Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07460/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 June 2019	**On 1st July 2019**

Before

UPPER TRIBUNAL JUDGE FRANCES
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MS DIANA BAWIAH JALLOH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A. Malik, instructed by BWF Solicitors
For the Respondent: Mr L. Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Ghana born 12 September 1981. She appeals against the decision of First-tier Tribunal Judge Harvard, promulgated on 29 January 2019, dismissing her appeal against the respondent's decision to refuse to issue her with a residence card under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). The respondent's decision was dated 16 May 2018.

Factual background

2. On 14 February 2018, the appellant applied for a residence card under the 2016 Regulations in respect of her marriage to Anafieu Jalloh, a citizen of the Netherlands born 16 December 1986 ("the sponsor"). Her application was refused on the basis that she had not provided sufficient evidence that the sponsor was a "qualified person" for the purposes of the 2016 Regulations. For the months July, August and September 2017, the appellant had provided two payslips for each month, in respect of her sponsor's claimed employment. Each payslip showed different amounts of pay. The sponsor's bank statements purporting to demonstrate his salary payments being made into his account featured still further figures. The most recent evidence she had provided to accompany her application was from 30 November 2017, predating her application by over six weeks. These inconsistencies lead the respondent to question the weight the documents attracted. He did not accept the sponsor to have been economically active.

3. The hearing before Judge Harvard took place on 4 January 2019. The appellant provided additional bank statements, payslips and supporting documentation demonstrating that he had been consistently employed, with the most recent documents being up to the end of December 2018. These documents suggested that his annual income for April 2018 was £25,000. At [47], Judge Harvard rejected the submission advanced by the appellant that he was able to take into account material which post-dated the respondent's decision. The judge said,

> "I am only able to consider the evidence which existed at the date of the Respondent's decision, together with the evidence which has been served subsequently but which relates to the period prior to the date of the Respondent's decision."

The judge outlined why the materials provided in support of the initial application were inadequate and dismissed the appeal. He did, however, accept an explanation provided for the discrepancies between the payslips provided in the summer of 2017, and the presenting officer on that occasion is recorded as having placed no reliance on those perceived inconsistencies.

Permission to appeal

4. Permission to appeal was granted by the Upper Tribunal on the basis that the judge arguably erred in law when refusing to take into evidence which post-dated the decision. The grant of permission noted that, pursuant to Boodhoo and another (EEA Regs: relevant evidence) [2013] UKUT 00346 (IAC), the judge arguably had the power to consider evidence relevant to the substance of the decision under challenge, including evidence which concerns a matter arising after the date of the decision.

Submissions

5. Before us, it was common ground that the judge below had erred in law by virtue of his failure to consider the post decision evidence. Mr Tarlow conceded that the

sponsor was economically active at the time of the application and invited us to find that there was an error of law, and to remake the decision.

Legal framework

6. Regulation 18(1) of the 2016 Regulations governs the issue of a residence card. It provides, where relevant:

> "(1) The Secretary of State must issue a residence card to a person who is not an EEA national and is the family member of a qualified person or of an EEA national with a right of permanent residence under regulation 15 on application and production of—
>
> (a) a valid passport; and
>
> (b) proof that the applicant is such a family member."

The essential issue in this matter is whether the sponsor, an EEA national, is a "qualified person". A "qualified person" is defined in regulation 6 to include a "self-employed person" and a "worker". Meeting the criteria to be classified as a "qualified person" is sometimes called "exercising Treaty rights", referring to the entitlement enjoyed by all EU citizens to the right of free movement, conferred by the EU Treaties.

7. Schedule 2 to the 2016 Regulations applies, with some modifications, certain provisions of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") concerning statutory appeals. It provides, where relevant:

> "1. The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal against a decision of the Secretary of State under section 82(1) of the 2002 Act (right of appeal to the Tribunal)—
>
> […]
>
> section 85 (matters to be considered), as though—
>
> (a) the references to a statement under section 120 of the 2002 Act include, but are not limited to, a statement under that section as applied by paragraph 2; and
>
> (b) a "matter" in subsection (2) and a "new matter" in subsection (6) include a ground of appeal of a kind listed in section 84 of the 2002 Act and an EU ground of appeal…"

8. Section 85(4) of the 2002 Act is one of the provisions applied by the deeming provisions contained in Schedule 2. It provides:

> "On an appeal under section 82(1) against a decision the Tribunal may consider [...] any matter which [it] thinks relevant to the substance of the decision, including [...] a matter arising after the date of the decision."

The effect of section 85(4), as applied by the 2016 Regulations, is that the tribunal does have the jurisdiction to consider matters arising after the date of the decision in an EEA case. This is subject to the important exception that the tribunal may not consider a "new matter" without the consent of the Secretary of State. The evidence under consideration in the present case was not a "new matter", rather it was further or better evidence of an existing matter, namely whether the sponsor was exercising Treaty rights.

Discussion

9. We indicated at the hearing that we agreed that Judge Harvard had erred and that we would consider the up-to-date evidence submitted by the appellant. The Judge had the power to consider post-decision evidence pursuant to section 85(4) of the 2002 Act, as applied by Schedule 2 to the 2016 Regulations. This tribunal considered this issue in relation to the predecessor regime to the 2016 Regulations, the Immigration (European Economic Area) Regulations 2006 in Boodhoo. There, the then President held, in the Headnote at [2], that

> "... 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."

Although Boodhoo concerned the 2006 Regulations, for present purposes there is no material difference between the appeal provisions contained in the 2016 Regulations. The underlying statutory provision considered in Boodhoo, namely section 85(4) of the 2002 Act, as applied by Schedule 1 to the 2006 Regulations to EEA cases, remains in materially the same form.

10. As such, the judge was incorrect to state that he did not have the ability to consider post-decision evidence. The sole issue in the case was whether the sponsor exercised Treaty rights; the evidence proffered to the judge clearly went precisely to that matter, and it was accordingly "relevant to the substance of the decision" for the purposes of section 85(4). The judge erred in law by refusing to take into account relevant post-decision evidence.

11. We consider that the judge's failure to take into account the post-decision evidence amounted to a failure to have regard to material evidence. The post-decision evidence appeared to demonstrate that the sponsor was a qualified person at the date of the hearing, and as such the judge's error was material.

12. There is no need for this matter to be remitted; we are able to remake the decision ourselves. It is necessary for us to analyse the evidence submitted by the appellant in support of the contention that the sponsor is economically active.

Remaking the decision

13. We recall that the sole basis upon which the appellant's application was rejected was on the basis that he was not a "qualified person" for the purposes of the regulations. There has been no challenge by the respondent to the assertion that the sponsor is a

citizen of the Netherlands, nor in relation to any of the other criteria which must be satisfied for the issue of a residence card.

14. The sponsor states in his statement prepared for the proceedings before Judge Harvard that he has two jobs. He is a sales manager for Providence Care and Cleaning Services Ltd, and also works on a part time basis at Meridian Manpower Ltd, as a healthcare assistant. He has provided a P60 End of Year Certificate for the tax year to 5 April 2019 in respect of his employment with Providence Care and Cleaning Services Ltd. That document states that the sponsor had taxable income of £13,775.38 during that tax year. His employment with Providence Care and Cleaning services is supported by a number of other documents in the appellant's bundle. He has provided a letter from the director dated 13 July 2017 confirming that he is in the company's employment with an annual gross salary of £25,200. This figure is consistent with the figure which features on the P60, once the annual tax-free allowance available to those in the position of the sponsor is accounted for. We take judicial notice of the fact that the tax-free allowance is £12,500.

15. The sponsor is currently part way through a six-month sabbatical from Providence Care and Cleaning Services. A letter from the director of the company dated 5 February 2019 was provided to us at the hearing. During the sabbatical, the sponsor will not be paid, but all other aspects of his employment will remain in force. We do not consider this temporary sabbatical – which coincides with the impending birth of the appellant's child – to amount to the sponsor losing his links with the labour market, such that he is no longer a worker or even a retained worker. In any event, he remains in employment with his other employer, Meridian Manpower Limited, and has provided a series of payslips administered by a company called "Ezy Solutions". Copies of the sponsor's bank statements were provided to us at the hearing, as well as a selection of payslips for earlier in the year. The payslips demonstrate that he is paid weekly by Meridian Manpower Limited. They display the following payments from Ezy Solutions:

4 Jan 19	£354.92
11 Jan 19	£225.28
18 Jan 19	£132.50
25 Jan 19	£279.00
1 Feb 19	£248.16
8 Feb 19	£266.52
15 Feb 19	£260.40
22 Feb 19	£179.16
1 Mar 19	£291.30
8 Mar 19	£116.92
15 Mar 19	£112.50
22 Mar 19	£184.80

29 Mar 19	£318.80
12 Apr 19	£318.88
18 Apr 19	£94.50
26 Apr 19	£182.93
3 May 19	£94.50
10 May 19	£94.50
24 May 19	£94.50

16. We find on the balance of probabilities that the sponsor is engaged in genuine and effective work with Meridian Manpower Limited. He has demonstrated a course of conduct in which he has been engaged by them, over a period of time. The evidence took us to shortly before the hearing. We find that the evidence demonstrates that the sponsor is a "worker" for the purposes of the 2016 Regulations. As such, he is a "qualified person" within the meaning of regulation 6. The appellant, therefore, meets the criteria for the issue of residence card. She is the family member of an EEA national who is a qualified person.

17. We set aside the decision of Judge Harvard and remake it in favour of the appellant. This appeal is allowed under the Immigration (EEA) Regulations 2016.

Notice of Decision

This appeal is allowed under the Immigration (EEA) Regulations 2016.

No anonymity direction is made.

Signed *Stephen H Smith* Date 28 June 2019

Upper Tribunal Judge Stephen Smith

TO THE RESPONDENT
FEE AWARD

As we have allowed the appeal and because a fee has been paid or is payable, we have considered making a fee award and have decided to make no fee award for the following reason. The information provided to the respondent with the initial application was plainly inadequate and the respondent's decision was open to him on the evidence then before him. Had sufficient supporting evidence been provided, these proceedings could have been avoided.

Signed *Stephen H Smith* Date 28 June 2019

Upper Tribunal Judge Stephen Smith