



IAC-AH-DN-V1

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

Appeal Number: OA/05834/2014

**THE IMMIGRATION ACTS**

Heard at City Centre Tower, Birmingham  
On 21<sup>st</sup> January 2016

Decision & Reasons Promulgated  
On 19<sup>th</sup> February 2016

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**MRS PRENDE PRENDI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER - TIRANA**

Respondent

**Representation:**

For the Appellant: No legal representation

For the Respondent: Mr D Mills (HOPO)

**DECISION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge E Lagunja, promulgated on 16<sup>th</sup> February 2015, following a hearing at Birmingham Sheldon Court on 7<sup>th</sup> January 2015. In the determination, the judge allowed the appeal of Mrs Prende Prendi, whereupon the Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

## **The Appellant**

2. The Appellant is a citizen of Albania and she was born on 26<sup>th</sup> July 1989. She appeals against the decision of the Respondent Secretary of State, made under paragraph 281 of HC 395, and dated 2<sup>nd</sup> April 2014, refusing her application to join her husband, a British citizen settled in the UK, under a spouse's visa.
3. The refusal letter of 2<sup>nd</sup> April 2014 observes that the application was initially refused under Appendix FM of the Immigration Rules, but this appeal was withdrawn by the Home Office for reconsideration under the previous provisions of paragraph 281 given the Appellant's online application was dated on 7<sup>th</sup> July 2012. The Appellant was not interviewed because, "It has not been necessary to interview". The Grounds for Refusal is that the Appellant maintained that her sponsoring husband, Mr Prendi, was self-employed and the director of the company, Kaleford, "However you have provided no evidence of this". Although bank statements had been provided by the Appellant, "However these show only that he has an income from 'Bella Venezi' - there is no evidence as to who or what this entity is, or what the terms of these payments are". Accordingly, it was decided that the Appellant had not adequately demonstrated that her sponsoring husband's income or employment was to the level required. The application was refused under paragraph 281(v).

## **The Judge's Findings**

4. The judge referred to the fact that the Sponsor had provided a "comprehensive bundle of documents for the appeal" and was assisted by Mr Lammy, as a McKenzie friend. The judge also confirmed that because the application was made before 9<sup>th</sup> July 2012, it was considered under the old Rules, namely, paragraph 281 of HC 395. The single issue was whether the Sponsor had the ability to maintain the Appellant without recourse to public funds. The judge went on to note that for a couple aged over 18, "Without any dependence the figure to attain is £113.70 per week" and that the Sponsor gave himself an income of at least £500 a week from his business (see paragraph 10). The Sponsor gave evidence that he had previously owned a business called Kaleford between April 2009 and 2010. The Respondent was not satisfied that he had this business (see paragraph 11).
5. However, the Sponsor's evidence was additionally also that in 2010, "He took ownership of a restaurant called Bella Venezi" and the judge said that, "I found the Sponsor's claimed income from this business is relevant to this appeal" (paragraph 12). Once again the Sponsor's evidence was that he managed to pay himself at least £500 per week from the business.
6. One aspect that did arise, however, was that

"From the documents provided it would appear that the Sponsor did have a tax liability at the end of the year, however he claims he did not pay any tax because he was not required to. In the light of this it may be necessary for the Sponsor to make the necessary enquiries with the tax authorities to ensure that he is fulfilling his tax duties correctly" (paragraph 13).

7. The judge also observed that the Appellant had provided bank statements in the Sponsor's name for a HSBC business account and a Lloyds personal bank account which begins in April 2014. The judge observed that, "There are a number of deposits each month from 'Bella Ven' which the Sponsor claims are payments from his business Bella Venezia". The judge went on to observe that, "The frequency appears to be weekly however at times it varies". The judge concluded from this that, "I find the variations in the deposits are consistent with the nature of self-employment and business activity" (paragraph 14).
8. The judge at the end of the determination, however, added an additional observation, which is vehemently contested by the Respondent. This was that, "As it is accepted that the Sponsor does own a business as he is self-employed and therefore cannot produce wage slips as evidence of income, I find the bank statements provide strong support for the Sponsor's claims ..." (paragraph 15). The Respondent, it would appear, had never accepted that the Sponsor owned a business.
9. The appeal was allowed.

### **Grounds of Application**

10. The grounds of application state that the judge did not consider the Respondent Secretary of State's contention that the Sponsor's evidence did not establish ownership of his claimed business. Moreover, there was a theory about the judge to take sufficient account of the non-payment of tax by the Sponsor in considering the lawfulness of his claimed income.
11. On 23<sup>rd</sup> April 2015, permission was granted with the observation that, "The above could be construed as normal than an attempt to re-argue the Respondent's case, but no reason was given by the judge at paragraph 15 for the comment that 'it is now accepted that the Sponsor does own a business'" (see paragraph 3).
12. Permission to appeal was granted.

### **The Hearing**

13. At the hearing before me on 21<sup>st</sup> January 2016, Mr Prendi once again appeared, assisted by a McKenzie friend, Mr Lammy, who sat at the back of the courtroom. For the Secretary of State, Mr Mills, a Senior Home Office Presenting Officer, attended. Mr Mills began by saying that it was the Secretary of State's appeal, and the issue was a narrow one.
14. Mr Mills went on to explain that the Sponsor's application was made before 9<sup>th</sup> July 2012 and therefore had to be considered under paragraph 281 of HC 395. Indeed, this was a case where originally the application had been determined under Appendix FM, only to be then revoked, and a new decision made under paragraph 281 of HC 395. Second, the challenge was that it was never conceded that the Appellant was self-employed or had his own business. Yet, at paragraph 15, the judge states that, "As it is accepted that the Sponsor does own a business ...". This

was untrue. The Entry Clearance Officer did not concede it and the Entry Clearance Manager did not concede it. It was also at the hearing before Judge Lagunja not conceded.

15. Finally, the judge states that the Appellant believed that he did not have a tax liability, and therefore was not paying tax for that year, but that this may be something that, "It may be necessary for the Sponsor to make the necessary enquiries" in relation to, with the tax authorities (see paragraph 13). However, if the Appellant was not paying tax then he could not be in receipt of lawful income.
16. There was one other issue namely, the availability of evidence twelve months prior to the application, to show that the Appellant had earned income as a self-employed person. The date of decision is 16<sup>th</sup> January 2015, but there was no income for the twelve months preceding in relation to the business, which could be relied upon given that every self-employed person has funds coming in, in sporadic terms, so that a trail of income is difficult to establish. Mr Mills suggested that what appeared at tab D in terms of the tax return from April 2012 to 2013 was suspect.
17. For his part, Mr Prendi submitted that he could not understand why this matter was being appealed. The business that he has, namely, Bella Venezi, is registered under his name. He has a lease for that business. He pays tax currently. At the time, his accountant advised him not to pay tax because there was no liability.
18. In reply, Mr Mills submitted that a decision made under paragraph 281 does not restrict the availability of evidence right up to the time of the date of the hearing. It was open to the Appellant to have the Sponsor submit evidence right up to today. If the incomes existed and could be related back to the business it was open to produce the evidence. None had been produced. He asked me to set aside the decision to remake the decision without relating it back to the First-tier Tribunal.

### **No Error of Law**

19. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. This is a case where the previous Rules fell to be applied because the application was a pre 9<sup>th</sup> July 2012 application which had to be determined under paragraph 281 of HC 395. There was no financial potential requirement of £18,600 that currently applies under Appendix FM.
20. Secondly, the judge considered the evidence in relation to the Sponsor's income. She did so specifically in relation to what was required in terms of a couple's maintenance needs, without any dependants, and noted the figure of £113.70 per week. She said that the Sponsor allows himself an income of £500 a week from his business. This was the case both for Kaleford which the Sponsor owned from April 2009 to 2010 and subsequently from his restaurant business of Bella Venezi, which he owned from 2010 onwards (see paragraphs 10 to 12 of the determination).

21. Third, regardless of whether “It is accepted that the Sponsor does own a business” (see paragraph 15), the fact remains that it was the judge’s express finding that the Sponsor did own now a business called Bella Venezi (see paragraph 14). There was an HSBC business bank account and there were a number of deposits each month from “Bella Ven”. The judge observed that the frequency appears to be weekly but also varies and that this was consistent with being self-employed.
22. Finally, the suggestion that the Sponsor may well be avoiding tax is not borne out by the facts. The evidence before the judge was that, “He claims he did not pay any tax because he was not required to” (paragraph 13). In these circumstances, it was entirely understandable that the judge should say that, “In light of this it may be necessary for the Sponsor to make the necessary enquiries with the tax authorities to ensure that he is fulfilling his tax duties correctly” (paragraph 13). It has to be remembered that this was a new business, and that previously the Sponsor was connected with Kaleford up until 2010.
23. In any event, the matter is entirely speculative but what is important is that the judge made a finding that the Appellant was receiving income, which tended to vary from week to week, from a business called, “Bella Venezi” for which he had an HSBC business bank account. The decision only had to be made on a balance of probabilities. The judge so made it. Given the latest Tribunal judgment in **Dasgupta [2016] UKUT 00028**, that in error of law appeals, the Upper Tribunal should apply the principle in **Edwards v Bairstow [1956] AC 14**, it is not possible to say that the judge erred in coming to the conclusions that she did.

### **Decision**

There is no material error of law in the original judge’s decision. The determination shall stand.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

13<sup>th</sup> February 2016