Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33569/2014

THE IMMIGRATION ACTS

Heard at Bradford **Decision & Reasons Promulgated**
On 26 November 2015 **On 4 January 2016**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

MR IYALLA JASON PETERSIDE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Mrs R Pettersen (Home Office Presenting Officer

DECISION AND REASONS

1. This is the Appellant's appeal to the Upper Tribunal, brought with permission, against a decision of the First-tier Tribunal (Judge Clough) promulgated on 23rd March 2015, dismissing his appeal against the Secretary of State's decision of 6th August 2014 refusing to vary leave to remain as a spouse and deciding to remove him from the UK.

2. By way of background, the Appellant is a national of Nigeria who was born on 10th July 1982. He came to the UK on 23rd September 2011 as a Tier 4 (General) Student Migrant. He subsequently claimed to have married a British national and, on that

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basis, sought variation of leave. The Secretary of State, however, refused the application on the basis that he did not meet the financial requirements as contained in Appendix FM, did not meet the exceptions contained in paragraph EX.1 to Appendix FM, did not meet the requirements of paragraph 276ADE of the Immigration Rules and was not able to benefit from Article 8 of the European Convention on Human Rights (ECHR) outside the Rules. There was, though, it is important to note, nothing in the Secretary of State's quite detailed reasons for refusal letter which suggested that the genuineness of the claimed relationship with his UK-based wife was in issue.

3. The Appellant submitted very detailed Grounds of Appeal containing arguments regarding the adequacy of the documentation he had submitted and the adequacy of his level of income and savings. Perhaps surprisingly, in the context of a case based upon marriage, he sought a papers determination of his appeal.

4. Judge Clough noted that the Appellant had elected to have his appeal considered on the papers and said that she was;

> "satisfied there was sufficient information to allow me to decide the matter".

5. She then went on to find that she could not be satisfied, on the material before her, that the marriage "still subsists". She added that she had no information from the Appellant's wife to show that the marriage was subsisting "at the date of consideration of the Appellant's appeal" and went on to say;

> "in the above circumstances I am not satisfied that, at the date of my consideration of his appeal, the Appellant has shown his marriage is still subsisting and refused the appeal for that reason".

6. The Appellant applied for permission to appeal and, surprisingly in my view, permission was refused by a Judge of the First-tier Tribunal. However, it was subsequently granted by a Judge of the Upper Tribunal in these terms;

> "1. The First-tier Tribunal (Judge Clough) dismissed the Appellant's appeal against the decision refusing him leave as a partner under Appendix FM and Art 8.
>
> 2. In the refusal letter, the Respondent was not satisfied that the Appellant met the £18,600 financial requirements of Appendix FM. The Appellant did not seek an oral hearing. The judge, however, dismissed the appeal on the basis that there was no information before him that the marriage was subsisting. This was arguably unfair. The Respondent had accepted that the marriage was genuine and subsisting in the refusal letter and the only "live" issue was whether the £18,600 financial requirement was met. Quite legitimately, the Appellant could not have anticipated that the judge would take a point not relied upon by the Respondent as to the subsistence of his marriage and that he needed to submit evidence in respect of it.
>
> 3. For these reasons, permission to appeal is granted".

7. The Secretary of State, in light of the grant of permission to appeal, provided a Rule 24 response in which it was contended that any error the First-tier Tribunal may have

made was immaterial because the evidence did not show that the £18,600 threshold was met such that the outcome would have been the same had the judge looked at that aspect (which she did not do at all) instead of simply focusing upon the question of whether the relationship was genuine and subsisting.

8. There was a hearing before me to consider, initially, whether the First-tier Tribunal had erred in law such that its decision ought to be set aside.

9. Mrs Pettersen, in my view very properly, correctly and appropriately, effectively disowned the Rule 24 response. She said that the Appellant was entitled to have his arguments as to finance considered. Whilst it did appear he might have difficulty in establishing that he did satisfy the financial requirements and "specified evidence" requirements at the appropriate time, he had advanced arguments which ought to have been considered. There had been unfairness in deciding the appeal upon matters not previously placed in issue.

10. In the circumstances there is really very little left for me to say. It seems to me the First-tier Tribunal did clearly err in deciding the appeal on the basis of an aspect of the relevant Immigration Rule which had not been placed in issue. In these circumstances there was procedural unfairness. It was open to the judge to address the question of the genuineness and subsisting nature of the relationship but, if she was to do that, she had to give the Appellant an opportunity to address it. That could have been done, for example, by way of an adjournment for an oral hearing.

11. In these circumstances I do set the decision aside. As I confirmed to the parties, it is my view that in the particular circumstances of this case the fairest course of action is to remit to the First-tier Tribunal so that matters can be determined, by that Tribunal, entirely afresh. That is what I do.

12. The Appellant, at the hearing before me, said that he did now wish to have an oral hearing before the First-tier Tribunal and that is what I have directed. I have also issued directions which should be sufficient to identify, prior to the hearing, what is and what is not in issue from the Respondent's perspective.

Directions for the Remitted Hearing Before the First-tier Tribunal

(a) This case is remitted to the First-tier Tribunal and nothing is preserved from the determination of Judge Clough.

(b) The time estimate for the remitted hearing shall be two hours.

(c) The Secretary of State shall, within one month of the date of issue of this decision and directions, indicate to the First-tier Tribunal at Bradford, and to the Appellant, whether the matters in issue are confined to those contained within the reasons for refusal letter of 6th August 2014 or whether other issues are raised and, if so, what they are.

(d) Either party may file further documentary evidence to be considered by the First-tier Tribunal but, if so, must ensure it is received by the First-tier Tribunal, with a copy

for the other party, at least five working days before the date which shall be fixed for the hearing.

Conclusion

The decision of the First-tier Tribunal involved an error of law and is set aside.

The case is remitted to the First-tier Tribunal.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

I make no fee award.

Signed Date

Upper Tribunal Judge Hemingway