



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/09026/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 31st August 2018**

**Decision & Reasons
Promulgated
On 28th September 2018**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

**TANVEER AHMAD
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Tinsley, instructed by JJ Law Chambers

For the Respondent: Ms A Fujiwala, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan born on 1 January 1972. His appeal against the refusal of a permanent residence card under the Immigration (EEA) Regulations 2016 was dismissed by First-tier Tribunal Judge G C Solly on 9 April 2018.
2. The Appellant appealed on three grounds:
 - (i) The refusal of an adjournment was unfair;

- (ii) The judge's conclusion dismissing the Appellant's evidence was irrational;
 - (iii) Insufficient reasons were given in respect of the submissions made.
3. Permission to appeal was granted by Upper Tribunal Judge Rintoul on 26 June 2018 for the following reasons: "It is just arguable that First-tier Tribunal Judge Solly erred in drawing inferences [29] from an absence of evidence in a witness statement, as is averred. Ground II is therefore arguable. It is also arguable that she erred in not considering whether the sponsor had retained the status of worker, see Regulation 6(2) of the Immigration (EEA) Regulations. Whilst there is less merit in ground 1, I do not refuse permission on that ground. The Appellant is strongly advised that he should be prepared in terms of accumulating all the necessary documentation to proceed to the appeal being remade immediately if an error of law is found."

The Judge's Findings

4. The judge made the following findings:

- "26. On the basis of these records there are 2 gaps [in employment], first from 24 August 2015 to 10 February 2016 and second from 8 August 2016 to 5 October 2016. I am told by the appellant that in the first period Miss Lima Ramos was in Portugal looking after her unwell father. The appellant said she was in Lisbon looking after her father for approximately 4 months. She left for Portugal a few days after finishing at Phase 8. He said that on return she had asked for her job back at Phase 8 and she was told that as she had overstayed her annual leave they would see if there was a new position available. He could not recall when she approached Phase 8 on her return. He said that she [sic] after starting work again with the company she then didn't have enough working hours at Phase 8. He said that before leaving Phase 8 she got a job with Pure Collection who were linked to Phase 8 having the same parent company. He said she now remained in employment with Pure Collection Limited. There is no documentary evidence to support this whether in the form of witness evidence or documents. Mr Tinsley urges me to accept the appellant's evidence and, in that respect then submits that the sponsor's continuity of residence is not affected by application of regulation 3 of the 2016 Regulations.
- 27. The Appellant's oral evidence was that his partner in periods of not working was self-sufficient and he said that no claim has been made for state benefits.
- 28. I remind myself that the standard of proof is on the balance of probabilities.
- 29. I note that the oral evidence is inconsistent with the letter from HMRC which shows a gap that I have identified as the 2nd gap before employment commenced with Pure Collection Limited and

after it ended with Phase 8. The appellant said in oral evidence that his partner had an offer of employment during this period and elsewhere in his oral evidence that she worked for Pure Collection Limited whilst working for Phase 8. He explains the 1st period by saying that she was in Portugal for 4 months however the employment gap is nearly 6 months. Given the inconsistencies I have identified between the appellant's evidence in his oral evidence, between his witness statement in which he failed to mention the first gap and his oral evidence, and the record of employment provided by HMRC I do not consider on the basis of all of the evidence before me that I can accept the appellant's oral evidence because there is no documentary evidence to support it or evidence in the form of [sic] witness statement from his partner. The appellant has been aware since the date of the RFRL [Reasons for Refusal Letter] that his partners [sic] employment record was a key issue and it is to be expected that this would be dealt with.

30. Turning to the oral evidence before me that the sponsor was self-sufficient during the gaps due to the inconsistencies I have identified I am not prepared to accept his oral evidence in this respect.
31. On the balance of probabilities and on the evidence before me I am not satisfied that the EEA citizen has been exercising her treaty rights whilst residing in the UK in accordance with the regulations for a continuous period of 5 years as is required by regulation 15 (1) of the 2016 regulations."

Submissions

5. Mr Tinsley submitted the issues were straightforward in this case and he agreed that there were two gaps in the EEA Sponsor's employment as identified by the judge at [26]. He submitted that in relation to the first gap the EEA Sponsor was in Portugal for four months looking after her sick father. She was out of work for six months. The judge did not accept the Appellant's evidence on these points and the reasons given at [29] were not sufficient. The failure to mention the first gap in the Appellant's witness statement was not an inconsistency. The Appellant's solicitors had not addressed the Appellant's mind to the gaps in employment. He was therefore required at the hearing, when he was unaided by any records, to give oral evidence on the point. The judge at [29] relied on matters which were not sufficient to dismiss the Appellant's oral evidence explaining the nature of the gaps in employment. This issue arose on the day of the hearing and was the reason why an adjournment was requested. Had the significance of the gaps in employment been appreciated there would have been more effort to provide evidence to explain this gap. The failure to provide evidence did not affect the Appellant's credibility and the judge erred in making an adverse inference at [29].
6. The judge had taken an approach which was not available to her and her findings on credibility were perverse given that the Appellant was not

given the opportunity to address his mind to the gaps in issue. Further, the judge's reasons for rejecting his explanations were inadequate. The judge should have granted an adjournment to enable the Appellant's wife, the EEA Sponsor to attend. She could have addressed the points in issues. Mr Tinsley believed that the Appellant's solicitors had not appreciated that the Appellant's wife should attend the hearing and therefore it was unfair for the Appellant to have to find details of matters to which he was not a party. On top of that the Appellant's evidence was examined in a very exacting manner which resulted in unfairness. The Appellant had supplemented his evidence-in-chief and had been working from a blank canvas. He was not cross-examined on these points.

7. Mr Tinsley submitted that the first gap of six months was covered by Regulation 3. The second gap was for a very short period of less than two months and the EEA citizen would have completed five years' employment shortly after she left Phase 8. There was an internal arrangement with Phase 8 and Pure Collection Limited. This internal arrangement with the EEA Sponsor's employer, when she returned from her trip to Portugal, was not working out and she was transferred to another area. The evidence was led in chief and required a finding on whether she retained worker status. She had made an internal shift between two companies. It was not reasonable for her to sign as a jobseeker because she had another job waiting and was able to support herself. If she had an offer of employment then she was still a worker. The Appellant's evidence was not genuinely inconsistent.
8. Ms Fujiwala submitted that the judge's findings were not perverse as submitted by the Appellant. It was clear from the reasons for refusal letter what was in issue. The Appellant had failed to provide evidence to show that his EEA Sponsor was working continuously for five years. Documents were sent to the Home Office on 26 July 2017. These documents did not include letters from HMRC which were submitted in the Appellant's bundle dated 9 February 2018. The gaps in employment were identified in the HMRC document and therefore the Appellant and his representative were well-aware of the issues they had to deal with. The gaps in employment were apparent from the HMRC documents so could have been dealt with in the Appellant's witness statement of 22 March 2018. The burden was on the Appellant to show that his wife was exercising Treaty rights.
9. The second gap was not dealt with in the Appellant's statement or his wife's statement, which was submitted for this appeal hearing and was dated 29 August 2018. The judge adequately dealt with the documents before her. The gaps in employment and the issue to be resolved at the hearing were apparent to the Appellant and his representatives. It was clear that evidence was required from the EEA Sponsor and the judge properly dealt with the request for an adjournment.
10. Ms Fujiwala submitted that the EEA Sponsor had gone to Portugal six days before the hearing. It was unclear why it was not apparent that she should

supply evidence in support of the appeal. The judge took into account the explanation given but when contrasted with the evidence in the Appellant's bundle, which did not address the issues, it was open to the judge to find that there was insufficient evidence provided to deal with the gaps in employment.

11. In relation to the first gap there was no evidence that the Appellant's wife went to Portugal and in relation to the second gap there was no documentary evidence of an offer of employment before her previous employment ended. It was unclear how the judge could have concluded that she had retained worker status. Regulation 3 was not relevant, this concerned residence not worker status. On the evidence before the judge the Appellant's wife had not retained worker status and she could not show that she had retained worker status even if the Appellant's account was accepted in its entirety. There was insufficient evidence to show that the Appellant and his wife were self-sufficient during the gaps in employment. In order to show that she was self-sufficient there should have been comprehensive sickness insurance and there was no evidence that was in place. There was no material error of law in the judge's decision and her findings were open to her on the evidence before her.
12. Mr Tinsley submitted there was unfairness at the hearing before the First-tier Tribunal in the way in which the Appellant's evidence was heard. He accepted that there was no documentary evidence provided to date but that the witness statement of the Appellant's wife corroborated the account given by the Appellant before the First-tier Tribunal.

Discussion and Conclusion

13. Ground (i): I find that the refusal of an adjournment has not caused unfairness in this case. The notice of hearing was sent on 4 December 2017 stating that the appeal would be heard on 26 March 2018. The EEA Sponsor, the Appellant's wife, left the UK on 20 March 2018. The Appellant has had ample opportunity to submit evidence from his wife. Having been given a further opportunity to submit evidence, in the grant of permission, the Appellant has still failed to submit documentary evidence to show that his wife went to Portugal to visit her sick father or to show that she had a job offer with Pure Collection Ltd prior to leaving her employment with Phase 8.
14. Grounds (ii): The judge was entitled to find that the unsupported assertions of the Appellant given in oral evidence were insufficient to show that the Appellant's wife had been exercising Treaty rights in accordance with the EEA Regulations 2016 for a continuous period of five years for the following reasons.
15. Regulation 3 of the Immigration (EEA) Regulations 2016 deals with continuity of residence and states that continuity of residence is not

affected by periods of absence from the UK which do not exceed six months in total in any year. Whilst this may cover the Appellant's wife's trip to Portugal it does not deal with the fact that she was not employed during that period.

16. The relevant Regulation is Regulation 6. Regulation 6(2) states: "A person who is no longer working must continue to be treated as a worker provided that the person—
- (a) is temporarily unable to work as the result of an illness or accident;
 - (b) is in duly recorded involuntary unemployment after having been employed in the United Kingdom for at least one year, provided the person—
 - (i) has registered as a jobseeker with the relevant employment office; and
 - (ii) satisfies conditions A and B;
 - (c) is in duly recorded involuntary unemployment after having been employed in the United Kingdom for less than one year... [This does not apply in this case].
- (5) Condition A is that the person—
- (a) entered the United Kingdom in order to seek employment; or
 - (b) is present in the United Kingdom seeking employment, immediately after enjoying a right to reside under subparagraphs (b) to (e) of the definition of qualified person in paragraph (1) (disregarding any period during which worker status was retained pursuant to (b) or (c)).
- (6) Condition B is that the person provides evidence of seeking employment and having a genuine chance of being engaged.
- (7) A person may not retain the status of—
- (a) a worker under paragraph (2)(b);
 - (b) a jobseeker;
- for longer than the relevant period without providing compelling evidence of continuing to seek employment and having a genuine chance of being engaged."
17. The evidence before the First-tier Tribunal judge, that the EEA Sponsor retained worker status, was the evidence of the Appellant in his witness statement and given orally at the hearing. It was accepted that there were two gaps of employment from August 2015 to February 2016, of just under six months, and from August 2016 to October 2016 of about two months. The explanation for the first gap is that the EEA Sponsor was in Portugal looking after her sick father. Whilst this does not affect her continuity of residence under Regulation 3, it is quite clear that she ceased employment

on 23 August 2015 and did not take up employment again until 11 February 2016. She was however employed by the same company. The Appellant's evidence was that on return from Portugal the EEA Sponsor asked for her job back. It was not the case that she had an offer of a job while she was in Portugal looking after her sick father. Therefore, even on the Appellant's own evidence, her employment had ended prior to her departure to Portugal.

18. The EEA Sponsor could not satisfy Regulation 6(2) because she failed to show that she was actively seeking employment and failed to provide any cogent evidence of it. It is apparent from the Appellant's own evidence that she was not actively seeking employment because she was away visiting her sick father. She does not come within Regulation 6(2)(b) because she was not registered as a jobseeker and she was unable to satisfy conditions A or B. There was no compelling evidence of continuing to seek employment and having a genuine chance of being engaged. There was no documentary evidence of when she visited her father, the date when she left the UK and returned, no flight tickets or evidence that he was in fact ill. This was not before the First-tier Tribunal and has not been supplied to the Upper Tribunal.
19. In her witness statement of 29 August 2018 at [7], the EEA national states: "I request that my short absences from the UK for the purpose of holidays and for the attendance of my sick father, may kindly not be taken an issue with, as that was out of compulsion and despite that period of absence that was less than 6 month period". This evidence was insufficient to show that the EEA Sponsor had retained the worker status pursuant to Regulation 6(2). It is therefore irrelevant that the judge found the Appellant's evidence to be inconsistent rather than appreciating that the Appellant failed to mention matters in his witness statement because, even accepting the Appellant's account given in oral evidence, there was insufficient evidence to show that his wife had retained worker status under Regulation 6(2).
20. In relation to the second gap there was no evidence whatsoever from the Appellant's wife. She failed to address this in her statement of 29 August 2018 submitted for this hearing. It was suggested that she had a job offer before leaving Phase 8 and starting employment with Pure Collection Limited. There was no documentary evidence to show that this was in fact the case. The judge was entitled to find that the Appellant's oral evidence was insufficient on this point because this was a matter about which there ought to have been documentary evidence, or at least evidence from the EEA Sponsor, and which the Appellant has failed to supply to date.
21. The judge's conclusions at [29] were not arguably perverse. She found that she could not accept the Appellant's oral evidence because there was no documentary evidence to support it and no evidence from the EEA Sponsor. The judge therefore found that there was insufficient evidence before her to discharge the burden of proof. The relevant and necessary

evidence was not submitted. That remains the case today. There is still insufficient evidence to explain the two gaps in employment. It is open to the Appellant to make a further application submitting the necessary evidence.

22. Accordingly, there were two gaps in the EEA Sponsor's employment of six months and two months and the Appellant has failed to show that the EEA Sponsor was employed for a continuous period of five years.
23. Ground (iii): The Appellant's skeleton argument was not before the First-tier Tribunal, although submissions were made on the points referred to therein. Regulation 3 did not assist the Appellant in establishing that the EEA Sponsor had retained worker status for the reasons given above. Further, the Appellant could not show that his wife was self-sufficient during the gaps in employment because there was no evidence of comprehensive sickness insurance. The judge gave adequate reasons for why the Appellant could not satisfy the EEA Regulations 2016. There was no argument in relation to Article 8 and permission was not granted on that basis.
24. On the evidence before the First-tier Tribunal, the Appellant failed to show that his wife retained worker status pursuant to Regulation 6(2) and therefore he was not entitled to a residence card under Regulation 15. I find that there was no error of law in the judge's decision promulgated on 9 April 2018 and I dismiss the Appellant's appeal.

Notice of decision

Appeal dismissed.

No anonymity direction is made.

J Frances

Signed

Date: 24 September 2018

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed

Date: 24 September 2018

Upper Tribunal Judge Frances