



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

Appeal Number: VA/22417/2012

THE IMMIGRATION ACTS

**Heard at Field House
On 19 June 2013**

**Determination Sent
On 28th June 2013**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

MR OLUFEMI ABAYOMI FALEBITA

Appellant

and

ENTRY CLEARANCE OFFICER - PRETORIA

Respondent

Representation:

For the Appellant: Mr Modupe Falebita, the Sponsor

For the Respondent: Mr Ouseley, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, born 30 April 195, is a citizen of Nigeria living in Botswana. He applied for entry clearance to visit his British citizen brother in the United Kingdom, Mr Modupe Falebita. This application was refused by an Entry Clearance Officer in a decision dated 23 May 2012 in the following terms:

"You state that you will visit your brother in the UK. Whilst I recognise that your sponsor proposes to bear the cost of your visit, I must take into account your own personal and economic circumstances in Botswana when coming to my decision. Whilst you have submitted evidence of company registration, there is no documentary evidence regarding the company's income. You have submitted personal bank statements and company

statements which show large deposits and I note there is no documentation to demonstrate the origin of these funds. Furthermore, you state that you are married and your wife resides with you in Botswana, however you have chosen not to submit any documentary evidence of your family circumstances. All of these factors lead me to doubt that your circumstances are as claimed and this leads me to doubt your credibility and intentions on your proposed visit. Therefore I am not satisfied that you are seeking a genuine visit or that you intend to leave the UK at the end of your visit. 41(i) and (ii).”

2. The appellant thereafter submitted lengthy grounds of appeal and a substantial amount of additional documentation to the Entry Clearance Officer. An Entry Clearance Manager reviewed these documents and responded on the 17 January 2013, stating:

“The appellant states that he is self-employed as the managing partner of Da Xiong PTY Ltd. He has submitted various documents relating to the business and I note that he is not named on any official registration documents. He has provided evidence that he is a director of a company named Sinai Holding (PTY), but this company is not mentioned on his application form and it is not clear whether he derives any income from it. Therefore, whilst I acknowledge that evidence that the business, Da Xiong PTY, is functioning has been provided, the appellant has not satisfactorily demonstrated that his role in the business is as claimed. This leads me to doubt that the appellant’s circumstances in Botswana or his intentions in the UK are as claimed.

I acknowledge that the appellant has provided evidence that his spouse resides in Botswana with him. The grounds of appeal also state that the appellant travelled to the UK in 1986. However, this was 26 years ago and I am not satisfied that this previous trip is relevant when considering the appellant’s intentions on this occasion.

Given all of the above I maintain the decision to refuse entry clearance.”

3. The appellant’s appeal came before First-tier Tribunal Judge Scott on 15 February 2013 and was dismissed in a determination promulgated on 26 March 2013. In his determination the judge observes that the respondent re-refused the appellant’s application pursuant to paragraph 320(7A) of the Immigration Rules on 4 December 2012, it having been concluded by the ECO that the appellant had submitted false documentation with his entry clearance application.
4. Much of the First-tier Tribunal’s determination thereafter concerns itself with the paragraph 320(7A) refusal, and it is ultimately concluded that the Entry Clearance Officer had made out his case under this paragraph of the Rules.
5. When coming to its conclusions the First-tier Tribunal make reference to a Document Verification Report dated 13 November 2012. It is said that this document is to be found in the Entry Clearance Officer’s bundle and that it sets out the ECO’s conclusion to the effect that a bank account, claimed

by the appellant to be held in his name at the Stanbic Bank in Harare, does not in fact exist; according to the bank.

6. By way of a decision dated 29 April 2013 Designated Immigration Judge McClure granted the appellant permission to appeal to the Upper Tribunal, stating:

“3. The documentation produced by the appellant with regard to his account commenced at page D47. From a cursory examination of the photocopies there is reference at least to the appellant’s address as Gaborone. If the document verification report does emanate from Harare then it may be arguable that the document verification report does not relate to the appellant or his account. The ECO in the refusal and the ECM in his review do not identify a document verification report relating to this application.

4. From an examination of the bundle I cannot see on file a copy of a document verification report. The determination does refer to a bank account held in Harare and indicates that the account does not exist on the bank’s system. It is arguable that the document verification report does not relate to the bank account in respect of the appellant as it is evident from the documentation he is based in Gaborone and his bank account appears to be based there as well.

5. As the document verification report is the basis upon which this matter was dismissed and was the only reason for the judge to dismiss this matter, the grounds are clearly arguable.”

7. Thus the matter came before me.

Error of Law

8. Having had opportunity to thoroughly examine the Tribunal’s file prior to the hearing of the appeal, I observed, and informed the parties, that the file did not contain a copy of a Document Verification Report, a decision of the Entry Clearance Officer dated 4 December 2012 or the First-tier Tribunal’s record of the proceedings for the hearing of 15 February 2013.

9. Mr Ouseley, thereafter, provided the tribunal with a copy of a Document Verification Report dated 16 January 2013. This report is plainly not the document referred to by the First-tier Tribunal, given its date and its contents. The report relates to an account purportedly held by ‘Da Xiong PTY Ltd’ at the Standard Chartered bank, not an account purportedly held in the appellant’s personal name at the Stanbic Bank in Harare. Further, the conclusion of the report was not that the account did not exist but rather that the Standard Chartered bank were not willing to provide any information to assist the Entry Clearance Officer.

10. Mr Ouseley confirmed that there were no other Document Verification Reports on his file. He accepted, as a consequence, that the determination of the First-tier Tribunal could not stand, it having based its conclusions on

a document which was not before it in the instant appeal and, insofar as it existed at all, did not relate to the instant appellant.

11. I entirely agree with Mr Ouseley's concession. None of the documentation before me supports the First-tier Tribunal's conclusion that the Entry Clearance Officer took a paragraph 320(7A) point against the appellant. The DVR, and the further decision of the ECO relied upon by the First-tier Tribunal, is said to pre-date the Entry Clearance Managers' decision of 17 January 2013. In such circumstances, if the First-tier Tribunal is correct in its conclusion that there was (i) a DVR in existence dated in November 2012 relating to this appellant and (ii) a decision of the ECO dated 4 December 2012 based on such DVR, it is somewhat surprising that the Entry Clearance Manager does not refer to either document in his reasoning of January 2013. It is equally surprising that Mr Ouseley has not been able to acquire a copy of either document.
12. For these reasons I conclude that the First-tier Tribunal's decision involved the making of an error on a point of law, and I set it aside in its entirety.

Re-making of the Decision

Law

13. The burden of proof, in relation to paragraph 41 of HC 395, is on the appellant and the standard of proof is to the balance of probabilities. By virtue of Sections 85 and 85A of the Nationality, Immigration and Asylum Act 2002, I am required only to take into account circumstances appertaining as at the time of the decision to refuse the appellant entry clearance. In the instant case that is 23 May 2012.
14. The requirements of the Rules in issue in the instant appeal are those found in paragraphs 41(i) and (ii) of HC 395:
 - “(i) is genuinely seeking entry as a visitor for a limited period as stated by him, not exceeding six months; and
 - (ii) intends to leave the United Kingdom at the end of the period of the visit as stated by him...”

Evidence

15. I have before me a bundle produced by the ECO and dated 29 January 2013. This bundle runs to page D67. I also have a copy of the appellant's notice of appeal to the First-tier Tribunal, which incorporates numerous attachments.
16. I have taken into account the oral evidence given by the sponsor before the First-tier Tribunal, as recorded in paragraphs 9 to 10 of the First-tier Tribunal's determination. Whilst the sponsor attended before the Upper Tribunal he was not called upon to provide further oral evidence.

Submissions

17. Mr Ouseley indicated that he had nothing to add to terms of the Entry Clearance Officer's decision, upon which he placed reliance.
18. I invited the sponsor to make submissions, however he indicated that he was content to rely upon the documentation before the tribunal.

Findings and Reasons

19. I have set out above the reasons given by the Entry Clearance Officer and the Entry Clearance Manager for refusing to grant the appellant entry clearance. At the core of the Entry Clearance Officer's conclusion is the rejection of the appellant's assertions as to his circumstances in Botswana.
20. The Entry Clearance Manager accepts that there is evidence that the appellant's spouse resides in Botswana with the appellant. Such evidence has also been placed before me and I accept the appellant's assertion that he lives with his spouse in Botswana and that his spouse is not travelling with him to the United Kingdom.
21. Despite nearly 200 pages of documentation having been placed before me neither party has produced a copy of the appellant's Visa Application Form. I observe, from the terms of the Entry Clearance Manager's review, that the appellant must have indicated in his Visa Application Form that he was the managing partner of a company called Da Xiong (PTY) Limited. It is clear that neither the Entry Clearance Officer nor the Entry Clearance Manager was of the view that there was sufficient documentation before them to demonstrate the truth of this assertion.
22. In this regard, I have before me a letter signed by a Mr Mbulawa dated 30 April 2012. He identifies himself as the director of the Divine Family Restaurant in Gaborone. The letter is on headed notepaper, with the heading indicating that the Divine Family Restaurant is the trading name for Da Xiong (PTY) Limited. This is consistent with the terms Standard Chartered bank statements I have before me, which refer to the company holding the account as "Da Xiong PTY Limited t/a Divine Family Restaurant". The letter from Mr Mbulawa asserts the appellant to be the managing partner of Da Xiong (PTY) Limited. It also purports to detail the appellant's monthly income and his percentage share of the firm's profits. A Certificate of Registration, certifying that Da Xiong (Proprietary) Limited carries on business in the name of Divine Family Restaurant is also contained within the documentation before me. This document is dated 18 September 2006 and is signed by the Acting Registrar of Business Names and stamped by the Botswana Police Service. It provides an address for the business which is consistent with the address given on other documents before me.

23. The appellant further provides a letter purportedly from the Gaborone City Council which, again, is on headed notepaper. This letter is stamped and signed by the licensing officer and purports to provide a licence to Da Xiong (PTY) Limited trading as the Divine Family Restaurant. Again, the address for the business provided on this document is consistent with the address found elsewhere in the documentation before me. A Tax Clearance Certificate has also been provided, dated 25 August 2011, relating to Da Xiong Proprietary Limited.
24. There are numerous further documents before me, including purchase orders and invoices, in the business name, all in a similar vein. Various other documents before me, such as water bills and utility bills, receipts for the payment of such bills and other invoices, identify banking details for the Divine Family Restaurant which are consistent with those found on the statements of account from the Standard Chartered bank. Significantly, a covering letter to the series of statements of account from the Standard Chartered bank identifies the appellant as being a signatory to the account held in the name of Da Xiong Proprietary Limited.
25. When assessing the weight to be attached to the documents purportedly originating from the Standard Chartered bank I take into account the contents of the Document Verification Report of 16 January 2013. It is plain that the Standard Chartered bank would not engage with the Entry Clearance Officer's verification process. This is a matter for the Standard Chartered bank and there is no suggestion on the documents before me that the appellant had any part to play in the Standard Chartered bank's actions in this regard. The statement of accounts, if reliable, support the contention that Da Xiong Proprietary Limited is a healthy going concern and has been for some considerable time.
26. The Entry Clearance Officer raises issues over large payments into the appellant's personal account, which is said to be held at the Stanbic Bank (Garborone branch). I have carefully considered the contents of the bank statements relating to this account and observe that the only unusually "large deposits" shown within the banks statements relate to deposits made as long ago as December 2010 and January 2011 i.e. approximately sixteen months before the date of decision under appeal. Given the date of these deposits I do not share the ECO's view that they should be treated as an adverse matter when ascertaining whether the appellant meets the requirements of paragraphs 41(i) and (ii) of the Immigration Rules.
27. I must weigh all of the evidence in the round, and come to my own conclusions on the issue of whether the appellant is a genuine visitor and whether he intends to leave the United Kingdom as required. Having done so, and also having taken into account all that is said in the Entry Clearance Officer's refusal decision and the Entry Clearance Manager's review, I conclude that there is nothing in the evidence before me that causes me to have any suspicions as to its reliability.

28. I find the documentary evidence as to appellant's financial and family circumstances in Botswana to be perfectly plausible and credible. The evidence is consistent in its terms, and is consistent with the appellant's own assertions.
29. Looking at the evidence as a whole, I am prepared to accept that the appellant is employed as claimed, earns the income he claims, and has the family members in Botswana as claimed. Given these facts, I am prepared to find, on the balance of probabilities, that the appellant is a genuine visitor and that he intends to leave the United Kingdom in accordance with any statement he may have made in his Visa Application Form and with the Immigration Rules.
30. Consequently, I find that the appellant meets the requirements of paragraphs 41(i) and (ii) of the Immigration Rules. The Entry Clearance Officer has raised no other issues. I accordingly allow the appellant's appeal.

Decision

For the reasons given above I find that the First-tier Tribunal's determination contains an error on a point of law such that it ought to be set aside. Upon remaking the decision I allow the appellant's appeal on the basis that the decision of the Entry Clearance Officer was not in accordance with the Immigration Rules.

Fees Award

No application has been made before me in this regard and I consequently I do not make a fees award in the appellant's favour.

Signed:



Upper Tribunal Judge O'Connor
Date 25 June 2013