



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

Appeal Number: IA/33382/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 24th April 2015**

**Determination
Promulgated
On 6th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

**MR PAUL OLUMESE AKHIGBE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Akindele, Solicitor instructed by A & A Solicitors LLP
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria whose date of birth is recorded as 24th September 1985. On or about 11th April 2014 he made application for a Residence Card under the Immigration (European Economic Area) Regulations 2006 as confirmation of a right to reside in the United Kingdom. The basis of the application was that his wife, Patricia Lemos, a Portuguese citizen, was exercising treaty rights in the United Kingdom.

2. On 8th August 2014 a decision was made to refuse the application. In refusing the application the Secretary of State was not satisfied that it had been established that the Sponsor was exercising treaty rights as contended for. A number of issues were taken in the refusal. It had been the Appellant's case that his wife was working for a company, Montago Management Limited. The Respondent said, however, that an attempt had been made to contact that company, without success. In those circumstances it had not been possible for the Secretary of State to establish that the company was genuine. Additionally, wage slips provided were photocopies whereas the Secretary of State had made plain that only original documents would be accepted.
3. The Appellant appealed and on 19th December 2014 the appeal, which was to be dealt with as a paper appeal, came before Judge of the First-tier Tribunal Freer. The Appellant through his solicitors provided the Tribunal with various supporting documents and a witness statement purporting to be from the Sponsor. That witness statement is dated 3rd November 2014. Judge Freer noted the various documents that were placed before him and made reference to them at paragraph 9 of the Decision and Reasons. He set out the law which directed his considerations and noted what the Appellant had to say at paragraph 17, namely that electronic payslips were being used, explaining why there were no original documents and asserting also that no phone call was made to the company, though how it was established that no call had been made, I do not know. Nevertheless that was the case advanced by the Appellant.
4. Significantly, in making findings the judge said at paragraph 19:
 - “(i) The Appellant's wife has not given any oral evidence so I do not know if she is still working or if she still supports the appeal; her witness statement is dated 3 November 2014 but she has not appeared before me to verify it or to adopt it as her evidence-in-chief.”
5. The issue in relation to the phone calls was in fact resolved in the Appellant's favour and I note what the judge had to say at paragraph 21.
6. As to the veracity of the Appellant's contention that the company truly existed, at paragraph 22 of the Decision and Reasons Judge Freer said:
 - “If the company is genuine, which precursor point has not been shown, it also has to be shown that it genuinely employs the partner of the Appellant. Documents can be unreliable. In the absence of any oral evidence or any document verification report, it must be said that neither Appellant nor Respondent have done everything possible to resolve the issues. In an oral hearing I could possibly have heard evidence from co-workers of the Appellant's wife that they have not even put in witness statements; there is simply an HR Department letter, which has not been verified.”
7. Judge Freer then went on to consider the documentary evidence provided to him notably bank statements and payslips and found that they were not actually supportive of the Appellant's claim and went on to say that the documents that had been submitted, being copies, were to be given no

weight. I refer to paragraph 24 of the Decision and again at paragraph 27. Judge Freer found that there was no evidence of weight before him of any money from the company entering either of the two accounts in the name of the Sponsor. It has to be said that there was a basis for that finding from the documentary evidence but the issue is whether the judge was entitled to make the finding in isolation of other evidence.

8. Not content with the decision to refuse the application, by Notice dated 23rd January 2015 the Appellant sought permission to appeal to the Upper Tribunal. A number of grounds were relied upon but when the matter came before Judge of the First-tier Tribunal Kelly he granted permission solely in respect of the manner in which Judge Freer treated the evidence of the Appellant's wife. Thus the matter comes before me.
9. At the outset I drew the attention of the parties to the case of **Shen (paper appeals; proving dishonesty) [2014] UKUT 00236 (IAC)**. I appreciate that that case, in which I had a passing interest, was not one such as the instant case, in that in the case of **Shen** dishonesty was very much at large. Nevertheless, the case of **Shen** does assist in what a judge might properly do, or what is open to a judge to do, in circumstances where he holds significant doubts about certain aspects of the evidence. At paragraph 27 in the case of **Shen** Green J said:

“In our view if the judge entertained doubts as to the Appellant's story, he should have sought to investigate further. He could have exercised the powers that he has pursuant to Rules 45 and/or 51 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 [now Rules to be found at Rule 4 of the 2014 Rules], to require, for example, the Appellant to adduce supporting documentary evidence, or the Secretary of State for the Home Department to comment upon the Appellant's evidence and adduce such evidence as the Secretary of State for the Home Department considered appropriate to refute the Appellant's evidence. In extremis the judge could remit the matter for oral hearing. A further alternative would have been for the judge to have allowed the appeal but to have remitted the matter to the Secretary of State for the Home Department to be re-taken, this time with a proper focus upon the evidence, with the Appellant's explanations and evidence now clearly upon the table, and having regard to the dishonesty test.”

10. As I have said, I recognise that the instant appeal is not so much concerned with the issue of dishonesty in that this is not a case in which the Secretary of State bears a burden, though I have to say in reading the decision of Judge Freer it does read as if he certainly entertained some doubts about the veracity not only of the documentation, but the relationship between the Appellant and the Sponsor, for it is not otherwise explicable why he dealt with that issue at all since it was not one that was raised by the Secretary of State. Nevertheless, he recognised at paragraph 19(ii) that:

“Unless there is shown to be a divorce, provided the marriage was genuine when contracted, it is still to be treated as such, as a matter of law.”

11. Ms Isherwood valiantly sought to maintain the decision of the judge. She took me to the matters dealt with by him at paragraph 23 in particular and to the various documents to which the judge made reference. She pointed to the fact that one of the payslips suggested that there had been payment to a bank account yet the bank statement produced by the Appellant did not show a corresponding entry. There is some force in the submissions made by Ms Isherwood and it may be that notwithstanding the material error of law I find, on the re-making and re-visiting of this appeal still the Appellant will be unsuccessful but in my judgment there has been significant unfairness in the manner in which the judge approached the evidence.
12. The Appellant's wife purported to submit a statement. I deliberately make no finding as to whether that witness statement is hers. That is a matter that will have to be determined in the re-making, but if the judge was not going to accept the witness statement as hers he was obliged to give reasons. Absent any sufficient basis for rejecting it some weight, however small, was attributable to it. If a judge in receipt of witness statements in a paper appeal gives no weight to those witness statements it is difficult to see how any Appellant in a paper appeal could ever succeed. An Appellant might submit documents but one reasonably might expect a witness statement, albeit a short witness statement, to accompany the documents to explain what they are. Yet it would seem by the approach of this judge that no weight would be given to the witness statement. It follows that no weight then should be given to the documents and so in every case the Appellant would be unable to succeed.
13. In this case the Sponsor's witness statement was to the effect that she was working at Montago Management Limited and still working there. She said that she was self-employed and produced a P60 confirming earnings with that company as well as a letter from Human Resources confirming that payslips were properly issued to her. The judge was obliged to deal with that witness statement. He could not simply set it to one side and give it no weight.
14. Further there is an inconsistency in the approach of the judge because he then goes on to criticise the Appellant in the manner in which he has presented his case by not putting in witness statements from others at the company. If the judge were going to attach no weight to witness statements that were not verified by the presence of the makers of those witness statements then the criticism is of no worth. What he said was:

"In an oral hearing I could possibly have heard evidence from co-workers of the Appellant's wife that they had not even put in witness statements, there is simply an HR department letter, which has not been verified."
15. That HR department letter was another document to which it would seem the judge attached no weight.

16. This determination simply cannot stand. I have considered whether it is possible to re-make it but it seems to me it is beyond redemption. This is a case that will need to be made again.

Directions

17. Given that this judge has formed a clear view that matters cannot adequately be resolved on paper and that the documents which have thus far been submitted require further examination, and so as to ensure that this case does not fall yet again to be considered by the Upper Tribunal on the basis there has not been a full consideration of all matters, I direct in remitting this matter to the First-tier Tribunal that there shall be an oral hearing. It will be a matter of course for the Appellant whether or not he now produces for cross-examination his spouse and those co-workers. If he does not then it will be open to the Tribunal to draw such inferences as it thinks appropriate. Additionally, the Appellant has now been put on notice as to the inadequacy of the documentary evidence and it will be open to the Appellant, in the re-making to produce such evidence as is deemed necessary in order for the Appellant, upon whom the burden lies to discharge it.
18. All matters remain at large.
19. The appeal is remitted to Birmingham.
20. Portuguese interpreter is required.
21. For the purpose of listing the Appellant's solicitors shall within 21 days inform the Resident Judge at Birmingham, and the Secretary of State of the names of all witnesses to be called and in the case of none UK witnesses any applicable HO reference number or numbers.

Notice of Decision

22. The appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal is set aside. The matter is now remitted to the First-tier Tribunal to be heard by way of oral hearing, by a judge other than Judge Freer, at which hearing all matters will be at large.

Signed

Date 24th April 2015

Deputy Upper Tribunal Judge Zucker