



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/14443/2016

THE IMMIGRATION ACTS

Heard at Field House
On 18 December 2018

Decision & Reasons Promulgated
On 6 February 2018

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

ASAD UL HUSSNAIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Nizami instructed by Sterling Chance Solicitors

For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Pakistan. He appealed to the First-tier Tribunal against the respondent's decision of 13 December 2016 refusing his application for a residence card on the basis of his relationship with [RH] a Lithuanian national.
2. The judge noted the relatively low earnings of the sponsor between 2012 and 2016. She had earned £8,616 in the year 2016 to 2017 but the levels of income in the previous years were noted as being substantially lower than the primary earnings thresholds for each of the years 2011 to 2016. The judge noted that her income

figures apart from that one year had been very low, being around £2,000 and in one year she earned nothing. The judge concluded that even taking into account all the circumstances for maternity leave and that her husband earned enough money to support the family her self-employment though genuine was not effective and therefore she did not meet the definition of a “worker” within the meaning of Regulation 6 of the Immigration (European Economic Area) Regulations 2006.

3. The appellant sought and was granted permission to appeal on the basis that the judge, having accepted that in the most recent year the sponsor earned well above the primary earnings threshold had done sufficient to justify the award of a residence card. There was also an argument in respect of Regulation 6 and the sponsor satisfying the criteria set out for self-sufficient persons in Regulation 4 of the Regulations.
4. Due to the fact that the appellant had now different representatives from those who had acted for him at the appeal and yet further representatives who had dealt with the subsequent matter, there had been some confusion as to exactly what his situation was. It appeared that the third set of solicitors who had not acted in respect of either appeal had written to the respondent making a further application for a residence card, on 17 November 2017, and a residence card had been issued to the appellant on 28 February 2018, for five years.
5. It appeared therefore that the appeal was essentially academic, Ms Nizami argued that it would be of assistance to have a finding on the error of law and possible remaking of the decision. She accepted that the claim in respect of Regulation 6 could not succeed as there was no evidence of comprehensive sickness insurance, but she argued that the judge had erred with regard to genuine ineffectiveness.
6. Mr Whitwell argued that the findings were open to the judge on the evidence. He had noted at paragraph 6 that the appellant was paid in cash and there was no audit trail. He could not however challenge the point made at paragraph 15 where the judge noted there was no challenge to the accuracy of the current level of income claimed.
7. I am satisfied that the judge erred in law in this case. On the basis of the level of earnings in 2016 to 2017 it was not correct to find that the appellant had not shown that the sponsor’s employment was genuine and effective. It is relevant also to bear in the mind the point made by Ms Nizami that the primary earnings threshold is geared towards the employed rather than the self-employed into which that category the sponsor falls. She also relied on what had been said in Kempf (case 139/85) that a part-time employed music teacher giving twelve one hour lessons a week was found to be engaged in a genuine and effective work. It is however in particular on the basis of the accepted earnings in 2016 and 2017 that I conclude that the sponsor is properly to be regarded as meeting the definition of a “worker” within the meaning of Regulation 6, and as a consequence the appeal against the refusal to grant a residence card is allowed.

No anonymity direction is made.

A handwritten signature in black ink, consisting of a large initial 'A' followed by several loops and a final flourish.

Signed

Date 10 January 2018

Upper Tribunal Judge Allen