Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/40395/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28 July 2014	**On 12 August 2014**
Oral determination given following hearing	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MRS ABISOYE OYETAYO ONYEFUNA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No Representation
For the Respondent: Mr G Jack, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal Judge Widdup promulgated on 11 March 2014 following a hearing at Hatton Cross on 4 March 2014 in which the judge had dismissed her appeal

against the refusal by the respondent of her application for further leave to remain as a Tier 1 (General) Migrant under the points-based system. At that hearing there had been no attendance by the appellant who had originally claimed to be too ill to attend. The judge records at paragraph 11 of his determination that:

> "On the day before the hearing the appellant's solicitors faxed a letter to the Tribunal requesting an adjournment on the grounds that the appellant was ill and unable to attend the hearing."

2. The judge continues that "the letter was accompanied by a doctor's certificate stating that the appellant was not fit for work due to 'back pain under investigation'." The judge records that this application was refused by the Duty Immigration Judge on the grounds that "not fit for work does not mean cannot attend court".

3. I should record that it is noted by the judge at paragraph 12 of his determination as follows:

> "At the start of the hearing I asked [the appellant's solicitor] if he was applying for an adjournment and he said he was not. The appellant was not present and the appeal proceeded on submissions only."

4. The appellant had provided evidence in support of her application which included evidence relating to income that she claimed to have made from self-employment running a business known as African Queen. In support of this aspect of her appeal she produced a series of invoices for catering services which she said she had provided to named individuals at least two of whom were doctors. Amongst the recipients of her services was said to be a Dr Abiola.

5. The respondent wrote to Dr Abiola, who replied in very strong terms that she had no knowledge of the appellant and had had no dealings with her. The letter from the doctor is dated 20 May 2013 and states as follows:

> "I received the attached letter from your office [this is a reference to a letter from the respondent] this morning regarding the above mentioned. I DO NOT HAVE ANY DEALINGS WHATSOEVER WITH THIS INDIVIDUAL OR named BUSINESS. Any document is submitted purported to have come from me should be regarded as forged. I have never dealt with the individual neither have I had any encounter with the business either on a personal or professionally."

6. The letter was referred to by the judge in his determination and unsurprisingly the judge made adverse credibility findings based in part on this letter. As the judge remarks at paragraph 22:

> "There is no obvious reason why Dr Abiola would want to make an allegation of forgery against the appellant whom she does not appear even to know. The allegation is made in very clear terms. I find that

> it is evidence of quality and weight. It is no answer for the appellant to argue that no-one else has provided evidence of forgery."

The judge also remarks at paragraph 23 that "no attempt has been made to rebut this allegation".

7. The judge also noted that other than denying dishonesty this allegation had not been answered by the appellant, who had not attended the hearing and given her own explanation for the invoices. He commented that there was no evidence that her back condition was such that she could not attend the hearing and of course, as already noted above, the judge had recorded that there was no application made for an adjournment at the hearing but that the representative of the appellant had stated in terms that she was not applying for an adjournment.

8. In light of the judge's adverse credibility findings clearly the appellant's claim with regard to her earnings could not succeed and in any event the appeal would have had to be dismissed on the basis that she had submitted false documents in support of her application because this is what the judge found.

9. There was though another limb to the appellant's appeal which was based upon her asserted EEA rights which were founded upon her case that she had a son, Daniel, who was an Irish citizen having been born in Dublin.

10. Although the judge stated that he was not dealing with the EEA issues (at paragraph 27) nonetheless he considered the evidence on this issue which was put before him and which he found (at paragraph 27) "was totally contradicted by her own application and by Daniel's passport".

11. The judge noted at paragraph 28 that in her witness statement the appellant had first alleged that Daniel was born in Dublin, (which is, as I set out below, inconsistent with the contents of his Nigerian passport) and also had regard to her lack of credibility generally because she had not dealt with the issues concerning Dr Abiola's letter.

12. With regard to the assertion that her son was an Irish citizen the appellant relied upon a document said to be a birth certificate in respect of Daniel. Daniel did not have an Irish passport, which the appellant claimed had been lost, and as the judge records at paragraph 29:

> "No explanation was given as to why Daniel, when aged 16 months, had an Irish passport, nor why it had taken until February 2014 for the appellant to report its loss in November 2003 when the family were attacked at home by armed robbers who murdered her husband and stole household property including the Irish passport."

13. It is recorded that although it was said that attempts had been made to obtain further information in support of her EEA claims these had only

been made in February 2014 and a letter which was said to have been sent to the passport office in Dublin had not produced a response.

14. With regard to the birth certificate the judge balanced this document with the other evidence in the case and he found at paragraph 31 "that I can attach no weight to it particularly as it is contradicted by the appellant herself in her application". The judge also found

> "as a fact that the postdecision claim that the appellant is entitled to an EEA residence card is contradicted by the reference in her application form to Daniel as having been born in Lagos and by the contents of his passport."

15. At paragraph 32 he finds unsurprisingly that:

> "The appellant's credibility is therefore severely damaged both by her deceptive use of forged [documents] and by her elaborate attempt to construct a case that Daniel was an Irish citizen."

16. With regard to whether or not Daniel was an Irish citizen it is relevant that the Nigerian passports exhibited in the appellant's bundle referred to at paragraph 4 of the determination shows that on their Nigerian passports both the appellant's children are said to have been born in Lagos. This cannot be reconciled with the case put before the Tribunal that in fact Daniel had been born in Dublin.

17. The grounds of appeal contain a number of assertions. Included amongst them is that the judge did not point to evidence that the Irish birth certificate is a forgery. Having regard to the well-known decision in *Tanveer Ahmed* the judge was not required to do this. There was not a specific allegation of forgery.

18. Moreover, a judge when deciding what weight to give to a document is entitled before relying on that document to have regard to all the evidence. In light of the evidence showing that the account given by the appellant was inconsistent with the passport of the child which stated that he had been born in Lagos and taking into account also that this appellant had produced documents which suggested she had supplied services to a doctor who had denied in forceful terms even knowing her the judge was perfectly entitled not to give any weight to the document said to be an Irish birth certificate.

19. It is also suggested in the grounds that the judge's refusal to accept that the children had lost their father in tragic circumstances is unsustainable, especially as the judge's conclusion with regard to the Irish birth certificate "is not supported by law as it flies in the face of the incontrovertible evidence of the birth certificate that cannot be concluded without further evidence as a forgery". Again, it would seem that the drafter of these grounds did not have in mind the authority of *Tanveer Ahmed* which deals with cases such as the present.

20. It is also said that the judge did not consider independently and sufficiently the best interests of the children pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009 but again, in light of the judge's finding that Daniel was not an Irish citizen, there was no basis upon which he could then have gone on to find other than that the best interests of the children was to remain with their mother and that there was no reason why they could not return to Nigeria with her.

21. On behalf of the respondent in this regard Mr Jack referred me to the Tribunal decision in *Azimi-Moayed* [2013] UKUT 00197 in which the Tribunal decided that there was no need to give specific consideration to a Section 55 point in cases where no welfare arguments had been put before the Tribunal.

22. Before the hearing the appellant's solicitors had written to the Tribunal objecting to the respondent's request that the case be listed as an oral hearing and subsequently no-one attended on behalf of the appellant.

23. This appeal had been listed as an oral hearing and in those circumstances it was perfectly appropriate for the Tribunal to take account of any submissions made on behalf of the respondent whether or not the appellant chose to attend or be represented.

24. The appellant was granted permission to appeal by Upper Tribunal Judge Reeds on the basis that subsequent to the decision the appellant had put before the Tribunal a letter purporting to be from the Irish authorities that an Irish passport had been previously issued. Judge Reeds considered that in those circumstances it was arguable that in light of the decision of *MM (unfairness; E & R) Sudan* [2014] UKUT 00105

> "the judge proceeded on a mistake of fact although it is plain that it was not due to any failing on the part of the First-tier Tribunal Judge and that it may have affected the overall findings made by the judge on the evidence."

25. Having considered the decision in *MM* very carefully, in my judgment this does not support the appellant's case. In the first case the decision in that case was extremely fact-specific. The applicant in that case had asserted that she had given her solicitors instructions to send a letter to the Home Office which the Home Office claimed never to have received.

26. At the hearing in that case the judge regarded this assertion in light of the fact that no letter had apparently been received as highly relevant to credibility but subsequently it was conceded that in fact a letter had been sent but mislaid by the Home Office.

27. The Tribunal in that case had regard to the guidance which had been given by the Court of Appeal in *R & Ors (Iran)* [2005] EWCA Civ 982 in which the Court of Appeal had in the words of the Tribunal at paragraph 20 "conducted a detailed review of categories of error of law frequently

encountered" and in which Brooke LJ having considered the effect of the decision in *E & R v Home Secretary* [2004] EWCA Civ 49; QB 1044 had stated that before *E & R* could be relied upon, "it must be possible to categorise the relevant fact or evidence as 'established' in the sense that it was uncontentious and objectively verifiable". In *MM* it was.

28. It is also important to note what the Tribunal in *MM* said at paragraph 25 concerning the flexibility that this Tribunal might have in certain circumstances, which was as follows:

> "The pivotal importance of the error of fact upon which the reasoning of the judge was demonstrably based helps to explain why, **in appeals raising issues of international protection** [my emphasis], there is room for departure from an inflexible application of common law rules and principles where this is necessary to redress unfairness."

29. This appeal does not raise issues of international protection, in which a lower standard of proof is required, and it is in my judgment not arguable either that this later evidence can somehow be accepted under any general Rule that late evidence which could have been put before the court at an earlier stage must be accepted.

30. If there was evidence available that the appellant had in fact been granted an Irish passport and was an Irish citizen this evidence could and should have been obtained before the hearing. It was not and on the basis of the evidence which the judge had before him he was entirely entitled to make the findings he did.

31. I would make one other point. I do not believe that this Tribunal has even been provided with the original letter said to be from the Irish authorities. All that the Tribunal has is a copy and even this it appears was never served on the respondent, who until the hearing had not even seen it.

32. In these circumstances it cannot on any view be said that this evidence is incontrovertible. The inconsistency between on the one hand the appellant claiming that her son was born in Dublin and on the other hand the existence of a Nigerian passport which says on its face that he was born in Lagos remains.

33. In these circumstances in my judgment there is no arguable error of law in Judge Widdup's determination. His findings were entirely open to him and are adequately reasoned.

34. This appeal must accordingly be dismissed and I so find.

Decision

There being no arguable error of law in the determination of the First-tier Tribunal this appeal is dismissed.

Signed:

Upper Tribunal Judge Craig

Date:
11 August 2014