



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/03368/2015

THE IMMIGRATION ACTS

Heard at Bradford  
On 25<sup>th</sup> May 2017

Decision and Reasons Promulgated  
On 31<sup>st</sup> May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

MR ISSA DIARA  
(ANONYMITY NOT DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M. Reyaz, Solicitor

For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal from the decision of Judge Hillis sitting at Bradford on the 3<sup>rd</sup> October 2016 in which he dismissed the appeal against refusal of the appellant's application for an EEA Residence Card as confirmation of his right of residence as the partner of an EEA national exercising her European Community Treaty rights in the United Kingdom as either a self-employed or a self-sufficient person.
2. The appellant is a citizen of Senegal and his partner, Ms Aicha Diara, is a citizen of the Czech Republic. The original application was made and considered by the Secretary of State on the basis that Ms Diara was a self-employed domestic cleaner. Judge Hillis upheld the Secretary of State's view that the evidence in support of this claim demonstrated that such work was, at best, "marginal or supplementary" and that she accordingly did not qualify as a "self-employed person" within the meaning of

regulation 6 of the Immigration (European Economic Area) Regulations 2006. There has been no challenge to this aspect of Judge Hillis's decision.

3. However, the grounds of appeal to the First-tier Tribunal also argued, in the alternative, that Ms Diara qualified as a "self-sufficient person" within the meaning of the regulation 6 (see paragraph 16 of Judge Hillis' decision). Judge Hillis duly considered this ground, apparently without objection from the Home Office Presenting Officer. His conclusions in this regard can be found at paragraphs 21 and 22 of his decision -

21. I reject the Appellant's claim that his partner is self-sufficient as she cannot claim to be such due to the income from his employment with Tesco Stores which on his latest wage slip shows a gross monthly income of GB£1864-88.

22. In my judgment self-sufficiency involves income from any source that is the EEA national's income and not that of their non-EEA national partner. By seeking to rely on the Appellant's own personal income this shows that the EEA national partner is not only not self-sufficient but is, in fact, financially dependent on her non-EEA national partner, namely, the Appellant and, therefore, does not meet the definition of a "qualified person" within the Regulations.

4. There was agreement between the representatives at the hearing that this conclusion was legally incorrect. The true position is as stated by the Court of Justice of the European Union in the decision of **Kuldip Singh C - 218/14** in which it was held as follows -

The Court has previously held that the expression 'have' sufficient resources in that provision [Article 7(1)(b) and (2) of Directive 2004/38] must be interpreted as meaning that it suffices that such resources are available to the Union citizen, and that that provision lay down no requirement whatsoever as to their origin, since they could be provided *inter alia* by the third country national.

5. That position is reflected in the definition of 'self-sufficient person' within regulation 4 in which the emphasis is simply upon the EEA national having "sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence".
6. Although it was not pursued by Mr Diwnicz at the hearing before me, the respondent's Rule 24 response argues that (a) the principle in **Kuldip Singh** applies only to what it describes an "installed" family member's earnings, and (b) given Judge Hillis' finding that Ms Diara's business was a 'sham' from the outset, subsequent contributions by the appellant cannot have had the effect of bestowing upon her the status of a 'self-sufficient person'. It thus appears to be argued that in order to be "a self-sufficient person", the EEA national must already have been exercising Community Treaty rights prior to becoming dependent upon the third country national. However, the decision in **Kuldip Singh** does not seem to me to contemplate any such restriction upon the right of free movement and no other authority is cited by the respondent in support of this proposition. The notion that a third country national is able to create the very circumstances that gives an EEA national a right to reside in the host state may well be

considered counter-intuitive. It is however consistent with the underlying objective of ensuring that EEA nationals do not become “a burden upon the social security system of the United Kingdom”.

7. Given that it was not disputed that the appellant’s gross monthly income of £1,864.88 was sufficient to ensure that neither he nor his partner would be a burden on the social security system of the United Kingdom, Mr Diwnicz realistically accepted that he was unable to argue that the error of law was immaterial to the outcome of the appeal or, indeed, that the appeal ought not to have been allowed upon a correct application of the law to the facts as found.

**Notice of Decision**

8. The decision of the First-tier Tribunal to dismiss the appeal is set aside and substituted by a decision to allow the appeal.

Anonymity not directed

Signed

Date: 25<sup>th</sup> May 2017

Judge Kelly

Deputy Judge of the Upper Tribunal

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