournment for the appellant to consider this document in more detail and provide instructions was made. The decision indicates in paragraph 7 that the appellant was not questioned about the document or any other matters and that the appeal was dealt with by way of submissions only.
8. The respondent maintained before the First-Tier Tribunal that the HMRC document showed that at the material times Mr [B] had earned so little that his work could be said to be marginal or ancillary and that he could not be considered to be a qualified person such that the appellant was entitled to a retained right of residence. The respondent drew support for that position from EEA case law such as **Levin v Staatssecretaris van Justitie C-53/81**. Further, the UKBA guidance regarding whether someone's work was sufficient to overcome the "marginal or ancillary" threshold, in force at the date of the decision, set out that the respondent applied the HMRC Level of Earnings threshold, the point at which employees must pay class 1 NI contributions, as a "primary earnings threshold (PET)" that had to be met. The HMRC document did not show that Mr [B] earned enough to meet the PET threshold.
9. The appellant's submissions, set out in paragraph 9 of the decision, were that the respondent was not entitled to rely on the PET threshold where it had not been referred to in the refusal letter. It was also argued that the calculation as to earnings in 2008/2009 was incorrect where Mr [B] had to stop work due to ill-health in 2008 and had gone to Holland in the weeks before he died. That should have been taken into account rather than the respondent being able to simply divide by 52 the figure earned as shown in the HMRC document in order to assess his weekly earnings.

10. Judge Birk found in paragraphs 12 to 14 that the evidence before him clearly showed that the EEA spouse had not earned above the PET at the material times. That was not seriously disputed before me and Mr Syed-Ali was able to confirm that, even calculating the amount earned in the most positive way possible, that is, not simply dividing the final year's earnings by 52 but by, say 26 as representative of the half a year that Mr [B] worked, his earnings still did not show that he had met the PET threshold. Judge Birk indicated in paragraph 13:

“There is no other evidence or valid explanations to consider as to whether he fell within any of the ‘exemptions’ as set out in Regulation 6(2). So there are two years when the sponsor fell below the PET”.

11. Judge Birk went on to find that the materials did not show that the appellant's deceased husband met the definition of a “worker” as defined in Regulation 6 and that therefore the appellant could not show that she met the criteria of Regulation 10(3)(a)(i) as to the EEA sponsor being a qualified person.
12. The appellant brings her appeal now on the basis that the guidance on the relevance of the HMRC PET thresholds was not in force at the time of her deceased husband's death in 2008 and was therefore not applicable here and should not have been applied by Judge Birk. I saw no merit in that argument where the respondent was required to apply the law in force as of the date of decision which was 19 May 2016, that remaining the applicable law before First-tier Tribunal Judge Birk and was entitled to place reliance on the HMRC PET thresholds as set out in the UKBA guidance document on the definition of an EEA worker.
13. The appellant also maintained that the comment in paragraph 13 of the decision that none of the exceptions under Regulation 6(2) had been shown to apply was in error. The appellant maintained that there had never been any dispute that Mr [B] had died in the Netherlands following a period of illness and he should still have been considered to be a worker under paragraph 6(2) as someone temporarily unable to work as a result of illness. However, nothing before me showed that this argument was put to Judge Birk with evidence that could have shown that Mr [B] remained a worker, albeit not actually working on the basis of illness, at the time of his death. Judge Birk was therefore correct to state in paragraph 13 that there was “no other evidence or explanation” that could assist the appellant in showing that her deceased husband was a qualified person under Regulation 6. The First-tier was not requested to consider the point and clear evidence on it was not put forward no error of law arises. It is also difficult to see how this argument could have succeeded where Mr [B] sadly died and so could not be said to be “temporarily” unable to work.
14. For these reasons I did not find that the decision of the First-tier Tribunal disclosed an error on a point of law.

Notice of Decision

15. The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

16. No anonymity direction is made.

Signed 
Upper Tribunal Judge Pitt

Date: 21 August 2018