



**Upper Tribunal
(Immigration and Asylum Chamber)
Number: IA/10221/2015**

Appeal

THE IMMIGRATION ACTS

**Heard at Field House
On 5 January 2016**

**Decision & Reasons
Promulgated
On 20 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

**ERIYOMA IGHAVODHA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. N. Ohanugo, Moorehouse Solicitors
For the Respondent: Mr. N. Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Nixon promulgated on 3 July 2015 in which he dismissed the Appellant's appeal against the Respondent's decision to cancel her continuing leave.
2. Permission to appeal was granted as follows:

"The grounds do sufficient to raise the issue of the burden and standard of proof where the respondent relies on dishonesty on the part of the

appellant. Insofar as the judge stated that the burden lay on the appellant she arguably erred in law: see *JC (Part 9 HC395 - burden of proof) China [2007] UKAIT 00027.*"

3. At the hearing I heard submissions from both representatives, following which I reserved my decision which I set out below with reasons.

Submissions

4. Mr. Ohanugo relied on the grounds of appeal.
5. Mr. Bramble relied on the Rule 24 response. He submitted that it was a single issue. I was referred to paragraph [4] of the decision. He accepted that there had been an error in this paragraph as the burden had been incorrectly placed on the Appellant whereas, as this was a refusal under paragraph 321, the burden of proof was on the Respondent. However, he referred to paragraph [6] where the Appellant had accepted that the application was incorrect in stating that she had no immediate family members in the United Kingdom. At paragraph [13] the judge set out her findings and set out why she believed that what the Appellant claimed was an "honest mistake" was actually dishonesty. Clear reasons had been given for why she had found against the Appellant. She found that it had not been human error on the part of the agent, but that the action had been taken knowingly. Irrespective of the error, the judge had come to the correct conclusion and the decision should be upheld.
6. In response Mr. Ohanugo questioned whether the judge had understood where the burden of proof lay. He submitted that it seemed from the decision that the judge believed that the burden of proof lay on the Appellant and that this was a fundamental and material error.
7. He referred to paragraph [11]. There was no reference here to the Respondent having disclosed any material information which could show that the Appellant had been attempting to mislead. He submitted that the standard of proof was very high. The judge had relied on the Appellant to discharge the burden. In placing no weight on the evidence of the agent, it showed that the burden had been placed on the Appellant, not on the Respondent.
8. There had been no attempt by the Respondent to discharge the burden. The decision showed that the judge had not relied on any documentary evidence from the Respondent to show that the burden had been discharged. The judge had not even had the copy of the application or details of the information relating to the application process. The immigration officer had relied on oral evidence to show that the Appellant had misrepresented her position in the application, but there was no transcript of the interview carried out at Heathrow. The burden was on the Respondent but no evidence had been provided to discharge this burden.

Error of law

9. I find that there is an error of law in paragraph [4] when the judge states “the burden of proof is on the Appellant and the standard of proof required is a balance of probabilities”. Given that this is a refusal under paragraph 321, as accepted by Mr. Bramble, the burden of proof lies on the Respondent, and the standard of proof is higher than the balance of probabilities. I have carefully considered whether this error of law is material by reference to the judge’s findings which are set out at paragraphs [12] to [14], entitled “Conclusions”.
10. In paragraph [12] the judge states: “I remind myself that the burden rests on the appellant”. This is immediately prior to her findings that there has been dishonesty on the part of the Appellant [13]. There is reference in paragraph [13] to the evidence provided by the Appellant. By placing little weight on this evidence from the agent [13], the judge shows that she is placing the burden on the Appellant rather than on the Respondent.
11. There is no reference in the decision to any evidence provided by the Respondent to discharge the burden of proof. The submissions of the Respondent’s representative are contained in paragraph [11], but there is no reference to any material on which the Respondent relied. There is no reference in paragraph [2] entitled “Documents” to any evidence provided by the Respondent. Mr. Ohanugo, who also represented the Appellant in the First-tier Tribunal, submitted that the judge did not have the application before her, nor the transcript of the interview carried out at Heathrow. In paragraph [13] the judge refers to the investigation by the immigration officer, but there is no evidence of this investigation referred to in the decision.
12. Although it appears from the decision that the Appellant accepted that the application was incorrect, this alone is not enough to show that the Appellant employed dishonesty. The burden of proof lies on the Respondent to show this, and no evidence was provided by the Respondent to discharge this burden. I find that the statement in paragraph [4] that the burden of proof lies on the Appellant has infected the whole of the decision. I find that the failure to appreciate that the burden lay on the Respondent is a material error of law.

Decision

The decision involves the making of an error on a point of law and I set it aside.

The appeal is remitted to the First-tier Tribunal to be remade.

Signed

Date 15 January 2016

Deputy Upper Tribunal Judge Chamberlain