



IAC-FH-NL-V1

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

Appeal Numbers: IA/23953/2014
IA/23958/2014
IA/23959/2014
IA/23962/2014
IA/23967/2014
IA/23973/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 22 September 2015**

**Decision & Reasons Promulgated
On 5 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

Appellant

**ESEGBUYOTA SOLOMON UGBEYE
UFUOMA LORINE UGBEYE
EJIROGHENE ANITA UGBEYE
OGHENOVA DONALD UGBEYE
KELVIN ONORIODE UGBEYE
OMONIGHO COLLINS UGBEYE
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Ms A Fijinala, Home Office Presenting Officer

For the Respondents: Mr E Anyeng, Counsel instructed by Calices Solicitors

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State for the Home Department in respect of a determination of First-tier Tribunal Judge M R Oliver which was promulgated on 19 March 2015. The determination is extremely brief and runs merely to seven paragraphs. The determination records that the respondents are a 50 year old father and his 40 year old wife together with four children. They are all Nigerian nationals and they arrived in the United Kingdom in June 2009 with leave as Tier 1 (General) Migrants. That leave was extended until 12 March 2014.
2. On 10 March 2014 the lead applicant applied for indefinite leave to remain but subsequently withdrew his application. He applied again on 9 April 2014. That application was refused, the decision being made on 15 May 2014. The reason for the application being refused was that the applicant claimed that his previous earnings as a self-employed person were £45,393 when in reality the profits were £8,918. The applicant gave notice of appeal on 30 May 2014 and argued before the First-tier Tribunal Judge that an error had been made by his accountants. A receipt was submitted showing that the appellant had paid income tax in the sum of £7,806.78 on 23 January 2015. This additional information post-dates the decision on behalf of the Home Secretary made on 15 May. Indeed it was sent under cover of a solicitor's letter dated 16 May 2014, the day immediately after the decision.
3. The determination is not merely brief, it is also somewhat confused. In paragraph 6 the First-tier Tribunal Judge states,

“there has clearly been an innocent error on the part of the accountants. Had the drawings been properly counted as income the appellant would comfortably have satisfied the requirements of Appendix FM”.

It was accepted today by the applicants' legal representative that this reference to Appendix FM is wholly erroneous because the case had at all times proceeded under separate appendices dealing with points-based claims. Not only that but the discussion under Article 8 is extremely cursory and consists of one sentence in paragraph 3 and the summary sentence in paragraph 7.

4. The argument to justify the brevity of the discussion of Article 8 is that the matter had been dealt with by means of additional documentation put before the Tribunal. The difficulty arises because it is contended that this documentation was not admissible. Section 85A of the Nationality, Immigration and Asylum Act 2002 states under sub-paragraph (2),

“in relation to an appeal under Section 82(1) against an immigration decision of a kind specified in Section 82(2)(b) or (c) the Tribunal may consider only the circumstances appertaining at the time of the decision”

Here the circumstances appertaining at the time of the decision quite clearly meant that there would have been a nil score in relation to earnings and therefore no entitlement.

5. It is argued before me today that that evidence that the accountants made a mistake should properly have been before the First-tier Tribunal Judge. It is said that no objection was taken to the admission of this corrective evidence. Whatever stance may have been adopted by the Home Office on the earlier occasion, section 85A is very clear in its terms. The Tribunal may consider only the circumstances appertaining at the time of the decision and even if the Home Office were willing to waive that provision and concur in the admission of other evidence, there is no power in the Tribunal to give consideration to it.
6. Subsection (iv) of section 85A does provide certain exceptions to this general rule. The applicant's representative relies on sub-paragraph (c) which refers to evidence which "is adduced to prove that a document is genuine or valid". It is to strain the meaning of that phrase to apply it in circumstances such as this. The evidence did not go to the genuineness or to the validity of a document. It was instead corrective evidence designed to address and deal with what was said to have been an error by an accountant at an earlier stage. On a plain reading of section 85A(iv)(c), it cannot apply in this case and the evidence ought not to have been considered by the First-tier Tribunal Judge. It was not open to the Judge to exercise some broad jurisdiction to include evidence on the basis he may have thought it just and proper to do so, in his words, to correct "an innocent error on the part of the accountants".
7. These matters amount to a clear error of law on the face of the determination and for that reason alone it must be set aside. The reference to Appendix FM, as I have already indicated, is meaningless, and is a further ground for setting aside this determination. The discussion under Article 8 is cursory in the extreme. The only suggestion that Article 8 might be engaged is the possibility of disruption to the schooling of the children.
8. In all those circumstances, having set aside the decision of the First-tier Tribunal Judge, the question is what to do about the original decision that the Immigration Rules were not satisfied and on the evidence I have seen that remains the case. In setting aside the decision of the First-tier Tribunal Judge, I reinstate and affirm the decision reached by the Secretary of State on 15 May 2014.

Notice of Decision

The appeal is allowed.

The decision made on behalf of the Secretary of State on 15 May 2014 is reinstated.

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No anonymity direction is made.

Signed *Mark Hill QC*
Deputy Upper Tribunal Judge Hill QC

Date 5 October 2015