Asylum and Immigration Tribunal

OA (Alleged forgery; section 108 procedure) Nigeria [2007] UKAIT 00096

THE IMMIGRATION ACTS

Heard at Field House

On 11th September, 2007

Determination Promulgated

Before

The Deputy President, C M G Ockelton
Senior Immigration Judge Chalkley

Between

OA

Appellant

and

ENTRY CLEARANCE OFFICER, LAGOS

Respondent

1. *Each application on behalf of the respondent for the section 108, Nationality, Immigration and Asylum Act, 2002 procedure to be invoked must be decided on its own merits.*
2. *Immigration Judges should first consider whether it is being alleged that the document concerned is a forgery, or whether it is simply asserted that it is a document which cannot be relied upon (Tanveer Ahmed [2002] UKIAT 00439*).*
3. *Applications must be heard in camera, in the absence of the appellant and the appellant's representatives.*
4. *The Home Office Presenting Officer should be ready to identify precisely what documents the respondent contends are forged and the evidence which it is claimed relates to the detection of the forgery and which is to be the subject of the section 108 application. Explaining why disclosure of this evidence would be contrary to the public interest.*
5. *A careful note should be taken by the judge. The respondent may, if he wishes to, withdraw the allegation and in doing so withdraw the evidence relied upon.*

6. *Clear evidence will be necessary; if RP (Proof of Forgery) Nigeria [2006] UKAIT 00086 is not satisfied, then the application will fail.*
7. *If the judge grants the application, he should say so in public and clearly identify which document or documents or other evidence is the subject of the section 108 application.*

Representation:
For the Appellant: *Miss T Fajobi, the appellant's sponsor*
For the Respondent: *Mr R De Kerbrech, Home Office Presenting Officer*

DETERMINATION AND REASONS

1. This is the reconsideration of a determination of Immigration Judge Field, promulgated on 2nd May, 2007, following a hearing at Hatton Cross on 30th April, 2007, in which he dismissed the appellant's appeal against the decision of the respondent, taken on 22nd November, 2006, to refuse to grant entry clearance to the appellant as a working holidaymaker.

2. In the respondent's Notice of Decision of 22nd November, 2006, the Entry Clearance Officer was not satisfied that the appellant:

   (i) had the means to pay for his return or onward journey;
   (ii) was able and intended to maintain and accommodate himself without recourse to public funds; and
   (iii) intended to leave the United Kingdom at the end of his working holiday.

3. In a review of the Entry Clearance Officer's decision by the Entry Clearance Manager, the Entry Clearance Manager referred to 'verification reports' in respect of a bank statement from United Bank for Africa Plc (UBA) and for First Bank, produced and relied on by the appellant, in which both statements were said to contain discrepancies such that it proved that the statements were forgeries. The use of such documents was said by the Entry Clearance Officer to undermine the intentions of the appellant.

4. In his determination, Immigration Judge Field acceded to the Presenting Officer's application pursuant section 108 of the Nationality, Immigration and Asylum Act 2002, ("the Act") that disclosure of the verification report would be contrary to the public interest and should be considered by the judge in private. He investigated the allegations in private and concluded that he was satisfied that the respondent had shown that the bank statement from UBA and First Bank were not genuine.

5. On the basis of that finding, Immigration Judge Field concluded that the appellant's reliance upon those documents undermined his credibility and also his asserted intention to leave the United Kingdom at the end of his working holiday. Judge Field was not satisfied that the appellant intended

to take up employment only as an incidental part of a working holiday and was not prepared to accept the evidence of the sponsor's financial circumstances. He concluded that he could not, therefore, be satisfied that the appellant was able to maintain himself without recourse to public funds.

6. Lengthy grounds were submitted by barristers and solicitors based in Nigeria. In making the order for reconsideration, Senior Immigration Judge Gill said in her order of 13th June 2007:

> *'Paragraph 7 of the determination confirms that the Immigration Judge acceded to the request made by the Presenting Officer pursuant to section 108 of the Nationality, Immigration and Asylum Act 2002, for the Immigration Judge to investigate the forgery allegation in private.*
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> *It is arguable that this gives rise to a procedural irregularity amounting to an error of law. In reaching this decision, I rely on the following separately and cumulatively:*
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> *(a) that the record of proceedings does not appear to indicate that the Immigration Judge recorded the proceedings in private, nor is there any indication that he recorded his reasoning for reaching his finding that the bank statement was not genuine. The effect of the procedure the Immigration Judge has adopted (if upheld as permissible and not wrong in law) is that his finding is not subject to any judicial scrutiny;*
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> *(b) that the Immigration Judge may have erred in law by failing to consider whether it was necessary to exclude the sponsor who had attended on the appellant's behalf, as well as the public. Rule 54(2)(b) of the Asylum and Immigration Tribunal (Procedure) Rules 2005, gave the Immigration Judge a discretion to exclude a party or a representative. It is arguable that the discretion must be exercised judicially. The failure to consider whether the discretion should be exercised and to give reasons (to the extent one is able to do so), arguably amounts to an error of law;*
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> *(c) that it appears that the appellant was not given notice that this procedure would be invoked. It is arguable that this is important in entry clearance cases, because a sponsor may not have been "briefed" on what to say in the event of such an application. Accordingly, it may be arguable that the appellant has not had a fair opportunity to make arguments to the Immigration Judge. Although it would have been necessary for the appellant to advance his arguments in ignorance of the evidence, and arguments to be advanced on the respondent's behalf during the private investigation, this is arguably not a reason to deny him the opportunity of making his arguments nevertheless.'*

7. The sponsor appeared before us unrepresented and explained that she was the appellant's aunt. She also confirmed that she had also appeared before Immigration Judge Field.

8. Mr De Kerbrech confirmed that there had been an application under section 108 of the Act by the Presenting Officer appearing before Mr Field. The sponsor agreed and confirmed that she was asked to leave the hearing for a short while by the judge.

9. We explained, in simple terms, the effect of the provisions of section 108 to the sponsor. She confirmed that she understood. She also confirmed that the appellant had been to the United Kingdom on at least one and possibly two previous occasions.

10. We pointed out to the Presenting Officer that section 108 of the Act relates to a document which, it is alleged, is a forgery. But, having read the respondent's Notice of Decision, the Tribunal were not able to find any allegation of forgery contained within it. Mr De Kerbrech accepted that there was no allegation within the Entry Clearance Officer's Notice of Decision of 22nd November, 2007.

11. We explained to the sponsor that we first wished to hear from Mr De Kerbrech with his submissions on whether or not it is in the public interest for the verification report to be considered by us in private. We asked her to leave whilst we heard the Presenting Officer's submissions.

12. We passed a copy of the verification report to Mr De Kerbrech, having read it ourselves. We asked him why it is not in the public interest that the document should be disclosed. He agreed that there is nothing in the report that is, in itself secret, but suggested that the Entry Clearance Officer would not wish to advertise the fact that there are anomalies within the bank statements, which mean that they cannot be relied on as being genuine. We asked the Presenting Officer to note that the information being used within the verification report is information which is within the public domain; it is simply that the information is not widely known.

13. We invited the sponsor to rejoin the hearing and we explained the nature of the submissions that we had heard. We told her that we were now going to hear arguments on whether or not the documents in question were forgeries and asked her to leave us again.

14. The Presenting Officer submitted that it was implied that the documents submitted could not be relied on as being genuine, as a result of checks made by a forgery officer. On that basis the documents are, he submitted, forgeries.

15. Having examined the documents in question and carefully read the verification report, we pointed out to Mr De Kerbrech that we would be in some difficulty in saying that the documents in question should not be disclosed in the public interest and that in the absence of any expert evidence, we believed that the Immigration Judge had made a finding which was not open to him to make. He gave no reasons for his findings. And a further difficulty which appeared to us was that the judge appeared

to accept the evidence of the Forgery Officer as to Nigerian tax law, despite the fact that the Forgery Officer did not make any claims to be knowledgeable on issues of Nigerian law. We enquired whether the Entry Clearance Officer might wish to take instructions on whether the evidence in question should be withdrawn.

16. We invited the sponsor to rejoin the hearing and explained to her that as a result of submissions we have received, we had invited the Presenting Officer to take instructions.

17. We adjourned briefly to enable Mr De Kerbrech to take those instructions.

18. Following resumption of the hearing, the Presenting Officer told us that he did not, any longer, rely on the verification report and wished to withdraw it.

19. We explained the significance of this to the sponsor and told her that we would take both of the bank statements into account in deciding the appeal before us. The sponsor told us that the appellant would come to the United Kingdom to live with her, at least initially. She explained that she worked as a child protection officer with families with mental health problems for Essex County Council, earning £26,000 per annum. She lives with her partner and one child. She has two other children who are at boarding school in Uganda. Her partner is a photographer. She owns the family house in which they live.

20. The sponsor explained that she would support and maintain the appellant until he was able to obtain work. He wanted to travel within the United Kingdom and has been to the United Kingdom on, she believed, at least two previous occasions. He has stayed at her home before and has just completed university in Nigeria. He is now embarking on his National Youth Service. The sponsor confirmed that she had modest savings of some £7000.

21. We reserved our determination.

22. In the Entry Clearance Officer's Notice of Decision of 22nd November, 2006, the Entry Clearance Officer gives as his reasons, the following:

> *'You have little idea about the likely costs of travelling around the UK for the time you propose. You have been unable to describe what type of incidental employment you would seek or how you would obtain it. I am not satisfied you are genuinely seeking entry clearance to the UK in the spirit of the working holidaymaker scheme which leads me to further doubt you will ultimately leave the UK at the end of any period of leave granted to you.*
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> *You have failed to provide satisfactory evidence of your ability to maintain and accommodate in the United Kingdom the United Kingdom without recourse to public funds. Neither have you satisfied me that you have the means to pay for your return or onward journey.*

You have submitted a WEMA bank statement in your mother's name and a UBA bank statement in your name to support your application. Anomalies and inconsistencies in this document has led me to conclude on the balance of probabilities that the document cannot be relied upon as satisfactory evidence of your or your sponsor's circumstances here in Nigeria. This therefore leads me to doubt you are genuinely seeking entry to the UK as a working holidaymaker and that you will ultimately leave the UK at the end of your proposed holiday.

You have not submitted satisfactory evidence to support your claims concerning your family circumstances in Nigeria and that of your sponsor. In the absence of this information, I am unable to establish whether or not you are a genuine working holidaymaker who intends to leave the UK at the end of your visit.'

23. The Presenting Officer who appeared before Immigration Judge Field made application for an investigation into the allegation relating to the UBA bank statement to be conducted in private pursuant to section 108 of the 2002 Act.

24. Section 108 provides as follows:

> **"108. Forged documents : Proceedings in Private**:
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> (1) This section applies where it is alleged -
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> (a) that a document relied on by a party to an appeal under section 82, 83 or 83A is a forgery, and
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> (b) that a disclosure to that party of a matter relating to the detection of the forgery would be contrary to the public interest.
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> (2) The Tribunal
>
> (a) must investigate the allegation in private, and
> (b) may proceed in private so far as necessary to prevent disclosure of the matter referred to in subsection (1) (b)."

25. Rule 51 (6) and (7) of the Asylum and Immigration Tribunal (Procedure) Rules, 2005, (the Rules) provides that:

> "(6) In an appeal to which section 85(5) of the 2002 Act applies, the Tribunal must only consider evidence relating to matters which it is not prevented by that section from considering.
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> (7) Subject to section 108 of the 2002 Act, the Tribunal must not take account of any evidence that has not been made available to all the parties."

So that the Tribunal may consider only the circumstances appertaining at the time of the Respondent's decision to refuse, namely 22nd November, 2006.

And 54(4) of the Rules provides that:

> "The Tribunal may also, in exceptional circumstances, exclude any or all members of the public from any hearing or part of a hearing to ensure that publicity does not prejudice the interests of justice, but only if and to the extent that it is strictly necessary to do so."

26. Section 108(1) (b) of the Act makes it clear that the section deals with the detection of forgery. In RP (Proof of Forgery) [2006] UKIAT 00086, the Tribunal emphasised that any allegation of forgery must be proved by the person making the allegation. The standard to which the allegation must be proved is the civil standard of a balance of probabilities but, due to the seriousness of the matter in issue, it is at the upper end of the scale. Whether the document in question is proved to be a forged document will have to be decided on the evidence as presented in the case as a whole. It will not be determined solely on the basis of the evidence (if any) which shows whether the document is a forged one. Even if the allegation of forgery is not proved, this will not be the end of the matter because the appellant will still need to prove that the requirements of the rules are satisfied, on the balance of probabilities.

27. These general principles apply in cases in which the respondent invokes the section 108 procedure.

28. However the general requirements of fairness require that evidence considered by the Tribunal should be made available to both parties who should both have a proper opportunity to address the Tribunal on it. That principle is, of course, also embodied in Rule 51 (7) of the Tribunal's Procedure Rules. The procedure provided for in section 108 of the Act is a departure from a very important principle. Any such departure should not be agreed to lightly by Immigration Judges.

29. On the other hand, there is a need to ensure that the disclosure to a party of a matter relating to the detection of a forgery should not be made public if it would be contrary to the public interest to do so. It is only if the disclosure of such evidence relating to the detection of forgeries is kept private, that the respondent is likely to adduce such evidence. If, for example, the respondent is given information by informants about particular forged documents being used in a particular application, then the respondent may understandably wish to ensure that the informant's identity is not revealed and that neither is any information revealed which would lead to the informant being identified. The identity of the informant would clearly be "a matter relating to the detection of the forgery". The desirability of ensuring that:

    - informants are protected in order to protect their safety;
    - the respondent's methods of detection are protected; as well as
    - ensuring that the sources of information do not dry up;

are sufficient to satisfy the public interest element in section 108 (1) (b) of the Act. The section 108 procedure is not, of course, solely limited to the protection of identity of informants; it can relate to any "matter relating to the detection of the forgery" and it is important that this be borne in mind.

30. Immigration Judges must consider each request for the section 108 procedure to be invoked on its own merits.

31. Where an application is made under section 108 of the Act, then the Immigration Judge should explain to the appellant's representative that this means that the application will have to be heard in the absence of the appellant and the appellant's representatives. The Immigration Judge should then explain that before reaching his decision, he will bear in mind the importance of the general principle that all evidence considered by the Tribunal should be made available to both parties and that the section 108 procedure represents a departure from a very important principle. Any representations which representatives may wish to make should be heard by the Immigration Judge at this stage, although it will, understandably, be very difficult for the representative to make any meaningful representations without any knowledge of the basis of the application. The appellant's representatives should then be invited to withdraw from the hearing. The next part of the hearing should be taken in camera, on a provisional basis; at least until the Immigration Judge decides whether or not to accede to the request to involve the section 108 procedure.

32. During the proceedings which are held in camera, the Presenting Officer should be ready to identify precisely what documents the respondent contends are forged and the information or evidence which relates to the detection of the forgery which the respondent requests should be the subject of the section 108 procedure and should be withheld from the appellant and why disclosure of this matter to the appellant would be contrary to the public interest. A careful record of these proceedings should be taken by the Immigration Judge so that there can be judicial scrutiny of the process and of the Immigration Judge's decision on the application.

33. If, having heard submissions, an Immigration Judge decides to grant an application to invoke the section 108 procedure, he should say so in camera and again in public after reopening the hearing to the public. He should explain that he has decided to grant the application, because there was evidence about a matter or matters relating to the detection of forgery which it would be contrary to the public interest to disclose. The appellant should be told clearly which document or documents are the subject of the section 108 application. Immigration Judges should, at this stage, avoid reaching any concluded view as to whether the document in question is forged, because that should only be assessed after all the evidence has been given and submissions heard. It is, therefore, unlikely that an Immigration Judge would be able properly to form a view as to whether the documents are forged until after the hearing has concluded.

The parties should be invited to address the Immigration Judge in the alternative.

34. In his written determination, the Immigration Judge should clearly explain that he has been requested by the respondent to invoke the section 108 procedure. Obviously it would be undesirable for the Immigration Judge to explain in the determination the nature of the evidence relied on by the respondent and which is the subject of the section 108 procedure and his reasons for granting the application. However, in order to ensure that the judge's consideration of the issue itself is subject to judicial scrutiny, the Immigration Judge should disclose as much as he feels properly able to do in the determination.

35. It is suggested that (either as an addendum to the Record of Proceedings, or as a separate part of it, clearly headed "The respondent's section 108 application – not to be disclosed") judges should describe fully the application made, the document or documents which are alleged to be forgeries, the precise matter or matters relating to the detection of forgery which is the subject of the section 108 procedure and the reason or reasons why the disclosure of the matter or matters to the appellant would be contrary to the public interest. The Immigration Judge should also explain whether this evidence was relevant to his overall decision on the appeal and, if so, to what extent.

36. It should be remembered that in all cases there does need to be clear evidence: if the respondent cannot, or for whatever reason does not, adduce evidence which can satisfy the higher standard applicable, then an application under section 108 will fail. If a report, for example, relies on something within a document adduced on behalf of an appellant, that would need to be proved by the giving of expert evidence, then it would be wrong for the Immigration Judge to assume that the forgery expert is an expert on other matters as well, apart from the detection of forged documents.

37. Immigration Judges must take care to ensure that the strength of the evidence on which the respondent seeks to rely, and which is the subject of the section 108 procedure, is not relied on in order to decide whether to grant the application. It may be that what the respondent seeks to withhold from the appellant is of such dubious reliability that it is unlikely to be of any great value in deciding whether the document relied on by the appellant is a forgery or not, but the respondent may still wish to avoid disclosure of material or information. For example, a particular informant might be unreliable or he or she may not be in a position to give evidence as to whether a document is forged or not. The respondent may, nonetheless, still wish to conceal the identity of the informant. Not to do so would deter other informants and in such cases an Immigration Judge would be entitled to grant the application to invoke the section 108 procedure to protect the information, whilst still proceeding to determine the appeal before him on the ground that the high standard which the

respondent had to discharge, in order to prove the allegation of forgery, was not met.

38. If on the other hand, the Immigration Judge decides to refuse the application to invoke the section 108 procedure, then he should reopen the hearing to the public and announce his decision, for reasons to be given in his written determination. The appellant's representatives should then be made fully aware of the nature of the application and the basis upon which it was made before the hearing proceeds. All the material which was disclosed to the Immigration Judge during the closed session should then be disclosed to the appellant, unless the Home Office Presenting Officer seeks to withdraw his allegations (or part of them) in order to preserve the confidentiality. However, the mere fact that the material is not the subject of the section 108 procedure does not mean that it cannot be relied on by the respondent, nor does it mean that the value of the evidence is reduced. The fact that the section 108 procedure is not being used simply means that the public interest requirement in preventing disclosure is not satisfied. It does not mean anything else.

39. We have concluded that, faced with an application by the Presenting Officer, Immigration Judge Field should first have considered whether it was being alleged that the document concerned was a forgery, or whether it was simply be asserted that the document could not be relied upon (see Tanveer Ahmed [2002] UKIAT 00439*).

40. We find that Immigration Judge Field materially erred in law in finding himself satisfied, in respect of each bank statement, that the respondent had shown that the bank statement was not genuine. He did not have any expert evidence before him on which he could reach such a conclusion. He was relying on evidence from the forgery officer, who was himself purporting to give expert evidence on a matter outside his knowledge of expertise.

42. The appellant's application was under Paragraph 95 of Statement of Changes in Immigration Rules, HC 395, as amended. This provides as follows:

> "**Requirements for leave to enter as a working holidaymaker**
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> 95. The requirements to be met by a person seeking leave to enter the United Kingdom as a working holidaymaker are that he:
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> (i) is a national or citizen of a country listed in Appendix 3 of these Rules, or a British Overseas Citizen; a British Overseas Territories Citizen; or a British National (Overseas); and
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> (ii) is aged between 17 and 30 inclusive or was so aged at the date of his application for leave to enter; and
>
> (iii) (a) is unmarried and is not a civil partner, or

(b) is married to, or the civil partner of, a person who meets the requirements of this paragraph and the parties to the marriage or civil partnership intend to take a working holiday together; and

(iv) has the means to pay for his return or onward journey, and

(v) is able and intends to maintain and accommodate himself without recourse to public funds; and

(vi) is intending only to take employment incidental to a holiday, and not to engage in business, or to provide services as a professional sportsperson, and in any event not to work for more than 12 months during his stay; and

(vii) does not have dependent children any of whom are 5 years of age or over or who will reach 5 years of age before the applicant completes his working holiday; and

(viii) intends to leave the UK at the end of his working holiday: and

(ix) has not spent time in the United Kingdom on a previous working holidaymaker entry clearance; and

(x) holds a valid United Kingdom entry clearance, granted for a limited period not exceeding 2 years, for entry in this capacity."

43. The appellant's application was refused under sub-paragraphs (iv), (v) and (viii) of paragraph 95 of Statement of Changes in Immigration Rules, HC 395, as amended. However, when one takes into account the fact that the appellant has visited the United Kingdom on two occasions previously and there is no suggestion that he failed to comply with the requirements of his visa on those two occasions and that at the date of the Entry Clearance Officer's decision, the appellant had in his UBA account a balance of 292,162.58 Nigerian Naira, in addition to the sum of 2,014,345.92 Naira in his Wema Bank account, then it is clear that, with the sponsor providing accommodation for the sponsor on his arrival, he does meet all of the requirements of Paragraph 95.

44. For the reasons we have set out above, **we find that Immigration Judge Field did materially err in law in his determination** and we substitute our decision for his: this appeal is allowed.

Decision

This appeal is allowed

Senior Immigration Judge Chalkley