



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/24762/2013

THE IMMIGRATION ACTS

Heard at Field House
On 12 March 2014

Determination Promulgated
On 18 March 2014

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

SAMSON ADESIWA ADEWUYI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Appellant, a citizen of Nigeria born on 28 May 1980, against the decision of the Respondent dated 12 June 2013 to refuse to him the issue of a

residence card as confirmation of a right of residence under European Community law as the spouse of an EEA national exercising treaty rights in the United Kingdom. The application was refused because it was said that “your EEA family member has failed to provide evidence that they are a qualified person as set out in Regulation 6 of the Immigration (EEA) Regulations 2006”.

2. The Appellant’s appeal against that decision was determined at his request on the papers at Taylor House by First-tier Tribunal Judge Wellesley-Cole who in a determination promulgated on 13 November 2013 dismissed the appeal. The First-tier Judge was not satisfied that the Appellant or his sponsoring wife had:

“... made out that there is adequate evidence of current economic activity so as to meet the requirements of Regulation 6 of Immigration (EEA) Regulations 2006. Regulation 6 states that to be a qualified person means one has to be an EEA national in the UK as a job seeker, worker, self-employed person, self-sufficient one or a student. I conclude that he has failed to provide evidence as an EEA Sponsor his wife is exercising treaty rights and as a consequence the appeal therefore does not succeed for the above cited reasons”.

3. Those “cited reasons” included at paragraph 7 of the judge’s determination the following:

“the gist of the refusal was that the document submitted with the application did not demonstrate economic activity so as to satisfy the Secretary of State that the Portuguese wife of this Nigerian Appellant was actually currently working. As a consequence, **I have had particular regard to the tax document, bank statements and employment letters in the indexed bundle referred to in the body of this determination. The Dunmade Associates Certified Public Accountants’ letter of 20 June in the penultimate paragraph confirm she is registered with Revenue and Customs for tax and NI purposes and has complied fully within the necessary regulations relating to the establishment of a business.** That letter does not actually confirm she is working. But the accounts for the tax year ending in April 2012 prepared **by the same solicitors** give a net profit of £7,733, with an income of £11,776. The HMRC letter of 31 March 2012 last year refers to a payment due of £87.50 which they expect to receive no later than 31 July 2012. Such a low payment due I find is not tantamount to economic activity so as to satisfy me, on balance, in the absence of further documentation, she is in employment. **The accounts were prepared by solicitors not accountants and are self-serving and as such I place limited weight on them, in relation to the £7,733 net profit**”. (Emphasis added).

4. The Appellant successfully obtained permission to appeal that decision and in granting such permission on 14 January 2014 First-tier Tribunal Judge Andrew had this inter alia to say:

“This was a paper determination. The sole issue in the appeal was whether the Appellant’s spouse was exercising treaty rights.

It is arguable that in her determination, the First-tier Tribunal Judge incorrectly referred to the accounts for the Appellant’s spouse’s business as having been prepared by a solicitor and as such, placed limited weight on the same (paragraph 7 of the determination).

Further, it is arguable there is reference in the determination to the Appellant’s spouse working as the Appellant’s case is that she is self-employed.

Accordingly I find that there is an arguable error of law”.

5. Thus the appeal came before me on 12 March 2014, where my first task was to decide whether the determination of the First-tier Judge disclosed an error or errors on a point of law such as may have materially affected the outcome of the appeal.
6. Immediately before the hearing, the Tribunal received from what I now best describe as the Appellant’s former solicitors, Messrs Chancery CS Solicitors, a letter dated 11 March 2014 as follows:

“We write to inform the court that we are not able to attend the hearing fixed for 12 March 2014 as our client could not put us in funds.

Therefore, it is our client’s instructions that this matter be dealt with on papers as already indicated on the notice of appeal form”.

7. In those circumstances Mr Melvin who appeared before me on behalf of the Respondent agreed there was no reason why I should not proceed with the hearing of the appeal in accordance with the provisions of paragraph 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008.
8. Most helpfully and in my view realistically, Mr Melvin immediately informed me that he accepted that the judge’s mistaken conclusion that the sponsoring wife’s account “were prepared by solicitors not accountants” and were therefore “self-serving” and that as such, the judge placed “limited weight on them in relation to the £7,733 net profit” was a material error of law and had “led to unfairness”.
9. Mr Melvin continued:

“Whilst the Appellant has been content to have the error of law hearing determined on the papers, that in my view still requires the appeal as a whole, to be determined afresh and I would therefore ask that the appropriate course in the interests of justice is for this matter to be remitted for fresh hearing to the First-tier Tribunal even if in the event, the Appellant still decides that the appeal be determined on the papers.”

10. Mr Melvin continued that there was still an issue to be decided as to whether the Sponsor’s accounts were properly understood and that as the sole issue to be determined was whether the Appellant’s spouse was exercising treaty rights at the material time, this necessitated careful understanding.
11. I found myself in agreement with Mr Melvin’s proposal. However as I observed to him, the First-tier Tribunal Judge’s oversight may well have been allayed had the Appellant chosen to avail himself of the opportunity to give oral evidence on his behalf. Whether the Appellant sought to avail himself of that opportunity at the remitted hearing would be a matter for him.
12. In consequence of my findings, it follows that there has been no satisfactory hearing of the substance of this appeal at all. The scheme of the Tribunal’s Courts Enforcement Act 2007 does not assign the function of primary fact finding to the

Upper Tribunal. In such circumstances Section 12(2) of the TCEA 2007 requires us to remit the case to the First-tier or remake it ourselves. For the above reasons, I have concluded that the decision should be remitted to a First-tier Tribunal Judge other than First-tier Tribunal Judge Wellesley-Cole to determine the appeal afresh with all issues at large at Taylor House. I am satisfied there are highly compelling factors, falling within paragraph 7.2(b) of the Senior Presidents Practice Statement decision that the decision should not be remade by the Upper Tribunal. It is clearly in the interests of justice, that the appeal of the Appellant be heard afresh in the First-tier Tribunal.

13. For that purpose it would seem to me that a time estimate of one to one and a half hours would be appropriate. In the event that there is to be an oral hearing, it will be for the Appellant to notify the First-tier Tribunal in good time should an interpreter is required. It will be a matter for the administration at Taylor House to find a suitable date for the hearing of the remitted appeal upon which the Appellant will be advised. It is however incumbent on the Appellant upon receipt of the appropriate Notice of Hearing, to immediately advise the Tribunal at Taylor House if he continues to require his appeal to be determined on the papers or seeks an oral hearing.

DECISION

14. The First-tier Tribunal erred in law such that their decision in the present appeal should be set aside. I remit the remaking of the appeal to the First-tier Tribunal at Taylor House to be heard before a First-tier Tribunal Judge other than First-tier Tribunal Judge Wellesley-Cole.
15. I note that no anonymity direction has been made.

Signed

Date 14 March 2014

Upper Tribunal Judge Goldstein