Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/45653/2013

THE IMMIGRATION ACTS

Heard at Bradford
On 14 May 2014

Determination Promulgated
On 3 July 2014

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

EMMANUEL UKAEGBU ONUOHA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Blundell, instructed by J Andrews Solicitors
For the Respondent: Mrs R Pettersen, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Emmanuel Ukaegbu Onuoha, was born on 24 August 1982 and is a male citizen of Nigeria. By a decision dated 17 October 2013, the appellant's application to vary his leave to remain in the United Kingdom was refused and a decision was taken to remove him under Section 47 of the Immigration, Asylum and Nationality Act 2006. The appellant appealed to the First-tier Tribunal (Judge J D L

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Edwards) which, in a determination which was promulgated on 24 February 2014, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. The appellant had applied for a variation of leave to remain in the United Kingdom as a Tier 1 (General) Migrant. His application was refused under paragraph 245 of HC 395 (as amended) and also under paragraph 322(2).

3. I find that the First-tier Tribunal erred in law such that its determination falls to be set aside. I have reached that finding for the following reasons. First, on more than one occasion in the determination, the judge has wrongly stated that the burden of proof in the appeal relating to the paragraph 322(2) refusal rested upon the appellant. It did not. The burden of proof was on the Secretary of State to prove that the appellant made false representations or had failed to disclose any material fact for the purpose of obtaining leave to enter or remain. The judge has stated at [11] that "the burden of proof in these cases rests with the appellant. The standard of proof is the civil standard of a balance of probability." Again, at [22], the judge wrote "the onus of proof in this case [he makes no distinction between the paragraph 245 and paragraph 322 refusals] rests with the appellant [and the standard of proof] is the civil standard of a balance of probability." At [26], the judge recorded that "I find that the representations submitted to the respondent by the appellant were false and that Rule 322(2) applies here…[the appellant] has not established his case and the appeal must be dismissed."

4. Secondly, I find that the judge has failed to have regard to material evidence in reaching his determination. At [18], the judge wrote:

> The respondent had cause to check [the appellant's self-assessment tax return for the years ended April 2011 and April 2012] with HMRC. From that [check] it emerged that for that tax year [2010/2011] the appellant had, in fact, declared a net profit of £6,684. The suggestion of the respondent is that the appellant amended his tax return after completing 90% of it [online] but before submission to ensure the figure contained on it matched that in his visa application.

5. At [19] the judge records the explanation given in oral testimony by the appellant for this apparent discrepancy in the evidence. However, at no point in his determination, does he refer to the extensive documentary evidence which the appellant had adduced (including a copy of the tax return itself for 2010/2011) which appears to show that the return was 100% complete when it was submitted for consideration by HMRC. There are documents from HMRC in the appellant's bundle which show that the appellant made adjustments to his business turnover figures for the year 2010/2011 some months after submitting his tax return online; the judge found (wrongly) that this adjustment had occurred whilst the tax return was 90% complete and had yet to be submitted. I find that the appellant was entitled to a proper consideration by the judge of the evidence which he had adduced. That is not to say that the judge should necessarily have accepted the appellant's explanations supported by the documentary evidence. However, I am not persuaded that the judge even considered all the relevant evidence or, if he has, he

certainly has given no or no adequate reasons for rejecting it and preferring the position adopted by the respondent.

6. I set aside the determination of the First-tier Tribunal. I set aside all the First-tier Tribunal Judge's findings of fact. Given the volume of the documentary evidence in this appeal, the fact that it may be necessary to hear oral evidence and the complete failure of the judge properly to address the case put to him by the appellant, I consider that it is appropriate for the appeal to be remitted to the First-tier Tribunal and for that Tribunal to remake the decision.

DECISION

7. The determination of the First-tier Tribunal which was promulgated on 24 February 2014 is set aside. None of the findings of fact shall stand. I remit this appeal to the First-tier Tribunal for that Tribunal to remake the decision.

Signed Date 10 June 2014

Upper Tribunal Judge Clive Lane