Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18044/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24 September 2014	**On 9 October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MRS NADIFO MOHAMED
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Chellah, Counsel instructed by Forward & Yussuf Solicitors
For the Respondent: Mr Tufan, Specialist Appeals Team

DETERMINATION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing her appeal against the decision by the Secretary of State to refuse to issue her with a residence card as confirmation of her right to reside in the United

Kingdom as the spouse of an EEA national exercising treaty rights here. The First-tier Tribunal did not make an anonymity order, and I do not consider that such an order is required for these proceedings in the Upper Tribunal.

2. The appellant is a national of Somalia, whose date of birth is 21st October 1970. She lives in the United Kingdom with her husband, a Norwegian national, and they have five dependent children whose dates of birth range from 1 July 1996 to 11 July 2007. Her husband is Abdullahi Omar Hassan. He was born on 3 December 1946 in Somalia, and he subsequently acquired Norwegian citizenship. He obtained a registration certificate in the UK on 18 May 2010. In January 2012, the appellant applied with her five dependent children for residence cards.

3. On 16 July 2012 the Secretary of State gave her reasons for refusing the applications. As evidence of her husband exercising treaty rights, the appellant had provided four pay slips from Sorag Carers and Special Needs for the period 26 September to 19 December 2010; and four pay slips from Towfiq Money Transfer and Telecom for the period 30 September 2011 to 30 December 2011.

4. According to the stamp in the application form, her EEA sponsor was employed by Towfiq Money Transfer and Telecom earning £389 per month. It was claimed that this employment had commenced on 1 September 2011. The department of the Home Office dealing with her application ("the department") did not consider that a family of seven could subsist on a monthly income of £389 without recourse to the social assistance system of the United Kingdom.

5. On the morning of 10 July 2012, the department tried on numerous occasions to telephone Towfiq on the number quoted on the employer's stamp in the application. For several hours the phone calls rang out. The phone was eventually answered, not in a professional businesslike manner, but simply by a hello. When asked what the name of the business was the gentleman confirmed that it was Towfiq. The department asked to speak to the manager, but was told that he was not available. When asked when he would be available, the department was told next week.

6. The department had telephoned Sorag Carers and Special Needs and had established the sponsor had left this employment in August 2011.

7. On 16 July 2012 another telephone call was made to Towfiq. The call was transferred to a mobile telephone. The department asked to speak to the manager, being the person named on the application form. But the department was told he was unavailable. When asked when he would be available, they were told next week. Accordingly, the department had been unable to confirm her EEA sponsor's employment status.

The Hearing Before, and the Decision of, the First-tier Tribunal

8. The appellant's appeal came before Judge Ievins sitting at Taylor House in the First-tier Tribunal on 11 July 2014. In his subsequent determination, he explained there was only one appellant before him as only one appellant had completed a notice of

appeal. The immigration status of each child stood or fell with that of their mother, so he proposed to treat the five dependent children as the appellant's dependants for the purposes of the appeal.

9. In paragraph [6], he rehearsed the documentary evidence which was before him. This included two original pay slips dated 31 May and 30 June 2014 from the husband's alleged employer Towfiq. He had also taken into account remarks made by the two advocates at the hearing about telephone calls that they had made, separately, on the day of the hearing to HMRC.

10. The judge received oral evidence from the appellant, who was legally represented, and from the sponsor. The appellant explained that she entered the United Kingdom on 15 October 2010, her husband having applied for family reunion for her. She travelled from Ethiopia to the United Kingdom with her husband and the five dependent children.

11. He understood from Mr Whitehead, who appeared on behalf of the Home Office, that he had telephoned HMRC on the day of the hearing, and had received the information that so far as HMRC was concerned the sponsor's last employment was in February 2013. Mr Yussuf, who appeared on behalf of the appellant, said that he had also telephoned HMRC on the day of the hearing. A man called Sam told Mr Yussuf that an application for working tax credit and child tax credit had been submitted in April 2010.

12. Both the appellant and the sponsor were cross-examined on the topic of whether the sponsor was genuinely working for Towfiq. The sponsor said he worked sixteen hours a week, the hourly rate of pay being £6.31 per hour.

13. In his closing submissions on behalf of the respondent, Mr Whitehead submitted that the appellant had not discharged the burden of proof. He relied on the information that he had received in his telephone call to HMRC. Also, there was no evidence of wages or money received by the sponsor in the period 2013 to date. Conversely, there was evidence of the sponsor earning £4,312 in the period 2012 to 2013.

14. In reply, Mr Yussuf submitted there were a number of different documents and the Home Office had not challenged the authenticity of the pay slips or whether the company existed. The bank statements showed that up until June 2014 the sponsor was receiving working tax credit and child tax credit and unless HMRC was satisfied at the time of renewal that the sponsor had provided evidence of his employment, those payments would not have been made.

15. The judge's discussion of the evidence is to be found at paragraph [25] onwards. The sponsor's evidence appeared to be that he was sometimes paid weekly and sometimes monthly. He could not explain why two of his pay slips showed that he was paid by BACS whereas his case was that he was paid in cash; nor could he explain why the word transfer was misspelt on the pay slips.

16. The point of a pay slip is to provide an accurate record of how much someone was paid and when and how the payment was calculated. It was not at all helpful therefore as the pay slips did not accurately reflect the sums paid or the frequency of payment. The judge went on to address in some detail the discrepancy which he had noted between the pay slip of 31 May 2014 and the pay slip for 30 June 2014.

17. The judge addressed Mr Yussuf's case that the sponsor must be in work because he had been awarded working tax credit and child tax credit. There was a flat contradiction between what the two advocates had told him. The judge acknowledged that the sponsor was receiving tax credit. His bank statements showed, for example, that on 29 May and on 5 June 2014 he had received two payments of £401.21 by way of working and child tax credit. The judge continued at paragraph [30] as follows:

> I do not know what checks HMRC carry out to satisfy themselves that someone is working before they allow a tax credit claim. It seems that the sponsor sent some pay slips in. Are those pay slips accepted at face value? I do not know. Although the sponsor is, it seems, currently receiving tax credits I do not know whether he should be receiving them or not. Is he really working?

18. The judge went on to express considerable doubt about the authenticity of the pay slips. The Home Office had difficulty contacting Towfiq when they telephoned back in 2012. There was a careless spelling mistake on the pay slips. Some of the pay slips said that payments were made by BACS whereas the appellant's case was that they were not. The pay slips did not seem to match with the frequency that the appellant was paid.

19. The judge stated his conclusion at paragraph [33]. He was not satisfied on the evidence before him that the sponsor was working for Towfiq, and his case was that he was not working anywhere else. He did not consider he had a full picture of the sponsor's financial circumstances. He was not satisfied the sponsor was exercising treaty rights in the United Kingdom as a worker. He dismissed the appeal under Regulation 6 of the Immigration (European Economic Area) Regulations 2006.

The Grant of Permission to Appeal

20. On 5 August 2014 First-tier Tribunal Judge P J G White granted the appellant permission to appeal. It was arguable that in reaching his decision the FTT Judge was improperly influenced by the evidence given by the respondent's representative concerning a telephone conversation between the representative and HMRC to the effect that no working tax credit had been claimed after February 2013, whereas the judge acknowledged that there was documentary evidence produced by the appellant showing the receipt of working tax credit up to June 2014. It was also arguable that the judge's doubts concerning whether HMRC checked on whether an applicant who claimed working tax credit was actually working was without reasonable foundation, given that HMRC in addition to administering working tax credit, administered PAYE and national insurance of employees.

The Rule 24 Response

21. On 14 August 2014 John Parkinson of the Specialist Appeals Team settled a Rule 24 response on behalf of the Secretary of State. The judge had listed clear problems with the evidence relied upon to demonstrate the sponsor was exercising treaty rights in the UK. It was clear there were a number of errors of concern and the judge was fully entitled to take them against the appellant. The grounds were a disagreement on findings open to the judge, and were an attempt to re-argue the case.

The Hearing in the Upper Tribunal

22. At the hearing before me, Mr Chellah developed the arguments raised in the grounds of appeal, and Mr Tufan took the same line as that taken by Mr Parkinson in the Rule 24 response.

Discussion

23. It would have been an error of law for the judge not to have taken any account of the hearsay evidence which he had received from Mr Whitehead on the day of the hearing. The weight which the judge attached to this piece of hearsay evidence was a matter for him, although of course he had to assess its probative value in the light of all the other evidence that was before him. It clear from the judge's line of reasoning that he was not improperly influenced by this hearsay evidence. He treated the hearsay evidence from Mr Whitehead as being neutralised by the contradictory hearsay evidence from Mr Yussuf. In the end, the judge based his conclusion on the pay slips, not on the hearsay evidence from Mr Whitehead.

24. I turn to consider whether it was perverse of the judge not to treat the documentary evidence of the sponsor receiving working tax credit as discharging the burden of proof. The argument for the appellant is that HMRC would not be awarding the sponsor working tax credit if HMRC was not satisfied that he was working in the first place.

25. The judge recognised the force of this argument, and he did not ignore it. He addressed it in paragraph [30]. The judge's reasoning was that HMRC might *erroneously* be paying working tax credit to the sponsor, and this is what he eventually concluded by necessary implication.

26. I consider it was open to the judge not to treat the evidence of ongoing payments of working tax credit as being determinative of the issue which he had to decide. The ultimate question was whether the sponsor was exercising treaty rights at the day of the hearing. While the receipt of working tax credit was supportive of the sponsor's case, it did not necessarily follow that the sponsor was in fact working. On analysis, all it showed is that when the decision was made to award the sponsor working tax credit sometime in the past, at that juncture HMRC was satisfied on the documentary evidence provided that he qualified for the award of working tax credit.

27. As the sponsor pointed out in the course of his oral evidence, his earnings from his claimed employment with Towfiq fell below the income tax and national insurance thresholds. So Towfiq did not have to account to HMRC for any income tax or national insurance arising from the sponsor's claimed employment. So the fact that HMRC also administers PAYE is nothing to the point. For in this particular case HMRC was not collecting any income tax or national insurance from the sponsor's claimed employer. Put another way, HMRC would be none the wiser if the sponsor was receiving zero cash each month, as opposed to £389.

28. In summary, I find that the conclusion reached by the judge was one that was reasonably open to him for the reasons which he gave.

Conclusion

29. The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Signed Date

Deputy Upper Tribunal Judge Monson