Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/09581/2016
& EA/10682/2016

THE IMMIGRATION ACTS

Heard at Field House **Determination & Reasons Promulgated**

On 25th September 2018 **On 14 February 2019**
& 11th February 2019

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

IOANNIS KONSTANTINOS ARGYRIOU (1)
JOHN PAUL ARGYRIOU (2)
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Dr F Lawson of Charlton Legal Practice
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The first appellant is a citizen of Greece, the second appellant is his adult (28 year old) son and is a citizen of the USA. They applied for EEA residence cards on the basis that the first appellant was entitled to

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permanent residence due to his self-employment in the UK, and the second appellant entitled to remain as his dependent. The application was refused in a decision dated 27th July 2016. Their appeal against the decision was dismissed by First-tier Tribunal Judge Freer in a determination promulgated on the 28th March 2018.

2. Permission to appeal was granted by Judge of the First-tier Tribunal ID Boyes on 6th August 2018 on the basis that it was arguable that the First-tier judge had erred in law.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law. The matter had to be adjourned on 25th September 2018 due to the non-attendance of Dr F Lawson of Charlton Legal Practice, who was required to explain his behaviour in a direction sent out on 29th September 2018. No response was apparently received from Dr Lawson. When Dr Lawson appeared before me on 11th February 2019 he said that he had provided a response to this direction but could not find a copy of it amongst his papers. He said that he would forward a copy to the Upper Tribunal after the hearing. **For clarity's sake Dr Lawson must provide this document to the Upper Tribunal within 7 days of the date this decision is sent to the parties. Failure to do this may lead to a report to the OISC for non-professional behaviour.**

4. At the start of the hearing it appeared that there was a state of animosity between the first appellant and his legal adviser, Dr Lawson. There were also emails on the file sent to the Upper Tribunal by the appellants complaining about Charlton Legal Practice and accusing them of corresponding with the Upper Tribunal without consulting them and failing to be in contact. I asked the first appellant to decide carefully whether he wished Dr Lawson to represent him at the hearing or whether he wished to represent himself. I made it clear that if he chose Dr Lawson to represent him he could not speak to me during the hearing, but instead must quietly pass Dr Lawson notes if he felt this was necessary or helpful. Dr Lawson asked for time to take instructions from the first appellant outside of the Tribunal hearing room, and he was given an opportunity to do this. When Dr Lawson and the first appellant re-entered the hearing room the first appellant informed me that he wanted Dr Lawson to represent him. Throughout the hearing the first appellant passed Dr Lawson notes, which he appeared to read before proceeding with his presentation of the case.

Submissions – Error of Law

5. In grounds of appeal; a skeleton argument and oral submissions the appellants contend in summary as follows.

6. It is said that the decision is an embarrassment which is "incoherent, disjointed and littered with simple and conspicuous errors". It is contended that the First-tier Tribunal Judge erred by holding himself out

as an expert in business in his decision-making and in failing to inform the parties that he would be making his decision by reference to his own knowledge and understanding, and in not putting them on notice as to what his position was in this respect. It is contended that the First-tier Tribunal Judge found problems with documents accepted as valid and satisfactory by the respondent, for instance his HMRC documents and created new requirements beyond those of the respondent, for instance evidence of company internet activity or signed business contracts. It is contended that he acted unfairly in making directions as to documents needed (namely accounts produced by a chartered accountant) and then being dissatisfied without good reason when this was done and requiring different documents (bank statements) which would clearly have been used by the chartered accountant to produce the accounts.

7. It is also contended that the First-tier Tribunal errs by applying irrelevant case law, namely Begum (EEA – worker -jobseeker) [2011] UKUT 275, which was not relevant to someone who was seeking permission to remain on the basis of self-employment. The Judge found matters that the respondent was satisfied with were not satisfied, for instance that the business existed, without putting the appellant on notice of his doubts. He confusingly found at some points in the decision that the first appellant is the sole director and shareholder, whilst at other points says that there is insufficient evidence to support this. It was clear that the six years tax returns had been produced and it would not be possible for this to happen if there was no business. The decision therefore contains fundamental contradictions, such as finding that the appellant had produced evidence rebutting the respondent's refusal at paragraph 52 but in not allowing the appeal; and is fundamentally unfair as the dismissal is based on matters on which the appellant was not on notice about (despite the fact that the judge had given directions in the case and reserved it to himself) and which are speculations based on the mistaken business understanding of the judge.

8. When asked by myself directly Dr Lawson could point however to no documents which had been before the First-tier Tribunal other than those from HMRC with zero figures which were of relevance to proving the operation of the first appellant's contended business. Dr Lawson clarified that only evidence that the first and second appellants live at the same address or that there was dependency between them was that they had given that same address on their application forms. All the evidence of cohabitation via energy bills and the like appeared to simply show that the first appellant and his wife lived together.

9. Dr Lawson's principal oral contentions were firstly that the First-tier Tribunal had erred in law in not allowing the appeal as the appellants had addressed the issues in the reasons for refusal letter as they had been successful in showing that the first appellant was the sole director of Bellerphon Investment Management LTD which had been doubted by

the respondent, and the appellants were not on notice that other issues such as the genuine nature and efficacy of the business and dependency of the second appellant were in play. As such the proceedings were unfair. Secondly, it was argued that the proceedings had been procedurally unfair as at the CMR all documents that the First-tier Tribunal would have liked to see, as evidence by the decision, were not listed as ones which the appellants should have lodged.

10. In response in a Rule 24 notice and in oral submission the respondent argues that the First-tier Tribunal directed itself appropriately. There were no material errors of law as it was clear on the evidence before the First-tier Tribunal the appellants could not have shown that Regulation 15(1)(a) of the 2006 Immigration (EEA) Regulations was met as there was insufficient evidence that the first appellant was exercising Treaty rights for the five year period or of the second appellant's dependency on the first appellant. It was rationally open to the First-tier Tribunal to find that there was no evidence of the claimed genuine and effective self-employment for the reasons set out at paragraphs 55 to 60 of the decision. There was no procedural unfairness as it was clear from the reasons for refusal letter that all issues were in play, and it was up to the appellants to prepare their case to show on the balance of probabilities that these requirements were met. The CMR hearing was not one at which the evidence of the appellants was prescribed, but simply some helpful directions to guide the appellants as to what could be useful.

Conclusions – Error of law

11. The first issue raised in the refusal letter was that it was not accepted that the first appellant was the owner of Bellerphon Investment Management LTD because of variants in the spelling of his first names, and the fact that the month of birth for the first appellant is different in the Companies House records, and it was noted that there was a lack of HMRC tax calculations as evidence of the first appellant's self-employment. As a result, it is said, there was no evidence that the first appellant had been exercising Treaty rights for a five year period. Secondly the refusal letter contends that the documentation did not show that second appellant was dependent on the first appellant which he needed to show as he was over the age of 21 years. I find that the refusal letter clearly put all issues under the relevant EEA Regulations in play, there were no concessions that any elements were met, and thus there was no procedural unfairness to the appellants in their having to show on the balance of probabilities that all aspects of the relevant tests under the 2006 EEA Regulations at Regulation 6 (showing the first appellant was self- employed as claimed) and Regulation 7(1) (showing the second appellant was the first appellant's dependent) were met before the First-tier Tribunal.

12. I find that the directions issued at the CMR hearing were an attempt to assist the appellants and their representative in assembling relevant

evidence to address issues in the appeal. As the identity of the first appellant/ his ownership of Bellerphon Investment Management LTD was in dispute due to many variants in the spelling of his name and the fact that he and his son have the same initial in the Greek alphabet it was rational to require his current Greek passport and as it was clear that the effective nature of the business was in issue business accounts were logically directed. The directions do not give any indication that these were the only documents required for the appellants to succeed. It is for all appellants to prove their case in accordance with the relevant EEA Regulations, or other legal provisions, and the need for additional documentation ought to have been assessed by the appellants and their legal advisers particularly when the content of the documents obtained in accordance with directions was viewed. The First-tier Tribunal Judge could not have been aware of the content of the accounts for instance, and thus what their evidential worth would be, when he ordered their production. It will always be for an appellant to assess whether the evidence obtained in accordance with directions suffices or whether further supporting evidence is needed.

13. It was unwise and unnecessary for the First-tier Tribunal Judge to have set out that he had relevant expertise in business and accounts: it is for the appellant to prove his case and there is no need for a judge to have such expertise, and if he or she does and this is pertinent to deciding an appeal it must always be notified to the parties. I do not find however that in this case that the Judge actually took on the role of expert. At paragraph 3 of the decision there is some irrelevant raising of other topics such as Brexit, naturalisation and the entrepreneur rules. This is, of course, not to be encouraged when determining an appeal but I do not find that it has led to a decision which did not then move on to deal rationally with the issues that were raised by the refusal and determine them lawfully.

14. At paragraph 49 of the decision the Judge accepts that the differences in the first appellant’s name that had concerned the respondent were caused by transliteration from Greek, and therefore were not an indication against his owning the company. At paragraph 50 the Judge accepts that the appellant is the sole director and shareholder of Bellerphon, and that there is no evidence the second appellant is involved with the company so concludes that all documents relating to the company related to the first appellant. At paragraph 51 the Judge dismisses the difference in the month of birth by Companies house as a minor error. He therefore concludes that he finds for the appellant on this issue at paragraph 52 of the decision, therefore finding that the first appellant was the owner of Bellerphon Investment Management LTD.

15. From paragraphs 55 to 62 of the decision the First-tier Tribunal then considers whether the evidence amounted to showing the first appellant had shown five years or a lesser amount of self-employment. These paragraphs focus on the entirely legitimate question as to

whether the appellant was in genuine and effective self-employment or employment or present as a work seeker. I find that this was the correct legal test to apply, and nothing the appellants have argued shows otherwise. It was rationally open to the First-tier Tribunal to find that as the HMRC corporation tax records all showed zero amount payable and that there was no other evidence had been placed before the First-tier Tribunal which assisted the first appellant in showing that there was no actual self-employment taking place. I find that the consideration of other evidence that could have been supplied by the appellants was a lawful approach in accordance with TK (Burundi) v SSHD [2009] EWCA 40. Before me Dr Lawson accepted that there was no material evidence before the First-tier Tribunal which was omitted from consideration on this issue. At paragraph 65 there is then consideration of whether the second appellant has shown that he is dependent on the first appellant and for entirely rational reasons it is found that he is not. Once again Dr Lawson could not identify any evidence that the First-tier Tribunal had failed to consider in reaching this conclusion.

16. If the first appellant has evidence that he is genuinely and effectively exercising Treaty rights in the UK, and if there is evidence that the second appellant is dependent upon him for his essential living needs then a new application can be made to the respondent with this evidence and the decision of the First-tier Tribunal which helpfully clarifies in the appellants favour the issues of identity which the Home Office had doubted in their previous decision.

Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

2. I uphold the decision of the First-tier Tribunal dismissing the appeals under the EEA Regulations.

Signed: Fiona Lindsley
Upper Tribunal Judge Lindsley

Date: 12th February 2019