



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/22457/2013
IA/22458/2013
IA/22459/2013
IA/22460/2013
IA/22461/2013

THE IMMIGRATION ACTS

Heard at Field House
On 14th March 2014

Determination Promulgated
On 4th April 2014

Before

UPPER TRIBUNAL JUDGE KING TD

Between

ERIC CAMARGO DUARTE ANDRADE
GLAUCIA PEREIRA SOUSA ANDRADE
LAURA PEREIRA SOUSA ANDRADE
DANIEL PEREIRA SOUSA ANDRADE
MATTHEW PEREIRA SOUSA ANDRADE

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: First Appellant in person
For the Respondent: Mr G Saunders, Senior Home Office Presenting officer

DETERMINATION AND REASONS

1. Appeals are brought against the decisions by the respondent to refuse to issue a registration certificate to the principal appellant and residence cards to the second appellant, his wife, and the third, fourth and fifth appellants, the children. The first appellant is a national of Portugal born on 21st August 1982. The second appellant is a national of Brazil and the third, fourth and fifth appellants are also nationals of Brazil.
2. It is not in dispute that the second, third, fourth and fifth appellants are dependants upon the first appellant's claim and are family members of an EEA national.
3. The central issue being whether or not he is exercising treaty rights in the United Kingdom so as to entitle him and his family members to the residence certificates as requested.
4. The appeal came before First-tier Tribunal Judge Kimnell on 14th January 2014. The appeal was determined without a hearing upon the papers. A large bundle of documents were submitted under cover of a letter of 2nd October 2013 from London Help 4U.
5. In the reasons for refusal dated 22nd May 2013, the Secretary of State notes the documentation that was submitted including a 2011 tax return, 2012 tax return, accountant's letters, financial statements, salaries and a letter from the employer. Seemingly documents that are dated more than six weeks prior to the application will not be considered. The decision letter regarded most of the documentation that had been submitted to be prior to the relevant period and for that reason the applications were refused.
6. It has been noted that the application was made on 10th December 2012.
7. The Judge sets out a number of those documents in the course of the decision in particular paragraph 8 as follows:-

“Turning to the financial evidence, Vertice Services have quoted a fee for preparing a tax assessment for the year 2012/2013 followed by a form for registering for self-assessment and national insurance contributions as a self-employed sole-trader. A self-employed profit and loss account dated 13th November 2013 covered the period 1st April 2012 to 18th October 2012 and shows an income of £5,000. That income is consistent with the salary statement provided by the Embassy of the Republic of Sudan which shows that the appellant is paid as a driver at a rate of £1,000 per month. The salary statement to the end of September 2012 is dated 9th October 2012. “

8. The Judge goes on to find that the tax returns for the tax year ending 2011 and 2012 are consistent with the material provided to the respondent.
9. However the Judge was unable, when looking at the bank statements, to identify any payment of £1,000 from the Embassy of Sudan. Various transfers and various accounts are noted but the source of those transfers was unknown.
10. It was also noted that in the bundle of documents appeared a balance sheet and tax return for the year ending 5th April 2013. According to the computation summary, the net income from trading profit is £10,270.57, although that is annotated as being tax credit.
11. The Judge concludes that the evidence does not establish upon the balance of probabilities that at the time of his application, or indeed at the hearing, the first appellant was an employed or self-employed person exercising treaty rights in the United Kingdom.
12. According the appeal was dismissed in respect of each and every one of the appellants.
13. Grounds of appeal were submitted against that decision on the basis that the Judge had not properly considered the documentation. Further it was not correct for him to require that the £1,000 must be reflected in the bank statements particularly when that was paid by cash.
14. It was contended that the documents clearly showed that the first appellant was present and currently working in the UK and economically active. The comment is made that an unduly high threshold was expected by the Judge.
15. Permission to appeal was granted on the basis that the Judge's positive findings concerning the first appellant's self-employment at paragraphs 8, 9, 10 and 12 of the determination were inconsistent with his conclusion at paragraph 13. It was considered that the conclusion appeared to be against the weight of the evidence and was for that reason in error.
16. Thus the matter comes before me in pursuance of that grant of permission.
17. The first appellant and second appellant appear unrepresented. Although they had the services of a legal representative it did not extend to their being represented at the hearing. For the purpose of the hearing London Help 4U had prepared a bundle of documents under cover of a letter of 5th March 2014, together with a skeleton argument.
18. Essentially the documents in the bundle were those that were submitted before the First-tier Tribunal.

19. The first appellant indicated that he did not understand why it was that the Judge did not accept that he was employed by the embassy and received the payment which was claimed. He invited my attention to the original bundle that was before the First-tier Tribunal Judge. There was a letter at N1 from the Embassy of the Republic of Sudan dated 26th August 2011 certifying that the appellant was employed by the embassy as a chauffeur since April 2011 and received a salary of £1,000 per month.
20. There were further salary statements from the Embassy of the Republic on the following pages setting out from April 2011 to September 2012 the salary which he receives and the payment which was made.
21. Although some reason reference is made to salary in net terms, it was apparent from the schedules that it should be read gross .
22. He indicated that the way in which he accounted for his earnings to Her Majesty's Custom and Revenue was somewhat complicated but he was only following what he was told to do namely to submit self-assessment tax returns. This he has consistently done with the tax returns for the tax year ending 2011, 2012 and 2013. That means he is able to pay the tax that is required to be paid.
23. In that connection my attention was drawn to page 54 of the bundle to a letter from Vertice Services of 13th November 2012. It was clear that in accordance with HMRC guidelines, in order to legally set up as a self-employed sole trader, the potential self-employed person must register and set up a financial recordkeeping system which involves the completion of a self-assessment tax return every year and paying class 2 and class 4 national insurance contributions.
24. It was confirmed that under HM Revenue & Customs guidelines the first appellant is recognised as self-employed and is meeting his obligations under the Regulations.
25. The first appellant explained that because he received cash most of his payments did not go through the bank but he met his obligations. Some of the money did find its way into his bank account as can be seen from his bank statements.
26. He also pointed out that in the bundle there was also a letter dated 22nd October 2013 from the Embassy of the Republic of the Sudan confirming that the appellant is employed by the embassy and is paid a monthly salary he being responsible for paying his own tax and national insurance. In the absence of any suggestion that these documents are false it is difficult to understand why the Judge came to the conclusion that he did.
27. A document that was not before the Judge was presented namely a letter from the Embassy of the Republic of Sudan dated 3rd March 2014 confirming that the appellant was employed at a monthly salary payable in cash. His salary on that occasion was

described at £1300 . The appellant said that he was receiving more money now than before because of his long service.

28. Mr Saunders invited me to find that there was no error on the part of the Judge. The matter had been considered upon the papers and the Judge had looked at all the documents and was entitled to be concerned as to the lack of any physical sign of the money going through the appellant's bank account.
29. It seems to me ,howeve,r a matter of fundamental importance that in giving reasons for a decision such reasons should be understood by those reading the decision so to explain why the decision came to be made.
30. The documentation, which was presented before the Judge, was of considerable volume and from many sources. There were letters from the accountants producing documents and accounts. There were documents from Her Majesty's Customs and Revenue concerning money and tax paid. There were letters from the embassy concerning the remuneration payment to the first appellant and confirming that he was employed by them.
31. Clearly it is a somewhat complicated way of managing the finances to seek to be described as self-employed, whereas in fact the easier route would have been to be regarded as employed and tax paid PAYE. It is not entirely clear why that could not be done but there may be some difficulties for embassies I know not. In any event, whether the appellant was paid as an employee or whether he is rightly to be regarded as self-employed, the issue is whether or not he received remuneration from the embassy and was therefore properly to be regarded as a worker for the Regulations.
32. If the Judge was of the view that the documents were unreliable or untrue as to their nature and effect that is a finding that should have been made. It would have been a bold finding in all the circumstances, particularly bearing in mind the standard and burden of proof that is to be applied.
33. I recognise of course in fairness to the Judge that dealing with the matter on the papers is sometimes very difficult, particularly when a matter of concern such as where the money is coming from and going to arises in the course of consideration. The appellant is not there to answer such questions.
34. As is set out in the skeleton argument ,which accompanied the bundle, there were many documents from so many sources to show that the appellant was present and currently working in the United Kingdom and active economically.
35. What was raised by the respondent in the refusal letter was not that the documents were false or unreliable but that they were not as recent to the application as they should have been. That was not a point which was taken by the Judge in

consideration of those documents nor taken before me.. The issue was to how the first appellant was paid and it was not raised in the reasons for refusal and seemingly has not been dealt with in the bundle at all.

36. It seems to me that as a matter of fairness, that if this new aspect troubled the Judge as clearly it did, the decision should have been adjourned for clarification on that point or list it for an oral hearing.
37. During the course of the hearing the Judge has made no adverse comment as to the documents that had been presented before him and acknowledges that, so far as the profit and loss accounts are concerned, they are consistent with the salary statement provided by the Embassy of the Republic of the Sudan. At no stage did the Judge indicate what weight he gives those documents. By giving the documents such little weight as clearly he has done I find that he has imposed an unduly high burden and standard of proof. In such circumstances I uphold the concerns that were expressed in the grant of permission. I find that the Judge's conclusions are against the weight of the evidence and in the light of no reasoned link between those documents and the absence of evidence of payment through a bank, the judge has imposed an unreasonably and unfair standard and burden to be met by the appellant.
38. Accordingly I find there to be an error of law.
39. I seek therefore to remake the decision in the light of the evidence of the appellants and in the light of all the documents that have been presented. Mr Saunders indicated that he did not want to ask the appellant any questions and was to content to leave the resolution of the issues to me. It is clear from looking at the bank accounts that some cash is paid into the account from time to time so as to maintain a relatively modest balance. I questioned the appellant about certain entries in his bank account and he gave an explanation as to the sums involved.
40. There are some entries which seem to be by cheque or by BAC but I did not consider that it was my task to investigate every entry in any great detail.
41. The central issue is whether or not the appellant is indeed paid a salary via the embassy which he converts to his own use and is a worker for the purposes of the Regulations. I find, having looked at all the documents in particular the documents from the embassy and the documents submitted to the Revenue and Customs, that the appellant is receiving such payment therefore is to be deemed a worker within the 2006 Regulations. I do so on the balance of probability.
42. In those circumstances I find that he is entitled to the registration certificate. There is no issue taken as to the genuineness of the relationship as between himself and the other appellants such that they should be deprived of a similar grant in line with his.

43. In the circumstances therefore the appeals of each and every appellant is allowed.

Signed

Date

Upper Tribunal Judge King TD