Upper Tribunal
(Immigration and Asylum Chamber)

Yusuf (EEA - ceasing to be a jobseeker; effect) [2015] UKUT 00433 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 December 2014	
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Before

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE RINTOUL

Between

MS HALIMO YUSUF
AND 3 OTHERS

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Fouladvand, Legal Representative
For the Respondent: Ms S Wise, solicitor (Treasury Solicitors)
and Mr P Deller, Senior Home Office Presenting Officer

An individual who has acquired the status of worker for the purposes of article 45 (ex Article 3) TFEU) (and thus regulation 4 (1) (a) of the Immigration (European Economic Area) Regulations 2006) only through being a jobseeker, who is a qualified person under regulation 6(1)(a), does not retain the status of worker on ceasing to be a jobseeker. In such a scenario, the purpose in interpreting article 45 widely – to give effect to the right to move to another member state to seek employment – is absent.

The term 'worker' within article 45 covers, to a greater or lesser extent, not only actual workers but also:

(1) those entering a state for the first time to seek employment ('first-time' job seekers')

(2) those who have had a job and are again seeking work ('second-time job seekers')

(3) vocational or occupational trainees; the involuntarily unemployed and sick;

(4) injured and retired workers; and,

(5) women who, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth, give up work or jobseeking, provided they return to work or find another job within a reasonable period after the birth of the child

DETERMINATION AND REASONS

1. The first appellant (hereafter the appellant) is a citizen of the Netherlands born on 15 November 1966. She is the mother of the second to fourth appellants born on 3 December 1991, 21 August 1993 and 18 December 1997 respectively. They appeal with permission against the determination of First-tier Tribunal Judge Blum promulgated on 28 October 2013 in which he dismissed their appeals against the decision of the respondent who, on 23 April 2013, refused to issue them with documents confirming their right of permanent residence in the United Kingdom, pursuant to regulations 15 and 17 of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

2. The appellants arrived in the United Kingdom in 2005 and have lived here ever since. The appellant first secured a job on 24 September 2009, having attended training courses on three previous occasions from 11 June 2007 to 14 September 2007, 14 April 2008 to 25 July 2008 and 15 March 2009 to 18 May 2009. It is the appellants' case that the first appellant has, since October 2005 been a qualified person as defined within the EEA Regulations, initially as a jobseeker from October 2005 and since 24 September 2009, as a worker. The second to fourth appellants' case is that they have at all material times been the dependent children of a qualified person. They argue that consequently, they have been lawfully resident in accordance with the EEA Regulations for in excess of five years, and so, have acquired the right of permanent residence. It was on that basis that on 12 March 2013 they applied for documents certifying their right of permanent residence, pursuant to regulations 15 and 18 of the EEA Regulations.

3. The respondent refused the applications on the basis that the appellants had not resided in the United Kingdom in accordance with the Immigration (European Economic Area) Regulations 2006 for a continuous period of five years. No further details were given.

4. On appeal, Judge Blum stated that while a jobseeker can be a qualified person, that requires the provision of evidence that the individual is seeking employment and has a genuine chance of being engaged. Judge Blum found that the appellant:-

(ii) had entered the United Kingdom in October 2005 to seek employment and had thus entered as a jobseeker [22];

(iii) had not worked prior to commencing employment in September 2009 [22];

(iv) had provided no evidence of seeking employment other than her word and although she did try to obtain employment when she first entered in October 2005, she was unable to do so for a period of three years and eleven months [23] and therefore he could not be satisfied that she had a genuine chance of being engaged when she entered the UK or throughout the period she was looking for work;

5. In respect of the second appellant, Judge Blum found:

(i) her claim was dependent on that first appellant [24] and thus failed; or, in the alternative,

(ii) her claim on the basis that she was a student failed given the absence of evidence of comprehensive sickness insurance in the United Kingdom as required by regulation 4 of the EEA Regulations [24].

Judge Blum therefore dismissed the appeals under the EEA Regulations and on human rights grounds.

6. The appellants sought permission to appeal on the grounds that the First-tier Tribunal:-

(v) failed to have proper regard to the appellant's record of national insurance contributions and credits indicating that she had entered the system on 10 November 2005 and was a jobseeker for twelve weeks in 2006/7, remaining a jobseeker until the 32nd week of 2009/10 [ground 1A];

(vi) erred in concluding that regulation 6(2) of the EEA Regulations requires that someone could not be treated as a jobseeker unless he had previously been in employment [ground 1A]; and,

(vii) erred in finding that the appellant had not worked in 2006 in preferring the evidence of HMRC over that of her daughter [ground 1B].

7. On 13 December 2013 Upper Tribunal Judge Storey granted permission stating:-

> "It is arguable that the First-tier Tribunal did not adopt an analysis in accordance with case law principles by reference to which the first appellant's situation should have been considered not just in relation to whether she was a jobseeker but whether she was a worker who continued to be a worker after becoming again a jobseeker. The parties will be expected to have regard to all relevant case law including Shabani v SSHD (EEA – jobseekers; nursery education) [2013] UKUT 315".

8. There have been a number of case management hearings in these appeals which were previously linked to those stayed pending the decision of the Court of Justice in Jessy St Prix v SSWP [2014] CJEU C-507/12.

The hearing

9. Mr Fouladvand submitted that the appellant had been a worker, a status she had retained pursuant to regulation 6(2) and that she had retained her status whilst in receipt of Job Seekers Allowance ("JSA") and while undergoing approved training on the three occasions – 11 June 2007 to 14 September 2007, 14 April to 25 July 2008 and 15 March 2009 to 18 May 2009 - as identified in the letter from Jobcentre Plus dated 7 April 2014. He submitted that she had been a worker when she entered (as a jobseeker), and had not lost that status, and, alternatively that the finding she had not worked was not one open to the First-tier Tribunal.

10. Ms Wise submitted that the appellant had not been a "worker" prior to commencing employment in September 2009. On that basis regulation 6(2) was not engaged and that there was no reason to overturn the findings of fact made by Judge Blum in particular at [23]. She submitted further that the attendance at approved training could not be equated with employment given there was no contract of employment and no evidence of payment of wages and whilst JSA and credits were given, with a slight top-up being offered as an incentive, this did not equate to work and thus somebody attending training could not be seen as "worker".

11. Ms Wise submitted further that there was adequate evidence for the conclusion that the appellant had no genuine chance of being engaged given the length of time she had taken to find employment and also the fact that she had been required to go on three separate training courses including English for the Speakers of Other Languages ("ESOL").

12. In reply Mr Fouladvand submitted that even were the appellant not to have been found to be a worker prior to her start of employment in September 2009, she was nonetheless a qualified person as a jobseeker.

13. It was agreed that we would accept further written submissions on the nature of approved in training but we received submissions from the respondent alone.

Our Assessment

14. The question of whether or not the appellants had resided in accordance with the EEA Regulations turns on whether the appellant had been a "qualified person" for the relevant period. It is not submitted that she met that definition other than as a "worker" or "jobseeker".

15. The starting point for our analysis of the law is the EEA Regulations which transpose Directive 2004/38/EC ("the Citizenship Directive") into domestic law. The EEA Regulations define "worker" for their purposes as meaning a worker within the meaning of Article 39 TFEU (now article 45).

16. We bear in mind that in analysing the EEA Regulations, we are assessing the law as it was on 28 October 2013, the date of the First-tier Tribunal's decision. We note that regulation 6 of the EEA Regulations has been amended extensively since that date, by the Immigration (European Economic Area) (Amendment) (No.2) Regulations 2013 (SI 2013/3032), the Immigration (European Economic Area) (Amendment) Regulations 2014 (SI 2014/1451) and the Immigration (European Economic Area)

(Amendment) (No.3) Regulations 2014 (SI 2014/2761). In each case, there are in any event transitional provisions which we do not set out here.

17. Regulation 6 of the EEA Regulations provided at the date of the First-tier Tribunal's decision:

> 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.

18. Article 45 (ex article 39) of TFEU provides:-

> Article 45 (ex Article 39 TEC)
>
> 1. Freedom of movement for workers shall be secured within the Union.
>
> 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
>
> 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

19. This provision has been supplemented by Directive 2004/38/EC ("the Citizens' Directive") and also Regulation 492/2011.

20. The Citizens Directive provides within its recitals:

(9) Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to jobseekers as recognised by the case-law of the Court of Justice.

(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

21. The Citizens Directive also provides at Article 7:

Article 7 Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or,

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

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

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a jobseeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a jobseeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

22. There is a substantial jurisprudence of the CJEU dealing with workers and job seekers. Much of this pre-dates the Citizens Directive which, in part, seeks to enact principles derived from the jurisprudence.

23. We draw the following principles from the jurisprudence:

(i) the term 'worker' within article 45 covers, to a greater or lesser extent, not only actual workers but also:

(1) those entering a state for the first time to seek employment ('first-time' job seekers') (see AG and others (EEA-jobseeker-self-sufficient person-proof) Germany [2007] UKAIT 00075, Begum (EEA – worker – jobseeker) Pakistan [2011] UKUT 00275(IAC) and Antonissen [1997] ECR 1-441);

(2) those who have had a job and are again seeking work ('second-time job seekers') (Shabani (EEA - jobseekers; nursery education) [2013] UKUT 315 (IAC), Case 75/63 Hoekstra (nee Unger) [1964] ECR 177, Case 66/85 Lawrie-Blum [1986] ECR 2121, Bernini v Minister van Onderwijs en Wetenschappen [1992] ECR I-1071, Case C-85/96 Martinez Sala v Freistaat Bayern [1998] ECR I-2691);

(3) vocational or occupational trainees (Lair v Hanover University [1988] ECR 3161, [1989] 3 CMLR 545, Brown v Secretary of State for

Scotland [1988] ECR 3205 [1988] 3 CMLR 403); the involuntarily unemployed and sick (see FMB (EEA reg 6(2)(a) – 'temporarily unable to work') Uganda [2010] UKUT 447 (IAC), Lair, Case C-302/90 Caisse Auxiliare d'Assurance Maladie-Invalidite v Faux [1991] ECR I-4875);

(4) injured and retired workers (FMB (Uganda) supra); and,

(5) women who, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth, give up work or jobseeking, provided they return to work or find another job within a reasonable period after the birth of her child (Jessy St Prix v SSWP [2014] CJEU C-507/12)

(ii) The amount of time given to jobseekers to find work is not fixed although Member States may require them to leave their territory after a reasonable period unless the person concerned produces evidence:-

(1) that he or she is continuing to seek employment (Shabani, AG & Others ; and

(2) has genuine chances of being employed (Antonissen; EC Commission v Belgium Case C-344/95 [1997] 2 CMLR 187).

24. We bear in mind in the light of St Prix at [38] that Article 7(3) of Directive 2004/38 does not list exhaustively the circumstances in which a migrant worker who is no longer in an employment relationship may nevertheless continue to benefit from that status but the facts of this case are not materially different from Antonissen. There is no suggestion in St Prix that Article 7 (3) should be expanded to include those simply seeking employment; people in that category are, unlike women in the position of Ms St Prix, already provided for.

25. Mr Fouladvand's submission that the appellant never lost her status as a worker, achieved through being a jobseeker initially, because she never ceased being a jobseeker until she started full-time work seeks to equate those who are to be treated as having acquired the status of worker through jobseeking with those who are workers through employment. He seeks, in effect, to apply the protections for those who have ceased to be employed, set out in article 7 (3) of the Citizenship Directive, to those who are workers for the purpose of European Law through being jobseekers.

26. These submissions takes no account of the established law arising from Antonissen and EC Commission v Belgium that there are limits to how long a person can seek employment, and that the individual must be able to show that she has a genuine chance of being employed. Those seeking employment as to be treated as though they are workers as otherwise, there would be significant constraints on the freedom of movement for workers. The protections under EU law for those who have ceased to be workers, as set out in Article 7 (3) are clearly for those who have ceased employment, to protect the right to move to seek work.

27. The effect of Mr Fouladvand's submission would be that there is no end to the period in which an individual could be a jobseeker. There is no support in either the Citizens Directive or the jurisprudence for such a proposition; on the contrary Article 7 (3) of the Citizenship Directive places restrictions on those who can continue to be treated as workers.

28. We turn next to the question as to how participation in an approved training course should be considered.

29. We are grateful to Ms Wise for her further written submissions on the nature of approved training. We bear in mind that there have been since 2009 major and substantial changes to the benefits system in the United Kingdom including wholesale changes to the relevant regulations governing approved training. Those changes are not relevant to the facts of these appeals; what we say about approved training is thus only of historical interest and cannot be taken as relevant to the current provisions.

30. The appellant has not provided any material relating to the legislative and regulatory framework governing approved training or as to the content of the courses. We accept that, due to the closures of the colleges the appellant attended and the lapse of time, that it would have been difficult to obtain evidence relevant to the courses. What is clear from the letter from Jobcentre Plus is that there were three periods of approved training from 11 June 2006 to 14 September 2007, 14 April to 25 July 2008 and 15 March 2009 to 18 May 2009.

31. In her written submissions, Ms Wise states that the primary power to make provision for training and training allowances is in section 2 of the Employment and Training Act 1973. Further, regulation 170 of the Jobseeker's Allowance Regulations 1996 provides that a person may be entitled to Income Based JSA without being available for employment; or without having entered in a jobseeker's agreement; or without actively seeking employment if they are in receipt of a training allowance. There are some exceptions to this if the training is training for which 18-24 year olds are eligible.

32. It is noted also that "approved training" is training approved by the Secretary of State for Work and Pensions, and is training to address skills issues and help move a claimant into work or closer to the labour market. A training allowance is paid by DWP/JCP whilst a jobseeker is attending full time training as regulation 15 of the JSA Regulations precludes a claimant from being actively available and being able to seek employment whilst they are undertaking full time training. The training on average would be 20 hours per week. Training credits are awarded for the period of the training allowance to protect the claimant's national insurance record.

33. It is also submitted that approved training is compulsory if the Jobcentre has mandated the claimant to undertake the training to address skills gaps and help move the claimant into work or closer to the labour market. Sanctions would be applied if a claimant refuses to attend the course. The training could be more than 20 hours or less than 20 hours depending on the course length and structure. The courses are run by external organisations, such as local colleges. A training allowance

is paid only if the training is for 16 hours or more a week and is equal in amount to the benefit they were receiving.

34. It is, however, accepted that the appellant was still effectively a jobseeker whilst attending the approved training, and the training allowance paid by her local Jobcentre would have included 10p Jobseekers Allowance to administratively keep her Jobseekers Allowance claim open. It is thus submitted that whilst being paid a DWP/JCP training allowance, a claimant is still effectively unemployed, and cannot be said to have employment status. The respondent noted also that the training certificates provided by the appellant show that she has ESOL and essential skills training the purpose of which is to give claimants with English as a second language understanding of spoken, listening, written and reading English, and to help them progress towards employment.

35. The respondent's case is that a person undertaking approved training and in receipt of a training allowance does not have employment status. It is for the appellant to show that the approved training did constitute employment but she has adduced nothing to rebut the submissions made by the respondent.

36. We do not consider that attending an approved course as a student could be considered as an employment relationship. It is, we consider, not arguable that the relationship meets the relevant criteria for an employment relationship within the meaning of EU law as set out in Barry v Southwark [2008] EWCA Civ 1440, given the absence of evidence of a contract for remuneration which meets the necessary criteria in European law to create such a relationship between the first appellant and either the DWP or the college. We conclude, therefore, that a person who attends an approved course is not employed.

37. It is, we accept, unclear from the evidence whether the courses were "vocational", but given that they were mandated by the DWP to assist the appellant to obtain employment, as the respondent submits, it would be perverse to conclude that they were not.

38. Nor do we consider that by attending courses the appellant was in the alternative a "student" for the purposes of the EEA Regulations, given the requirement for comprehensive sickness insurance. It is not suggested by the appellants that such an insurance policy was in place, nor was there evidence thereof before the First-tier Tribunal.

Applying the law to the facts

39. The grounds of appeal are, in part misconceived. It is not arguable that, as is averred at paragraph [1.a] that Judge Blum misdirected himself to the effect that an individual could be a jobseeker only if previously employed, nor is it arguable that he misconstrued regulation 6 (2) of the EEA Regulations. On the contrary, he directed himself properly at paragraph [23] that a jobseeker can be a qualified person, but that to do so an applicant must show that he is seeking employment and has a genuine chance of being engaged. That is entirely consistent with the established jurisprudence, in particular with Antonissen, and with the EEA Regulations.

40. Contrary to what is averred, Judge Blum did accept [23] that the appellant was seeking employment, and accepted the evidence of HMRC to that effect. What he did not accept was that she had genuine chance of being engaged in employment when she first entered, or throughout the period she was looking for employment.

41. The grounds of appeal are further misconceived in averring at [1.b] that Judge Blum erred in his approach to the evidence as to whether the appellant had worked prior to 2009. The grounds state at paragraph [2] that the appellant was a jobseeker, looking for employment and attending approved training from her arrival in this country until 24th September 2009 and make no mention of the alleged prior employment. It is therefore inconsistent to argue that the appellant had in fact worked prior to that date.

42. Judge Blum records [22] that the appellant initially said she had been employed for six months in 2006 and for a month in 2008; that her evidence changed in cross-examination; that there was no documentary evidence relating to such employment; and, that her daughter said she had not worked prior to 2009. The records from HMRC adduced by the appellant and attached to the grounds of appeal disclose no record of tax or NI contributions paid until 2009/10. There is thus no positive documentary evidence from HMRC or any other source that the appellant had worked.

43. It was for the appellant to establish that she had been employed as claimed. The Judge noted discrepancies in the oral evidence, and the absence of documentary evidence of employment, and the absence of any record or tax or National Insurance paid at the relevant time. He explained adequately why, in the circumstances, he did not accept the claim that the appellant had worked prior to September 2009, and he was entitled to come to that conclusion.

44. Judge Blum was thus entitled to find that, prior to starting work on 24 September 2009, the appellant had spent a period of 3 years and 11 months without employment, and despite attending in this period the three courses referred to above, had not previously found employment. We consider that in the circumstances, he was entitled to conclude that she had not, on her arrival or during the whole of that period, shown that she had a genuine chance of employment. His conclusion that the appellant was not a qualified person was one open to him and his reasons for reaching that conclusion are adequately reasoned and based on sufficient evidence.

45. While the appellant's presence may have been lawful for the first three months of her stay here, it ceased to be so thereafter as the evidence did not establish that she had a genuine chance of being employed from the outset, nor could it be argued that she fell to be treated as a "worker" for the purposes of Article 45 (ex Article 39) TFEU (even with the Antonissen concept of a worker-cum-jobseeker).

46. We do not accept the argument that an individual who has acquired the status of worker for the purposes of article 45 (ex Article 39) through being a jobseeker, retains that status if she ceases to be a jobseeker. In such a scenario, the purpose in interpreting article 45 widely – to give effect to the right to move to another member state to seek employment – is absent. Such an argument, if correct, would expand

"worker" to cover any individual who had ever entered another Member State to seek work. That is plainly contradictory to the jurisprudence as set out above.

47. Further, while the appellant attended three courses, that does not assist her. Even assuming that they were vocational courses, regulation 6 (2) provides that the status of worker is only extended for those who have ceased working; the appellant had not worked. Article 7 (3) of the Citizenship Directive does not assist her either, as again, the status of worker for those attending training is predicated on that person having worked prior to commencing training.

48. For these reasons, we find that the decision of the First-tier Tribunal did not involve the making of an error of law capable of affecting the outcome. We therefore uphold its decision to dismiss the appeals.

Endnote

49. It is apparent that the appellants may now have acquired the right of permanent residence, given that it appears the first appellant has worked continuously for over 5 years. That is not a factor we can take into account when assessing whether there is an error of law in the decision of the First-tier Tribunal. It is of course open to the appellants to make fresh applications for certificates confirming their right of permanent residence. We express no view as to whether such applications would be successful, given that the position of the second and third appellants as dependants of their mother is unclear, in light of their ages.

Signed Date

Upper Tribunal Judge Rintoul