



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/00202/2018

THE IMMIGRATION ACTS

Heard at Field House
On 20th December 2018

Decision & Reasons Promulgated
On 31st January 2019

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

ROSE OGOCHUKWU UWAKAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Eaton of Counsel, instructed by Clyde solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Swinnerton promulgated on 21 September 2018, in which the Appellant's appeal against the decision to refuse her application for an EEA Residence Card on the basis of permanent residence under Regulation 15 of the Immigration (European, Economic Area) Regulations 2016 (the "EEA Regulations") was dismissed.
2. The Appellant is a national of Nigeria, born on 10 November 1986, who entered the United Kingdom in August 2010 and was granted an EEA Residence Card on 24 May

2012 as a dependent of her mother, an Italian national, the “Sponsor”. She applied on 30 April 2017 for a permanent residence card on the same basis, which was refused by the Respondent on 8 December 2017.

3. The reasons for refusal were that there was insufficient evidence to show that the Sponsor had been exercising treaty rights in the United Kingdom for the required continuous period of five years. In relation to claimed periods of jobseeking, there was a lack of evidence of the Sponsor seeking employment and having a genuine chance of being engaged and exact time periods of jobseeking had not been identified, further there was no proof that the unemployment preceding it was involuntary. In relation to claimed self-employment, the Appellant had provided self-employment tax calculations for the Sponsor for the years ending April 2014, 2015 and 2016, showing income of £362, £2832 and £3120 respectively. The self-employment comprised of a few hours a week at a car boot sale and was not considered to be genuine and effective employment, rather it was only supplementary to the state benefits being received.
4. Judge Swinnerton dismissed the appeal in a decision promulgated on 21 September 2018 on all grounds. It was not accepted that the Sponsor was self-employed during the period 2012 to 2017, which was not supported by the HMRC documents and at best the evidence showed only ad hoc use of car boot sales. The Sponsor’s claimed period of incapacity to work from July 2016 was also queried by the First-tier Tribunal given the claimed self-employment and receipt of carers allowance for her disabled son at the time. It was accepted that there was sufficient evidence of job seeking however in 2018.

The appeal

5. The Appellant appeals on three grounds as follows. First, the First-tier Tribunal erred in law in applying an income threshold to establish employment. Secondly, the First-tier Tribunal erred in finding that it was inconsistent for a person to be self-employed and also to be ill and in receipt of carer’s allowance at the same time. Thirdly, the First-tier Tribunal failed to recognise that the Appellant’s worker status could be retained even if they were temporarily unable to work due to illness and there is no specific time limit on temporary incapacity to work in the circumstances.
6. Permission to appeal was granted by Judge Hollingworth on 1 November 2018 on all grounds.
7. At the oral hearing, on behalf of the Appellant, Mr Eaton went through the Appellant’s claim to the Sponsor’s exercise of treaty rights through the relevant period, by reference to the decision of the First-tier Tribunal and the evidence before it. There was no dispute before the First-tier Tribunal that the Sponsor was in employment in the early years relevant to the consideration in this application, but the First-tier Tribunal did not accept that she was self-employed in later years. Issue was taken in particular with paragraphs 17 and 18 of the decision, as being lacking in detail; including an unfair finding about a car boot sale not being genuine employment given that the Sponsor was not asked specific questions about this and

reaching findings that receipt of carers allowance was inconsistent with self-employment which were not sustainable.

8. The Sponsor's evidence was that employment had ended on 15 April 2012, following which there was a period of work seeking and she then commenced self-employment from January 2013. The First-tier Tribunal's finding that there was no evidence of job searching at this time failed to attach any weight to the Sponsor's own evidence in her written statement and supported by emails submitted in the appeal bundle showing the same. It was submitted that there was sufficient evidence before the First-tier Tribunal to show job seeking in this period.
9. In terms of self-employment, there was evidence before the First-tier Tribunal of earnings to the year ending April 2014 of £362, earnings of £2832 for the year ending April 2015 (this figure was accepted in the reasons for refusal letter, albeit it was accepted that there was no evidence of the same contained in the bundle before the First-tier Tribunal) and of income of £3120 to the year ending April 2016. The documentary evidence included tax returns, management accounts and bank statements.
10. Finally, there is evidence of a period of ill-health from 2017 from which the Sponsor was temporarily incapable of work.
11. On behalf of the Respondent, Mr Tufan submitted that for the Appellant to succeed, it must be shown that the Sponsor had five continuous years exercising treaty rights in the United Kingdom. The primary reason for refusal was the claimed period of self-employment within the relevant five years. The evidence before the First-tier Tribunal was very limited, including tax returns only and even taken at their highest showed very low annual earnings which at their highest equated to about £60 per week. For employment to be genuine and effective rather than merely marginal and ancillary, one needs to look carefully at the nature of claimed employment as well as the earnings. In this case there was insufficient evidence that this was genuine and effective employment and therefore no error of law in the findings with regards to self-employment.
12. In relation to the claimed jobseeking period, there is only one email available in the evidence before the First-tier Tribunal which falls far short of establishing that the Sponsor was an active jobseeker for the purposes of Regulation 6 of the EEA Regulations.
13. Overall it was submitted that the decision of the First-tier was well reasoned and rational, with findings which were entirely open to it on the basis of the lack of evidence relied upon by the Appellant.

Findings and reasons

14. The decision of Judge Swinnerton set out the key documentation before the First-tier Tribunal with regards to self-employment in paragraph 16, including the tax return

calculation, other tax documents and benefit notifications. The key findings in relation to self-employment and job seeking were then as follows:

“17. In relation to herself-employment, the sponsor stated at the hearing that she had sold goods at car boot sales for five years. To clarify that she was not a market stall holder who had a licence and paid a rent for a stall at an established market but rather that she bought goods which she then sold at car boot sales. That was the nature of her self-employment. The sponsor was not able to provide much by way of details at the hearing as to how she went about carrying out the self-employed work of selling items at car boot sales. At the same time as carrying out the self-employed work, the sponsor was a carer for her son and received carer’s allowance for doing so which, by her own account, was for a period from 2012 ending in April 2017.

18. A letter from HMRC dated 4.10.2016 details that the sponsor did not receive income for the tax years ending April 2014, 2015 and 2016. The tax return calculation for the sponsor for 2013/14 details income of £362. Based upon the evidence of the sponsor at the hearing and the available documentation, I do not accept that the sponsor was engaged in self-employment as claimed during the period from 2012 to 2017 because she had caring responsibilities throughout that time for her son for which she was receiving carers allowance and the level of income earned as reported by HMRC does not indicate that the sponsor was engaged in self-employment as maintained but rather that she carried out some ad hoc activity in selling items at car boot sales.

19. I note also that the sponsor was awarded personal independence payment (which is a welfare benefit intended to help with the cost of living with a long-term health condition or disability) for the period from July 2016 until September 2019. It appears therefore that the sponsor was, at least from mid-2016, in receipt of both carer’s allowance in relation to her son and personal independence payment for herself such that any self-employment activities would clearly have been impacted by the sponsor’s need to care for her son and by her own health condition or disability.

20. In relation to the job seeking activities of the sponsor, the documentation provided in the Appellant’s bundle appears to relate to efforts made quite recently and largely in 2018. It does not appear to relate to the period from late 2012 onwards as it is self-employment that the sponsor maintains was the way in which she exercised Treaty rights for almost all of the relevant period of 5 years.

21. I am satisfied, therefore, that the Appellant has not addressed the points raised in the refusal letter, that the sponsor has not exercised Treaty rights as required by the Regulations and that the Appellant is not entitled to permanent residence.”

15. In relation to self-employment, the summary of the evidence before the First-tier Tribunal contained in the decision is a fair summary of the very limited evidence before the First-tier Tribunal. The Sponsor’s evidence in relation to her self-employment was incredibly brief and lacking in any detail. There is an incomplete copy of two sets of management accounts, the first relating to the period to April 2015 contains only the first two pages and no financial information whatsoever and

the second relating to the period to April 2016 includes a single page setting out turnover and profit but does not include any cost of sales, which does not support the Sponsor's claim that she was buying goods to sell at car boot sales as a business. The HMRC documents, comprising of the tax return to April 2014 and a tax calculation for the year to April 2016, even taking into account the intervening tax return referred to in the decision letter, at their highest show very low or low levels of income only. Although there is no minimum income requirement, employment, or self-employment must be genuine and effective, rather than merely ancillary marginal. There was nothing more in the present appeal to support a claim that self-employment was genuine and the factual findings as set out above based on this incredibly limited evidence are unchallengeable on any factual or legal grounds.

16. There is some force in the criticism of the reasoning of the First-tier Tribunal that a person would not be able to engage in self-employment in circumstances in which they were also themselves suffering from a health condition or disability, as well as providing a significant level of care for a child. Those matters are not mutually inconsistent, albeit as a matter of practicality, it is clear that the Sponsor had responsibilities which would impact on her ability to engage in any extensive self-employment. In any event the primary reason for the finding that the Sponsor had not been self-employed as claimed is not to do with health or caring responsibilities, but the lack of evidence of actual self-employment and lack of earnings claimed as a result. There is therefore no material error of law overall in the findings in relation to self-employment.
17. In relation to job seeking activities, the First-tier Tribunal refers to a lack of evidence of job seeking from late 2012 onwards and notes that the period overlaps with the claimed period of self-employment. Having considered the material before the First-tier Tribunal, there are three emails in relation to jobseeking in November 2012 (albeit they all relate to a single application for the same job); four emails in February 2013 relating to job applications and one in each of March and April 2013. The claimed period of jobseeking falls after the Sponsor's employment ended on 15 April 2012, through to the end of December 2012, following which self-employment was said to have begun in January 2013. The evidence amounts to a single application for a job in the period claimed and could not on any view establish that a person was actively seeking work during that period for the purposes of exercising treaty rights in the United Kingdom. There is therefore no error of law in the findings reached on this point either by the First-tier Tribunal, who came to the only conclusion reasonably open to it on the paucity of evidence submitted by the Appellant.
18. The Appellant's final ground of appeal in relation to the lack of time restriction on the period in which a person could be temporarily unable to work because of illness, during which they would retain their worker status, bears no relevance at all to the outcome of this appeal. It fails to recognise that the Sponsor did not have the status of a worker immediately preceding her period of temporary incapacity for work and there was therefore no status which could be retained for any period of time. There can be no error of law on this basis and the appeal was bound to fail for the reasons already given.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed



Date

24 January 2019

Upper Tribunal Judge Jackson