IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37599/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 August 2015	**On 8 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MS MELDA EDANGAL MARIANO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Mohamed Hasan, Solicitor, Kalam Solicitors
For the Respondent: Mr P Duffy, Specialist Appeals Team

DECISION AND REASONS

1. The appellant appeals against the decision of the First-tier Tribunal dismissing her appeal against the decision by the Secretary of State to refuse to grant her leave to remain as a Tier 2 Migrant. The decision appealed against was made on 12 September 2014. The appellant was refused leave to remain on the ground that her salary did not meet the required threshold, as specified under Appendix A of the Rules. The First-tier Tribunal did not make an anonymity direction, and I do not

consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

2. The Certificate of Sponsorship stated that her salary would be £17,500 per annum. This is below the minimum required salary threshold of £20,500 per annum as specified under Appendix FA. The Certificate of Sponsorship checking service entry recorded that she was being sponsored as a nurse. But there is no evidence that she would continue to be sponsored as a nurse or midwife by the sponsor after achieving Nursing and Midwifery Council registration, and that her salary would not be less than £20,500 per year once that registration was achieved. So she is not considered to be exempt from meeting the appropriate salary requirements as detailed in Appendix A of the Rules.

3. The appellant's appeal came before Judge Mazolowski sitting at Bedford House in Belfast on 30 January 2015. The appellant had not requested an oral hearing, so he determined the appeal on the papers. I set out below the judge's findings of fact and discussion of the evidence.

> "9. According to the Appellant, she is single, aged 26 from Manila in the Philippines. The Appellant obtained a Masters degree in Business Administration in Health Care Management from the University of Wales in March 2012. She now seeks to work with the Alexander's Care and Support unit in Farnborough, Hampshire which is part of the Park Group of Residential Homes ("the Sponsor") as a supervised practice nurse earning £17,500 p.a.
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> 10. The Respondent refused the Appellant as detailed in paragraphs 3 and 4 above.
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> 11. The Appellant stated in her appeal that she was employed by the Sponsor as a supervised practice nurse and she produced the CoS with her appeal to that effect. The job description summarised that the Appellant was to professionally assist care teams to meet the needs of purchasers and to provide nursing care for them. The Appellant argued that the salary paid by her Sponsor was above the minimum threshold for sponsoring a supervised practice nurse. The Appellant produced the Respondent's Codes of Practice for Skilled Workers dated 6 April 2014 (Code of Practice) which listed under the code number 2231 for Nurses the first entry being "supervised practice nurses (Band 3 and equivalent) £16,271".
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> 12. In her appeal the Appellant also produced the Sponsor's Tier 2 Policy Guidance version from 6 April 2014. At page 19 of the policy guidance the Sponsor must pay Band 5 rate salary (£21,388) if the Appellant achieves full NMC registration having undergone a period of supervised practice during sponsorship (also at page 3 of the Code of Practice).
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> 13. In taking all of the above into account, at first blush, the Appellant would seem to meet the criterion of salary which was refused by the Respondent, provided the Appellant can show that she is a supervised practice nurse. The problem lies with this particular aspect of the refusal. It is for the Appellant to produce evidence that she is a supervised practice nurse. Firstly, to call herself a nurse, she must be registered on the NMC and show her PIN number. She has a British qualification in hospital management but she has shown no such qualification in nursing which is quite another issue. If she intends to be a student nurse, which is a form of practice nurse, then her Sponsor must demonstrate that the

appropriate training can be provided by this group of residential homes. Residential homes per se do not have nursing staff in them, as care homes do. Therefore, the student training would have to be fully looked at.

14. On the other hand, it may well be (and it is not revealed by the Appellant) that the Appellant happened to have a nursing qualification from the Philippines, which is not recognised by the MNC without further qualification or supervision by a suitably qualified and experienced nurse in the United Kingdom. I note that earlier at the application stage, nor even now has the Appellant produced this evidence to indicate who would be supervising her to allow her to fall into the category of supervised practice nurse. The CoS job description gives little comfort and sounds as if the Appellant is attached to a home care agency but there is absolutely no mention at all of her being fully supervised by a fully qualified nurse to satisfy the NMC regulations. I consider that it would be a requirement for the Appellant to show the nature of her work and the supervisory aspect of it and she has not done so. The burden of proof lies on the Appellant and so she must fail through lack of information.

15. On the totality of the evidence before me, I find that the Appellant has not discharged the burden of proof upon her and the reasons given by the Respondent justify the refusal. Therefore the Respondent's immigration decision is in accordance with the law and the applicable immigration rules."

4. On 28 April 2015 First-tier Tribunal Judge Landes granted the appellant permission to appeal to the Upper Tribunal for the following reasons:

"2. Contrary to the submissions in the grounds the decision appears perfectly clear and well-written. Nevertheless there is force in the argument at paragraphs 1, 2 and 3 of the grounds in particular that the judge was requiring the appellant to produce evidence that she was indeed a supervised practice nurse (see [13] and [14]) when she was so described in the COS and that point was not taken by the respondent.

3. I have considered whether any error made by the judge could be said to be immaterial. The point taken by the respondent in the reasons for refusal letter was that there was no evidence that the appellant would continue to be sponsored once achieving NMC registration and then would have the necessary minimum salary. The appellant's exhibit 3 suggests that such continuation of sponsorship is necessary to achieve 20 points for appropriate salary. I observe that no documents were produced to the respondent or the judge to evidence such continuation of sponsorship and it is for this reason that I have considered whether any error would be unarguably immaterial. However the judge does not appear to have considered the point specifically raised by the reasons for refusal letter and it is arguable as set out at ground 7 (although the point may be in another context) that if the judge found necessary information was missing the judge should have considered the provisions of paragraph 245AA of the rules/evidential flexibility. Accordingly I consider it arguable that if the judge erred such error was a material one."

5. On 15 May 2015 a member of the Specialist Appeals Team settled a Rule 24 response opposing the appeal. In summary, he submitted that the judge of the First-tier Tribunal directed himself appropriately and made reasonable sustainable findings

that were properly open to him on the evidence. The grounds contended that he erred in failing to apply paragraph 245AA of the Rules to the missing evidence. But the application of 245AA would not have led to a grant of leave because the appellant's application was defective. Paragraph 245AA would not have assisted the appellant, given that the missing evidence had not been submitted and given that it was not a question of the documents submitted being in the wrong format as was envisaged under the Immigration Rule.

6. Before me, Mr Duffy acknowledged that the judge had been wrong to find that the burden rested with the appellant to show the nature of her work and the supervisory aspect of it, and wrong to find that her appeal failed because she had not produced evidence to show that she was a supervised practice nurse. But he submitted that the error was not material as the Certificate of Sponsorship clearly did not show what it was required to show in order for the appellant to be exempt from being paid an appropriate salary of at least £20,500 per annum. So the judge had been right to find that the appellant had not discharged the burden of proving that the appeal should be allowed under the Rules.

Discussion

7. As I informed the parties at the end of the hearing, this appeal falls to be dismissed. It is an indisputable fact that the Certificate of Sponsorship viewed by the Secretary of State when assessing the application did not contain the mandatory information that the appellant was going to continue to be sponsored as a nurse or midwife by the sponsor after achieving a Nursing and Midwifery Council registration, or that her salary would be not less than £20,500 per year once that registration was achieved. The Certificate of Sponsorship checking service entry was completely silent on these two aspects.

8. Mr Hasan's submission is that the Secretary of State should not have made a decision about compliance with the Rules before investigating with the appellant whether she could produce evidence to show that these two additional requirements could in fact be satisfied. I reject this submission for the reasons given below.

9. Paragraph 245AA does not bite, as this is not a case where the appellant is required to provide a specified document. This is a case where the onus is on the sponsor to provide a Certificate of Sponsorship which shows that the applicant is going to be paid an appropriate salary; and, if not, that the applicant is exempt from being paid £20,500 at this stage because the additional requirements referred to in the decision letter are met.

10. Paragraph 79A of Appendix FA of the Rules as they stood at the date of decision provided that no points would be awarded if the salary referred to in paragraph 79 above was less than £20,500 per year, unless:

> '(b) The Certificate of Sponsorship checking service entry records the applicant has been sponsored as a nurse or midwife, will continue to be sponsored as a nurse or midwife by the sponsor after achieving Nursing and Midwifery Council

registration, and the salary will not be less than £20,500 per year once that registration is achieved.'

11. The present version of this Rule distinguishes between the *recording* of this information, and the provision of *evidence* to support what is recorded in the Certificate of Sponsorship checking service entry. If the Certificate of Sponsorship had recorded all the required information, it would have been wrong for the Secretary of State to reject what was recorded without the appellant being afforded the opportunity to provide evidence to support the entry. But here there was no record in the first place, so there was no good reason for the Secretary of State to afford the appellant the opportunity to provide evidence that she would continue to be sponsored as a nurse by the sponsor after achieving Nursing and Midwifery Council registration etc. So there was no breach of paragraph 245AA, and there was also no breach of the Secretary of State's common law duty of fairness in the Secretary of State assessing the application on the information recorded in the Certificate of Sponsorship, without giving the appellant or the sponsor the opportunity to amend what was recorded in the Certificate of Sponsorship checking entry, still less to provide evidence on matters about which the entry was completely silent.

12. Accordingly, the decision of the First-tier Tribunal dismissing the appeal under the Rules is not vitiated by a material error of law such that the decision should be set aside and remade. Albeit that it was erroneously reasoned, the decision was right in substance and the only decision that the First-tier Tribunal could have reached.

Notice of Decision

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.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson