



IAC-AH-CO-V1

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

Appeal Number: IA/26686/2014

THE IMMIGRATION ACTS

**Heard at RCJ Belfast
On 26 October 2015
Judgment given orally at hearing**

**Decision & Reasons Promulgated
On 28 January 2016**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DR STUART ROSS

Respondent

Representation:

For the Appellant: Ms A O'Brian, Home Office Presenting Officer

For the Respondent: Ms F Connolly, Counsel instructed by Madden & Finucane Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision by First-tier Tribunal Judge M. M. Hutchinson who heard the appeal of Dr Stuart Ross on 9 December 2014. The appellant in these proceedings therefore, is the Secretary of State but I refer to the parties as they were before the First-tier Tribunal.
2. The appellant is a citizen of the USA. He appealed to the First-tier Tribunal against a decision by the respondent to refuse a residence card. The application for a residence card was on the basis that he is the spouse of

an EEA national exercising Treaty rights, his spouse said to be a self-employed person. The respondent's decision identified what could be said to be deficiencies in the documentary evidence provided by the appellant in relation to the self-employment of his wife.

3. The appellant's wife, Maria Cristina Tuero-O'Donnell, is a citizen of Spain. The basis of her self-employment is as a language teacher, as set out in the First-tier Judge's decision.
4. In the respondent's refusal of the application for a residence card it said that the evidence provided in relation to self-employment was insufficient because it did not prove that the appellant's wife was exercising Treaty rights for five years. Reference is made to the tax returns provided, the respondent stating that those are for the EEA's sponsor's personal records and are not for official use. Other evidence that could have been provided is identified in the decision letter, in terms of for example, tax and national insurance contributions, bank statements reflecting self-employment, accountant's letters, and "official account statements". The overall conclusion was that insufficient evidence of self-employment had been provided.
5. First-tier Judge Hutchinson heard evidence from the appellant, his wife and from another witness, Mr Thomas Logue. She identified at [15] what the issue in the case was namely "one of adequacy of evidence." Having heard evidence from the witnesses and considered what documentary evidence there was, she allowed the appeal under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). It may be, although it is not clear, that the judge also allowed the appeal under Article 8 of the ECHR, although that is not expressly said to be the case under the subheading "Decision".
6. The respondent complains about the judge's conclusions with respect to the EEA Regulations, the argument in essence echoing the terms of the decision letter, namely that there was a lack of documentary or supporting evidence of the appellant's wife's self-employment. It is said that the judge impermissibly allowed the gap in that evidence to be filled by oral evidence. In other words, there was an over reliance by the judge on oral evidence to the exclusion of what documentary evidence could and should have been expected. At 1(d) of the respondent's grounds it is said that whilst the oral evidence was deemed cogent by the First-tier judge, that did not overcome the "paucity of evidence" in support of the assertion that the Regulations are met.
7. Submissions on behalf of both parties can be summarised in the following way. On behalf of the respondent the grounds were relied on. I was referred to the reasons for refusal letter in general terms, to the effect that it identified what evidence could have been provided on behalf of the appellant.

8. For the appellant Ms Connolly submitted that the judge was perfectly entitled to take into account the oral evidence. It was within the judge's province, as it were, to allow the oral evidence to supplement what documentary evidence there was, even though it could be said that some of the documentary evidence was lacking. I was referred to the nature of the appellant's employment in terms of what could have been expected.
9. There was separate argument on behalf of the respondent in relation to Article 8 but, as I indicated during the course of submissions, that seems to me to be very much a side issue.
10. Generally speaking, where evidence of a fact could reasonably be expected to be provided the Tribunal is entitled to expect that it would be. Applications for residence cards are, as is well-known, open to abuse by those seeking to take advantage of free movement rights of workers in the European Union.
11. It is readily apparent however, that First-tier Judge Hutchinson was well aware of the issues in the appeal. As I have already indicated, at [15] she clearly identified the issue in the appeal in the very first sentence, that is to say, an apparent lack of supporting evidence. She pointed out however, that she had had the advantage of hearing and seeing the witnesses. At [19] she said that the evidence of the appellant, his wife and Mr Logue was consistent and given in a straightforward manner, and which confirmed the appellant's wife's ongoing self-employment as a language teacher. The judge said as follows:

"I accept that due to the nature of her business, which she generally runs from her home, although on occasions she gives lessons in her student's homes, that she does not have advertising or invoices etc. I also further accepted the consistent evidence that she gets paid in cash and that she does not, as a rule, deposit this money in an account, using it instead for household expenses."
12. She then went on at [20] to refer to the income from the business as being relatively modest but in general she has not had to make a net tax payment because her income falls below the personal allowance.
13. Reference is also made to the appellant's spouse raising the couple's children. She concluded that it was entirely credible that she would wish to work around those commitments. She gave an example in the oral evidence of the number of weeks when she had not worked at all because of the children being unwell. Judge Hutchinson also said that although self-employment may be part-time, that does not make it any less effective (presumably in terms of the exercise of Treaty rights). There is also reference to Ms Tuero-O'Donnell's previous work at a language school and that she obtains all her clients by word of mouth and recommendations. This would appear to reflect on the issue of evidence of advertising, referred to in the decision letter.

14. At [22] the judge said that she accepted the point made on behalf of the respondent that there is perhaps “a paucity of independent documentary evidence” but she reminded herself that she did not require corroboration. She also said that the appellant and his wife, and indeed Mr Logue (a retired tax inspector) would be perpetrating a reasonably sophisticated fraud over an extended period if she were to accept the inference that the oral and other evidence in the detailed records kept by Ms Tuero-O’Donnell of her ongoing self-employment, cannot be relied on as accurate.
15. At [17] she said that it was regrettable that there was no written evidence of national insurance contributions or statements from clients, or diaries noting client appointments over the years. It is clear however, that she had a plain understanding of the basis of the sponsor’s self-employment and undertook a careful analysis of it.
16. It is not a case here, of no documentary evidence and simple blind acceptance by the judge of the oral evidence of individuals who could be said to have a motive for deception. The judge was perfectly entitled to conclude that although documentary evidence was lacking, the deficiencies in that evidence were made up by, or supplemented by, credible oral evidence.
17. In these circumstances, I am not satisfied that it has been established that there is any error of law in the First-tier judge’s decision. The decision to allow the appeal under the EEA Regulations is to stand.
18. It is not necessary for me to decide the point in relation to Article 8 of the ECHR because the decision in that respect, so far as it can be deduced, fell in line with that under the EEA Regulations. There may otherwise have been a separate point about whether an Article 8 ground of appeal is available at all in an appeal against the refusal of a residence card, in the light of recent authorities, but this is not one of those cases on which a determination on that issue needs to be made.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to allow the appeal therefore stands.

Upper Tribunal Judge Kopieczek

27/01/16