Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/53857/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 August 2015	**On 23 September 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

JULIENNE ARELLANO ESPINELI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Frederico Singarajan, Counsel.
For the Respondent: Mr Ian Jarvis, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

2. The appellant appeals against the decision of the First-tier Tribunal (Judge Handley) dismissing the appellant's appeal against a decision taken on 18 December 2013 to

refuse the appellant's application made under the Immigration (EEA) Regulations 2006 ("the Regulations") for a residence card.

Introduction

3. The appellant is in a relationship with Mr Roman Slavik who is a citizen of Slovakia ("the EEA Sponsor"). He claims to work as a car salesman for his uncle since 1 August 2014 ("the current employment") but has irregular hours. He has also worked for 11 different agencies for the past 9 years, as evidenced by his HMRC records since 2007.

4. The Secretary of State concluded that the evidence submitted with the application (3 contracts of employment, an employee handbook from PMP Recruitment, a P45 and tax code documents) was not sufficient to show that the EEA sponsor was a qualified person exercising treaty rights in the UK.

The Appeal

5. The appellant appealed to the First-tier Tribunal and attended an oral hearing at Richmond on 4 November 2014. She was represented by Mr M Sowerby, Counsel. The EEA sponsor did not attend. The First-tier Tribunal found that the current employment post-dated the date of decision and that the EEA sponsor had provided little information about the dates he had worked for his previous employers and about the length of his employment with them.

6. The judge found that a number of documents in relation to the current employment gave cause for concern and took into account a witness statement from a HMRC officer who stated that the EEA sponsor was employed by Interecruit GB Ltd during 2013-2014 and paid 99p tax. The judge had seen a contract with PMP Recruitment and the EEA sponsor signed on 4 July 2013 but the HMRC witness statement made no mention of that employment. No current employer was shown for 2014-2015. The P45 submitted by the appellant showed that the PMP Recruitment employment ended on 4 January 2013.

The Appeal to the Upper Tribunal

7. The appellant sought permission to appeal to the Upper Tribunal on 13 February 2015 on the basis that the First-tier Tribunal had erred in law. The HMRC witness statement failed to consider that tax is only paid above a certain income level. The EEA sponsor subsequently obtained HMRC records from 2007 and those records show a total income of £1571.41 from Interecruit GB Ltd for 2012-2013 and £97.92 from PMP Recruitment Ltd. Further information was also submitted in relation to the current employment.

8. Permission to appeal was granted by Upper Tribunal Judge Reeds on 18 May 2015. Evidence had been produced which showed that it was arguable that the information in the HMRC witness statement was not accurate. That evidence was not before the

judge but it was arguable that the judge proceeded on a mistake of fact by relying on information from an official source when that information was not wholly accurate.

9. Thus, the appeal came before me

Discussion

10. Mr Singarajan submitted that the relevant date was the date of hearing. The HMRC witness statement has never been disclosed to the appellant and it is not clear why it was not served on counsel at the oral hearing. The HMRC witness statement was sparse regarding the EEA sponsor's employment history. The appellant's bundle shows continuous employment from 2008-2014. Mr Singarajan relied upon paragraphs 7, 14, 15 and 16 of MM (unfairness) Sudan [2014] UKUT 00105 (IAC). The information from HMRC that was damaging to the appellant's case was not disclosed before the oral hearing. The judge was not at fault but the error of fact led to a material error of law. The employment history was fundamental to the appeal.

11. Mr Jarvis submitted that the new evidence should be treated with caution. The appellant could have brought evidence to the oral hearing and there was no request for an adjournment. MM was an asylum decision. There was no material error here. The appellant was represented by experienced counsel and the EEA sponsor did not attend the oral hearing. The appeal had already been adjourned from 23 July 2014 on the basis of the respondent's desire to conduct a HMRC check. The new evidence could have been supplied at the oral hearing. There was nothing to prevent the appellant from making a valid fresh application.

12. Mr Singarajan replied that the judge thought that the HMRC witness statement was a full employment history but it clearly was not. There was no opportunity for the appellant to test the accuracy of the HMRC witness statement. The judge gave significant weight to that evidence. There was no requirement for the appellant to submit HMRC evidence in relation to a speculative and hypothetical issue that might be raised by the respondent. The payslips and employment contracts should be enough. There was no reason for the appellant to believe that the HMRC witness statement produced at the oral hearing would be incomplete.

13. I have seen a letter dated 8 January 2015 from HMRC which sets out the EEA sponsor's earnings and tax/national insurance paid for each tax year from 2007-2014. The letter shows earnings as set out in paragraph 7 above for 2012-2013 as well as £4298.35 from Servest Group Ltd and £917 from TC Facilities Management Ltd. For 2013-2014, the letter shows earnings of £532.65 from Ecoclean Services Ltd. The letter obviously contradicts the findings set out at paragraph 6 above based upon the HMRC witness statement. There is a conflict within the HMRC evidence and the HMRC witness statement does not appear to be a reliable source of evidence.

14. I have considered MM. That was an asylum case but the governing principles set out at paragraph 14 to 23 are not restricted to asylum cases. I am satisfied that the judge made a mistake as to existing fact (the employment record of the EEA sponsor) which has led to unfairness. The letter dated 8 January 2015 sets out established facts

regarding the EEA sponsor's employment record. The appellant was not responsible for the mistake because the HMRC witness statement was not included in the respondent's bundle and was not served on the appellant at any time. There was no opportunity to test or contradict the evidence before or during the oral hearing. The EEA sponsor was not present and the appellant had no available evidence to rebut the evidence in the HMRC witness statement. The mistake clearly played a material part in the judge's reasoning. I accept Mr Singarajan's submission that it was reasonable for the appellant to rely on the employment evidence contained within the appellant's bundle and to assume that any evidence obtained from HMRC by the respondent would be accurate.

15. Thus, the First-tier Tribunal's decision to dismiss the appellant's appeal under the EEA regulations involved the making of an error of law and its decision cannot stand. The judge was not at fault in any way. This is a straightforward factual issue and the respondent may be able to determine the issue by resolving the conflicts within the HMRC evidence without the need for a further hearing.

Decision

16. Both representatives invited me to order a rehearing in the First-tier Tribunal if I set aside the judge's decision. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I consider that an appropriate course of action. I find that the error of law infects the decision as a whole and therefore the re-hearing will be de novo with all issues to be considered again by the First-tier Tribunal.

17. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined de novo by a judge other than the previous First-tier judge.

Signed  Date 21 September 2015

Judge Archer
Deputy Judge of the Upper Tribunal