



Upper Tribunal

(Immigration and Asylum Chamber)

Zubair (EEA regs: self-employed persons) [2013] UKUT 00196(IAC)

THE IMMIGRATION ACTS

Heard at Phoenix House, Bradford

Determination Promulgated

On 26 March 2013

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Before

THE PRESIDENT, THE HON MR JUSTICE BLAKE

UPPER TRIBUNAL JUDGE TAYLOR

Between

SAMEENA ZUBAIR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr T Hussain instructed by Parker Rhodes Hickmott

For the Respondent: Mrs R Pettersen Senior Home Office Presenting Officer

(1) The provisions of the Immigration (European Economic Area) Regulations 2006 concerning, respectively, self-employed persons and workers ultimately derive from different previous Directives and cannot be elided, so as, for example, to create a concept of "self-employment seeking".

(2) Accordingly, a person cannot combine a period of self-employment with a period of seeking employment, so as to achieve a requisite period of residence under the Regulations.

DETERMINATION AND REASONS

1.

The appellant appeals against the decision of Judge Birkby dated 12 October 2012. The judge dismissed her appeal from a decision of the Secretary of State refusing her a permanent residence card under the provisions of the Immigration (EEA) Regulations 2006 as amended (the Regulations).

2.

The material facts as found by the judge are as follows. The appellant is a citizen of Pakistan born in 1968. She is married to Mohammed Zubair a German national. The appellant and her husband have three children all born in Germany in 1997, 1999 and 2005.

3.

Mohammed Zubair ran a successful business in Germany. In July 2006 he established a company called ZZ Sports fashion in the United Kingdom. In February 2007 the appellant was issued with a residence card as the family member of an EEA national who was a qualified person by reason of self-employment. Unfortunately, the business did not prosper and Mr Zubair closed it in November 2007. Between November 2007 and May 2008 the appellant and her husband appeared to be living off the assets of the wound-down business. In May 2008 the husband submitted an application for jobseekers allowance, and there was evidence of his actively seeking work in the sports garment industry throughout the period thereafter until 28 January 2011 when he became unwell and unable to work. This was first considered to be a temporary incapacity but on 7 July 2011 he was diagnosed as permanently incapacitated and suffering from Parkinson's disease. This remains the position since. The appellant cares for him daily and was unable to attend the First-tier hearing by reason of such care.

4.

In February 2012 the appellant applied for permanent residence on the basis that she had completed five years residence as the spouse of an EEA national. This application was refused in August 2012. The Secretary of State explained that for a spouse to be eligible for permanent residence the qualified person must have resided five years as a worker, a self-employed person, a self-sufficient person or a jobseeker. Although he had been a work-seeker from May 2008 to July 2011, he had never found employment and must have been employed or self-employed for a minimum of twelve months prior to becoming unemployed.

5.

The judge found the facts set out in paragraph 3 above. He was not satisfied that evidence had been provided to show that Mr Zubair was a self-sufficient person within the meaning of the Regulations either before 2006 or from November 2007.

6.

On the basis of these findings he dismissed the appeal. He concluded:-

i.

The appellant's husband was never employed and so never qualified as a worker within the meaning of regulation 6(2).

ii.

In any event, Mr Zubair could not be regarded as a jobseeker as he did not enter the United Kingdom for that purpose as required by regulation 6(4).

iii.

Finally, Mr. Zubair could not rely on his permanent incapacity because his self-employment has not come to an end as a result of this incapacity as required by regulations 5 (3)(a) and 6 (1) (c).

7.

The judge further considered a claim under Article 8 ECHR but concluded that there was no reason why the appellant could not return to Germany with her husband and her children.

8.

Grounds of appeal were lodged contending that:

i.

There was fresh evidence to show that the appellant and her husband had been self-sufficient prior to his applying for jobseeker's allowance.

ii.

The impact of the removal of the children after some six years residence in the United Kingdom had not been properly assessed.

9.

Permission to appeal was granted by Judge Shaerf on the basis of the second of these grounds.

10.

Regulations 4, 5 and 6 of the Regulations as amended in 2012 are in the following terms:-

Worker", "self-employed person", "self-sufficient person" and "student"

4.—(1) In these Regulations —

(a) "worker" means a worker within the meaning of Article 45 of the Treaty on the Functioning of the European Union;

(b) "self-employed person" means a person who establishes himself in order to pursue activity as a self-employed person in accordance with Article 49 of the Treaty on the Functioning of the European Union;

(c) "self-sufficient person" means a person who has—

(i) sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence; and

(ii) comprehensive sickness insurance cover in the United Kingdom;

(d) "student" means a person who—

(i) is enrolled for the principal purpose of following a course of study (including vocational training) at a private or public establishment which is –

(aa) financed from public funds or

(bb) otherwise recognized by the Secretary of State as an establishment which has been accredited for the purpose of providing such course or training within the law or administrative practice of the part of the United Kingdom in which the establishment is located;

(ii) has comprehensive sickness insurance cover in the United Kingdom; and

(iii) assures the Secretary of State, by means of a declaration, or by such equivalent means as the person may choose, that he has sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence.

(2) For the purposes of paragraph (1)(c), where family members of the person concerned reside in the United Kingdom and their right to reside is dependent upon their being family members of that person—

(a) the requirement for that person to have sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence shall only be satisfied if his resources and those of the family members are sufficient to avoid him and the family members becoming such a burden;

(b) the requirement for that person to have comprehensive sickness insurance cover in the United Kingdom shall only be satisfied if he and his family members have such cover.

(3) For the purposes of paragraph (1)(d), where family members of the person concerned reside in the United Kingdom and their right to reside is dependent upon their being family members of that person, the requirement for that person to assure the Secretary of State that he has sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence shall only be satisfied if he assures the Secretary of State that his resources and those of the family members are sufficient to avoid him and the family members becoming such a burden.

(4) For the purposes of paragraphs (1)(c) and (d) and paragraphs (2) and (3), the resources of the person concerned and, where applicable, any family members, are to be regarded as sufficient if

(a) they exceed the maximum level of resources which a United Kingdom national and his family members may possess if he is to become eligible for social assistance under the United Kingdom benefit system or

(b) paragraph (a) does not apply but taking into account the personal situation of the person concerned and, where applicable, any family members, it appears to the decision maker that the resources of the person or persons concerned should be regarded as sufficient.

(5) For the purposes of regulation 15A (2) references in this regulation to “family members” includes a “primary carer” as defined in regulation 15A7.

Worker or self-employed person who has ceased activity”

5.—(1) In these Regulations,-

“worker or self-employed person who has ceased activity” means an EEA national who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the conditions in this paragraph if he—

(a) terminates his activity as a worker or self-employed person and—

(i) has reached the age at which he is entitled to a state pension on the date on which he terminates his activity; or

(ii) in the case of a worker, ceases working to take early retirement;

(b) pursued his activity as a worker or self-employed person in the United Kingdom for at least twelve months prior to the termination; and

(c) resided in the United Kingdom continuously for more than three years prior to the termination.

(3) A person satisfies the conditions in this paragraph if—

(a) he terminates his activity in the United Kingdom as a worker or self-employed person as a result of a permanent incapacity to work; and

(b) either—

(i) he resided in the United Kingdom continuously for more than two years prior to the termination; or

(ii) the incapacity is the result of an accident at work or an occupational disease that entitles him to a pension payable in full or in part by an institution in the United Kingdom.

(4) A person satisfies the conditions in this paragraph if—

(a) he is active as a worker or self-employed person in an EEA State but retains his place of residence in the United Kingdom, to which he returns as a rule at least once a week; and

(b) prior to becoming so active in that EEA State, he had been continuously resident and continuously active as a worker or self-employed person in the United Kingdom for at least three years.

(5) A person who satisfies the condition in paragraph (4)(a) but not the condition in paragraph (4)(b) shall, for the purposes of paragraphs (2) and (3), be treated as being active and resident in the United Kingdom during any period in which he is working or self-employed in the EEA State.

(6) The conditions in paragraphs (2) and (3) as to length of residence and activity as a worker or self-employed person shall not apply in relation to a person whose spouse or civil partner is a United Kingdom national.

(7) For the purposes of this regulation—

(a) periods of inactivity for reasons not of the person's own making;

(b) periods of inactivity due to illness or accident; and

(c) in the case of a worker, periods of involuntary unemployment duly recorded by the relevant employment office,

shall be treated as periods of activity as a worker or self-employed person, as the case may be.

“Qualified person”

6.—(1) In these Regulations, “qualified person” means a person who is an EEA national and in the United Kingdom as—

(a) a jobseeker;

(b) a worker;

(c) a self-employed person;

(d) a self-sufficient person; or

(e) a student.

(2) A person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if—

(a) he is temporarily unable to work as the result of an illness or accident;

(b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom, provided that he has registered as a jobseeker with the relevant employment office and—

(i) he was employed for one year or more before becoming unemployed;

(ii) he has been unemployed for no more than six months; or

(iii) he can provide evidence that he is seeking employment in the United Kingdom and has a genuine chance of being engaged;

(c) he is involuntarily unemployed and has embarked on vocational training; or

(d) he has voluntarily ceased working and embarked on vocational training that is related to his previous employment.

(3) A person who is no longer in self-employment shall not cease to be treated as a self-employed person for the purpose of paragraph (1)(c) if he is temporarily unable to pursue his activity as a self-employed person as the result of an illness or accident.

(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.

11.

At the hearing Mr Hussain submitted that the appellant’s entitlement to permanent residence depended on whether Mr Zubair could be considered to be self-sufficient. We pointed out that that self-sufficiency could not assist as:-

i.

There was no evidence that the family had health insurance as required by regulation 4(1)(c).

ii.

There was no evidence that Mr Zubair had completed five years residence as a self-sufficient person prior to his seeking jobseekers allowance in 2008 or illness in 2011 as would be required by regulation 15(1)(b). ¹

iii.

There was no provision in the Regulations or the Citizens’ Directive 2004/38/EC for a person who had been self-sufficient for a period of less than five years to acquire permanent residence by reason of permanent incapacity for work.

12.

We did indicate that, although there was no reason to doubt the judge’s conclusions as to employment set out in paragraph 6(i) above, an arguable issue arose as to the relationship between self-employment and permanent incapacity and therefore a question as to whether the judge’s conclusions at paragraph 6(iii) above were correct.

13.

Mr Hussain therefore applied to amend his grounds to raise this issue. Mrs Pettersen did not object to the amendment but we gave her time to make written representations in response, having regard to the previous lack of notice that this issue would be ventilated at the appeal. In due course, she submitted the IDI on permanent residence to which we have had regard.

14.

Having considered the matter further, we conclude the judge was correct in his reasoning and no error of law accordingly arises on this issue. We summarise our reasons as follows:-

i.

Regulation 5(3) requires a person to terminate his activity as a worker or self-employed person as a result of permanent incapacity to work and has either resided in the United Kingdom continuously for more than two years prior to the termination or has suffered an accident at work or occupational disease that precludes such a period of residence.

ii.

Mr Zubair has resided in the United Kingdom for more than two years prior to his permanent incapacity to work but he has not resided either as a worker or as a self-employed person for more than two years before that incapacity. His self-employment lasted 16 rather than 24 months and although he has remained as a work seeker for 38 months prior to his permanent incapacity such residence never counted as residence as a worker as he never found work.

iii.

His illness was not an accident at work or industrial disease obviating the requirement for two years lawful residence within the meaning of EU law before he acquired permanent residence.

iv.

We see no reason why a person who has entered the United Kingdom in another capacity cannot subsequently become a work seeker, and note that the respondent treated him as such. The words of regulation 6 (4) 'enters the United Kingdom in order to seek employment' should be read to include those who having entered can provide evidence that he is seeking employment. We do not think the judge was correct in his conclusions summarised at paragraph 6 (iii) above. However, such an interpretation does not avail Mr Zubair because although he was a genuine work seeker, he never obtained employment and thus never fell to be considered as a worker within the meaning of regulation 6 (2)(b) which properly reflects Article 7 (3) of the Citizens' Directive.

v.

The judge was correct to note that Mr Zubair could not benefit from regulation 6 (3) because it was not illness that caused him to be unable to pursue his activity as a self-employed person but the closing of his business some 42 months before he first became ill. Similarly he did not terminate his activity as a worker or self-employed person as a result of permanent incapacity to work within the meaning of regulation 5 (3)(a), faithfully reflecting Article 17 of the Citizens' Directive. What his illness terminated was his activity as a work-seeker.

vi.

We have considered whether regulation 5(3)(a) should be read purposefully to treat activity as a self-employed person or a worker the same, as Article 17 (1)(b) appears to do, but on reflection conclude that this would not be appropriate. Preamble 19 to the Directive explains that these provisions were designed to continue rights that had been separately provided to workers and self-employed persons by different previous Directives. Council Directive 75/34/EC dealt with self-employed persons and

there is nothing in the terms of that Directive that suggests that periods of self-employment could be combined with periods of work seeking to achieve the requisite period of residence. There is no concept of 'self-employment seeking'.

vii.

Contrary to the indication we raised during the hearing, it does not, on reflection, appear to be the case that the critical issue is whether the self-employment was immediately prior to the illness, but whether illness prevented continued lawful residence either as a worker or self-employed person.

15.

We turn to the Article 8 question on which permission to appeal has been granted. We note that the Secretary of State has never considered this question herself and no removal decision had been taken in respect of the appellant, her husband or the three children. In the light of their circumstances it may be that no such decision will ever be taken. The appellant is the only non-EEA national in the family but her case should not be considered in isolation.

16.

The children are now aged 16, 14 and 8. They are all in education in the United Kingdom. Although the youngest was born in Germany in 2005 there is clear evidence of visits to the United Kingdom before that time. Even taking 2005 as the date since the whole family unit have been here permanently, this was a period of some seven years prior to the decision, and consisted of the formative years of the first two children and nearly all the life of the third child. Matters have now moved on.

17.

We conclude that the judge did indeed fail to give adequate consideration to the interests of the children in determining the Article 8 aspect of the claim and that this is a material error of law.

18.

Rather than re-making this aspect of the decision for ourselves, we will set aside the judge's decision and treat the representations made in this appeal as representations made to the Secretary of State that should be considered and determined by her first. We would observe the following:

i.

The appellant should not be separated from her husband and children, if the Secretary of State is content that they remain here at least discretionary leave to remain should be granted to the appellant.

ii.

It may be that the children have their own rights under EU law to remain for the purpose of education and if so their mother ought to be given a residence card or leave to remain to give effect to the children's rights.

iii.

If neither Mr Zubair nor any of the children have any further EU rights of residence then they could be made the subject of a decision to remove them as EEA nationals who are no longer qualified persons.

iv.

Before such a decision could be taken EU law would require an assessment of their degree of integration into the United Kingdom and an article 8 assessment of the impact on removal on the children having regard to their prior legal residence.

v.

It would be open to the Secretary of State to take into account that Mr Zubair would have qualified for permanent residence if he had been employed by his company for at least 12 months before closing the business and becoming a work seeker and then falling ill.

vi.

If a decision to remove every member of the family is to be taken, it should be taken promptly and generate a right of appeal under the Immigration (EEA) Regulations where the position of the whole family can be examined. Every passing year makes it less likely that the children can be lawfully removed.

vii.

If on the other hand, it is decided that the family should be permitted to reside here indefinitely appropriate leave or authority should be granted to them to do so. A period of ambiguity not subject to a right of appeal is not desirable and may not be lawful.

19.

The appeal against the Secretary of State's decision with respect to the refusal of a permanent residence card is dismissed.

20.

The appeal against the decision of Judge Birkby on Article 8 grounds is allowed to the extent that the judge's decision is set aside. This aspect of the appeal remains outstanding for a lawful decision to be made by the Secretary of State in the light of the observations in this determination.

21.

No other order is made save that the Secretary of State should respond to the representations made in the course of this appeal and anything else the appellant or her family seeks to place before the respondent and either grant a period of discretionary leave or make an immigration or EEA decision in respect of the appellant and her family that will give rise to a right of appeal where the matter will need to be considered afresh.

Signed

Chamber President of the Upper Tribunal

10 April 2012

1 15.— Permanent right of residence

(1) The following persons shall acquire the right to reside in the United Kingdom permanently—

(b) a family member of an EEA national who is not himself 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;