Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/36661/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 December 2015	**On 20 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MS SHEENA AGNES GALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Walsh, Counsel, instructed by Universe Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Del Fabbro (Judge Del Fabbro), promulgated on 20 May 2015, in which he dismissed her appeal against the Respondent's refusal to issue her with a permanent residence card under the Immigration (European Economic Area) Regulations 2006 (the Regulations).

2. The Appellant has at all material times been a family member of an EEA national, a Polish citizen whom she married on 5 July 2008. Following the marriage a residence card was applied for and then granted by the

Respondent, running from 25 September 2008 until 25 September 2013. In late 2013 the couple separated but have not as yet divorced. The application for the permanent residence card was made on 25 July 2013. The initial refusal of the application was subsequently withdrawn by the Respondent and a fresh decision issued. The appeal came before Judge Del Fabbro on 9 April 2015.

3. At paragraph 6 of this decision he set out the evidence that was before him and at paragraphs 16 to 18 he considered that evidence and concluded that there was insufficient information for him to be satisfied that the EEA national had in fact been exercising his Treaty rights in the United Kingdom for a continuous period of five years. Reference was made to various items of documentary evidence before him, to the fact that there was no direct evidence from the EEA national himself, to the small amounts of National Insurance contributions made by the EEA national over the course of time, and to the absence of other evidence showing economic activity. It is said in paragraph 18 that there was no "clear and cogent evidence" upon which the judge could conclude in the Appellant's favour. He therefore dismissed the appeal under the Regulations. There was no Article 8 issue before him.

4. The Appellant sought permission to appeal and this was refused by the First-tier Tribunal but then granted by Upper Tribunal Judge Canavan on 10 September 2015. She commented that in light of the documentary evidence, in particular the SA302 forms from HMRC, it was arguable that Judge Del Fabbro had in fact applied too high a standard of proof in respect of the evidence before him and in light of the issues to be decided.

The Hearing before me

5. At the outset of the hearing Mr Clarke confirmed that he was not conceding any issues in this case and he relied upon the Rule 24 notice. Mr Walsh submitted that the HMRC documents referred to in the grant of permission were strong and cogent evidence of the EEA national's exercise of Treaty rights during the five-year period from 2008 to 2013. The Respondent herself had accepted that he was exercising such rights in 2008 when the initial application for the residence card was granted. There was effective and genuine self-employment by the EEA national. The judge had failed to engage with the SA302 forms adequately. He had misdirected himself as to the amount of National Insurance contributions paid by the EEA national and had failed to have any regard to the fact that contributions were based upon profit: when the profits did not reach a certain threshold, no contributions were payable. In addition to the SA302 forms, Mr Walsh referred me to tax assessment statements and to the self-employment short forms. He then relied on the decision of the Court of Justice of the European Union in the case of Levin [1982] ECR 1035, and referred me to paragraphs 2 to 4, 13 to 14 and 16 to 17 thereof. I was referred to Appellant's first bundle, which had been before the judge. He referred me to the Appellant's witness statement and pages 74, 75, 83 and 85 of that first bundle. He also referred me to pages 74 to 77 of the Appellant's

second bundle. The evidence contained in these pages, Mr Walsh submitted, was sufficient to have satisfied the relevant standard of proof.

6. In his submissions, Mr Clarke accepted that the judge had made a minor error in suggesting that the relevant five-year period was that leading up to the date of application or the date of decision: the five-year period could arise at any time provided that it was continuous. Mr Clarke submitted that the judge had in fact referred to all relevant evidence, had taken it into account, and had reached conclusions that were open to him. There was nothing irrational in his approach. He relied on the Court of Appeal decision in Amos [2011] EWCA Civ 552 for the point that the Respondent was not under a duty to seek out evidence from HMRC. Mr Clarke submitted that it was to be expected that the Appellant should have provided more evidence about the EEA national's self-employment at the relevant time. There were no audited accounts and very little evidence about the actual economic activity during the relevant period.

7. In reply, Mr Walsh suggested that the judge should have gone on and considered an alternative basis for a right of residence in respect of the Appellant even if she was not entitled to permanent residence. Mr Clarke responded to that by stating that this point had not been raised before the judge, was not in the grounds of appeal and in any event the evidence did not show that the EEA national was either a worker or in self-employment as at the date of hearing before the judge.

Decision on error of law

8. In my view the judge has made a material error of law in this case. This could be categorised in one of two ways. First, that despite his self-direction in paragraphs 15 and 16, the Judge Del Fabbro did not ultimately apply the correct standard of proof and effectively required something specifically more when assessing the evidence as a whole. Alternatively, and in line with a point raised in the grounds, the conclusions he reached based upon the evidence that was before him was one to which no Tribunal properly directed to the relevant evidence and standard of proof could reasonably have come.

9. The evidence emanating from HMRC consisting of the SA302 forms for the five years 2008 to 2013 were contained in the Respondent's bundle at G1 to G6. There is no suggestion that these forms were false or unreliable and the judge certainly did not find that the EEA national had fabricated any evidence submitted to the HMRC. Whilst of course the burden of proving her case rested with the Appellant, there was nothing from the Respondent to contradict the HMRC evidence. The forms all showed that profit was being generated, albeit not of any particularly high value. The fact that little tax was due does not mean that there was no genuine economic activity given that the profits were of course net of relevant expenses and bearing in mind the purposive interpretation that one must apply in respect of the concepts of working and self-employment in light of the decision in Levin. In my view what is said by the judge in paragraph 17, namely that the SA302 forms to which I have referred provided only

"little support" for the contention that the EEA national was exercising Treaty rights indicates either that the relevant standard of proof has not been applied or that the judge was simply not entitled to have reached that conclusion (when combined with the evidence as a whole).

10. Further, the SA302s were supported by additional documentary evidence contained within the Respondent's bundle, evidence that again emanated from the HMRC. The judge placed weight upon the fact that there was minimal National Insurance contributions and that in his view these had only been paid for a four-month period. With respect to the judge, this ignored the fact that such contributions only become payable once a certain taxable income threshold is reached, a fact that was not challenged by Mr Clarke at the hearing before me.

11. In addition to the HMRC documents there were before Judge Del Fabbro a number of invoices relating to building materials that could only have related to the EEA national's claimed self-employment. These are numerous and had not as far as I can see been challenged at any stage. Bank statements for the EEA national also showed relevant money being paid into his account albeit not on a regular basis. However, as far as I can see from the papers it was not the Appellant's case that earnings from the EEA national's building work was regularly paid in or that he had an accountant who could have prepared audited accounts. Indeed it was in fact the Appellant's case before the judge that the EEA national was disorganised when it came to his financial affairs. In my view the judge has not looked at the evidence as a whole and in the manner in which it was put and has in reality required too much by way of proof from the Appellant, thus again indicating that a higher standard of proof was in fact applied, or that the ultimate conclusion reached was not one properly open to the judge on the evidence before him.

12. The Appellant herself gave evidence before Judge Del Fabbro, and there are witness statements in the papers before me. She was living together with the EEA national during the relevant five-year period between 2008 and 2013 and there are no adverse credibility findings from the judge in respect of her evidence. As I read that evidence, she was asserting that the EEA national was self-employed in the building trade. That evidence was clearly relevant to the issue of whether he was exercising Treaty rights for the relevant period, and yet the judge has not taken this into account or, more likely, has applied a higher threshold of required proof than was appropriate to the totality of the evidence. In my view Mr Walsh was right to emphasise the fact that the Respondent herself had accepted certain evidence when granting the residence card in 2008, and that that evidence included the first of the SA302 documents at G1 of the Respondent's bundle and an unaudited profit and loss account document (also in the bundle). Given that this evidence was deemed to be satisfactory by the Respondent in 2008 it is then difficult to see why similar evidence covering a period thereafter was deemed insufficient by the judge.

13. In my view, given the Appellant's circumstances as set out before the judge and accepted by him, in particular that she had separated from the EEA national in late 2013 (and despite the fact that they still occasionally met up), she had adduced a variety of items of evidence relating to his exercising of Treaty rights from a variety of sources, including of course the HMRC. Given that the standard of proof was only that of the balance of probabilities the decision taken as a whole discloses one or other of the two errors to which I have eluded previously. I therefore set aside the decision of the First-tier Tribunal.

Disposal

14. Both representatives were agreed that if I were to find a material error of law I could proceed to re-make the decision on the evidence before me.

15. Having regard to all of the evidence referred to previously and the additional evidence submitted for the purposes of the hearing in the Upper Tribunal under cover of a letter dated 3 December 2015 (in particular pages 16-42 of the bundle), I find that the EEA national was in fact exercising Treaty rights as a self-employed person, and therefore a "qualified person", for the continuous period of five years beginning at the latest in July 2008 and at least up until July 2013. In support of this conclusion I rely in particular on the SA302s contained in the Respondent's bundle referred to earlier, the other evidence HMRC contained therein, the invoices relating to the buying of building materials, and the evidence of the Appellant herself contained in a witness statement the truth of which I have no reason to doubt. In respect of the last item, given that her evidence relates to a period when she was still actually living with the EEA national, I find that she was and is able to provide direct and reliable evidence in respect of the particular issue with which I am now dealing.

16. It follows that the EEA national had himself acquired a permanent right of residence in the United Kingdom at the latest by July 2013. In turn, I find that the Appellant, being the EEA national's "family member" at all material times, also acquired a right of permanent residence in accordance with Regulation 15(1)(b) of the Regulations as of July 2013. There is no evidence to suggest that she has subsequently lost that right. As such she is entitled to the issuance of a permanent residence card under Regulation 18. Her appeal is therefore allowed on this basis.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I re-make the decision by allowing the appeal under the Immigration (European Economic Area) Regulations 2006.

No anonymity direction is made.

Signed Date: 17 January 2016
Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award because this is a case in which it cannot be said that the Appellant's original application to the Respondent should clearly have been successful. Although a certain amount of evidence was supplied at first instance, additional material evidence only became available on appeal.

Signed Date: 17 January 2016

Deputy Upper Tribunal Judge Norton-Taylor