



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/14746/2014

THE IMMIGRATION ACTS

**Heard at Newport
On 14 October 2014**

**Determination
Promulgated
On 6 November 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

**OLUFEYISAYOMI INIOLUWA PEACE OKETIKUN
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Grubb instructed by Graceland Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REMITTAL

1. The appellant is a citizen of Nigeria who was born on 23 February 1998. On 23 December 2013, together with her two siblings, applications were made for residence cards as confirmation of the appellant's right of residence as a "family member" of an EEA national exercising treaty rights in the UK under the Immigration (EEA) Regulations 2006 (SI 2006/1003 as amended). The basis of the application was that the appellant and her siblings were the stepchildren of Aneta Malgorzata Pilch

(the sponsor), a Polish citizen working in the UK and married to the appellant's father.

2. On 6 March 2014, the Secretary of State refused to grant a residence card to the appellant and her siblings principally on the basis that the evidence did not establish that the sponsor was exercising treaty rights as a worker in the UK.
3. Thereafter, the appellant appealed to the First-tier Tribunal. For reasons which have not been made clear to me, the appellant's siblings did not appeal albeit that their claims would appear to be indistinguishable from that of the appellant.
4. The appellant did not request an oral hearing and on 21 May 2014, the First-tier Tribunal (Judge Pirota) dismissed the appellant's appeal under the EEA Regulations and also under Art 8 of the ECHR. The Judge was not satisfied that the sponsor was exercising treaty rights as a worker.
5. The appellant sought permission to appeal to the Upper Tribunal principally on the ground that the judge had failed to consider a number of payslips relating to Ms Pilch which had been sent to the Tribunal and had subsequently been returned to the appellant's representatives under cover of a letter dated 21 May 2014.
6. On 4 July 2014, the First-tier Tribunal (Judge J M Holmes) granted the appellant permission to appeal on that ground namely:

"The grounds assert that the Judge failed to engage with evidence that had been submitted to the Tribunal, and that was returned to her after the decision upon the appeal was reached. The Tribunal file does record that some unidentified documents were returned to her on 21 May 2014, but it is not clear what those documents were, or why they did not form part of the bundles of evidence that are on the Tribunal file and which appear to have been considered by the Judge. In the circumstances, I grant permission so that the appellant might have the opportunity to establish that she did submit relevant evidence to the Tribunal that was overlooked by the Judge."

7. Thus, the appeal came before me.
8. Before me, Ms Grubb, who represented the appellant, sought to make good the ground upon which permission to appeal was granted. She accepted that there was no direct evidence that the payslips had been submitted but her instructions were that had been the case and it was a reasonable inference from the Tribunal's letter dated 21 May 2014 which returned "nine" wage slips and "four" other or miscellaneous original documents to the appellant's previous representatives.
9. While there is much to be said for the merit of Ms Grubb's submission, it is not necessary to determine the factual issue of whether the payslips were submitted and, as a consequence, were not taken into account by the judge. I say that because of the judge's reasoning at para 19 of her

determination where she considered a number of payslips that were undoubtedly submitted with the application and available to the Judge on the appeal. The judge said this:

“19. The Sponsor submitted no cogent evidence of her claimed work as the documents submitted in the application did not refer to a period close to the application but for only 4 months in 2009 and 2010. Some of the pay slips submitted in the appeal refer to her or to a person whose name is not intelligible, because the photocopy is so poor. The employer is said to be ‘Two sisters Food Group’ or ‘(illegible) ...DS Brookes AV’ not ‘Premier Foods’ who the Sponsor claimed to be her employers. There is no cogent evidence that the Sponsor is exercising Treaty Rights or that she was employed during any relevant period.”

10. Clearly there the judge considered that the two sets of payslips before her - one relating to “Two Sisters Food Group” and the other to “Premier Foods” did not both relate to employment by the sponsor as she only claimed to work for “Premier Foods”. That is contrary to the sponsor’s evidence in her witness statement dated 2 May 2014 at pages 2-4 of the appeal bundle. At para 3, she states:

“As at the time the application was submitted, I was employed by 2 Sisters Food Group as a cake decorator and I continued to work for the same company. My employers were formerly known as Premier Foods. My Employee number (0002793) with Premier Foods and 2 Sisters Food Group is the same as evidenced in my payslips.”

11. Mr Richards, on behalf of the Secretary of State, accepted that the judge had been in error when he considered that the two sets of payslips (which were undoubtedly before the judge) did not both relate to the sponsor. He accepted that as a result of that error the judge’s findings in relation to the sponsor’s employment and whether she was, at the relevant time, exercising treaty rights as a worker in the UK were flawed.
12. In my judgment, that error, in itself, justifies setting aside the judge’s decision. In addition, I have considerable concern as to the evidence that was in fact before the judge and whether it was all taken into account in any event. However, given the judge’s reasoning in para 19 of her determination, the decision to dismiss the appellant’s appeal under the EEA Regulations involved the making of an error of law. The decision is set aside.
13. One final point. Neither party addressed me on the Judge’s finding in paras 22 and 23 that the appellant and sponsor had not established they were married as claimed. That finding was based upon on the absence of supporting evidence. However, this was not a point taken by the Respondent in her decision letter of 6 March 2014. It would appear, therefore, that she was satisfied the sponsor and appellant’s father were married. The appeal was determined on the papers and the appellant had no notice that the Judge might take this point on the evidence available at the hearing. To take the point in this way was undoubtedly unfair and may well be contrary to the Respondent’s position in the light of the evidence submitted with the application. It is a point which could only

fairly be taken on notice to the appellant. For this reason, that adverse finding also cannot stand. It may be a matter relevant at a re-hearing of this appeal.

Disposal

14. Both representatives indicated that the more appropriate course was to remit the appeal to the First-tier Tribunal for a *de novo* rehearing of the appeal.
15. Given that it may be said that the appellant has not had a fair hearing on all the evidence and given the factual issues that remain to be decided, I agree having regard to para 7.2 of the Senior President's Practice Statement that the appeal should be remitted to the First-tier Tribunal for rehearing before a judge other than Judge Pirota.
16. Ms Grubb indicated that it was likely that the appellant would wish to have an oral hearing, not least so that the evidential matters concerning the sponsor's employment could be satisfactorily dealt with.

Signed

A Grubb
Judge of the Upper Tribunal
14 October 2014