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Judgment: approved by the Court for handing down
(subject to editorial corrections)

Ref: NICC3625
Delivered: 22.03.2002

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

LIU BI XIA

(Applicant)Appellant

and

ENTRY CLEARANCE OFFICER, GANGZHOU

(Respondent)Respondent

NICHOLSON LJ

A. Introduction

This is an appeal by Liu Bi Xia ("the appellant") against the decision of the Immigration Appeal Tribunal ("the tribunal") notified on 11 October 2001 under Schedule 4 of the Immigration and Asylum Act 1999 ("the 1999 Act"). The appeal raises the issue whether rule 128(iii) of the Immigration Rules (HC 395) requires an adjudicator under the 1999 Act to act on "objective" evidence in addition to "subjective" evidence so as to determine whether a person is capable of undertaking the employment described in his or her work permit.

B. Background

A work permit was issued by the Department of Economic Development in Northern Ireland ("the Department") to the appellant, who is Chinese, on 19 May 2000 to permit her to work as a head chef at the Happy Valley restaurant, 47 Castle Street, Comber. The unchallenged evidence was that such a permit would only be issued after advertisement of the job and after the Department was satisfied that no EU worker had presented himself or herself as available.

The appellant applied for Entry Clearance on 31 October 2000 and on two other occasions in November and December 2000. These applications were refused by the Entry Clearance Officer at Guanzhou, China ("the respondent"). "The grounds were that the Officer was not satisfied that the appellant was capable of undertaking the employment specified on her work permit and was not satisfied that she did not intend to take employment other than that specified on her work permit.

The appellant appealed to a Special Adjudicator under the 1999 Act. The appeal was heard at Belfast on 3 May 2001 and the decision of the Special Adjudicator was promulgated on 1 June 2001.

<u>The decision of the Special Adjudicator</u>

He set out the history of the application, the evidence which he had read and heard and dealt with the reasons why the respondent refused entry clearance. He set out paragraph 128 of the Immigration Rules in full, including paragraph 128(iii) which reads as follows:

> "The requirements to be met by a person coming to the United Kingdom to seek or take employment ..... are that he:

.....

(iii) is capable of undertaking employment specified in his work permit;

He found as a fact that Mr Steven Yao, the owner of the restaurant, required a head chef for his restaurant, that he approached a Mr Henry Ng who was an important person in the Chinese community in Northern Ireland. He stated that there are about a thousand Chinese restaurants in Northern Ireland and that it is difficult to find chefs for them. Mr Ng, who had been a head chef, carried out, as part of his professional services, the administrative work necessary to obtain work permits for head chefs in appropriate cases.

In January 2000 Mr Ng and Mr David Lau, a friend of Mr Ng, who had also been a head chef, went to China and visited the Success Link Hotel in Fijuan City. They made an appointment to see the head chef, who was the appellant, and went into the kitchen of the hotel to see how well the kitchen was run. They had a meal prepared by the appellant which Mr Ng described as "very, very top class". Mr Ng was satisfied that she was a head chef and reported to Mr Yao that she was a very good cook. The Special Adjudicator then dealt with the ground on which the Entry Clearance Officer had refused the applications.

He stated that he believed Mr Ng and Mr Lau when they said that they had met the appellant in China, had inspected her kitchen and had a meal prepared by her, which satisfied them as to her fitness to fulfil the role of head chef. He found in the transcript of the interview between the appellant and the Entry Clearance Office, corroboration and confirmation of the truthfulness of Mr Ng and Mr Yao and, by inference, the truthfulness of the appellant. That is to say, there was no evidence of a

link between them by way of family or friendship. He dealt in detail with the references supplied by the appellant which the respondent had held to be forged and concluded that there was no more than a possibility that something may have been wrong with them. Equally possibly, a perfectly innocent explanation could have resulted if the matter had been properly investigated by the Entry Clearance Officer.

He held that he was satisfied on the evidence that the appellant was qualified to fulfil the post in respect of which a work permit had been granted and that she did intend to fulfil same. He pointed out that he had had the advantage of having three witnesses before him, namely, Mr Yao, Mr Ng and Mr Lau, each of whom had held the position of head chef in a Chinese restaurant. Accordingly he allowed the appeal. Leave was granted by the Tribunal to the Entry Clearance Officer to appeal to the Tribunal.

Appeals to the Tribunal are governed by section 56 and Schedules 2 and 4 of the 1999 Act. By paragraph 22(2) of Schedule 4 the Tribunal may affirm the determination of the Adjudicator or make any other determination which the Adjudicator could have made.

The hearing before the Tribunal

This took place on 5 September 2001 and the determination of the Tribunal was notified on 11 October 2001. The grounds of Appeal to the Tribunal were set out at paragraph 3 of their Determination. It was contended on behalf of the respondent that the issues before the Special Adjudicator were paragraphs 128(iii) and (iv) of the

Immigration Rules (HC 395) and that he had erred in law in concluding that the references supplied by the appellant were not crucial to his decision.

At paragraph 11 of their determination, the Tribunal stated:

> "We take it that there is no controversy over the issue of the Work Permit, which had been issued to the original appellant, and that she had satisfied all the elements of paragraph 128 of HC 395 save only for the question of her being 'capable of undertaking employment specified in the work permit'. It seems to us, that once the issue of the Work Permit has been achieved, in order to put it into effect, it is implicit that there must be come sort of objective evidence as to the capability of the candidate for the doing of the work contemplated in the Work Permit. The adjudicator made the decision solely on the subjective oral evidence before him. We can have no objection to the oral evidence given, or that it was found to be credible. To construe the matter, as did the adjudicator and as is argued on behalf of the appellant would, in our view, leave the assessment of suitability entirely in the hands of employers and those subjectively involved with prospective employees who are applicants for admission ... without any means of objective or independent assessment of the particular candidate. In our judgment this cannot be the effect of the relevant provisions of Rule 128 and the provisions concerning issue of Work Permits."

Later they stated that the:

> "The Rule ... imports a different, and in our view, objective type of test which is not satisfied in this case."

Under paragraph 23(1) of Schedule 4 of the 1999 Act, it is provided that any party to the appeal may bring a further appeal to the [Court of Appeal]on a question of law material to the determination of the appeal with the leave of the Tribunal or the Court of Appeal. We gave leave to appeal on 17 January 2002.

The hearing before the Court of Appeal

Mr Larkin QC and Mr Scoffield appeared on behalf of the appellant and Mr O'Reilly appeared on behalf of the Entry Clearance Officer. We are most grateful for their helpful skeleton arguments and succinct submissions.

Mr Larkin concentrated his submissions on Rule 128(iii) which appeared to us to be the only relevant part of the Rule requiring scrutiny by the Court.

He submitted that the Tribunal had required 'objective' certification or documentation and "external, objective" evidence in order to comply with Rule 128; that it had been contended on behalf of the Entry Clearance Officer and the Tribunal appeared to have accepted that corroboration of credible evidence was required in order to satisfy Rule 128(iii).

In his skeleton argument and in submissions he contended that there was a false dichotomy between 'objective' and 'subjective' evidence, that there has been an improper approach on the part of the Tribunal in setting aside a finding of fact by the Adjudicator and that an independent assessment of the relevance, weight and sufficiency of the evidence was made by the Adjudicator which had not been analysed by the Tribunal.

He relied on Macdonald and Webbers Immigration Law and Practice in the United Kingdom (5th ed.) at para 18.182 and *R v Immigration Appeal Tribunal, ex parte Balendran* [1998] Imm AR 162. The Court of Appeal had ruled on a number of occasions that where, on examination of the evidence, the Adjudicator's conclusions on the facts were unsustainable, the Tribunal would be entitled to reverse these findings in reaching its own conclusions although the Tribunal would be most

reluctant to interfere with a finding of primary fact by the Adjudicator which was dependent on his or her assessment of the credibility of a witness who had given oral evidence. He also referred to *Assah v Immigration Appeal Tribunal* [1994] Imm AR 619 and other authorities.

The Tribunal has not found the Adjudicator's conclusions about the credibility of the witnesses to be unsustainable on the evidence before him and did not reach a conclusion on its own consideration of the relevant evidence, as it did in *Ikhlaq v Secretary of State for the Home Department* [1997] Imm AR 404 where it reached a separate conclusion on the evidence, recognising that this was the necessary approach, having taken all of the evidence into account.

The Tribunal's determination concerned the proper interpretation of para 128(iii) of the Immigration Rules (HC 395), as it conceded and the distinction between subjective and objective evidence was invalid.

In reply Mr O'Reilly argued by reference to his skeleton argument that there were a number of significant discrepancies between the description of the intended occupation on the work permit as "head chef" and the various statements of the appellant that she was a cook and later that she was a head chef.

He contended that a mere assertion by the appellant would be insufficient. He criticised the decision of the Special Adjudicator on the ground that the authenticity of the appellant's references were doubted by the respondent and yet no further written references relating to the appellant's past working record were made available to the Adjudicator.

He argued that none of the appellant's witnesses could prove that the appellant had previously worked as a head chef or had the necessary skills to be considered a head chef. Whatever terms the Tribunal used, it was clear that the Tribunal considered that the belief of the witnesses referred to by the Adjudicator as to the competency of the appellant to act as a Head Chef was insufficient for the purposes of paragraph 128(iii) of the Immigration Rules.

Para 22(2) of Schedule 4 of the 1999 Act provided that the Tribunal had the same powers as an Adjudicator relating to appeals and was not limited to correcting errors of law. The real issue was whether the evidence of the witnesses on behalf of the appellant was of a sufficient nature to provide the necessary support for the claims of the appellant.

We consider that if the Tribunal has analysed the evidence of the witnesses for the appellant and had concluded on the facts that such evidence was insufficient or inadequate to sustain the contention that the appellant was capable of undertaking the job description on the work permit as "head chef", it would have been entitled to do so. The Tribunal did not do so but, instead, concluded that 'objective' or 'independent' evidence was needed. They appeared to have in mind documentary references, qualifications or witnesses independent of those concerned in applying for Entry Clearance. This is to apply a gloss which is not required by Rule 128(iii). The evidence presented to the Adjudicator and accepted by him, was that Mr Ng, Mr Lau and Mr Yao had no prior personal association with the appellant and were, therefore, unlikely to be biased in her favour. Moreover the

reputation of Mr Ng would be severely damaged if it could be shown that he had supported an application for other than disinterested reasons.

The duty of the Tribunal was to consider whether on the available evidence, the appellant had established that she was capable of undertaking employment as a head chef.

It would have been open to us to refer the matter back to the Tribunal to make its own findings on the facts but we do not consider that this would serve any useful purpose.

We are of the opinion that on the true construction of paragraph 126(iii) an applicant for entry clearance is simply required to produce such evidence as will establish to the satisfaction of the Adjudicator and on appeal to the satisfaction of the Tribunal on the balance of probabilities that he or she is capable of undertaking the relevant employment. On appeal the Tribunal must, of course, bear in mind that it has not had the opportunity of seeing and hearing the witnesses. The Tribunal, construed paragraph 126 incorrectly. Accordingly we allow the appeal and affirm the decision of the Special Adjudicator.