



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/08391/2017
EA/08396/2017, EA/08401/2017
EA/08403/2017, EA/08406/2017
EA/08408/2017

THE IMMIGRATION ACTS

Heard at Field House
On 4th April 2019

Decision & Reasons Promulgated
On 8th April 2019

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

MUHAMMAD [S]

KANEEZ [B]

[H S]

FAKHRA [S]

[S S]

[Z S]

(ANONYMITY DIRECTIONS NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim of Counsel, instructed by Law Lane Solicitors

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants appeal against the decision of First-tier Tribunal Judge Thomas promulgated on 24 September 2018, in which the Appellants' appeal against the decision to refuse their applications for EEA registration certificates dated 3 October 2017 were dismissed.
2. The First appellant is an Italian national, born on 1 August 1966 and the other Appellants are his wife and four children, all of whom are Pakistani nationals. The Appellants made applications on 10 May 2017 for registration certificates confirming that the First Appellant is an EEA national exercising treaty rights in the United Kingdom and that the other Appellants are the family members of an EEA national exercising treaty rights in the United Kingdom. The Second to Sixth Appellants' applications and appeals are entirely dependent on the outcome of the First Appellant's application/appeal.
3. The Respondent refused the applications the basis that he had not been able to verify the First Appellant's employment, having not been able to contact them by phone or locate them on the Internet, such that it was not accepted that they were a genuine employer. Further, it was not accepted that the Sixth Appellant was related as claimed to the First Appellant.
4. Judge Thomas dismissed the appeals in a decision promulgated on 24 September 2018 on the basis that the First Appellant's employment had not been proven and in any event, even if it was, it was not found to be genuine employment but only marginal and ancillary to the income received by the Appellants from public funds. There was unchallenged evidence of the parental relationship between the First the Sixth Appellants before the First-tier Tribunal and this reason for refusal therefore fell away.

The appeal

5. The Appellants appeal on four grounds as follows. First, that the findings of the First-tier Tribunal in relation to employment were irrational given that the range of evidence before it that the First Appellant was working in the United Kingdom. Secondly, that the findings of the First-tier Tribunal that even if genuine, such employment was only marginal and ancillary and therefore not sufficient to show the exercise of treaty rights was irrational in light of the level of earnings. Thirdly, that the First-tier Tribunal failed to make adequate credibility findings. Finally, that the First-tier Tribunal failed to consider the evidence before it cumulatively and in the round.
6. Permission to appeal was granted by Judge Kamara on 1 March 2019 on all grounds.
7. At the oral hearing, Mr Karim relied on the written grounds of appeal and expanded on those in oral submissions by reference to the context of the refusal decision and the evidence before the First-tier Tribunal. Firstly, it was reiterated that the sole reason for refusal remaining before the First-tier Tribunal was that the Respondent

could not verify the First Appellant's employment and at that stage there was no suggestion that employment was not genuine and effective.

8. Secondly, there was a range of consistent evidence before the First-tier Tribunal about the First Appellant's employment, including payslips, P60's, documents from HMRC (including statement of earnings and tax credits calculations referring to employment), a letter about pensions enrolment, letter and statement from the employer and Companies House documents in relation to the employer's business. The First-tier Tribunal concluded that there was insufficient evidence of employment, partly by rejecting the HMRC evidence as not valid because it was based on information given only by the employer. However, that would be the case for any evidence of employment, which would necessarily come from the employer and/or employee. Further, the pensions enrolment letter was rejected on the basis that there was no evidence that the First Appellant had been enrolled in a pension or deductions made on his payslips for that purpose. However, the letter shows evidence of employment and even if the employer had not complied with the pensions requirement, that is not material to the question of whether the First Appellant is in fact working in genuine employment in the United Kingdom.
9. Thirdly, the First-tier Tribunal's rejection of individual pieces of evidence fails to consider the material in around, with consistent evidence of employment across a variety of pieces of evidence from different sources.
10. Fourthly, a Tribunal could not on any legitimate basis could include that the First Appellant's permanent employment, with earnings of £8640 per annum, working 24 hours per week was not genuine and effective but merely marginal or ancillary, particularly in the context of this family environment. The earnings are significantly above the lower earnings limit set by HMRC by which the Respondent usually has reference when considering whether employment is genuine and effective.
11. On behalf of the Respondent, Ms Isherwood submitted that there was no material error of law in the decision of the First-tier Tribunal and the fact that the employer could not be verified is the correct context in which the other evidence must be assessed. The main findings of the First-tier Tribunal are set out in paragraph 11 of the decision, highlighting that there was a lack of evidence of employment, the employer had not attended the hearing, there was no contract employment and no further evidence of the business. The payslips submitted on behalf of the First Appellant did not show any pensions payments or contributions and no holiday entitlement, further there was no evidence of the First Appellant actually being paid.

Findings and reasons

12. The findings of the First-tier Tribunal are set out primarily in the following two paragraphs:

"11. The Appellant claims to be employed as a shop assistant for [~] Foods Ltd. he has produced two letters from his employer [MR], the director of the company,

confirming the Appellant works 24 hours each week on a permanent basis as a shop assistant for an annual salary of £8640. He does not describe the Appellant's duties in detail and gives no information on the Appellant's economic value to the company. Mr [R] did not attend the hearing, so was not available to give this information. The Appellant himself gives no information in respect of the nature of his job, duties or responsibilities. The fact that the Appellant is recorded by HMRC as having employment working 24 hours does not in itself prove the employment as these assessments are based on information provided by the Appellant and his employer. There is no contract of employment. I accept there is company registration for the employer but there is no evidence of the actual business premises, retail licenses or employer's insurance. The letter of enrolment in the Smart Pension is a notice of requirement to enrol in a pension scheme. It does not evidence actual enrolment by the Appellant and pension contributions are not reflected in the payslips. I note also that the payslips, which range from January 2017 to July 2018, show no holiday entitlement, which without explanation appears contrary to statutory requirements. Taking the evidence at its highest, I find the Appellant has not discharged the burden of proof that the claimed duties and work relationship constitute effective and genuine employment activity that is of economic value to the employer.

12. The Appellant's monthly claimed income from employment is £745.56 at present. His bank statements reflect income from child tax credits, child benefits and council tax payments, which make up most, and at times, all his monthly income. He lives within those means generally, and the bank statements also reflect food purchases. Whilst he claims to have an income from employment, this is in no way reflected in his bank statements because he is paid in cash. There is therefore no independent evidence to prove he actually receives the salary claimed. In these circumstances, I find that the Appellant's employment activities and salary are not proven, and if they exist, they are marginal and ancillary to his income from public funds."

13. In relation to the issue of whether there is genuine employment, the First-tier Tribunal appear to be requiring a significant range of evidence from the Appellant without explaining why this is needed over and above the evidence already submitted, which included payslips, P60's, confirmation of employment from HMRC via different means (through tax credits as well as confirmation of earnings), the written and oral evidence of both the First and Second Appellants, as well as the written evidence of the employer, together with Companies House documents showing the existence of the business.
14. The reasons given by the First-tier Tribunal for finding that the First Appellant had not established genuine employment do not withstand scrutiny. First, a lack of detailed evidence about the nature of the First Appellant's employment from either the employer or the First Appellant is relied upon. However, it does not appear that any detailed questions about the nature of employment were put to the First Appellant at the hearing, nor any concerns raised by the Respondent before or during the hearing in this regard. The First Appellant identified his role as a shop

assistant (for which duties, responsibilities and the value to the employer can reasonably be inferred), his working days and hours, his salary and a start date of employment. This was consistent with and supported by the documentary evidence, as well as being consistent with the oral evidence from the Second Appellant and written evidence from the employer himself. The lack of further detail, not asked of any of the witnesses, does not support a finding that employment was not genuine.

15. Secondly, the documentation from HMRC would normally be considered reliable and sufficient evidence of employment and in any event, would always be based on information submitted by an employer and/or employee and cannot rationally be discredited for that reason alone.
16. Thirdly, the First-tier Tribunal placed weight on the lack of evidence of business premises, retail licenses or employer's insurance; however it is not apparent that any of this information has ever been requested and in circumstances where there is no doubt from information from Companies House that this is an active registered company, there is no apparent basis upon which such further evidence would be necessary to assist the Appellant in establishing genuine employment.
17. In the absence of any express adverse credibility findings against the Appellants and no sustainable reason to discount or discredit the totality of the evidence submitted by the Appellants, which consistently shows the First Appellant working 24 hours per week on a permanent basis for a named employer at a salary of £8640 per annum, it is entirely unclear why the First-tier Tribunal required further evidence to establish employment on the balance of probabilities. I find that the First-tier Tribunal materially erred in law in failing to consider the totality of the evidence before it in relation to employment and reached a conclusion that was not rationally open to it on the basis of that evidence.
18. The First-tier Tribunal's findings in relation to whether the employment was genuine and effective rather than merely marginal and ancillary are contained only in paragraph 12 of the decision, following relatively brief reference in paragraph 10 to a person not being regarded as a worker if they do "not pursue effective and genuine activities, or pursue activities on such a small scale as to be regarded as purely marginal and ancillary or which have no economic value to an employer". The conclusion appears to have been reached on the basis that there is lack of evidence of receipt of the salary from claimed employment and that the majority of the Appellant's monthly income is from public funds. Although given as an alternative reason for refusal, the First-tier Tribunal again rely on employment itself not having been established.
19. For the purposes of whether employment is genuine and effective rather than marginal and ancillary, there is no consideration by the First-tier Tribunal of the hours worked by the First Appellant, or the salary received, or any detailed consideration of any of the authority on genuine and effective employment. On the facts of this case, it not legitimately open to the First-tier Tribunal to find that

employment consisting of 24 hours work per week, even at minimum wage, earning £8640 per annum was not genuine and effective and merely marginal and ancillary. This is not arguably a case in which work is at such a low level or at such low earnings that it could fall within this category. The earnings were above the lower earnings limit set by HMRC used as a benchmark by the Respondent to determine genuine and effective employment in the first instance. The findings are not in accordance with the established principles upon which genuine and effective employment are assessed and contain a material error of law. The finding made was not rationally open to the First-tier Tribunal on the evidence before it.

20. At the oral hearing, the parties were agreed that if errors of law were found in the First-tier Tribunal as to whether the First Appellant was in genuine employment and whether that employment was genuine and effective rather than merely marginal and ancillary, that the appeals should be remade in the Appellants' favour.
21. The making of the decision of the First-tier Tribunal involved the making of material errors of law in both of the key findings in relation to the First Appellant's employment in the United Kingdom and as such it is necessary to set aside the decision. For the reasons already given above, the appeals are remade and allowed. In summary, I find that the First Appellant has established genuine and effective employment in the United Kingdom such that he satisfies the requirement of being a worker and therefore a qualified person pursuant to Regulation 6 of the Immigration (European Economic Area) Regulations 2016, such that he satisfies the requirements of Regulation 17 of the same, to be issued with a registration certificate; as do his dependent family members.

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.

The appeals are re-made as follows:

the appeals are allowed under the Immigration (European Economic Area) Regulations 2016.

No anonymity direction is made.

Signed



Date

5th April 2019

Upper Tribunal Judge Jackson