



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/06233/2015

THE IMMIGRATION ACTS

Heard at Newport
On 5 July 2016

Decision & Reasons Promulgated
On 15 July 2016

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

**MOHAMMAD AMINUR RASUL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Hussain of Hubers Law on behalf of Hafiz & Haque Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The appellant is a citizen of Bangladesh who was born on 7 February 1991. He entered the United Kingdom on 30 March 2012 with leave as a student valid until 30 April 2013. His leave was subsequently curtailed because his sponsor's licence was revoked. A further application made out of time application for leave as a student was refused. On 14 April 2014, the appellant applied for a residence card as an extended family member of an EEA national exercising treaty rights in the UK under reg 17(4) of the Immigration (EEA) Regulations 2006 (SI 2006/1003 as amended) (the "2006 Regulations"). That application was rejected on 6 October 2014.

2. On 20 October 2014, the appellant again made an application for a residence card on the basis of his relationship with a Latvian national, Julija Potasa with whom he had undergone an Islamic marriage on 24 June 2014.
3. On 29 January 2015, the Secretary of State refused the appellant's application. The application was dealt with as an application by an "extended family member" as the appellant's religious marriage was not recognised in English law. The Secretary of State approached the application on the basis that the appellant was claiming to be in a "durable relationship" falling within reg 8(5) of the 2006 Regulations.
4. The Secretary of State refused the appellant's application on two bases. First, the Secretary of State was not satisfied that the appellant and his partner were in a "durable relationship". Secondly, the Secretary of State was not satisfied that the sponsor was a "qualified person" on the basis that she was working as claimed.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 28 August 2015, Judge Trevaskis dismissed the appellant's appeal. He accepted, on the evidence before him, that the appellant and sponsor were in a "durable relationship". However, he was not satisfied that the sponsor was a "qualified person" as the appellant had failed to establish that she was a worker.

The Appeal to the Upper Tribunal

6. The appellant sought permission to appeal to the Upper Tribunal on the basis that the judge had erred in law in finding that the sponsor was not a qualified person. Permission was initially refused by the First-tier Tribunal but on 23 February 2016 the Upper Tribunal (UTJ Blum) granted the appellant permission to appeal.
7. Permission was granted on the basis that the judge had arguably erred in law in taking the relevant date, to determine whether the sponsor was a worker, as being the date of application rather than the date of the hearing. Further, the judge had arguably erred in law in finding that the evidence did not establish that the sponsor was working as claimed immediately prior to her taking maternity leave on 14 June 2015 when their son was born.
8. On 9 March 2016, the respondent filed a rule 24 notice seeking to uphold the judge's decision.
9. Thus, the appeal came before me.

Discussion

1. Error of Law

10. The appellant's claim before the judge was that the sponsor was working in a clothing factory (Right Serve Limited) at the date of the application, namely 20 October 2014. She had started working there in June 2014. She had made trip to

Latvia between 7 and 16 October 2014 but had returned to the UK and continued working. She stopped working in November 2014 when they moved to Swindon but found another job. In December 2014 the sponsor started working for Tennessee Chicken Limited. She had continued to work for that employer until she began maternity leave on 14 June 2015 when their son was born. At the date of the hearing on 13 August 2015, the appellant's case was that the sponsor was on maternity leave and that she intended to return to work after that leave.

11. Having accepted that the appellant and sponsor were in a durable relationship, Judge Trevaskis dealt with the evidence concerning the sponsor's employment at paras 43-45 and, at 46 having done so, concluded that the appellant had not established that she had been working for Tennessee Chicken Limited immediately before taking maternity leave. The judge's reasons are as follows:

- "43. I have considered the question of whether the sponsor is a qualifying person, on the basis that she is an EEA citizen exercising treaty rights in the United Kingdom as a worker. The material date for the purpose of the application for a residence card was the date of application, 20 October 2014. At that time, the sponsor stated that she was working for Right Serve Limited in a clothing factory, but had been to Latvia from 7 - 16 October 2014. The only evidence of that employment was a payslip recording 171 hours work during August 2014. There is no evidence of income from employment after that date, and before the date of application. There is no evidence of the deposit of that claimed income into the sponsor's bank account. The payslip makes no deduction for income tax. The next evidence of income from employment is provided by payslips from Tennessee chicken limited beginning with the week ending 19 December 2014. Those payslips are for a net weekly wage of £52, and no national insurance number appears. When questioned about these payslips, the sponsor was unable to explain why there were irregularities, and simply said that she did not understand such matters.
44. The burden of proof of employment is upon the appellant, and I am not satisfied that that burden has been discharged to the required standard, either by the documents relied upon, or by the oral testimony of the appellant or the sponsor. There is no reason why the appellant could not produce a contract of the sponsor's employment, or even a letter from her employer, to prove that she was working.
45. The question of whether or not the sponsor qualifies as a worker whilst unable to work because of pregnancy is not a matter which is relevant to this appeal; because I am not satisfied that she has shown that she was a worker at the material time, her subsequent circumstances do not figure in this decision. She has not produced any evidence of her claimed medical advice not to return to work, and she has not evinced any actual or intended return to work.
46. For these reasons, while I am satisfied that the Appellant and the Sponsor are in a durable relationship, I am not satisfied that the sponsor is a qualifying person for the purposes of the EEA regulations."

12. Mr Hussain, on behalf of the appellant, submitted that the judge had erred in law in para 43 in taking as the “material date” for the purposes of determining whether the sponsor was a “qualified person” as that of the date of application, namely 20 October 2014. He submitted that the correct date was the date of the hearing.
13. As regards the evidence concerning the sponsor’s employment prior to taking maternity leave on 14 June 2015, Mr Hussain submitted that the judge had been wrong to take into account the absence of payslips for the claimed period of employment in 2005 as the sponsor had given evidence that these had been submitted to the DWP in order to claim maternity pay. Mr Hussain submitted that the judge had failed to take into account an email dated 15 July 2015 from the responsible accounting firm for Tennessee Chicken Limited which pointed out that the sponsor was not entitled to statutory maternity pay from her employer but that she should make a claim, including “the last few payslips as evidence of her working”. Mr Hussain submitted that the judge had, therefore, failed to take into account relevant documentary and oral evidence supporting the appellant’s claim that the sponsor was employed by Tennessee Chicken Limited as claimed prior to taking maternity leave on 14 June 2015 and that, therefore, she was a “qualified person” at that point in time and continued to be so whilst she was on maternity leave – two months later – at the date of the hearing before Judge Trevaskis.
14. Mr Richards, on behalf of the Secretary of State, accepted that the judge had wrongly taken the relevant date as the “date of application”. Further, he accepted that the judge had failed to adequately consider the sponsor’s employment position at the date of hearing. Mr Richards confirmed from the record of the Presenting Officer at the hearing that the sponsor had said in her oral evidence, in answer to questions put by the judge, that she had sent the Tennessee Chicken Limited payslips to the DWP. He accepted that the judge had not considered the email from Tennessee Chicken Limited’s accountants; had not considered the evidence of the sponsor - whom he had found to be (like the appellant) credible - that she was employed and that there was an explanation for the absence of payslips; and that the sponsor had stated in her witness statement and oral evidence that she intended to return to work after her maternity leave.
15. In my judgment, the judge did materially err in law in reaching his adverse finding in relation to the sponsor’s claimed employment.
16. The Judge did misdirect himself in para 43 that the relevant date for considering the appellant’s claim was the date of application. That was clearly wrong. The judge was, by virtue of s.85(4) of the Nationality, Immigration and Asylum Act 2002 (applied to EEA appeals by Schedule 1 to the 2006 Regulations), required to “consider evidence about any matter ... relevant to the substance of the decision, including evidence which concerns a matter arising after the date of decision” (my emphasis).
17. That said, in para 43 onward Judge Trevaskis considered the evidence relevant to the sponsor’s employment after the date of application and so that error was not

material. However, in doing so, in my judgment, he failed to take into account all the evidence that was before him. He did not consider the explanation by the sponsor (whose evidence he found (at para 39) to be credible and truthful) that the absence of the payslips was explicable because she had sent them to the DWP in order to make a claim for maternity pay. He noted that she had made such an application at para 17. Further, the email of 15 July 2015 also provided support for her explanation as to their absence. That email, of course, also provided support for her claim that she was employed by Tennessee Chicken Limited immediately prior to taking maternity leave. For these reasons, in my judgment, the judge's adverse finding that the sponsor had not established that she was a "qualified person" was legally flawed and cannot stand.

18. In addition, the judge found that the sponsor had not established that she intended to return to work after her maternity leave. That finding in para 45 of his determination was, as the judge pointed out, not a live issue as he had not accepted that she was employed immediately prior to taking maternity leave and that, therefore, it was not strictly speaking relevant whether during her maternity leave she continued to be a "worker" for the purposes of the 2006 Regulations. That finding is, in my judgment also flawed because there was, as Mr Richards acknowledged, evidence from the sponsor (whom the judge found to be credible and truthful) that she did intend to return to work.
19. Consequently, for these reasons, the judge's decision to dismiss the appellant's appeal involved the making of an error of law. It cannot stand and I set it aside.

2. Re-making the Decision

20. On my enquiry, Mr Richards indicated that given the documentary material and the judge's positive credibility findings in respect of both the appellant and sponsor in para 39 of his determination, there was no reason why I should not find in the appellant's favour and allow the appeal.
21. That position is, as regards the issue of whether the sponsor was a "qualified person", an entirely proper position to take.
22. In addition to the evidence before Judge Trevaskis, a bundle of additional material was submitted by the appellant including payslips in the sponsor's name from the Tennessee Chicken Limited between January and June 2015 showing net weekly earnings of £52. In addition there is a P60 form in respect of the sponsor for the tax year to April 2015 and a notice of coding relating to the sponsor in respect of Tennessee Chicken Limited for the tax year 2015-2016. No objection to their admission was made. Given the circumstances concerning the payslips which I have previously identified and that some of the documents are very recent, it is appropriate to admit those documents under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended).
23. Whilst the absence of a national insurance number on the payslips may be unusual, the judge made a very clear positive credibility finding in relation to both the

appellant and sponsor at para 39 of his determination. The sponsor's explanation was that she simply did not have any understanding why her NI number was omitted. I see no reason, given the judge's very positive credibility finding, to doubt her evidence and the authenticity of the payslips. Her employment by Tennessee Chicken Limited immediately prior to her maternity leave is also supported by the email of 15 July 2015 and the HMRC documents to which I have referred.

24. I find, therefore, that the appellant has established on a balance of probabilities that at the date of her maternity leave she had been and continued to be employed by Tennessee Chicken Limited. At the date of the hearing she was on maternity leave and, again in the light of the judge's very positive credibility finding, I accept her evidence that she intended to return to work after her maternity leave. At the date of the hearing she was, of course, only two months into that leave.
25. Consequently, the appellant has established on a balance of probabilities that at the date of the hearing (and at the date of the respondent's decision on 29 January 2015) that he was in a "durable relationship" with the sponsor and that the sponsor was a qualified person.
26. Having established that the applicant is an "extended family member", by virtue of reg 17(4)(b) the Secretary of State had a discretion to issue the appellant with a residence card. The issue of discretion was considered by the Secretary of State in her decision limited to the following sentence:

"We do not believe that you have provided enough evidence to allow us to exercise discretion in your favour for the following reason(s) applicant has previously attempted to acquire leave by deception, and having been served with removal papers on 14-Mar-2014."
27. The issue of discretion was not considered by Judge Trevaskis and it was not raised in the respondent's rule 24 notice. It does not appear to have been raised in the appellant's grounds or skeleton argument.
28. The Secretary of State's obligation in exercising that discretion was, as set out in reg 17(5) to "undertake an extensive examination of the personal circumstances of the applicant". The Secretary of State's decision not to exercise discretion in the appellant's favour was, of course, based upon two false factual premises, namely that the appellant was not in a durable relationship with the sponsor and the sponsor was not a qualified person. Neither of those factual premises was correct. The only factor referred to by the Secretary of State in her decision was said to be the appellant's previous deception. It is unclear to me from the file precisely what the circumstances of that claimed deception were.
29. Having considered the matter carefully, I do not consider that I am in a position to exercise, one way or another, the discretion under reg 17(4)(b) of the 2006 Regulations. The respondent's exercise of discretion is clearly flawed due to the false premise and that merely to take into account (even if established) the appellant's previous deception cannot be said to be "an extensive examination of the

personal circumstances” of the appellant. There are now clearly relevant circumstances that were not considered by the Secretary of State because they post-date her decision, in particular the birth of the appellant and sponsor’s son on 14 June 2015. In my judgment, the proper disposal of this appeal is to allow the appeal such that the appellant’s application for a residence card remains outstanding to be decided by the Secretary of State on a lawful basis, namely that the appellant has established that he is an “extended family member” and that discretion has yet to be lawfully exercised having regard to all the circumstances of the appellant.

Decision

30. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant’s appeal under the 2006 Regulations involved the making of an error of law. That decision cannot stand and is set aside.
31. I remake the decision allowing the appellant’s appeal to the extent that the decision of the Secretary of State was not in accordance with the law and that the appellant’s application remains outstanding before the Secretary of State to make a lawful decision whether to exercise discretion in the appellant’s favour on the basis that he has established that he is an “extended family member” and, therefore, meets the requirement in reg 17(4)(a).

Signed

A Grubb
Judge of the Upper Tribunal

Date: 15 July 2016