Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00382/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20th September and 23rd October 2018	**On 11th December 2018**

Before

UPPER TRIBUNAL JUDGE COKER

Between

TANIA BOLAND

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Hawkin, instructed by Arlington Crown Solicitors
For the Respondent: Mr T Lindsay (on 20th September), Mr D Mills (on 23rd October)
Senior Home Office Presenting Officers

DECISION AND REASONS

1. On 20th September 2018, I heard an appeal by Ms Boland against a decision of the First-tier Tribunal and made the following decision:

Error of Law and Directions

1. The appellant's appeal against the decision of the respondent refusing her a permanent residence card was dismissed by First-tier Tribunal Judge Carroll for reasons set out in a decision promulgated on 4th April 2018. He had written the decision and signed it on 19th March 2018.

2. The appellant had, on 7th March 2018, notified the First-tier Tribunal that, contrary to what she had said on her appeal notice, she wished the appeal to be determined on the papers. When the First-tier Tribunal judge wrote the reasons for his decision, he did not have any documentary evidence from the appellant that supported her grounds of appeal and he dismissed the appeal. It is not apparent that there was any indication on the file that documents were expected from the appellant and the date for filing documents as set out in the directions had passed.
3. The appellant's solicitor, in a witness statement to the Upper Tribunal, states that when he spoke to a member of the Administrative staff at the First-tier Tribunal he was told that the appeal had been transferred to a paper list, as requested, and that any documentary evidence to be relied upon was to be sent to the First-tier Tribunal by 21st March 2018. The solicitors sent a bundle of documents to the First-tier Tribunal. Although the solicitor says he was told that the documents had arrived on 21st March 2018, they are date stamped as having arrived on 22nd March 2018. I note in passing that the solicitor has not appended his attendance note with the administrative person at the First-tier Tribunal.
4. The First-tier Tribunal administration sent the documents to the judge who sent them back to the administration with a note dated 29th March 2018 that the papers had been received "after promulgation". That note is incorrect – the judge had sent his decision to the promulgations team but it was not in fact promulgated until 4th April.
5. The documents should have been considered by the judge in reaching his decision and the judge has erred in law in failing to consider them.
6. Mr Lindsay submitted that the error was not material – the solicitors could have filed the documents very soon after the request for the hearing to be transferred to a paper hearing but they were not; the documents had not been filed in accordance with directions; there was no basis upon which the solicitors could or should have relied upon a statement by an administrative member of staff as to when documents could be filed; the documents had not been served upon the respondent who had not had an opportunity to consider them and therefore the First-tier Tribunal judge could have legitimately excluded them from consideration in any event.
7. All the submissions made by the respondent are legitimate. The filing of documents at such a late stage, contrary to directions and not served upon the respondent is to be deplored and may, in some circumstances, lead to costs or other sanctions. The failure to comply with directions has resulted in direct expense to the appellant because of the application for permission to appeal to the Upper Tribunal and the hearing, and to public funds because the application had to be considered by an Upper Tribunal Judge, listed for hearing and the respondent had to appear. There is no apparent justification for such expense.
8. Nevertheless, had the judge contacted the promulgations team to establish whether in fact his decision had been promulgated, he would have been informed it had not. He would then have had to take a decision on what view to take of the documents. That view could either have been to refuse to admit them (as submitted by Mr Lindsay) or he could have adjourned consideration with a direction that the documents be served on the respondent by a certain date, that the respondent be given adequate time to consider the documents and make representations, that the solicitors provide an explanation for late filing and the decision be taken thereafter.
9. I therefore conclude that the error by the First-tier Tribunal judge is material – it is not inevitable that the judge would have excluded the documents.
10. I set aside the decision of the First-tier Tribunal and make the following directions, which were given orally at the hearing on 20th September and take effect from 20th September 2018.

Directions

The resumed hearing is listed for hearing at Field House on 23rd October 2018, the respondent now having the bundle of documents relied upon by the appellant.

The appellant's solicitors to explain in writing by 4pm on 26th September 2018, marked for the attention of UTJ Coker, why the documents relied upon by the appellant were

not filed in compliance with directions and why they were not served upon the respondent[1].

2. The essential difference in the submissions by Mr Hawkin and Mr Mills was that Mr Hawkin submitted that the documents relied upon were sufficient to support the contention that Ms Boland had been exercising Treaty rights for five years such that she was entitled to a permanent residence card; the underlying question was whether she was self-employed and self-sufficient prior to 1st January 2014; that it was possible in considering whether she was entitled to a permanent residence card to consider the proportionality of the decision: she is, at the date of the hearing only a couple of months short of five years employment as accepted by the respondent to be in exercise of Treaty Rights, that she has been resident in the UK since she was aged 15 i.e. nearly 19 years and well over half her life and that she has three children all born in the UK the oldest two (aged 17 and 15) being British Citizens and the youngest (aged 5) being Romanian citizen.

3. Mr Mills submitted that although there was some evidence that the appellant had been working and it was accepted that since 2014 she had been exercising Treaty Rights, her self-employment work prior to January 2014 was minimal and/or did not support the submission that she had been working at all and did not cross the threshold to mean that she had been exercising Treaty rights for five years. He submitted that this appeal was not a human rights appeal and, in accordance with *Amirteymour and others (EEA appeals; human rights)* [2015] UKUT 466 (IAC) "Where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot bring a Human Rights challenge to removal in an appeal under the EEA Regulations. Neither the factual matrix nor the reasoning in JM (Liberia) [2006] EWCA Civ 1402 has any application to appeals of this nature", proportionality of the decision in human rights terms was not the subject of the appeal.

4. Ms Boland is a Romanian citizen and self-employment (prior to 1st January 2014 in this case), can be counted towards the five-year period. There was no dispute that the appellant had been exercising Treaty Rights since 1st January 2014. The dispute centred on whether the evidence of self-employment relied upon by the appellant for the period to 1st January 2014 was sufficient to make a finding that she had been exercising Treaty Rights during that period.

5. The evidence she relies upon is:

[1] The appellant's representatives wrote to the Tribunal as directed and said that the appellant's documents had been sent to the Presenting Officers Unit and to the First-tier Tribunal on 16th March. Although date stamped by the Tribunal, the solicitors state they were informed by the administration in a telephone call they made after receiving my Error of Law decision, that the documents had been received on 21st March but entered "on the system" on 22nd March. The letter from the solicitors does not explain why they failed to file the documents in accordance with the written directions of the Tribunal but rather relied upon what they say they were told by a member of the administrative staff. I do not propose to take this matter any further but assume that in future the solicitors will comply with the directions of the Tribunal rather than telephone conversations with administrative staff.

(i) A letter from HMRC dated 12th May 2016 stating, *inter alia*, that according to their records she was "a self-employed individual for the tax years 2012-2013, 2013 to 2014 and 2014 to 2015. And you are still self-employed."
(ii) Tax calculation for 2012-13 (year ended 5 April 2013) showing profit from self-employment of £6745.
(iii) Tax calculation for 2013-14 (year ended 5 April 2014) showing pay from all employments as £1287 and profit from land and property of £1860.

6. The appellant was also employed during those tax years, but her employment income does not count towards her exercise of Treaty Rights until after 1st January 2014.

7. The letter from HMRC dated 12th May 2016 does no more than state that she was registered self-employed. It is not evidence that she was earning an income as a self-employed person during those years. The tax calculation for the year ended 5 April 2013 is adequate evidence to find that she was exercising Treaty Rights during that year up to 5 April 2013.

8. Mr Hawkin submitted that during the year ended 5 April 2014 the phrase "profit from land and property" was the phrase used to denote earnings from self-employment. He did not produce anything to substantiate that. In this case however whether it is the same or not has no impact on the outcome of the appeal. If a person is self-employed they will keep detailed records of their income and expenditure to fill in a tax return to ensure a correct tax calculation is undertaken; these records were not produced. There was no evidence from Ms Boland when that income was earned, what it was for or whether it was earned in the latter part of the calendar year 2013.

9. I was not directed to caselaw that considered the question of self-employment and whether there was a minimum required income level for a period of work. The cases Mr Hawkin relied upon all consider the issue of part-time employment. In considering whether such part-time employment is marginal such that a person is not considered to be exercising Treaty Rights, matters such as holiday leave, sickness pay, pension accrual, and the type of job were all material considerations as well as how many hours were worked and the hourly rate of pay. In this case there is no evidence provided of the nature of the self-employment undertaken prior to 1st January 2014 or what the income was during that period. Although the bank statements show some cash payments in, there is no information what those cash payments were for or where they came from. I do not agree that the concept of marginal activity can be readily transposed to self-employed earnings given the other matters that have to be considered in considering employment. Whilst Mr Hawkin is correct that earnings do not have to be large and only must be more than marginal, it cannot be said that £1860 over the tax year 2013/2014 is more than marginal – it is less than £36 per week at a time when the national minimum wage was £6.31 so would equate with about 5 ½ hours work per week. In the absence of further

information, it cannot be concluded that her self-employment was anything more than marginal.

10. Mr Hawkin submitted that although there was no justiciable human rights claim (see *Amirteymour*), *JK v secretary of State for Work and Pensions (SPC)* [2017] UKUT 179 (AAC) was support for the proposition that there was a category of exceptional cases where proportionality can come into play. *JK* in turn refers to *Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1 which in turn explains the effect of *Baumbast v SSHD* C-413/99 as follows:

> The effect of the decision in Baumbast is that the fact that an applicant may fall short of the strict requirements of having 'self-sufficiency' status under what are now the 2004 Directive and the EEA regulations cannot always justify the host Member State automatically rejecting his or her rights to reside on the ground that the requirements for status are not wholly complied with. In Baumbast the court was concerned, inter alia, with the issue whether an applicant could exercise the right to reside in the UK in circumstances where he was resting his case on the ground that he was a 'self-sufficient person'. It is clear from paragraphs 88 and 89 of the judgment that the applicant had sufficient resources to be self-sufficient in practice, and that he had medical insurance. his only possible problem was that the insurance may have fallen short of being 'comprehensive' in one respect, namely that it was not clear whether it covered 'emergency treatment'. The court held that, on the assumption that the insurance fell short in this connection, it would nonetheless be disproportionate to deprive the applicant of the right to reside.
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> In paragraph 92 the court pointed out that there were strong factors in the applicant's favour, namely that he had sufficient resources, that he had worked and resided in the UK for several years, that his family had also resided in the UK for several years, that he and his family had never received any social assistance, and that he and his family had comprehensive medical insurance in Germany. In those circumstances, the court said at paragraph 93 that it would be 'a disproportionate interference with the exercise' of the appellant's right of residence conferred by what is now Article 21.1 of TFEU to refuse to let him stay in the UK because of a small shortfall in the comprehensiveness of his medical insurance".

11. In *JK* the SSHD accepted that the claimant's son had been residing continuously in the UK for 10 years by the time the claimant (his mother) claimed pension credit, that he was working legally, when he was actually working, before Poland's accession, that he intended to work legally after accession and that he strove to avoid a period of illegal work after his visa expired. The SSHD accepted that the claimant's son had acquired permanent residence by the time his fifth job expired in April 2011. Mr Hawkin submitted that in this case, the appellant had been in the UK for nearly 19 years, more than half her life, she was in employment, two of her children were British and that although not registered to work prior to 1st January 2014 she had worked. There was, he submitted, no evidence of wrong doing, there were no adverse public interest matters and in January 2019 she would in any event be entitled to permanent residence which were all factors under EU law.

12. From the evidence produced it is difficult to see how the appellant can be described as self-sufficient in the period up to 1st January 2014, other than for the year 2012/13, even if her income from employment is taken into

account; employment that she should not have undertaken without registration. The Directive clearly states that enjoyment of Permanent Residence is key to social cohesion and Union citizenship and that a right of permanent residence will be granted if there is compliance with the conditions laid down for a continuous period of five years. This appellant's application for permanent residence was refused on 3rd January 2017 at which time she had to remain exercising Treaty Rights for a further two years before becoming eligible for Permanent Residence. Although of course I take the decision on the facts as they are today, the only reason that she has in effect almost accrued those two years is because she has pursued her appeal rights. I do not say here that she should not have done so; the submissions made in connection with her self-employment were plainly submissions that were arguable. But in terms of the proportionality of the decision to refuse her permanent residence, I cannot accept that it is disproportionate to refuse her permanent residence when the evidence that she was self-sufficient up to 1st January 2014 is not there; she is not being required to leave the UK; she continues to work and it is accepted that she is exercising Treaty Rights.

13. For these reasons I find that the appellant was not self-employed in the period leading up to 1st January 2014 such as to be exercising Treaty Rights. I find that the decision to refuse her Permanent Residence is not disproportionate.

Conclusion

The First-tier Tribunal materially erred in law and I set aside the decision to be remade.

I remake the decision and dismiss the appeal.

Date 8th November 2018

Upper Tribunal Judge Coker