Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/00883/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 26 July 2018	**On 01 August 2018**

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR OLUWABANKOLE OLUREMILEKUN JOHNSON
(anonymity direction not made)

Respondent

Representation:

For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondent: Mr D Akinpelu, Solicitor
(Spring Solicitors LLP)

DETERMINATION AND REASONS

1. Permission to appeal was granted to the Secretary of State by First-tier Tribunal Judge Landes on 11 June 2018, against the decision to allow the Respondent's appeal seeking the issue of a permanent residence card under regulation 15 of the Immigration (European Economic Area) Regulations 2016 (as amended) made by First-tier Tribunal Judge Shiner in a determination promulgated on 17 August 2017. The Respondent is a national of Nigeria, born on 4 August 1983. He had previously been married to an Italian national from whom he was divorced on 5 January 2015. In issue was whether he had proved that he was self employed between December 2014 and May 2015, as he had contended.

2. Judge Shiner found at [39] of his determination that the Respondent's attempts to start a business were genuine and that he was self employed during the relevant period.

3. Permission to appeal was granted because it was considered arguable that the judge should not have regarded the period December 2014 to May 2015 as a period of genuine and effective self employment, given that the judge had not found that the Respondent was in self employment immediately before that period, that the Respondent did not engage in any business for which he received remuneration during that period and that the judge had not found that the Respondent was in self employment in that business after May 2015, but rather had simply attempted to start a business.

4. Ms Everett for the Secretary of State relied on the grounds seeking permission to appeal and the grant of permission. It was a narrow issue of law on which the judge had misdirected himself. The CJE had defined self employed activity in Jany and Others C-268/99 as outside any relationship of subordination concerning the choice of that activity, working conditions and conditions of remuneration, under that person's responsibility and in return for remuneration paid to that person directly and in full. The First-tier Tribunal Judge's findings had not met that definition. Indeed, the judge had found that the Respondent had received no remuneration as none had been proved. The appeal should be allowed and the decision remade and dismissed.

5. Mr Akinpelu for the Respondent relied on his skeleton argument. He submitted that Jany and Others (above) was

misinterpreted by the Home Office and was disingenuous. Other factors were in play, including permission to set up a business which was lacking on the facts found in Jany and Others. The Respondent held a residence card and had permission to work and to set up a business. The fact that his business had not yet become profitable was not a relevant consideration and the judge had in effect reached such a finding. The judge had held that the self employment did not require self sufficiency. The Home Office's appeal should be dismissed.

6. The tribunal found that the judge had fallen into material error of law as Ms Everett had submitted. The judge found that the Respondent had been employed prior to and after the period of claimed self employment. He noted that the Respondent's previous, similar application under the 2006 regulations had been dismissed by Judge Aujla. Judge Aujla's findings remain relevant: at [30] the judge found that there was no credible evidence of the Respondent's claimed self employment for the same period.

7. On the subsequent renewed application made by the Respondent, there was still no evidence that the Respondent had earned any income during the claimed period of self employment. On no sensible view could it have been found that the self employment was effective and the judge did not turn his mind to that question as he should have done. The most that the judge found was that the Respondent was genuinely attempting to start a business. In fact the inference from the judge's findings about the Respondent's resumption of employment so soon afterwards is that the business never commenced, which of course corresponds to Judge Aujla's findings for the same period which remain relevant. The characteristics of self employment for free movement purposes as indicated in Jany and Others were not met. Even if they were not applicable, and the Home Office's interpretation was wrong, as was contended on the Respondent's behalf, the logical inference from the judge's primary findings of fact is that the self employment had not commenced, had no real substance, had produced no income and was not effective for the purposes of the EEA Regulations 2016. The judge overlooked the lack of substance to the Respondent's case.

8. The tribunal accordingly sets aside the First-tier Tribunal judge's decision for material error of law. The decision is remade in the only manner possible, that is that the appeal of the Respondent (the original Appellant) must be dismissed.

DECISION

There was a material error of law in the First-tier Tribunal's determination, which is set aside.

The original appeal is remade and is dismissed.

Signed **Dated** 26 July 2018

Deputy Upper Tribunal Judge Manuell