The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: IA/36326/2014**

THE IMMIGRATION ACTS

Heard at Manchester	**Decision and Reasons promulgated**
On July 17 2015	**On July 20 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MRS SHAZIA BARI
(NO ANONYMITY DIRECTION)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
Appellant Miss Evans (Legal Representative)
Respondent Mr Harrison (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant is a citizen of Pakistan and is now thirty-nine years of age. She applied on July 4, 2014 for a residence card pursuant to the Immigration (EEA) Regulations 2006. The respondent refused her application on September 3, 2014 because she was not satisfied the sponsor was a qualified worker.

2. The appellant appealed that decision on September 16, 2014 under section 82(1) of the Nationality, Immigration and Asylum Act 2002 and regulation 26 of the 2006 Regulations.

3. The matter came before Judge of the First-tier Tribunal Pickup on November 24, 2014 and in a decision promulgated on November 26, 2014 he upheld the refusal and dismissed the appellant's appeal.

4. The respondent applied for permission to appeal on December 8, 2014 submitting the Tribunal had erred but permission to appeal was refused by Judge of the First-tier Tribunal Osborne on January 22, 2015. The grounds were renewed and extended on February 5, 2015 and Upper Tribunal Judge Warr found the grounds arguable.

5. The First-tier Tribunal did not make an anonymity direction pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 and I see no reason to make an order now.

ERROR OF LAW SUBMISSIONS

6. Miss Evans submitted that there were two issues that needed to be considered in this appeal. The first issue was whether the sponsor was genuinely in work and she submitted that the Tribunal had misunderstood the facts and in particular had erred with regard to whether the appellant would have to pay tax or National Insurance. Evidence from the government's own website demonstrated that the appellant would pay neither National Insurance nor tax because his income fell beneath the taxable threshold in force at the time. The Tribunal had drawn an adverse credibility finding on the failure by the appellant to pay National Insurance and this erroneous finding undermined the Tribunal's conclusion that the sponsor was not a genuine worker. The second issue was that the Tribunal erred in its approach to the ratio of benefits to salary. Neither the appellant nor the sponsor disputed they were in receipt of benefits. If the Tribunal concluded the sponsor was working, then the evidence was he worked for 24 hours a week. Case law confirms that part-time workers are qualifying workers and accordingly if the Tribunal concluded the sponsor was a genuine worker then it should have gone on to find that he was a qualifying worker and the appellant's application should have been allowed.

7. Mr Harrison relied on the Rule 24 response dated May 12, 2015. He submitted that the Tribunal had provided a detailed analysis of the appellant's claim and had given reasons for rejecting the sponsor's claim to be employed. It had been open to the Tribunal to conclude that the failure to disclose the other bank account in which the benefits were paid was relevant. The grounds were merely a disagreement with the Tribunal's findings. The Tribunal had made a number of findings relating to be disingenuous nature of the evidence and those findings were open to it. An allegation of

perversity was a high threshold to satisfy and the grounds did not reach that threshold. The appeal should be dismissed.

FINDINGS ON ERROR IN LAW

8. Both representatives agreed there were two elements to this appeal. The first element concerned whether the sponsor was genuinely in employment and the second issue was whether that work was marginal or ancillary. Mr Harrison conceded during an exchange with me that in light of the decision of DM Levin v Staatssecretaris van Justice [1982] EUECJ R-53/81 part-time workers came within the 2006 Regulations. Mr Harrison accepted that if the sponsor's employment was genuine then his employment would be neither marginal nor ancillary.

9. The issue therefore for me was whether the Tribunal had erred in finding the sponsor was not in genuine employment. It is clear from the Tribunal's determination that the sponsor's previous employment, the appellant's previous determination and the sponsor's current employment were all considered in assessing the genuineness of the sponsor's employment.

10. On April 2, 2014 Judge of the First-tier Tribunal Dennis dealt with the appellant's earlier application on the papers and expressed serious concerns with documents that had been produced in support of the sponsor's claim to be employed. He found insufficient evidence of employment and refused the appeal.

11. In this current appeal a letter from HMRC was produced and this confirmed the sponsor commenced employment with his current employer on June 2, 2014. Whilst the Tribunal had a number of concerns about the employer it concluded on the balance of probabilities that the sponsor's employer was both active and genuine. The Tribunal also accepted that the sponsor's National Insurance number appeared both on the HMRC letter and the sponsor's wage slips although commented the content in the HMRC letter was based on information provided by the appellant.

12. The Tribunal examined the sponsor's letter and considered the wage slips and concluded that the sponsor's gross income would be £7874 per annum. This was identical to the income the sponsor had with his previous employer and the Tribunal found this curious. Miss Evans, in submissions, argued that the Tribunal had made an unnecessary adverse finding about the sponsor's income. The sponsor was paid the minimum wage and consequently his income with both employers would be the same, as long as his hours were similar. Additionally, she submitted the Tribunal had erred in paragraph [23] of its determination when it found that National Insurance deductions should have been made. Evidence produced to demonstrate the Tribunal's error confirmed that no National Insurance by the sponsor was payable as he only earned £151.04 a week. Miss Evans submitted that the Tribunal's

approach to the sponsor's earnings undermined its assessment of whether the sponsor was actually employed. By erroneously concluding the sponsor should have paid National Insurance the Tribunal had erred.

13. The Tribunal had accepted that a sum matching the figure on his wage slip was paid into his bank account albeit it was not paid by bank transfer as suggested on the wage slip. However, at paragraph [25] the Tribunal concluded that this evidence was insufficient to prove he was genuinely employed is claimed. The reasons given were:

    a. The wage slips suggested monies paid by bank transfer whereas they were paid by cash.
    b. It was odd and not credible that no National Insurance deductions were made.
    c. The sponsor had been less than forthright by failing to disclose the extent of state support.

14. There was clearly evidence before the Tribunal, in the form of wage slips and credit entries in a bank account, that the sponsor was receiving an income from somewhere. The Tribunal did not accept that he was employed as claimed for the reasons set out in paragraph [15] above but one of those findings was based on the fact National Insurance deductions should have been made.

15. I accept Mr Evans's submissions that no National Insurance was payable. The Tribunal erred when it found that it was odd and simply not credible that no deductions were made. This finding was an assumption based on no evidence and was contrary to the government's own tables. In addition, the Tribunal did have a letter from HMRC, wage slips and credit entries matching those wage slips and these were evidence of a regular income.

16. I find that Miss Evans's submissions amounted to more than a mere disagreement and I find the Tribunal erred when finding the sponsor was not actually employed.

17. Having found the sponsor was employed I remind myself that Mr Harrison accepted that part-time employment was sufficient to meet the 2006 Regulations. The fact the sponsor and the appellant income was made up of salary and tax credits did not mean the sponsor was not a qualified worker in light of the fact part-time working is covered by the Regulations. If the government allows part-time workers to supplement their wages with tax credits then neither the sponsor nor the appellant could be criticised for taking advantage of such a system.

18. I am satisfied there was sufficient evidence before the Tribunal of the sponsor's earnings and in light of the fact the Tribunal erroneously took into

account the absence of National Insurance payments I am satisfied there was a material error.

DECISION

19. There was a material error. I set aside the decision and I remake the decision and grant the appellant a residence card.

Signed:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

Although I have allowed the appeal I make no fee award because one of the factors that led me to allow the appeal was the evidence relating to National Insurance levels.

Signed:

Deputy Upper Tribunal Judge Alis