



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal no: EA/02044/2017

THE IMMIGRATION ACTS

At **Royal Courts of Justice, Belfast**
on **23.07.2018**

Decision & Reasons Promulgated
on 31.07.2018

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Edgaras SINKUS

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *S McTaggart* (counsel instructed by Gerard Maguire, Portadown)

For the respondent: Mr A Govan

DECISION AND REASONS

1. This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Francis Farrelly), sitting in Belfast on 11 May 2017, to allow an appeal by a citizen of Lithuania, born 1987. The appellant had worked here from 1 September 2007, when he entered the National Insurance scheme, and had had various short-term jobs between then and 2012. I am not surprised that the judge found the print-out before him hard to follow, but he found as a fact (see his paragraph 12) that the appellant had not worked here for as long as a year at any time during that stay.
2. The appellant returned to Lithuania for some time, then came back here, at that stage with his girl-friend and their son, in May 2016. From the 27th he was working through an employment agency called Diamond Recruitment, and there were wage-slips before the judge going up to 14 August that year. The appellant told the judge he got a new job shortly before 18 November, when he was detained, and on 8 December he was served with

*NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.
(2) persons under 18 are referred to by initials, and must not be further identified.*

removal directions, on the basis that he had not exercised Treaty rights, as his employment claims had not been validated.

3. Neither side's grounds of appeal set out the relevant provisions; nor do they appear in the judge's decision. The legislation in force at the time in question was the Immigration (European Economic Area) Regulations 2006, and the appellant was no longer an employed person at the date of the decision under appeal. It is common ground that the only way for the appellant to show that he was a 'qualified person', and so resist removal, was to provide evidence that he was a jobseeker (or else a person with retained rights as a worker under reg. 6 (2)).
4. Whichever basis the appellant chose, he had to satisfy (reg. 6 (6)) Condition B, which required him to provide evidence, not only that he was seeking employment; but that he had 'a genuine chance of being engaged'. The judge had an e-mail from Diamond, sent on 4 May 2017, which confirmed that the appellant had completed induction with a food company through them, and would start work as soon as the company had a job for him; so there was no issue about him seeking employment.
5. The point on which the judge's decision is challenged by the respondent is the conclusion he reached on whether the appellant had a genuine chance of being engaged. This was of course a question of fact for him; but it is suggested that his finding in favour of the appellant can only be explained by his rather general statement of the law at 12:

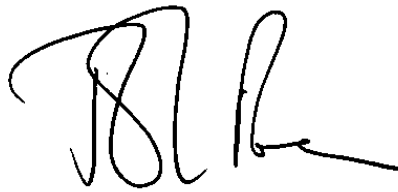
"Given the inbuilt flexibility in the regulations in relation to someone with a realistic prospect of work [it] is my conclusion that he could be considered as still exercising Treaty rights."
6. The judge did not explain what he meant by 'inbuilt flexibility'; and Mr McTaggart's best suggestion was that he was referring to the greater freedom allowed under the EEA Regulations than under the rules on the points-based system. However it is clear that on Condition B, the judge had a straightforward question of fact before him, which he had to decide on an objective basis, without giving latitude on the basis of an 'inbuilt flexibility' for which the Regulations do not make any special provision.
7. Looking at the judge's findings of fact at 11, he noted the appellant's 'extended periods of employment' in the past, and his work for Diamond from May to August 2016. He was about to start another job when arrested that November, but in the end was not bailed till March 2017. Since then he had not been in work, but had done the induction course referred to at 4. Then the judge notes that Diamond's e-mail of 4 May was sent to the appellant's solicitors (who as it happens were also dealing with the criminal case against him): he goes on

"Consequently the agency should have some appreciation that there are complications. I accept the appellant has sought employment in other venues but has been unsuccessful. It would seem hardly surprising that an employer would be reluctant to engage someone who is on bail pending a Crown Court trial."

8. The passage cited is entirely understandable in terms of the appellant's work problems not being his fault, other than through committing the offences, to which he later pled guilty and received suspended sentences. However, it did not amount to an objective assessment of whether as things stood the appellant had a 'genuine chance of being engaged', or, in the judge's words, a realistic prospect of work. So far as the passage on its own is concerned, it tends to go against that conclusion, if anything.
9. The result is that there will have to be a fresh hearing, at which the appellant's current prospects of work can be assessed, in the light of his up-to-date record.

Appeal allowed: first-tier decision set aside

Fresh hearing in First-Tier Tribunal at Belfast, not before Judge Farrelly

A handwritten signature in black ink, appearing to be 'J. Farrelly', written in a cursive style.

(a judge of the Upper Tribunal)

Decision signed: **24.07.2018**