Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/22717/2013
IA/22724/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 17th July 2014	**On 28 July 2014**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

JIMOH RASHEED AKANMU
IEVA TKACOVA

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr R Worthington of Parker Rhodes Hickmotts Solicitors (Leeds)
For the Respondent: Mr Diwnycz, Home Office Presenting Officer

DETERMINATION AND REASONS

1. These are the Appellants' appeals against the decision of Judge Mensah made following a hearing at Bradford on 18th February 2014.

Background

2. The first Appellant is a citizen of Nigeria and the second a citizen of Latvia. The first Appellant made an application for a residence card as confirmation of a right to reside in the UK on the basis that his EEA family member, the second Appellant, was a jobseeker. The Secretary of State considered that insufficient evidence had been provided to demonstrate that she was currently a qualified person and the claimant was therefore refused his application for a residence card.

3. The Appellants appealed and by the date of the hearing the second Appellant claimed to be in self employment.

4. The judge briefly set out the background to the appeal and then wrote as follows:

> "The Appellant's maternity allowance ceased on 14 January 2012. On the evidence before me the Appellant was registered with the employment office as unemployed on 10 September 2012. Therefore the Appellant had a period of more than six months where she was unemployed and not registered with the employment office and therefore did not meet the qualified person criteria at that time. The Appellant registered as self-employed on the 21 July 2013. The Appellant has failed to provide evidence to substantiate that she continued to be registered with the employment office for the entire period to 21 July 2013. The Appellant therefore has failed to show that she was registered with an employment department but in any event this period was in excess of six months. The Appellant gave evidence that she was self-employed from 21 July 2013 onwards. The Appellant has produced evidence in the form of hand written receipts and declarations of earnings to the relevant benefit department of £380 to £400 for the entire period from 21 July 2013 to the date of the hearing. This equates to average monthly earnings of £58. I do not accept that the Appellant has shown she was genuinely self-employed, moreover this was done to create the appearance of being self-employed. I take into account the inability of the Appellant to provide accurate details in cross-examination of her business, in particular the Appellant was unable to tell me how much profit she had made out of the £400. I consider any person genuinely self-employed in a small business would be able to provide accurate information as to their profit. In those circumstances the Appellant has failed to demonstrate that she currently meets the criteria as a qualified person and therefore both her appeal and the appeal of the second Appellant fails under the Regulations."

5. The judge declined to consider the Article 8 grounds and dismissed the appeal.

The Grounds of Application

6. The Appellant sought permission to appeal on the grounds that the judge had erred in failing to properly consider that the Appellant was self-employed. The judge was only able to give one example of an inability to provide accurate details in cross-examination and the expectation that all genuine small business people would be able to provide accurate information about their profit at any given time e.g. part-

way through a tax year, was unrealistic and unreasonable. For the judge to find that the self-employment was not genuine on the basis that the Appellant, in a stressful court environment, needed to check her paperwork before she could give an accurate figure for her profit to date was perverse.

7. Moreover she had failed to take into account the substantial evidence that the Appellant was genuinely self-employed including registering with the relevant authorities, paying national insurance contributions and the oral evidence. The Appellant was actually creating her own products and selling them and the judge gave no reason for rejecting her substantial evidence.

8. Second, the judge was wrong not to consider Article 8 since she did have jurisdiction not only because the second Appellant's notice of immigration decision entitled him to appeal but also because of Ahmed (Amos; Zambrano; Reg 15A(3)(c) 2006 EEA Regs) [2013] UKUT 00089 which held that there was jurisdiction to consider Article 8 in cases where, for example, there has been a refusal of a permanent residence card.

9. Permission to appeal was granted by Judge Ievins who stated that it was arguable that the judge failed to engage with the evidence in sufficient detail to such an extent that her decision failed to take into account relevant facts and so falls into arguable material error of law.

The hearing

10. Mr Diwnycz made a telephone call to the Inland Revenue who informed him that the EEA national Appellant had registered online for self-employment on 31st July 2013 and had been trading since 22nd July 2013.

11. He conceded that she was self-employed as claimed and had been at the date of the hearing before the judge.

Findings and Conclusions

12. This determination is not an adequate reconsideration of the evidence which was before the judge, and which was not recorded. It is clear that oral evidence was given of the business, and how the goods were advertised. Moreover there was the evidence from the Inland Revenue, which is the basis of the present concession, and which was not referred to in the determination.

13. Moreover, although not mentioned in the grounds, the judge erred in her consideration of whether the EEA national was a jobseeker, wrongly importing into her considerations Regulation 6(2)(b), which refer to workers and not 6(4) which merely states:

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

14. The reference in the determination, taken from the refusal letter, to not being employed for more than six months and being registered as a jobseeker, refers to persons no longer working but not to jobseekers.

15. Accordingly the decision must be set aside.

16. Mr Diwnycz conceded that the Appellant as at today's date, and indeed as at the date before the judge, was self-employed. The fact that she made her application on the basis of being a jobseeker and not on the basis of self-employment does not mean that she is not entitled to succeed in her appeal. The refusal was on the basis that she was not thought to be a qualified person. The fact that she could show that she was a qualified person as at the date of the hearing, albeit upon a different basis, entitles her to succeed in the appeal.

17. An application under the EEA Regulations is distinguishable from one under the Immigration Rules when an in-country applicant has to show that he could meet the requirements of the Rules as at the date of decision, albeit that he can adduce evidence up to the date of hearing. (EA (Section 85(4) explained) Nigeria [2007] UKAIT 00013). The focus is on the decision actually made in response to the application made.

18. In this case the decision was that the Appellant was not entitled to a residence card. The Presenting Officer now concedes that she was so entitled.

Decision

19. The original judge erred in law. Her decision is set aside. The appeals are allowed.

Signed Date

Upper Tribunal Judge Taylor