



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/05264/2017

THE IMMIGRATION ACTS

Heard at Field House
On 25th September 2018

Decision sent to parties on
On 12th October 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

VERONICA ODUAN ONYEMAUWA
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Som Nwaku instructed by Moorehouse Solicitors
For the Respondent: Mr Nigel Bramble, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing her appeal against the respondent's refusal to grant her an EEA residence document pursuant to the Immigration (European Economic Area) Regulations 2016 as the spouse of a person exercising Treaty rights in the United Kingdom.
2. It is common ground that the evidence which was before the Secretary of State was inadequate to show that the sponsor was in fact exercising Treaty rights as asserted.

3. On 29 September 2017 the First-tier Tribunal sent to the appellant's former representatives, Jesuis Solicitors the Tribunal's standard directions, which she passed to her current representatives, Moorehouse Solicitors:

"The respondent must send copies of all the documents to the Tribunal to the other party. This should include a copy of the notice of decision to which the notice of appeal relates and any other document provided to the appellant giving reasons for that decision together with any Statement of Evidence Application Form, record of interview or any other unpublished documents on which you rely to arrive before 27 October 2017.

The appellant must send copies of all documents to the Tribunal and to the other party a bundle of all documents you wish to rely on in support of the appeal. You should identify any essential passages you consider highly significant in your appeal, copies of documents in a language other than English must be accompanied by a full certified English translation.

It is important to submit all the documents as soon as they are available as the respondent will review the evidence you submit before the hearing of your appeal. This could result in their decision being revised in your favour. If this happens your appeal may be treated as withdrawn and the hearing cancelled.

The appellant must send copies of all the documents to the respondent at the Presenting Officers' Unit. The respondent must send copies of all the documents to the appellant."

The appellant's former representatives, Jesuis Solicitors, did nothing in response to that notice.

4. Notice of hearing was issued on 30 November 2017, for a hearing on 21 May 2018, some 8 months ahead. Moorehouse Solicitors were instructed, and had been acting for the appellant for just over a fortnight when the notice of hearing was issued: there is a notice of acting on the file dated 14 November 2017. The directions with the 30 November 2017 notice of hearing were as follows:

"You must send the following documents to the Tribunal at the above address and to the other party to arrive no later than five days before the date of full hearing.

- Witness statements of the evidence to be called at the hearing
- A bundle of all documents being relied on at the hearing. These must be clearly page numbered, indexed and include a schedule identifying the essential passages (the essential passages are any sections you consider highly significant in your appeal).
- The appellant must send copies of all the documents to the respondent at the Presenting Officers' Unit.
- The respondent must send copies of all the documents to the appellant.
- Copies of documents in a language other than English must be accompanied by a full certified translation."

5. I am told this morning that there the appellant and sponsor experienced some difficulties in obtaining from Jesuis Solicitors the documents on their file, but since Mr Nwakwu, the appellant's solicitor with Moorehouse Solicitors, was able to show me a copy of the standard directions, I am satisfied that Moorehouse Solicitors were aware of the need to produce documents in advance of the hearing.

Refusal letter

6. The refusal letter of 23 May 2017 set out what the Home Office would expect to see: evidence that the appellant was registered with HMRC and was paying income tax, national insurance or VAT as a self-employed person, proof of his earnings as a self-employed person in the form of business bank accounts, copies of invoices issued by the business, receipts for payments or work carried out and statutory accounts and evidence such as contracts of services, business advertising and client testimonials to show the business was actively trading.

First-tier Tribunal decision

7. Mr Nwakwu was acting in two appeals on the morning of the hearing on 21 May 2018. By that morning, no bundles had been filed for the appellant in this appeal. Mr Nwakwu had a bundle with him, but did not hand it to the clerk for this appellant's appeal at the beginning of the hearing: instead, he completed the other client's hearing and then produced to the Judge hearing this appellant's appeal a 92-page bundle of documents. The First-tier Judge heard submissions on the late-produced bundle, and decided to refuse to admit it into evidence, for the reasons given at [13] in his decision:

"I have considered the points raised by both representatives and decided to refuse the application to admit this evidence. No good reason was put forward why the bundle has been filed so late. I have taken into account the overriding objective and the parties' obligation to corroborate with the Tribunal as set out in paragraph 2 of the Tribunal Procedure Rules 2014. I considered that the appeal could be fairly and justly dealt with today. This is an appeal where there are no removal directions and Article 8 is not to be considered. This is not an appeal requiring anxious scrutiny of the evidence and where it is the appellant's last chance to remain in the UK. To have admitted this evidence at a late stage would have prejudiced the respondent's position and it is important that both parties are dealt with fairly. There was insufficient time for either myself or Ms Leyshon to properly consider the appellant's bundle as it was submitted so late. Mr Nwakwu did not make an application for an adjournment."

8. The grounds of appeal assert that it was not open to the First-tier Tribunal to exclude the documents on the basis that no good reason had been put forward for their late production. I note that the First-tier Judge's typed record of proceedings records Mr Nwakwu as saying that he wished to proceed, to save costs, and that an adjournment would not assist as the issues were narrow.
9. At the hearing this morning, Mr Nwakwu asserted that he did make an adjournment application, but that is not amongst the grounds of appeal to the Upper Tribunal and there is no application to vary the grounds. I consider that if the appellant had

wished to seek an adjournment, and been refused, the question of an adjournment would certainly have been raised in the grounds of appeal. I do not accept that any such application was made and I refuse to permit any variation of the grounds of appeal on which permission to appeal to the Upper Tribunal was granted.

10. I have seen a copy of the Home Office Presenting Officer's note of the hearing, which records that the judge reflected and rose to consider the position on admitting the bundle on the day of the hearing, and that the appellant and her husband had the opportunity to give oral evidence. That is borne out by the typed Record of Proceedings on the file, in which Mr Nwakwu is recorded as having sought to persuade the Judge that at the date of application there was at least some evidence that the sponsor was exercising Treaty rights through his company structure.

Permission to appeal

11. Permission to appeal was granted by First-tier Tribunal Judge PJM Hollingworth on the following basis:

"The judge declined to admit into evidence a bundle submitted on behalf of the appellant despite the facts as referred to by the judge. It is arguable that unfairness has arisen in relation to the appellant's case. The appellant was represented. It is arguable that the appellant was entitled to expect that the full extent of the available evidence would be placed before the judge. It is arguable that other steps were available which could have been taken to avoid the causing of prejudice or the creation of potential prejudice to the applicant."

Rule 24 Reply

12. The respondent's Rule 24 Reply, so far as material, states as follows:

"The respondent submits that it was open to the First-tier Tribunal Judge to exclude the appellant's evidence bundle (which had not been filed in accordance with directions, the hearing date for the appeal having been set some eight months before the hearing took place). The First-tier Judge also properly records that this case was to confirm a right of residence and was not a removal or Article 8 ECHR case and that the appellant could make a new properly documented application. The fact the First-tier Tribunal could take into account the appellant's circumstances at the date of the hearing did not require him to admit late evidence."

13. That is the basis on which this appeal came before the Upper Tribunal.

Submissions

14. For the appellant, Mr Nwakwu submitted that self-employment is not defined in the Regulations and there exists no definitive list of documents to be provided as proof of exercising Treaty rights on a self-employed basis. No more onerous burden should be placed on an European Union citizen than on a national of the United Kingdom.

15. Mr Nwakwu submitted that had the respondent made his own enquiries, he would have been satisfied that the sponsor was economically active in the United Kingdom and exercising his Treaty rights here. Mr Nwakwu argued that the respondent could have verified matters himself: the register maintained by Companies House would have confirmed that the sponsor's limited company was still in existence and HMRC if asked could have confirmed that he was exercising Treaty rights and paying tax at the material times.
16. Mr Nwakwu observed that the Home Office Presenting Officer had taken the 92-page bundle on the day and could by now have made a further decision thereon.
17. For the respondent, Mr Bramble submitted that it remained open to the appellant to make a properly documented application. The grounds of appeal did not assert that there had been any application for an adjournment and the First-tier Judge had given adequate reasons for his decision. He agreed that it would not be necessary to remit the appeal as all relevant evidence was before the Upper Tribunal.

Analysis

18. There is no challenge to the First-tier Judge's decision in the grounds of appeal on the basis of failure to adjourn. I do not consider that argument, which I have not admitted.
19. The appellant relied on the decision of the Upper Tribunal in *Boodhoo and Another* (EEA Regs: relevant evidence) [2013] UKUT 00346 (IAC) where the judicial head note was as follows:
 - “1. Neither Section 85A of the Nationality, Immigration and Asylum Act 2002 nor the guidance in *DR (Morocco)** [2005] UKAIT 38 regarding a previous version of Section 85(5) of that Act has any bearing on an appeal under the Immigration (European Economic Area) Regulations 2006. In such an appeal a Tribunal has power to consider any evidence which it thinks relevant to the substance of the decision including evidence which concerns a matter arising after the date of the decision.
 2. Accordingly evidence of comprehensive sickness cover which began after the date of the decision appealed fell to be considered by the First-tier Tribunal Judge as it was plainly relevant to the substance of the decision albeit that it arose after the date of that decision.
 3. It is particularly important that the Home Office should engage properly with observations of the Upper Tribunal made on or following the grant of permission to appeal.”
20. The *Boodhoo* decision only states that the First-tier Tribunal has a *discretion* to admit evidence. In this case there was a signal failure by the appellant's representatives even to attempt to comply with directions which are intended to avoid precisely the situation that arose at the hearing, that is to say, both the respondent and the Judge being taken by surprise by a substantial volume of documents.
21. The appellant still has not explained why the 92-page bundle was produced so late, but in any event, its contents are not material to the outcome of this appeal. The 92-

page bundle is on the appeal file. Most of the material identified as required in the letter of refusal is not in that bundle. There are two invoices from 2016, one on 9 November and one on 26 October which between them total £788 plus VAT. There are no HMRC documents save for a P60 for the tax year ending 5 April 2018 which is nothing to the point as regards the application made to the respondent. There are, in addition, a number of documents which might now arguably form the basis of a properly documented application, but there is nothing in this bundle which had it been admitted would meet the respondent's requirements as set out in the letter of refusal or have materially altered the decision made by the First-tier Tribunal.

22. There continues to be no proper explanation from Mr Nwaku for the appellant as to why he considered it appropriate to keep the relevant documents up the appellant's sleeve until the morning of the hearing rather than submitting them in time so that the respondent can have the opportunity of considering whether they are likely to change his view.
23. Nor has the appellant produced any authority for the proposition that the investigatory burden should be regarded as having shifted to the respondent. It was for the appellant to show that the sponsor met the requirements of the Rules at the date of application. The respondent was not required to make his own enquiries at Companies House, or with HMRC.
24. On the question whether the appellant could instead make a fresh application Mr Nwaku insisted that he was entitled to rely on the present application, made in November 2016. Mr Nwaku asked the Tribunal to say what else would be required if a fresh application were to be made. The answer is contained in the refusal letter.
25. The decision made by the First-tier Judge was plainly open to him and I am not satisfied that there is any material error of law in his decision.
26. This appeal is therefore dismissed.

Signed: *Judith A J C Gleeson*
Upper Tribunal Judge Gleeson

Date: 8 October 2018