



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA076162015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 26<sup>th</sup> April 2016**

**Decision & Reasons  
Promulgated  
On 9<sup>th</sup> June 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS**

**Between**

**MR GOZIE OKEBAE  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Miss S Pararajasingam, Counsel

For the Respondent: Mr S Walker, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Nigeria born on 26<sup>th</sup> November 1971. On 1<sup>st</sup> March 2015 the immigration office at Terminal 3 Heathrow Airport refused the Appellant leave to enter the United Kingdom and therefore cancelled his continuing leave which had been issued on 16<sup>th</sup> May 2013. The reason for refusal was that the Immigration Officer was satisfied that Nigerian re-

entry stamps had been obtained in an attempt to create a false travel history in and out of Nigeria disguising the true length of the Appellant's stay and that as a result the Immigration Officer was satisfied that the situation described represented a significant change in the Appellant's circumstances since the issue of the visa on which he relied for admission.

2. A formal notice was served on the Appellant on 5<sup>th</sup> April 2015. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Oliver sitting at Richmond on 24<sup>th</sup> September 2015. In a very short decision the Appellant's appeal was allowed under the Immigration Rules in a decision and reasons promulgated on 2<sup>nd</sup> October 2015.
3. The Secretary of State lodged Grounds of Appeal on 2<sup>nd</sup> October 2015. Permission was refused by First-tier Tribunal Judge Robertson on 15<sup>th</sup> February 2016. Renewed Grounds of Appeal were lodged on 25<sup>th</sup> February 2016. Those grounds contended that the First-tier Tribunal Judge had erred in law at paragraph 5 of his determination by stating that the evidence from Virgin Atlantic was an anonymous email. They noted that it was clear from the Respondent's appeal bundle that in fact the email was not anonymous and that it was submitted that the First-tier Tribunal Judge had consequently materially erred in law by not considering the evidence which was clearly attached to the Respondent's bundle appropriately. Secondly it was further reiterated that the judge had failed to allow the Presenting Officer to make any submissions. The Presenting Officer's minute was attached. It was therefore submitted that the judge's conclusions were unsafe and the decision needed to be remade.
4. The Upper Tribunal granted permission to appeal on 3<sup>rd</sup> March 2016. In giving reasons the judge noted that the Respondent had submitted a note from the Home Office Presenting Officer who appeared before First-tier Tribunal Judge Oliver stating that the appeal was allowed without him having an opportunity to make submissions. Although the Appellant was present he had not given evidence and there were clearly significant matters in issue between the parties concerning which the Respondent was entitled to advance submissions. The judge contended that if it was established that the Respondent's representative wished to make submissions but was not permitted to do so then that arguably constituted a procedural irregularity giving rise to unfairness such as to amount to an error of law. No Rule 24 response has been filed. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by his instructed Counsel, Miss Pararajasingam. Miss Pararajasingam is familiar with this matter having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer, Mr Walker.
5. In addition I am greatly assisted by the production of two documents. Firstly, a note from the Home Office Presenting Officer before the First-tier Tribunal and secondly, a memorandum served on 14<sup>th</sup> March 2016 from the Appellant's representatives.

## Submission/Discussion

6. Mr Walker takes me to two documents being emails from Virgin Atlantic which he submits show clearly that the exchange from Virgin Atlantic regarding the flights taken by the Appellant are clearly not anonymous and that they reflect different dates for the flights to those stamped in the Appellant's passport. Further Miss Pararajasingam acknowledges that she was present before the First-tier Tribunal. She does not entirely agree the minute that is produced but quite properly and understandably is reluctant to give evidence in the case in which she is appearing. She takes me to the minute respectfully submitting that the Respondent's representatives were not precluded from making submissions and that the basis of a procedural irregularity was inaccurate. To the contrary they contend the representative was required by the First-tier Tribunal Judge to make submissions on issues in support of the serious allegation of forgery in response of which the Home Office Presenting Officer admitted to being unable to assist the Tribunal. The issue she contends upon which the Home Office Presenting Officer was invited to make submissions by Judge Oliver were detailed at paragraph 5 of his determination and that the Presenting Officer had further confirmed that the two disputed entry stamps have not been submitted to an expert for testing to discover evidence of forgery. Therefore, in the absence of any expert evidence, a serious allegation of fraud was made against the Appellant following which he was refused entry and then detained for some two weeks.
7. It was on this basis she contends that Judge Oliver ruled that he was not going to allow the Home Office to seek further instructions. In precluding the Presenting Officer from seeking such further instructions, she contends that the judge explained his position and he felt that it would be unjust to the Appellant, particularly when the Appellant had been detained for some two weeks on the strength of the extremely serious allegation and secondly, since despite months having elapsed the Respondent still attended the hearing without satisfactory evidence to hand. Miss Pararajasingam relies on the authority of *RP (Nigeria) [2006] UKIAT 86* in support of her submission that the standard of fraud had not been met. She asked me to find that there is no material error of law.
8. Mr Walker in response submits that the difficulty with this is that does not concur with the minute produced by the Home Office Presenting Officer and that the documentation on the Secretary of State's file addresses the issue of the evidence regarding the stamps on the Appellant's passport which were before the First-tier Tribunal Judge and then when looked at, as they should have been properly against the non-anonymous documents from Virgin Atlantic, it shows that there is conflicting evidence regarding the facts and the stamps in the passport which the Home Office were not given the opportunity to investigate. On such basis he submits that there is procedural unfairness to the Secretary of State and that the decision of the First-tier Judge should be set aside and the matter remitted back for rehearing.

## The Law

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

## Findings

11. There are two quite specific issues relating to this matter. The first relates to whether or not the email from Virgin Atlantic was anonymous or not. The fact remains that although considered anonymous it clearly was not an anonymous document. That in itself would not create a material error of law. However when looked at in the round, alongside other issues in this matter, it is a factor that needs to be considered because it was instrumental in part seemingly in the decision of the First-tier Tribunal Judge.
12. Secondly, and perhaps more importantly, is the issue relating to potential procedural unfairness due to the allegation made that the Secretary of State was not granted the opportunity to make submissions. Despite her attempts to the contrary to contend that she is not giving evidence that exactly is what Miss Pararajasingam has done both by virtue of her additional statement and the submission she has made. I accept she is in a position of some difficulty because after all she was the legal representative present but it does seem clear that there is an acceptance, albeit quite possibly for different reasons, that the judge curtailed the evidence without giving the Secretary of State the opportunity to make submissions. To a certain extent that is shown by the length of the

decision and by the comment expressed in the final sentence of the judge's decision which whilst not constituting a material error of law, is clearly an inappropriate step for an Immigration Judge to make.

13. In such circumstances I find that when all issues are looked at together the judge has not addressed his mind fully to the relevant factors that were extant before him and that there has been procedural unfairness to the Secretary of State in the failure to allow her representative to make proper submissions. That has to create a material error of law and which would make the findings of the First-tier Tribunal Judge unsafe. It is not ultimately to say that the outcome will be different but clearly the matter should be progressed and addressed without any form of procedural unfairness.
14. In such circumstances the correct decision and approach is to find a material error of law and to set aside the decision of the First-tier Tribunal Judge with none of the findings of fact to stand and the matter be remitted to the First-tier Tribunal for rehearing.

### **Decision and Directions**

- (1) The decision of the First-tier Tribunal Judge contains a material error of law and is set aside.
- (2) None of the findings of fact are to stand.
- (3) The matter is remitted to the First-tier Tribunal sitting at Hatton Cross or Richmond on the first available date 28 days hence with an ELH of two hours.
- (4) That the remitted hearing is to be before any First-tier Tribunal Judge other than Immigration Judge Oliver.
- (5) That there be leave to either party to file an updated bundle of evidence upon which they seek to rely at least seven days pre-hearing.
- (6) That in the event of the Appellant requiring an interpreter his legal representatives do notify the Tribunal service at least fourteen days pre-hearing.

No anonymity direction is made.

Signed

Date 3<sup>rd</sup> June 2016

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT  
FEE AWARD**

No application is made for a fee award and none is made

Signed

Date 3<sup>rd</sup> June 2016

Deputy Upper Tribunal Judge D N Harris