



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/07874/2013

THE IMMIGRATION ACTS

Heard at Field House
On 31 October 2013
Prepared 31 October 2013

Determination Promulgated
On 8 November 2013

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

KATARZYNA ANNA GADAWSKA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Mr G Saunders, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Poland born on 3 March 1989 appeals, with permission, against the determination of Judge of the First-tier Tribunal Gurung-Thapa who in a determination promulgated on 8 August 2013 dismissed the appellant's appeal

against a decision to refuse her a registration certificate as an EEA national under the provisions of the Immigration (EEA) Regulations 2006.

2. The Secretary of State had refused to grant the certificate on the basis that the appellant had not shown that she was exercising Treaty rights in Britain. The appellant had claimed that she was working for K & K Delivery Limited but telephone calls made to that company were unanswered and it was therefore considered that the appellant had not shown that she qualified for leave to remain as a qualified person in Britain.
3. The judge heard evidence from the appellant. She noted that although the appellant had originally applied for a residence permit both for herself and for her partner her partner's application had not succeeded because he was not able to provide a relevant document. It was confirmed to the judge by the appellant's representative that the only appeal before her was the appellant's appeal and not that of her partner.
4. In the appellant's application form EEA1, she had stated that she worked for K & K Delivery for sixteen hours a week at a salary of £421.55 per month and that her employment had started on 1 August 2012. In the appellant's witness statement the appellant had again stated that she had started working on 1 August 2012. However, in her oral evidence the appellant had said that she had not started working until December 2012 and when it was put to her that she had produced a payslip for 30 November 2012 she had then said that she had started employment in September that year. The judge placed weight on the fact that the appellant should have known when she started her employment and found that that led her to conclude that she could not be satisfied the appellant had worked, and indeed still was working, for K & K Delivery.
5. The judge went on to state there was no other documentary evidence corroborating the appellant's employment. Moreover, the appellant had said in cross-examination that she had asked her boss to provide a letter but he was busy and also that she had a contract of employment which she had lost. She had not asked her boss for a duplicate copy. She did not know why there had been no response when her employer had been telephoned. She had added that before she started working for her employer they were friends and that her employer had lived with her and her boyfriend in Ilford for two weeks. She said that she had always worked at home. Her employer sold alcohol to shops in crates and she would pick up telephone orders from the shops. She stated that she had not asked her boss to come to give evidence. She went on to say that they were now no longer friends but she still worked for him.
6. The judge considered that given the terms of the refusal it was not credible that the appellant would not have asked her employer to give evidence and her conclusion was that the appellant was not employed as claimed and therefore was not exercising treaty rights.

7. Grounds of appeal asserted that the decision was unreasonable and that there were no clear findings of fact. The determination was described as “at the very least objectionable”.
8. The grounds added that the judge had been wrong to state there was no other documentary evidence to corroborate the appellant’s employment, referring to the appellant’s P45 in the bundle of documents lodged.
9. It was claimed that the judge was not entitled to reach the conclusion that she had in that she had relied on only one discrepancy.
10. In granting permission Judge of the First-tier Tribunal Brunnen stated that apart from the fact that the judge had erred when she had stated there was no documentary evidence other than the appellant’s payslip to support her claim to be in genuine employment when there was a P45 in the bundle the other grounds submitted only amounted to a disagreement with conclusions which the judge was entitled to make.
11. At the hearing of the appeal before me the appellant appeared in person.
12. I pointed out at the beginning of the hearing that having gone through the papers I considered that although the P45 had not been submitted with the original application it had in fact been before the judge. Mr Saunders stated that he accepted that the P45 had been before the judge but stated that the error in not mentioning the P45 was not material. He stated that all that the P45 showed was a leaving date from K & K of 31 January 2013. The appellant’s daughter had been born on 22 January 2013 and the appellant had indicated that she had been on maternity leave but had not specified for how long. He stated that the P45 did not resolve the lack of certainty in the appellant’s oral evidence.
13. I considered that, given that the appellant was not represented and that I had the grounds of appeal before me that it would be of use if Mr Saunders made his submissions first to give the appellant the opportunity to reply as in that way she would understand the case which had had to be met.
14. Mr Saunders referred to the three payslips which he stated were all in identical terms notwithstanding the fact that it was asserted that the appellant had been on maternity leave for part of the month of January 2013. He stated that taking into account all the documents including the P45 all they served to show was the disarray in the appellant’s evidence that she was working. Moreover the payslips were not in accordance with the evidence which had been given, given the date of the appellant’s daughter’s birth. The P45 did not resolve any of the initial concerns. The absence of a letter from the appellant’s employer and the contract were material issues. He therefore stated there had not been any material error of law in the conclusions of the judge.

15. The appellant replied that she had had no difficulties when she had had the baby on 22 January and had been able to work on with the same hours. She asked if her employer was present could he give evidence. her employer, Mr Ghulam Muhammad Khakwani then gave evidence. He stated that the appellant had started working for him in May 2012 and had finished on 31 January 2013 returning to work on 1 April 2013. He referred to a contract for the appellant showing that she was to be paid £429 each month for sixteen hours' work and he stated that no tax or national insurance was deducted. This was an issue for his accountant. He stated that the appellant remained working for him. He would do the deliveries and she would answer the telephone. He referred to his accounts which he had brought with him. I asked him how many employees he had. He stated that he had one employee. I put to him that the accounts showed that the wages of his employee were £3,987 for the year to 31 May 2013 and his salary during the same period had been £5,293 and that it appeared therefore odd that he would need to employ an employee to answer the phone or indeed that he could afford to do so when his own earnings were so small. He said that he was a delivery man and it was difficult for him to attend the phones and drive as well.
16. In cross-examination by Mr Saunders he stated that he had limited leave to remain as he had had a child with an EEA national. He stated that he had lived in the same house as the appellant for one and a half months starting in September 2012 after he had had an argument with his wife. He was then asked when he had started the business and he said that he had started it in May 2011.
17. It was pointed out to him that the registered office for the business appeared to have changed and he said that this was because his wife had started returning post sent to his home address because she was angry. Again he was asked when he had started the business and he said that he started in 2012. It was put to him that he had just said the business started in 2011 and he then said that he had not started living with the appellant until September 2012 and gave the reason why he had changed the registered address of the company to that of the appellant and said that that had remained the address of the registered office of the company despite the fact that he had then returned to live with his wife.
18. Mr Saunders asked him if he had a mobile phone and he replied that he paid half of the appellant's mobile phone bill.
19. He was then asked where he now lived and said that he lived at 35 Blad Court in Romford but had been living at the address at 34 Elgin House when he had set up the business and emphasised that he had been trading since May 2011.
20. It was put to him that in her witness statement the appellant had said that the business had ceased trading on 28 February 2012 and he said that he did not know why the appellant had said that. He said that his business was struggling as it was hard to get work here.

21. Mr Saunders summed up by stating that the evidence was completely inconsistent and it was simply not credible that the appellant was employed here.
22. In reply the appellant submitted that she was working and she had no idea why she was not believed as she had all relevant evidence – she had changed her solicitor because he had made mistakes.
23. I have considered all the evidence before me as I consider that that is a necessary exercise in order to decide whether or not the error (which Mr Saunders accepted) made by the judge in not referring to the P45 was material.
24. I have come to the conclusion that the error is not material and I therefore do not set aside the decision of the judge.
25. My reason for doing this is that although there is a certain amount of documentary evidence placed before me and indeed was before the judge there are so many inconsistencies in that evidence that, taken with the evidence of the appellant and her claimed employer I find that no weight can be placed thereon: I consider that I can place no weight on the documentary evidence.
26. It is the appellant's evidence, set out in her witness statement that she was employed "as a receptionist" with K & K Delivery Limited in August 2012. The appellant's own evidence before the judge in that regard was inconsistent. There is no evidence that she was employed at that stage. The first payslips for the appellant covers the periods November and December 2012 and January 2013. Her P45 is dated 31 January 2013. Further payslips refer to the period April, May, June 2013. However, it is of note that none of the payslips nor the P45 show any tax or national insurance being deducted and there is no indication that either the P45 was submitted to the tax authorities or that there has been any official recording of the appellant's employment. Moreover the appellant's bank statements do not appear to have any entries in the sums of £429.17 corresponding to the sums which are shown on the payslips which had been lodged. I therefore place no weight on the payslips and the P45 – and not, of course that the reality is that only photocopies have been provided.
27. Moreover, I have considered other factors relating to the appellant's employment. She states that she works from home answering the telephone. For this she appears to have been paid in the year to 31 May 2013 £3,987, that sum, of course, including a period it appears when she said that she was on maternity leave although again her evidence in that regard was confused in that she said that as she worked from home she did not need to take maternity leave. However, the reality is that in that period her employer's salary was £5,293. It is simply not credible that a man with a business with a turnover of £29,205 a year and a gross profit of £15,166 would pay a receptionist, sitting in her own flat, 80% of his own pay and given the small turnover there seems no reason why Mr Khakwani required a receptionist and could not have dealt with calls on his own mobile phone.

28. I have also considered the employment agreement which is dated 30 July 2012. That is a document in pro forma terms and given Mr Khakwani's lack of fluency when speaking English I simply do not consider that he could have drafted it let alone could understand the terms thereof. Moreover, Mr Khakwani's evidence was somewhat surprising particularly with regard to the issue of the changes in the registered office of his company and the fact that he left the address of the registered office of the company at the appellant's flat when it appears he returned to his wife. Again there are discrepancies regarding the addresses where he lives as he now states that he lives in Blad Court rather than the original address given of 34 Elgin House in Romford. I should add that there was the further discrepancy in that the appellant stated that K & K Delivery Limited had ceased trading at the end of January 2013 and had started up again in April that year when that fact was denied by Mr Khakwani.
29. The burden of proof lies on the appellant. It is for a judge to assess the evidence submitted. I do not consider that the evidence which I have seen and heard discharges the burden of proof to show that the appellant was at the time of the decision exercising Treaty rights in Britain.
30. Having considered all the evidence I conclude that the judge was correct to be sceptical when she considered the evidence given to her and that reliance on the discrepancies in the documentary evidence and in the appellant's evidence to her was sufficient for her to reach her conclusions. The fact that she omitted the consideration of the P45 - a photocopy document which was not submitted to the tax authorities - was not a material error. I therefore find, as I have stated above that the decision of the judge dismissing this appeal shall stand.
31. This appeal is dismissed.

Signed

Date

Upper Tribunal Judge McGeachy