Upper Tribunal
(Immigration and Asylum Chamber)

EA/03261/2018

THE IMMIGRATION ACTS

Heard at Glasgow
On 19 July 2019

Decision & Reasons Promulgated
On 1 August 2019

Before

UT JUDGE MACLEMAN

Between

AZIF AMIN ADEEL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by Jones Whyte, Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant applied on 20 December 2017 for a permanent residence card as the former family member of an EEA national exercising treaty rights in the UK who has retained a right of residence.

2. The respondent refused that application for reasons set out in a detailed letter dated 19 March 2018. The letter sets out why the evidence provided is considered inadequate, and what the respondent would expect to see if the appellant were to apply again. The appellant did not take that route, but appealed to the FtT.

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3. In his decision promulgated on 12 February 2019, FtT Judge Farrelly at paragraph 25 was "not satisfied that the appellant has demonstrated that his former wife was exercising treaty rights as required", and dismissed the appeal.

4. The grounds of appeal to the Ut are as follows:

> "1. At [19 – 22] the judge highlights papers provided confirming self-employment. The judge then goes on to mention at [24] "it is difficult to see how on the figures presented the self-employment was meaningful and how she sustained herself". The judge has used the incorrect test. The cases of *D M Levin v S* (C-53/81) and *Kempf v S* (C-139/85) both concerned very low earnings, and both succeeded. In *Levin* the issue had been whether earnings below the level considered necessary to support a person would count and they did. On the facts of *Levin*, the claimant had alternative resources available. In *Kempf*, the claimant did not have alternative income and claimed benefits at the same time as working because his income was so low.
>
> 2. The appellant had provided documents which have not been taken into consideration by the judge. At [25] the judge has not considered or, at the very least, not provided the reasoning why the evidence before him should not be taken into account."

5. On 21 March 2019 FTT Judge Osborne granted permission, for these reasons:

> "… In an otherwise careful decision it is at least arguable that in requiring the self-employment of the European national to be "meaningful" at [24], the judge applied the wrong test.
>
> As this arguable error of law has been identified, all grounds are arguable."

6. The points which I noted from the submissions by Mr Winter were these:

   (i) It was an error to ask at [24] whether the self-employment was meaningful. The question should have been whether it was genuine and effective.

   (ii) At [19 – 23], the judge conflated the issues.

   (iii) The decision could not be saved by equating "meaningful" to "genuine and effective", because the evidence narrated clearly did meet the test in *Levin* at [13, 16, & 17] reiterated in *Kemp* at [13 – 15].

   (iv) The point intended by ground 2 was that at [25] the judge was wrong to rely on gaps in the employment history, as by piecing together the periods of employment accepted in the refusal letter with the evidence in the appellant's FtT inventory, there was no gap.

   (v) It was accepted that no schedule had been provided, but the evidence was clear.

   (vi) The decision of the FtT should be reversed.

7. Mr Whitwell submitted thus:

(i) The term “meaningful” at [24] might not be the best choice, but in context of the decision as a whole, and [19 – 23] in particular, the judge had effectively found the self-employment not to be genuine and effective.

(ii) The earnings over the 4 years referred to at [19 – 23] were erratic, and over the period came to about £33 per week. That was no more than marginal and ancillary, in the language of the case law, and the judge was entitled to find it not meaningful. The exact phrase used did not matter.

(iii) It was notable that the evidence of late filing of a tax return and of a subsequent demand dated from just after the respondent’s decision, and there was no evidence the tax assessed had been paid.

(iv) The decision should stand.

8. Mr Winter said in reply:

(i) The point about the timing of the tax return had not been made in the FtT, and came too late.

(ii) The level of earnings in *Levin* had been similar, about £30 per week

(iii) On the correct test, the decision fell to be reversed on ground 1 alone, even if ground 2 was not made out.

9. I reserved my decision.

10. I deal firstly with ground 2.

11. The respondent’s decision makes clear sense in setting out what is to be looked for in establishing a case of this nature.

12. The appellant’s response was in his statement, item 2 of his FtT bundle, the further documents in that bundle, and in his oral evidence. I am unable to accept the submission that it was clear from that evidence that the gaps had been filled. The respondent continued to submit at the hearing that they had not. It was for the appellant to supply a precise chronology, indexed to the evidence, with figures, to establish the contrary. It was not for the judge to extricate his case from 29 items in an 89-page bundle.

13. It is still not made apparent that there was such a case to be found.

14. Apart from that, parts of the explanations tendered were weak, such as the presentation of late tax returns, as commented on by the judge at [24].

15. The second ground of appeal is far too vague. It persists in the error of failing to specify what the appellant’s case was, and passing to the judge a task which was his.

16. I am also unable to uphold the submission that ground 1 would be enough on its own. Without any clear presentation of how and when the sponsor had been exercising her treaty rights, any error over the legal test is immaterial.

17. All that ground 1 takes from the case law is that other cases have succeeded where earnings were low. That does not amount to a rule that all cases where income is low, without more, demonstrate the exercise of treaty rights and entitlement to a residence card.

18. *Levin* at [16] shows that economic activity may suffice although it falls below what is regarded as the minimum for subsistence, or less than the minimum wage, but must not be "of such small degree that it appears to be merely minimal and subsidiary"; freedom of movement is guaranteed only to those who "perform or wish to perform an activity of an economic nature"; and finally, at [18], income may be below the minimum for subsistence set in the member state so long as it is "real and actual work in paid employment".

19. *Kempf*, as Mr Winter said, confirms but does not add to those principles.

20. The term "meaningful" does not appear to me to be clearly distinguishable from "genuine and effective". I have been referred to no authority that to use any term other than the latter is, in this context, a legal error.

21. Decisions must be read fairly and as a whole. The respondent did not say that the sponsor had not engaged in economic activity, but refused the application because it was at a low level, and not shown to cover the whole period. The appellant did not clarify exactly what the activity amounted to, and when. This was a case around the borderline. I could not say that the appellant's case is impossible ever to establish. However, ground 1 does not show that the judge's conclusion that he had failed to do so, on his presentation to the FtT, involved the making of an error on a point of law, such that it should be set aside.

22. The decision of the First-tier Tribunal shall stand.

23. No anonymity direction has been requested or made.

24 July 2019
UT Judge Macleman