Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02642/2015

THE IMMIGRATION ACTS

Heard at Field House, London
On the 11th December 2015

Decision & Reasons Promulgated
On the 5th January 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MRS ESTHER BOATEMAAH-LANGE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In Person
For the Respondent: Mr K Norton (Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Cope promulgated on the 16th June 2015, in which he dismissed the Appellant's appeal under the Immigration (EEA) Regulations 2006.

2. Within the Grounds of Appeal to the Upper Tribunal, it was argued by the Appellant that the First-tier Tribunal had not taken into account the self-assessment records that have been set up for her husband and an online payment as a self-employed class II National Insurance contribution paid to the HMRC, as evidence of him exercising Treaty

Rights both as a self-employed and also a self-sufficient person and that he had submitted such documentation to show that he was working. It is further argued that in June 2011 the UK border agency amended Chapter 4 and Annex A of the European Casework Instruction to indicate what would be considered acceptable proof of comprehensive sickness insurance and that the UKBA was willing to accept:

i) a comprehensive private sickness insurance policy

ii) an European health insurance from an EU member state other than the UK or

iii) in certain circumstances S1, S2 or S3 form FOM (forms for reimbursement from medical treatment).

3. It is further argued that Article 19 (1) of Regulation 883-04 permitted EEA nationals and their families to get in-kind sickness benefit as long as they were not in the UK to stay permanently and that the UK had bilateral reciprocal health care agreements with a list of countries in the EU, which included Germany. It is further argued that the Appellant had taken a further step by taking out private insurance cover, which was not available during the appeal at the First-tier Tribunal.

4. Within the Rule 24 reply on behalf of the Respondent it is argued that the First-tier Tribunal Judge directed himself appropriately and made reasonable and sustainable findings open to him on the evidence.

5. Permission to appeal was granted by First-tier Tribunal Judge Simpson on the 24th September 2015 on the grounds that it was arguable that the HMRC record dated October 2014 related to payment of class II National Insurance contributions and that evidence of those contributions having been paid was arguably sufficient evidence to conclude that the sponsor Mr Lange could be described as a worker within the meaning of Regulation 6 and that a self-employed worker was not required to have sickness insurance in place and that it was arguable that the Judge failed to consider that issue.

6. In her oral submissions to me, the Appellant argued that she had submitted suitable proof that she did meet the requirements of the Regulations and that inclusion of her and her husband's European health insurance card was sufficient proof, in light of the changes made to Chapter 4 Annex A of the European Casework Instruction in June 2011. She conceded that no statement of intent had been submitted with the application, giving evidence of her intentions regarding staying in the UK permanently or on a temporary basis.

7. She argued that the payments to HMRC had not been considered by the First-tier Tribunal Judge and that within the Pre-Action Protocol letter that she sent to the Respondent on the 9th March 2015, she had stated that she intended to put forward National Insurance contributions as evidence of her husband being self-employed, as well as being self-sufficient.

8. In his submissions on behalf of the Respondent, Mr Norton argued that there is nothing within the application to prove that the Appellant's intended residence was only short-term or temporary and that a statement of intent would need to have been submitted for consideration with the application given the wording of Chapter 4 Annex A. He further argued that the fact that someone registered with HMRC and paid contributions upfront was not a sufficient basis to demonstrate that someone was working. He argued that within the application it had been said that the sponsor had to get a National Insurance number, in case he had to show that he was working to get a residence card. He conceded that the Appellant could seek to re-apply on the basis of fresh evidence, but argued that the decision of the First-tier Tribunal Judge did not disclose a material error of law. He sought to rely upon the case of Choma-Lucena v Secretary of State for the Home Department, an unreported case which is on the Tribunal website, heard by Mr Ockelton, the Vice President and Upper Tribunal Judge Deans on the 19th December 2014 which was promulgated on the 31st March 2015, in support of his argument that in order to be able to rely upon a European health insurance card, the Appellant would have to be in the UK only on a temporary basis and that in this case the evidence did not suggest that the Appellant was here only temporarily. However, as this is not a reported case, I have not placed weight upon it in reaching my decision.

My Findings on Error of Law and Materiality

9. In respect of the first ground of appeal, in respect of which permission to appeal was granted by First-tier Tribunal Judge Simpson, namely that the First-tier Tribunal Judge failed to consider whether or not the payment of class II National Insurance contributions were sufficient to conclude that Mr Lange was a self-employed worker and if so he did not need comprehensive sickness insurance in place for the purpose of Regulation 6, I find that First-tier Tribunal Judge Cope did consider the question regarding the HMRC self-assessment records and payment of class II National Insurance contributions at [26] and [27] of his decision.

10. The First-tier Tribunal Judge found specifically that the Appellant and her sponsor had provided a letter dated the October 2014 from HM Revenue and Customs confirming that a self-employed record had been set up for him and that notice of payment due for self-employed class II national insurance contributions for the period of the 1st June 2014 to the 28th February 2015 had been sent and the Internet payment record from Mr Lange's Halifax Bank account for payment of that amount due have been submitted. However, the First-tier Tribunal Judge went on to find that that he was not satisfied that this documentation was sufficient evidence to conclude that the presence of Mr Lange in the UK for exercising Treaty Rights purposes, was on any other basis in this country rather than him continuing to be here on a self-sufficient basis. The Judge therefore has properly considered this issue and the evidence submitted, and given clear and adequate reasons for finding that this was not sufficient evidential basis to conclude that Mr Lange was

exercising Treaty Rights in the UK as a self-employed worker. Indeed, in this regard, I agree with the submission made by Mr Norton, that the fact that someone has set themselves up for National Insurance contributions and partially paid contributions upfront for the period between the 1st June 2014 to the 28th February 2015 does not necessarily indicate that Mr Lange was actually working as a self-employed worker during this period. There was no evidence that other documentary evidence was placed before First-Tier Tribunal Judge Cope to show that Mr Lange was actually working, in the form of letters from any of his employers or contracts of employment, wage slips or otherwise. It was therefore perfectly open to First-tier Tribunal Judge Cope to find that the documentation submitted from the HMRC and payment of self-employment class II National Insurance contributions was not sufficient evidential basis to conclude that Mr Lange was in the UK exercising Treaty Rights on any basis other than him being self-sufficient. This was a finding that was perfectly open to him on the evidence presented. This is especially the case where on the application it was said by the sponsor at A10, that he had to obtain his National Insurance number "in case I have to work for my wife to get a residence card".

11. In respect of the second ground of appeal, it is argued by the Appellant that the changes to Chapter 4 Annex A of the European Casework Instruction in June 2011 meant that simply providing her and her husband's European health insurance cards from another EU state was sufficient evidence of comprehensive of sickness insurance.

12. Although Annex A within Chapter 4 of the European Casework Instruction did state that applications from EEA nationals applying for documentation confirming their right to reside in the UK “as a student or self-sufficient person must present one of the following forms of evidence in order to demonstrate comprehensive sickness insurance…" and that evidence did include "for persons temporarily in the UK a valid European health insurance card (EHIC).” The EHIC is a replacement for the E111 form. Under subparagraph B entitled "use of EHIC as evidence of comprehensive sickness insurance" the European Casework Instruction went on to state that "the addition of the EHIC as a valid form of comprehensive sickness insurance in circumstances where the holder is in the UK temporarily follows consultation and negotiation with other government departments. Where an applicant presents a valid EHIC issued by a member state other than the UK, with an application as evidence of comprehensive sickness insurance then, in accordance with Department of Health Guidelines, we can accept this as meeting the comprehensive sickness insurance requirement but only where they are resident in the UK on a **temporary basis**. One way an applicant can demonstrate that they are a temporary resident in the UK is by providing a "statement of intent" with their application. The statement may include a declaration that the Appellant has a number of properties and or business interests in their home country to which they intend to return. Alternatively, they may provide details of their family ties in their

home country and evidence of visits home. Any statement should be signed and dated by the applicant and assessed on its individual merits".

13. It was conceded by the Appellant that no statement of intent had been submitted with her application. Nor do I find that there is any evidence of her having provided to the Respondent or the First-tier Tribunal evidence of her intent to remain only temporarily in the UK and there was no evidence seemingly submitted to the Respondent that she had sufficient property or business interests in either her or her sponsor's home countries to mean that they intended to return there or that they had sufficient family ties to mean that they were likely to leave the UK. It was not argued before me that such evidence had been presented. Without such evidence that the residence was temporary in the United Kingdom, First-tier Tribunal Judge Cope did not materially err in law in finding that simple presentation of the EHIC did not meet the requirements of Regulation 4 (c) (ii) of the EEA Regulations. First-tier Tribunal Judge Cope properly dealt with this issue between [29] to [33] of the decision.

14. Further, the fact that family members and EEA nationals may get in-kind sickness benefit as long as they are not in the UK to stay permanently under Article 19 (1) of Regulation 83/04 or that the UK has bilateral reciprocal health care agreements with countries including Germany, does not in itself entitle the Appellant to a residence card in circumstances where the Regulations and the interpretation of European Casework Instructions are not complied with. Without evidence before the Tribunal that the Appellant's residence was temporary, the Casework Instructions was not complied with, and therefore the simple submission by her and her husband of their EHIC's was insufficient to prove they had comprehensive insurance cover which was necessary for a self-sufficient applicant.

15. The decision of First-tier Tribunal Cope not disclosing a material error of law, the decision is maintained.

Notice of Decision

The decision of First-tier Tribunal Judge Cope not disclosing any material error of law the decision is maintained and his decision stands;

No Anonymity Order is made, none having been made by the First-tier Tribunal and none having been sought before me.

Signed Dated 14th December 2015

RFMcGinty

Deputy Judge of the Upper Tribunal McGinty