



**Upper Tribunal
(Immigration and Asylum Chamber)
Number: HU/11806/2015**

Appeal

THE IMMIGRATION ACTS

**Heard at Field House
On 17th November 2017**

**Decision & Reasons
Promulgated
On 3rd January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MR CHEKUSE ALLY MFAUME KAWAWA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Childs, Counsel, instructed by Duncan Lewis & Co
Solicitors (Harrow Office)

For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Tanzania born on 13th July 1976. The Appellant applied for entry clearance on 29th October 2014 for leave to remain on the basis of family and private life. This application was granted outside the Immigration Rules until 17th July 2015. Prior to that it would appear from the Appellant's immigration history that he had applied initially back in April 2004 for entry clearance, which had been granted, and thereafter on 6th November 2004 had applied for leave to remain on the basis of UK ancestry but that application had been refused.

2. On 9th July 2015 the Appellant made a human rights application for leave to remain in the United Kingdom on the basis of his private life with Clara Hammhal. That application was refused by Notice of Refusal dated 10th November 2015. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Grimmatt, sitting at Birmingham, on 5th January 2017. In a Decision and Reasons promulgated on 13th January 2017 that appeal was dismissed.
3. The Appellant lodged Grounds of Appeal to the Upper Tribunal and permission to appeal was refused by Judge of the First-tier Tribunal Grant on 20th July 2017. Renewed Grounds of Appeal were lodged to the Upper Tribunal contending that the First-tier Tribunal had made a material error of law in finding that the Appellant was dishonest in his application by failing to disclose a conditional discharge.
4. On 13th September 2017 Upper Tribunal Judge Hanson in granting permission to appeal set out lengthy reasons but noted that the issue arguably was whether in the light of the allegation of dishonesty the Appellant would have been entitled to succeed under the Immigration Rules. He considered that if the response by the Appellant was in accordance with the reported decision the Secretary of State may have wished to consider whether the reference in the refusal to dishonesty had arguable merit and if not the impact upon the impugned decision. He considered that at the next hearing the Tribunal should consider the nature of any legal error and the materiality of same. He further considered that although the findings in relation to Article 8 ECHR may be sustainable in the absence of consideration or reasoning related to the private life element it was appropriate to grant permission on all grounds.
5. On 28th September 2017 the Secretary of State responded to the Grounds of Appeal under Rule 24. That Rule 24 response is important. Paragraph 2 states:

“The Respondent does not, in the light of the Tribunal’s guidance in *Omenma [2014] UKUT 00314 (IAC)*, oppose the Appellant’s application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral hearing to consider whether the Appellant is entitled to a grant of leave as the husband of a British national.”

6. 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, Ms Childs, and the Secretary of State appears by her Home Office Presenting Officer, Mr Duffy.

Submissions/Discussion

7. Mr Duffy does not seek to go behind the Rule 24 statement. Ms Childs refers me to the decision of the First-tier Tribunal Judge, particularly at paragraph 21, and submits that that paragraph seems to her to suggest that the application pursuant to Article 8 would/should be successful. I

took the view that that issue had not been determined and that if the matter was to be reheard that would produce a situation of fairness both to the Appellant and to the Secretary of State. Mr Duffy concurred with such an approach.

The Law

8. 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.
9. 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.

Case Law

10. The guiding case law is to be found in the decision of *Omenma (Conditional discharge - not a conviction of an offence) [2014] UKUT 00314 (IAC)*, which is authority for saying that the effect of Section 14(1) of the Powers of Criminal Courts (Sentencing) Act 2000 is that a person who has received a conditional or absolute discharge does not make a false representation if the answer is "no" when asked if he has ever been convicted of an offence.

Findings on Error of Law

11. It is clear that the above authority is not an issue that has been addressed properly by the First-tier Tribunal Judge and he has made findings that misapply that authority. As such I agree with both the Secretary of State and the Appellant's representative that the First-tier Tribunal Judge has erred in law and that that error is material.
12. Neither Mr Duffy nor Ms Asanovich asked me to rehear the matter today albeit that that is raised as an issue in the Rule 24 response. There is agreement between the legal representatives that the correct approach,

particularly bearing in mind that it would take out a level of appeal if I did not follow it, is for the matter to be remitted back to the First-tier Tribunal, having found that there is a material error of law and that that error of law means that the decision of the First-tier Tribunal cannot stand. I agree with that approach and I set out hereinafter directions for the rehearing of this matter.

Decision and Directions

- (1) The decision of the First-tier Tribunal contains a material error of law and is set aside.
- (2) The matter is remitted to the First-tier Tribunal sitting at either Nottingham or Birmingham with none of the findings of fact to stand.
- (3) That the appeal is to be heard before any Judge of the First-tier Tribunal other than Immigration Judge Grimmett on the first available date 28 days hence with an ELH of two hours.
- (4) That there be leave to either party to file and serve a bundle of objective and subjective evidence upon which they intend to rely at court and to serve same upon the other's party at least fourteen days prior to the restored hearing.
- (5) That in the event that the Appellant would require an interpreter his instructed solicitors must notify the Listing Office within seven days of receipt of these Directions.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

No anonymity direction is made.

TO THE RESPONDENT FEE AWARD

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

Signed

Date

Deputy Upper Tribunal Judge D N Harris