Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00945/2019

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 9th November 2021	**On 22nd November 2021**

Before

UPPER TRIBUNAL JUDGE MANDALIA
and
DEPUTY UPPER TRIBUNAL JUDGE NAJIB

Between

MRS MARINA MEKONEN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Rutherford, instructed by Sydney Mitchell Solicitors
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of the Russian Federation. On 9th October 2018 she applied for a residence card as the direct family member of Mr Samuel Mekonen, a

British Citizen, who has previously exercised treaty rights in Spain. Her application was refused by the respondent for reasons set out in a decision dated 11th February 2019. First-tier Tribunal Judge Symes dismissed her appeal for reasons set out in a decision promulgated on 9th September 2019.

2. The appellant was granted permission to appeal by First-tier Tribunal Judge Bulpitt on 31st December 2019. Judge Bulpitt noted that the day after the hearing of the appellant's appeal, the decision of the Upper Tribunal in ZA (Reg 9 EEA Regs; abuse of rights) Afghanistan [2019] UKUT 281 (IAC) was published, and in light of that decision, Judge Symes had arguably erred in law.

3. The respondent filed a response to the grounds of appeal and conceded the error of law. The respondent invited the Upper Tribunal to determine the appeal. The appeal was therefore considered by Upper Tribunal Judge McWilliam under Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008 without a hearing. Upper Tribunal Judge McWilliam considered the grounds of appeal, and the concession made by the respondent. For reasons set out in her decision promulgated on 26th May 2020, she was satisfied that the decision of First-tier Tribunal Judge Symes is vitiated by an error of law such that it must be set aside with no findings preserved. She considered the submission made by the appellant that the appeal should be remitted to the First-tier Tribunal for hearing afresh. She declined to adopt that course and directed that the decision will be remade by the Upper Tribunal. She issued a direction that the appellant is to make any application under Rule 15(2A) of The Tribunal Procedure (Upper Tribunal) Rules 2008 within 14 days of the date of her decision being promulgated.

The issues and the evidence before us

4. The appeal was listed for a resumed hearing before us on 9th November 2021. The appellant attended the hearing with her partner and was assisted by an interpreter arranged by the Tribunal. Neither party raised any concerns about the error of law decision of Upper Tribunal Judge McWilliam having been made without a hearing. At the outset of the hearing, we discussed the issues that arise in the appeal with the representatives, and the evidence before the Tribunal. It was common ground that the issue is whether the appellant has established that the

exercise of Treaty rights in Spain was "genuine" in the sense that it was real, substantive, or effective. The parties agree that in addressing that issue we must consider whether the self-employment relied upon, was "genuine and effective" and not marginal or ancillary.

5. Mr Bates confirmed that if we find there had been a genuine exercise of treaty rights when the appellant and her partner lived in Spain, the respondent does not claim that the purpose of the residence in Spain was as a means for circumventing any immigration laws applying to non-EEA nationals to which the appellant would otherwise be subject.

6. As for the evidence, we informed the parties that we have a copy of the respondent's bundle and a copy of the interview record relating to the interview of the appellant and her partner, completed on 28th January 2019. We informed the parties that the only material received from the appellant's representatives in response to the direction previously made by Upper Tribunal Judge McWilliam, is a letter from the appellant's solicitors dated 29th October 2021. They enclose a copy of a birth certificate relating to the birth of the appellant's daughter on 17th May 2021. There is no application under Rule 15(2A) of The Tribunal Procedure (Upper Tribunal) Rules 2008 for the Tribunal to consider any other evidence that was not before the First-tier Tribunal. Ms. Rutherford quite properly accepted the birth certificate relied upon would only be relevant to an Article 8 claim and that here, there has been no human rights claim made by the appellant which has been refused by the respondent. The birth certificate relied upon therefore does not assist us in our consideration of the issues before us. The only other evidence relied upon by the appellant is that contained in a bundle comprising of 149 pages sent to the First-tier Tribunal previously, by the appellant's previous representatives in June 2019.

7. For the sake of completeness, we add that after we had heard the evidence of the appellant, Ms. Rutherford made an application to admit evidence of a comprehensive health insurance policy that was held by the appellant's partner. We were not provided with any explanation for the failure of the appellant and her representatives to make a Rule 15(2A) application, properly setting out the nature of that evidence and explaining why it was not submitted to the First-tier

Tribunal. The application to admit that evidence was opposed by Mr Bates. He submits the appellant's application for a residence card has always been premised upon the claim that her partner had previously exercised treaty rights in Spain as an individual who was self-employed. It has never formed any part of the appellant's claim previously, that the appellant and her partner were self sufficient and held comprehensive sickness insurance.

8. We refused the application to admit that further evidence. The underlying application for a residence card was made in October 2018 and was made on the basis that the appellant's partner was exercising treaty rights as a self-employed person in Spain. It formed no part of the appellant's appeal before the First-tier Tribunal that the appellant and her partner were exercising treaty rights on the basis that they were self-sufficient. In paragraph [6] of the Grounds of Appeal against the decision of Judge Symes, the appellant confirms the evidence supports the appellant's contention that her husband was in fact self-employed in Spain. In refusing the application to admit the evidence, we had regard to the overriding objective of the rules which is to enable the Upper Tribunal to deal with cases fairly and justly and the obligation on the parties to the further the overriding objective and cooperate with the Upper Tribunal generally. We are quite satisfied that there has been unreasonable delay in producing the evidence the appellant now seeks to rely upon, without any explanation, let alone reasonable explanation for why it was not disclosed and relied upon previously.

9. The oral evidence and the submissions made by Ms Rutherford and Mr Bates are set out in the record of proceedings. We have also had regard to the skeleton argument settled by Ms Rutherford dated 8th November 2021. At the end of the hearing, we reserved our decision. We informed the parties that our decision will follow in writing, and this we now do. We have both contributed to the decision. It is impractical for us to refer in this decision to all the evidence that is before the Tribunal. For the avoidance of any doubt, in reaching our decision we have had regard to all of the evidence before us whether that evidence is expressly referred to or not, in this decision.

Remaking the decision

10. In reaching our decision we have carried out a fact specific and qualitative assessment of whether there had been a genuine exercise of treaty rights when the appellant and her partner lived in Spain between January and September 2018.

11. In ZA (Reg 9. EEA Regs; abuse of rights) Afghanistan [2019] UKUT 00281 (IAC), the Upper Tribunal reviewed the authorities in relation to the correct interpretation of Regulation 9 of the Immigration (European Economic Area) Regulations 2016. Having noted the obligation on Courts and Tribunals to construe domestic legislation consistently with EU law, the Upper Tribunal summarised the position in the headnote as follows:

> "*(i) The requirement to have transferred the centre of one's life to the host member state is not a requirement of EU law, nor is it endorsed by the CJEU.*
>
> *(ii) Where an EU national of one state ("the home member state") has exercised the right of freedom of movement to take up work or self-employment in another EU state ("the host state"), his or her family members have a derivative right to enter the member state if the exercise of Treaty rights in the host state was "genuine" in the sense that it was real, substantive, or effective. It is for an appellant to show that there had been a genuine exercise of Treaty rights.*
>
> *(iii) The question of whether family life was established and/or strengthened, and whether there has been a genuine exercise of Treaty rights requires a qualitative assessment which will be fact-specific and will need to bear in mind the following:*
>
> *(1) Any work or self-employment must have been "genuine and effective" and not marginal or ancillary;*
>
> *(2) The assessment of whether a stay in the host state was genuine does not involve an assessment of the intentions of the parties over and above a consideration of whether what they intended to do was in fact to exercise Treaty rights;*
>
> *(3) There is no requirement for the EU national or his family to have integrated into the host member state, nor for the sole place of residence to be in the host state; there is no requirement to have severed ties with the home member state; albeit that these factors may, to a limited degree, be relevant to the qualitative assessment of whether the exercise of Treaty rights was genuine.*
>
> *(iv) If it is alleged that the stay in the host member state was such that reg. 9 (4) applies, the burden is on the Secretary of State to show that there was an abuse of rights.*

12. We heard oral evidence from the appellant and Mr Samuel Mekonen. Although the appellant has a reasonable understanding of the English language, to avoid any confusion, she gave evidence with the assistance of a Russian interpreter. Both the appellant and interpreter confirmed that they understood each other without any difficulty.

13. On the issue before us, the burden of proof therefore rests with the appellant. In reaching our decision we have considered whether the evidence of the appellant and her partner and their account of events is internally consistent and consistent with any other relevant evidence. We have had the opportunity of hearing the appellant and her partner give evidence and of seeing that evidence tested in cross-examination. In considering the evidence, we have borne in mind the fact that events that occurred some time ago, can impact on an individual's ability to recall exact circumstances. We also recognise that there may be a tendency by a witness to embellish evidence because although the core of the claim may be true, he/she believes that by embellishing their evidence, the claim becomes stronger. We also reminded ourselves that if a Court or Tribunal concludes that a witness has lied about one matter, it does not follow that they have lied about everything.

Findings and conclusions

14. The appellant adopted her witness statement dated 24th June 2019. She confirms she met her partner in Moscow in February 2015 and they decided to marry in 2016. They were married in Denmark on 8th February 2017. In her oral evidence before us the appellant said that following their marriage in February 2017, they spent 10 days together in Greece on their honeymoon. She then returned to Russia and her partner returned to the UK. She lived in Russia until she joined her partner in Spain on 8th January 2018.

15. In cross examination, the appellant said that when they originally moved to Spain, she understood her partner had enough money for them to live there for about one year, without needing to look for a job. She said that later, when they realised there was an opportunity to work, they looked at starting a business. She could not recall exactly when her partner started the business, but said it was several months after they had arrived in Spain. The move to Spain was not a holiday. The appellant said that after they had married, she had wanted to live somewhere warm and close to the sea, and they considered various options. They had considered a move to Bali but that was too far away and very expensive and Sochi, Russia, was not suitable. She said that initially, they did not want to look for a job in Spain but wanted to have a rest and spend time together. She could not say how they supported themselves but said that her partner eventually began an on-

line shop selling musical instruments. The appellant realised there were many nurseries in the area and friends of hers in Russia, had a shop selling musical instruments and toys. She said that her partner established a business buying items from Russia and China and selling them in Spain. The appellant was unable to say how her partner imported items to sell from outside the EU, but occasionally, she assisted with packaging. She explained that her partner would make sales by visiting local nurseries and showing them the items available. If they agreed to make a purchase, the items would be ordered and delivered to the customer. Other sales were made online.

16. In answer to questions asked by us by way of clarification, the appellant said that when they moved to Spain in January 2018, they intended to support themselves from the savings held by her partner. She said that they had not discussed setting up a business or being self-employed in Spain before moving to Spain, and having moved there in January 2018, she did not look at any employment opportunities. Her partner was not going out looking for a job either, although it is possible that he was looking on-line. She said that her partner was unable to speak Spanish and looking for a job would therefore be problematic. To the best of her recollection, it was several months after they had arrived in Spain before they discussed setting up a business. She did not know anything more about the business and how it operated, because the day-to-day running of the business was left to her partner. She said she was sure they had enough money to support themselves, but how that was done, was the responsibility of her partner.

17. Overall, we are satisfied the appellant is a credible witness in most respects who has done her best to assist the Tribunal. She was entirely candid in the evidence that she gave about the background to the move to Spain, and how they intended to support themselves. She was however unable to give any meaningful evidence as to whether there had been a genuine exercise of treaty rights when they lived in Spain. She candidly accepted her involvement in any trading by her partner was very limited. In the end, she candidly accepted she left all financial matters to her partner, and it was his responsibility to ensure they had sufficient funds to support themselves. She was unable to say how her partner imported items to sell from outside the EU. Her evidence was that her only involvement was that occasionally, she assisted with packaging. We note that is inconsistent with the

evidence of Mr Mekonen, who, when asked about the appellant's involvement in his trading activity, said that she had contacted her friend in Russia, helped him with communication and helped him get items at a very good price. Although we find the appellant to be a credible witness overall, we find that she has embellished her evidence regarding the assistance that she provided to her partner to support the claim that there was an exercise of treaty rights in Spain, and we reject her evidence in that regard.

18. Mr Samuel Mekonen adopted his witness statement dated 24th June 2019. He exhibits evidence of PayPal transactions that appear to relate to sales made via eBay. He also provides what he describes as bank statements showing payments to the Spanish Ministry of Employment and Social Security as well as evidence of his registration certificate for self-employment. He has also exhibited invoices from an accountant and an Internet provider.

19. In his evidence in chief, he was taken through the documents that are in the appellant's bundle. He said that at page 15, there is a letter from the Spanish Ministry of Employment and Social Security acknowledging his registration in the scheme operated in Spain for self-employed and freelance workers. The letter confirms the date of registration to be 20th February 2018 and sets out an 'initial contribution base' of €919.80. He said that the contribution is a fixed amount and is not dependent or based on the profit made. He confirmed the documents at pages 42 to 49 of the bundle are evidence of payments made by him in respect of the Social Security fees for self-employed workers.

20. Mr Mekonen was referred to the documents at pages 50 to 53 of the appellant's bundle and he confirmed that is evidence of payments made to an Accountant that he had contacted at the end of January or beginning of February 2018, to provide him with business advice and to deal with tax payments. The evidence demonstrates payments of €32.16 made to 'Limit Business Consulting SL' on 15th 14th March 2018 (*page 51)*, 18th May 2018 (*2 payments - pages 52 and 53)*, and on 15th June 2018 (*page 50)*. There are invoices raised by Limit Business Consulting SL at pages 54 to 56 of the bundle. The service provided is described as "Basic Plan – Software & Assistance".

21. Finally, Mr Mekonen was referred to the bank statements that are to be found at pages 78 to 90 of the appellant's bundle. Ms Rutherford pointed out that there appeared to be no credits into that account. Mr Mekonen said that the statements in the bundle relate to his private account and not the business account that he operated. He was asked why he has not provided the business account statements and he said that he was not asked to provide the statements relating to that account. When he was asked whether he is able to access the business account, Mr Mekonen said that the account had been closed in or about November or December 2018. When he was asked by Ms Rutherford about the lack of documents regarding his business, Mr Mekonen said that they brought instruments from his wife's friend in Russia and found customers in the local area. The business model operated was that if the customers were happy with the items and the price, the items would be ordered from Russia and delivered either to the customer directly, or to Mr Mekonen, for onward delivery to the customer. He does not have any purchase orders, and he said there was no customs documentation relating to the importation, because they made purchases in small values (€40 to €60), and in an extreme case to a value of €100, and the purchases from outside the EU did not attract any customs documents. Mr Mekonen said that he did not have any sales invoices because trading in Spain is more relaxed. When sales were made, he would confirm that the items had been delivered to the customer, and if the customer was happy with the items, they would then make payment to him. He accepted there was no evidence of any payments from customers before the Tribunal. He said that he did not give receipts or invoices to his customers, and payments were made by the customers in cash, which he kept at home.

22. Mr Mekonen told us that he started trading in about March 2018 and that in the first month he did OK, and then he was making a profit of between €600 and €1000 each month. He told us that when he went to Spain in January 2018 he had enough money to support himself for about a year, and he did not take any steps to look for employment. Because of language problems, he only intended to consider self-employment and he started trading sometime between the middle of February and March 2018. We asked whether he had completed any tax returns and he said that he had provided all his documents to his accountant, including details of the purchases and sales that he made, and his expenses, and the

accountant calculated how much tax he had to pay. He accepted there is no evidence before us regarding any tax calculations or information provided to the accountant.

23. In cross-examination, Mr Mekonen said that he was earning a salary of between £20,000 to £22,000 in the UK before he moved to Spain but accepted there is no evidence of that before the Tribunal. He said that when he moved to Spain, he initially planned to live off his savings and then become self-employed. He said that his accountant has everything to do with the accounts, and in the end, accepted that he did not pay any tax at all to the Spanish authorities. He explained that he understood the 'contribution base' payable to the Spanish Ministry of Employment and Social Security was not based on actual profit but was based upon an estimation of the profit that had been calculated by the accountant when he first registered. When asked about his business model, Mr Mekonen said that when he was buying products from Russia and China, the majority of items were delivered directly to customers, but some items were held by him in his flat. When asked why his customers would not buy directly from the suppliers, he said that he would give his customers a very good discount and ordinarily, when an order is placed on-line, payment must be made up-front. Buying through him, the customer was able to take delivery of the item first, and was only required to make payment to him, once the customer was happy with the goods delivered. He confirmed that he was making a profit of €600 to €1000 each month trading in that way. It was that profit, that he and the appellant used to meet their living costs, together with the savings he had.

24. Mr Bates referred Mr Mekonen to the bank statements in the appellant's bundle. There was an opening balance of €9,953.40 on 1st February 2018 *(page 90)*. The balance had dropped to €9,246.38 *(page 89)* on 9th February 2018, but the next statement shows a balance of €10,390.13 *(page 88)* on 12th March 2018. Mr Mekonen was unable to explain the missing bank statements or how the increase in the balance had come about. When asked about the appellant's involvement in the business, Mr Mekonen said that she had contacted her friend in Russia, helped him with communication and helped him get items at a very good price. When asked why there was no evidence from his wife's friend in Russia, who is likely to have retained the commercial documents surrounding the sale of goods to Mr

Mekonen and dispatched to his customers, Mr Mekonen said that they exchanged 'WhatsApp' messages. He said that he would give her the delivery address for the items being purchased, and she would send the relevant information to him once the items had been sent out. He would then confirm when the payment was made to her. Mr Mekonen confirmed that there is no evidence before us regarding that exchange of 'WhatsApp' messages. Mr Bates put to Mr Mekonen that the evidence of transactions that is before the Tribunal, relates to low value items, and it is difficult to see how the profits claimed could be achieved once costs of transportation from Russia and China are taken into account. Mr Mekonen simply claimed that items would be sent to him in a big box to minimise transportation costs, and the customers were not charged for postage. The transportation costs were included in the sale price. By way of clarification, we asked Mr Mekonen what the overall profit margin was. He claimed it was hard to predict. He would receive a box containing 20 to 25 items and he would make a profit of about €60 from each box. We suggested to Mr Mekonen that taking his figures conservatively, to achieve a profit of €600 each month, he would have to receive at least 10 boxes each month, and that is likely to have attracted the attention of customs. Mr Mekonen said that he did not think it was a problem in relation to items purchased from China and that 90% of the time, the items were delivered directly to his customers so did not come to him. He accepted there is no evidence before us of any payments made to suppliers in China or Russia or of any payments received by him from customers that he sold to save for the PayPal transactions. He maintained that he was told that there were no issues regarding customs duties in relation to his trading.

25. We accept as Ms Rutherford submits, that the ultimate failure of a genuine business that is established, is not to say that there was no genuine trade or that Mr Mekonen was not genuinely exercising treaty rights. However, having had the opportunity of hearing his evidence, we have no hesitation in concluding that Mr Mekonen is not a credible witness, and we conclude that he is not being honest about his claimed self-employment in Spain. His evidence is internally inconsistent, and he was unable to give us a cogent account of his trading activity or the business model that he claims to have operated. He was vague in the evidence that he gave before us, and his evidence lacked any detail and clarity. His evidence is not supported by evidence that would be readily available.

26. We accept that there is evidence before us that in February 2018, Mr Mekonen registered with the Spanish Ministry of Employment and Social Security under a special scheme for self-employed and freelance workers. The simple fact of registration does not on its own establish that there has been a genuine exercise of treaty rights by Mr Mekonen as a self-employed person. We accept the 'Economic activity' stated was 'Retail trade by mail', which is consistent with the account given by Mr Mekonen of his trading activity. By analogy, it is possible for an individual to register with HMRC in the UK as being self employed, but the mere fact of registration is not to say that the individual has in fact traded. Whether the individual has traded is then a matter ordinarily demonstrated by the commercial documents relating to the trading activity, accounts prepared, and any submissions made to the authorities in relation to matters such as import duties and tax and national insurance liabilities.

27. In our search for evidence regarding the trading activities of Mr Mekonen, and whether we can be satisfied that there had been a genuine exercise of treaty rights we turn to the evidence relied upon by Mr Mekonen to support his claims. We accept there is evidence before us relating to payments made to the Spanish Ministry of Employment and Social Security, however there is no evidence before us regarding the information provided, leading to the calculation of the 'contribution base', or of any forecasts provided. Furthermore the evidence of those payments is extremely limited and simply demonstrates the following payments were made during the three months between March 2018 May 2018:

Date	Amount	Period	Page number in bundle
28.03.18	€32.23	02/02 - 2018	44 (translation at 47)
28.03.18	€50.92	03/03 - 2018	46 (translation at 45)
30.04.18	€50.92	04/04 - 2018	48 (translation at 49)
31.05.18	€50.92	05/05 - 2018	42 (translation at 43)

28. There is evidence before the Tribunal relating to 'PayPal transactions' at pages 28 to 41 of the appellant's bundle. At its highest, the evidence establishes the following transactions:

Date	Price	Payment received	Page number in bundle
25.02.18	€25.50	€24.28	30
25.03.18	€25.00	€23.80	28

27.03.18	€ 5.98	€ 5.43	38
27.03.18	€ 2.99	€ 2.54	40
27.03.18	€ 2.99	€ 2.54	41
04.04.18	€ 5.98	€ 5.43	39
06.04.18	€ 8.97	€ 8.32	36
06.04.18	€ 4.99	€ 4.47	37
10.04.18	€39.00	€37.32	29
10.04.18	€ 2.99	€ 2.54	35
12.04.18	€ 2.99	€ 2.54	31
12.04.18	€ 8.00	€ 7.38	32
12.04.18	€ 2.99	€ 2.54	33
12.04.18	€ 8.00	€ 7.38	34
TOTAL	**€146.37**	**€136.51**	

29. There is nothing within the evidence relating to the 'PayPal transactions' that links the 'PayPal' account to either the appellant or Mr Mekonen. The payments appear to relate to eBay transactions and although there are 14 payments received, there are only 5 customers; Musicales Torre *(pages 28, 30, 38, 40 and 41)*, Diego Contana *(pages 29, 33, 34, 36, and 39)* Regalitos Para Todos *(pages 31 and 35)*, Fernando Gomez *(page 32)* and Mika Andrea *(page 37)*. There is no evidence before us of the payments received via PayPal being transferred into a Bank account held by Mr Mekonen, but even if we accept that the PayPal account belongs to Mr Mekonen, that evidence does not even begin to support the claim made by Mr Mekonen that in the first month he did OK, and he was then making a profit of between €600 and €1000 each month. The PayPal transactions show that there was a single payment received *(after deduction of PayPal fees)* of €24.28 in February 2018 and then payments received of €34.31 in March 2018 and €77.92 in April 2018. The payments received reflect the value of the sales but before the profit on the transactions can be calculated, one would have to have regard to the purchase price of the goods sold, and other associated costs, such as the costs of transportation of the goods from Russia or China to Spain. The PayPal account held by Mr Mekonen is an account that he would readily have access to, and there is no evidence before us regarding any other transactions. Similarly, if sales were regularly made on-line to meet local demand, we would expect to see evidence of the adverts placed by Mr Mekonen on on-line platforms such as eBay demonstrating a regular pattern of on-going trading. There is no such evidence before us, although again, that would be evidence readily available to Mr Mekonen.

30. We reject the evidence of Mr Mekonen that he received payments by cash that he simply kept at home. We acknowledge that it is quite possible that some local customers might make payment by cash, but even so, we would expect to see evidence of some of that cash being deposited into an account or being remitted as payments to his suppliers in China and Russia. By way of clarification, we asked Mr Mekonen whether he kept a record of any of the cash received. He initially said that he kept a manuscript note of the payment for himself, that he kept for about 14 days, because a customer would only have 14 days to reject the goods. We asked him what he did with the notes, and he then claimed that the cash payments were recorded in a small book. He said that when they moved from Spain, he did not think the notebook would be relevant and so he does not have it. When we pressed him as to how he would know what his tax liability would be based upon his income, if there was no record of the cash payments received, Mr Mekonen then claimed that the information was recorded in an 'App' that they have downloaded. They recorded in that 'App', how much they had paid for the items and how much the items were sold for. He accepted there is no evidence of the information recorded, in the evidence before us. The initial claim that Mr Mekonen retained a manuscript note of the cash received for 14 days because a customer would only have 14 days to reject the goods, makes no sense in light of his evidence that the customer would only make payment for the goods after they had been delivered, and the customer was happy with the goods delivered. According to his account of the business model, the customer would not make the cash payment to Mr Mekonen if the customer was not happy with the goods and so it is difficult to see what a manuscript note of the cash received, would have added. It was clear to us that Mr Mekonen was adapting his evidence as he went along when the difficulties with his evidence were pointed out to him.

31. We gain no assistance at all from the evidence at pages 50 to 56 of the appellant's bundle of invoices and payments made to 'Limit Business Consulting SL' of €32.61 on 14th March 2018, 18th May 2018 and 15th June 2018. Mr Mekonen claims that is evidence of payments made to an Accountant that he had contacted at the end of January or beginning of February 2018, to provide him with business advice and to deal with tax payments. The invoices describe the service provided as "Basic Plan – Software & Assistance", but there is no evidence before us regarding the software provided, or of any assistance. If the software being referred to, is the

'App' that Mr Mekonen referred to in his evidence when we pressed him regarding his records for the purchases and sales that he made, we are surprised there is no evidence before us of the information recorded. Evidence of the self-employed activities of Mr Mekonen would have been readily available to Mr Mekonen from his Accountant, who would no doubt have maintained records if, as Mr Mekonen claims, the Accountant dealt with all his tax affairs. The records would be required to establish any tax liability, but no such evidence is before us. In the end Mr Mekonen accepted that he had in fact paid no tax to the Spanish authorities on any earnings from self employment, and there is no evidence of any declarations made by Mr Mekonen to the authorities relating to any income from self-employment.

32. Equally we gain no assistance from the invoices before us at pages 57 to 60 of the appellant's bundle. Those invoices relate to an Internet connection and is not evidence of trading. There is a distinct lack of commercial documentation before us. There are no purchase orders whatsoever recording the orders placed by customers or orders placed by Mr Mekonen with his suppliers. There are no invoices recording the sales made by Mr Mekonen or in relation to the purchases that he made from his suppliers. There is no documentation relating to any shipping or transportation costs related to purchases made by Mr Mekonen from either Russia or China. There are no documents confirming dispatch of goods from Russia or China or of delivery to Mr Mekonen or his customers. The only bank statements that are relied upon by the appellant are bank statements relating to an account held by Mr Mekonen, but when his attention was drawn to the fact that there are no credits into that account, he claimed that he had a separate business account relating to his business activity. It is simply incredible that having been able to provide statements relating to a personal account, Mr Mekonen has failed to disclose the account relating to his self-employment, when the issue before us is whether there has been a genuine exercise of treaty rights and that any self-employment must have been genuine and effective. There is no evidence at all before us of any payments being made to anyone in Russia or China relating to the purchase of goods. To generate a profit of €600 to €1000 each month, we would expect to see at least some evidence of the payments made in relation to the purchase of goods.

33. Mr Mekonen was very vague in his evidence before us regarding his trading activity and his business model. When asked about transportation and customs liabilities, Mr Mekenon initially claimed that there was no customs documentation relating to the importation, because he made purchases in small values (€40 to €60), and in an extreme case to a value of €100, and the purchases did not attract any customs documents. When we asked him about his profit margin he claimed it was hard to predict and that he would receive a box containing 20 to 25 items and he would make a profit of about €60 from each box. When we pointed out that to make a profit of €600 each month, he would have to receive about 10 boxes each month, he then claimed that 90% of the time, the items were delivered directly to his customers so did not come to him. That is certainly not borne out by the limited evidence before us. There is no evidence before us whatsoever to support a claim that any boxes of small value goods were delivered to customers from either China or Russia. The claim made by Mr Mekonen is incredible because the shipping costs alone are likely to have been prohibitive. In any event we do not accept that without any commercial documentation either in the form of a purchase order from his customer or any documents relating to delivery of the goods to the customer, Mr Mekonen would arrange for delivery of goods from China or Russia direct to the customer. The risks associated with that, of goods simply being rejected once delivered, or of non-payment by the customer without any recourse to commercial documents would be significant.

34. At its highest, any income that he may have generated from the very low level of sales that he made as evidenced in the appellant's bundle, is of the type that one might expect to see where a person is periodically selling small value items on platforms such as eBay. We have considered whether Mr Mekonen operated a genuine business that had simply failed, but on the evidence before us and the findings we have made, we find there was no genuine attempt by Mr Mekonen to trade in Spain as a self-employed person. We accept on the evidence before us that the appellant and Mr Mekonen lived together in Spain but looking at all the evidence before us in the round, we do not accept that there was a genuine and effective exercise of treaty rights by Mr Mekonen as a self-employed person.

35. It follows that the appeal is dismissed.

Notice of Decision

36. The appeal is dismissed.

Signed *V. L. Mandalia* Date 12th November 2021

Upper Tribunal Judge Mandalia