Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42699/2013
IA/42702/2013
IA/42704/2013

THE IMMIGRATION ACTS

Heard at Stoke	**Determination Promulgated**
on 17th December 2014	**On 17th December 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

GODWIN ARIKIBE
CHINYERE ARIKIBE
CHINONSO CHUKWUEMEKA ARIKIBE
(Anonymity direction not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No attendance
For the Respondent: Miss C Johnstone – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge V A Osborne promulgated on 30th January 2014, following

a hearing at Stoke on 9th January 2014, in which she dismissed the appellants' appeals under both the Immigration Rules and on Article 8 grounds.

Background

2. The appellants are a family group all of whom are citizens of Nigeria. The first appellant father was born on 5 October 1959, the second appellant his wife on 22 July 1961 and their son, the third appellant, on 11 April 1995.

3. On 19th August 2013 the first appellant submitted an application for leave to remain in the United Kingdom as a Tier 2 Migrant under the Points-Based System. He had previously been granted leave to enter in 2006 as a student. That leave was extended on three separate occasions, the last period of which expired on 30th August 2013.

4. The application was considered by the respondent who wrote to the applicant querying the code appearing on the certificate of sponsorship and asking whether the code provided, 3543, was correct. Judge Osborne notes and when no reply was received the query was repeated a week later after which the sponsor replied confirming that the code to be relied upon was that stated as a result of which the application was refused on the basis that the prospective employment most closely corresponds with occupation code 3541. It is accepted that that in itself is a typographical error which should have read 3543.

5. The respondent stated the occupation code relied upon is not listed in the list of NVQ level 6 occupations, as stated in the Code of Practice, and that the skills for the job the first appellant is being sponsored for should be at least NVQ 6 level.

6. Having considered the evidence provided the Judge found that the appropriate code against which the application should have been assessed was 1132- which is in accordance with the job description as a Marketing Director and which is at NVQ level 6, which accords with the first appellant's qualifications as having obtained an MBA. The first appellant also indicates that he had moved on to study for a PhD although the Judge was not satisfied he had made it clear in his application form that it was his intention to continue work on his PhD at the same time as working for his sponsor. It was also accepted that the first appellant's primary consideration is to be in a position to earn money to support his family.

7. The appellant sought permission to appeal which was granted by the First-tier Tribunal on 4th April 2014. The matter was listed

for hearing before Upper Tribunal Judge Chalkley on 19 September 2014. On 22 September 2014 Judge Chalkley issued a document described as a 'Notice of Withdrawal'. Judge Chalkley noted the procedural history and records that at the hearing he drew the Presenting Officers attention to the fact the refusal notice appeared to refer to the wrong classification under the Occupational Codes of Practice which was accepted. The Presenting Officer sought to withdraw the decision for which leave was granted. Judge Chalkley then stated: "That decision operates as a withdrawal of the Secretary of State's case before the Upper Tribunal and the First-tier Tribunal, pursuant to rules 17 of the Upper Tribunal and First-tier Tribunal Procedure Rules respectively". Judge Chalkley then found that consequently there was no longer an outstanding appeal before either tribunal.

8. That finding was subsequently set aside by Judge Chalkley in late October 2014 by reference to SM (withdrawal of appealed decision: effect) Pakistan [2014] UKUT 00064 followed by a direction that the matter be listed for further hearing which comes before me today.

Discussion

9. All three appellants have attended. They have a nominated legal adviser who did not attend and during the course of the hearing the first appellant referred on more than one occasion to the fact he did not have a lawyer present. Whilst I appreciate that he is not himself a lawyer and that there was not a lawyer there to speak to or to assist or advise him, there is no specific adjournment application to permit legal representation and nor has it been established that without legal representation the appellants will not receive a fair hearing.

10. An earlier application for an adjournment was refused by the Upper Tribunal. This was based upon pending judicial review proceedings issued by the appellant challenging the decision of the Upper Tribunal to refuse to adjourn today's hearing and transfer the case to Taylor House in London. That application is potentially flawed as the Upper Tribunal do not sit at Taylor House. Today the first appellant indicated he has written to the High Court seeking to amend his grounds to substitute the reference to Taylor House to that of Field House where the Upper Tribunal sits in London. As indicated to the first appellant in court it is not appropriate for me to make a comment upon the judicial review application as the respondent is the Upper Tribunal of which I am a salaried judge, although the fact he attended with his family before the Upper Tribunal in Stoke and in light of the fact the matter has been appropriately disposed

off today may indicate that there is little merit in his continuing with the judicial review proceedings. That is a matter for him.

11. Many people appear before tribunals without legal representation and it is an established principle of English and Welsh law that ignorance of the law is no defence. When the appellant mentioned lack of representation he was asked whether he had paid for such representation or for a lawyer to attend. The question had to be repeated on five separate occasions with the request that the first appellant gives either a yes or no answer which he failed to give. It can only be assumed in the absence of an assertion a lawyer had been paid or there was a legitimate expectation that one would attend that in fact no payment has been made for his lawyer to attend or for a local representatives such as an agent solicitor or barrister to represent him before this tribunal. Although the first appellant stated that this particular point was not the issue, the fact of the matter is that if he has not taken steps to secure the attendance of his lawyer he cannot complain that there is no lawyer there to assist him, whatever his own level of legal knowledge.

12. It is not in issue that the decision made by the Secretary of State is flawed. Judge Osborne in her determination referred to the nature of the error in that the wrong code had been considered but failed to determine the matter by reference to the correct code or to find that as the incorrect code had been considered by the Secretary of State the decision might be one that was 'not in accordance with the law' which needed to be remitted to the Secretary of State for a lawful decision to be made. Such material legal error in the determination of Judge Osborne was conceded before the Upper Tribunal by Miss Johnstone. I accordingly set the determination aside.

13. Miss Johnstone was asked whether she is instructed to withdraw the decision in accordance with Mr Harrison's indication before Judge Chalkley which she indicated she was. Had the decision not been withdrawn I would have substituted a decision allowing the appeal to the limited extent it was remitted to the Secretary of State for a lawful decision to be made. Permission was, however, granted to Miss Johnstone to withdraw the decision as a result of which there is no extant immigration decision before the Upper Tribunal against which the appellants can appeal and a upon which a decision can be made. I have had regard to the guidance provided by the Upper Tribunal in **SM (withdrawal of appealed decision: effect) Pakistan [2014] UKUT 00064 (IAC)** in relation to this matter.

14. The effect of the decision made is that application remains outstanding upon which a lawful decision is awaited. The first

appellant referred to the impact upon him and his family of the delay to date and the situation that has arisen, which Miss Johnstone noted. The tribunal hope that a lawful decision is made at the first available opportunity. If the decision is to grant leave that will resolve the matter but if to refuse leave the appellants will have a further right of appeal to the First-tier Tribunal.

Decision

15. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. Following the grant of permission to the Secretary of State to withdraw the immigration decision which is the subject of this appeal there is no longer an extant decision before the Upper Tribunal upon which a substantive decision can be made.**

Anonymity.

16. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed…….
Upper Tribunal Judge Hanson

Dated the 17th December 2014