



Upper Tribunal

(Immigration and Asylum Chamber)
EA/04627/2017

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House
On 11th September 2018

Decision and Reasons
Promulgated
On 24th October 2018

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

Gloria Judith Gordillo Ontaneda
(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Victor-Maze, Direct Access.

For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was granted permission to appeal a determination of First-tier Tribunal Judge S H Smith, which dismissed the appellant's appeal against a decision of the Secretary of State dated 2nd May 2017 to refuse her a

permanent residence card as a family member under the European Economic Area (EEA) Regulations 2016.

2. The Secretary of State asserted that the appellant had not provided adequate evidence to show that she was the family member of a person, who had been exercising Treaty Rights in the UK for five continuous years.
3. Having noted, that the essential issue was whether there was such evidence that the Sponsor was economically active for a five-year period. As the representative noted the case would turn on the documentary evidence [26].
4. The First-tier Tribunal Judge made the following findings.

(i) the tax returns taken in isolation were not proof of income. There were a number of other documents, many of which would be readily available to a self-employed person and which one would expect to see accompany a tax return in order to establish income levels, such as bank statements showing receipt of payments corresponding to the turnover declared to HMRC or simple accounts of the self-employed undertaking. There were none.

(ii) At paragraph 29 the judge found

'the particular documents produced by the appellant lack weight because they are inconsistent with the payslips submitted. As outlined in the table above, the appellant's case is that her husband was a worker for a period of time, in 2012 and 2013. Yet during the same periods, her husband did not declare to HMRC that he was employed. On each of the tax returns included with the appellant's bundle, including those which cover the periods covered by the payslips, the sponsor declared to HMRC that he was not employed. On the face of the documents, therefore, there are significant inconsistencies. It is difficult to me to attach weight to documents which are inconsistent with other pieces of evidence submitted on the appellant's behalf. Whichever way one looks at the documents submitted there are difficulties ascribing much weight to them due to these inconsistencies. It is clear that either the tax returns do not present a full financial picture on behalf of the appellant, or the payslips outlined above are not reliable. It is not possible to place weight on both'

(iii) At paragraph 30 the judge found

'Even putting aside these concerns as to the reliability of the documents submitted, I returned (sic) to my initial point concerning the tax returns and national insurance calculations. Taken in isolation, such documents do not provide evidence of income. All they do is demonstrate that the person declared to HMRC that their income reached a particular level during a particular year. In the case of receipts for payments for tax and insurance contributions, all those documents demonstrate is that the individual concerned made payments to HMRC corresponding to the liability arising from the figures they themselves had declared. While such declarations and payments capable of attracting a degree of weight, taken in isolation that cannot be determinative of income of any particular level. In the present context, where there is a complete absence of the sort of supporting documentation which one would expect to [ac]company self-employment, those concerns apply with even greater force'.

(iv) The judge did not consider that the documents were reliable [31] and concluded that the appellant had failed to establish that her husband had exercised treaty rights for the requisite period [32].

Application for Permission to Appeal

5. The application for permission contended

(i) the judge failed to consider the documentary evidence properly when he his findings were made. The appellant provided proof of her sponsor self-employment and employment since 2011 included payslips, P60, self-assessment tax returns for more than 5 years, proof of paying national insurance contributions. The decision was contrary to the Secretary of State's EEA (PR) Guidance Notes Version 3.0 April 2017. The judge overlooked the evidence.

6. Permission to appeal was granted by First-tier Tribunal Judge PJM Hollingworth who noted that the judge at paragraph 7 had stated that had the representative prepared properly for the hearing the time which the judge had referred to in the preceding paragraph would not have been wasted. The grant stated

'It is arguable given the basis of the permission application in relation to the scope of the available evidence and taking into account the observations of the judge that the perception of unfairness is capable of having been seen to have arisen. The judge has set out

the chronology of the adjournments which took place on the day of the hearing. At paragraph 6 of the decision the judge refers to the difficulty which Nicholas explained still existed'.

The Hearing

7. Ms Victor Maze submitted that the judge had been biased and had come to his conclusions at the outset of the hearing. The judge had not considered all the documentation.
8. Mr Avery relied on the judge's findings that the documents were not reliable. The judge's findings were open to him.

Conclusions

9. The assertion of bias was not a matter raised in the application for permission and I find no evidence of the judge being either biased or impatient (as advanced by Ms Victor-Maze) during the hearing. The allegation is a serious one. As set out in **Alubankudi (Appearance of bias)** [2015] UKUT 00542 (IAC), one of the important elements of apparent bias is that the hypothetical fair minded observer is properly informed and possessed of all material facts. **Ortega (remittal; bias; parental relationship)** [2018] UKUT 00298 (IAC) confirmed that it was necessary to be in the position of a "duly informed" hypothetical reasonable observer in order to assess whether the First-tier Tribunal decision discloses an absence of judicial impartiality or real possibility of such. Nothing in the grounds for application for permission nor in the submissions to me at the Upper Tribunal hearing support any allegation of bias.
10. The documentation on file was not helpfully organised in a schedule. The judge commented at paragraph 7, and having granted two adjournments during the day, to enable the representative to organise her papers, that time could have been saved had the file been prepared properly. That is self-evident. Court resources are an important factor and relevant to the overriding objective of the Tribunal Procedure Rules. Nonetheless, that the judge granted two adjournments during the day which showed that he did not proceed in an impatient manner but gave the appellant's representative time to organise the papers. That the judge made plain his view that time could have been saved does not reflect bias in the actual decision making. In fact, the judge analysed all the information put before him and took time to set it out carefully in a tabulated schedule form. It is simply incorrect to allege that the judge omitted a relevant piece of evidence. His comment that the matter could be determined on the papers was also a reflection of the representative's view.

11. It was submitted that the judge failed to follow the Secretary of State's EEA guidance at Annex G which set out the evidence required on self-employment. The appellant maintained that she had supplied one piece of evidence for each tax year for the period from April 2011 to April 2016 which was the relevant requisite period. It was contended the judge ignored this Guidance when looking for further evidence and it was not open to him to do so. The Guidance quoted explains as follows at page 25 onwards:

'We accept any one of the following, covering the relevant qualifying period:

- proof of self-assessment with HMRC*
- business accounts*
- P60s, including tax and National Insurance contributions for the relevant qualifying period*

If you are able to send these, you do not need to provide additional evidence of self-employment.

Please ensure that your evidence shows a UK address.

*If you are not able to send these, then you can instead provide one of the items from each of Categories 1, 2 and 3 below, for each relevant financial year in which the business was trading. Only if relevant to your business, you can also provide the evidence suggested in **either** Category 4, 5, 6 below.*

Category 1: Tax and National Insurance documents

For any period in which you were/your sponsor was self-employed, you must show that you/they were registered with Her Majesty's Revenue and Customs (HMRC) and paying any relevant Income Tax, National Insurance or Value Added Tax (VAT) as a self-employed person.

Note: *If you wish to use tax and National Insurance documents as evidence you should only provide one item from any of the groups below to cover each year of your self-employment within your qualifying residence period:*

(a) Income Tax documents

For each relevant financial year in which the business was trading:

- *copies or printouts of Self-Assessment tax returns (SA100) for the relevant period and evidence that they have been received by HMRC (such as written notification or printout of online confirmation)*
- *statements of account (SA300) or tax calculations (SA302) issued by HMRC*
- *P60s showing tax and National Insurance paid for each relevant financial year (such as if the self-employed person was a company director)*
- *receipts or other written confirmation issued by HMRC of relevant taxes paid*

If the self-employed person hasn't been trading long enough to pay tax or to send a Self-Assessment tax return, you must show that you/they have registered as self-employed with HMRC. Please send one of the following:

- *copy of form CWF1 or printout of their online registration as a self-employed person with HMRC*
- *evidence that HMRC has received their application - such as letter or printout of online acknowledgement*
- *notification from HMRC of their national insurance number and/or unique taxpayer reference number*

(b) National Insurance documents

For each relevant financial year:

- *stamped receipts showing payment of class 2 National Insurance contributions during the relevant period (if paid in person at the post office or over the counter at the bank)*
- *evidence from your/your sponsor's bank statements showing payment of National Insurance contributions if paid by BACS, CHAPs, online or telephone banking or (before July 2015) direct debit (direct debits should show on bank statements as 'HMRC NI - DD')*
- *if you are/were or your sponsor is/was a company director who receives/received wage slips, and these show payment of National Insurance contributions through the PAYE system, all relevant wage slips*
- *if you are/were or your sponsor is/was a self-employed subcontractor under the Construction Industry Scheme*

(CIS), send your/their CIS pay and deduction statements from the contractor showing unique taxpayer reference (UTR) number and CIS deductions for the relevant period

- *certificate of small earnings exception issued by HMRC (if you/your sponsor did not earn enough during the relevant tax year to pay National Insurance)*

- *any other written confirmation from HMRC of National Insurance paid'.*

12. For clarity I have underlined the sections which are relevant. It is correct that the judge appeared to err in his assessment when stating that there are a number of other documents expected to accompany a tax return to establish income such as bank statements, however, the guidance clearly states that the person/or sponsor must show that they were paying 'any relevant Income Tax' in order to be residing in the UK in accordance with the EEA Regulations.
13. Crucially the judge found he was not satisfied with the reliability of the documentation because the husband's payslips which were provided showed that he had earned employed income in the tax year 2012 -2013 and yet stated in his tax return for that year that he had not been employed. That conclusion was open to the judge and indeed he sets out the payslips in the bundle of evidence which he tabulated. The examples he gives of payslips are dated 5th April 2012, 29th June 2012, 23rd September 2012, 21st October 2012, 18th November 2012, 13th January 2013, February 2013, and 14th March 2013. All these payslips are with either Ocean Contract or Office and General Environmental and fall within the period when the appellant's sponsor was said to be self-employed and the description he gave to the HMRC. Specifically, he declared he was not employed. As the judge set out '*the tax returns did not present a full financial picture on behalf of the appellant, or the payslips outlined above were not reliable*'. That fundamentally undermined the evidence provided and led to the finding that the appellant had not demonstrated that her sponsor had resided in the United Kingdom in accordance with treaty rights.
14. The Guidance emphasises that when evidencing self-employment it is important to demonstrate that the sponsor was paying relevant income tax. The judge found that the documents were unreliable and was not satisfied that tax returns were accurate. The findings were not contrary to the Guidance.

15. In these circumstances the judge's findings were open to him and the decision discloses no arguable error of law. The decision of the First-tier Tribunal judge will stand.

Signed Helen Rimington
2018

Date 16th October

Upper Tribunal Judge Rimington