Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/06976/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2nd November 2018	**On 14th November 2018**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

MOHAMED NAJEEB MOHAMED NASEEF
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Coleman of Counsel instructed by TMC Solicitors Ltd
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Bart-Stewart promulgated on 27 November 2017, in which the Appellant's appeal against the decision to refuse his application for an EEA Residence Card dated 26 May 2016 was dismissed.

2. I found an error of law in Judge Bart-Stewart's decision promulgated on 27 November 2017 following the first hearing of this appeal on 30 July 2018. The background to this appeal is set out in the error of law decision contained in the

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annex and will not be repeated here save where reference to the background facts is needed. This decision is the re-making of the appeal.

3. The issues in the appeal were first, whether the Appellant satisfied the requirements for an EEA Residence Card set out in regulation 10(5) of the Immigration (European Economic Area) Regulations 2006; and secondly, whether he had obtained a right of permanent residence under regulation 15 of the same.

4. The Respondent initially refused the application, essentially on the basis that it was not accepted that the EEA national sponsor was in genuine and effective employment prior to or at the date of divorce and insufficient evidence that the Appellant was a worker, self-employed person or a self-sufficient person since the date of divorce.

5. At the hearing on 2 November 2018, the Appellant produced a significant volume of original payslips and corresponding bank statements and a short adjournment was granted for the Home Office Presenting Officer to consider this additional evidence, even thought it had been produced exceptionally late and in breach of directions.

6. Following consideration of the documents, it was accepted on behalf of the Respondent that there was clear evidence of both the Appellant and his EEA national Sponsor working since 2010, up to the date of divorce for the Sponsor and up to the date of hearing for the Appellant. In the circumstances, there was no longer any submission that the Sponsor's employment was not genuine and effective (part-time work being sufficient and with sufficient pooled resources for the couple from the same business). It was as a result accepted on behalf of the Respondent that the Appellant had a retained right of residence on divorce pursuant to regulation 10 of the Immigration (European Economic Area) Regulations 2006 and also that he had obtained a permanent right of residence under regulation 15 of the same. There were no other outstanding issues in the appeal.

7. On the basis of the Respondent's acceptance that the Appellant meets the relevant requirements of regulation 10 and 15 of the Immigration (European Economic Area) Regulations 2006, I allow the Appellant's appeal for those reasons.

<u>Notice of Decision</u>

For the reasons given in my decision promulgated on 28 August 2018, the making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it was necessary to set aside the decision.

The decision of the First-tier Tribunal is set aside and re-made as follows:

Appeal allowed under the Immigration (European Economic Area) Regulations 2006

No anonymity direction is made.

Signed Date 8th November 2018
Upper Tribunal Judge Jackson

ANNEX

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/06976/2016

THE IMMIGRATION ACTS

Heard at Field House
On 30th July 2018

Decision & Reasons Promulgated

…………………………………

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

MOHAMED NAJEEB MOHMED NASEEF
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Harvey of Counsel, instructed by TMC Solicitors Ltd
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Bart-Stewart promulgated on 27 November 2017, in which the Appellant's appeal against the decision to refuse his application for an EEA Residence Card dated 26 May 2016 was dismissed.

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2. The Appellant is a national of Palestine, born on 21 December 1991, who entered the United Kingdom in 2008, initially claiming asylum which was refused in February 2009. An application for leave to remain on 16 June 2009 was refused on 22 February 2010. On 12 January 2012, he applied for an EEA Residence Card on the basis of his marriage to an EEA national, which was approved and issued by the Respondent. On 26 November 2015, the Appellant made a further application for an EEA Residence Card to reflect a retained right of residence following divorce from his EEA national spouse.

3. The Respondent refused the application on 26 May 2016 on the basis that not all the requirements of Regulation 10(5) of the Immigration (European Economic) Regulations 2006 (the EEA Regulations) had been met. Although it is accepted that the Appellant had been married to an EEA national and had provided P60s for the financial years ending April 2013 to 2015 inclusive, it was not accepted that there was genuine and effective employment as the earnings were below the Primary Earnings Threshold (PET) and there was no other evidence to demonstrate that the employment was genuine and effective. In addition, there was insufficient evidence to show that the Appellant was a worker, self-employed person or a self-sufficient person since the date of his divorce as required by Regulation 10(6) of the EEA Regulations.

4. Judge Bart-Stewart dismissed the appeal in a decision promulgated on 27 November 2017. In essence, it was not accepted that the Appellant had established that the EEA national was in genuine and effective employment at the date of dissolution of the marriage and exercising treaty rights in the UK. I return below in more detail to the reasoning given for the conclusion.

<u>The appeal</u>

5. The Appellant appeals on the grounds that the First-tier Tribunal materially erred in law in (i) failing to take into account the duration of the EEA national employment when considering whether it was genuine and effective; (ii) reaching adverse findings against the Appellant without putting the points to him and in drawing adverse inferences from photocopied documents without requesting whether the originals were available; (iii) misdirecting itself by proceeding on the basis of a erroneous understanding the material facts in evidence before him as the earnings of all employees in the company and incorrectly identifying the EEA nationals pay; (iv) misdirecting itself in failing to provide reasons for rejecting the evidence that all employees worked two days and earned similar income; and (v) thereby cumulatively erring in the assessment of whether the EEA national's employment was genuine and effective.

6. Permission to appeal was granted by Judge Jackson on 12 June 2018 on all grounds.

7. At the oral hearing, Ms Harvey made detailed submissions about the factual circumstances and evidence before the First-tier Tribunal, which she said were not fully taken into account when the conclusion was reached that the EEA national's employment was not genuine and effective and there was an erroneous understanding of the facts. In particular, the First-tier Tribunal found that all

employees earned the same, however the payslips showed that they did not and where some employees earned the same wage, this was based on earning the national minimum wage and working same basic hours. It was accepted that there was no clear evidence of higher pay for the more highly skilled jobs undertaken but no reasons were given for rejecting the business model that all employees worked two days per week.

8. Further, there was no assessment of the EEA national's pattern of work as a whole. She had worked 16 hours a week in her previous job, doing the same thing and there had been a consistent number of hours worked. However on closer inspection of the payslips at the hearing, it was accepted that the hours worked were not in fact consistent and at the beginning of the period of employment did not amount to 16 hours a week. However, the EEA national was replaced by a new employee on the day that she left and the only change in employment circumstances since the Appellant was issued with an EEA Residence Card in 2012 was that her employer had changed to being the Appellant.

9. In terms of the finances of the Appellant and his spouse, they were both earning and lived in a council flat with low outgoings such that their income was sufficient to live on and there was no additional employment or sources of income required. In all, it was submitted that there was sufficient evidence before the First-tier Tribunal to show that the EEA national was employed in genuine and effective work.

10. The adverse inferences which were drawn by the First-tier Tribunal were not raised by the Respondent in the reasons for refusal letter and not put to the Appellant in the course of the hearing before the First-tier Tribunal. There was no suggestion that the employment was not genuine, that payslips and bank statements did not match up, nor that original documents had not been provided.

11. In relation to paragraph 13 of the First-tier Tribunal's decision, it was submitted that the findings there were incorrect on the face on the evidence, but both parties were in difficulties as neither had a copy of the Appellant's bundle before the First-tier Tribunal. I have what appears to be the complete bundle on file and the parties were content that I examined the factual points against that bundle. On one point of detail, my attention was drawn to the payslips which did show cumulative earnings as a year-to-date figure, contrary to the finding in paragraph 15 of the First-tier Tribunal.

12. On behalf of the Respondent, Ms Isherwood submitted that the findings reached were open to the First-tier Tribunal on the basis of the documents and evidence before it and with particular reference to the lack of plausibility and consistency in those documents. In particular, the Appellant had failed to give an explanation of the work schedules that he submitted and could not explain why employees were paid the same regardless of whether they worked or not. There had for example been no company bank accounts submitted and a number of documents were inconsistent.

Findings and reasons

13. To determine this appeal, it is necessary to set out in more detail the findings made by the First-tier Tribunal and consider these against the evidence before it submitted by the Appellant. The key factual findings are set out in paragraphs 13 to 15 as follows:

> *"13. The sole issue is whether the EEA national was a worker at the date of divorce and the appellant also in genuine and effective employment. The relevant date is that of the divorce on 29 April 2015. The appellant said that he had his own business in 2012 and he and the EEA national worked for the business. The bundle of documents which is large, consists mainly of photocopies of payslips and P60s. There are some joint bank statements for 2011 to April 2014 but those after 1 August 2013 only summary statements. There are computer printout statements stated to be printed on 17 May 2015 with transactions from 28 July 2014 to 18 May 2015. There is no corresponding payslip for a credit on 29 April 2015. There are two credits for £450.61 on 4 March 2015 and 10/2015 which is not consistent with the amount shown on the employee summary and only one payment £437.47 on 1 September 2014.*
>
> *14. The business bank statements have not been produced. In evidence the appellant said that the company was set up in March 2012 and the EEA national began to work for him in April 2012 however the Certificate of Incorporation shows a company incorporated on 28 June 2012.*
>
> *15. I do not consider credible all employees regardless of the skill and type of trade, whether office worker or skilled tradesperson, would be paid the same amount, or that all worked only 2 days a month when there were multiple projects. The appellant's explanation for only paying himself for 2 days a week is implausible. His P60 for the tax year ended 5 April 2015 showed net pay of £4453.64 and for the EEA national it is £4328.72. They should be the same on his explanation. These are photocopies but in any event self-generated. There is just a selection of payslips and none show cumulative pay."*

14. The decision goes on to set out the need for work to be genuine and effective, such that part-time work and work below the level of the minimum means of subsistence is not necessarily relevant to a person's status as a worker and all circumstances relating to the nature of the activities in question and employment relationship at issue has to be taken into account. The final conclusion is then, as above, that the Appellant had not satisfied the First-tier Tribunal that the EEA national was in genuine and effective employment at the date of divorce and exercising treaty rights in the UK.

15. I note at the outset that the reasons given for the decision are very brief and essentially seem to amount to a finding that the employment of the EEA national was not genuine, although this is not expressly or separately articulated. It also appears that the same finding extends to the Appellant's exercise of treaty rights in the United Kingdom although the two are somewhat conflated and no distinct reasons are given in relation to the Appellant. There are also no express findings or reasoning as to whether either the Appellant's or the EEA national's employment was effective despite the direction in law as to what needs to be taken into account to

determine this question. There is nothing to suggest consideration has been given to the employment relationship, the terms of employment, the employment history or the couple's lifestyle and expenses compared to their earnings (and there was evidence on the latter before the First-tier Tribunal).

16. However, in relation to employment history, the Appellant's claim that the First-tier Tribunal failed to have regard to the consistent nature of the EEA national's employment, said to be for 16 hours a week in her previous employment and throughout the four years' employment in the Appellant's business does not withstand scrutiny. The payslips provided for the EEA national from September 2012 to June 2013 show 43.33 hours a month work, equating to only 10 hours per week and only increasing to the equivalent of 16 hours per week in August 2013. The P60's provided similarly show significantly lower earnings to the year ending April 2013 compared to later years (around half or less). It is therefore unlikely that this particular point could have assisted the Appellant even if expressly taken into account.

17. The Appellant also claims that the First-tier Tribunal proceeded on an erroneous factual basis as to the nature of the Appellant's business and failed to give adequate reasons for rejecting the evidence that everyone was contracted to work 2 days per week and earnt a similar salary (that being the national minimum wage). The First-tier Tribunal was however entitled to question the plausibility of a business where skilled tradesman were paid at the same salary as other employees and find that the explanation provided about the operation of the business was inadequate. Sufficient reasons were given in light of the Appellant's evidence on this point.

18. As to the specific challenges on the findings made in paragraphs 13 and 15, I find that save for the payslips not showing cumulative pay (they do), these findings are all supported by the evidence before the First-tier Tribunal. It is correct that there is no corresponding payslip for the credit in the bank account dated 29 April 2014 for £901.30; that credits of £450.61 on 4 March 2015 and October 2015 were not consistent with the employer summary and that there is only one payment of £427.14 on 1 September 2014. I would also note that following the agreement during the hearing that I would consider the payslip, employer summary and bank statements carefully to check these points (as the parties did not have a full copy of the Appellant's bundle before the First-tier Tribunal), that the findings as to inconsistencies could have been made much more broadly than the specific examples given in paragraph 13 of the First-tier Tribunal's decision. There is for example a lack of consistency between the payslips and bank statements and lack of clarity as to who payments from the company are being made to as payments are made to a joint bank account.

19. Although the reasons that have been given by the First-tier Tribunal are, in the main, accurate in relation to the evidence referred to, the First-tier Tribunal has materially erred in law in failing to make adequate or clear findings of fact necessary for the parties to understand why the appeal was dismissed. The findings that were made are too limited and not adequately reasoned or related to the issues in the appeal. There is a significant lack of express and distinct findings on all of the matters required for proper determination of the appeal, including as to whether the

employment of the EEA national and Appellant's employment was genuine and effective; which are distinct issues in this appeal.

20. In addition, the Appellant also relies upon two procedural fairness points, first, that adverse inferences were drawn from photocopied documents without the originals being requested and secondly, that discrepancies between payslips and bank credits were not put to the Appellant nor relied upon by the Respondent in the reasons for refusal. In relation to the first, I do not find that the First-tier Tribunal drew any adverse inferences from the fact of itself that payslips were photocopied, which are accurately described in any event as self-generated. It is expressly noted that there are only a selection of payslips and that they do not correspond to the bank statements that were provided. Although it is stated that the payslips do not show cumulative pay, in fact they do. However, overall, the lack of comprehensive and consistent payslips which were in any event generated by the Appellant as employer/owner of the business are the substantive basis for this being part of the reasoning as to why the employment was not genuine and effective rather than that documents in the bundle were photocopies. The same reasoning would apply to original documents.

21. As to the discrepancies in payslips and credits shown in bank statements and/or in the employee schedule, there is nothing to suggest that this point was specifically put to the Appellant during the course of the First-tier Tribunal hearing. I find that this, combined with the material error of law already identified above as to the lack of comprehensive reasons for dismissing the appeal based on the apparent view that has been reached by the First-tier Tribunal that the employment was not genuine – a point not expressly raised or relied upon by the Respondent, nor put to the Appellant - does amount to a further error of law in the First-tier Tribunal's decision.

22. For these reasons, the decision of the First-tier Tribunal must be set aside and the matter will be relisted for a further hearing in the Upper Tribunal to redetermine the appeal. Although further fact finding is required, having regard to the overriding objective and the relevant Practice Statement I do not consider that it is so extensive as to make it appropriate for this appeal to be remitted to the First-tier Tribunal to remake the decision.

23. Subject to any express concession to the contrary by the Respondent, the Appellant is on notice that in light of the facts that were found by the First-tier Tribunal in relation to discrepancies and limited employment documentation, that the genuineness and effectiveness of employment of both the Appellant and the EEA national is in issue

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

No anonymity direction is made.

<u>Directions</u>

A. The Upper Tribunal to provide the Appellant and Respondent with a copy of the Appellant's bundle and additional documents (the employer summaries) that were before the First-tier Tribunal.

B. The Appellant to file and serve any further written statement(s) and evidence to be relied upon, no later than 14 days prior to the relisted hearing.

C. The Respondent to file and serve any further evidence to be relied upon, no later than 14 days prior to the relisted hearing.

D. Parties are at liberty to file and serve a further or updated skeleton argument, no later than 7 days prior to the relisted hearing.

Signed Date 23rd August 2018
Upper Tribunal Judge Jackson