



IAC-FH-AR-V1

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

Appeal Number: IA/12764/2014

THE IMMIGRATION ACTS

Heard at Field House

On 2 July 2015

Prepared 2 July 2015

**Decision &
Promulgated**

On 8 July 2015

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ANDREW OMORUYI AGBONIAHOR
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Presenting Officer

For the Respondent: Mr O Ononeme, Counsel, instructed by Moorehouse Solicitors

DECISION AND REASONS

1. The Appellant is referred to as the Secretary of State and the Respondent is referred to as the Claimant.
2. The Claimant, a national of Nigeria, date of birth 17 March 1981, appealed against the Secretary of State's decision dated 3 March 2014 to refuse to

vary leave to remain under Tier 2 PBS and to make removal directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

3. The matter came before First-tier Tribunal Judge Afako on 13 November 2014 who allowed the appeal and the Secretary of State challenged that decision.
4. On 6 May 2015 I found that there had been an error of law in that the judge's reasoning had failed to address relevant considerations and also because the issue had been raised of reliance on representations by UKBA made to the Claimant's Sponsor, Thames Water Utilities Plc (Thames Water), that the application to extend the Tier 2 PBS leave should be made on a varied basis, and it would be considered on a varied basis to reflect the circumstances of the particular Tier 2 employer. On the strength of the conversation, which at that time was not in any sense particularised, it was said that there was unfairness and/or that there was a legitimate expectation that the application would fall to be considered. At that time I gave directions to address the question of to what extent there was unequivocal understanding or representations made to Thames Water by or on behalf of the Secretary of State.
5. At the resumed hearing before me there was some excerpts of correspondence that related back to or preceded the date of the Claimant's application: Included was the Certificate for Sponsorship created by Thames Water in which they indicated the application was for a Tier 2 (General) extension. The relevant particulars are given of the Claimant's work. Essentially it was identified that the Claimant was seeking a Tier 2 extension for an existing employment, where no job role was being changed. It was clearly identified in the application form from Thames Water that no labour market test was required ("per Home Office 28.08.2013") and again emphasised that this was a Tier 2 application by a person already employed and not changing role. Produced is a copy letter to UKBA, which was put on the Thames Water files on 14 March 2014 by Miss Laura Taylor resourcing manager on behalf of Thames Water in which she recited with reference to the Claimant:

"... I would like to state the occupation code attributed to Mr Agbonlahor was corrected as per our letter of 12 March 2012. The updated code was confirmed as SOC Code 1235 which relates most closely to the area of business in which Mr Agbonlahor works. The SOC code 1235 was used for his visa which expired on 3 February 2014, this code will continue to be relevant to his employment. Therefore there is no significant change in Mr Agbonlahor's role.

Mr Agbonlahor was hired via our graduate recruitment programme, and his job title changed through the natural progression of this programme. I would also like to state in conclusion I believe the above facts to be true. Please feel free to contact me if you require any further information."

The letter was duly signed.

6. More recent correspondence which related back, in terms of factual matters, to the engagement of the Claimant by Thames Water in October 2010 as a graduate trainee, stated that

“The Thames Water graduate schemes leadership programme with the intention of fast tracking individuals into manager/leadership roles within five years. Following the eighteen months on the programme the individuals will be expected to naturally progress into positions across Thames Water, building their career through a number of different roles (please find enclosed our current graduate programme recruitment summary from Thames Water website).”

7. A later letter from Thames Water to the UKBA confirmed the earlier to UKBA was sent in March 2014 and signed by Laura Taylor (resourcing manager on behalf of Thames Water). In January 2014 a certificate of sponsorship was provided by Thames Water in relation to the Claimant’s employment. The later letter is signed by Laura Simarro, HR operations and Resourcing Manager, on behalf of Thames Water.
8. A further letter of 17 June 2015 signed by Miss Simarro stated

“I verified the following information with Theresa Davies, HR coordinator in relation to this case. On 28 August 2013 Theresa contacted the Home Office in relation to (Mr Agbonlahor) certificate of sponsorship. Theresa was advised that no labour market test was required for his Tier 2 extension. She was further advised to include the following wording on the application ‘This is a Tier 2 extension for a person already employed with us, and is not changing roles. Please find a copy of the form which was submitted’.”

Indeed as a fact in the application form before the Tribunal such words were indeed included by Thames Water.

9. It seemed to me that the chain of information was sufficient to show the following facts. First, UKBA operate a helpline for Tier 2 employers. Secondly, Thames Water through its officers made use of the helpline and were advised, as evidenced by the correspondence, about the format of the application form and what would be required for the particular application. Thirdly, Thames Water properly relied upon the UKBA advice and submitted a form which properly reflected the fact that, in the circumstances of the case, a labour market test was not needed nor any material change which required any reference through Jobcentre Plus, Jobcentre on line, Universal Job Match or indeed any other organisation. Thus, there was no need for a job vacancy reference number.
10. It is not impossible for Thames Water officers to have completely misunderstood the advice they were given: Mr Melvin argued that that may be the position. Given Thames Water, not a fly by night employer nor

with any reputation for flouting UK immigration controls, was obtaining advice and the contents of the application was not in dispute, it was unsurprising that the letter did not particularise who had been speaking to who, the time and date of the telephone call, and all those other particulars that Mr Melvin says would give you more confidence in believing that such a telephone call had been made. It did not seem likely that such mistakes or misunderstandings would occur. First, Thames Water had a real interest, as an employer of ensuring the Claimant was able to continue working for them and complete his traineeship. Secondly, the contemporary correspondence was not disputed then or since by UKBA. Thirdly, the later Thames Water correspondence was not substantively challenged by UKBA. Fourthly, the Thames Water staff, e.g. Resourcing manager or HR manager, being directly involved in employment issues were unlikely to have been left in doubt about the advice received. If they had been they would not have written as set out above. Fifthly, it does not seem credible that Thames Water would fabricate their claims about their dealings with UKBA. Sixthly, there was no positive case put by UKBA to even suggest that such advice would not be given come what may because 'the rule is the rule'.

11. I was satisfied on a balance of probabilities that the application form made by the Sponsor, Thames Water Utilities Limited, demonstrated that they had understood that the Tier 2 extension was tailored to reflect the fact it was a graduate scheme, which was always longer than the original grant of leave, for a total period of five years, and accordingly it was necessary for an extension application to address those particular circumstances.
12. Mr Melvin said, 'the Rules are the Rules', they can not be tailored to suit anyone and that it was a matter for any applicant to fit the requirements of the Rules even if any of them was not appropriate or factually necessary. As a broad statement of a position from the Home Office I quite understand his submission but in this case what occurred was that there clearly was advice given by UKBA upon which Thames Water were entitled to act and rely to deal specifically with their particular circumstances and those of the Claimant.
13. In those circumstances what appeared to me to have happened and it is certainly not a matter of criticism of any particular officer, was that the point appears to have got lost when the T2 extension application was considered. Instead, it was approached on the basis that the application was for a different job and needed to contain all the information that would normally be required for a new T2 application.
14. It seemed to me that this is not a case specifically of any legitimate expectation that the application would be permitted but rather there was a reasonable expectation that the application, made as advised, would be considered on its merits. The Secretary of State is still able to refuse the application but obviously that will require at least some rational explanation. Plainly if the Secretary of State wishes to resile from the advice given, the Claimant and Thames Water must be given notice and

the Claimant an opportunity to amend the application. I do not see how the Secretary of State can lawfully require a fresh application, when the Claimant's application was made in time.

15. I find the Secretary of State's approach in determining the matter, irrespective of how it had been put in the context, was not in accordance with the law. There was an underlying factual error about the Claimant's employment and the applicable requirements ultimately affected the validity of the Secretary of State's decision.
16. Accordingly, I am satisfied that the correct course is that the Original Tribunal's decision does not stand. The following decision is substituted.

NOTICE OF DECISION

17. The appeal of Mr Agbonlahor is allowed to the extent that the matter is returned to the Secretary of State to determine the application on the merits of the application advanced taking into account that there is no criticisms of the reliability of the Sponsor nor of Mr Agbonlahor in terms of them being a genuine employer and a genuine employee seeking to continue and complete the original course under the graduate training scheme run by Thames Water.
18. The appeal is allowed against the removal directions made.

Anonymity Order

19. No anonymity order was requested nor is one required.

Fee Award

20. The resolution of this matter has arisen through information being provided in a clear way which was not previously identifiable to the Secretary of State and in the circumstances it seemed to me a fee award was not appropriate.

Signed

Date 8 July 2015

Deputy Upper Tribunal Judge Davey