IAC-YW-LM-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/38241/2014
& IA/38245/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 November 2015	**On 14 March 2016**
And 24 February 2016	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

TEMITOPE OLUWATOYIN SOYE (1)
[A S] (2)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Claimant

Representation:

For the Appellant: Ms S Haji, instructed by Nathan Aaron solicitors
For the Respondent: Ms A Holmes, Presenting Officer (9/11/15)
Mr S Walker, Presenting Officer (24/2/16)

DECISION AND REASONS

1. The appellants appeal with permission against the decision of First-tier Tribunal Judge Geraint Jones QC promulgated on 14 April 2015 in which he dismissed their appeals under the Immigration (European Economic Area) regulations 2006 ("the

EEA Regulations") against the decision of the respondent to refuse to issue them with residence cards as confirmation of their right of permanent residence in the United Kingdom under the EEA regulations.

Appellants' case

2. The first appellant is the mother of the second appellant. Both are citizens of Nigeria. The first appellant has lived in the United Kingdom since at least 2006 and the second appellant has lived here since her birth in 2007. On 14 May 2009, the first applicant married Ousmane Sady Ndiaye, a French Citizen at Brent Registry Office. That marriage was dissolved on 26 March 2015.

3. The appellants' case is that prior to the marriage and during the marriage until it was dissolved, Mr Ndiaye had been exercising Treaty rights in the United Kingdom as a self-employed person and on that basis, as they are the family members of an EEA national who has resided in the United Kingdom in accordance with the EEA Regulations for a continuous period of five years, they have acquired the right of permanent residence pursuant to reg. 15 (1) of the EEA Regulations. On that basis, their case is that they are entitled under reg. 17 to residence cards as confirmation of that status and on 14 July 2014 made the relevant application to the respondent.

The Respondent's Case

4. The respondent's case is set out in the refusal letter of 24 September 2014. In summary, she was not satisfied by the material provided that the Mr Ndiaye had been self-employed or otherwise exercising Treaty rights to cover any of the years in the period 16/01/2009 to 2014.

5. The respondent considered that no valid application for leave to remain on the basis of article 8 of the Human Rights Convention had been made and so, if she wished that to be considered, a separate application would need to be made.

The appeal to the First-tier Tribunal

6. The judge heard evidence from the first appellant and submissions from her representative; the respondent was not represented.

7. The judge found that:-

   (i) there were no documents before him of a type he would ordinarily expect to find generated by an operating business [17]; that the evidence supplied by Vertice Services as to income generated between 6 April 2014 and 30 September 2014 was unsatisfactory [18]-[20]; that the evidence of tax returns and National Insurance Records did not show that Mr Ndiaye was engaged in any or any meaningful self-employment, the sums earned being negligible [26], there being nothing suggestive of him being self-employed as a fashion designer; or, what kind of work or self-employment he has undertaken from the end of fiscal year 2013/2014 [27];

   (ii) although [28] there was some evidence capable of leading to a conclusion that Mr Ndiaye had undertaken some very modest work, he was not satisfied that

he could be characterised as a self-employed person, the level of the earnings being trivial; and thus, the requirement of reg.4 of the EEA regulations were not met [29]; and, on that basis the appeal under reg. 15 failed;

(iii) the first appellant did not come within re. 10 (5) as there was insufficient evidence to show that Mr Ndiaye was a qualified person within the meaning of reg. 6 of the EEA Regulations;

(iv) although there was no oral argument with respect to article 8, he should nonetheless consider that [33] and the best interests of the second appellant [34]-[35]; but, he was not satisfied that requiring the appellants to depart from the United Kingdom would not be disproportionate [41],[42]

8. The appellants sought permission to appeal on the grounds that the judge had erred in law:-

(i) in disregarding the claim that reg. 10 and not reg. 15 was in issue in these appeals;

(ii) in assessing the evidence in an unfair and unreasonable manner, relying on trivial differences in the evidence, and in applying to high a standard of proof;

(iii) in misdirecting himself as to the provisions of the regulations and EU law as to the meaning of self-employment, there being no evidence that Mr Ndiaye was not compliant with the requirements for self-employment, thus not having regard to the "purposive momentum" of the EEA regulations;

(iv) in failing to have proper regard to the interplay between the 2006 Regulations and Directive 2004/38; and that, having met the requirements of reg. 10 (5) (d) (i), the first appellant's rights of residence fell to be assessed on her own right as a worker rather than on the basis of her ex-spouse's employment up to the dissolution of the marriage;

(v) in dismissing the appeal on human rights grounds

9. On 10 August 2015, First-tier Tribunal Judge Ransley granted permission on all grounds.

The Hearing before the Upper Tribunal on 9 November 2015

10. Ms Haji accepted that confusion appeared to have arisen from reliance on reg.10, given that, on the appellants' case, the right of permanent residence had accrued prior to the divorce. She accepted also that it would have been better had the bundle of evidence been accompanied by schedules indicating what had been earned and when; and grouping the evidence by year.

11. Ms Haji submitted that the First-tier Tribunal Judge had misdirected himself in seeking to impose on the appellants requirements to establish that Mr Ndiaye was self-employed over and above those set out in the EEA Regulations or European Law.

12. Ms Haji submitted that while it was clear that Mr Ndiaye had not earned enough to support himself and his family, the first appellant had worked as she was entitled to do; and, as it was not submitted that Mr Ndiaye was self-sufficient, no arguments as to whether he could rely on the first appellant's income to demonstrate self-sufficiency arose, and thus the decision in **Kuldip Singh** [2015] EUECJ C-218/14.

13. Ms Holmes submitted that the judge had not misdirected himself, and had been entitled, on the material before him, to conclude that Mr Ndiaye had not been exercising Treaty rights for the required period; and, that in any event, any error was not material. She submitted also that the evidence was simply insufficient to show self-employment during the relevant periods.

The Law

14. The central issue in these appeals is whether Mr Ndiaye was self-employed for the purposes of European Law. Self-employment for the purposes of the EEA Regulations is defined in reg.4 as follows:-

> (1) In these Regulations—
>
> (a) "worker" means a worker within the meaning of Article 45 of the treaty on the Functioning of the European Union;
>
> (b) "self-employed person" means a person who establishes himself in order to pursue activity as a self-employed person in accordance with Article 49 of the treaty on the Functioning of the European Union

15. Article 49 TFEU provides:

> Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
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> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

16. Ms Haji's submission is in effect, that all that is required is that the individual establishes himself, that is, complies with the formalities and that there is, in effect, no continuing requirement of economic activity; the historical fact of having established oneself being sufficient. I reject that proposition. Were it correct, then there would be no need for the Citizenship Directive at art. 7 (3) to provide for the self-employed who have ceased economic to retain that status in limited circumstances. Further, It is sufficiently clear from the case law of the CJEU, in particular **Jany** [2001] EUECJ C-268/99 and **Deliège** [200] EUECJ C-51/96 that there is a continuing requirement to be undertaking economic activity

17. It is also evident from the jurisprudence, and in particular from **Jany**, that, so far as is possible, the position of the self-employed is to be equated with workers, the difference being that the latter are "subordinated" [34] , that is, carrying on their economic activity under the direction and control of another. It is the quality and extent of that economic activity which is in issue, not that it is "work" as can be seen in **Vatsouras** [2009] C-22/08 which at [26] to [30] sets out a summary of the law:

> 26. It must be pointed out in that regard that, according to settled case-law, the concept of 'worker' within the meaning of Article 39 EC has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, inter alia, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17, and Case C-28/07 *Petersen* [2008] ECR I-0000, paragraph 45).
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> 27. Neither the origin of the funds from which the remuneration is paid nor the limited amount of that remuneration can have any consequence in regard to whether or not the person is a 'worker' for the purposes of Community law (see Case 344/87 *Bettray* [1989] ECR 1621, paragraph 15, and Case C-0/05 *Mattern and Cikotic* [2006] ECR I-3145, paragraph 22).
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> 28. The fact that the income from employment is lower than the minimum required for subsistence does not prevent the person in such employment from being regarded as a 'worker' within the meaning of Article 39 EC (see Case 53/81 *Levin* [1982] ECR 1035, paragraphs 15 and 16, and Case C-17/93 *Nolte* [1995] ECR I-4625, paragraph 19), even if the person in question seeks to supplement that remuneration by other means of subsistence such as financial assistance drawn from the public funds of the State in which he resides (see Case 139/85 *Kempf* [1986] ECR 1741, paragraph 14).
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> 29. Furthermore, with regard to the duration of the activity pursued, the fact that employment is of short duration cannot, in itself, exclude that employment from the scope of Article 39 EC (see Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 16, and Case C-13/01 *Ninni-Orasche* [2003] ECR I-13187, paragraph 25).
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> 30. It follows that, independently of the limited amount of the remuneration and the short duration of the professional activity, it cannot be ruled out that that professional activity, following an overall assessment of the employment relationship, may be considered by the national authorities as real and genuine, thereby allowing its holder to be granted the status of 'worker' within the meaning of Article 39 EC.

18. It is apparent from in particular at [27] and [28] that, the level of remuneration is not an important factor and is far from determinative of whether economic activity is genuine and real.

19. It is self-evident that there is a wide spectrum of economic activity between, for example, working 60 hours a week and activity which is only marginal or ancillary.

As A-G Colomer observed in his opinion in **Vatsouras** at [26], there is little guidance for interpreting the concept of 'marginal and ancillary work' but it is to be noted that on **O v Sari** [2015] EUECJ C-432/14 at [24] – [27] the ECJ did not reject the possibility that a contract of employment of 4 days duration was genuine and real, leaving the issue to be resolved as a question of fact by the referring court. What is "marginal or ancillary" is primarily a question of fact for the referring Court – see **Genc** [2010] EUECJ 14/09 at [29]-[33], albeit that it must be considered within principles of European Law and given a wide interpretation so as to give effect to the freedom to move and reside in another member state.

20. There is in the determination of the First-tier Tribunal no express self-direction as to the law but it is sufficiently clear that the judge considered the question of whether the self-employment was genuine or real. It is, however, also evident from the determination at [21], [25] and [28] that the level of earnings was a significant factor taken into account in reaching the conclusion that Mr Ndiaye was not self-employed. That was a clear error of law. Given the evidence that there was some level of self-employment as disclosed in returns to HMRC, that error was clearly material insofar as there was evidence of earnings up to and including fiscal years 2013/2014.

21. While the judge may have been entitled to conclude that there was no evidence of earnings for the period from 5 April 2014, there was no evident consideration of the position of Mr Ndiaye in terms of reg. 5 and reg.6 of the EEA Regulations as to whether previous status as a self-employed person had retained. Given that it needed only to be shown that he had retained status until 14 May 2014 in order for the appellants to have acquired the right of permanent residence, the error identified above at [20] is material to the outcome.

22. Turning to the first and fourth grounds of appeal, it is no longer submitted by the appellants' that reg. 10 is relevant. It is, in any event, difficult to understand why it is relevant, given that on the appellants' case, the right of permanent residence accrued before the marriage was dissolved. It would only be necessary to have regard to reg.10 if, in order to have acquired five years residence, the appellants needed to take into account time accruing after the divorce. Neither of these grounds are thus made out.

23. In the light of my conclusions with respect to ground 3, ground 2 is no longer relevant. I do not, however, consider that the determination viewed as a whole indicates that an incorrect burden of proof was applied or that the assessment of the evidence was per se unfair or unreasonable. The judge was clearly entitled to note that the bundle was not prepared in a helpful manner, and that the witness statement was lacking in detail. That said, the judge's concerns could have been expressed in more temperate language, and what is said at [15] irrelevant. The issue was not in dispute and the language used is inappropriate.

24. It is not, however, arguable that there is any error in the decision with respect to article 8. There is no decision to remove the appellants, nor have they made a human rights claim. The issue was not pursued before the First-tier Tribunal in submissions,

as the judge noted. There is no indication that the respondent has served a notice pursuant to section 120 of the 2002 Act, and given the decision in **Amirteymour and others (EEA appeals; human rights)** [2015] UKUT 466, it is not arguable that the First-tier Tribunal (or the Upper Tribunal) has jurisdiction to consider human rights arguments in an appeal under the EEA Regulations to refuse residence documents. Any error with respect to consideration of article 8, within which the issues concerning section 55 of the UK Borders Act 2009 would need to be considered, could not therefore be material. That said, it follows that the findings of fact reached in respect of article 8 are a nullity.

25. It therefore follows that the decision of the First-tier Tribunal must be set aside insofar as it relates to the EEA Regulations and remade. The hearing was then adjourned until 24 February 2016.

Remaking the decision

26. The first appellant attended and adopted her witness statement. There were no supplementary questions from Miss Haji and Mr Walker elected not to ask any questions of the appellant. Mr Walker accepted that the first appellant's husband had been self-employed and that, although this was at a relatively low level, nonetheless it was given the case law set out in the error of law decision, sufficient to amount to economic activity.

27. In light of these submissions and in light of the evidence which has not been challenged, I am satisfied that Mr Ndiaye was in fact self-employed at all material times and that his self-employment was neither marginal nor ancillary.

28. Accordingly for these reasons I am satisfied that the appellant's husband, had at all material times been a qualified person, before and during the marriage. It follows that on that basis, the first appellant acquired the right of permanent residence on 14 May 2014. As I am satisfied that as at that date the appellant acquired the right of permanent residence it also follows that her daughter also acquired permanent residence at the same date.

29. I am therefore satisfied that the appellants are entitled to residence cards confirming their right of permanent residence in the United Kingdom and that is on the basis that they have fulfilled all the requirements of the Immigration (European Economic Area) Regulations 2006 and accordingly I allow the appeal on that basis.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal involved the making of an error of law, and I set it aside.

2. I remake the decision by allowing the appeal under the Immigration (European Economic Area) Regulations 2006.

3. No anonymity direction is made.

Signed Date: 3 March 2016

Upper Tribunal Judge Rintoul