



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

Appeal Number: IA/37320/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 1 September 2014**

**Determination
Promulgated
On 24 September 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

WALID SAYED AMIN ABOU ELHANA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Hart, Terence Ray, Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Walid Sayed Amin Abou Elhana was born on 28 September 1974 and is a male citizen of Egypt. By a decision dated 29 August 2013, the respondent refused the appellant's application for a residence card as confirmation of a right of residence as a family member of an EEA national

exercising treaty rights in the United Kingdom. The appellant is married to a Lithuanian citizen, Eligija Abou Elhana (hereafter Mrs Elhana). The appellant appealed to the First-tier Tribunal (Judge Powell) which, in a determination promulgated on 24 March 2014, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. Granting permission, Judge Grubb stated at [3]:

It is, however, arguable that the judge erred in law in reaching his adverse finding in respect of the period of the sponsor's self-employment. The judge's findings may not be as clear as they might have been given his view that the sponsor's evidence was contradictory on whether she started trading in September 2008 or September 2009. However, it appears that the judge accepted the sponsor was trading from 1 August/September 2009 but that there was no evidence of trading between March and August/September 2009. In reaching that finding, he does not appear to have taken into account evidence at page 258 of the bundle which relates to the rental of a 'catering van' from 1 March 2009. That evidence was relevant to whether the sponsor was actively trading from 1 March 2009 and, perhaps, whether in any event any preparation or set-up time counted towards the 5 years.

3. The grant of permission quoted above encapsulates the issue in this case. There appears to have been some disagreement on the part of the appellant as to the judge's fixing of the date prior to which the appellant had to prove continuous residence in the United Kingdom for a period of at least five years. However, that does not appear to be material given that, as Mr Wilding submitted, a problem would arise whenever the starting date was fixed because the judge found that the appellant had failed to prove that the sponsor had been self-employed in the period April-September 2009. In any event, at [18], the judge recorded that it had been "common ground that the relevant date was the date of hearing. As such, the appellant must show that his sponsor has been exercising treaty rights in the United Kingdom continuously for a period of 5 years."

4. There is no dispute as to the judge's application of the law only as to his assessment of the evidence. At [258] of the appellant's bundle of documents, there is an "application for a payment" issued by Savills Commercial Limited. The invoice is addressed to the sponsor and refers to a "catering van". The charges for rent for the catering van appear on the document at monthly intervals during the period 1 March 2009 to 1 March 2010. It is the appellant's submission that the judge ignored that evidence; if he had considered it then he would not have reached the finding set out at [35] of the determination:

There is no evidence to show trading in the form of invoices or receipts before 1 August 2009. The Profit and Loss account is based on self-reporting and is not accompanied by evidence of trading. It also stands at odds with the sponsor's evidence about the start date of her self-employment and the end date of her employment. There is no evidence to show the payment of tax at all; the payment of a direct debit for self-employed national insurance contributions is the only piece of evidence that

shows registration for self-employment from January 2009, and it is not evidence of actual self-employment. I am not helped at all by bank statements. There is no evidence of caterers' insurance or business insurance or vehicle insurance or inspections from the local authority in 2009 to help me to find in favour of the sponsor.

I am not therefore satisfied that the appellant has shown on balance of probabilities that his sponsor was exercising treaty rights continuously from 17 March 2009, being the relevant date for a period of 5 years ending at the date of the hearing.

5. The judge noted at [20] that the appellant and the sponsor had purchased a mobile burger van in April 2009. However, he found that there was "a clear discrepancy" in the sponsor's evidence as to the year she claimed to have stopped working for her previous employer, Southern England Farms Limited. There was also a "clear discrepancy" [23] between the date upon which the appellant's audited accounts had begun (1 September 2008) and the sponsor's evidence that she had started her self-employment on 1 September 2009.
6. It is true that the judge does not refer specifically to the Savills' invoice. However, that invoice does not, as Mr Wilding submitted, render inappropriate the findings as to discrepancies in the evidence to which the judge referred. Those discrepancies remain unresolved. Certainly, the Savills' invoice *might* have been taken by the judge as evidence of trading (or preparation for trading) in the "missing" period of April-September 2009 but it is, in my opinion, not a piece of evidence which compels that conclusion. Significantly, the judge has been concerned by the lack of evidence in the form of invoices and receipts or of the payment of income tax or business insurance prior to August 2009. He does not suggest (nor do I) that such evidence is required by necessity in cases such as these but, given that the judge states in the determination [24] that he had "looked for documentary evidence to assist me to resolve these discrepancies," there seems no reason to conclude that he has ignored the Savills' invoice; rather, it appears that he has concluded that neither it nor any other item of documentary evidence was sufficient to resolve the discrepancies in the evidence which had concerned him nor did the evidence as a whole discharge the burden of proof which rested on the appellant to show that the sponsor was employed or self-employed throughout the five year period. In the light of the discrepancies identified by the judge, it simply cannot be said that, even if he had dealt in detail with the Savills' invoice, he would have concluded that it provided (given the inadequacy of the remaining evidence) sufficient proof of the sponsor's self-employment.
7. Considering the determination as a whole, I find that the judge has not erred in law for the reasons asserted in the grounds or at all. I would say, however, that there was nothing in either this determination or that of the First-tier Tribunal which would suggest that there is anything dishonest or inappropriate in the appellant's application. It is simply the case that he has failed, on this occasion, to discharge the burden of proof upon him. As

the judge notes at [33] there is “a wealth of documentary evidence” to show that the sponsor is now and has been for some time operating her own business. There is nothing to prevent the appellant making a further application although that is, of course, a matter for him and his advisers.

DECISION

8. This appeal is dismissed.

Signed

Date 22 September 2014

Upper Tribunal Judge Clive Lane