



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/03409/2016

THE IMMIGRATION ACTS

Heard at Field House

On 30th January 2018

Decision & Reasons

Promulgated

On 1st March 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

**MR SAJID HUSSAIN
(ANONYMITY NOT RETAINED)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Nassim of Counsel

For the Respondent: Mr Kotas

DECISION AND REASONS

Introduction

1. The Appellant born on 16th May 1977 is a citizen of Pakistan. The Appellant had made application for a permanent residence card as the family member of an EEA national under the Immigration (European Economic Area) Regulations 2006. The Respondent had refused the Appellant's application on 8th February 2016. The Appellant had appealed that decision and his appeal had been heard by First-tier Tribunal Judge Graham on 7th April 2017 with the decision promulgated on 11th May 2017.

The Appellant's appeal had been dismissed. The Appellant had made application for permission to appeal and permission was granted by Judge of the First-tier Tribunal Dineen on 23rd November 2017. It was found that it was arguable an error of law had been made in the failure of the judge to take account of evidence that was before him in terms of the Sponsor being in employment at the relevant period.

Submissions on Behalf of the Appellant

2. It was submitted by Mr Nassim that the judge's decision showed that he was satisfied that the Sponsor had been a qualified person exercising treaty rights as a worker during the period 2010 to 2014. The refusal by the judge had been on the basis that there is no evidence of the Sponsor exercising treaty rights from December 2014 to September 2015. It was submitted however that the judge had only looked at the Sponsor's claimed self-employment during that period and had overlooked evidence that was within the Appellant's bundle that during that period there had been income from employment as disclosed within the letter from HMRC which had provided the source of income during the relevant periods, together with the timeline of the Sponsor's employment.

Submissions on Behalf of the Respondent

3. Mr Kotas accepted that it appeared that the judge had only looked at self-employment during that period and most if not all of the findings of the judge related to findings on the credibility or otherwise of the Sponsor's claimed self-employment. It was accepted that there had been identified evidence of income from employment disclosed within the bundle.
4. On the basis of submissions made and having considered matters I found an error of law in this case and by agreement given the narrow issue and the evidence available I set aside that decision and remade it allowing the appeal. I said that I would provide a decision with reasons which I now provide below.

Decision and Reasons

5. Permission was granted on the basis that arguably the judge had failed to take account of evidence of employment when concluding the Sponsor failed to demonstrate that she was exercising treaty rights between December 2014 and September 2015.
6. The Respondent in their earlier refusal had refused the Appellant's application firstly on the basis that the earnings she had disclosed did not show a sufficiency of funds to indicate that she was exercising treaty rights, and secondly in any event had not shown any employment or self-employment in the period December 2014 to September 2015.
7. The judge had concluded at paragraphs 12 to 16 that in the period from 2010 to 2014 the Appellant's level of income was such that, in accordance with the case law of **Begum [2011] UKUT 00275** and **Levin [1982] 2**

CMLR 454 her level of income was not such a small amount that it could be properly regarded as marginal and ancillary. That conclusion was open to the judge on the basis of the evidence available and the case law and disclosed no error of law. Indeed it does not appear to have been subject to any further challenge by the Respondent.

8. In terms of the period December 14 to September 15 the judge had focused on the Sponsor's claimed self-employment as a cleaner. He had considered the evidence and concluded that there was an insufficiency of credible evidence to assert that she was exercising treaty rights as a self-employed person. He gave clear reasons for that finding and it was a finding open to him. However in an examination of the evidence which understandably focused on this issue, the judge overlooked that in the same period the Sponsor had also had employment. This was evidenced by the letter from HMRC dated 5th February 2017 and a bar chart showing her employment during that period. There does not appear to have been any challenge to the veracity of that employment or the letter produced by HMRC as being sufficient cogent evidence in support of that claimed employment. It was also employment that was consistent with that she had undertaken in previous years which had been accepted. The level of income derived from that employment was of a consistent level with previous years, found by the judge to indicate that whilst only a modest amount did indicate that she was exercising treaty rights following the principles outlined in the case law. To some extent that may be reinforced by the Respondent having granted her two previous residence visas based on that level of income.
9. Accordingly the judge inadvertently and understandably failed to note the employed income in the critical period having focused upon the claimed self-employment during that period. That led to him making an error of law sufficiently material that had he noted that income from employment and given his findings upon the level of income being not inconsistent with exercising treaty rights he was bound in reality to have allowed this appeal.

Notice of Decision

10. I find a material error of law was made by the First-tier Tribunal such that I set aside that decision and with the agreement of the parties remake that decision and in so doing I allow the appeal for the reasons given.
11. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Lever

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable

Signed

Date

Deputy Upper Tribunal Judge Lever