Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/18709/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On 3 July 2015

Decision and Reasons Promulgated
On 29 July 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

MRS BABY KOUR TULWAR

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr TDH Hodson, Solicitor, of Elder Rahimi Solicitors
For the Respondent: Mr S Kandola, 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

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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 Khawar) dismissing the appellant's appeal against a decision taken on 7 April 2014 to refuse to issue a residence card under the Immigration (EEA) Regulations 2006 ("the Regulations") as confirmation of a right of residence in the UK.

Introduction

3. The appellant is a citizen of Afghanistan born on 1 July 1987. She is married to Mr Harmon Singh Chopra who is a citizen of Holland born on 1 January 1972 ("the EEA sponsor").

4. The Secretary of State accepted the respondent's identity and nationality but concluded in a decision dated 7 April 2014 that there was insufficient evidence that the relationship with the EEA sponsor was authentic or that the EEA sponsor was exercising treaty rights in the UK.

The Appeal

5. The appellant appealed to the First-tier Tribunal and attended an oral hearing at Hatton Cross on 27 November 2014. She was represented by Mr Hodson. The First-tier Tribunal found that there was not a shred of evidence to suggest that the marriage was one of convenience. However, judge also found that the oral evidence in relation to the employment of the EEA sponsor was highly unsatisfactory and did not explain significant issues relating to the sponsor's employment and documents submitted. The appeal was therefore dismissed.

The Appeal to the Upper Tribunal

6. The appellant sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law.

7. Permission to appeal was granted by First-tier Tribunal Judge Levin on 24 April 2015 on the basis that it was arguable that the judge failed to take into account relevant evidence, namely the EEA sponsor's bank statements which showed his wages being credited for the limited period from October 2013 to January 2014 and the award of child tax credits

8. Thus, the appeal came before me

Discussion

9. Mr Hodson submitted that there was substantial evidence regarding the existence of Heera and Sons including accounts. SK Associates are accountants and not solicitors. The documents establish the existence of the company. The respondent moved the issue on to genuine employment at the oral hearing. Paragraph 18 of the decision complains that the accounts do not identify individual employees but that is not their purpose. HMRC evidence is normally taken as good evidence of employment at the

level of income indicated on the P60. The bank statements show £429.15 paid on the 1st or 2nd of each month with four entries in total. The judge has not explained why the pay slips match the bank statements. The tax credits and housing benefit claims were also included in the appellant's bundle. The appellant had to provide evidence to HMRC about his work in order to obtain the tax credits. The judge has not engaged as to why the appellant would declare false income that would reduce his housing benefit.

10. Mr Hodson further submitted that if the judge is correct then there has been an extraordinarily elaborate charade. The documents were clearly not produced for this appeal. The judge has failed to give proper consideration to the context of the evidence. The employment contracts appear in the appellant's bundle – the first contract shows an annual salary of £24,000 and the second contract shows no change in the place of work or the hours but the rate of pay was now £6.19 per hour. The first contract also specifies a £6.19 per hour minimum wage. There may have been a change from afternoon to morning working and the £24,000 salary reference may have been a simple miscalculation. The evidence about hours worked is not contrary and the judge failed to take account of the totality of the evidence. The evidence needs to be looked at again with the EEA sponsor and respondent on notice that this is the issue. The findings at paragraphs 10 and 11 (genuine marriage and genuine business) should be preserved.

11. Mr Kandola conceded that there is a certain amount of consistency in the frequency of the income which is supported by the child tax credits and the P60s. The issue is whether the weight of the evidence points to only one conclusion or could the discrepancy in the oral evidence lead to a different conclusion. Mr Kandola submitted that the judge had adequately assessed the weight of the evidence; suspecting that the claimed employment was really a guise. The points raised in paragraphs 16 and 17 of the decision still have weight. The underlying cause for concern was valid and the findings of fact were open to the judge. Mr Kandola agreed that the appeal should go for rehearing if a material error of law was identified and agreed with the preserved findings of fact.

12. I find that the judge failed to have regard to the relevant evidence that was before him in relation to the payslips, bank statements, tax credits, housing benefit claim and P60. The implications of that evidence were not properly considered and analysed. The judge also made a mistake as to a material fact when he found at paragraph 11 that, "*There is no evidence from an independent objective source to establish that the sponsor is genuinely employed at his cousin's grocery store*". The evidence from HMRC is from an independent and objective source. The information supplied by the EEA sponsor was assessed by HMRC in order to make decisions about tax and tax credits. I am satisfied that the judge's approach to the evidence amounts to a material error of law.

13. Thus, the First-tier Tribunal's decision to dismiss the appellant's appeal under the Regulations involved the making of an error of law and its decision cannot stand.

Decision

14. 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 following findings of fact made at paragraphs 10 and 11 of the decision should be preserved; namely,

- There is not a shred of evidence to suggest that the appellant's marriage to the EEA sponsor is one of convenience.

- Heera and Sons is a grocery store business owned by Mr Chopra who is the cousin of the EEA sponsor.

15. 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 by a judge other than the previous First-tier judge.

Signed *David Archer* Date 28 July 2015

Judge Archer

Deputy Judge of the Upper Tribunal