



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/08520/2017
EA/08521/2017
EA/08523/2017
EA/08524/2017

THE IMMIGRATION ACTS

Heard at Field House
On 14th January 2019

Decision & Reasons Promulgated
On 13th February 2019

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

ZAKARIA [N]

ZOYA [N]

[Z N¹]

[Z N²]

(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S Khan, instructed by Malik & Malik Solicitors

For the Respondent: Ms A Brocklesby-Weller, Home Office Presenting Officer

DECISION AND REASONS

1. The second Appellant Mrs Zoya [N] is a citizen of Norway. The remaining Appellants are citizens of Afghanistan. The application was made by the second

Appellant for a residence card as confirmation of a permanent right of residence in the UK and the remaining Appellants are her dependants. I shall refer to the second Appellant as the Appellant in this decision.

2. The Appellant appeals against a decision of First-tier Tribunal Judge Fowell dated 7 June 2018 dismissing her appeal against the refusal of a permanent residence card under the Immigration (EEA) Regulations 2016.
3. Permission to appeal was granted on 26 November 2018 by Upper Tribunal Judge Pitt on the grounds it was arguable that the judge took an incorrect approach to the earnings of the EEA national spouse and whether under EEA law they could be said to be marginal or ancillary.
4. The grounds are essentially twofold. The judge erred in his approach to the evidence of the business' turnover and expenses and, secondly, misdirected himself in the application of the community law concept of effective and genuine activity by focusing solely on the level of profit from the business.

Submissions

5. Mr Khan submitted that the judge stated that the bank statements did not show business expenditure or credit card payments and essentially concluded that there was no documentary evidence that the business was running (at paragraph 25 and 26). There were two errors in this finding. Firstly, at paragraph 14, it was clear that the Appellant gave evidence that she was paid in cash, which did not show up in her bank account, and that she had no separate business account. Her business was a cash business. Her income was generated in cash and her outgoings paid for in cash. This evidence was not part of the judge's evaluation.
6. At paragraph 27, the judge concluded that there was no basis for finding that her accounts were bogus. It must be implied that if the judge had concluded that they were not false, then it must be implied that they were genuine. There was no mention of the accounts in paragraphs 25 or 26. The judge had failed to take into account HMRC documentation and the evidence of the Appellant's accounts prepared by accountants in addition to the oral evidence to show that the business was effective and running. The judge did not take into account the cash nature of the business but focused on a lack of evidence in the bank statement, thereby ignoring a significant proportion of the evidence before him.
7. In relation to the second ground, Mr Khan submitted that the judge calculated that the Appellant's income contributed to ten percent of the family income. This was a restrictive approach because the judge failed to also take into account the nature and type of business the Appellant was running. He erred in focusing solely on the income generated. The Appellant did not need to show that her income was not

marginal or ancillary, but that her self-employment was genuine and effective. The judge failed to consider seasonal and part-time nature of her self-employment; the fact that the Appellant moved to a new house and had to re-establish herself on numerous occasions; the fact that she had taken time off for her children; and her illness. This meant that her contribution to the family income was low. However, her business generated a turnover of £15,000 which was not taken into account. It was incorrect for the judge to say that her employment was marginal and ancillary because she only contributed ten percent to the income of the family.

8. Further, the judge failed to take into account the damage to her ice cream van in 2014 and the fact that she was working between three and five hours a day which suggested her work was genuine. There was also an investment in equipment and products which were part of establishing that her work was genuine. The focus on income and profit as part of the family income was an error of law.
9. For the Respondent, Ms Brocklesby-Weller submitted that there were two issues. Firstly, whether the business was trading and secondly whether the earnings were marginal or ancillary. She submitted that the judge went out of his way to identify evidence which was before the Tribunal. It was clear from paragraphs 24 to 26 that the judge had adopted a holistic approach and had considered the evidence in the round.
10. The issue was whether the Appellant was a qualified person, exercising Treaty rights during the relevant five-year period. The bank statements were relevant to this issue. The judge noted that there was no evidence of payments within the five-year period and the invoices were not reflected in the Appellant's bank account. There were no credit card statements or payments made. If the Appellant was running a business, there would have been receipts and invoices which were presumably presented to the accountant to produce the accounts in order to be able to give a figure for turnover. However, the evidence before the judge was incomplete and the judge was unable to evaluate whether the Appellant was exercising Treaty rights for a period of five years.
11. The judge noted that the bank statements were incomplete and covered a period in 2013 and then again in 2018. On that basis alone, there was insufficient evidence to substantiate a finding of permanent residence. In relation to paragraph 27, there was insufficient evidence to show that the accounts were false. That issue was not relevant to the decision because there was insufficient evidence to show that the Appellant had discharged the burden of showing that she was exercising Treaty rights for a five-year period.
12. Ms Brocklesby-Weller submitted that the judge's conclusions at paragraph 28 onwards were in the alternative. If the evidence which was before the judge was sufficient to show that the business was operating, then the judge considered whether the Appellant's earnings were marginal or ancillary. Again, he did not have

a complete picture of the money coming in and out of the Appellant's bank account and therefore looked only at years 2013 and 2018. He then conducted a mathematical analysis which showed that in 2013 the family's income consisted of 75% from state funds, 16% percent from her husband's income and 9% percent from her income. Whereas in 2018 the reliance on state funds was reduced to 42%, her husband's contribution was 48% and the remaining 10% percent came from the Appellant's business.

13. The question the judge asked himself at paragraph 34 was correct. He then applied relevant case law and considered the Appellant's submissions, which he had set out at paragraphs 18 to 20. At paragraph 38 it was clear that the judge adopted a broad construction to the definition of worker in EU law and his conclusion that the Appellant's economic activity was marginal or ancillary was open to him on the evidence before him. There was insufficient evidence to show that she was engaging in sufficient economic activity under the Regulations. The judge had not confined himself to a particular form of employment but had adopted a holistic approach and considered the nature of the business. The previous grant of a residence card was not relevant to the question of permanent rights of residence for a five-year period.
14. The judge properly directed himself in law which he set out at paragraph 2: "To succeed in the appeal it is necessary for Mrs [N] to show that she has been exercising Treaty rights for a period of five years continuously and her claim is that she has been self-employed running an ice cream business for the necessary period."
15. In response, Mr Khan submitted that the question the judge asked himself at paragraph 34 was incorrect. The judge stated: "Despite the imperfections in the evidence therefore, the broad position is that Mrs [N]'s income appears to represent about ten percent of the family income over the period in question. Is that marginal or ancillary?" The judge had looked merely at income when he should have looked at the entirety of the Appellant's economic activity, the seasonal nature of the business, the hours she worked and the fact that it was a purely cash business. It was not just the amount she contributed to the household income that was relevant to the test of marginal and ancillary.
16. In relation to the first ground, he submitted that the judge should first have considered whether the Appellant was exercising Treaty rights and, secondly, whether it was for the five-year period. The judge had not considered all the evidence, in particular, the accounts. He submitted that if an error was found the matter should be remitted to the First-tier Tribunal in order to make factual findings.

Discussion and Conclusion

17. The evidence that was before the judge relating to the Appellant's business amounted to a number of bank statements, invoices from 2012, 2014 and 2016/17 and

accounts prepared by an accountant. There were invoices paid for by credit card but no credit card statements were provided and there were only two payments by credit card visible in the Appellant's bank statements.

18. I am of the view that, reading the decision as a whole, the judge has taken into account all the evidence before him, not only the bank statements to which he specifically refers at paragraphs 25 and 26. It is clear that he has considered the accounts because he uses the figures for turnover in assessing the Appellant's income in relation to the second ground of the appeal.
19. I am not persuaded by Mr Khan's submission that the judge's evaluation at paragraphs 25 and 26 failed to take into account the Appellant's oral evidence or the documentary evidence other than the bank statements. The judge stated that the Appellant's oral evidence was at odds with the payments made in her bank statements. The Appellant said it was a cash business and it was submitted that she was paid in cash and that she paid for all her expenses in cash. However, it was apparent from the bank statements produced that there were two payments to Mastercard in 2013 and two of the invoices showed that the Appellant had paid for goods from Makro by Mastercard. However, she failed to produce any credit card statements or any further details of the Mastercard.
20. I find that the judge took into account her oral evidence that it was a cash business but found that it was not supported by the documentary evidence produced. In any event, the documentary evidence that was produced was incomplete. The onus is on the Appellant to produce sufficient evidence to show that she was self-employed for the period of five years in order to be granted permanent residence. It is quite clear from the judge's findings at 25 to 27 that he concludes that there was insufficient evidence to establish that she was exercising Treaty rights for a five-year period.
21. The judge found that there was insufficient evidence to show that the Appellant had been running an ice cream business for five years. The judge did not need to make a finding as to whether the accounts were genuine because even with those accounts there was insufficient evidence to show that the business was running and operating for a five-year period.
22. I find that the Appellant failed to provide sufficient evidence to show that she was self-employed for a period of five years and there was no error of law in the judge's conclusion that the appeal should be dismissed on that basis. This finding is fatal to the Appellant's appeal and therefore any error in relation to whether her earnings were marginal or ancillary is not material. In any event, I find that there was no misapplication of the relevant test. The judge took into account all relevant factors in deciding whether overall her economic activity could be regarded as marginal or ancillary.

23. The fact that the Appellant was granted a residence card in 2014 was not relevant to the judge's finding that the Appellant had failed to show that she was exercising a Treaty rights for a five-year period.
24. The judge's conclusion that there was insufficient evidence to show that the Applicant was exercising Treaty rights for a five-year period was open to him on the evidence before him. There was no error of law in the decision to dismiss the appeal.
25. Accordingly, I find there is no error of law in the decision of 7 June 2018 and I dismiss the Appellant's appeal.

Notice of decision

Appeal dismissed

No anonymity direction is made.

J Frances

Signed

Date: 11 February 2019

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed

Date: 11 February 2019

Upper Tribunal Judge Frances