Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/29090/2012

THE IMMIGRATION ACTS

Heard at: Manchester	**Determination Promulgated**
On: 17th March 2014	**On: 6th June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Abdul Shakoor
(no anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr Karnik, Counsel instructed by Mellor & Jackson Sols
For the Respondent: Ms Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Pakistan. He has permission to appeal against the decision of First-tier Tribunal Judge Levin to dismiss his appeal against directions for his removal from the United Kingdom pursuant to section 10 of the Immigration and Asylum Act 1999. That decision to remove the Appellant followed rejection of his application for indefinite leave to remain.

2. The Appellant came to the UK on the 21st June 2006 in possession of a grant of entry clearance as a work permit holder. He was granted leave to enter until the 25th July 2011. On the 21st July 2011 he applied for indefinite leave to remain on the basis that he had accumulated five years lawful residence in the UK as a work permit holder.

3. The application was refused on the 27th September 2012. The Respondent asserted that on the 27th June 2007 the UKBA received notification of the premature end of the Appellant's employment from his employer and as a result his leave to remain was curtailed with no right of appeal on the 23rd July 2007. He therefore had accumulated only 13 months of lawful residence. The Appellant has resumed employment but this had ceased on the 3rd August 2011. He could not therefore claim to be paid "at or above the appropriate rate for the job as stated in the Codes of Practice in Appendix J". The application was therefore refused with reference to paragraph 135 of the Immigration Rules. The Respondent then considered whether the Appellant had established any right to remain in the UK as a result of his private or family life and concluded, with reference to paragraph 276ADE of the Rules, that he had not.

4. The appeal to the First-tier Tribunal came before Judge Levin in April 2013. In respect of the matter of curtailment Judge Levin accepted that any decision to that effect had never been served on the Appellant and so was not lawful. He did not however accept that the Appellant had been continually employed as claimed. He found the Appellant to be evasive, an additional witness called on his behalf to be inconsistent and found in the documentary evidence before him a discrepancy which he considered to be of great significance:

> "In support of his claim to have been working for the Al Nawaz Restaurant for five years the Appellant relied heavily upon P60s for the tax years 2006-2007, 2007-2008, 2008-2009, 2009-2010 and for the tax year ending 5th April 2011, and all of which record the Appellant was working for Elite Chain Limited trading as Al Nawaz Restaurant. However upon each of those five form P60s the Appellant's national insurance number is recorded as being SC899485B which is inconsistent with his national insurance number SG899485B as recorded in the two witness statements of Wendy Gilbart, and also upon the Appellant's wage slips from Islamabad Restaurant Limited where his national insurance number is also recorded as being SG899485B. In such circumstances I find that the P60s are not reliable and I place no weight upon them as proof of the Appellant's employment…"

5. Judge Levin went on to find, at paragraph 39 of the determination, that the Appellant had used deception in making his claim to have been continuously employed for a period of five years.

6. Permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Kebede on the grounds that the matter of the different NI numbers had never been put to the Appellant. At the first hearing of this matter in September 2013 Mr Harrison, who appeared for the Respondent, accepted that to be so, and conceded that this was *prima facie* an error of

law. It was of some significance because the P60s were otherwise strong evidence that the Appellant had been employed as claimed, that could potentially outweigh the letters from Ms Gilbart of the HMRC as well as the poor evidence of the Appellant and his witness. There may be an explanation for why there are two different numbers, and this would go to the finding of deception as well as the question of whether the Appellant had in fact worked for the same employer all along.

7. Mr Harrison was correct to concede that it is generally an error of law to introduce a point against a party without that party having any notice of it, and thus denying him a chance to respond to that forensic challenge. In this case Judge Levin was the first person to notice the discrepant numbers. Having declined to place any weight on the P60s for that reason alone he went on to find that the Appellant had sought to deceive by submitting his application in the way that he did. Mr Karnik submitted that this was a further error. He submitted that having gone on a frolic of its own the First-tier Tribunal then compounded the error by making a finding of deception on insufficient evidence and without having regard to the appropriate burden and standard of proof. Mr Harrison agreed.

8. Having heard those submissions I indicated that I remained to be satisfied that any error on the part of the First-tier Tribunal was such that the decision should be set aside. Reluctant to interfere with this carefully written and reasoned decision I indicated that it would only be set aside if it could be established that some material unfairness had arisen. What could the Appellant, or Mr Holt who represented him before the First-tier Tribunal, have successfully done to respond to the point about the different numbers? Mr Karnik submitted that Mr Holt could have done nothing else but apply for an adjournment. The point had never been taken by the Respondent and since no-one else had noticed the discrepancy it was not something that the Appellant's representatives had addressed. Mr Holt would have asked for an adjournment to clarify the matter with the HMRC. Mr Harrison agreed that in the circumstances, such an adjournment should have been granted. Although it may not make a difference to the overall decision in the end, it was pertinent to the finding of deception, which would have long-term consequences for the Appellant. Having heard these submissions I agreed to adjourn the 'error of law' hearing part-heard to enable those instructing Mr Karnik to make the relevant enquiries. I did so, directing the Appellant's representatives to make such enquiries as necessary to clarify why the Appellant appears to have two NI numbers.

9. It unfortunately took until the 17th March 2014 for the matter to be relisted before me, ready to proceed. The Appellant's representatives had by that date received a letter from the HMRC dated 21st November 2013 which confirmed that the Appellant's NI number is SG899485B and not SC899485B. Whilst the HMRC do not comment on why that latter number might have appeared on the P60s, the letter does state that they are unable to provide copies of his P60s since these are issued by employers. The letter confirms that the Appellant has been paying national insurance contributions under the number SG899485B. A further letter dated 10th December 2013 reproduces HMRC records to show that in 2010, 2011 and 2012 the Appellant was employed by 'Elite Chain Ltd' and in 2012 and 2013 by Elite Chain, Rusholme Restaurant and MCC Restaurant Ltd.

10. I have looked again at the P60s in light of these letters from HMRC confirming that the Appellant has been paying national insurance contributions and tax for four years, between April 2009 and April 2013. I note that the HMRC record of how much the Appellant earned in those years, and the amount of tax he paid, does correspond to the amounts shown on the P60s. For instance in the year ending 5th April 2011 both HMRC records and the P60 produced at hearing show that the Appellant earned £11,440 and paid tax of £992. Both identify his tax code as 647L. Given HMRC's indication that the P60s are prepared by the employer – and in this case the employer's accountant – it seems likely that the letter 'C' has wrongly been entered by that accountant in place of the 'G' which the number should have contained. Given the confirmation from HMRC that tax and NI were in fact being paid I find it unlikely that there was in this case any deliberate deception or forgery in respect of the P60s. I further find it unlikely that Judge Levin would have found this to be the case had he had sight of the information from HMRC. I am therefore satisfied that the First-tier Tribunal erred in taking this point against the Appellant in this way. Had he been given the opportunity to address the issue he could have produced the HMRC evidence that I now have before me, which shows that he was in fact employed and that he was paying tax and national insurance contributions. I set the finding of deception aside.

11. There remains the substantive issue raised in the Respondent's refusal letter, whether the Appellant had in fact been continually in the same lawful employment for a period of five years between August 2006 and August 2011. As Ms Johnstone points out, the determination gives detailed reasons as to why it was not accepted that the Appellant had been continually employed by the employer identified on his work permit, 'Al Nawaz Restaurant'. The grounds of appeal challenge those findings on the grounds that the Judge was wrong to have placed no weight on the P60s all of which showed the Appellant to have been employed by "Elite Chain Limited trading as Al Nawaz Restaurant". I have already found that the First-tier Tribunal erred in attaching no weight to those P60s on the grounds that the numbers were different from the HMRC records; that was because the Appellant had not been given a chance to rebut the suggestion that the P60s were unreliable or forged. However that fact does not resolve the matter in the Appellant's favour. That is because there were a number of other issues emerging from the evidence which made it less than clear that the Appellant had in fact been working for the same employer all along:

    a) The P60s produced for 2006-2007 and 2007-2008 do show employment by Elite Chain trading as Al Nawaz but since HMRC hold no record of tax being paid in those years (contrary to the information provided on those P60s) there is limited weight that can be attached to these documents. They may have been generated by the Appellant's employer but since there was in fact no tax actually paid in those years this gives rise to doubt that the Appellant was actually employed as claimed;

    b) In his oral evidence the Appellant had said that he had initially worked at Al Nawaz but then this operation had ceased and his employer had transferred him to the restaurant Bollywood Masala. Asked how long he had actually been at Al Nawaz the Appellant was evasive and then said that he "could not remember"

when he moved restaurants. Judge Levin found that this failure "to give a straight answer to this simple question" damaged his credibility;

c) A witness called Mr Dongal had given evidence before Judge Levin. He claimed to have been the manager of Al Nawaz. His evidence was that Al Nawaz had been the trading name of a company called Elite Chain Ltd which also owned Bollywood Masala. When the lease on Al Nawaz ceased they closed it down and moved the whole operation, including the Appellant, to Bollywood Masala. Judge Levin found this evidence to be contradicted by the Appellant's own contract of employment, which identified his employer as 'Al Nawaz trading as Sabina Enterprises' with no mention of Elite Chain Ltd;

d) A further discrepancy arose from Mr Dongal's evidence in that he also said that Bollywood Masala was owned first by a company called Islamabad Restaurant Limited and then by one called MCC Limited. Judge Levin found that if true, this dispelled the argument that the Appellant had been employed by the same employer, since these were clearly different legal entities from Elite Chain;

e) Judge Levin rejected Mr Dongal's claim to have been the manager of Al Nawaz at all, since he could not say when it had closed down.

12. The grounds of appeal do not address any of these points; paragraph 7 erroneously suggests that the matter of the two national insurance numbers was the sole reason for the Judge's adverse findings in this matter. That is clearly not so. Even absent the finding of deception that I have set aside, the First-tier Tribunal gave cogent reasons why the Appellant had not discharged the burden of proof. The First-tier Tribunal found the evidence to fall short of establishing that the Appellant had been employed between 2006 and 2011 by Al Nawaz, the employer named on his work permit. It has not been established that there was any error of law in these findings.

Decisions

13. The decision of the First-tier Tribunal is set aside only in respect of the finding of deception. The remaining findings are upheld.

14. I re-make the decision on deception by finding that the Respondent has not shown to the requisite standard that the Appellant had any intention to deceive.

Deputy Upper Tribunal Judge Bruce
2nd May 2014