Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/08912/2017

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, Belfast	**Decision & Reasons Promulgated**
On 9 August 2019	**On 23 August 2019**
Judgment given orally	

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

PARVEEN SHAHID
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr McQuitty, instructed by John J Rice & Company
For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant, a citizen of Pakistan against the decision of FtTJ Gillespie who dismissed her appeal against the Secretary of State's decision refusing to issue a permanent residence card as a family member of Mr [SS], a German national. They were married in Pakistan in 1978. The judge recorded at [3] of his decision the basis of the Secretary of State's refusal:

> "3. The respondent determined that she had not provide adequate evidence to show that she was entitled to a permanent residence card on the basis of

> the claim that her husband had been exercising Treaty rights in the United Kingdom for a continuous period of five years. She had provided her application pension credit letters for her husband, bank statements for both of them and gas bills ranging from 2010 up to 2017. She claims to have lived in Pakistan until 2011 when she joined her husband in Northern Ireland in that year."

The judge continued at [4]:

> "4. The decision maker determined that she had not evidenced how her husband, as her EEA national sponsor, was exercising Treaty rights in the United Kingdom with details to back up what she said in her application form. The Home Office would not accept as evidence of his exercising Treaty rights, documents that showed he was dependent on state benefits. The Home Office could also only accept a retention of worker status for a maximum of six months. Her husband began to receive Job Seeker's allowance (JSA) in 2012/2013 and thereafter remained unemployed until to date. Evidence produced with her application showed that he was getting Pension Credit. The decision-makers refusal letter also records that she had not provided any documents from earlier years of employment which the Home Office could use as evidence of him exercising Treaty rights."

2. The judge noted in his decision that the case had come before another First-tier Tribunal Judge, First-tier Tribunal Judge Hutchinson, on 22 June 2018 when gaps were revealed in the appellant's husband's employment record as follows:

> "7 March 2006 – 31 March 2008
>
> 20 March 2009 – 4 October 2009
>
> 6 October 9 – 14 November 2009
>
> 16 November 2009 – 13 March 2010
>
> 26 July 2010 – 31 August 2010
>
> 29 May 2011 – June 2012"

3. The hearing was adjourned to enable further enquiries to be made with HM Revenue and Customs.

4. In paragraph [6] of his decision, the judge observed that a letter dated 6 August 2018 had been produced which recorded the appellant's husband's earnings for each of the four tax years commencing 2008/2009, in the fourth of which he is recorded as receiving Job Seeker's Allowance for 2012/2013.

5. Judge Gillespie made the following findings:

> "19. I have considered the evidence in the round and the submissions of the parties. There is no evidence of the appellant's husband being continuously employed prior to 2008 and the HM Revenue & Customs letter records that he started receiving JSA during the tax year 2012/2013 which is consistent with his oral evidence that he stopped working entirely

in July/August of that year. The most the letter shows, when taken with his oral evidence, is that he was employed for circa three and a half years.

20. Mr Jebb said evidence was being insisted upon, going back some time and it was very difficult for an individual to retain evidence of that nature. The appellant had done her best, and in his view, there was clear evidence that her husband had worked continuously for at least five years.

21. I find the evidence shows her husband stopped working in 2013 with a period thereafter when he received JSA and then no record of any employer up until the present.

22. A person who ceased working may continue to be treated as a worker in the circumstances set out in Regulation 6(2) but may only retain worker status, for a maximum of six months. There is no evidence that her husband fulfilled any requirements necessary to retain worker status after stopping work entirely in June/July 2013 up until he began to draw the State Pension and which presumably occurred when he turned 65. It appears he stopped working some four years before the normal retirement age.

23. There is no evidence of sufficient weight to show that he was continuously employed prior to 2008 and indeed the oral evidence of the parties would point to the community of employment being broken on occasions and her indeterminate periods when he returned to Pakistan."

6. The grounds of challenge on which permission has been granted argue that the judge had erred in dealing with the evidence of the appellant's husband's employment. Erroneously the judge had referred to the letter from HMRC dated 6 August 2018 covering four rather than five years and thus the Job Seekers Allowance was in the fifth year. Furthermore, the appellant's husband had not received any benefits in the fifth year. The judge had found as a matter of fact that the appellant's husband had stopped working in June/July 2013 and there was clear evidence in the HMRC letter that he had been working for five years previous to that rather than for three and a half years as found in the decision. Furthermore, there was evidence of his employment prior to 2008, being two P45s dated 8 June 2005 and 11 April 2007 which the judge had failed to consider.

7. Regulation 15 of the Immigration (European Economic Area) Regulations 2016 provides, relevant to the issue in this case:

"15.- (1) The following persons acquire the right to reside in the United Kingdom permanently—

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(b) a family member of an EEA national who is not an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

…"

8. Brief submissions were made by the parties after they had the opportunity of conferring; Mr Diwnycz explained that he accepted that the judge had clearly erred in the light of the documentary evidence relied on by Mr McQuitty. This included not only the letter from HMRC dated 6 August 2018 which relates to the appellant's husband's employment from 2008 until 2013 where his final post appears to be at Bombay Dreams but also another document being a letter from Bumbles Delicatessen dated 19 March 2009. This is in the following terms:

> "This is to confirm that Mr [SS], d.o.b. 01/06/51, resident of [Belfast] is a permanent employee of Bumbles Delicatessen Ltd. since 1 April 2008. He is employed full-time as Curry Chef at the rate of £6.00 per hour, 40 hours per week."

This letter was before the judge on which he made no adverse finding. The error he made relates to the commencement date for the calculation of the period of employment in question when finding that the appellant's partner had been employed for "circa three and a half years". The judge made a positive finding that the appellant's husband had stopped working as stated in 2013. Mr Diwnycz acknowledged that evidence of his five years' earnings had in fact been shown, and accordingly conceded the judge erred in law.

9. I set aside the decision of Judge Gillespie for error of law. By way of re-making the decision, Mr Diwnycz acknowledged with reference to the letter from HMRC that the appellant's husband had worked continuously for a five year period and so exercising treaty rights between 1 April 2008 and June 2013. Mr Diwnycz confirmed that this was the only issue in the appeal, having regard to the reasons given by the Secretary of State for refusing the application in his letter dated 28 September 2017.

NOTICE OF DECISION

The decision of the FtT is set aside for error of law. I remake the decision and allow the appeal against the Secretary of State's decision.

Signed Date 20 August 2019

UTJ Dawson
Upper Tribunal Judge Dawson