



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/06633/2016

THE IMMIGRATION ACTS

Heard at Manchester
On 4th September 2017

Decision & Reasons Promulgated
On 18th September 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

NOSAKHARE IMADIYI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss W Bremang of Counsel, instructed by Charles Hill & Co
Solicitors

For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Siddiqi of the First-tier Tribunal (the FtT) promulgated on 3rd April 2017.
2. The Appellant is a male Nigerian citizen born 2nd February 1982. His application for a permanent residence card was refused on 17th May 2016. The Appellant had been granted a residence card as a result of his marriage to the Sponsor on 30th November 2010.

3. The Respondent did not accept that the Sponsor had been a qualified person between November 2010 and 26th June 2015. It was not accepted that the Sponsor was exercising treaty rights at the time of divorce. In addition the Respondent pointed out that the Appellant had served a six month prison sentence, and therefore this time could not be counted as residency in accordance with the Immigration (European Economic Area) Regulations 2006.
4. The appeal was heard by the FtT on 10th March 2017. The FtT did not accept that the Sponsor had been a qualified person by way of self-employment. The FtT found that insufficient documentary evidence had been submitted to prove this.
5. In the alternative, if it was found that the Sponsor had been self-employed, the FtT found that her earnings were so low that her economic activities should be regarded as purely marginal and ancillary. The FtT considered the principles on this issue in Begum Pakistan [2011] UKUT 00257 (IAC). The FtT found that because the self-employment was marginal and ancillary, the Sponsor could not be described as a qualified person as defined by regulation 6 of the 2006 Regulations.
6. The third reason given by the FtT for dismissing the appeal was that it had not been proved that the Sponsor was exercising treaty rights in the UK at the date of divorce in June 2015.
7. Following dismissal of the appeal the Appellant applied for permission to appeal to the Upper Tribunal. In summary it was contended that the FtT had erred by failing "to give due credence to the Appellant's evidence." It was submitted that the FtT had erred by not accepting that the Sponsor had been self-employed, and it was pointed out that she had submitted business accounts, and evidence from HMRC.
8. It was contended that the FtT had erred by assessing the Sponsor's self-employment by referring to the net profit, which the FtT described at paragraph 21 as not exceeding £2 per week since 2010. It was contended that the 2006 Regulations do not distinguish between a small scale enterprise and a large scale venture when considering the exercise of treaty rights. It was sufficient for the Sponsor to show that she had been engaged in economic activity, and the FtT had erred by finding otherwise.
9. Permission to appeal was granted by Judge O'Garro and I set out below paragraph 3 of the grant of permission which provides the reasons for granting permission to appeal;
 - "3. At paragraph 21 the judge found that the profit of the Appellant's Sponsor's self-employed business were (sic) so small that he found her activities were purely marginal and ancillary and concluded from that she was not a worker. In light of the guidance given in Begum (EEA - worker - jobseeker) Pakistan [2011] UKUT 00275 (IAC) where the Tribunal held that when deciding whether an EEA national is a worker for the purposes of the EEA regulations, regard must be had to the fact that the term has a meaning in EU law, that it must be interpreted broadly and that it is not conditioned by the type of employment or the amount of income derived, it is arguable that an error of law was made by the judge in the test he applied in reaching his decision."

10. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. In summary it was contended that the FtT directed itself appropriately. Notwithstanding the findings at paragraph 21 of the FtT decision, adequate reasons had been given in paragraphs 17 and 18 for finding that the evidence failed to demonstrate that the Sponsor was exercising treaty rights at the relevant time. In any event the Respondent noted that the FtT finding in paragraph 22 that the Sponsor had not been exercising treaty rights at the date of divorce had not been challenged and therefore the appeal could not succeed.
11. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

12. Miss Bremang relied upon the grounds upon which permission to appeal had been granted. She submitted that the FtT had erred in law by failing to accept that evidence had been submitted to prove that the Sponsor was self-employed. In addition the FtT had erred by failing to take into account the principles in Begum and had erred in finding that the Sponsor's income from self-employment was marginal and ancillary.
13. Evidence had been before the FtT to prove that the Sponsor was a qualified person exercising treaty rights at the date of divorce, that evidence being an HMRC self-assessment statement dated 2nd March 2016 contained at page 38 of the Appellant's bundle, and the FtT had erred in law by not taking this into account.
14. Mr Bates relied upon the rule 24 response. He submitted that the judge had taken into account all relevant evidence and was entitled to find that it had not been proved that the Sponsor was self-employed as claimed.
15. It was further submitted that it was open to the FtT in the alternative, to find that the self-employment produced such a small income that the description marginal and ancillary was apt, and the Sponsor was not a qualified person by reason of that self-employment.
16. Finally it was submitted that the FtT at paragraph 22 had been entitled to find that there was insufficient evidence to prove that the Sponsor was a qualified person at the date of divorce.
17. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

18. I consider firstly the challenge to the FtT decision, which contends that the FtT erred in not accepting that the Sponsor was self-employed and therefore a qualified person pursuant to regulation 6 of the 2006 Regulations. The FtT in paragraph 5 set out the correct burden and standard of proof. I find that the FtT considered and engaged with all the evidence before it.

19. The FtT considered and analysed the evidence in paragraphs 17 and 18. The FtT noted that the Sponsor did not have a business bank account. It was noted that there was a lack of receipts in relation to items purchased for the Sponsor's business. The FtT noted that only one receipt was produced at page 113 of the Appellant's bundle, dated 10th March 2010. The FtT noted that the Sponsor's personal bank account did not indicate payments or receipts in relation to the claimed self-employment.
20. The FtT accepted that some invoices had been produced but observed that no evidence had been provided to show how or when these invoices had been paid. It was noted that the Sponsor had registered with HMRC and submitted tax returns but that no tax had been paid. The accounts that had been prepared appeared to be unaudited. The FtT could also have mentioned that there was no evidence submitted to prove that rent or rates were paid in relation to business premises although there is reference to these payments in the accounts.
21. I consider that the FtT took into account all the evidence produced, and did not fail to consider any material evidence, and the FtT was entitled to conclude that it was not satisfied that it had been proved that the Sponsor had been residing in the UK as a self-employed person under regulation 6 of the 2006 Regulations. The grounds display a disagreement with the conclusion reached by the FtT, but do not disclose a material error of law.
22. Secondly I consider the FtT finding that the income received by the Sponsor was so small as to be regarded as marginal and ancillary. This was an alternative finding, which strictly speaking was not necessary, as the FtT had made a primary finding that the Sponsor's self-employed status had not been proved. However, I do not find that the FtT erred in law. Net profits of the Sponsor were claimed to be £3,615 over five years, and in my view it was open to the FtT to find the self-employment to be marginal and ancillary, and I do not accept that the FtT failed to consider the principles in Begum.
23. Thirdly, I do not find that the FtT erred in law in concluding at paragraph 22 that it had not been proved that the Sponsor was exercising treaty rights at the date of divorce in June 2015. The document relied upon by the Appellant as proving the Sponsor's self-employment at the date of divorce is the self-assessment statement dated 2nd March 2016. This does not prove self-employment as at June 2015. This document indicates that the only payment made by the Sponsor to HMRC was £106.60 on 6th August 2012. There was a balancing payment due for the tax year 2014/15 of £82.40 and that relates to the tax year ending April 2015.
24. The FtT made findings open to it on the evidence, and provided adequate reasons for those findings in accordance with the principles in Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC).

Notice of Decision

The decision of the FtT does not disclose a material error of law. The decision is not set aside and the appeal is dismissed.

Anonymity

The FtT did not make an anonymity direction. There has been no request for anonymity made to the Upper Tribunal and I see no need to make an anonymity order.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

7th September 2017

TO THE RESPONDENT FEE AWARD

The appeal is dismissed. There is no fee award.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

7th September 2017