Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13811/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25th September 2014	**On 13th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE HARRIES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR SHASHIDARAN KANAPATHIPILLAI
(NO ANONYMITY DIRECTION)

Respondent

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondent: Ms M Sanchez, Solicitor

DETERMINATION AND REASONS

1. The appellant in the Upper Tribunal is the Secretary of State for the Home Department. The respondent is a citizen of Sri Lanka born on 17th September 1974; he is referred to hereafter as the claimant. Permission was granted to the Secretary of State to appeal against the decision of First-tier Tribunal Judge Kempton (the Judge) allowing the claimant's appeal against the Secretary of State's decision to

refuse him a residence card as confirmation of a right to reside in the United Kingdom under Regulation 15(1) of the EEA Regulations 2006.

2. Permission was granted by First-tier Tribunal Judge R A Cox on 13th June 2014 because he considered the grounds of appeal were clearly arguable, namely that the Judge had failed to give reasons for findings on material matters and/or committed procedural unfairness. I was satisfied after the initial hearing before me on 7th August 2014 that the Judge had erred in law and I set the decision aside for the reasons fully set out in that decision. The claimant was at that time without legal representation but indicated that he wished to reinstruct solicitors. I therefore adjourned to allow time for the claimant to obtain representation and the matter now comes before me again for a continuation hearing in order to remake the decision.

3. The relevant law, under regulation 15(1)(b) of the Regulations, is that 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 the Regulations for a continuous period of 5 years shall acquire the right to reside in the United Kingdom permanently. The EEA national is the claimant's wife, Mrs Nagarajah, a person of French nationality. The claimant claims that she has been residing in the United Kingdom, exercising Treaty rights as a qualified person, in accordance with the Regulations.

4. Regulation 6 sets out the categories of qualified people as follows:

> **"Qualified person"**
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> **6.** (1) In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as—
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> (a)a jobseeker;
>
> (b) a worker;
>
> (c) a self-employed person;
>
> (d) a self-sufficient person; or
>
> (e) a student

5. The Secretary of State's reasons for refusal of the application are set out in a letter dated 7th March 2014. The claimant's application, made on 19th December 2013, was considered firstly on the basis of the EEA sponsor's status as a qualified person deriving from her status as a worker for a period of 5 years. The supporting evidence consisted of a letter of employment from Londis dated 10th October 2007 confirming the sponsor's employment from 10th April 2007; a job offer letter from Sandwich 4 You dated 27th March 2007; a letter and payslip from Mahalaxmy Silks confirming an employment start date from 1st November 2013.

The Secretary of State found an absence of evidence to show how the sponsor was exercising Treaty rights in the United Kingdom between the end of her employment with Londis in April 2008 and the beginning of her next job in November 2013.

6. The Secretary of State states that she took further account of the claimant's statement that his wife ceased to exercise Treaty rights whist she was having children; the claimant provided his own work documents for that period. The Secretary of State asserted that the claimant's income could only be taken into account for the purpose of showing his wife to be a self-sufficient person for the period in which she was not working in accordance with Regulation 4(1)(c) as follows:

> **Worker", "self-employed person", "self-sufficient person" and "student"**
>
> **4.** (1) In these Regulations —
>
> (a)"worker" means a worker within the meaning of Article 39 of the Treaty establishing the European Community(**1**);
>
> (b)"self-employed person" means a person who establishes himself in order to pursue activity as a self-employed person in accordance with Article 43 of the Treaty establishing the European Community;
>
> (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;

7. The Secretary of State found a lack of any submitted evidence that the EEA national and her family members in this case had comprehensive sickness insurance cover in the United Kingdom for the period from April 2008 to November 2013. There was considered to be a further lack of evidence that there had been no dependency on the social assistance system of the United Kingdom during the period of residence. The Secretary of State concluded that there was insufficient evidence to establish whether the EEA national had been exercising Treaty rights in the United Kingdom for a continuous period of 5 years and refused the application.

8. The Secretary of State advised the claimant that the refusal to issue a permanent residence card did not require him to leave the United Kingdom if he could otherwise demonstrate his right to reside under the Regulations. He was further advised that consideration could be given to the application under Appendix FM and paragraph 276 ADE of the Immigration Rules if he made and paid for a separate application under those provisions.

9. At the outset of the hearing before me I allowed some time to the representative now instructed by the claimant, Ms Sanchez, to consider my decision on the error of law and the setting aside of the previous decision as it had not apparently been served upon her. Ms Sanchez had been unaware that the matter was listed today for a hearing to remake the decision; had she been aware of the situation she said that she would have brought the claimant's wife, the EEA national, to give evidence as well as the claimant who was present. Ms Sanchez asked me to adjourn if I wished to hear from the EEA national. My response was that the manner of conducting of her case was for Ms Sanchez and I would consider the merits of an application to adjourn should such an application be made. After taking some time to consider the position Ms Sanchez opted to continue with the hearing on the available evidence without applying to adjourn.

10. The sole ground of appeal is that the Secretary of State's decision causes a breach of the claimant's rights under the EEA Regulations. The burden of proof is upon the claimant and the standard of proof is on the balance of probabilities. I may consider evidence about any matter which I think relevant to the substance of the decision, including evidence which concerns a matter arising after the date of decision.

11. Clarification was not forthcoming at the beginning of the hearing before me about whether the claimant relies on his wife's status as a worker throughout the necessary 5-year period or whether she is claimed to have been a self-sufficient person because of the claimant's income. On his application form the claimant did not complete section 4.17 asking whether he is the family member of a person qualified as a worker or as an economically self-sufficient person. In the section listing the documents submitted he entered "N/A" against the provision of a document showing sickness insurance for the category of a self-sufficient person, although he now submits such evidence.

12. The covering letter from Thomas Sanchez, Solicitors, dated 19th December 2013, sent with the claimant's application submitted that the claimant's wife qualified as a worker under the Regulations, notwithstanding her maternity leave. Although it was submitted that the claimant had worked since his arrival in the United Kingdom in 2007 it was not submitted that his wife was a self-sufficient person and no document was submitted to show any comprehensive sickness insurance cover.

13. There is no statement or oral evidence from the claimant's wife in support of the appeal. The claimant's evidence is contained in his statement dated 25th April 2014 which was adopted in his oral evidence before me. He states that he and his wife married in India on 24th March 2003. In 2004 the claimant moved to France to live with his wife, a French citizen. On 31st March 2006 their first child was born in France and in April 2006 the claimant came to the United Kingdom as a student; his wife and child moved to the United Kingdom to join him in February 2007.

14. On 10th April 2007 the claimant's wife started her employment with Londis which continued until 28th February 2008 when she became pregnant with the couple's second child; that child, a son, was born in London on 22nd October 2008, after which the claimant's wife did not work again until 1st November 2013. It was the couple's decision that the claimant should continue to work after the birth of their children and his wife would remain at home to look after them.

15. In his statement the claimant asserts that the Secretary of State has acted wrongly and unfairly in refusing his application because he had a legitimate expectation that the she would apply her own policy and guidelines as set out on the website dealing with "EEA and Swiss Nationals". The advice set out therein and relied upon by the claimant is that the definition of "worker" includes "those between jobs (for example, women who have ceased employment on becoming pregnant but who intend to resume work at some point after the birth)".

16. The claimant's oral evidence is that his wife intended to work again when she stopped in February 2008 but did not do so for a period of over 5 years when their son started school. The claimant did not know whether his wife had applied for maternity leave. They did investigate the possibility of child care from other sources but did not wish to follow that course; it was the claimant's view that, particularly when they had two children, it was better for his wife to look after them whilst he worked full time; it is the claimant's belief that children cared for by their parents are well behaved and better behaved than those looked after by child carers. It is his opinion that it was better for the children to have a parent at home.

17. In her final submissions the main argument put forward by Ms Sanchez for the claimant was that he was entitled to rely upon the website guidance set out above (and included in the bundle of documents) giving the definition of a "worker" for the purposes of the Regulations. She submitted that the definition covered the position of the claimant's wife, namely that she had ceased employment on becoming pregnant but intended to resume work at some point after the birth. It was unfair on the part of the Secretary of State to have decided the matter as she did, namely by failing to give weight to her own guidance and deciding the application on the basis of self-sufficiency without allowing an opportunity to submit evidence of sickness insurance.

18. Mr Avery's submission for the Secretary of State was that although there is now some evidence of French medical insurance cover it is not adequate for the purposes of the claimant's application or appeal. He relied upon the case of Ahmad v SSHD [2014] EWCA Civ 988 which considered the issue of comprehensive sickness insurance cover; he submitted that there was insufficient evidence to show that the French cover was adequate for the purposes of the Regulations, particularly in the light of the length of time the parties had been in the United Kingdom.

19. Dealing with issue of self-sufficiency first of all I find that the appeal cannot succeed on that ground. I find a lack of evidence that there was comprehensive sickness insurance cover in the United Kingdom as required by the Regulations. It is apparent from the covering solicitors' letter that the application was not put made on this basis and the necessary evidence was not submitted. I do not accept the argument that there was unfairness caused by the Secretary of State failing to allow an opportunity to the appellant to submit necessary evidence of insurance cover; he was legally represented and specifically entered "N/A" in the relevant document box on the application form.

20. It is open to me to consider the evidence now submitted which was not with the application and I do so. It consists of a document and its translation from French into English, at pages 13 – 16 of the claimant's bundle of documents submitted to the Upper Tribunal. The document is dated 6th February 2006 and is described as a certificate of additional universal health cover, the insured person being the claimant's wife. The certificate, which was issued in France, declares the rights and benefits of the insured and her family members to exemption from advance fees from health professionals. The entitlement is recorded as being from 1st February 2006 to 31st January 2007; the claimant's wife and children are named as its beneficiaries. I am not satisfied that this is sufficient evidence of comprehensive sickness insurance cover in the United Kingdom and I find that the claimant's wife was not qualified as a self-sufficient person for the purposes of the Regulations.

21. Ms Sanchez in her final submissions referred to the case of Jessy Saint Prix v Secretary of State for Work and Pensions (Case C – 507/12) CJEU (Fourth Chamber), 19th June 2014, considering the effect of pregnancy and childbirth upon a person's status as a "worker" and relied on paragraph 42 in particular in submitting that the question of the "reasonableness" of the length of maternity leave has been left open by the European Court. She submitted that the period that has elapsed between childbirth and starting work again is reasonable taking account of all the specific circumstances of this case. She submitted that no laws have broken and in the light of the birth of the claimant's second child it was reasonable for his wife to remain at home given the greater demands of caring for two children rather than one child; a legitimate choice had been exercised by the parties.

22. I accept that in her deliberations set out in the refusal letter the Secretary of State did not consider the definition of a "worker" in the context of maternity leave, but nor did she move directly to consider the issue of self-sufficiency as submitted by Ms Sanchez. The Secretary of State interpreted the application as stating that the appellant's wife had not exercised Treaty rights whilst she was having children and found no evidence of the exercise of Treaty rights by her between April 2008 and November 2013.

23. Although there may have been a misinterpretation of the solicitors' submissions I do not accept that the Secretary of State failed to apply her own policy. There was an absence of any evidence I can identify before the Secretary of State that the claimant's wife had any intention of resuming work at some point after the birth. It is accepted for the claimant that this is a necessary element of retaining the status of "worker" and I find that it was absent from the information before the Secretary of State.

24. I accept that the claimant's wife did return to work, although not for a period of over 5 years after ceasing work. The only evidence that she intended to resume work at some point is contained the claimant's oral evidence before me. If I accept that evidence the issue then revolves around whether the status of "worker" was retained in the light of the period of absence from work. I do not accept the submission that the website guidance stating that a worker can be a woman who "intends to resume work at some point after the birth" is the end of the matter. Ms Sanchez suggests that this is a binding definition from which the Secretary of State cannot depart so that no time limit can therefore be put on the length of absence from work for maternity reasons. The guidance is in my view no more than guidance and does not stand apart from case law on the issue.

25. The relevant findings in the case of Jessy Saint Prix are as follows:

> 39 In the present case, it is clear from the order for reference, a finding not contested by the parties in the main proceeding, that Ms Saint Prix was employed in the territory of the United Kingdom before giving up work, less than three months before the birth of her child, because of the physical constraints of the late stages of pregnancy and the immediate aftermath of childbirth. She returned to work three months after the birth of her child, without having left the territory of that Member State during the period of interruption of her professional activity.
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> 40 The fact that such constraints require a woman to give up work during the period needed for recovery does not, in principle, deprive her of the status of 'worker' within the meaning Article 45 TFEU.
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> 41 The fact that she was not actually available on the employment market of the host Member State for a few months does not mean that she has ceased to belong to that market during that period, provided she returns to work or finds another job within a reasonable period after confinement (see, by analogy, *Orfanopoulos and Oliveri*, C-482/01 and C-493/01, EU:C:2004:262, paragraph 50).
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> 42 In order to determine whether the period that has elapsed between childbirth and starting work again may be regarded as reasonable, the national court concerned should take account of all the specific circumstances of the case in the main proceedings and the applicable national rules on the duration of maternity leave, in accordance with Article 8 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1).

> 43 The approach adopted in paragraph 41 of the present judgment is consistent with the objective pursued by Article 45 TFEU of enabling a worker to move freely within the territory of the other Member States and to stay there for the purpose of employment (see *Uecker and Jacquet*, C-64/96 and C-65/96, EU:C:1997:285, paragraph 21).
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> 44 As the Commission contends, a Union citizen would be deterred from exercising her right to freedom of movement if, in the event that she was pregnant in the host State and gave up work as a result, if only for a short period, she risked losing her status as a worker in that State.
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> 45 Furthermore, it must be pointed out that EU law guarantees special protection for women in connection with maternity. In that regard, it should be noted that Article 16(3) of Directive 2004/38 provides, for the purpose of calculating the continuous period of five years of residence in the host Member State allowing Union citizens to acquire the right of permanent residence in that territory, that the continuity of that residence is not affected, inter alia, by an absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth.
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> 46 If, by virtue of that protection, an absence for an important event such as pregnancy or childbirth does not affect the continuity of the five years of residence in the host Member State required for the granting of that right of residence, the physical constraints of the late stages of pregnancy and the immediate aftermath of childbirth, which require a woman to give up work temporarily, cannot, a fortiori, result in that woman losing her status as a worker.
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> 47 In the light of all the foregoing considerations, the answer to the questions referred for a preliminary ruling by the referring court is that Article 45 TFEU must be interpreted as meaning that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of 'worker', within the meaning of that article, provided she returns to work or finds another job within a reasonable period after the birth of her child.

26. In paragraph 39, as set out above, the situation considered is that in relation to the physical constraints of the late stages of pregnancy and the immediate aftermath of childbirth, not the need for childcare in the following years. The finding is that the period needed for recovery does not, in principle, deprive a woman of the status of 'worker' within the meaning Article 45 TFEU. The reference to the period needed for recovery after childbirth in my view does not extend to years of post-birth child care. There is a requirement for the period between childbirth and starting work again to be reasonable.

27. Article 16(3) of Directive 2004/38 provides, for the purpose of calculating the continuous period of five years of residence in the host Member State allowing Union citizens to acquire the right of permanent residence in that territory, that the continuity of that residence is not affected, inter alia, by an absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth. In paragraph 46 above the contemplation is that work is given up

temporarily. The requirement is to return to work, or to find another job, within a reasonable period after the birth for a woman to remain within the category of a worker.

28. In these circumstances I reject the submission by Ms Sanchez that the appellant's wife had a free choice about when to return to work with no upper limit. If that argument were followed through it would be possible for a woman to exercise that choice and not to work if she wished to remain at home to care for a third, fourth, or fifth child and so on. That in my view goes beyond a reasonable time within the relevant case law and beyond the time allowed to remain a worker for the purposes of the Regulations, as does the period of 5 years exercised as a matter of choice in this case. For this reason I find that the claimant fails to show that his family member was exercising Treaty rights as a worker for the period required by the Regulations. The appeal fails under the EEA Regulations. I find no other ground on which the appeal can succeed and it is dismissed.

Summary of Decisions

29. The making of the decision of the First-tier Tribunal was previously found to have involved the making of errors on a point of law. That decision was set aside and is remade as follows.

30. The appeal is dismissed under the EEA Regulations.

31. The appeal of the Secretary of State for the Home Department succeeds in the Upper Tribunal.

Anonymity

The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. There is no application to make such a direction and there is nothing to suggest that such a direction is needed.

Signed

J Harries

Deputy Upper Tribunal Judge
Date: 10th October 2014

Fee Award

The full fee award made in the First-tier Tribunal falls away with the dismissal of the

claimant's appeal on its remaking in the Upper Tribunal.

Signed

J Harries

Deputy Upper Tribunal Judge
Date: 10th October 2014