



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/05458/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 15<sup>th</sup> November 2018

Decision & Reasons Promulgated  
On 18<sup>th</sup> January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR ABIOLA OLAOLU AKINWUNMI  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: No legal representation  
For the Respondent: Miss L Kenny, (Senior HOPO)

**DECISION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge Coutts promulgated on 25<sup>th</sup> June 2015, following a hearing at Hatton Cross on 22<sup>nd</sup> May

2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

### **The Appellant**

2. The Appellant is a male, a citizen of Nigeria, and was born on 20<sup>th</sup> October 1975. He appealed against the decision of the Respondent dated 31<sup>st</sup> May 2017, refusing his application for a permanent residence card, as the husband and family member of an EEA national, namely, Ms [KH].

### **The Appellant's Claim**

3. The essence of the Appellant's claim is that the Sponsor has been exercising treaty rights for the required period through a combination of being employed, working as a receptionist for Anataliazeez Allied and Venture and BD Financial Services, and also as a domestic cleaner, on a self-employed basis. He was able to produce class 2 national insurance payment demands for the Sponsor which were receipted as paid for periods from 9<sup>th</sup> October 2011 to 30<sup>th</sup> June 2012, and 31<sup>st</sup> March 2013 to 5<sup>th</sup> October 2013. He had produced pay slips for the Sponsor for the period April 2013 to November 2013. He had also produced pay slips for the following periods: May, September, November and December 2014; and May, June, July, October and November 2015. He had furthermore produced the Sponsor's tax return for the year ending 5<sup>th</sup> April 2016 which showed her being self-employed on earnings of £8,320. In addition, he had produced a letter from HMRC confirming the receipt of the Sponsor's tax return for the period 6<sup>th</sup> April 2016 to 5<sup>th</sup> April 2017. In the circumstances he maintains that he qualifies for permanent residence.

### **The Judge's Findings**

4. The judge observed that the Sponsor had not attended court, although he would draw no adverse inference from this. Even so, if she had attended the hearing there would have been an opportunity to discuss some of the inconsistencies in the presented case. In particular there was the inconsistency in the Sponsor stating in her witness statement that she was employed as a receptionist for BD Financial Services, and the fact that there were no pay slips produced for this employer (paragraph 22). Furthermore, the latest documentation produced, namely her P60 for the year ending 5<sup>th</sup> April 2018, showed her to be working for Abbatt Property Services, but there was no mention about this employment in her witness statement or for how long it has lasted. (Paragraph 23). There was also some evidence of self-employment by the Sponsor in terms of her class 2 national insurance contributions for periods in 2011, 2012, and 2013 and the self-assessment tax return for the period for 6<sup>th</sup> April 2015 to 5<sup>th</sup> April 2016. However, there were no further details about this self-employment (paragraph 24). In addition, that as the Sponsor describes her other work as being a domestic cleaner, the tax return describes her self-employment as multi-trading (paragraph 24). In the end, however, there were only eight months' pay slips produced for the year 2013, and four months for the year 2014, and five

months for the year 2015, so that the Sponsor could not show working as a receptionist for Anataliazeez Allied and Venture (paragraph 30).

5. The appeal was dismissed.

### **Grounds of Application**

6. The grounds of application state that the judge erred as a question of fact because there was an omission (at paragraph 22) of his determination to refer to the pay slips for BD Financial Services, because these appear at pages 47 to 49 of the Appellant's bundle. Second, the judge also erred (at paragraph 23) of his determination in overlooking the fact that the Sponsor did produce a P60 for 5<sup>th</sup> April 2018, which did show her work with Abbatt Property Services. Third, the judge erred also in not taking into consideration the Appellant's child's welfare under Section 55 of the BCIA 2009, because the Appellant was in a loving relationship with his daughter as her father.
7. On 18<sup>th</sup> September 2018, permission to appeal was granted by the Tribunal on the basis that pages 47 to 49 of the Appellant's bundle do show pay slips from BD Financial Services. Moreover, paragraph 22 of the decision, refers to an inconsistency, but the Sponsor makes it clear in her witness statement that she was employed as a receptionist for BD Financial Services.

### **Submissions**

8. The Appellant appeared in person. He submitted that the judge had erred in law at paragraph 22 in stating that pay slips had not been produced for BD Financial Services when in fact they had clearly been produced at pages 47 to 49. This meant that they had not been taken into account. The failure to take them into account was a material error. In the same way, the judge questioned the fact that the Sponsor stated she worked as a domestic cleaner but her tax return stated she worked in multi-trading (paragraph 24), but her wage slips (at pages 47 to 49) were not taken into account, with a view to clarifying the situation.
9. For her part, Ms Kenny relied upon the fact that, given the totality of the evidence before the judge, and the number of unexplained gaps, which would have been failed had the Sponsor only attended to give evidence (see paragraphs 20 to 22) the judge was right to conclude as he did. It must not be forgotten that the various forms of employment by the Sponsor had not been all put to the judge in a proper way and there were inconsistencies.
10. In reply, the Appellant submitted that he was not a lawyer, and he had attended court to tell the truth, and as far as he was concerned his wife had been working, and he had provided evidence to this effect.

### Error of Law

11. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows. The Appellant was issued with a residence card on 13<sup>th</sup> October 2011, on the basis of his marriage to the Sponsor, and this was extant until 13<sup>th</sup> October 2016. There is a child of the marriage with the EU spouse who was born on 28<sup>th</sup> July 2012. When on 31<sup>st</sup> May 2017, the Appellant applied for a permanent residence card, this was refused on 25<sup>th</sup> June 2018. In the appeal before Judge Coutts, it is clear that all of the submitted evidence has not been taken into account. In particular, there is a significant error (at paragraph 22) in the judge stating that the Sponsoring wife did not produce pay slips for BD Financial Services, when these appear at pages 47, 48 and 49 of the Appellant's bundle. In the same way, such evidence as is produced, such as the P60 for year ending 5<sup>th</sup> April 2018, showing the Sponsor to be working for Abbatt Property Services, is wrongly discounted on the basis that "there is no mention about this employment in her witness statement or how long it has lasted" (paragraph 23). Given that the issue was whether the Sponsor was exercising treaty rights as claimed, the oversight of such evidence as was produced, amounts to an error of law.

### Decision

12. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Coutts and pursuant to Practice Statement 7.2(b) because the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal. I note that the Appellant, appearing in person before me, has stated in his grounds of application that this appeal should be allowed "on the basis of the near miss of the Appellant's Sponsor not producing all but some of the Sponsor's proof of exercising treaty rights", but this is the very reason why it is not appropriate to allow the appeal. It is incumbent upon the Appellant to ensure that all the evidence is properly produced before the Tribunal, and where possible for the Sponsor to attend court to explain away any discrepancies, so that the decision maker has a full picture upon which to make findings of fact.
13. This appeal is allowed.

No anonymity direction is made.

Signed

Dated

Deputy Upper Tribunal Judge Juss

17<sup>th</sup> December 2018