Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/04854/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 April 2018	**On 18 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

KUNAL SURESHBHAI RAVAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Vidal, of Counsel instructed by London Imperial Immigration Service
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission, against a decision of Judge of the First-tier Tribunal Conrath who in a determination promulgated on 9 November 2017 dismissed the appellant's appeal against a decision of the Secretary of State to refuse to grant him a residence card pursuant to the provisions of the Immigration (EEA) Regulations 2016.

2. The appellant claimed that he was in a relationship with a French citizen who was exercising Treaty rights here. His application was refused because it was not

accepted by the Secretary of State that the sponsor was exercising Treaty rights here as the Secretary of State could find scant evidence that he was doing so.

3. The appellant is a citizen of India born on 26 March 1988. He gave evidence at the hearing, as did his sponsor, Mr Benjamin Guillaume Georges Jones who is also aged 29.

4. At the hearing the judge had before him evidence that the sponsor had been employed by Baytex Limited until the end of July 2015 and that the sponsor had started a business in August 2015 called BJ Entertainment.

5. The sponsor's evidence was that he worked as a self-employed musician and as well as working with other musicians at concerts he was a writer and composer. He would supplement his income by taking paid employment although he had last had paid employment at Christmas 2015 until March 2016. He said that he had worked in self-employment, his last contract ending in July 2017 – that is two months before the hearing. The sponsor said that he was looking for a new contract and for further gigs and work.

6. He produced tax returns for the years 2015-16 and 2016-17 showing that he had worked and earned £10,992 in the first year and £10,800 in the second year. The sponsor said that he had no invoices and had no business bank account and had no accountant to draft accounts for him. He stated he did that himself but was not sure if he paid national insurance contributions. He stated he had not worked full-time during the previous year as he had visited France on occasion for family reasons.

7. The judge noted both the sponsor and the appellant accepted that the sponsor was not actually working at the time of hearing, although the sponsor had maintained that he was currently seeking additional gigs and work. The judge, having considered the financial evidence found that it was not established by the appellant or the sponsor that the sponsor was a qualified person for the purposes of Regulation 6 of the Immigration (EEA) Regulations 2006. He stated that he was not required to reach a conclusion as to whether or not the appellant was an extended family member of the sponsor as the Secretary of State had refused the application solely on the basis that the EEA national was not exercising Treaty rights.

8. The appellant appealed arguing that not only was he in a relationship with Mr Jones but that the judge in the First-tier Tribunal had failed to consider the evidence in the round. There was no evidence that the appellant or the sponsor were not credible and that the judge had made no clear finding in that regard. It was argued that although the appellant's partner was not actually working on the day of the hearing it was in the nature of self-employed that it ebbed and flowed and lack of work on a specific day did not mean that someone was not self-employed in the wider sense.

9. Permission to appeal was granted by Upper Tribunal Judge Grubb who stated in his reasons:-

> "It is arguable that the judge reached an irrational conclusion that the sponsor was not a 'qualified person'. The appellant's case was that the sponsor is a self-employed musician. Although there was evidence (from the appellant and sponsor) that the sponsor had not worked since December 2016 but had spent six months back in France, it does not appear that the evidence was that he had ceased to be self-employed even if he was not actually performing as a musician up to the date of hearing. He had supplemented his income in July 2017 with other work and he was 'looking for a new contract, and looking for further gigs and work'; (see para 13). It does not appear that the judge disbelieved the appellant and sponsor. He had made no adverse credibility finding. If so this evidence was arguably evidence of continued economic activity – and certainly was inconsistent with him having ceased economic activity. For these reasons the judge arguably erred in law in reaching his adverse finding.".

10. At the hearing before me it was agreed by both representatives that the issue before me was the narrow issue confined to whether or not the judge should have found that the sponsor was exercising Treaty rights.

11. Ms Vidal referred to the determination and stating that it appeared to be the case that the judge based his decision on the fact that there was no physical evidence before him and she pointed out that that was not what was required. There was oral evidence relating to the self-employed work which the sponsor had undertaken and indeed which he was seeking. He was therefore engaged in economic activity.

12. In reply Mr Clarke stated that the grounds were merely a disagreement with findings which were open to the judge – the judge had not been satisfied that the burden of proof was discharged. He had to take a holistic assessment of the evidence and there was nothing to indicate that there was any evidence which he had not taken into account. He had considered the tax returns of the sponsor and was correct to place weight on the fact that there was no physical evidence of anything undertaken by the sponsor after 2016. He was entitled to place weight on the fact that the sponsor was not working at the date of hearing and had spent time in France.

13. I consider that there is a material error of law in the determination of the First-tier Judge – that error of law is highlighted in the grant of permission from Upper Tribunal Judge Grubb which I have quoted above. It is clear that the judge did not find that the appellant and the sponsor were not credible. Their evidence was that the sponsor was looking for work and that his economic activity had not ceased. I consider that the judge did not properly consider that evidence and, indeed the reality is that the fact that the sponsor was not working at the date of hearing does not mean that he had ceased economic activity and indeed there is evidence of economic activity while he had been in Britain. In all I consider that the judge reached a conclusion which was not open to him on the evidence and I therefore set aside his decision.

14. I consider that it is appropriate that I proceed then to consider the evidence before me. There is evidence in a supplementary bundle of further economic activity by the sponsor since just before the hearing of the appeal and in the following months. While it is the case that the sponsor's earnings appear meagre when the invoices

produced are considered it was the evidence of the sponsor through his Counsel at the hearing that he also busks to supplement his income. I consider there is clear evidence that he is exercising Treaty rights and for that reason I allow the appeal.

15. That of course is not the end of the matter. It will be now for the Secretary of State to reconsider the application both because there has been no decision on the relationship between the appellant and the sponsor but also to consider all relevant financial evidence placed before her. Detailed submissions backed up by documentary evidence and witness statements should therefore be submitted to the Secretary of State.

Notice of Decision

The appeal is allowed and the decision of the judge in the First-tier is set aside. I have remade the decision allowing this appeal under the Immigration (EEA) Regulations 2006.

No anonymity direction is made.

Signed  Date: 13 April 2018

Deputy Upper Tribunal Judge McGeachy