



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/41258/2014
IA/41264/2014

THE IMMIGRATION ACTS

Heard at Field House
On 6 November 2015

Decision and Reasons Promulgated
On 13 January 2016

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MR KASHIF KHALIL
ZEESHAN WAHEED
(no anonymity directions made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms S Iqbal of counsel
For the respondent: Mr E Tufan, Senior Presenting Officer

DETERMINATION AND REASONS

1. The first appellant is a citizen of Belgium born on 16 October 1972. The second appellant, who is the first appellant's nephew, is a Pakistani national born on 2 July 1987. They appealed to the First-tier Tribunal against the decisions of the respondent dated 28 August 2014 to refuse to issue the first appellant with an EEA registration certificate and to refuse to issue the second appellant with a residence card as a

family member of an EEA national under regulation 6 of the Immigration (European Economic Area) Regulations 2006 (the '2006 Regulations'). First-tier Tribunal Judge Cox dismissed that appellant's appeal. In a decision of 21 May 2015, First-tier Tribunal Judge Bartlett granted the appellants permission to appeal to the Upper Tribunal.

2. Thus the appeal came before me.
3. The main issues in the proceedings before the First-tier Tribunal were whether the first appellant who is a Belgium national was a qualified person exercising his treaty rights in the United Kingdom as a self-employed person pursuant to regulation 6 of the 2006 regulations.
4. The issue in respect of the second appellant was whether he was living with his sponsor in an EEA state as a worker or self-employed person and was dependent on his EEA national sponsor as required under regulation 8 (2) (a) of the 2006 regulations and whether he has a basis to stay in the United Kingdom under the 2006 regulations.
5. The appellant's grounds of appeal argue as follows. The Judge accepted at paragraph 15 of the determination that the first appellant is registered with HMRC for tax purposes. At paragraph 16 it is recorded that the first appellant had over £4000 from 18 March 2014 to 8 July 2014 in a period of just over three months. The financial year ended on 5 April 2014 and therefore part of this earning was counted towards the first appellant's earnings for the year ended on 5 April 2014. The first appellant's self-employed commission agent and his earnings were received from different sources as opposed to an employment income. Therefore, in most cases the first appellant was paid in cash and the same was paid into his bank account as received.
6. The first appellant has declared his earnings as £5986 for the year ending 5 April 2014. The appellant made a national insurance contribution of £74.50 which is mandatory for self-employed persons in the United Kingdom. The letter attached at page 103 of the appellant's bundle is dated 4 October 2014 and hence it postdates the application. This is because the first bill was received from HMRC and that the HMRC only sends such a bill twice a year and no regular payments are expected from a self-employed person as opposed to those who are in employment.
7. The first appellant applied to register with HMRC for tax purposes before starting his business in the United Kingdom and received confirmation in June 2014. After various telephone requests to the HMRC, the first appellant received his first national insurance bill in October 2014. This bill was not available prior to the date of decision hence it postdates the application. Section 85 (4) of the Nationality Immigration and Asylum Act 2002 allows the Tribunal to consider any evidence material is relevant to the issue in question and existing at the time even after decision. The Judge has clearly erred in law by not accepting the appellant's evidence.

8. In relation to the Judge's findings at paragraph 20 and 21, the conclusion is against the essence of regulation 6 of the 2006 regulations. The Home Office guidance on EEA national qualified person version 2.0 valid from 25 February 2015 explains how an EEA national can qualify to be treated as "a qualified person". The first appellant meets the test and has provided letters confirming the registration for tax and national insurance purposes with HMRC. He has provided letters confirming registration for tax and national insurance purposes, the accountants report, accountant's letter and bank statements. In the presence of these authentic documents, the appellant felt he did not need to submit business invoices. There is no legal requirement to submit invoices with his application. The Home Office guidance sets out the kind of evidence to show self-employment.
9. At paragraph 23 of the determination, the Judge failed to assess the appellants Article 8 rights. The case law quoted by the Judge is inapplicable to the present case and nor does it support the Judge's findings that no Article 8 rights arise in the present circumstances.
10. I find that there is no error of law in the determination of the First-tier Judge in relation to the application of the 2006 Regulations. The Judge found that the appellant does not satisfy Regulation 9(2)(a) and (b). Nothing presented to me suggests that this finding was legally erroneous.
11. I find that the first-tier Tribunal Judge did not materially err in law and gave adequate reasons for his finding that the first appellant has not demonstrated that he is a self-employed person and therefore a qualified person and is not exercising his EEA treaty rights in the United Kingdom. The Judge also did not fall into error by finding that the second appellant who is dependent on the status of the first appellant does not, as a consequence, qualify for a residence card.
12. The Judge was entitled to conclude that there was no credible evidence of the provenance for the £4000 deposited into the appellant's bank account and that this money had been generated from his business activity in the United Kingdom. The Judge was entitled to not rely on the accountant's summary of the appellant's income and expenditure for the period 1 October 2013 to 5 April 2014 and the accountants projected summary of the appellant's income and expenditure for the tax year ending April 2015. The Judge found that the summary reports were very basic and stated at paragraph 18 "the first one stated after deducting expenses such as "use of home"; motor and travelling; telephone; and general expenses, the appellant's net income was £5986". The Judge correctly noted that the appellant must have provided his invoices to the accountant for him to have prepared his report and found that the appellant had not given a reason for why he did not provide any of the invoices to support his appeal.
13. I do not accept the appellant's argument that there is no legal requirement for him to provide invoices. The burden of proof is on the appellant and it is for him to demonstrate that he is self-employed in this country and invoices from clients would have gone a long way in establishing his purported business activity in this country.

The Judge found that the appellant has not provided any invoices or receipt of letters from his clients to demonstrate self-employment. It is implicit in the determination that if the appellant was self-employed and had clients, there must have been a paper trail which he could have been provided as evidence of self-employment. These are proper findings by the Judge and cannot be faulted.

14. Although the Judge stated at paragraph 17 that the evidence postdates the decision he however did take it into account and stated that this evidence does not demonstrate that the appellant is making regular national insurance contributions as one would expect from a self-employed person. The Judge allowed the evidence and considered it but attached little weight to the evidence which he was entitled to do.
15. In respect of the HMRC documents, the Judge found at paragraph 20 that registration with the HMRC does not in itself establish that a person is self-employed. He was entitled to find that the appellant failed to provide evidence as to the source of the funds in his bank account and therefore registration with HMRC in itself does not show that the appellant is self-employed in this country.
16. The Judge was entitled to find, on the evidence that the appellant is not a qualified person under paragraph 6 of the 2006 regulations and therefore he is not entitled to a registration certificate and the second appellant cannot qualify for a residence card.
17. I therefore uphold the first-tier Tribunal's determination as there is no material error of law.

DECISION

I dismiss the appellant's appeal

Dated 12th day of January 2016

Signed by,
A Deputy Judge of the Upper Tribunal

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Mrs S Chana