



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

Appeal Number: IA/36989/2014

THE IMMIGRATION ACTS

Heard at Field House

On 27th May 2016

**Decision &
Promulgated
On 4th July 2016**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MS ROSEMARY TOYIN OGUNBUSOLA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Stedman, Counsel

For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria born on 18th November 1982. The Appellant first arrived in the UK on 31st October 2005 with leave to remain until 31st October 2008 subject to the condition restricting employment

and recourse to public funds. Her leave to remain was extended on two subsequent occasions until 30th July 2013. On that day a further application for leave to remain as the spouse of a person present and settled in the UK was made and that application was refused by Notice of Refusal dated 3rd September 2014.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Black sitting at Taylor House on 20th October 2015. In a decision and reasons promulgated on 27th October 2015 the Appellant's appeal was allowed under the Immigration Rules.
3. On 3rd November 2015 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. The Grounds of Appeal noted that the Appellant's application was for leave to remain as a partner under Appendix FM and that this had been refused on the basis that the Appellant's partner's immigration leave had been invalidated as a consequence of fraud. The First-tier Tribunal Judge found the Respondent had failed to discharge the burden of proving fraud as the unsigned and undated witness statement of Chief Immigration Officer Pearce was not carefully drafted and was not accompanied by a statement of truth or exhibits. It was submitted in the Grounds of Appeal that while the burden was on the Respondent to prove fraud, the burden was on the Appellant to prove that he had indefinite leave to remain. In detailed grounds it was submitted that the First-tier Tribunal Judge had erred by failing to attach any weight at all to the Secretary of State's evidence and had reversed the burden of proof to paragraph E-LTRP 1.2 of the Immigration Rules.
4. On 12th April 2016 Immigration Judge Mark Davies granted permission to appeal. Judge Davies noted that the burden of proof rests upon the Appellant to satisfy the requirements of the Immigration Rules. He noted that in this case that meant the Appellant must satisfy the judge on the balance of probabilities that her husband had indefinite leave to remain and that it was not for the Respondent to prove that fact. He accepted that it was arguable that the judge had reversed the burden of proof in this case and that there appeared to have been no evidence put before the judge that established that the Appellant had valid leave to remain.
5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. No Rule 24 response appears to have been served or filed by the Appellant's legal representatives. For the purpose of continuity throughout the appeal process the Secretary of State is referred to herein as the Respondent and Ms Ogunbusola as the Appellant. The Appellant appears by her instructed Counsel Mr Stedman. Mr Stedman is familiar with this matter, having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer Mr Wilding.

Submissions/Discussion

6. Mr Wilding relies on the Grounds of Appeal submitting that it is a question of fact as to whether or not the Appellant's husband had indefinite leave to remain and that whilst fraud was relevant to the issue of suitability, it is irrelevant to the issue of eligibility under Appendix FM. He points out there was nothing before the Tribunal to say that the Appellant's spouse had indefinite leave to remain and the judge made the mistake in that she misunderstood how the case was put. He points out this was not a classic deception case but one that the Appellant's spouse's indefinite leave to remain claim was not recognised by the Secretary of State. It is the Secretary of State's submission that the Appellant's spouse does not have indefinite leave and that there was no evidence before the Tribunal to say that he has. He points out the judge does not deal with this issue and looks at CO1 statement instead. It is consequently his contention that the judge has addressed the wrong issue which is a material error of law and he asked me to set the decision aside and to remit the matter to the First-tier Tribunal.
7. In response Mr Stedman points out that the Tribunal should be cautious with interfering with any finding of fact and points out that at paragraph 9 the judge has indicated that she understands the correct burden of proof. He notes that the judge has given six reasons set out at paragraphs 17 to 22 as to why the judge did not like the evidence of the Respondent (albeit that I note that this has to be from the Notice of Refusal as the Respondent was not represented before the First-tier Tribunal) and that she has looked at all the issues. He submits that the judge made findings on the evidence that was available to her and that save for the sentence in paragraph 9 with regard to where the burden of proof lies, the judge's decision is well balanced.
8. Mr Wilding responds by stating it is not just paragraph 9 where there has been a misdirection but from paragraph 14 onwards reference is made by the judge to the burden of proof being on the Respondent and therefore the starting point is on the wrong footing even before the judge gets to paragraph 23 where she again states that the burden rests with the Respondent. He submits that the judge has, to use his words, got the burden of proof back to front and that this is clearly material and infects the judge's findings.

The Law

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's

factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

11. The way in which the burden of proof should be approached is clearly acknowledged and accepted by both legal representatives. Any allegation of fraud, the burden of proof rests on the Secretary of State to prove. Any question of fact such as in this instance as to whether there has been a grant of indefinite leave to remain is a question of fact and the burden of proof lies on the Appellant and to produce evidence accordingly. I note that the evidence that was produced included the witness statement of Matthew Pearce which confirmed that the Home Office had never served any paperwork or letters confirming indefinite leave to remain on the Appellant's partner. And I also accept the submission that was made that whilst the First-tier Tribunal Judge accepts the reasonable explanation for the non-availability of the passport, that is irrelevant whether or not her husband actually has or has not indefinite leave to remain.
12. The issue is a narrow one. I am satisfied that the decision of the First-tier Tribunal Judge does show that she has reversed the burden of proof and that there has been no evidence put before the judge that establishes the Appellant's spouse had valid leave to remain. In such circumstances the finding of the judge must be materially flawed and the correct approach is to set aside the decision of the First-tier Tribunal Judge and to remit the matter back to the First-tier for rehearing.

Findings and Decision

- (1) The decision of the First-tier Tribunal Judge contains material errors of law and is set aside. None of the findings of fact are to stand.
- (2) The matter is remitted back to the First-tier Tribunal for rehearing at Taylor House on the first available date 28 days hence with an ELH of two hours before any judge other than Immigration Judge A M Black.

- (3) That there be leave to either party to file and serve an up-to-date bundle of evidence upon which they seek to rely at least seven days prior to the restored hearing.
- (4) I am advised by the parties that no interpreter is required. However in the event of an interpreter being required, it is the responsibility of the Appellant's representatives to advise the administration at least fourteen days prior to the hearing.

No anonymity direction is made.

Signed

Date: 4th July 2016

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date: 4th July 2016

Deputy Upper Tribunal Judge D N Harris