



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

Appeal Number: IA/29795/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 13 August 2015**

**Decision & Reasons Promulgated
On 20 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**MR KULJIT SINGH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Coleman, Counsel, instructed by Charles Simmons Solicitors

For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant is a national of India, born on 4 November 1980. This is an appeal by him against the decision of First-tier Tribunal Judge Paul (Judge Paul), promulgated on 20 March 2015, in which he dismissed the appeal. That appeal was against the Respondent's decision, dated 7 July 2014, refusing to issue a residence card under the Immigration (European Economic Area) Regulations 2006 (the Regulations).

The decision of Judge Paul

2. On appeal to Judge Paul the sole issue in dispute had been whether or not the Appellant's durable partner, Ms Kiara Balagova, a Hungarian national, was exercising her Treaty rights in the United Kingdom (see paragraph 4 of his decision). The Appellant's case was that she was employed by Sabi Traders UK Limited, and documentary evidence in support of this was provided on the day of the hearing, including payslips, bank statements and a contract of employment.
3. At paragraphs 12 to 15 Judge Paul expressed a "number of concerns" about the documentary evidence before him, and ultimately concluded that the Appellant had failed to show that the payslips and contract of employment were "genuine" (paragraphs 15 and 17). He also drew adverse conclusions based upon Internet research he had undertaken, apparently during the hearing itself (paragraph 16).

The grounds of appeal

4. The grounds take issue with all of Judge Paul's conclusions. Permission to appeal was granted by First-tier Tribunal Judge Levin on 27 May 2015.

The hearing before me

5. Mr Coleman relied on the grounds of appeal.
6. Mr Duffy, whilst not conceding the appeal, acknowledged that Judge Paul's decision suffered from some problems.

Decision on error of law

7. As indicated to the parties at the hearing, I found there to be several errors of law in the decision of Judge Paul. All were material.
8. First, on a proper reading of the decision, he was in effect concluding that documents provided by the Appellant were false: he states in terms on two occasions that the contract of employment and the payslips had not been shown by the Appellant to be genuine. This is not simply a matter of loose terminology. Judge Paul expressly relies on his view that the payslips looked as though they were produced on a computer (paragraph 15). In addition, the other elements of his reasoning strongly indicates that he was reaching a conclusion that the documents in question were fake. I note that the Respondent had not raised the issue of whether the documents were false.
9. Judge Paul erred in failing to expressly inform the Appellant and his representative that he was, of his own motion, raising an issue as to the genuineness of the documents. In addition, he erred in failing to apply the appropriate law in respect of this issue in any event, namely the location of the burden of proof (being on the Respondent).
10. Second, Judge Paul's reliance on the absence of a stated rate of pay in the contract of employment was, in my view, speculative and not based upon any evidence either before him or brought to the attention of the Appellant's representative at the hearing.

11. Third, there was procedural unfairness by Judge Paul in respect of his Internet research at the hearing. Such activities are potentially fraught with difficulties, and great care must be given to ensure that a complete picture of the information obtained is considered and available to the parties for comment. Here, whilst I accept that Judge Paul informed the representatives of what he was doing, I also accept that he then went on and based adverse conclusions on evidence that was not available to the parties and does not appear to have been complete in any event. It might have been better if the Appellant's representative had sought an adjournment, but in the context of this case the failure to do so does not 'cure' the procedural unfairness.
12. Fourth, Judge Paul failed to give adequate consideration to the bank statements provided by Ms Balagova at the hearing. There is but a passing reference to them in paragraph 14. Having examined the statements, I see that the payments going into the account match with the payslips (the October 2014 payment being split into two during that month). This was clearly highly relevant, and indeed supportive, of the Appellant's case and the evidence required careful consideration and reasoning. This is not apparent on the face of the decision.
13. For the reasons set out above, I set aside the decision of Judge Paul.

Re-make decision

14. Both representatives were agreed that I should go on and re-make the decision in this case.
15. I admitted in a bundle from the Appellant consisting of, amongst other items, evidence of Ms Balagova's continuing employment with Sabi Traders UK Limited. Mr Duffy had no objection to this.
16. On the evidence now before me, I find that Ms Balagova has been since August 2014, and still is, in employment with Sabi Traders UK Limited, as claimed.
17. There has been no assertion from the Respondent at any time that the documents are false. I find that they are all genuine. I also find that the documentary evidence is reliable. There has been no suggestion to the contrary by Mr Duffy. I find that the payslips (covering the period September 2014 to August 2015) show the relevant wages, tax and National Insurance contributions, and that the figures stated therein are reflected in the payments into Ms Balagova's bank account. I find that the absence of a rate of pay in the contract of employment does not diminish its reliability. I find that the P60 contained in the new bundle is reliable and fully supportive of the fact of employment in the tax year 2014/2015. Finally, I accept the reliability of the employer's letter, dated 10 August 2015, in which Ms Balagova's engagement is confirmed.
18. In light of the above, I find that Ms Balagova is a worker and therefore a qualified person under Regulation 6 of the Regulations.

19. It has been accepted throughout that the Appellant is in a durable relationship with Ms Balagova. They have cohabited for a significant time and have a child together. I find this to be so. The Appellant is therefore the extended family member of an EEA national who is exercising Treaty rights in the United Kingdom.
20. The basis of the Respondent's decision to refuse to issue the residence card was that the EEA national was not a qualified person. The discretion under Regulation 17(4) of the Regulations was not exercised. I cannot exercise that discretion at first instance, and therefore I can only allow the appeal to the extent that the Respondent's decision of 7 July 2014 was not in accordance with the law, and the Appellant's application for a residence card remains outstanding before the Respondent awaiting a lawful decision.
21. Accordingly, I allow the appeal on this limited basis.

Anonymity

22. No direction has been made previously, and none has been sought from me. I make no direction.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

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

I re-make the decision by allowing the appeal to the extent that the Respondent's decision of 7 July 2014 was not in accordance with the law, and the Appellant's application for a residence card remains outstanding before the Respondent awaiting a lawful decision.

Signed

Date: 17 August 2015

H B Norton-Taylor
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT **FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award. The Appellant only provided evidence of his partner's employment at the hearing before the First-tier Tribunal.

Signed

Date: 17 August 2015

Judge H B Norton-Taylor
Deputy Judge of the Upper Tribunal