Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07106/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 29 July 2013	**On 7 August 2013**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

AKINWUMI OLUWALEIMU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Osifeso, Legal Representative
For the Respondent: Ms K Pal, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant who is a national of Nigeria born 31 July 1969 has been granted permission to appeal the decision of First-tier Tribunal Judge V Cox who had dismissed his appeal against the respondent's decision of 19 February 2013 refusing to issue a residence card. The Secretary of State gave as her reason that the EEA family member of the appellant had failed

to provide evidence that she was a qualified person as set out in reg.6 of the Immigration (EEA) Regulations 2006. The judge noted the concession that when the appellant made his application on 27 July 2012, his wife the EEA family member was already out of work and furthermore did not accept that his wife had started searching for alternative employment based on an absence of corroborative evidence apart from a statement.

2. The appellant had however relied on his wife having started a course in London as a student at Eden College evidenced by documentation including a letter from the college dated 16 October 2012 (D1) and a photocopy of the appellant's wife's ID card issued by the college (D2). The judge had before her a number of documents relating to the studies listed in the bundle as D1 to D19.

3. The judge was concerned that D1 did not bear the name of the appellant's wife or her address. The document at D2 was a "black page" and concluded thee was no ID document before her. After reviewing the other documentation, the judge concluded that it was not credible a student involved in attending a course for seven months would not be able to provide evidence of this directly from the college and concluded the appellant's wife was not a student so dismissed the appeal.

4. Permission to appeal was granted on the basis that the judge had only a faxed bundle and that a hard copy version had been sent. First-tier Tribunal Judge Mailer concluded:

> "It is arguable that if as asserted the posted originals were not made available before the judge she might not have been able to properly determine whether the wife had been exercising treaty rights. The appellant will be expected to demonstrate that the originals were posted and that they showed that his wife had been exercising treaty rights at the relevant time. To that extent there may have been a procedural irregularity, not referable to the judge, but the administration."

5. Before hearing submissions I observed to the parties that although the file contained a bundle of documents accompanying a letter from the appellant's advisors, Lannex Immigration and Legal Advice Services, dated 15 May 2013 (the appeal was heard on 21 May), the file did not contain the faxed documents which were referred to in the application for permission to appeal.

6. The judge does not reveal whether she had regard only to the faxed version but it is clear to me that the hard copies were received at the hearing centre on 16 May according to a stamp on the covering letter. Significantly, notwithstanding the judge's observation otherwise in her determination, the letter from Eden College of 16 October 2012 *does* refer to the appellant's wife by name (Jirina Horvathova) with a date of birth of 20 August 1980. Furthermore D2 is an enlargement of an identity card

with Ms Horvathova's photograph and confirmation of her course (NVQ level 2 in business and administration).

7. Ms Pal argued that there had been no material error of law by the judge. She appreciated that D1 included a reference to Ms Horvathova and that D2 is a reasonably clear copy. She argued however that the appellant had plenty of time within which to adduce further evidence of her attendance on the course.

8. Mr Osifeso argued that the judge had applied the wrong standard of proof but in substance he relied on the judge's treatment of the evidence to sustain his argument that there had been an error of law. He also sought to rely on a more recent letter from Eden College dated 6 June 2013 which had not been previously served on the Upper Tribunal nor the Secretary of State and in respect of which no notice had been given pursuant to Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. He accepted that the judge could not have been in error in respect of evidence that was not before her.

9. Although I had some sympathy with Ms Pal's position, I announced at the hearing that there had been procedural unfairness in that the judge had either failed to take into account the hard copies of two important documents the appellant had relied on either by oversight or because these had not been linked to the file before the determination was written up. The evidence at D1 and D2 is important and it was a clear mistake by the judge in failing to note that Ms Horvathova's name appears not only on the letter from the college of 16 October 2012 but in the identity document. This leads me to conclude that she erred in failing to correctly take into account the evidence that was before her. That error was sufficiently material to require the decision to be set aside and re-made.

10. I return now to the letter from Eden College of 6 June 2013. Mr Osifeso was unable to provide an explanation why this had not been sent earlier to the Tribunal or why there had been a failure to comply with the Procedure Rules despite the clear indication in the directions issued with the grant of permission to appeal that he should do so. Ms Pal indicated that she wanted the opportunity to contact the author of the letter at the college as a basis for her argument that the document should not be allowed into evidence. I stood the case down for her to make a telephone call. Ms Pal was unsuccessful in reaching the author of the letter, Ms Jacobson, but she had spoken to the receptionist at the college giving her the appellant's reference number and explaining why she had made the call. I proposed to stand the matter down for a further period until later in the morning by when it was hoped Ms Jacobson would reach the college. In response, Ms Pal took a constructive approach. She explained that she had looked at the college when preparing for the hearing. The letter of 6 June 2013 was well written and she had great difficulty in asking me not to attach weight to it. She was happy for the letter to be taken into evidence and furthermore noted the only issue outstanding was whether the appellant's

wife was a qualified person. Based on this new evidence she accepted that she was.

11. Without the need for further submissions I allowed the appeal. In doing so I drew the attention of the parties to *Boodhoo & Another (EEA Regs: relevant evidence)* [2013] UKUT 00346 (IAC), in particular paragraph 1 of the head note:

> "Neither Section 85A of the Nationality, Immigration and Asylum Act 2002 nor the guidance in *DR (Morocco)** [2005] UKAIT 38 regarding a previous version of Section 85(5) of that Act has any bearing on an appeal under the Immigration (European Economic Area) Regulations 2006. In such an appeal, a Tribunal has power to consider any evidence which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of decision."

12. By way of conclusion therefore I am satisfied the First-tier Tribunal Judge erred in law. I set aside her decision which I re-make and allow the appeal.

Signed

Date 6 August 2013

Upper Tribunal Judge Dawson