Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42725/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2nd of February 2018	**On 8th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MS OKWUCHI MARYCLAIRE OKOFOR
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Nwaekwu, Solicitor
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Nigeria born on 19th of December 1993. She appeals against a decision of Judge of the First-tier Tribunal Grant sitting at Hatton Cross on 27th of February 2017 to dismiss the Appellant's appeal against a decision of the Respondent dated 30th of October 2014. That decision was to refuse to issue a

residence card as the spouse of an EEA national exercising treaty rights pursuant to Regulation 7 of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations").

2. The Appellant married Mr Euklidson de Carvalho, a Portuguese national, ("the Sponsor") on 17th of December 2013. On 27th of May 2014 the Appellant applied for a residence card on the basis of this marriage the refusal of which has given rise to the present proceedings. The Respondent refused the application because she was not satisfied that the Appellant and the Sponsor were in a genuine and subsisting marriage and was not satisfied that the Sponsor was exercising treaty rights.

The Proceedings

3. The Appellant's appeal was allowed at first instance by Judge of the First-tier Tribunal Keith sitting at Hatton Cross on 20th of October 2015. He was satisfied that the marriage was genuine. The Respondent appealed that decision arguing that the second reason for the refusal had not been dealt with at first instance, that the Respondent was not satisfied that the Sponsor was exercising treaty rights. The Sponsor had claimed that he was working for an employment agency called Apex Recruitment but the Respondent stated she had attempted to confirm this employment through Internet searches and telephone calls but was unable to verify that the Sponsor's employment was genuine and subsisting.

4. Upper Tribunal Judge Goldstein sitting at Field House on 1st of June 2016 found it self-evident that Judge Keith had materially erred in law because he had failed to deal with the issue of the Sponsor's employment. The finding that the marriage of the Appellant and Sponsor was genuine was preserved but Judge Goldstein remitted the balance of the appeal back to the First-tier to be reheard. At the hearing before Judge Goldstein the Presenting Officer indicated that if there was further evidence that the Appellant now wished to tender to demonstrate that the Sponsor was exercising treaty rights it would be helpful if such evidence could be forwarded to the Presenting Officer before the remitted hearing date so that it might be considered with possibly a recommendation that a residence card be issued, depending of course on the contents of any such further evidence.

The Decision at First Instance

5. As a result of the Upper Tribunal's decision the matter came before Judge Grant on 27th of February 2017. The Appellant was not called to give evidence but the Sponsor did give evidence. Although the Appellant had been invited to supply further evidence before a remitted hearing, it appears from [4] of Judge Grant's decision that an incomplete supplementary bundle was only faxed or attempted to be faxed by the Appellant's representatives the day before the hearing. It does not appear that any such bundle was received by the Tribunal as the Judge had to be lent the bundle of the Appellant's solicitor.

6. This bundle contained nine payslips issued to the Sponsor by a company called Den Security Group Limited ("Den Security") covering the period 31st of May 2016 to 31st

of January 2017. The Sponsor argued that he could prove he was a qualified person exercising treaty rights because he had evidence to show his salary being paid directly into his bank account by this employer. He had provided his recent payslips and bank statements to support the claim. The Sponsor had supplied the Respondent with an Apex Recruitment Agency employment contract and a copy of a payslip issued by Apex for 2nd of May 2014 and 9th of May 2014. There were bank statements issued to the Sponsor by Barclays bank which covered a 6-month period between August and January 2017. There were credits shown from Den Security of £500 on 31st of August, 30th of September, 30th of October, 30th of November and 30th of December of 2016 and 31st of January 2017.

7. The Judge noted that the late submission of the supplementary bundle had given the Respondent no opportunity to verify the nine payslips and copy bank statements. There was no doubt, the Judge recorded at [16], that the bank statements showed credits from Den Security in the sum of £500 per month but the payslips of themselves were not credible evidence that the Sponsor was working. At [17] the Judge observed that all the payslips were for an identical sum of money. The Sponsor had indicated that he received the minimum wage of £7.20 p per hour and his income was always £500 per month. This meant that he was working 69.44 hours per month which was precisely 16 hours per week. Yet the Sponsor had claimed in oral evidence that he worked for 17 or even 17½ hours per week on average. If he genuinely worked for 17 hours per week for Den Security then his take home pay would necessarily be more than the precisely round figure of £500 per month shown on the payslips.

8. £500 was clearly not sufficient to live on, it would not even pay rent for a month in London. The Sponsor was receiving large additional sums each month to meet his living expenses but the origin of those funds had not been properly explained to the Judge. The Sponsor might be working and not declaring his income for tax but if that were the case such income could not be relied upon for the purposes of establishing qualifying status under the 2006 Regulations. The Judge did not find the Sponsor to be a credible witness and drew an adverse inference from the late disclosure of the evidence which had given the Respondent no opportunity to verify it.

9. If the Sponsor genuinely did work for Den Security the solution was for the Appellant to make a fresh application to the Respondent properly supported with cogent evidence which could then be verified by the Respondent. It had been found that the marriage was genuine. Assuming the Sponsor was a qualified person there would be no difficulty about the issue of a residence card to the Appellant. The Judge dismissed the appeal.

The Onward Appeal

10. The Appellant appealed against this decision arguing that the finding that the Sponsor was not exercising treaty rights could not be sustained since it had not been made in line with the Court of Justice of the European Union decision of **Levin (1982) 53/8**. This case had given guidance on the definition of what constituted work. Part-

time work counted as employment provided it was genuine and gave an effective means for a person to earn a living even if it needed to be supplemented from public funds. Further, the grounds argued, there were contradictory findings in the determination. On the one hand the Judge accepted that the Sponsor was receiving £500 per month on the other hand she found the payslips were not credible evidence. The Judge had also found that it may well be that the Sponsor was working.

11. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Hollingworth on 20th of September 2017. He refused permission finding that the Judge had made credibility findings open to her in the light of which the outcome was inevitable. The Judge specifically addressed the issue in question whether treaty rights were being exercised.

12. The Appellant renewed her application for permission to appeal on the same basis as before. Upper Tribunal Judge Alan granted permission to appeal on 19 December 2017 briefly stating that it was arguable that the Judge's findings were not clear and the grounds raised matters which indicated arguable errors of law in the Judge's decision.

13. The Respondent replied to the grant of permission by letter dated 17th of January 2018. Although the Appellant was aware that the only issue in the case was whether the Sponsor was in employment she had only submitted banks statements and payslips with no other supporting evidence of the claimed employment. The Judge had given adequate reasons for doubting the credibility of the payslips. It was open to the Judge to find that although the Sponsor was in receipt of funds from Den Security he had not established that he was genuinely employed by them.

The Hearing Before Me

14. At the hearing before me to establish whether there was a material error of law in the First-tier Tribunal's decision it was submitted on the Appellant's behalf that there had been clear evidence before the Judge that the Sponsor was receiving income from Den Security. The Judge had made no reference to Regulation 6 of the 2006 Regulations when finding the Sponsor was not exercising treaty rights. Regulation 6 defined a qualified person. The Judge's concerns about the payslips were insufficient to find the Sponsor was not exercising treaty rights. There was no definition in the Regulations of what a payslip must contain. The important point was there was evidence of employment.

15. In reply, the Presenting Officer indicated that the crucial paragraph in the determination was [17], see paragraph 7 above. There had been no challenge by the Appellant to the findings the Judge had made at that paragraph when calculating how many hours per week the Sponsor was working compared to what his oral evidence had been that he was working. The sums did not add up as a result the Judge could not place weight on the payslips. The bank statements were equally not credible since although they showed money going in they did not establish where that money was coming from, it might be that he was working without paying tax. The Appellant's challenge to the determination did not touch on [17]. If this had been

a self-employment case and the accounts submitted were not credible the Appellant would not have discharged the burden of proof. It was not so much the documents were false but rather that the figures within them were not credible. There had been no allegation of forgery as such.

16. The Judge could only make findings on the evidence before her. She was unimpressed with the Sponsor's evidence. If the payslips were not reliable the Sponsor could not establish employment. Another Judge might have reached a different conclusion but [17] was difficult for the Appellant to overcome as there was no challenge to it.

17. In conclusion the Appellant's solicitor relied on the case of **Levin**. Part-time work counted as employment provided it was genuine and effective. There was oral evidence from the Sponsor confirming that he worked for Den Security. That could not be ignored. The only issue was a calculation of a payslip. That was not sufficient to outweigh all the other evidence. The narrative on the bank statement said that the money going into the bank account was coming from Den Security.

Findings

18. The issue I have to decide is whether the Judge made a material error of law in this decision such that her determination be set aside and the decision remade. If she did not then her decision would stand. What the Sponsor had to demonstrate in this appeal was that he was in employment. I accept that if the Sponsor could show he was genuinely in employment receiving £500 per month from an employer that would probably be sufficient to demonstrate he was a worker within the meaning of Regulation 6. Although there is case law on the issue of how much work has to be performed to satisfy the Regulations, it is established that the level of work must not be marginal. 16 hours work per week earning £500 per month would not be so marginal that it could be disregarded.

19. The question the Judge had to answer was: could the Sponsor established that he was genuinely working for at least 16 hours per week earning £500 per month? The Judge had suspicions that the Sponsor might be receiving income from elsewhere but that was not declared in these proceedings and therefore she had to proceed on the basis that there was no other claimed employment. As she correctly pointed out if there was any further employment which was evading tax that would not be sufficient to meet the requirements of the Regulations however substantial it was.

20. The problem for the Appellant in this case was that the evidence put forward to demonstrate the Sponsor was working did not, in the view of the Judge, establish that. The Appellant had been given fair notice by the Respondent at the hearing before Judge Goldstein that if she were to submit further evidence showing the Sponsor's employment then the application would be reconsidered and might very well result in the issue of a residence card. Unfortunately, that very strong hint was not taken up by the Appellant.

21. Instead in rather chaotic scenes the Appellant submitted an incomplete bundle of documents on the morning of the hearing before Judge Grant which as the Judge demonstrated left unanswered many questions. The bundle referred to a completely new employer Den Security (not Apex). According to the letter from that company in the Appellant's bundle the Sponsor was said to have been employed by Den Security since January 2015. I pause to note here that a further employer's letter was contained in the bundle prepared for the hearing before me. That bundle is not relevant for the purposes of establishing an error of law in the original determination. The second letter indicated the sponsor began his employment with Den Security in May 2016 and was still working for them as at January 2018.

22. If it was the case that employment began in January 2015 (or even May 2016 for that matter) the Sponsor was working for Den Security group at the time of the hearing before Judge Goldstein. That makes it even more inexplicable that the indication given by the Presenting Officer at the hearing before Judge Goldstein was not taken up. From January 2015 alternatively May 2016 the Sponsor would have been accumulating evidence on the Appellant's case of his employment with Den Security which could and should have been given to the Respondent in good time. That that was not done of itself undermined the weight that could be given by the Judge to the payslips when they finally emerged on the day of the hearing at first instance. This was the Appellant's appeal, she had been told what she needed to do to succeed but she had not done it.

23. The documents that were produced to Judge Grant were contradicted by the Sponsor's own evidence. The Judge had made a very careful calculation at [17] of her determination which, as the Presenting Officer pointed out, was not challenged. If the payslips were genuine the Sponsor was working 16 hours per week. If he was working 16 hours per week every single week such that his monthly pay was always the same, he would reasonably be expected to know that he was working 16 hours per week. As his working week never varied he would know it very well. Unfortunately for the Appellant, the Sponsor's evidence conflicted with the payslips and he told the Judge he was working 17 or even 17 ½ hours. That strongly suggested a very poor knowledge of what the payslips contained and thus what the Sponsor's case on employment was meant to be.

24. In those circumstances the Judge's suspicions about the payslips were aroused. It was correct that the Sponsor had produced bank statements showing he received a regular payment of £500 per month from Den Security. If, however he could not show that that money was received from employment it was meaningless for the purposes of the application for a residence card. The Sponsor had to link the payments received in his bank account with genuine employment. This he did not do. There was a considerable amount of supporting evidence which could have been produced if the employment was to be relied upon, for example HMRC documentation. This was not produced to Judge Grant.

25. As I have indicated, the Appellant prepared a further bundle in time for the hearing before me but as the hearing I was conducting was to establish material error of law

or otherwise, that documentation could not be relied upon since it was all post hearing evidence. Having briefly perused the documentation it does raise a number of questions which do not need to be answered or put to the Sponsor at this stage but in the event that the Appellant decides to submit a further application to the Respondent it would be open to the Appellant to deal with those questions which arise from a brief reading of the bundle.

26. By way of example, the payslips produced to Judge Grant showed the Sponsor's payroll number with Den Security as being 1027 but the P60 produced for year ending April 2015 showed his payroll number is 254. Letters from Den Security give two different start dates for the employer one suggests he began work in January 2015 another that he began work in May 2016. At least three different addresses for Den Security appear on the paperwork. These are matters which no doubt can be addressed by the Appellant in the event she decides to submit a further application to the Respondent.

27. For present purposes I have to consider whether there was a material error of law in Judge Grant's decision. On the basis of the very limited and unsatisfactory evidence before her, she was quite entitled to place no weight on the payslips submitted as evidence of the Sponsor's employment. In the absence of cogent evidence of the Sponsor's employment she could not find that he was exercising treaty rights. I do not find there was any material error of law in the Judge's decision. As Judge Grant pointed out the Appellant's remedy is to submit a further application properly supported. That is matter for the Appellant. In the meantime, I dismiss her onward appeal against the decision of the First-tier Tribunal. I make no anonymity order as there is no public policy reason for so doing.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order.

Signed this 23rd of February 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee was paid or payable and I have dismissed the appeal and therefore there can be no fee award.

Signed this 23rd of February 2018

…….
Judge Woodcraft
Deputy Upper Tribunal Judge