Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/22052/2016(V)
HU/00189/2017(V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 September 2020	**On 11 September 2020**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

MOSHOOD [S]
KULTHUM [S]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms. B Asanovic, Counsel, instructed by Danielle Cohen Immigration Law
For the Respondent: Mr. E Tufan, Senior Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellants against a decision of Judge of the First-tier Tribunal Hoffman ('the Judge') sent to the parties on 7 January 2020 by which the appellants' appeal against decisions not to grant them settlement under the Immigration Rules ('the Rules') were dismissed.

2. Judge of the First-tier Tribunal Grant-Hutchison granted the appellants permission to appeal on all grounds by a decision dated 17 April 2020.

Hearing

3. The hearing before me was a Skype for Business video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in exactly the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

4. The parties agreed that all relevant documents were before the Tribunal. The video and audio link were connected between the representatives and the Tribunal throughout the hearing. At the conclusion of the hearing both parties confirmed that the hearing had been completed fairly.

5. The appellants attended the hearing remotely.

Anonymity

6. The Judge did not issue an anonymity direction and no request for such direction was made before me.

7. I observe paragraph 18 of the Guidance Note 2013 No 1 which confirms that the identity of children whether they are appellants or the children of an appellant (or otherwise concerned with the proceedings), will not normally be disclosed nor will their school, the names of their teacher or any social worker or health professional with whom they are concerned, unless there are good reasons in the interests of justice to do so. I am satisfied that there is no requirement to name the appellants' children in this matter.

Background

8. The appellants are a married couple and citizens of Nigeria.

9. The first appellant entered the United Kingdom on 29 August 2006 with leave to enter as a student. He made in-time variation applications, initially as a student and then as a Tier 1 (Post-Study Work) Migrant and as a Tier 1 (General) Migrant which were successful. His last grant of leave to remain was valid until 18 March 2016.

10. The second appellant was granted entry clearance as a dependent partner of her husband and was granted leave to enter on her arrival in this country on 12 May 2010. It is understood by the Tribunal that consequent to variation applications she enjoyed leave to remain in line with her husband.

11. The first appellant applied for indefinite leave to remain as a Tier 1 migrant on 22 February 2016. The respondent refused the application on

22 February 2016. The first appellant requested an administrative review of that decision on 7 March 2016, but on 16 March 2016 he withdrew his request. On the same day he applied for indefinite leave to remain on the basis of 10 years' continuous lawful residence under the paragraph 276B of the Rules. The respondent refused the application by a decision dated 8 September 2016, asserting that the first appellant had misrepresented his earnings at various times to either or both the respondent and Her Majesty's Revenue and Customs.

12. The second appellant applied on 16 March 2016 for leave to remain as the spouse of a person present and settled in the United Kingdom. The respondent refused her application by a decision dated 28 October 2016 detailing that neither her husband nor their children enjoyed a right to remain in this country and there were no exceptional circumstances that justified a grant of leave outside of the Rules on human rights (article 8) grounds.

Appellate history

13. This matter enjoys an unfortunate appellate history.

14. By a decision dated 30 November 2017 Judge of the First-tier Tribunal Grimmett refused the appeals. The appellants were granted permission to appeal and by a decision dated 28 November 2018 the Upper Tribunal (Upper Tribunal Judge Latter) set aside the decision of JFtT Grimmett consequent to several factual errors arising in her decision, both as to documentary and oral evidence. Such factual errors amounted to material errors of law.

15. The matter was remitted to the First-tier Tribunal and heard by Judge of the First-tier Tribunal Bristow who allowed the appeals by a decision dated 25 March 2019. The respondent secured permission to appeal and the Upper Tribunal (Deputy Upper Tribunal Judge Hutchinson) set aside the decision of the First-tier Tribunal by a decision dated 13 June 2019. The Tribunal found that JFtT Bristow had erred in finding that the respondent's bundle did not contain the first appellant's tax returns for the years April 2011 and April 2013. Further, it was found that the Judge failed to make findings beyond undertaking a consideration in line with *Muhandiramge (section S-LTR.1.7)* [2015] UKUT 00675 (IAC) with there being no judicial consideration of the first appellant's explanation as to the purported discrepancies. The matter was remitted back to the First-tier Tribunal.

Hearing before the FtT

16. The matter was transferred from the First-tier Tribunal in Birmingham to Taylor House and came before the Judge on 20 December 2019. Both appellants attended and gave evidence. The Judge dismissed the appeals.

Grounds of appeal

17. The appellants rely on grounds of appeal authored by Ms. Asanovic who has represented them throughout. Five grounds of appeal are advanced.

18. In granting permission to appeal JFtT Grant-Hutchison succinctly identified the grounds:

> '2. It is arguable that the Judge has erred in law
>
> a) By relying on a number of perceived defects in the first appellant's evidence which were never raised or put to him, for example,
>
> i) in relation to establishing a centre in Scotland, and
>
> ii) for rejecting the explanation that instead of real expenses the first appellant sent projected expenses for 2013 when there is no such requirement or expectation for sole traders of limited turnover such as the appellant;
>
> b) By placing weight on an account in interview, a copy of which was never given to the first appellant and was not disclosed with proper (or any) notice until the day of the hearing and which the Judge said contained errors instead of the first appellant's account of events (paras. 43 and 44 of the decision);
>
> c) In relation to the standard of proof when it is arguable that the first appellant offered full disclosure of all the relevant financial documents and explained what happened and it is then for the respondent to dispel any doubts; and
>
> d) Which assessment could arguably undermine the Judge's findings in relation to the article 8 considerations and the children, particularly the best interests and private life of [H] and the weight given to the public interest.'

Decision on error of law

19. At the outset of the hearing Mr. Tufan accepted that the 'questions', or issues, considered by the Judge as identified in ground 1, which are extensively detailed at para. 6 of the grounds, had not been asked of the appellants. He confirmed that he had intended to defend the decision because it remained the respondent's position that there were serious discrepancies in the accounts of the first appellant, but acknowledging that the questions were not asked, and the subsequent adverse findings were at the core of the Judge's findings, he accepted that the decision was not sustainable on procedural fairness grounds.

20. I am satisfied that Mr. Tufan was correct to adopt such approach. The appellants can expect compliance with the well-established common law rule of evidence identified by the House of Lords in *Browne v. Dunn* (1893) 6 R. 67, namely that it is only fair to witnesses that if their evidence is to be disbelieved, they must be given a fair opportunity to deal with the allegation. As observed by Lord Herschell L.C., at [70]-[71]:

> 'I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.'

21. Newey LJ confirmed in *Howlett v. Davies* [2017] EWCA Civ 1696; [2018] 1 W.L.R. 948, at [39]:

> '39. … where a witness' honesty is to be challenged, it will always be best if that is explicitly put to the witness. There can then be no doubt that honesty is in issue. But what ultimately matters is that the witness has had fair notice of a challenge to his or her honesty and an opportunity to deal with it. It may be that in a particular context a cross-examination which does not use the words "dishonest" or "lying" will give a witness fair warning. That will be a matter for the trial judge to decide …'

22. Whilst the appellants in this matter were on notice that the respondent considered the first appellant to have been dishonest in previous interactions and applications, fairness required that concerns as to certain documents were expressly identified by the Judge so as to permit the first appellant the opportunity to explain his position in circumstances where concerns arising from these documents were not expressly relied upon by the respondent in her decision letter, nor were they addressed during relatively short cross-examination or ultimately by the presenting officer in submissions. The purpose of the rule in *Browne v. Dunn* is well-grounded; witnesses should be given an opportunity to respond to competing versions of events.

23. Whilst Mr. Tufan expressly agreed on behalf of the respondent that the decision of the Judge be set aside for the reasons set out in ground 1, I observe that ground 2 also raises meritorious concerns as to the Judge's approach to the evidence presented. I further observe that there were strong merits to grounds 4 and 5, concerned with the article 8 appeal.

24. In the circumstances the decision of the Judge exhibits procedural unfairness and consequent to such material error it must be set aside.

Remaking the decision

25. As to the re-making of this decision I note the fundamental nature of the material errors identified. On behalf of the respondent Mr. Tufan observed that this Tribunal had now set aside three decisions of the First-tier Tribunal in this matter and so the remaking of this decision should properly be undertaken by this Tribunal. Ms. Asanovic noted the poor procedural history but observed that to date the appellants had not enjoyed a fair hearing and should not themselves be punished by losing their first stage of appeal because of the failings of the First-tier Tribunal to date.

26. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal that reads as follows at paragraph 7.2:

> 'The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
>
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.'

27. I have considerable sympathy for the approach identified by Mr. Tufan. There is much to be said for seeking finality in these appeals. However, having read all the previous decisions in this matter, both First-tier Tribunal and Upper Tribunal, I have ultimately decided that Ms. Asanovic is correct in her submission that the appellants have not received a fair hearing to date and to lose the opportunity to advance their appeal before the First-tier Tribunal would, in effect, be a punishment upon them for the failings exhibited by that Tribunal to date.

28. I therefore set aside this decision and remit it back to the First-tier Tribunal at Taylor House. Though this Tribunal is hesitant to issue directions to the First-tier Tribunal, in the circumstances of this matter I direct that upon its return to Taylor House the appeal files are to be placed before the Resident Judge to undertake appropriate case management.

29. The parties agreed before me that this matter is not to be listed before January 2021 consequent to the second appellant's expected due date in October 2020.

Directions

30. I direct:

    i) Upon their return to the First-tier Tribunal at Taylor House, the appeal files in this matter are to be placed before the Resident Judge for appropriate case management.

31. I make the following observation to the Resident Judge that at the hearing before me the parties were in agreement as to the following, such agreement not being conveyed as directions by this Tribunal but for consideration as part of the First-tier Tribunal's case management:

    ii) The appellants are to file and serve all evidence to be relied upon, including evidence previously served and, if so advised, a report from an independent social worker, in a new hearing bundle no later than 4pm on Monday 16 November 2020.

    iii) The hearing of this matter by the First-tier Tribunal is to take place on the first available date on or after 4 January 2021.

    iv) Listing is to ascertain Ms. Asanovic's availability for the next hearing via her clerks at Lamb Building.

Notice of Decision

32. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision promulgated on 7 January 2020 pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

33. This matter is remitted to the First-tier Tribunal for a fresh hearing before any Judge other than Judges Grimmett, Bristow and Hoffman.

34. No findings of fact are preserved.

Signed: D. O'Callaghan
Upper Tribunal Judge O'Callaghan

Dated: 9 September 2020