



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

THE IMMIGRATION ACTS

**Heard at Field House
On 3 June 2014**

**Determination
Promulgated
On 5th June 2014**

Before

UPPER TRIBUNAL JUDGE WARR

Between

**OCHUKO ADONIJAH IGHAVODHA
(No anonymity direction made)**

Appellant

and

SECRETARY OF STATE

Respondent

Representation:

For the Appellant: Mr O Jibowu , of counsel, instructed by MJ Solomon & Partners

For the Respondent: Mr N Bramble, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria born on 22 February, 1988. He arrived in this country on 24 January, 2010 as a Tier 4 (General) student.

He had leave to remain until 28 May, 2011. On application his leave was extended until 28 June, 2013. On 10 May 2013 he applied for a residence card following his marriage to an EEA national exercising Treaty rights under the Immigration (European Economic Area) Regulations 2006. The application was refused on 18 October, 2013.

2. The appellant appealed and his appeal came before First-tier Judge Obhi on 28 February, 2014. The judge records that she did not hear any oral evidence or submissions as the appellant who had originally requested an oral hearing had changed his mind and had requested a paper determination of the appeal.
3. The judge summarised the case for the respondent in paragraph 12 of her decision. The respondent was not satisfied that the appellant's spouse was a qualified person having carefully checked the evidence of employment. The letter from the employer was of poor quality and in poor English and there appeared to be a change of gender of the employee towards the end of the letter. It provided no start date or salary but did provide a character reference. It was not accepted as evidence of employment. Three payslips had been provided. They appeared to quote the correct tax code for the appellant's wife but the actual calculation of tax and NICs was inaccurate. The discrepancies caused the respondent to undertake further research into the existence of the company that the appellant's wife was supposedly working for. No response to telephone calls made to the number provided by the appellant had been received. The net book value of the company appeared to be insufficient for it to be trading and the registered office was not shown as trading from the address provided under the Royal Mail postcode finder.
4. The judge noted in paragraph 14 of her determination that the appellant's wife was now employed in a different capacity at a different business. She had commenced her employment on 1 October, 2013 and payslips were provided covering the previous four months. The judge observed:

"However this is an entirely new situation from the one presented to the Secretary of State, and the grounds of appeal assert that the Secretary of State was wrong to refuse the application as the appellant's wife was genuinely working as claimed. There is no explanation as to why if there was nothing wrong with the previous employment, the appellant has changed jobs. There are no letters from the Inland Revenue to confirm the employment and the payment of tax. There is, in short nothing to refute the reasons why the application was refused. Although the date for the determination of facts is the date of hearing, the facts which I have to determine are whether the information provided to the Secretary of State at the time of the application was true. Issues are raised about the reliability of the information provided which are potentially serious and which have not been addressed. Therefore it is for the respondent to consider the new application, as that is what it essentially is, made on behalf of the appellant."

5. In paragraph 15 of the determination the judge noted that the marriage appeared to have been a proxy marriage in Ghana and there was no evidence that the customary marriage was an acceptable and recognised form of marriage in the appellant's wife's home country, Slovakia. Although the point had not been raised by the respondent the Tribunal had made it clear that there needed to be evidence of the acceptance of such marriages by the laws of the EEA country from which the EEA national comes. The judge referred to Kareem (Proxy Marriages – EU Law) [2014] UKUT 24 (IAC). She concluded paragraph 15 as follows:

"I make no finding in relation to the marriage, and it will be a matter for the Secretary of State to consider afresh as and when the appellant submits his application based on the new employment that his wife has."

6. The information provided to the judge was insufficient to determine the appeal under Article 8 given her concerns about the marriage and the applicant's case ought to be put to the respondent, the primary decision maker. She accordingly dismissed the appeal.
7. There was an application for permission to appeal, it being argued that the judge should have focused on the state of play at the hearing and determine whether or not the sponsor was a qualified person. The judge had erred in drawing a negative inference as to why the sponsor had changed her job as this conflicted with the concept of free movement. Irrelevant matters had been taken into consideration.
8. Permission to appeal was granted by First-tier Judge Landes on 24 April, 2014. The judge noted that it had not been made clear that the new evidence provided by the appellant's solicitors had ever been supplied to the respondent and referred to rule 51 (7) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. This rule prevents the tribunal taking into account any evidence that has not been made available to all the parties.
9. Mr Jibowu referred to his skeleton argument. The appellant's wife had started her employment in October prior to the refusal of the application on 18th October. Accordingly there was proof of the sponsor's employment at the time of the respondent's decision at the date of the hearing.
10. The judge was entitled and obliged to consider the state of affairs as of the date of the hearing and reference was made to section 85 (4) of the Nationality, Immigration and Asylum Act, 2002:

"On an appeal under section 82 (1), 83 (2) or 83A(2) against a decision the tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision."

11. It was accordingly implicit that the judge could consider evidence about any matter including evidence arising before or after the decision which had not been considered by the respondent. The judge had accordingly erred by failing to consider the evidence of the sponsor's employment in circumstances appertaining before the decision (albeit not before the respondent) and at the time of the hearing.
12. Counsel submitted that the judge had erred as she had the payslips in front of her and there was no requirement to explain the change of jobs given the free movement provisions. The appellant's wife was exercising Treaty rights.
13. In relation to the point flagged up by Judge Landes, counsel acknowledged there was no evidence that the appellant's bundle had ever been sent to the respondent. Mr Bramble confirmed that there was no bundle from the appellant in the file.
14. Mr Bramble referred to the response filed on 20 May, 2014. It was quite clear that the judge had considered the evidence as of the date of the hearing. She had made many other findings which were relevant for the just disposal of the appeal. This was an entirely new situation to the situation presented to the Secretary of State. The issues raised with the original employment were relevant. The appellant had chosen not to fully engage with the appellate system and had opted for a paper hearing. The new evidence could not be tested by the judge. There was no evidence of tax being paid or confirmation from the Inland Revenue of employment. It was not clear moreover that rule 51 (7) had been complied with and the respondent had not had an opportunity to verify the new evidence. The observation made by the judge at paragraph 15 in relation to the proxy marriage was also valid and this affected the application.
15. Having carefully considered the matter I am not satisfied that the judge erred in law in determining the appeal as she did. Reliance is placed on fresh material that was not before the respondent. The appellants bundle was sent to the Tribunal under cover of a letter dated 12 February, 2014. Despite the point being flagged up when permission to appeal was granted there is no evidence that that bundle was sent to the respondent. It is a fundamental principle reflected in the Procedure Rules that the material considered by the judge should be available to both parties.
16. The judge was entirely correct in the circumstances to observe that the situation was an entirely new one. Mr Bramble also points out that the judge did consider the new evidence but found it unsatisfactory given the history. I accept this point. The judge was also correct in stating it was for the Secretary of State to consider the new application "as that is what it essentially is".

17. The judge was moreover entitled to dismiss the appeal on that basis alone quite apart from the issue relating to the marriage itself. That was a matter which no doubt will have to be looked into when the appellant makes a fresh application based on the material which had not been made available to the respondent and had not been lodged in accordance with the procedure rules before the Tribunal.

18. For these reasons I find this challenge fails and the determination is confirmed.

Appeal dismissed

Signed

Upper Tribunal Judge Warr

4 June 2014