Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA 07514 2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 February 2019	**On 25 April 2019**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

JASPER [N]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Murphy, Counsel, instructed by Hunter Stone Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India. He is married to an EEA national. On 16 June 2016 he was refused a residence card as confirmation of his claimed right to reside in the United Kingdom. He had previously been granted a residence card but that expired in December 2015.
2. The difficulty with this case is that the evidence he provided about his wife's employment showed that she had been a jobseeker for more than twelve months. The Secretary of State decided that the appellant's wife was not exercising treaty rights and therefore that the appellant did not have a consequential right of residence. The First-tier Tribunal dismissed the appeal against that decision but permission to appeal was granted by Upper Tribunal

Judge Grubb who found it arguable that the First-tier Tribunal had misdirected himself.

3. I have found the judge's determination and reasons to be particularly clear. He explained as follows: "

> 12. When the appellant made his first application for a Residence Card his wife was working and evidence of this was provided to the Home Office. Unfortunately after a few years she began to suffer from mental health issues and was unable to work full-time. For a while she was able to work a few hours but when depression became worse she was unable to work. As a result of her being considered temporarily incapable of working by the DWP in their assessment she received benefits in the form of employment support and allowance.
> 13. The sponsor's GP has confirmed in a short letter, dated 28 November 2017, that she has been on treatment for depression since November 2012. The treatment is still continuing and as a result of this she is experiencing mood swings and anxiety due to which she is unable to work."

4. The judge then said at paragraph 21:"

> 21. The witness statement of the appellant and also that of his wife, the EEA national, refer to her depression and mental health issues being a temporary impairment to her working. They refer to her still being a jobseeker. However in his oral evidence today the Appellant confirmed that his wife last worked in 2010 or 2011. At that time she was working part-time as a cleaner for a company. I find and accept that the evidence that the appellant has given today is credible.
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> 22. The situation therefore is that the EEA national has not been working for the past 7–8 years and there has been no evidence that she has been a genuine jobseeker. She has not been able to show she is a qualified person pursuant to Regulation 6 of the 2006 Regulations. Her inability to work is not temporary and the passage of 7–8 years in which she has not worked shows that this is a permanent situation, or at least has been permanent for this period."

5. The judge dismissed the appeal.

6. The decision complained of was made as long ago as 13 June 2016 and was made, appropriately, under the Immigration (European Economic Area) Regulations 2006 and particularly Regulation 15(1)(b). This provides for the acquisition of a permanent right of residence by the family member of an EEA national "who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years". It was not doubted that the appellant's wife resided with the EEA national but not accepted that she had resided in the United Kingdom in accordance with the Regulations for a continuous period of five years.

7. The difficulty for the Secretary of State in this case is that Regulation 5(7)(b) provides that, subject to certain other Regulations, a period of inactivity due to illness or accident "shall be treated as periods of activity as a worker". The only relevant qualification is at paragraph 6(2) which provides that a person "no longer working shall not cease to be treated as a worker" if he is "(a) temporarily unable to work as a result of an illness or accident".

8. This regulation was considered in **FMB (EEA Reg 6(2)(a) – "temporarily unable to work") Uganda [2010] UKUT 447 (IAC)** which led to the less than startling judicial headnote that "A state of affairs is 'temporary' if it is not

permanent". The point is that, for the purposes of the Regulation, a very long break is not necessarily a permanent break. A very long break is not the same as a permanent break and a break that is not permanent is temporary.

9. Mr Melvin argued that the First-tier Tribunal had made a finding of fact and the finding determined the appeal. I agree. That is what happened but that I am satisfied that the finding of fact is not lawful. There is nothing in the decision that suggests to me that the First-tier Tribunal considered the possibility of the long break being a temporary break. It follows that I set aside the First-tier Tribunal's decision.

10. The appellant was found to be credible by the First-tier Tribunal. He said unequivocally that his wife suffers from a temporary illness. He supported that contention with reference to her conduct. She was presently employed on a zero-hours contract. She was not doing any work and was not required to do any work under that contract but he submitted that having the contract was clear evidence of an intention or willingness to work. More significantly she was on benefits. They were benefits appropriate for somebody who was temporarily unable to work. She had at times received Employment Support Allowance which is a payment made to people who are employed but not earning very much money rather than someone who was out of work. Further she was not receiving benefits appropriate to someone who was not going to work again. Her benefits were paid on the basis that she was temporarily unavailable for work.

11. It is by no means impossible for different departments of government to have different definitions of "temporary" but there is clear evidence here that this appellant's wife is not permanently unable to work and has not given up the intention of working. I am quite satisfied that this appeal ought to have been allowed.

12. Further I think it is at least possible that the appellant has established a right to be in the United Kingdom because his wife has established a right to be here by reason of exercising treaty rights for more than five years. That is an additional element of the case that both parties might need to think about. My reason for allowing the appeal is that the First-tier Tribunal misdirected itself and the credible evidence supports a different conclusion. I set aside the decision of the First-tier Tribunal and I substitute a decision allowing the appellant's appeal.

Notice of Decision

13. The First-tier Tribunal erred in law. I set aside its decision and I substitute a decision allowing the appellant's appeal.

Signed

Jonathan Perkins
Judge of the Upper Tribunal

Dated 24 April 2019