IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17494/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 March 2016	**On 14 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLUBUNMI HANNAH BADEMOSI
(ANONYMITY DIRECTION NOT MADE)

Claimant

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Claimant: Dr Victor Omipede of Counsel

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal who allowed the appeal of Ms Bademosi ("the claimant"). The claimant

had appealed against the respondent's decision of 20 April 2015 to refuse to issue a residence card as confirmation of a right of residence as a family member of an EEA national.

Background Facts

2. The claimant is a citizen of Nigeria born on 29 September 1979. The claimant applied for a student visa which was granted on 21 May 2009 and which was valid until 31 July 2009. She was then given further student visas valid to 11 October 2014. The claimant married Abdoulaye Bagate on 28 July 2014. On 29 September 2014 the claimant applied for a residence card which was refused by the Secretary of State. On 13 November 2014 she applied again for a residence card. The Secretary of State refused the application for the residence card considering that the claimant did not have a right to reside under Regulation 14(1) of the Immigration (European Economic Area) Regulations 2006 (the 'Regulations'). The Secretary of State had invited the claimant and the sponsor, on two occasions, to attend for interview to verify that the claimant's right to residence was genuine. The respondent also considered that the claimant had not provided sufficient evidence to demonstrate that the sponsor was exercising treaty rights in the United Kingdom.

The Appeal to the First-tier Tribunal

3. The claimant appealed to the First-tier Tribunal. In a decision promulgated on 15 September 2015 First-tier Tribunal Judge Dhaliwal allowed the claimant's appeal. The Tribunal found that the sponsor was a qualified person under Regulation 6 of the EEA Regulations and that the claimant fell within the definition of a spouse. The Tribunal was not satisfied that the Secretary of State had set out sufficient grounds establishing a reasonable doubt which satisfied the evidential burden upon her.

The Appeal to the Upper Tribunal

4. The Secretary of State sought permission to appeal to the Upper Tribunal. The grounds of appeal assert that the judge erred in law in allowing the appeal, having found that the Secretary of State could not have had a reasonable doubt about the claimant's right to reside. On 2 February 2016 First-tier Tribunal Judge Nicholson granted the Secretary of State permission to appeal. The grant of permission sets out that as by the date of application the clamant was an overstayed, it is arguable that the Secretary of State was entitled to have doubts about the claimant's right to reside and that as the claimant was applying for a document under Part 3 of the Regulations the Secretary of State was entitled to call her for an interview.

Summary of Submissions

The Secretary of State's Submissions

5. It is asserted in the grounds of appeal that conducting a marriage interview is part of the process in order to verify the claimant's claim and that the Secretary of State was

entitled to request this. The Secretary of State considered that, as the claimant was issued with multiple student visas from 2009 and applied for the residence card on 13 November 2014 after her student visa had expired, this was sufficient to cause her to suspect that the claimant did not have a right to reside in the UK. The Secretary of State asserts that as there were two invitations to attend an interview made under Regulation 20B(2)(b) and the persons invited have failed to attend on both occasions, then Regulation 20B(4) applies. This sets out:

> "(4) If, without good reason, A or B fail to provide the additional information requested or, fail to attend an interview on at least two occasions if so invited, the Secretary of State may draw any factual inferences about A's entitlement to a right to reside as appear appropriate in the circumstances."

6. The Secretary of State submits that the failure to attend two marriage interviews without good reason is sufficient to allow her to draw any factual inferences about the claimant's entitlement to a right to reside and to find that the claimant does not have or ceased to have a right to reside in the UK. The Secretary of State refers to the First-tier Tribunal's decision at paragraph 4 submitting that the judge, having found it unusual that two letters would go astray, failed to give any adequate reason to why it was inappropriate for factual inferences to be drawn. It is further asserted that the First-tier Tribunal wrongly considered that no issue had been taken with the sponsor's documentation and that she was a qualified person for the purposes of the Regulations and that therefore the claimant was entitled to a residence card. The Secretary of State asserts that she had not accepted that the EEA sponsor was a qualified person because despite attempting to verify the sponsor's employment on multiple occasions she had been unable to do so. It is asserted that the First-tier Tribunal failed to have any regard to this in assessing whether the claimant's EEA sponsor was a qualified person. The Secretary of State submits that the judge erred in finding that she had not discharged the evidential burden. It is asserted that the failure of the claimant and the sponsor to attend the interviews was sufficient to allow the Secretary of State to draw adverse inferences and as such the burden was discharged. On that basis the Secretary of State submits that it was therefore for the claimant and the sponsor to demonstrate at the appeal that the claimant was entitled to reside in the UK.

7. Mr Tufan relied on the grounds of appeal. He submitted that the striking feature of this case was that neither the Secretary of State nor the court have ever seen the claimant. He submitted that in view of the immigration history, namely that the claimant was a student who had made a number of applications, had applied for a residence card which was refused, the Secretary of State was correct to invite the claimant to attend an interview. He submitted that the judge was wrong to consider that the Secretary of State cannot invite the claimant to an interview and that this finding was very perplexing. He submitted that with regard to the two invitations to attend interview, neither the claimant nor the sponsor attended. The whole reason for Regulation 20B is to enable the Secretary of State to determine whether or not the marriage is valid. If the claimant does not attend for interview the Secretary of State cannot reach a decision. He submitted that it was within the domain of the Secretary

of State to conclude whether or not the marriage was genuine. What the judge could at most do would be to allow the appeal to the extent that the Secretary of State make a new decision. He submitted that there is nothing in joint names within the documents and that a number of documents do not appear to be in the name of the sponsor. He referred for example to the document at 17 in the bundle before the First-tier Tribunal to the letter from Thames Water which is addressed to Mr B Abdoulah. He submitted that it is not clear who this document is addressed to. With reference to the pay slips submitted from RCCG School of Disciples, the postal address was in Hertfordshire whereas the claimant lives in Kent. The Secretary of State had made efforts to confirm the employment with the employer and had been unable to make contact. With regard to the P60s these could have been written by anyone. He submitted there were no letters from either of the employers. He had tried to find out who the employer AK & CA Onita were without success. At page 35 of the bundle were pay slips belonging to a Michael Giraud also employed by AK & CA Onita. It is not clear who Michael Giraud is and what relevance his pay slips have. Although bank statements have been submitted they did not match up with any of the pay slips and were not evidence of salary paid into the bank account despite a number of entries being highlighted as salary paid in. He submitted that the claimant and the sponsor had failed to attend two invitations for interviews. They did not attend the hearing before the First-tier Tribunal and they did not attend the hearing today. He submitted that the claimant had been sent directions by the Upper Tribunal indicating that if a material error of law was found the matter would proceed to a continuation hearing. The claimants were not here today to give evidence had it been required.

Oral Submissions for the Claimant

8. Dr Omipede submitted that the claimant's immigration history was perfectly normal, she had never been refused a student visa, she had made her application before the expiration of the student visa. Her initial application for an EEA residence card was rejected not refused. It was rejected because of non-payment. After the rejection the claimant had reapplied for the residence card. He submitted that the decision of the judge contained no material error of law. The test required was that the Secretary of State must have a reasonable doubt before the claimants were invited for interview for the purpose of Regulation 20B. The judge accepted that the claimant did not receive the two letters. There was an issue with regard to the address which was pointed out by the claimant in her witness statement. He submitted that the Secretary of State did not provide any documents regarding the letters inviting the claimant for interview. He submitted that the judge made a valid conclusion. He asserted that the judge had to consider whether there was a valid marriage and whether the sponsor was exercising treaty rights. He submitted that there was no evidence from the Home Office as to what calls were made to the sponsor's employer. He submitted that the bank statements supported payments being made into the bank account that represented the claimant's pay. I indicated to Dr Omipede that I could find no link between the amounts shown on the pay slips and the amounts that were credited to the bank account. He checked the accounts and the pay slips and accepted that that was correct. He submitted that the judge was

entitled to find that the claimant and the sponsor were living together, there did not need to be letters in joint names, both claimant and sponsor had submitted official letters at the same address. He submitted that there were often errors in names on documents and that the claimant and the sponsor should not be prejudiced by others' mistakes.

Discussion

9. I propose to deal firstly with the documents in support of the sponsor exercising treaty rights as I find that there was a material error of law in the First-tier Tribunal decision. The judge sets out at paragraph 15 of the decision:

> "Furthermore, when I take note of the fact that included with the initial application were copies of the marriage certificate, the French identity card and indeed the wage slips and that no issue was taken with the authenticity of these documents, I take the view that I am able to accept them."

10. At paragraph 17 of the decision the judge found:

> "… On the basis of his wage slips which were produced with his initial application and further wage slips contained within the appellant's bundle, he appears to have two jobs, one with RCCG School of Disciples and another with AK & CA Onita, I am satisfied that he falls within the definition of a worker. Indeed he has produced P60s for each of the two jobs, and on that basis, I am satisfied that he is a qualified person who is exercising treaty rights."

11. This was an appeal decided on the papers at the request of the appellant. In the Reasons for Refusal Letter the Secretary of State set out:

> "You have stated that your EEA family member is employed and have provided three wage slips dated 31 January, 28 February and 30 September 2014. On 25 April 2015, multiple attempts were made to contact your sponsor's employer in order to confirm their employment. On these occasions, we were unable to contact your sponsor's employer and therefore unable to confirm their employment.
>
> Whilst every attempt has been made by the UK Border Agency to establish your EEA family member's employment the burden of proof rests with the applicant to provide such evidence and you have failed to do so.
>
> It is therefore concluded that you have failed to provide sufficient evidence to demonstrate that your EEA family member is currently a qualified person in the United Kingdom as a worker, as detailed under Regulation 6 of the Immigration (EEA) Regulations 2006."

12. The judge has failed to engage at all with the Secretary of State's reason for not accepting that the sponsor was exercising treaty rights. The judge has not considered or engaged with the fact that the Secretary of State was unable to confirm the claimant's employment with RCCG School of Disciples. It was incumbent upon the judge to provide adequate reasons as to why in spite of the Secretary of State's inability to confirm the sponsor's employment with his employer, she was prepared

to accept the evidence that the sponsor was indeed employed by RCCG School of Disciples. The judge does not appear to have questioned why pay slips from AK & CA Onita for a totally unrelated person, Michael Giraud, were submitted by the claimant. As submitted by Mr Tufan, P60s are not necessarily confirmative of employment. He also noted that only the copies of documents were submitted, no originals have been submitted.

13. I find the judge failed to consider at all that there might be any doubt as to the sponsor's employment with RCCG School of Disciples. The judge has ignored the evidence set out in the Secretary of State's Reasons for Refusal Letter that despite several attempts the sponsor's employer could not be contacted to confirm the sponsor's employment. The judge has failed to give any adequate reasons as to why she accepted that the evidence of the employment with RCCG School of Disciples was genuine. In the Reasons for Refusal Letter, as set out above, the Secretary of State made it clear that the burden of proof rested with the applicant to provide sufficient evidence to demonstrate that the sponsor is currently a qualified person as a worker.

14. I have considered the documentation carefully and note that the bank statements submitted in support of the claimant's appeal, which Dr Omipede submitted clearly showed salary payments into the account, were not borne out by those bank statements and in fact, despite payment being made by way of BACS from AK & CA Onita, none of those payments set out on the pay slips have been paid into the claimant's bank account. For example, on 30 December 2014 the claimant's net pay was £732.80, payment method being BACS. There is no corresponding deposit into the claimant's bank account either direct by the employer or by way of a deposit. The same applies to the payment purportedly by BACS of £745.96 on 30 November 2014. The judge was clearly influenced by the P60s. She found:

> "…Indeed, he has produced P60s for each of the two jobs, and on that basis, I am satisfied that he is a qualified person who is exercising treaty rights."

15. P60s are documents issued by employers. If it was doubtful that the wage slips from RCCG School of Disciples were not genuine then a P60 would not take that evidence any further. I find that the judge has failed to critically analyse the evidence before her when arriving at her conclusions, has erroneously considered that no issue was taken with the payslips by the Secretary of State, has failed to engage with the Secretary of State's assertions in the reasons for refusal letter and has failed in light of those assertions to give adequate reasons for her findings.

16. I find that there are material errors of law in the Tribunal's decision on this ground of appeal.

17. With regard to the first ground of appeal the judge set out at paragraph 11 of the decision that Regulation 20B(1) of the EEA Regulations applies when the Secretary of State has a reasonable doubt as to whether a person has a right to reside. At paragraph 12 the judge sets out that the only grounds relied on were that a number of student visas had been issued to the claimant, that she got married on 28 July 2014 and applied for a residence card on 13 November 2014. In fact, the claimant applied

for a residence card on 29 September 2014 which was before her leave had expired. This application as clarified by Dr Omipede was rejected purely on the basis that the fee had not been submitted. The application was not refused. The judge found as set out at paragraph 13 that in the absence of anything more, she could not be satisfied that the respondent had a reasonable doubt to be able to exercise her discretion to call the claimant and spouse for an interview. I take it from that paragraph that the judge was clearly referring to Regulation 20B and not a general discretion available to the Secretary of State who may invite a claimant and a sponsor for an interview. The judge sets out at paragraph 13:

> "I accept that she may well have had a mere suspicion but that is a much lower standard than a reasonable doubt. I therefore conclude that the respondent did not have the grounds to exercise that discretion."

18. On the basis of the factual scenario in this case, that was a finding that the judge was entitled to reach. It was a finding within the provisions of Regulation 20B of the EEA Regulations which sets out clearly that the Secretary of State has to have a reasonable doubt as to whether a person has the right to reside for Regulation 20B to apply. The judge was entitled to arrive at the conclusion that she came to. As the judge states, a mere suspicion is not sufficient and there was nothing adverse in the claimant's immigration history, timing of marriage or application for a residence card that the judge considered would be sufficient to give rise to a reasonable doubt. Whilst I may have come to a different view, the finding of the judge was open to the judge to make.

19. With regard to the judge's findings that the marriage is valid, the starting point is that the claimant had submitted her passport, her sponsor's French identity card and a marriage certificate. Evidence from official sources indicates that they are both living at the same address albeit that there are no documents in joint names. The judge's findings that the marriage was not a marriage contracted for the sole or decisive purpose of gaining admission or remaining in the United Kingdom was a finding that was open to the judge.

20. Although the grant of permission to appeal set that it is arguable that as the claimant was applying for a document under Part 3 of the Regulations this argument was not advanced at the hearing by eth Secretary of State.

Re-Making the Decision

21. I have considered whether or not I can proceed to remake the decision on the exercise of treaty rights point. This was an appeal considered on the papers before the First-tier Tribunal. I therefore consider that I can remake the decision on the papers before me. I have considered carefully the documents submitted by the claimant in support of her appeal. Despite the Secretary of State alerting the claimant to the fact that they could not obtain confirmation of the sponsor's employment with RCCG School of Disciples and that the burden of proof rested with the claimant to provide sufficient evidence to demonstrate that the sponsor was working in the UK, the claimant submitted only a P60. No other evidence was submitted such as a letter

from the employer confirming the sponsor's employment with them. A P60, whilst being supportive evidence, is not in my view sufficient to discharge the burden on the claimant in the circumstances pertaining in this case, namely that the Secretary of State had attempted on a number of occasions to contact the claimant's employer. Mr Tufan provided a geographical indication that the address of RCCG School of Disciples was in Hertfordshire whilst the sponsor lives in Kent. This is a considerable distance to travel for work. Neither the claimant nor the sponsor were available to provide any explanation. Whilst that evidence was not admissible on the error of law decision I take that into consideration in re-making the decision when considering the documents in relation to this employment and the reasons set out in the Reasons for Refusal Letter. I also take into consideration that the bank statements which were purportedly submitted in support of salaries being paid into the claimant's bank account do not show that the claimant's pay from his employment with AK & CA Onita (or RCCG School of Disciples) were in fact made into his bank account. The pay slips for AK & CA Onita indicate that the payment method is BACS but there are no corresponding payments into the bank account by the employer for the relevant dates. Further the amounts paid in by way of cheque do not appear to match up with the pay slips provided in respect of dates or amounts for either employment. In light of the fact that Mr Omipede submitted that the bank statements were included as evidence of payments made into the bank accounts, with regard to the employment by AK & CA Onita I am not satisfied that the claimant has discharged the burden of proving that the sponsor is employed. Mr Tufan asserted that in preparation for the hearing he had attempted to find out who the employer AK & CA Onita was without success. I do not understand why pay slips from AK & CA Onita for a totally unrelated person, Michael Giraud, were submitted by the claimant. Had the claimant attended the hearing an explanation might have been provided. In light of the fact that the claimant was on notice that the Secretary of State had concerns regarding the sponsor's employment and therefore whether or not he was exercising treaty rights, I am not satisfied that the claimant has discharged the burden of proving that the sponsor is employed by AK & CA Onita or RCCG School of Disciples. The P60 that has been provided is supportive evidence but as a P60 is not a document provided by anyone other than the employer, and given that I have doubts with regards to the employment with AK & CA Onita based on the lack of any pay going into the sponsor's bank account for the relevant period (where the payment method is BACS), it does not take the claimant any further. I am not satisfied that the sponsor is a qualified person in the UK exercising treaty rights. The burden is upon the claimant to prove that the sponsor is exercising treaty rights. The claimant has not discharged the burden of proof.

22. As I am not satisfied on the evidence that the sponsor is a qualified person under Regulation 6, the claimant's appeal fails and the Secretary of State's decision on the exercise of treaty rights stands.

Notice of Decision

The First-tier Tribunal decision contained material errors of law as set out above. I set aside that decision. I remake the decision. I dismiss the claimant's appeal against the

Secretary of State's decision that the sponsor was not a qualified person under Regulation 6 of the EEA Regulations.

I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Signed *P M Ramshaw* Date 7 April 2016

Deputy Upper Tribunal Judge Ramshaw