



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/08344/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 6<sup>th</sup> January 2015**

**Decision & Reasons  
Promulgated  
On 28<sup>th</sup> January 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL**

**Between**

**MS KINGA DOBRAWA BINKOWSKA  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms A Smith (Counsel)

For the Respondent: Mr S Walker (Senior Home Office Presenting Officer)

**DECISION AND REASONS**

1. The appellant's appeal against a decision to refuse to issue her with a permanent residence card, as an EEA national exercising treaty rights in the United Kingdom, was dismissed by First-tier Tribunal Judge Bart-Stewart ("the judge") in a determination promulgated on 30<sup>th</sup> September 2014.

2. The appellant claimed to be entitled to a permanent residence card, having resided here in accordance with the 2006 Regulations for a continuous period of five years. She relied particularly on her employment and provided wage slips bearing dates in 2013, P60 certificates and a contract of employment. The Secretary of State found that bank statements and wage slips were not provided over a period of five years and so the evidence was insufficient. Moreover, it appeared that the appellant's earnings varied in the years 2010 to 2011.
3. Having weighed the documentary evidence before her, the judge found that the appellant had not discharged the burden upon her of showing that she fell within regulation 15(1)(a) of the 2006 Regulations.
4. In an application for permission to appeal, it was contended that the judge erred in several respects. First, in finding that "the only original documents produced were the payslips for 2009 to 2010". In fact, other original items, including payslips for 2008 and 2009, were made available. The judge inspected a bundle of such items and returned them to the appellant's representative. Secondly, the judge erred in relation to the evidence before her. At paragraph 9 of the determination the judge noted that the Secretary of State's representative accepted that a lot of new evidence had been provided by the appellant, which had not been before the caseworker. That evidence supported the appellant's case but the judge failed to give reasons or adequate reasons for rejecting it. Further, the evidence showed that the judge's conclusion that there were "omissions" for 2011 and 2012 and "up to July 2013" was unsustainable. There were payslips and P60s showing the appellant's employment from April 2008 to April 2011 and then as a part-time worker from April 2011 to March 2012. At the beginning of April 2012 the appellant began work as a maternity care assistant for the NHS and remained employed in that role to date. Finally, the judge failed to consider the reasons given by the appellant for her income being lower during 2011 and 2012. In any event, part-time employment was still sufficient to show worker status, for the purposes of Community law.
5. Permission to appeal was granted on 19<sup>th</sup> November 2014. In a rule 24 response from the Secretary of State, the appeal was opposed on the basis that the judge properly considered the evidence. The response was qualified, however, in relation to the specific grounds regarding evidence submitted at the hearing and showing employment over five years, as the author of the response did not have access to the respondent's bundle or the Record of Proceedings.

### **Submissions on Error of Law**

6. Mr Walker said at the outset that he was now in possession of the respondent's bundle and the Presenting Officer's minute. This confirmed what appeared in the appellant's grounds that there was much evidence which had not been before the caseworker. The respondent's

representative at the hearing observed that there was a lot of evidence of employment and that she did not have much to add on behalf of the Secretary of State. The Secretary of State also had a yellow ring-binder which contained copies of the evidence produced at the hearing. One of the earliest items was a letter confirming that the appellant started employment on 10<sup>th</sup> April 2008 and the other items in the folder showed employment through to 2014.

7. Ms Smith said that the original documents regarding employment in 2008 and 2009 were before the judge, who looked at them and then handed them back. A trainee at the appellant's solicitors had made a short witness statement to this effect, referring to the yellow ring-binder containing original documents. Moreover, the judge confirmed that these original items were before her, in paragraph 10 of the determination.
8. Paragraph 11 showed that the judge may have misunderstood the evidence regarding periods of employment. The Secretary of State was concerned particularly with 2011 and 2012, years in which the appellant's earnings were less than in other years. The judge's reasons for rejecting the evidence, as supporting the appellant's claim, were inadequate. Paragraph 11 contained material errors. The judge referred to a contract of employment at Guy's Hospital in 2014 but that contract belonged to the appellant's husband. The appellant worked for the NHS, beginning in 2012, but not at Guy's Hospital. It was not clear from paragraph 11 how the judge dealt with the evidence regarding employment in 2011 and 2012 or the evidence showing full-time employment in the NHS from that year to date. There was an absence of focus on the years in dispute and on the supporting evidence. There was no issue of falsity regarding any of the documents. Part-time employment was sufficient for the purposes of the 2006 Regulations and, again, it was not clear from the determination how the judge engaged with the evidence showing part-time employment in 2011 and 2012.
9. Mr Walker said that the Secretary of State accepted that the judge had made a material error in assessing the evidence of the appellant's employment. It was clear that there was evidence of employment from 2008, through to 2014 but the determination contained no reasons for rejecting that evidence or showing how the judge reached her conclusion that the appellant had failed to discharge the burden of proof.
10. Ms Smith said in a brief response that the documentary evidence included P60s and payslips showing residence and employment throughout a period of five years, beginning in 2008 and including the years the Secretary of State had been concerned about.

### **Conclusion on Error of Law**

11. I conclude that the judge made a material error of law in failing to properly engage with the evidence before her. The critical issue was whether the

appellant could show five years' continuous employment here. At the very end of paragraph 10, the judge noted that a bundle of original payslips for 2008 and 2009 was produced and returned to the appellant. However, at the very beginning of the next paragraph, she found that "the only original documents produced were the payslips for 2009 to 2010". With great respect to her, it is difficult to reconcile that finding with the presence of the earlier payslips. The judge went on to make a general observation that the balance of the documents in the ring-binder regarding payment were photocopied payslips and P60s. Nonetheless, those items had weight as evidence, of course, even though they were copies. She found that Inland Revenue self-assessment statements did not take matters further as the information was provided to the appellant's accountants after the adverse decision was made. As a matter of general principle, however, that evidence was relevant and fell to be taken into account in the overall assessment, even though it postdated the decision. The judge made a factual mistake in relation to the Guy's Hospital employment contract, dating from 2014. This belonged to the appellant's husband and the judge may have failed to keep the focus on the appellant's own employment contracts, including one dating from 2012 showing her employment with the NHS (which employment continues to date).

12. Overall, I conclude that the judge erred in failing to give weight to the original payslips showing employment beginning in 2008 and in appearing to give no weight or negligible weight to post-decision evidence.
13. The decision of the First-tier Tribunal is set aside. The two representatives agreed that the decision could be remade in the Upper Tribunal, in the light of the evidence already available.

### **Remaking the Decision**

14. Mr Walker said that the Secretary of State no longer maintained her stance that the requirements of the 2006 Regulations were not met, in the light of the evidence before the Upper Tribunal. This included P60s and payslips, showing employment, on a full-time and part-time basis, between 2008 and 2014.
15. Having made my own assessment of the documentary evidence, I find that Mr Walker was right to give that indication. The documentary evidence does indeed show, by means of a combination of part-time and full-time employment, that the appellant has resided here and has been continuously employed for a period of over five years, beginning in April 2008. Since 2012, she has been employed by the NHS. Before that, she worked as a part-time welfare officer for Aldgate College between April 2011 and March 2012 and before that she was employed by the Alliance Business Network, from April 2008 to April 2011. Evidence showing these periods of employment includes payslips, P60s and contracts of employment. It is true that her earnings were less in the years 2011 and

2012 but that is neither here nor there, for the purposes of the 2006 Regulations.

16. The grounds of appeal have been made out. The decision to refuse the application is unlawful as the appellant fell within regulation 15(1)(a) of the 2006 Regulations. She has shown, in the light of the evidence of her employment that she has resided in the United Kingdom in accordance with the 2006 Regulations for a continuous period of five years.

17. The appeal is allowed substantively, as, in the light of my findings of fact, the duty to issue a permanent residence card arises under regulation 18(1) of the 2006 Regulations. The appellant is entitled to the document she applied for.

### **Decision**

The decision of the First-tier Tribunal having been set aside, it is remade as follows: the appeal is allowed.

### **Anonymity**

There has been no application for anonymity at any stage in these proceedings and I make no order on this occasion.

Signed

Dated

Deputy Upper Tribunal Judge R C Campbell

### **TO THE RESPONDENT** **FEE AWARD**

As I have allowed the appeal, I make a whole fee award in respect of the fee payable in these proceedings.

Signed

Dated

Deputy Upper Tribunal Judge R C Campbell