



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/19141/2013
IA/19188/2013

THE IMMIGRATION ACTS

Heard at Birmingham
on 11th August 2014

Determination Promulgated
on 22nd September 2014

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SRIKANTHAN NALLIAH
PRETHIGA SRIKANTHAN
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. In a determination promulgated on 7th March 2014 First-tier Tribunal Judge Camp allowed the appeals of this father and daughter, born on 31st January 1964 and 20th February 2002 respectively, against the refusal of the Secretary of State to issue them with a Residence Card as confirmation of their right to reside in the United Kingdom as the spouse and daughter of an EEA national, a German citizen, exercising Treaty rights in the United Kingdom.
2. The Respondent asserts the Judge erred in allowing the appeal on the basis of the available evidence which it is submitted was inadequate to establish that the EEA national was exercising Treaty rights in the United Kingdom.
3. Permission to appeal was granted on 25th March 2014 and the matter came before Deputy Upper Tribunal Judge Davey on 6th June 2014 who adjourned the initial hearing as a result of late documentation having been received from the Appellant which Mr Smart for the Respondent wished to corroborate with

HMRC. There was no finding in relation to whether there was an error of law in the determination.

Background

4. The first appellant entered the United Kingdom on 24th September 2012. He states his wife and daughter were already in the country, having arrived in May of the same year. His oral evidence was that at that time they lived at 300 Grangemouth Road, Coventry. When asked where his wife worked at that time the appellant was hesitant indicating he was not sure about the place although when asked what sort of place it was he stated it was a convenience store.
5. The first appellant was not employed at that time although has worked since, but claims to be currently unemployed now. He was asked whether when he came to the United Kingdom on 24th September his wife lived in 300 Grangemouth Road, which he stated was the case. He was not sure how long she had lived there although stated she arrived around 2nd September.
6. The first appellant was referred to two letters of 10th October 2013 from Ponswood Convenience Store and Costcutter but he stated he had never been to that place. When asked how his wife obtained those letters he did not know the details but claims to know she got them from there. It was also his evidence that his wife had now started a new job and provided pay slips relating to that employment with Pizza Express which she started in June 2014. She still worked at Costcutter in Coventry too.
7. The evidence of the EEA national is that she came to the United Kingdom in May 2012 and initially lived in Hastings in accommodation above a convenience store in that town. She stopped working at Ponswood in October 2012 and stated her husband arrived in the United Kingdom in September 2012 although he has never lived with her in Hastings.
8. The EEA national's evidence is that she worked at Ponswood and provided a P45 showing an income of £2,553.60 from that employment and a leaving date of 1st October 2012. She was asked about a payslip provided in relation to her employment dated 30th September 2012 which showed a gross income of £2,553.60, the figure appearing on the P45, but which appeared to be contradicted by a second pay slip dated 31st October 2012 recording 140 hours worked and a gross income figure of £3,420.20, which post-dated the date the EEA national allegedly terminated her employment with that organisation. The response was that the accountant gave her the evidence which she now has. When asked why the tax authorities were told she had finished on 1st October 2012, whereas she was now asserting that she was paid to 31 October 2012, she alleged an error had been made but that she could not "get a reference for that".

9. The EEA national confirmed her husband came to the United Kingdom on 24th September 2012 and that at that time they lived at 300 Grangemouth Road in Coventry. She also, however, claimed to be going to her work in Brighton although when asked when she moved to the address in Coventry she was not able to recall. When it was put to her that her husband had stated that they came on 24th September 2012 and both lived at 300 Grangemouth Road she confirmed that her husband had joined her at her brother's house for two days after which they moved to the Coventry address. Notwithstanding this statement, she also confirmed that she continued working at Ponswood until the end of October in Hastings. She claimed she returned to Coventry at the weekend.
10. Two letters have been provided in support of the appeal dated 2nd October 2013 in relation to which the EEA national claims one was collected by her by hand and the other was posted. She claims they were written by "the Boss" but denied this was a reference to the same man. When asked who wrote the Costcutter letter the EEA national's response was that she told them what she wanted and they wrote it. She did not know who typed the letter which she collected in Coventry. The letter from Ponswood was sent by post after she spoke to them and requested the letter on the telephone and when she was working there. Her explanation for the fact both letters are dated 2 October 2013 is that she "requested the same series" which she confirmed to mean that she provided the same information to "both of them". It was pointed out the two letters are similar in the way they are laid out to which the EEA national's reply was that as "they did not know how to draft the letters" she gave them information with the help of an assistant from the Law Centre.
11. The EEA national stated she did not know if the authors of the letter used the same computer and was unable to explain how two letters, one purportedly from Hastings and one from Coventry, had the same typeface and spacing.
12. The EEA national also referred to wage statements provided at the hearing which she stated related to further employment she obtained at Pizza Express in June 2014. She claims she still works at Costcutter in Coventry on a part-time basis of 24 hours per week too.
13. The EEA national was asked whether her bank statements reflected the cash she claimed she earned which she stated they did not.
14. In reply to questions put in cross-examination the EEA national confirmed her evidence was that she worked at Ponswood until 1 October 2012. When it was put to her that her P45 indicated she stopped working there on 1 October 2012 she claimed this document was not wrong but claimed to have a letter of explanation dated 7th February 2014 which was handed in. When it was put to the EEA national that she had submitted an official document indicating the tax office were told she stopped work on 1 October 2012 having learned £2252

which was contradicted by a wage slip indicating that she in fact ceased such employment on 31 October 2012, she alleged it must have been made by the accountant and that she worked until 30th October 2012.

15. The EEA national repeated her claim to have lived in Coventry at the weekends only before returning to her work in Hastings during the week and claimed to support the family.
16. Additional documentary evidence includes a scanned copy of a letter from Saha Accounting Services based in Harrow in Middlesex stating they act for Ponswood Convenience Store for whom they prepared the wage slips and who allegedly informed the accountant that the EEA national left their employment on 1 October 2012 after which they sent an amended payslip to the employer, and attach a copy to their letter.
17. The letters dated 2 October 2013, one purportedly originating from Ponswood Convenience Store in Hastings confirming the EEA national worked as a shop assistant from 2 July 2012 to October 2012 on a full-time basis fails to specify the date of termination of employment, and from Costcutter (Trew Ltd) in Coventry alleging employment from 2 December 2012 to the date of the letter on a part time basis, appear to be in identical format.
18. There is in addition in the appeal bundle a number of related documents, a letter from the EEA national dated 25 November 2013 stating she did not transfer wages into her bank account as she was paid in cash, copy wage slips from Ponswood Convenience Store for 31st July 2012 to 31st October 2012, a letter from HMRC dated 18th July 2012 to the EEA national containing a Hastings address and containing an employer registration and reference numbers, a Hastings Borough Council non-domestic rate demand in the EEA nationals brothers name in relation to shop premises in Hastings, together with wage slips relating to employment with Trew Limited dated 31st October 2013 to 30th November 2013, and a number of bank statements showing varying amounts being credited into the EEA nationals bank account.
19. Following additional documents having been disclosed at the hearing on 6th June 2014 Mr Smart sought an adjournment to enable him to undertake checks with HMRC which has resulted in the production of a witness statement by a named Revenue Officer dated 18th July 2014. There is also an earlier statement from another named officer of HMRC indicating that in relation to the EEA national they have an address for her since 30th October 2012 at 300 Grangemouth Road in Coventry and previously from 18th July 2012 at 103 Battle Road, St Leonards on Sea, East Sussex. The author of the report also states that HMRC computer records show PAYE employment in the tax years 2013/12 at Ponswood Convenience Store and an earned income of £2,553.60 with nil tax deducted.

20. A statement dated 18th July 2014 from a different officer of HMRC records the address in Coventry and in relation to the employer details confirms the 2012/13 employment at Ponswood Convenience Stores and also from 3rd December 2012 at Trew Ltd with a declared income of £7,409.50 and for 2013/14 at Trew Ltd with a declared income of £8,107.92. The Officer's report also records that Trew Ltd submitted form P35 on 15th May 2014 resulting in reconciliation as a result of an underpayment of PAYE to be collected in 2015/16. That document is exhibited to the statement.
21. A third statement dated 7th August 2014 produced by the same Officer refers to a copy of form P14 for the tax year 2012/2013 submitted to HMRC by Ponswood Convenience Store and correcting a typographical error in relation to the Trew Ltd income figure for 2013/14 which should read £8,017.97. The P 14 document indicates employment by the EEA national at Ponswood Convenience Store from 1 July 2012 to 1 October 2012 with a total income of £2,553.60.
22. In relation to the 'error of law' element of this case, I find Judge Camp has materially erred in law as it was clear that all the Judge had available to him at that hearing was oral submissions, including a statement by the first appellant that his wife only worked at Costcutter yet then claiming that she worked elsewhere at Costcutter, trading as Trew Ltd. Before the Judge the P45 in relation to Ponswood refers to employment to the end of October 2012 which was allegedly received in May 2013 some six months later and the absence of any other form of documentary evidence. The record of proceedings notes submissions raised the lack of evidence, a statement by an HMCR Officer and inconsistencies were highlighted, together with the fact the employer was not in attendance and the fact that false information had been presented to the court. The determination fails to deal with any of the conflicts in the evidence and appears to be decision based solely upon accepting the word of the witnesses who appeared before him. Whilst the weight to be given to the evidence may be a matter for the Judge it is not clear that evidence was considered with the required degree of anxious scrutiny or that adequate reasons have been given to support findings made. For this and the reasons set out in the grounds a material legal error is found and the determination set aside.

Discussion

23. In proceeding to remake the decision I note the Secretary of State's position which is that the evidence regarding employment remains inadequate and contradictory. The documentary evidence regarding the Ponswood employment to the end of October is not confirmed by HMRC who also note an address of 300 Grangemouth Road since 10th October 2012.
24. In relation to the employment with Ponswood and Costcutter two letters have been provided as evidence of employment in the bundle and when reviewed it is submitted they should have little weight placed upon them as proof of such

employment, in isolation, for the reasons set out above. Mr Smart submitted it could be inferred that the employment is not genuine and that the tax office have been provided with the details they have recorded as a result of proceedings before the Tribunal, and accordingly is evidence that cannot be relied upon.

25. The EEA national's evidence is that on arrival in the United Kingdom she lived with her brother which one assumes to be at the address in Hastings until she moved to Coventry with her husband and daughter. The relationship between the members of this family is not disputed and the issue is whether the above appellants have established the right to be granted a Residence Card as recognition of their right to reside in the United Kingdom as family members of an EEA national exercising Treaty rights.
26. EEA matters have to be determined on the basis of the evidence available at the date of the hearing and, in this respect, the EEA national relies upon three separate periods of employment. The first of which is with a store within the building where she lived in the Hastings (Ponswood). I find there are evidential discrepancies in relation to this employment and the letters provided in support at pages three and four of the bundle need to be approached with caution as a result of similarities and the EEA national's admission in evidence that she effectively dictated the terms of the contents of the letters which have been produced solely for the purposes of these proceedings.
27. The major discrepancy relates to the claim by the EEA national that she remained working in Hastings at the time her husband claimed she had moved to Coventry, which she tried to explain by alleging that she commuted on a weekly basis to Hastings returning to Coventry at the weekends. No further details were provided and I find that such a claim is implausible especially in light of the information contained in the HMRC reports that from early October 2010 the EEA national's address was given as that in Coventry indicating that at that time she informed HMRC that she had left Hastings and lived in the West Midlands. The witness statement provided by HMRC supports employment with that employer for the period to 1st October 2012 for which she received an income of £2,553.60. This is supported by the P45 provided in the evidence. That claim it is, however, undermined by the provision of a further wage slip alleging the EEA national remained employed at Ponswood after the date the official documentation shows she ceased such employment. The letter from the accountant purportedly supporting this does not adequately explain the discrepancy and I find greater weight may be placed upon the documents produced by HMRC in relation to this matter.
28. The latest statements indicate that in addition to the employment at Ponswood Convenience Store the EEA national subsequently obtained employment from 3 December 2012 with Trew Ltd with whom she continues to be employed and who have returned the required documents to the tax authorities on her behalf.

- 29. The third area of employment is stated to be with Pizza Express, which is more recent employment for which wage slips have been provided, as a cleaner and which refer to her personal details and the address in Coventry. It appears therefore that at the date of the hearing the employment being relied upon as evidence of the exercise of Treaty rights is that with Trew Ltd and Pizza Express.
- 30. Mr Smart was correct to refer to the need for employment to be genuine and his assertion that as a result of what may be the production of false documents relating to the employment in Hastings all such evidence should be discounted is not a sustainable argument. The submission that the documents from HMRC are based upon false details or inaccurate information provided solely for the purposes of these proceedings is not supported by adequate evidence. The EEA national lives in Coventry with her husband and child and having moved to the area has obtained employment in accordance with her rights as an EEA national. The documents paint a plausible picture and there is no evidence of enquiries having been made with the benefit authorities to indicate dependency on public funds or elsewhere. I find on the basis of the material made available that at the date of the hearing of this appeal the appellants have discharged the burden of proof upon them to the required standard to show that their EEA national wife/mother is undertaking genuine employment in the United Kingdom such as to show that she is exercising Treaty rights and that they are entitled, as a result, to the issue of Residence Cards in recognition of their rights as family members of the EEA national.
- 31. Mr Smart's assertion of forged/false employment is not proved in relation to the evidence from Trew Ltd or Pizza Express.

Decision.

- 32. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. These appeals are allowed.**

Anonymity.

- 33. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson
Dated the 19th September 2014