

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Before: Upper Tribunal Judge K Markus QC

The appeal is dismissed.

DECISION

Representation:

Appellant: Mr D. Kelly (Welfare Rights Officer) Respondent:

Ms E. Roxburgh (counsel)

REASONS FOR DECISION

1. The short point in this appeal is whether the First-tier Tribunal erred in law in deciding that the Appellant's work as a Big Issue seller was not genuine and effective so that it did not give rise to a right of residence for the purposes of entitlement to child benefit. Permission to appeal was given by the First-tier Tribunal. An oral hearing of the appeal took place before me on 29 March 2017. The Appellant was represented by Mr David Kelly (welfare rights officer) and HMRC was represented by Ms Elizabeth Roxburgh (counsel). I am grateful to both for their written and oral submissions.

The law

2. The applicable law is not in dispute. In summary an EEA national's right to reside in the United Kingdom depends on their remaining a "qualified person", which includes a self-employed person, defined as "a person who establishes himself in order to pursue activity as a self-employed person in accordance with Article 49 of the Treaty on the Functioning of the European Union": regulations 14(1), 6(1) and 4(1) of the Immigration (European Economic Area) Regulation 2006 ("the EEA Regulations"). Article 49 provides that freedom of establishment includes the "right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies and firms...".
3. Self-employment for these purposes has a Community law meaning. It exists where economic activities are carried out by a person outside any relationship of subordination with regard to the conditions of work or remuneration and under his own personal responsibility: Jany v Staatssecretaris van Justitie Case C-268/99, [2001] ECR I-8615 at paragraph 37. Economic activities include the provision of services in return for some form of remuneration provided that the work performed is genuine and effective rather than marginal and ancillary: Jany at paragraph 33.
4. The requirement for work to be genuine and effective applies equally to the activities of employed persons, as to which there is a considerable body of case law. In order to decide whether work is genuine and effective, what is required is

“an examination on objective criteria and ... an overall assessment of all the circumstances of the case relating to both the nature of the activities concerned and the nature of the employment relationship at issue”. It is necessary to consider whether the services performed under a contract of employment are capable of forming part of the normal labour market. For these propositions see Trojani v Centre Public D’Aide Sociale De Bruxelles [2004] 3 CMLR 38 at paragraph 17 and 24.

5. Case law of the European Court of Justice, in particular Levin v Staatssecretaris van Justitie, Case 53/81, [1982] 2 CMLR 454, and Kempf v Staatssecretaris van Justitie Case 139/85 [1986] ECR 1741, establishes that the Community provisions relating to free movement of workers include part-time as well as full-time workers and may include those who earn less than the nationally recognised minimum subsistence level and those who supplement their wage from other sources, including from state financial assistance, provided always that the work is genuine and effective and is not on such a small scale as to be regarded as purely marginal and ancillary. The level of remuneration and the hours worked may be relevant factors in the overall assessment: Genc v Land Berlin Case C-14/09 [2010] ICR 1108. The motives which prompted a person to seek employment in another Member State are of no account provided that she or he pursues or wishes to pursue a genuine and effective activity (Levin at paragraph 23).
6. In Secretary of State for Work and Pensions v JS (IS) [2010] UKUT 240 (AAC) Upper Tribunal Judge Jacobs observed that, although there is no employer-employee relationship to consider in relation to the self-employed, most of the same principles can be safely applied and there may also be indicators of self-employment other than actual work and remuneration, such as administration, marketing and business development. He said:

“5. ... the issue can only be decided in the context of the facts at any particular time. The amount of work is one factor. Whether the claimant is taking any other steps in the course of self-employment is also relevant. The claimant’s motives and intentions must also be taken into account, although they will not necessarily be decisive.”

Factual background

7. The Appellant is a Romanian national. She came to the UK in January 2015 with her partner and child. The relevant findings of fact by the First-tier Tribunal were that she started selling the Big Issue in April 2015 and had done no other work in the UK. She worked 40 hours per week selling the magazine and by June 2015 had built up her sales to 40 magazines per week which had remained constant up to the date of hearing. She made a profit of £1.25 per magazine or £50 per week. She had registered her self-employed business with HMRC, had submitted a tax return and made a claim for tax credits. Her earnings were below the threshold for national insurance contributions. The tribunal recorded that she was “content with her self employment and has no intention of registering as a job seeker or seeking other or more remunerative work.”
8. The tribunal accepted that the Appellant’s activity in building up her trade over a period of months demonstrated a commitment to employment, stability and regularity but said that that was not determinative of the question of effective self-employment. It found that, taking account of tips and finishing early she earned

less than £2 per hour. The tribunal noted that the Appellant's income was so low that maintaining business records was irrelevant.

9. The tribunal noted the requirement for work to be "genuine and effective" rather than "marginal or ancillary". It reminded itself that this was a question of fact, and that relevant factors include the period of employment, the number of hours worked, the level of earnings, whether work was intended to be short-term or long-term at the outset and whether it was regular or erratic. As to earnings, it said that there must be "an economic measurement of effectiveness", but accepted that the Appellant did not need to show that she was self-sufficient. The tribunal noted the decision of the Upper Tribunal in Bristol City Council v FV (HB) [2011] UKUT 494 (AAC) but rejected the submission for the Appellant that it was general authority that all Big Issue sellers are self-employed persons. In that case the Upper Tribunal dismissed an appeal against the First-tier Tribunal's finding that a Big Issue seller was a self-employed person for the purpose of the EEA Regulations, but Judge Rowland observed at paragraph 19 that a different tribunal may have reached a different conclusion on the same evidence.
10. The First-tier Tribunal's conclusions in this case are found in the following paragraphs:

"19. I considered the totality of the appellant's family financial circumstances. The appellant's rent was met by Housing Benefit and she claims Tax Credits of about £150 per week. The appellant's earnings from selling the Big Issue make up the remainder of the family income and I hold on the balance of probabilities that the appellant's self employment is not genuine in the sense that it generates a meaningful income. I hold the appellant's self employment to be a means of demonstrating economic activity for the purposes of qualifying for benefits to which the appellant would otherwise not be entitled to as a person from abroad. In my view earnings of £50 per week plus tips less costs, if any, of travelling to and from work are so low that they must properly be described as marginal and ancillary and therefore the appellant's self employment cannot be considered to be effective.

...

24. The appellant's self employment in the form of a Big Issue seller does not generate an income which enables her to be self sufficient without recourse to public funds. Despite the low return on her efforts the appellant confirmed in her oral evidence that her self employment income was a useful and necessary addition to the household income to the extent that she would not contemplate giving it up or even diverting some of her time to seeking paid employment or more remunerative self employment. I held on this evidence that the appellant was content to continue with her unviable business as it at least served the purpose of giving her the status of a self employed person which in turn gave her a right to reside in the UK for the purposes of claiming other benefits. The appellant's self-employment in these circumstances is, in my judgment, neither genuine nor effective.

Submissions

11. On behalf of the Appellant, Mr Kelly submitted that at paragraph 19 the tribunal wrongly took into account the proportion of the Appellant's earnings relative to the social assistance which she received. He submitted that the tribunal's approach was contrary to the established position that the amount of social assistance is not relevant. He said that the tribunal's approach would mean that, if the Appellant ceased to be entitled to a particular benefit so that her earnings formed a larger proportion of her total income, she would become a

worker even though the nature of her economic activity had not changed.

12. He also submitted that, while he agreed that the level of the Appellant's earnings was relevant, the tribunal treated the low level of her remuneration as determinative of the issue rather than taking into account all relevant factors.
13. Ms Roxburgh for HMRC submits that the tribunal set out the correct legal test and identified the factors relevant to the application of the test in this case. The tribunal correctly had regard to the Appellant's remuneration but weighed this up in the light of all relevant factors.

Discussion

14. The tribunal correctly directed itself as to the relevant legal principles and the approach to be taken in determining whether self-employed activity is genuine and effective. Mr Kelly does not contend otherwise.
15. The tribunal did not adopt the sort of arithmetical approach to the relative amounts of earnings and benefits which Mr Kelly criticised it for. The tribunal considered the Appellant's finances in the round as indicating the level of income she required and the extent to which the Big Issue income provided a real contribution towards it. The relevance of the state benefits was that they formed the bulk of what the Appellant relied on. Her earnings were a top-up but were not "meaningful" income. The conclusion was supported by the tribunal's finding that the Appellant did not keep sales records and was vague about how much her business generated. That is an unexceptionable approach, as illustrated by that of Upper Tribunal Judge Ward in HMRC v HD and GP [2017] UKUT 11 (AAC) at paragraphs 21 and 22.
16. I also reject Mr Kelly's submission that the tribunal treated the low level of remuneration as determinative. The statement of reasons demonstrates a careful assessment of all relevant factors. The tribunal found that the Appellant had initially built the business up to the current level of sales but they had since remained constant (and there was no suggestion that sales were likely to increase). The Appellant worked 40 hours a week, sold only 40 magazines and made a profit of less than £2 per hour. In all the circumstances the tribunal was entitled to conclude that the Appellant's business was not viable. Mr Kelly agreed that productivity was relevant but says that it is not clear what the tribunal meant by "unviable". I disagree. The meaning is clear from the tribunal's reasons which I have summarised. Moreover although motive is irrelevant where the economic activity is genuine and effective, the reason for continuing with an activity, particularly where that activity is not economically viable, can be relevant to the decision whether it is genuine and effective. The tribunal noted that the Appellant had said that she was not interested in earning more, whether through employment or other self-employment. On the evidence, she did not need to do so because of the state benefits that she received.
17. It was open to the tribunal to conclude, in the light of all the evidence, that the business was a means to obtaining benefits and that the income from it was no more than a "useful and necessary addition" to that income in the sense explained at paragraph 24 of the statement of reasons.
18. In conclusion, the tribunal did not err in law and I dismiss the appeal.

**Signed on the original
Kate Markus QC
Judge of the Upper Tribunal**

on 6 April 2017