Upper Tribunal
(Immigration and Asylum Chamber)

Begum (EEA – worker – jobseeker) Pakistan [2011] UKUT 00275(IAC)

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
On 22 March 2011	**23 June 2011**

Before

MR C M G OCKELTON, VICE PRESIDENT

DESIGNATED IMMIGRATION JUDGE McCARTHY

Between

SURRAYA BEGUM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr N Chawla, instructed by IAS

For the Respondent: Ms D Cantrell, Senior Presenting Officer

(1) When deciding whether an EEA national is a worker for the purposes of the EEA Regulations, regard must be had to the fact that the term has a meaning in EU law, that it must be interpreted broadly and that it is not conditioned by the type of employment or the amount of income derived. But a person who does not pursue effective and genuine activities, or pursues 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. In this context, regard must be given to the nature of the employment relationship and the rights and duties of the person concerned to decide if work activities are effective and genuine.

(2) When considering whether an EEA national is a jobseeker for the purposes of EU law, regard must be had to whether the person entered the United Kingdom to seek employment and, if so, whether that person can provide evidence that they have a genuine chance of being engaged. If a person does not or cannot provide relevant evidence, then an appeal is bound to fail on this ground.

DETERMINATION AND REASONS

1.

On 17 November 2009, the Secretary of State for the Home Department refused the appellant's application for a residence card as the family member of a Union citizen. In a separate letter of the same date, the Secretary of State gave his reasons for refusing the application. In summary, the application was refused because the appellant had failed to provide satisfactory evidence to show that her husband, an Italian national, was working as claimed. The reason for this conclusion was that the official of the UK Border Agency acting on behalf of the Secretary of State had been unable to verify the existence of the stated employer of the appellant's husband.

2.
The appellant appealed against this immigration decision as she was permitted to do under reg. 26 of the Immigration (European Economic Area) Regulations 2006. Her appeal was dismissed in a determination promulgated on 18 February 2010. The reasons why the Immigration Judge dismissed the appeal are evident in the following extract taken from para. 20 of her determination:

"… There has been no evidence of [business] premises, equipment or relevant insurances being carried. There has been no suggestion that there was a business plan of any sort. In its totality the setting up of the business and employment of the Appellant's husband in the circumstances described tended to give the impression that it was a business of convenience, and with the deficiencies already pointed out had the appearance of insubstantial foundations and very limited prospects for viability."

3.
The appellant sought permission to appeal to the Upper Tribunal against this determination. The grounds for that application can be summarised as follows:

a.
The Immigration Judge failed to direct herself to the relevant legal provisions that identify who is a worker under Community law. As such, the findings relating to the appellant's husband cannot be sustained.

b.
The Immigration Judge failed to make material findings of fact because she did not have regard to the claim of the appellant's husband that he was looking for a second job. As such, she should have considered his position as a jobseeker.

Permission to appeal was granted on 9 September 2010.

4.
The grounds of application have been adopted as the grounds of appeal. We take each in turn.

Did the Immigration Judge err in deciding whether the appellant was a 'worker' ?

5.
In settling the first ground, the appellant refers to two reported decisions, OA (Prisoner – Not a qualified worker) Nigeria [2006] UKAIT 00066 and RP (EEA Regs – worker – cessation) Italy [2006] UKAIT 00025, which discuss Community law about who is a worker. They are a starting point. A fuller and more recent discussion of Community law relating to who is a worker can be found in Barry v The London Borough of Southwark [2008] EWCA Civ 1440. It is to that judgment we turn for authority on the first issue arising in this appeal.

6.

The Court of Appeal there examines the jurisprudence of the Court of Justice of the European Union (formerly the European Court of Justice). Reliance was placed in particular on the decisions in D M Levin v Staatssecretaris van Justitie (case no. 53/81) and Lawrie-Blum v Land Baden-Wurttemberg (case no. 66/85). The Court of Appeal identifies the following features for a Union citizen to be regarded as a worker.

a.
The terms ‘worker’ and ‘activity as an employed person’ have a Community meaning and may not be defined by reference to the national laws of the Member States (see para. 11 of Levin , citied in para. 18 of the judgment).

b.
Since it defines the scope of freedom of movement, the Community concept of a 'worker' must be interpreted broadly (see para. 16 of Lawrie-Blum , cited in para. 39 of the judgment).

c.
The right of residence as a worker is not subject to any condition relating to the type of employment or to the amount of income derived from it (see para. 14 of Levin , citied in para. 18 of the judgment).

d.
A worker is a person who pursues effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary (see para. 17 of Levin , citied in para. 18 of the judgment).

e.
The concept of ‘worker’ must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that for a period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see para. 17 of Lawrie-Blum , cited in para. 39 of the judgment).

f.
Such activities must have economic value to the employer (see para. 19 of Lawrie-Blum , cited in para. 39 of the judgment).

7.
These six features set out the requirements that a Union citizen must demonstrate to be treated as a worker. With these factors in mind, the challenge posed by the first ground is whether or not the conclusions of the Immigration Judge are consistent with this approach.

8.
In order to answer this question, it is relevant to set out the evidence that the Immigration Judge took into account. In summary, it was as follows.

9.
First, there were documents and oral evidence dealing directly with the employment relationship. The evidence established that the employer was a friend of the father of the appellant’s husband and it was as a result of this connection that the appellant’s husband was recruited. The documents were a contract of employment, which was signed on 30 June 2009, described itself as a ‘pro forma’, wage slips and letters from HM Revenue & Customs regarding the business and National Insurance contributions.

10.
Secondly, the evidence about the business and employer was as follows. The employer claimed he established the business in June 2009 and employed the appellant's husband soon thereafter. The employer said that he did not have knowledge of the building industry but relied on the appellant's husband who could undertake brickwork and plastering. The employer explained that he had changed the business address to his home address. The employer confirmed there was no employer's or public liability insurance. The employer confirmed he was not a member of a trade organisation. The employer confirmed there was no evidence of the business having secure premises to store equipment and materials for the business. The employer confirmed there was no evidence of the company having any transport. The employer admitted that he did not have any documents showing profit or loss for the period from when the business started up to the date of hearing (20 January 2010). He only had receipts for small items purchased and some rough working papers.

11.
Thirdly, there were allegations about the existence of the business. The Secretary of State alleged that the company was not traceable at Companies House. The employer explained that because he was a sole proprietor he did not need to register. The Secretary of State alleged that the company could not be found using internet search engines such as Google or online directories such as Yell.com. The employer said that he could not afford to advertise and this was why there was no evidence about the company. The Secretary of State said she had been unable to contact the employer on the telephone number provided. The Secretary of State queried the reliability of the letters from two accountants relating to the business and employment. It was unclear on the basis of the other evidence how the authors of the letters could describe the business as established and thriving.

12.
It was from this evidence that the Immigration Judge concluded that the employer was running a "business of convenience". Mr Chawla submitted that these factors did not undermine the status of the appellant's husband as a worker. He pointed to the employment relationship established by the contract of employment. He relied on the wage slips, two accountancy letters and documents from HM Revenue & Customs as further evidence of the employment relationship. Mr Chawla maintained that these documents demonstrated there was an employment relationship. He submitted that the evidence was not given the weight it deserved and that the Immigration Judge was distracted by irrelevant matters that related to the employer and not the employee. Mr Chawla concluded that if the evidence had been properly assessed, then the only legitimate finding would have been that the appellant's husband was a worker.

13.
In response to our questions, Mr Chawla acknowledged that there was no evidence that the appellant had ever undertaken any actual work for the business. Mr Chawla had no response to our concerns about the terms of the contract which included paying the appellant's husband for four hours each weekday morning whether or not any work was actually done. We noted that the contract contained an exclusivity clause and that the appellant's husband was not permitted to work elsewhere for the duration of the contract. We also noted that contrary to law there was no entitlement to annual leave or sick leave.

14.
In response to the first ground we make the following findings. First, although we find the term used by the Immigration Judge, "business of convenience", to be descriptive, it is unhelpful because it could easily be confused with the established concept of marriage of convenience. The latter term

relates specifically to circumstances where there is an attempt to abuse the provisions of Community law and where such abuse falls foul of article 35 of the Citizen's Directive (2004/38/EC). In the appeal there was no allegation of abuse. The reasons for refusal were merely that the appellant's husband was not a qualified person because he was not a worker.

15.
Secondly, we are satisfied that the Immigration Judge correctly assessed that the appellant's husband was not a worker within the meaning of Community law. She had regard to all the evidence and drew the conclusion that the work was neither effective nor genuine. The employment relationship was clearly of no economic benefit to the employer. We find no error on a point of law with regard to this matter.

Did the Immigration Judge err in not considering whether the appellant was a jobseeker?

16.
We move on to consider the remaining ground of appeal. The appellant says that her husband was not only working but that he was also looking for work. As such, it was stated that he was a jobseeker and thereby met the requirements of Community law on that basis.

17.
The evidence relied upon was one comment made by the appellant's husband in answer to a question put to him in cross-examination. The appellant's husband was asked what he did in his other time. He replied that he "was looking for a job, a second job." The appellant relies on a transcript of the hearing prepared by her legal representatives, which has been submitted in accordance with directions and to which is attached a statement from her representative. That transcript is unchallenged.

18.
It is clear that the Immigration Judge did not consider this evidence. There is no reference to it in her determination. The question is whether this omission is an error on a point of law.

19.
Mr Chawla confirmed no other evidence was presented to the Immigration Judge to demonstrate that the appellant's husband was looking for additional work. Neither witness statement mentioned that the appellant's husband was looking for additional work. The appellant's representative did not mention the issue in the skeleton argument on which they relied at that time. We have not seen any note by the Immigration Judge but we have examined the transcript provided by the appellant's representatives and notice that no argument was raised about job seeking during closing submissions.

20.
We start from the fact that the issue was not argued before the Immigration Judge. It was for the appellant to make her case. She was professionally represented. Since nothing had been said in support of the present argument, it would be hard to criticise the Immigration Judge for not dealing with it. Although in R v Secretary of State for the Home Department ex parte Robinson [1997] EWCA Civ 4001 it was recognised that the Tribunal has a duty to take an obvious Convention point in a protection context, we would be cautious before extending that duty to a judge dealing with a matter of private entitlement albeit within Community law. We are not persuaded, therefore, the Immigration Judge made an error in not dealing with the issue.

21.

In any event, we are of the opinion that even if the Immigration Judge had dealt with the issue, on the material available she could only have concluded that the evidence did not establish that the appellant was a jobseeker for the purposes of Community law.

22.
Although the evidence given by the appellant's husband was clear to the effect that he said he was looking for work, the evidence was merely an assertion. That assertion was not supported by any further evidence. No details were given as to what steps the appellant's husband had taken to look for work and there was no supporting evidence to show what efforts he had made.

23.
EU law provides for jobseekers in two distinct situations. Provisions have been made in relation to Union citizens who move to another Member State to look for work but who have never worked in the host Member State. The other provisions relate to Union citizens who are seeking work after previously working in the host Member State.

24.
The provisions relating to Union citizens in the second category are much more robust than those in the former since in the second situation Union citizens will often retain their rights of residence already secured. The strength of these provisions can be seen by examining art. 7(3)(b) and (c) of the Citizens Directive (2004/38/EC), as discussed by the Court of Appeal in Tilianu v The Secretary of State for Work and Pension [2010] EWCA Civ 1397.

25.
In this appeal, however, given the facts found by the Immigration Judge and upheld by us, we are concerned with a Union citizen who falls within the first category, that is, Union citizens who have moved to the United Kingdom and who have yet to find work. It is those provisions we need to examine.

26.
Little is said in the Citizens Directive about free movement rights of Union citizens to move to another Member State to look for work. Article 14(4) provides as follows:

14(4). By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or

(b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

27.
The provision in art. 14(4)(b) are given effect in the United Kingdom through reg. 6(4) of the Immigration (European Economic Area) Regulations 2006:

6(4) For the purpose of paragraph (1)(a), "jobseeker" means a person who enters the United Kingdom in order to seek employment and can provide evidence that he is seeking employment and has a genuine chance of being engaged.

It may be that the provisions of reg. 6(4) appear to be somewhat more generous than those in art. 14(4). This is not, however, the case. It must be remembered that art. 14 deals with the retention of the right of residence and it is in that context that expulsion measures may not be adopted. This, in turn, was a measure introduced into the Citizen's Directive to reflect the judgment of the European Court of Justice (as it then was) in Antonissen [1991] EUECJ C-292/89, the conclusions of which are summarised by the Tribunal in para. 30 of MDB and others (Article 12, 1612/68) Italy [2010] UKUT 161 (IAC):

Whilst Antonissen established that a job seeker could qualify as a worker, the case also made clear that the period of time allowed for the job-seeker to find employment was not indefinite and that the applicant had to show that he was someone who was genuinely seeking employment.

28.
The Tribunal also considered the question of who is a jobseeker in AG and others (EEA- jobseeker - self-sufficient person - proof) Germany [2007] UKAIT 00075 and, after having drawn conclusions similar to those in MDB and others , examined the further question of proof. It concluded (as summarised in the headnote) that:

The burden of proof is on the applicant/appellant to establish any EEA right of admission or residence. A failure to substantiate any such right - for example by failing to produce relevant evidence – is likely to mean that the claim/appeal will fail.

29.
Applying these principles to the facts in this appeal, we find there is no possibility that the single comment made by the appellant's husband during cross-examination to the effect that he was looking for a second job could be regarded as being satisfactory evidence to meet these requirements. The appellant failed to provide evidence to show that her husband was seeking additional employment or that he had a genuine chance of being engaged.

30.
As there was no prospect of success on this issue given the evidence presented, even if the Immigration Judge had erred by not taking the issue of her own initiative, any error was wholly immaterial to the result.

Other issues

31.
Mr Chawla specifically accepted that no other issues arose.

Decision

The determination discloses no error on a point of law. The appellant's appeal to this Tribunal is dismissed.

Signed Date

DIJ McCarthy

Deputy Judge of the Upper Tribunal