Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07852/2016

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision & Reasons Promulgated**
On 15 January 2018	**On 31 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS MARIANA IORDAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: In person
For the Respondent: Mr Bates, Home Office Presenting Officer

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of Romania, born on 4.10.95. On 29 June 2016, a decision was made to remove her from the United Kingdom pursuant to regulations 19(3)(a) and 24(2) of the Immigration EEA Regulations 2006, on the basis that during an interview on that day, the Claimant stated that she did not have meaningful employment and had entered and exited the United Kingdom on two separate occasions and that she had been encountered by Greater Manchester Police in June 2016 begging on Piccadilly.

2. The Claimant appealed against this decision and her appeal came before First tier Tribunal Judge Shergill for hearing on 22 March 2017. In a decision and reasons promulgated on 6 April 2017, the judge allowed the appeal. The reasons provided were that the Claimant produced an original letter from HMRC dated 7.11.16 which showed that she declared income resulting from work selling the "Big Issue" magazine amounting to £4520. The judge noted that this was topped up by working tax credit and child tax credit to £15,097.84. The judge further noted that no tax returns, bank receipts or bank statements had been provided and that the declared income would be tax free [14]. However, the judge was satisfied that the HMRC evidence was *prima facie* evidence that the Claimant was exercising treaty rights within the United Kingdom and regulation 6 of the Immigration (EEA) Regulations 2006 [15].

3. The judge noted that the evidence in relation to the Claimant's self-employment as poor and constituted receipts from the offices of the "Big Issue" and no explanation as to how the Claimant came to be selling the magazine given that she has a fixed address. The judge considered whether the self-employment was "genuine and effective" or "marginal and ancillary" and concluded at [22] that the Secretary of State had failed to demonstrate that the evidential burden had been satisfied in respect of an abuse of rights, in light of the evidence from the HMRC and the absence of evidence on the part of the Secretary of State to prove her case.

4. The Secretary of State sought permission to appeal to the Upper Tribunal, in time, on the basis that the judge's findings were contradictory in that at [18] the judge appears to concede that the Claimant's self-employment was not meaningful based on the fact that the Claimants income was only 22% of money coming in, the remainder being made up of public funds. Consequently, if the employment was not genuine and meaningful then the Claimant has no right to reside in the UK and is subject to administrative removal. It was further submitted that the judge erred in considering the wrong relevant period ie. the tax year 2015-2016 rather than the date of the hearing *cf.* Boodhoo [2013] UKUT 00036 (IAC).

5. Permission to appeal was granted by First tier Tribunal Judge Andrew in a decision dated 19 October 2017, on the basis that there were arguable errors of law in the decision for the reasons set out in the grounds of appeal.

Hearing

6. At the hearing before me, the Claimant appeared in person, unrepresented but stated that she wished the appeal to proceed and that she was content to communicate in English.

7. In his submissions, Mr Bates sought to rely on the grounds of appeal. He submitted that the First tier Tribunal Judge appears to have allowed the appeal on the basis of the HMRC assessment provided by the Claimant but also made a clear indication that the employment was not meaningful employment at [7]. The judge's findings of fact and reasoning are at [14] where he noted that there was no evidence of self-employment, such as tax returns, bank receipts and bank statements. At [16]-[17] the judge made no positive findings and the judge was far from satisfied that the Claimant is undertaking *bona fide* self

employment. At [17] he noted that the quality of the evidence is poor and at [18] that less than 22% of the Claimant's income is from declared self-employment.

8. Mr Bates submitted that, even if self-employment had been taking place, the burden of proof was upon the Claimant to demonstrate that she met the requirements of the Immigration (EEA) Regulations 2006 and the judge should have found that the Claimant failed to discharge the burden of proof, on the basis that her self-employment was marginal or ancillary. At [23] the judge applied the wrong test in that the burden was upon the Claimant to show that she meets Regulation 6 and the judge failed to make a sustainable finding as to the Claimant's ability to meet the Regulations. Mr Bates submitted that, at the date of hearing, the Claimant had failed to establish that she was entitled to residence as a qualified person *cf.* Boodhoo [2013] UKUT 00036 (IAC).

9. Mr Bates informed the Upper Tribunal that there was no caselaw on the first issue in an immigration context but he handed up a copy of a decision from the Administrative Appeals Chamber in DV v SSWP [2017] UKUT 0155 (AAC) where Upper Tribunal Judge Markus QC held, in a case with a strong factual similarity to the extant appeal, that self-employment as a Big Issue seller was not economically viable when the bulk of that Appellant's income came from State benefits, holding at [16]:

> *"…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."*

10. The Claimant in response submitted that she had been paying tax; that her children are going to school and that she has been working in the UK. She added that her husband had also been working as an Uber driver.

11. I reserved my decision, which I now give with my reasons.

Findings

12. I find material errors of law in the decision of First tier Tribunal Judge Shergill, for the reasons set out in the grounds of appeal. It is clear in light of the decision of the AAC in DV v SSWP (op cit) that in light of the fact that the Claimant's self-employment amounted to only 22% of her overall income, the remainder deriving from State benefits, that her economic activity was not viable and thus is marginal and ancillary and cannot properly be considered as genuine and effective *cf.* Jany v Staatssecretaris van Justitie Case C-268/99 [2001] ECR 1-8615 at [33].

13. Whilst the decision in Boodhoo (op cit) did not state in terms that the relevant date for consideration of the evidence in an EEA appeal is the date of hearing, the Upper Tribunal found that a tribunal has the 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 decision. Mr Bates' better point was that there was simply no evidence apart from the letter from HMRC dated 7.11.16 relating to the 2015/2016 tax year that the Claimant was working and thus the judge erred in finding that she discharged the evidential burden of proof.

Decision

14. I find material errors of law in the decision of First tier Tribunal Judge Shergill. I set that decision aside and re-make the decision, dismissing the appeal.

15. The Claimant informed me that she has been working and paying tax in the United Kingdom and her husband has also been working. Thus it remains open to her or her husband to make an application to the Secretary of State for a residence card as recognition of their right to remain on the basis of an exercise of Treaty rights as EEA nationals working in the United Kingdom.

Rebecca Chapman
Deputy Upper Tribunal Judge Chapman

29 January 2018