IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/04024/2013
OA/04026/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 November 2014	**On 18 November 2014**

Before

THE HONOURABLE MRS JUSTICE ANDREWS DBE
DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

O.O.E
O.G.E
(ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Ms L Appiah, Counsel, instructed by Isaac Akande & Co Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a determination that was promulgated as long ago as 10 December 2013 by the First-tier Tribunal (Judge Wyman) in an appeal against a decision by the Entry Clearance Officer in January 2013 to refuse an application for a Certificate

of Entitlement to the Right of Abode. The applicants are citizens of Nigeria who at the time of the determination were twins aged just over 1 year.

2. In the determination the First-tier Tribunal made an assessment of the credibility of the sponsor, the children's alleged father, found him to be credible, found his oral evidence corresponded with the documentary evidence relied upon in support of the application, and allowed the appeal.

3. In the appeal before the First-tier Tribunal reliance was placed on a number of documents including birth certificates ostensibly issued by the Anna Marie Hospital in Lagos stating that the twins were born on 5 August 2012. Those documents had been before the Entry Clearance Officer. The Secretary of State had noted that despite the birth certificates there was no evidence that the births had been registered with the appropriate Nigerian authorities, and there was an absence of other usual documents such as health records and maternity documents which would have provided good supporting evidence of the relationship.

4. When the matter came before the First-tier Tribunal on appeal some further evidence was submitted by the sponsor including further birth certificates issued by the National Population Commission in Nigeria. The sponsor gave an explanation to the Tribunal as to why he did not obtain the birth certificates from the National Population Commission in Nigeria from the very beginning, and that explanation was accepted.

5. One of the points made on behalf of the Secretary of State at the time was the failure by the sponsor and his wife to obtain DNA certificates. That would have proved beyond doubt that the relationship of parent and child subsisted between them and the twins. Other points were also made to undermine their credibility including the very late registration of the births.

6. On the face of the determination the First-tier Tribunal Judge has clearly given reasons for the conclusion to which she came, and it was a decision that she was entitled to reach on the evidence before her having found the evidence of the sponsor to be credible. It is inherent in the decision that the Judge was satisfied that the birth certificates issued by the hospital, which were not the full birth certificates, were nevertheless genuine documents. That finding is at the heart of the determination.

7. No application for permission to appeal was made by the Secretary of State initially or within time. The next thing that happened was that, notwithstanding the successful appeal to the First-tier Tribunal, the Secretary of State refused to issue certificates of entitlement for the right of abode and required further evidence of the relationship to be provided before she did so. There was an email sent by the Secretary of State on 15 January 2014 to the sponsor explaining why she was requiring further evidence to be provided.

8. The sponsor sought permission to bring judicial review of that decision, pointing out that no challenge had been made to the authenticity of the

documents on which he relied. Permission was refused by Upper Tribunal Judge Kebede on 14 August 2014. It would appear that the application for judicial review was not renewed to an oral hearing because by then matters had moved on.

9. On 26 June 2014, several weeks before Judge Kebede considered the application for permission to bring judicial review, an application was made in this Tribunal for permission to appeal to the Upper Tribunal out of time against the determination of the First-tier Tribunal. The application was based upon fresh evidence in the form of a letter dated 23 April 2014 from the National Agency for the Prohibition of Traffic in Persons. That document, which appears to have been provided to the Secretary of State after the application for permission to bring judicial review was issued, calls into question the authenticity of the hospital certificates and it gives various cogent reasons for that. It is a document which not only raises serious doubt as to the authenticity of the birth certificates but more to the point, it raises serious grounds for concern as to whether indeed there is the claimed relationship between the appellants and their supposed parents, including the man whose oral evidence was accepted by the First-tier Tribunal.

10. Initially permission to appeal to this Tribunal out of time was refused by First-tier Tribunal Judge Kelly, who in a careful reasoned decision came to the conclusion that there was no arguable error of law in that the Tribunal based its findings upon the information that was before it at the time. However the application for permission was renewed, and in a decision dated 1 October 2014 Upper Tribunal Judge Macleman granted permission to appeal, observing that the application raised unusual questions about possible constructive legal error arising not from evidence which was before the First-tier Tribunal but from later evidence going not only to alleged mistake of fact but to alleged fraud. He thought that those questions called for full debate. Notwithstanding the six months that had elapsed between the decision under appeal and the application for permission, he considered that it was appropriate to admit the application under Rule 21(7), observing that the delay would no doubt be part of the debate before the Upper Tribunal.

11. Before us, Mr Tufan on behalf of the appellant, the Secretary of State, relied upon the decision of the Court of Appeal in the case of **Cabo Verde v Secretary of State for the Home Department [2004] EWCA Civ 1726**. The case concerned a man who had claimed and had initially been refused asylum on grounds that are not really spelled out in the judgment, but which expressed what was described as a “high degree of scepticism” about the truth of his account. He had come to this country from Belgium and was claiming asylum against return to Angola, of which he was ostensibly a citizen, and where he had allegedly suffered torture at the hands of the authorities. Less than a year after he had successfully appealed to the Immigration Appeal Tribunal against the decision to refuse him asylum, (having been found to be a credible witness), the Government received an extradition request in his name from the authorities in

Portugal claiming that he had committed a number of serious criminal offences, principally concerned with robbery or conspiracy to rob. The alleged offending took place during precisely the same period when he was alleging that he was detained and tortured in a prison in Angola.

12. In the light of that fresh information, even though the Portuguese allegations were at that stage unproven, and objection was taken to admitting the evidence on that basis, the Court of Appeal took the view that the matter should go back before the Immigration Appeal Tribunal on the basis that it had been arguably seriously misled. In paragraph 15 Lord Justice Buxton giving the main judgment in the case said:

> "I would not undervalue or diminish the importance of prompt applications to this court not least where what is sought to set aside a decision originally given in favour of the liberty of the subject. But in any discretionary determination the seriousness of the allegations that are made against Mr Cabo Verde must necessarily be weighed in the balance. If what is claimed in the Portuguese material is correct, not only is Mr Cabo Verde not somebody who should benefit from the claims that he made, but also the Immigration Appeal Tribunal in considering his case were seriously misled. We therefore turn to the question of whether this Court should remit this matter for rehearing in the light of the material from Portugal."

13. Ultimately the Court of Appeal came to the conclusion that it should. In paragraph 19 they said that the materials showed that the factual basis upon which the Tribunal proceeded was, through no fault of its own, simply wrong in that the Tribunal were unaware of the involvement of the Portuguese authorities in investigating the affairs of Mr Cabo Verde. That being so, fairness (by which the court meant fairness to a proper and rational immigration policy) clearly demanded that the whole facts of the matter should be placed before the Immigration Appeal Tribunal. Reference was made to the fact that Mr Cabo Verde would no doubt want to give further evidence before the Tribunal when the matter was remitted to it.

14. The conclusion was reached that all that had to be established for the appeal to succeed, was that relevant evidence was not before the Tribunal (paragraph 21.) Lord Justice Buxton observed: "It would be a sorry day if it were not possible now to revisit the matter in the light of the full facts and allegations as they are now known."

15. That is clear authority for the proposition that this Tribunal has the jurisdiction to remit the matter on the basis of the fresh evidence if it is satisfied that there is a sufficiently arguable case that, through no fault of its own, the First-tier Tribunal was misled, misdirected or reached a conclusion that it would not have reached if it had had the full evidence before it.

16. On behalf of the respondents Miss Appiah argued that that decision could be distinguished from the current case, on the basis that the information from Portugal in the **Cabo Verde** case could not possibly have been put before the Immigration Appeal Tribunal when it made the decision. In this case, however, she submitted that it was incumbent upon the Secretary of State at the time of the hearing before the First-tier Tribunal to bring to the Tribunal's attention any evidence that might cast any doubt upon the material relied upon by the sponsor. In particular if the Secretary of State had wished to challenge the authenticity of the documents relied on, it would have been possible to obtain the evidence from the trafficking agency much sooner. A respondent cannot sit on its hands and wait until it has lost the appeal before producing evidence challenging the authenticity of the evidence relied on by the winning party. It is notable, she submitted, that that letter of 23 April 2014 was only produced at the last minute in response, it appears, to the application for permission to bring judicial review in which the very point had been made that the determination of the First-tier Tribunal was not the subject of any appeal by the Secretary of State.

17. We see the force of those submissions, and if this were a standard **Ladd v Marshall** type situation where it is incumbent upon the appellant seeking to rely upon fresh evidence to show that they could not reasonably have provided that evidence at the date of the decision, matters might have taken a different course. But in our judgment, looking at the decision of **Cabo Verde** it is not simply a question of whether that evidence could or should have been provided at an earlier juncture. The evidence that has been produced raises a serious issue as to whether the Tribunal has been deliberately misled and the documents that it believed to be genuine are fake. A judgment that has been obtained by fraud is always susceptible to being set aside on provision of the appropriate evidence to prove it; as the decision in **Cabo Verde** demonstrates, the same principle applies to decisions of an appellate Tribunal.

18. There is a clear distinction between an ordinary case where a party is belatedly seeking to argue a point that it did not take below, or which could easily have been the subject matter of an application for permission to appeal within time, and a situation like this, where permission to appeal out of time has been granted on the exceptional basis that the fresh evidence from a reputable third party source upon which the appellant seeks to rely could make a very significant and material difference to the outcome of the case, because it tends to undermine the whole basis upon which the Tribunal accepted the veracity of the other party’s evidence.

19. We bear in mind also the very serious nature of the allegations that have been made, and that no wrongdoing has yet been established. The same was true in **Cabo Verde**. It may be that there is absolutely nothing in this, and that the case would still fall to be determined the same way in the light of the evidence that will be adduced before the First-tier Tribunal the next time round. We observe that it is still open to the alleged parents to have the DNA testing which would put the matter beyond doubt. It does

beg the question why, notwithstanding the fact that this case has been all the way to an abortive application for judicial review, and despite the lapse of time since the letter from the Trafficking Agency was first produced, that simple step still does not appear to have been taken.

20. There is credible evidence to suggest that there is at least a possibility that there is a case here of human trafficking and that the victims are vulnerable babies. We put it no higher than that, but in the light of the guidance we have from the Court of Appeal in the **Cabo Verde** case that evidence is enough to send the matter back, and to say that there is at least a real possibility that the basis on which the First-tier Tribunal proceeded was (through no fault of its own) simply wrong. In the light of the contents of that letter of 23 April 2014 and notwithstanding the very able submissions of Miss Appiah we conclude that the threshold in **Cabo Verde** has been met.

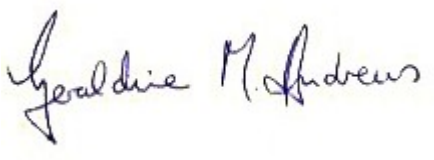
21. For those reasons, therefore, we consider that the decision made by the First-tier Tribunal should be set aside. There is constructively a material error of law in that, through no fault of its own, the First-Tier Tribunal did not have all relevant material before it on which to reach an informed decision about the veracity of the sponsor's account. We shall direct that the matter be sent back to the First-tier Tribunal for a fresh decision on the evidence, including the fresh evidence, and of course any other evidence that the appellants and their representatives see fit to put before the Tribunal.

Notice of Decision

The appeal is allowed. The matter is to be remitted to the First-tier Tribunal for a fresh determination.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.



Signed Date 16 November 2014

Mrs Justice Andrews