



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

Appeal Number: IA/28842/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 8<sup>th</sup> June 2015**

**Decision & Reasons Promulgated  
On 15<sup>th</sup> June 2015**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON  
UPPER TRIBUNAL JUDGE BLUM**

**Between**

**MR ADEYEYE OLATOKUNBO AMIGUN  
(ANONYMITY DIRECTION NOT MADE)**

**Appellant**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellant: No Appearance

For the Respondent: Miss J Isherwood, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a national of Nigeria, born in 1984 and now 31 years old. He was last admitted to the United Kingdom in February 2011 and granted leave as a Tier 1 (post-study work) Migrant valid until 12<sup>th</sup> February 2013.
2. In January 2013, the appellant made an application for a residence card pursuant to the Immigration (European Economic Area) Regulations 2006,

based on his marriage to a French national who he said was exercising Treaty rights in the United Kingdom. The marriage took place just a few weeks earlier, in December 2012, the wife stating her occupation to be 'babysitter'. His application was refused on 3<sup>rd</sup> June 2013 because the Secretary of State was not satisfied that the sponsor was exercising Treaty rights as a self-employed person. In June 2013, the appellant made a further application which was refused on 14<sup>th</sup> August 2013 for the same reason. There was no challenge to the respondent's decision on either of the 2013 applications.

3. The application which is the subject of this appeal, the third application by this appellant, was made in January 2014 and refused on 26<sup>th</sup> June 2014 refused on the single basis that the Secretary of State was not satisfied that the sponsor was a qualified person, the third time that issue had been raised on the same factual matrix.
4. In her refusal letter, the respondent accepted that the sponsor was making national insurance contributions but was not satisfied that the bank statements provided showed payments from her jobs as a babysitter and/or cleaner or that there was sufficient other evidence to support her claimed self-employment.

#### **First-tier Tribunal appeal**

5. The appellant appealed, electing for his appeal to be considered on the papers. In his notice of appeal he gave an address in Cuthbert Road. At the end of July 2014, it appears that the applicant moved to a different address, in Lincoln Road. He did not inform the First-tier Tribunal of his change of address until 2 August 2014. A handwritten letter to that effect is produced with the grounds of appeal, but there is no record, either electronically or on the Tribunal file, of the receipt of such a document.
6. On 3 September 2014 the First-tier Tribunal served on the appellant at his Cuthbert Road address, notice that his appeal was shortly to be considered by the Tribunal and that any written evidence and submissions on which he sought to rely should be received not later than 1 October 2014. The letter was returned by the postal service on 4 September 2014, endorsed "please return to sender, person named has moved out of property".
7. On 2 October 2014, the First-tier Tribunal Judge considered the appeal on the papers. Her determination was prepared on 6 October 2014. The appellant states that he telephoned the First-tier Tribunal enquiring as to the status of his appeal, on 3 October 2014, and was told that it was already before a judge. At 13:33, according to the Tribunal file, the applicant fax confirming his change of address. On any view, therefore, by 6 October 2014, when the judge finalised her determination, the Tribunal (if not the judge) was aware of the change of address.
8. In her determination the Judge indicated her surprise that the appellant had not provided any evidence from his wife's clients which might have clarified

entries in her bank account and supported her account of the income relied upon to establish the exercise of Treaty rights. The appellant's wife had not attended the hearing or provided any witness statement to support his application. She dismissed the appeal.

### **Upper Tribunal appeal**

9. In his Grounds of Appeal the appellant stated that he had not received the notice of paper consideration and asserted that, had he received the letter of 3 September 2013, further evidence of the sponsor's exercise of Treaty rights would have been produced to support his case. Permission to appeal was granted on the basis that it was arguable there may have been a procedural error resulting in an unfair hearing.
10. On 29 May 2015, notice of hearing was served on the Lincoln Road address by the Upper Tribunal sent notice of the present appeal hearing to the appellant at the updated address he gave, in Lincoln Road. The appellant neither responded nor attended the hearing. We are satisfied that he was properly served with the notice of hearing and has given no reasonable explanation for his absence. We proceeded to hear the appeal in his absence, pursuant to rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008.
11. We approach this appeal taking the appellant's account at its highest, and assuming that the letter of 2 August 2014 was sent to the First-tier Tribunal but not recorded or linked to the file. In any event, by the time the judge finalised her decision, the Upper Tribunal was on notice of the earlier change of address.
12. On that basis, applying the principles in *E & R v Secretary of State for the Home Department* [2004] EWCA Civ 49, the First-tier Tribunal was on notice that the appellant had not had an opportunity to submit further evidence. We are satisfied that there was a material error of law, as set out in *MM (unfairness; E & R) Sudan* [2014] UKUT 00105 (IAC) and that it is appropriate to set aside the First-tier Tribunal decision and proceed to remake it, pursuant to section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007.

### **Evidence before the Upper Tribunal**

13. The appellant produced a substantial bundle of documents (over 300 pages), including a number of receipts and invoices which he contends were created by the sponsor through her self-employment, together with business insurance documents relating to the sponsor's self-employment, which covered her business until September 2014, and a number of advertisements for her business, with dates in 2013 and 2014. There was evidence of a number of National Insurance payments, in relatively small amounts, and a letter from her accountants accompanied by a draft tax return, purporting to declare taxable profits of £7,342 up to 31<sup>st</sup> March 2014. There was no direct evidence from the Inland Revenue as to the sponsor's declared income and no up to date evidence

about her employment. There is still no witness statement or letter from the sponsor herself, supporting the application.

14. In submissions for the respondent, Miss Isherwood noted that there was no up-to-date evidence of the sponsor's exercise of Treaty rights. The appellant was aware that this was the crucial issue, since it had been the reason for refusal of his two previous unchallenged EEA spouse applications. Miss Isherwood referred us to the authority of *Begum (EEA - worker - jobseeker) Pakistan* [2011] UKUT 00275 in respect of what must be proved and the type of work and remuneration which can satisfy the requirements of the EEA Regulations. Miss Isherwood asked us to dismiss the appeal.

### **Discussion**

15. The appellant has not taken any further interest in this appeal, although notice of hearing has been correctly served on him at his last known address. He did not provide the evidence of his spouse's exercise of Treaty rights with the application for an EEA residence card, although he was aware how important that question had been in the two previous applications, and his spouse has not supported this application.
16. Some evidence has now been provided, but it is post-decision evidence and is not current: the most recent document is about 6 months ago. If the appellant had appeared, with his wife, to explain his circumstances, that might well have assisted the Tribunal but he has chosen not to do so.
17. The burden of showing that at the material times the EEA citizen is exercising Treaty rights is upon the appellant and we are not satisfied, on this evidence, that he has discharged it. We therefore remake the decision by dismissing the appellant's appeal.

### **Decision**

**The appellant's appeal is dismissed.**

Signed

Date 11 June 2015

Upper Tribunal Judge Blum