Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13665/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 27 November 2014	**On 2 December 2014**

Before

Deputy Upper Tribunal Judge Pickup
Between

Nkiruka Mary Okoye
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr R Subramanian, instructed by Lambeth Solicitors
For the respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Nkiruka Mary Okoye, date of birth 29.9.77, is a citizen of Nigeria.

2. This is her appeal against the decision of First-tier Tribunal Judge Blair promulgated 22.8.14, dismissing her appeal against the decision of the respondent, dated 1.3.14, to refuse her application made on 19.12.13 for an EEA residence card as confirmation of a right to reside in the UK pursuant to the Immigration (EEA) Regulations 2006. The Judge dealt with the appeal on the papers on 15.8.14.

3. First-tier Tribunal Judge Ransley granted permission to appeal on 15.10.14.

4. Thus the matter came before me on 27.11.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Blair should be set aside.

6. In summary, the grounds submit as follows:

   (a) That the judge erred in law by failing to make clear findings on the credibility issues raised by the respondent regarding the EEA sponsor's employment documents. At §7 the judge recorded the appellant's comments on those issues. Judge Ransley considered it arguable that the failure to make a ruling on those issued at §8 represents an arguable error of law;

   (b) That the judge misdirected himself in law in finding that the sponsor needed to show evidence of exercising Treaty right in the UK for a period of five years. Judge Ransley considered it arguable that the judge's adverse findings at §9 and §11 that there was a lack of evidence to show the sponsor had been exercising Treaty rights for 'the relevant' 5-year period in the UK to represent an error of law;

   (c) That the judge failed to properly assess proportionality under article 8. Judge Ransley noted that the decision made no reference to article 8.

   (d) That the judge was wrong to disregard the evidence of the sponsor's current work as a cleaner in a church. Judge Ransley stated that contrary to the assertion, the judge at §10 to §11 did take account of the sponsor's job at the church.

7. Judge Ransley considered that the decision of the First-tier Tribunal has been shown to involve arguable errors of law and stated, "permission is therefore refused. All grounds may be argued." It appears to be common ground that Judge Ransley intended to state that permission was granted.

8. For the following reasons, I find no material error of law in the decision of the First-tier Tribunal such as to require the decision to be set aside and remade.

9. At the outset of the hearing before me, Mr Subramanian conceded that as article 8 had not been raised in the grounds of appeal to the First-tier Tribunal or in any other submissions to the Tribunal. Thus the First-tier Tribunal Judge was not required to address it. In Sarkar [2014] EWCA Civ 195, the Court of Appeal held that even when Article 8 is in the grounds of appeal, if no evidence is adduced and no submissions made the Appellant can be taken to have abandoned it as a ground of appeal and the Judge does not err in failing to deal with it.

10. In the circumstances, there is no merit in the ground of appeal that the judge neglected to address article 8.

11. Very little evidence was submitted in relation to employment and the exercise of Treaty rights. There was a wage slip and an employment letter from November 2013. The respondent was unable to confirm that the business was genuine and noted that the registered office was different to that given in the letter. At §8 the judge found it difficult to know what to make about the respondent's claim or the appellant's response to this issue. There was no evidence of the registered address of the business. Thus the judge was unable to reach any finding on this issue.

12. However, this was not a material issue, as by the date of the hearing before the judge, the sponsor had left that employment, on 30.12.13, and claimed to be working part-time at a church, Christ Embassy in Hounslow, where he was paid in cash. At §11, the judge reached the conclusion that there was no evidence of any substance that the sponsor had been working or otherwise exercising Treaty rights in the UK.

13. In order to determine whether the appellant was entitled to the residence card, the judge was required to assess the situation prevailing at the date of the hearing; not whether the sponsor had been working at some stage in the past, though this was potentially relevant to the credibility of the sponsor's claim. There was precious little evidence of employment at the church. The letter in support from Alexander Adesope, who did not attend the appeal hearing, states that the sponsor works part-time as a cleaner in the church for "about" 20 hours every week. It does not state that he is in fact employed or even paid. There is no evidence of any HMRC or NI payments, or receipts, or bank accounts to show the funds had been received. It is not clear whether this is actual employment or charitable service, which is mentioned in the letter. In the circumstances, I find that the judge was entirely correct to conclude that there was insufficient evidence that the sponsor was exercising Treaty rights in the UK. He may well be, but the appellant has failed to produce sufficient evidence to demonstrate it. In the circumstances, the appeal was doomed to failure.

14. In passing, I note that Mr Subramanian produced to me the case Begum (EEA – worker – jobseeker) Pakistan [2011] UKUT 00275(IAC), where the Upper Tribunal held that,

> "When deciding whether an EEA national is a worker for the purposes of the EEA Regulations, regard must be had to the fact that the term has a meaning in EU law, that it must be interpreted broadly and that it is not conditioned by the type of employment or the amount of income derived. But a person who does not pursue effective and genuine activities, or pursues activities on such a small scale as to be regarded as purely marginal and ancillary or which have no economic value to an employer, is not a worker. In this context, regard must be given to the nature of the employment relationship and the rights and duties of the person concerned to decide if work activities are effective and genuine."

15. Whilst it was not considered by the First-tier Tribunal Judge, it appears to me that even if the sponsor is employed as claimed, such employment might well be

regarded as no more than purely marginal and ancillary and thus not genuine employment so as to qualify him under regulation 6.

16. The judge was entirely wrong to require at §9 that the appellant demonstrate that the sponsor had been exercising Treaty rights for a period of five years. That only applies to an application for a right of permanent residence. All that is required for a residence card is for the appellant to demonstrate that she is the family member of an EEA national present and exercising Treaty rights in the UK so as to be a qualified person under regulation 6.

17. However, in the light of my other findings in respect of the grounds of appeal, set out above, I am not satisfied that this somewhat serious error was in fact material to the outcome of the appeal. There was insufficient evidence of employment, without which the appeal could not succeed.

Conclusion & Decision

18. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The appeal of the First-tier Tribunal stands and the appeal remains dismissed.

Signed: Date: 27 November 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed: Date: 27 November 2014

Deputy Upper Tribunal Judge Pickup