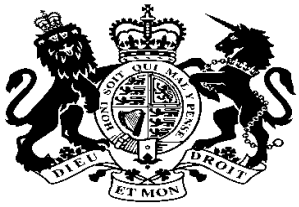

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/24663/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 April 2017	**On 3 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

INDERJEET KAUR BAGGA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Jimenez, Harrow Law Centre
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge James promulgated on 17 October 2016, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 22 January 1980 and is a national of India. On 17 June 2015, the Secretary of State refused the Appellant's application for a residence card as confirmation of the right to remain in the UK as a family member of an EEA national.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge James ("the Judge") dismissed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 6 March 2017 Judge Osborne gave permission to appeal stating, inter alia

> 2. The grounds assert that the Judge referred to materials which had not been submitted in support by either the appellant or the respondent. The Judge conducted her own research. It is unclear whether the Judge had done so in advance of the hearing but if so she failed to disclose this. The Judge has failed to explain the scope of her research. The Judge has not given a chance to comment upon this. The Judge held at [15] that Mr Bagga appeared not to have been paid the minimum wage which suggested strongly that he was not working. This is a conclusion that does not follow from the caselaw. The term "worker" is given a very wide interpretation which establishes that someone might be a worker even if he works for less than the minimum wage and even if he works only part time. The alternative finding that if Mr Bagga had worked then his employment was on such a small scale that it should be regarded as purely marginal and ancillary and was not open to the Judge on the evidence. At [6] the Judge appears to confuse different types of derivative rights to reside. The appellant conceded that she could not rely on a Zambrano type but asserted that she could rely on an Ibrahim type (right) to reside. The Judge's findings at [17] that the payslips submitted do not marry with the P45 issued by HMRC is misconceived as a P45 covers money earned in the relevant tax year. At [24] the Judge notes there is no evidence of Kall Belex taking over Karan Impex and the Companies House information confirms that prior to April 2014 Kall Belex was in liquidation and had already been subject to a Gazette announcement of compulsory strikeout due to failure to submit accounts to Companies House. This provides confirmation that the Judge conducted her own researches. Companies House confirms this notice was withdrawn in May 2014 and it was only in September 2014 the court wound up the company and therefore the Judge's assertion is mistaken.
>
> 3. In an otherwise careful and well-reasoned decision and reasons it is nonetheless arguable that to an extent the Judge conducted her own research. At [24] the Judge refers to Companies House information upon which the appellant has had no opportunity to give evidence as those matters were arguably not put to the appellant. It is arguable that in all circumstances she should not be denied that opportunity which arguably amounts to an arguable error of law.
>
> 4. As this arguable error of law has been identified, all the issues raised in the grounds are arguable.

The Hearing

6. (a) Mr Jiminez moved the grounds of appeal. He told me that the decision contains many material errors of law, but that his principle submission is that the Judge had manifestly carried out her own investigations and research. He told me that a number of the Judges findings of fact are based on material which neither party to the appeal produced or referred to. He referred me specifically to [22], [24], [29] and [44] of the decision, and told me that there the Judge makes several findings suggesting she relied entirely on her own research. He told me that none of the matters leading to those findings of fact were put to the appellant or to the respondent for comment. In [22] the Judge refers to credit report records which do not form part of any of the documents produced to the First-tier. [24], [29] and [44] all contain findings based on the materials found by the Judge at the Companies House website. None of those materials or records were before the First-tier tribunal nor were either the appellant or the respondent given the opportunity to comment on those matters.

(b) Mr Jiminez relied on Elayi (fair hearing - appearance) [2016] UKUT 508 (IAC) and told me that the findings based on the Judge's own research, which had not been put to the parties for comment, create procedural unfairness. He told me that unfairness, in itself, amounts to a material error of law so that the decision should be set aside.

(c) Mr Jiminez adopted the terms of the grounds of appeal in their entirety. He told me that the Judge had incorrectly interpreted European caselaw and, on the one hand makes a findings of fact which places the appellant's husband within the definition of an EEA national present in the UK as a worker, but, on the other, uses those same findings to conclude that the appellant's EEA husband is not a worker. He told me that the Judge has misinterpreted the relevant types of derivative rights to reside. He told me that the Judge's findings are clearly irrational, and even biased, conclusions.

(d) Mr Jiminez told me that the Judge had taken a negative approach to evidence which should have been interpreted in the appellant's favour. In particular, he told me that the appellant's entitlements to working tax credits and child tax credit are adminicles of evidence to support the appellant's account that she and her husband are working, yet the Judge found that claims to DWP/HMRC benefits indicated that the appellant and her husband were engaging in fraud. He told me that the decision contains a number of factual errors. He urged me to set the decision aside and to substitute my own decision allowing the appeal.

7. Mr Tarlow, for the respondent, candidly conceded the decision shows that the Judge carried out her own internet research, and that the parties had not had the opportunity to comment on that research. As a result, he told me that the decision is not safe and should be set aside.

8. I told both representatives that I find a material error of law in the decision because it is clear that the Judge had carried out her own research, and reached conclusions based on that research, without inviting comment from the parties. I told both representatives that I would first consider whether or not I can substitute my own decision, but that if I find that I cannot substitute my own decision, I would remit the case to the First-tier to be determined on new.

Analysis

9. In EG (post-hearing internet research) Nigeria [2008] UKAIT 00015 the Tribunal said that it is most unwise for a Judge to conduct post-hearing research, on the internet or otherwise, into the factual issues which have to be decided in a case. To derive evidence from post-hearing research on the internet and to base conclusions on that evidence without giving the parties the opportunity to comment on it is wrong.

10. In Elayi (fair hearing - appearance) [2016] UKUT 508 (IAC) it was held that justice must not only be done but must manifestly be seen to be done. That appeal was allowed when the Judge had engaged in a private conversation relating to the Appellant's case with the Appellant's representative in the absence of the other party's representative, in the precincts of the court room but partly out of sight and earshot of the Appellant and his spouse, in a setting other than that of bench/bar before the Appellant's hearing began: the contents whereof, other than a question about the Appellant's religious adherence, itself an improper enquiry made in this fashion, were not divulged to the Appellant.

11. In AM (fair hearing) Sudan [2015] UKUT 00656 (IAC) it was held that If a Judge is cognisant of something conceivably material which does not form part of either party's case, this must be brought to the attention of the parties at the earliest possible stage, which duty could in principle extend beyond the hearing date;

12. It is clear that some of the Judge's findings of fact are drawn from enquiry made at Companies House. It is equally clear that no credit reports are produced or relied on by either party to the appeal. Both parties' representatives tell me that the Judge carried out her own research and that that research lead the Judge to her findings of fact. The Judge's findings of fact should, of course, have been drawn from the evidence placed before her rather than the fruits of her own investigation.

13. I therefore find that the decision is tainted by material error of law. I set the decision aside. There is sufficient evidence before me to enable me to substitute my own decision.
14. The 2006 EEA regulations have now been superseded by the 2016 EEA regulations. Although the new regulations revoked the 2006 EEA regulations by operation of Reg 1 (2), they are preserved for the purposes of appeals.

15. The basis of the appellant's appeal is that she is the family member of a German national who is exercising treaty rights of movement in the UK as a worker. This appeal focuses on the appellant's EEA spouse's work history.

16. In Boodhoo and another (EEA Regs: relevant evidence) [2013] UKUT 00346 (IAC) it was held that neither section 85A of the Nationality, Immigration and Asylum Act 2002 nor the guidance in DR (Morocco)* [2005] UKAIT 38 regarding a previous version of section 85(5) of that Act has any bearing on an appeal under the Immigration (European Economic Area) Regulations 2006. In such an appeal, a tribunal has power to consider any evidence which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.

Findings of fact

17. The appellant is an Indian national. She was born on 22 January 1980. On 1 January 2003, the appellant married Gurmit Singh Bagga (The EEA Spouse), a German national. The EEA spouse was born in Afghanistan in 1960. He moved to Germany in 1992 and subsequently was granted German citizenship.

18. The appellant applied for a Schengen Visa in January 2003. She entered Germany on 31 January 2003 and joined her husband there. The appellant and her EEA spouse have two sons. Their first child was born in 2003. He has dual UK and German citizenship. Their second son was born in 2006. He is a German national.

19. The appellant and her family entered the UK in 2003. On 28 February 2004 the respondent issued the appellant with a residence card, valid until 28 February 2009. In January 2009, the appellant tried to renew her residence card. Between January 2009 and October 2014 the appellant made four unsuccessful applications for a residence card. On 3 October 2014 the appellant submitted a fifth application for a residence card. That application was refused on 17 June 2015. It is against that decision that the appellant appeals.

20. Between 1 April 2014 and May 2014 the EEA spouse worked for a company called Kall Belex UK Ltd.

21. Between June 2014 and 30 April 2016 the EEA spouse worked for a company called Karan Impex UK Ltd.

22. On 31 December 2015 the EEA spouse became a director of Timberwood UK Ltd, a company incorporated under the Companies Acts. On 1st June 2016 HMRC provided the EEA Spouse with a tax code for an employer called Pizza Plus (Ashford) Ltd.

23. Since 1 June 2016 the EEA spouse has worked for Carpet Express UK. At the date of this hearing the EEA spouse still works for Carpet Express UK Ltd. He is therefore

an EEA national present in the UK as a worker. He is an EEA national exercising treaty rights of movement.

Conclusion

24. The appellant is a family member of an EEA national exercising treaty rights of movement as a worker. She therefore qualifies for a residence card.

25. The appeal is allowed. The appellant meets the requirements of the Immigration (EEA) Regulations and is entitled to a residence card.

Decision

26. The decision of the First-tier Tribunal is tainted by material errors of law.

27. I set aside the Judge's decision promulgated on 17 October 2016.

28. I substitute my own decision. The appellant's appeal against the respondent's decision dated 17 June 2015 is allowed.

Signed Paul Doyle Date 1 May 2017

Deputy Upper Tribunal Judge Doyle