Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07601/2018

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Wednesday 16 March 2022	**On 30 March 2022**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR WASIM UL GHANI

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Ahmed, Counsel instructed by JJ Law Chambers
For the Respondent: Ms H Gilmour, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Roots promulgated on 25 February 2021 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 21 November 2018, refusing him a permanent right of residence as the family member (spouse) of an EEA national exercising Treaty rights in the UK (Ms Monika Bozsar).

2. The Appellant is a national of Pakistan. He came to the UK as a student on 9 May 2011. He had leave in that capacity until 11 September 2012. On 18 January 2013 he married Ms Bozsar, who is a Lithuanian national. He was issued with a residence card as Ms Bozsar's family member valid from 16 November 2013 to 16 November 2018. He made an application for permanent residence on 28 September 2018. Although the relationship had by that stage broken down, the Appellant remained (and remains) married to Ms Bozsar. As the Judge correctly pointed out, therefore, the Respondent's basis for refusal of the Appellant's application (that he was not a former family member with retained rights) was misconceived.

3. The issue before the Judge however was whether the Appellant's wife was exercising Treaty rights at all relevant times. The Appellant is no longer in contact with his wife and therefore the First-tier Tribunal had made an "Amos direction" asking HMRC to provide details of Ms Bozsar's earnings at the relevant times. I will come to what that evidence shows so far as relevant below. It is sufficient to note for current purposes that the Appellant relied on Ms Bozsar having exercised Treaty rights between the tax years 2013/14 to 2017/18. The Judge accepted that Ms Bozsar was exercising Treaty rights for the tax years 2014/15 to 2017/18 but not 2013/2014. He found that in that latter year, Ms Bozsar's earnings were marginal and ancillary rather than genuine and effective and that he could not be satisfied that she was exercising Treaty rights throughout that year.

4. The Judge dismissed the Appellant's appeal therefore on the basis that he could not establish a continuous period of five years' residence under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") because his EEA national wife was not exercising Treaty rights throughout the requisite period.

5. Although the Appellant's grounds run to twenty-seven paragraphs, there is only one ground of appeal, namely that the Judge erred in finding that Ms Bozsar was not exercising Treaty rights in 2013/14. I will come to the detail of the grounds below.

6. Permission to appeal was refused by First-tier Tribunal Judge O'Garro on 20 April 2021 in the following terms so far as relevant:

> "… 2. The appellant's grounds of appeal is long and detailed. In essence the grounds assert that the judge did not consider all the evidence which was before him properly. That he failed to give weight to material evidence and that as a result his assessment of 'genuine and effective work' is flawed.
> 3. The judge considered all of the evidence carefully and having considered the evidence in the round gave adequate reasons for finding that there was insufficient evidence that shows that the appellant's spouse was exercising treaty rights in the United Kingdom at the relevant period. There is no error of law."

7. The Appellant renewed his application to this Tribunal. On 8 December 2021, Upper Tribunal Judge Sheridan granted permission to appeal stating "[i]t is arguable that the judge applied too high a threshold when assessing whether the self-employment of the appellant's partner was 'genuine and effective' in the 2013/14 tax year."

8. The Respondent filed a Rule 24 reply on 25 January 2022 seeking to uphold the Decision and pointing out that the burden is on the Appellant to establish that the requirements of the EEA Regulations are met. The Judge was entitled to reach the conclusions he did on the evidence and the Appellant had failed to discharge that burden.

9. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. I have before me a core bundle including the Respondent's bundle, the Appellant's bundle before the First-tier Tribunal and some loose documents as well as a skeleton argument filed on the Appellant's behalf. The skeleton argument broadly follows the pleaded grounds challenging the Decision. For reasons I will come to, the only document to which I need to make reference apart from the core documents is the loose document in the form of a witness statement from HMRC.

DISCUSSION

10. Although the Appellant filed a witness statement (unsigned and undated in the copy I have), he was not called to give evidence. Nor does his statement deal in any detail with his wife's employment. He asserts without more at [4] of his statement that his "ex-spouse, Ms M Bozsar, has been working in the UK and is exercising her Treaty rights in the UK". He provides no detail of when she was working, in what capacity or for how long. Whilst I recognise that he is no longer in communication with her, he did not provide any evidence about her employment in 2013/14 which is the crucial year for the purposes of this appeal and when the Appellant had just married her.

11. Instead, the Appellant relied entirely on a witness statement from Anna Findlay of HMRC setting out what is known by that department about Ms Bozsar's employment, and benefits position.

12. In relation to 2013/14 the statement shows that Ms Bozsar was not employed. For that tax year, she is shown as having self-employed income for the accounting period ending 4 April 2014. Her turnover is shown as £1560 and her net profit as £1280. The self-employment is stated as "make dresses, curtains, pillows etc". It is not said when that self-employment began.

13. In the following tax year, the statement shows that Ms Bozsar was still self-employed rather than employed. That shows self-employment income from

sewing jobs of £3497 (turnover) and £3607 (net profit). There is also self-employment income from cleaning jobs of £153 (turnover) and £122 (net profit).

14. At the end of the period for which HMRC has any information about Ms Bozsar, in 2017/18 she was employed by what appear to be two connected employers earning a total of £9462.16 gross. In 2018/19 working for the same employer, she earned £1772.53.

15. Ms Bozsar was also in receipt of tax credits for some of the period. She was not in receipt of working tax credit in 2013/14. She received £4127.64 working tax credit in 2014/15, £4715.99 in 2015/16, £3453.10 in 2016/17 and £698.64 in 2017/18. She also received child tax credits. She was paid those in the sum of £2876.69 in 2013/14. This is said to be on a joint application status which ended on 5 January 2014. Thereafter, she was paid on a sole application status £2874.72 in 2014/15, £5152.91 in 2015/16, £6676.09 in 2016/17 and £1357.75 in 2017/18. The payments for child tax credits appear to have ceased on 27 May 2017. Ms Bozsar was also in receipt of child benefit in the period 9 December 2013 to 13 August 2019.

16. I turn then to the Judge's findings and reasoning. At [15] of the Decision, the Judge noted that the figures for 2014/15 were still low. However, he noted that the earnings from self-employment were still nearly three times higher than in 2013/14. Given the nature of the employment, he "consider[ed] it reasonable to accept this as evidence of genuine and effective self-employment".

17. The Judge then turned to the 2013/14 tax year and said this:

> "*The tax year of 2013/2014*
> 16. The issue is with the year 2013/2014. The only evidence the appellant can point to is a figure from HMRC of £1638.44 for Turnover/sales/Gross profit and £1280 of Net profit. I accept that this relates to the relevant tax year, but there is no other evidence whatsoever of the period of self-employment, when it started etc. As noted above the appellant's own witness statement is completely silent on such details. If spread equally over 52 weeks this gives a net profit of £24.61. But there is absolutely no evidence as to when this income was earned, whether it was spread over the whole year, or six months or three months or one month.
> 17. The burden is on the appellant. He must prove his case. I take into account that he is not in contact with his wife, and can obtain no evidence from her. I have been prepared to accept the evidence for the years from 2014/2015 onwards. However for 2013/2014 I do not accept that this figure on its own establishes on the balance of probabilities that his wife was engaged in genuine and effective self-employment for the whole (or the very large majority) of the tax year 2013/2014.
> 18. The appellant must also show that his wife was exercising treaty rights for a continuous period. Whilst I accept that short gaps may not break continuity, as per case law, Ms Wass did not make any detailed submissions on this. As above there is no evidence at all as to what period the net profit of £1280 refers to. It is conceivable that this might have been early in the year 2013/2014 and that there

was then a significant break. I accept this is only speculation and I do not make any such finding. At the point is that the burden is on the appellant and he cannot establish what period these earnings or net profit of £1280 relate to. Given the low level of such earnings, it is entirely possible that they relate only to a short period in the year and the Appellant can point to no evidence to establish the relevant period.

18. Since complaint is also made about the Judge's treatment of the evidence relating to tax credits, I also need to record what the Judge said about these as follows:

"*Tax credits for 2013/2014*
19. Ms Wass made submissions about the receipt of tax credit. She accepted that receipt of tax does not establish how many hours his wife was working. I would also find that it does not establish when any self-employment started.
20. I also note from the evidence that his wife was not in receipt of working tax credit until 5 January 2014 as I understand the HMRC evidence, as this is the date when a new sole claim for tax credits apparently commenced, although Ms Wass did not address this directly.
21. I accept that it is necessary to establish a right to reside to claim tax credits. However a right to reside can be established on various different grounds and there is no evidence as to which one applied to his wife's tax credits claim. Secondly, a decision of any government body is not binding upon me. Thirdly, as was accepted it provides no evidence of the number of hours of self-employment (if indeed that was the basis of the right to reside, of which there is no evidence). Fourthly it provides no evidence as to when self-employment commenced.
22. For all those reasons I do not accept that the receipt of tax credits by his wife assist the appellant in establishing that her self-employment was genuine and effective.
23. I also note that Ms Bozsar was in receipt of child benefit from 9 December 2013. As noted above, it seems that his wife made a sole claim from tax credits in very early 2014. The appellant has said absolutely nothing about a child in his witness statement. I do not make any adverse finding, and do not make any finding or inference against the Appellant, but I simply observe that the Appellant has not chosen to offer any explanation of these facts, and how they may be relevant to his wife's earnings, which is the principal matter on which this appeal turns."

19. The Judge then turned to reach his conclusions which read as follows:

"24. In conclusion, the burden is on the Appellant.
25. Ms Wass made clear that the Appellant relies on the years 2013/2014 up to 2017/2018.
26. The Appellant has given no details whatsoever of his wife's self-employment, the nature of the work, the hours etc. The Appellant must show that she has been exercising Treaty Rights for 5 years continuously, but he has given no explanation of whether her employment or self-employment was continuous, or of any breaks. Self-employment must be genuine and effective. The Appellant has provided no other evidence of this with her [sic] appeal or subsequently, apart from the HMRC evidence referred to above. Whilst I appreciate that they have separated, the Appellant has been completely silent on these matters.

> 27. I am prepared to accept on the balance of probabilities that the HMRC evidence from 2014/2015 – 2017/2018 does show that his wife was exercising treaty rights for that four-year (tax year) period. However, that is not sufficient. I do not accept the evidence for 2013/2014 establishes that she was exercising treaty rights for that tax year. He has not established that her self-employment was genuine and effective.
> 28. The appellant has only established that she was exercising treaty rights for a four-year period, and not the required five year period in order to establish his permanent right of residence. There is no 'near miss' or discretion in this matter. The regulations state 5 years and the Appellant has failed to establish this. Therefore the appeal is dismissed."

20. I deal then with the arguments put forward by the Appellant in the order they are pleaded in the grounds of appeal.

21. First, it is said that the Judge should have accepted that the self-employed earnings in 2013/14 were sufficient given his finding that the earnings in 2014/15 demonstrated that Ms Bozsar was exercising Treaty rights in that year. There are two difficulties with that argument. First, the Judge expressly explained at [15] of the Decision that the reason why he accepted Ms Bozsar's employment in 2014/15 to be genuine and effective but did not in 2013/14 was because her income in 2014/15 was about three times higher. Second, as is self-evident, 2013/14 is the first of the years which the Judge had to consider. As the Judge said, he could not be satisfied that the evidence showed that Ms Bozsar was self-employed throughout that year.

22. The second point raised is that the Respondent had not taken issue with the period during which Ms Bozsar was exercising Treaty rights. It is said that the Judge took this point of his own volition. The Respondent had of course determined the application on an entirely misconceived premise. There was therefore no need for her to raise the issue of the exercise of Treaty rights. The Judge had to determine for himself whether the evidence showed that Ms Bozsar was exercising Treaty rights for the relevant period. It is very difficult to see how the issues raised at [16], [18] and [26] were not ones to which the Judge was entitled to have regard. The central matter to be determined was whether Ms Bozsar was a qualified person throughout the requisite period. The Judge could not determine that issue without considering the evidence (on which the Appellant relied) and making findings about what that evidence did or did not show.

23. The third and fourth issues concern the Judge's finding that Ms Bozsar's earnings in 2013/14 were not "genuine and effective". This is the basis on which permission to appeal was granted. However, as I have already pointed out, much of what is said at [16], [18] and [26] is not related to the question whether Ms Bozsar was a "worker" based on the extent of her self-employment activity, but whether she was actually exercising Treaty rights in the UK throughout the period.

24. Insofar as the Judge did make a finding that the earnings did not reflect self-employment which was "genuine and effective" work, as Ms Gilmour

pointed out, the cases referred to in the grounds and repeated in the skeleton argument said to be relevant to the error asserted were not drawn to the Judge's attention. As the Judge said at [9] of the Decision, the Appellant's representative did not refer to any case-law.

25. Of course, if there were relevant cases of which the Judge should have been aware, there may still be an error even if a representative has not drawn it to the Judge's attention. Nonetheless, I accept Ms Gilmour's point that, whilst this might apply to case-law, it cannot apply to the DWP guide which is referred to at [8] of the grounds and [27] of the skeleton argument.

26. The Judge expressly recognises, in relation to 2014/2015 at [15] of the Decision that sewing, and cleaning work is likely to be low paid. The assertion that the Judge should have considered the earnings as reflecting the "feast and famine" inherent in self-employment does not assist because the Judge had no evidence about Ms Bozsar's work to suggest that this was the position. In short, citations from other cases setting out what the evidence showed in those cases does not assist in a case such as this where there is no such evidence.

27. Ms Gilmour drew my attention to the guidance given in Begum (EEA – worker – jobseeker) Pakistan [2011] UKUT 00275(IAC) (which post-dates the cases to which the Appellant refers) which reads as follows:

> "(1) When deciding whether an EEA national is a worker for the purposes of the EEA Regulations, regard must be had to the fact that the term has a meaning in EU law, that it must be interpreted broadly and that it is not conditioned by the type of employment or the amount of income derived. But a person who does not pursue effective and genuine activities, or pursues activities on such a small scale as to be regarded as purely marginal and ancillary or which have no economic value to an employer, is not a worker. In this context, regard must be given to the nature of the employment relationship and the rights and duties of the person concerned to decide if work activities are effective and genuine."

28. Given the way in which the case was presented to the Judge on this issue as set out at [11] of the Decision, he was entitled to focus on the question whether the extent of the work was such as to render it marginal and ancillary. In any event, even if the Judge had not properly considered this issue, it is not material since the effect of the Judge's reasoning is that the Appellant had not shown that Ms Bozsar was exercising Treaty rights throughout the period in question.

29. I do not understand the point being made by the fifth issue raised, based on calculations linked to the minimum wage. The Judge did not use the minimum wage as a yardstick nor was he invited to do so as far as I can see. The skeleton argument in this regard (at [26]) refers to [24] of the Decision. There is no reference at all to minimum wage in that paragraph. I can find no such reference elsewhere in the Decision. There is nothing to suggest that the calculations as set out at [9] to [11] of the grounds were ever put to the Judge or that it was suggested to him that this was an appropriate way

to consider whether employment was genuine and effective. As I say, any error in this regard is not in any event material given the Judge's finding about the period during which Ms Bozsar was working.

30. I turn then to the sixth issue which concerns the evidence in relation to tax credits and child benefit.

31. It is asserted at [12] of the grounds that the Judge erred by failing to find that the receipt of tax credits in 2013 and child benefit from December 2013 to August 2019 meant that Ms Bozsar must have been resident in the UK and working at the relevant times.

32. The first difficulty with that assertion is that, as is made clear at [25] of the Decision, the Appellant relied only on the period up to the end of the tax year 2017/2018. The Judge was not required to consider the position thereafter.

33. The Judge dealt with the evidence about the tax credits but for the reasons given did not accept that these showed the period from which Ms Bozsar was paid those tax credits. He also noted that Ms Bozsar received child benefit from December 2013. That is consistent with the HMRC evidence and, if anything, undermines a case that Ms Bozsar had been in the UK and working throughout the 2013/14 tax year.

34. The Appellant also relies on tax legislation which he says shows that Ms Bozsar was resident in the UK at the relevant times as she could not be paid tax credits if she were not. Again, the Judge dealt with this ([21] of the Decision). He was right to say that whether HMRC considers someone to be resident is not binding on him. Residency for tax purposes has a particular meaning and does not require a person to be in the UK for any more than half of the year. I add that the references in the grounds to 2003 regulations does not assist as there is no longer a concept of "ordinarily resident" which is replaced by a statutory residency test. Nor, as I understood Mr Ahmed to accept, can HMRC provide any indication as to a person's immigration status. For those reasons, as the Judge pointed out, these payments still do not provide evidence of the periods when Ms Bozsar was resident in the UK.

35. In relation to child benefit, the Judge noted that Ms Bozsar started to receive child benefit from December 2013 (which might be an indication that the tax credits were similarly limited in time). The fact that child benefit payments continued into 2019 does not necessarily mean that Ms Bozsar or her child were in the UK. Child benefit was payable to EEA nationals whose children were resident in another EU member state and Ms Bozsar might have continued to be treated as resident for tax purposes even if she had left the UK for a substantial period (as I have already indicated). In any event, as I have already pointed out, the Appellant did not rely on the period after the tax year 2017/2018. A period from December 2013 to April 2018 could not avail the Appellant.

36. As the Respondent pointed out in her rule 24 statement and as the grounds appear to recognise, the Judge's findings were not based principally on whether Ms Bozsar's employment was "genuine and effective" but mainly on the start date during 2013/14 when she began employment (or rather self-employment). The Respondent had approached the application made by the Appellant on a wrong basis, assuming that the Appellant was no longer a family member. That she did not take a point about Ms Bozsar's exercise of Treaty rights is therefore nothing to the point.

37. Although the Judge noted at [10] of the Decision that the Respondent's submissions focussed largely on the level of earnings and it appears that this was also the basis for the Appellant's submissions, the Judge had to determine whether the Appellant's wife was a qualified person at all relevant times. That included not only whether her employment was genuine and effective but also whether she was in fact exercising Treaty rights in the UK.

38. The Judge was entitled to reach the conclusions he did that the evidence did not establish when the Appellant's spouse was working in the UK, particularly at the beginning of the period he was asked to consider. Even if there were an error in relation to the finding that the self-employment in that year was not genuine and effective, such error would not make any difference to the outcome. The Judge was however entitled to conclude that the evidence of self-employment in the period 2013/14 showed that this was not genuine and effective.

CONCLUSION

39. For the foregoing reasons, I am satisfied that there is no error of law in the Decision. I therefore uphold the Decision with the result that the Appellant's appeal remains dismissed.

DECISION

The Decision of First-tier Tribunal Judge Roots promulgated on 25 February 2021 does not involve the making of an error on a point of law. I therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

Signed: L K Smith

Upper Tribunal Judge Smith

Dated: 22 March 2022