



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/01277/2013

**THE IMMIGRATION ACTS**

Heard at Bradford  
on 21<sup>st</sup> October 2013

Determination Promulgated  
on 28<sup>th</sup> October 2013

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ZHANGYE WU

Respondent

**Representation:**

For the Appellant: Mrs Pettersen – Senior Home Office Presenting Officer.

For the Respondent: In person.

**DETERMINATION AND REASONS**

1. On the 20<sup>th</sup> August 2013 the determination of First-tier Tribunal Judge Deavin, promulgated on 26<sup>th</sup> March 2013, in which he allowed the appeal was set aside for the reasons set out in the error of law finding and directions document dated 21<sup>st</sup> August 2013. At the Resumed hearing on the 21<sup>st</sup> October 2013 Mr Wu was advised that his appeal will be dismissed under both the Immigration Rules and Article 8 ECHR but allowed to the extent it is remitted to the Secretary of State for a lawful removal decision to be made. It was accepted by Mrs Pettersen that

the decision made contemporaneously with the refusal to vary leave pursuant to section 47 of the Immigration Asylum and Nationality Act 2006 is 'not in accordance with the law'.

## Discussion

2. Mr Wu arrived in the United Kingdom on 18<sup>th</sup> December 2003 with entry clearance as a work permit holder valid from 28<sup>th</sup> November 2003 to 28<sup>th</sup> May 2005. Further periods of leave were granted valid until 7<sup>th</sup> November 2010. On 3<sup>rd</sup> June 2010 he applied for settlement as a work permit holder which was refused by the Secretary of State, in a decision dated 21<sup>st</sup> December 2012, by reference to the provisions of paragraph 134 of the Immigration Rules and by reference to paragraph 322 (1A) as it was stated that Mr Wu provided false documents in an attempt to deceive the Secretary of State with regard to his employment as part of his application to obtain leave to remain.
3. Paragraph 322 (1A) is one of the grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom are to be refused. It is a mandatory requirement the wording of which is:

(1A) where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application.

4. Mr Wu was granted a work permit for the purposes of employment at James' Fish Bar in Colwyn Bay where he worked as a chef. In support of his continued employment in accordance with the terms of his work permit he provided a letter dated 1<sup>st</sup> June 2010 purportedly written by a Siu Tung Wan, together with a number of payslips purportedly showing continued employment at the Fish Bar for the months of March, April and May 2010. The letter is in the following terms:

To whom it may concern

RE: Mr ZhangYe WU D.O.B 01/02/1968 - Application of Indefinite Leave to Remain in the United Kingdom.

I am writing this letter to confirm that the above person is currently employed as a Chef by our restaurant.

Mr Wu has proved to be hard working, dedicated, and reliable and has successfully handled all tasks and responsibilities given to him. His performances to date are satisfactory and I have no reason to doubt that his employment will continue with our company.

Should you have any further queries, please do not hesitate to contact me.

5. The wage slips show receipt of a gross income of £1,000 per month upon which PAYE of £92.08 and national insurance of £57.57 have been deducted leaving a net pay of £850.35. However, the Secretary of State has provided a copy letter from HMRC dated 10<sup>th</sup> August 2010 stating that in relation to PAYE they have a record of employment for Mr Wu with a Mr J Wan between 2005 and 2007 at 117 Abergele Road but that there is no current employment shown on his record.
6. Additional evidence provided by the Secretary of State includes a copy of the Home Office records relating to the consideration of Mr Wu's case. These record receipt of the application dated 3<sup>rd</sup> June 2010, the request to HMRC made upon receipt in July 2010 and, as a result of the information received from HMRC, an attempt being made to contact James' Fish Bar to confirm Mr Wu's alleged employment there. The record shows that the letter from the Fish Bar contains an incorrect telephone number as the number provided as that of a private house. The case worker records that he subsequently obtained the correct telephone number and telephoned the Fish Bar, but was informed that they did not know Mr Wu. As a result of this and concerns recorded relating to Mr Wu's nominated immigration adviser the refusal decision was served to the file. The case note shows that a subsequent review, following correspondence regarding the process of the application, accepted that the decision to serve to the file rather than send a copy of the refusal to Mr Wu and/or his nominated representative was wrong, as a result of which the application was reconsidered on the basis of the law in force at the date of the application, and in relation to the current provisions of the Immigration Rules to be found in Appendix FM and 276ADE. A further refusal was issued dated 21<sup>st</sup> December 2012 which was served on 2<sup>nd</sup> January 2013.
7. In his grounds of appeal Mr Wu denies any wrong doing and repeats his claim to have worked for Mr Wan at the Fish Bar for the period claimed. He also states that in July 2010 his employer sold the business at that address and asked him to work for him at another address. He claims the employer's letter as well as the wage slips were given to him by Mr Wan and that he was working for this individual at the Fish Bar at the time he submitted his application; therefore the documents are genuine. Mr Wu maintains he was employed by this individual until his business went bankrupt around November 2011. He blames his employer for any mistakes made. He claims as a result of the delay it is not possible for him to undertake enquiries of his own to verify the situation. He claims Mr Wan has also left the United Kingdom for health reasons.
8. In A (Nigeria) v SSHD [2010] EWCA Civ 773 the Court of Appeal decided that references to "false" representations and documents in paragraph 322(1A) and by implication to 320(7A) and other similar paragraphs required an element of dishonesty, even though these paragraphs include the words "(whether or not

material to the application, and whether or not to the applicant's knowledge)". Dishonesty or deception was needed, albeit not necessarily that of the applicant himself, to render a false representation a ground for mandatory refusal.

9. Three issues arise from the documentary and oral evidence given by Mr Wu at the hearing. These are firstly that the telephone number appearing on the letter purportedly written by Mr Wan for James' Fish Bar is incorrect. Mr Wu was asked whether he had the correct number. He referred to an address book and provided a telephone number similar to that appearing on the letter but not the same. In this respect I was referred to the caseworker's records noting that the number provided on the letter is that of a private residential address and that contact was eventually established with the Fish Bar using a different telephone number. The number included on the letter is therefore false.
10. When asked why, if he was working at the Fish Bar for the period he claimed, the case worker was told by the individual he spoke to that he had no knowledge of Mr Wu, he replied that this may have been because the employer was not paying income tax on his behalf that he should have been. Two issues arise from his reply and evidence relating to this aspect of the appeal which are (i) if the information given to the case worker is correct, in that the proprietor who was spoken to by the case worker did not know Mr Wu, he could not have been working there at that time. As a result both the letter claiming he was employed at the Fish Bar in June 2010 and the wage slips supporting such alleged employment must be false, or, (ii) if Mr Wu was working at the Fish Bar the statement given on the telephone that he was not must be a false/dishonest representation. If made to hide the fact Mr Wu was employed at the Fish Bar but that income tax and national insurance that should have been lawfully paid was not been paid this proves the required element of intentional dishonesty.
11. Mr Wu was also asked why he had not provided a P60 for the year ending April 2010 for which no satisfactory answer was provided.
12. There was also a material discrepancy in relation to Mr Wu's own evidence regarding periods of employment. In his grounds of appeal he claimed to have been employed until a date in 2011 when Mr Wan's business went bankrupt. In his oral evidence he claimed that he stopped work in June 2010 and not to have worked at all after this time. No satisfactory explanation was provided for this discrepancy either.
13. Having considered the evidence I am satisfied the Secretary of State has discharged the burden of proof upon her to the required standard to show that paragraph 322 (1A) is engaged in this appeal. I find it more likely than not that Mr Wu is the person responsible for the production of false documents in relation to alleged employment at the Fish Bar at a period of time that he was not working there or had knowledge of the same. He denies this and blames a third party but as shown in the summary of the case law above, any dishonesty

does not necessarily have to be that of the appellant, and even if by the named third party such element of dishonesty has been proved. I find paragraph 322(1A) engaged. This is determinative of the appeal under the Rules which is dismissed.

14. In relation to Article 8 I find Mr Wu unable to satisfy the requirements of the current provisions of the Rules relating to private and/or family life in the United Kingdom and this element of the appeal is dismissed.
15. Mr Wu travelled to Hong Kong in 2007 and 2009 to visit his wife and two children, a boy and a girl, who are now 20 and 18 years of age respectively. It was not established that he has any family life recognised by Article 8 ECHR in the United Kingdom. I accept that he has a private life in the United Kingdom as he entered in 2003 and has worked and has friends but there was little evidence of the nature and extent of that private life, the quality of the private life, or to prove that the private life he has relating to employment and friendships could not be replicated elsewhere, and particularly in his home state. My primary finding is that it has not been established that Article 8 (1) is engaged as it has not been proved that any interference with the private life Mr Wu has developed in the United Kingdom will result in consequences sufficiently serious to engage Article 8. In the alternative, if there were elements of friendships and associations that could not be replicated, it will be my finding that the Secretary of State has discharged the burden of proof upon her to the required standard to prove that the decision is proportionate. This is in light of the lack of evidence regarding the quality of any private life, the weight given to the Secretary of State's case in light of the use of fraud/deception and the engagement of 322(1A), and the margin of appreciation available to the Secretary of State relating to the control of those permitted to enter into and remain within the borders of the United Kingdom.
16. The appeals under the Rules and Article 8 ECHR are dismissed. Only the appeal against the s47 removal direction is allowed.

### Decision

17. **The First-tier Tribunal Judge materially erred in law. I have set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed to the limited extent it is remitted to the Secretary of State for a lawful removal direction to be made**

Anonymity.

18. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) as there was no application for anonymity and the facts do not establish the need for such an order.

Fee Award.

Note: this is **not** part of the determination.

19. In the light of my decision to re-make the decision in the appeal I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The substantive element of the appeal failed. There has been the use of deception. The appeal has only been allowed on a legal technicality relating to the removal direction.

Signed.....  
Upper Tribunal Judge Hanson

Dated the 25<sup>th</sup> October 2013