



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00001/2020 &
EA/00002/2020 (V)**

THE IMMIGRATION ACTS

**Heard at Field House *via Microsoft Teams* Decision & Reasons Promulgated
On 25 November 2021 On 13 December 2021**

Before

**UPPER TRIBUNAL JUDGE O'CALLAGHAN
DEPUTY UPPER TRIBUNAL JUDGE FROMM**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**KINDA CAMARA
LASSANA CAMARA
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Mr. E Tufan, Senior Presenting Officer

For the Respondent: Ms. S Aziz, Counsel, instructed by RAD Solicitors.

DECISION AND REASONS

Introduction

1. For the purpose of this decision the appellant is referred to as the 'Secretary of State' and the respondents as the 'claimants'.

2. This is an appeal by the Secretary of State against a decision of Judge of the First-tier Tribunal Murshed ('the Judge') sent to the parties on 10 February 2021. The Judge allowed the claimants' linked appeals against the Secretary of State's decisions to revoke their EEA permits granted under regulation 11 of the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations') and to refuse their admission to this country in accordance with regulations 23 and 24 of the same Regulations.
3. The challenge before us primarily concerned the procedural fairness of the Judge proceeding with the hearing in the absence of the Secretary of State's representative. Evidence was provided to us establishing that Ms. Mckenzie, a Presenting Officer who had conduct of the appeal on behalf of the Secretary of State, was unaware of the hearing having been listed on 18 December 2020. She continued to seek confirmation as to whether the hearing had been listed some weeks after the hearing had taken place.
4. We allowed the Secretary of State's appeal at the hearing, to the extent that the claimant's appeals are remitted to the First-tier Tribunal, and now give our reasons.

Permission to appeal

5. The Secretary of State filed appeal forms with both the First-tier Tribunal and this Tribunal expressly naming only the first claimant, Mr. Kinda Camara.
6. Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ('the 2014 Rules') requires a party seeking permission to appeal to the First-tier Tribunal to make a written application for permission to appeal. This requirement is replicated in respect of an appeal direct to the Upper Tribunal at rule 21(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the 2008 Rules').
7. The 2014 Rules require an appellant to identify the decision of the Tribunal to which the application relates: rule 33(5)(b). Rule 21(4)(d) of the 2008 Rules requires the details (including the full reference) of the decision challenged to be provided.
8. Appeal forms exist in respect of written applications for permission to appeal to the First-tier Tribunal (Form IAFT 4) and the Upper Tribunal (Form IAUT 1). Use of the forms is not mandatory, but there is an expectation that they will be used.
9. In this matter, the relevant forms were completed by Ms. Andrea Connor, a member of the Secretary of State's Specialist Appeals Team. Both forms were completed in full and referenced the appeal number and name of Mr. Kinda Camara. No appeal form was filed in respect of Mr. Lassana Camara. Nor, in the alternative, was Mr. Lassana Camara's name and appeal number referenced in the appeal forms filed with either Tribunal. We note

that Mr. Lassana Camara is not expressly referenced in the body of the grounds of appeal relied upon by the Secretary of State.

10. A fax cover sheet accompanying the appeal form filed with the First-tier Tribunal references the names and appeal numbers of both claimants. Subsequent to the hearing before us, where only the appeal of Kinda Camara was listed, we have located a decision of Judge of the First-tier Tribunal O'Brien refusing to grant permission to the Secretary of State to appeal the decision in respect of Mr. Lassana Camara. This decision is dated 8 March 2021. We therefore proceed on the basis that the First-tier Tribunal was satisfied that the reference made in the fax cover sheet was sufficient for the purpose of rule 33(5)(b) of the 2014 Rules.
11. However, no reference was made to Mr. Lassana Camara when the Secretary of State filed her appeal with this Tribunal. His appeal number was not detailed. We proceed on the basis that the Secretary of State applied for permission to appeal in the matter of Mr. Kinda Camara alone and the grant of permission by Upper Tribunal Judge Plimmer on 30 April 2021 only concerned this claimant. This is the explanation as to why only Kinda Camara's appeal was listed before us at the hearing held on 25 November 2021.
12. Having found the Judge's decision to be materially infected by procedural unfairness, we concluded that it would be perverse to set aside the decision in respect of one claimant, and not the other, in circumstances where the intention of the Secretary of State had been to challenge the decision of the Judge in respect of both appeals.
13. We directed the Secretary of State to file an application for permission to appeal which was to be sent directly to the Upper Tribunal Lawyers who would forward it to the panel. We informed the parties that upon receipt, our intention was to reconstitute ourselves as the First-tier Tribunal, grant permission to appeal, and permit both appeals to be considered together. Though such application for permission to appeal would be significantly out of time, the panel indicated to the parties that the identified procedural unfairness was sufficient to justify relief from sanctions under the third stage of the guidance provided by the Court of Appeal in *Denton v TH White Ltd*. [2014] EWCA Civ 906; [2014] 2 WLR 3926.
14. Mr. Tufan filed the relevant form and attendant grounds of appeal at 17.05 on the day of the hearing. An explanation was provided as to the failure to file the appeal in time, namely administrative oversight.
15. We have now located the decision of Judge O'Brien in the matter of Lassana Kamara, and so treat the application authored by Mr. Tufan as being one made directly to the Upper Tribunal for permission to appeal in the matter of EA/00002/2020. The written application is accepted, as the form used is not, in this matter, detrimental to the interests of justice. By means of this decision we extend time for the Secretary of State to apply for permission to appeal in EA/00002/2020 and grant permission.

Background

16. The claimants are nationals of The Gambia. They are respectively aged 21 and 23. Consequent to an entry clearance application they were granted EEA Family Permits on 25 September 2019 as family members (children) of a Spanish national who is a qualified person with a right to reside in the United Kingdom under the 2016 Regulations.
17. On 6 November 2019, the claimants' arrived at Gatwick airport. Their baggage was searched, and they were interviewed by immigration officers. They were admitted to the country, and subsequently attended an interview with immigration officials on 20 November 2019.
18. On 21 November 2019, the respondent received information from the British High Commission, Banjul. An investigation had been undertaken with the Gambian Registrar of Birth and Deaths resulting in the High Commission being informed that the claimants' birth certificates were not genuine.
19. The claimants' EEA Family Permits were revoked by decisions dated 24 November 2019 on the ground that the respondent was not satisfied that they were family members of an EEA national with a right to reside in this country.
20. On 13 December 2019 a section 120 notice was served by the claimants upon the Secretary of State. Recently issued birth certificates accompanied the notice. The respondent confirmed her decision following a case review on 5 February 2020, observing, *inter alia*, that the birth certificates provided with the grounds of appeal were different to the original certificates found in the claimants' baggage.

Hearing

21. The claimants' appeals were linked, and a case management review hearing was held before Judge of the First-tier Tribunal Mehta at Taylor House on 1 December 2020. The claimants were represented. Ms. Mckenzie attended the hearing on behalf of the Secretary of State. Judge Mehta was satisfied that the appeals were ready to proceed to a substantive hearing, with notice of the listed hearing to be sent to the parties later.
22. The Judge heard the appeals on 18 December 2020, proceeding in the absence of a presenting officer.
23. The Secretary of State filed two emails from Ms. Mckenzie. The first was sent to an administrative section of the First-tier Tribunal at Taylor House, timed at 17.09 on 18 December 2020. Ms. Mckenzie requested that the date of the substantive hearing be provided to her. The second email was sent to the claimants' legal representatives at 13.35 on 18 January 2021 asking whether they were aware as to a date having been set for the

hearing of the appeals. Both emails post-date the hearing of the appeals by the Judge.

24. The claimants do not dispute the reliability of the two emails.

Decision of the First-tier Tribunal

25. In allowing the appeals, the Judge reasoned as to the substance of the appeals, *inter alia*:

‘58. Contact was made with the British High Commission in Banjul. There is an email (Respondent’s bundles, Appendix K) dated 21 November 2019, from Mr. Beulah Ogoh, a Consular Officer stating “with reference to the request for verifications of Birth Certificates, kindly be informed that, the Registrar of Births and Deaths, got back to us via a phone call. He is currently at the province on an official duty and has no access to emails. He mentioned that KML 19491 98 - with the name Lassana and KML 1462000 with the name Kinda are not authentic.”

59. It is on the basis of this email that the appellants’ family permits were revoked. I find this evidence to be wholly inadequate and not sufficient to discharge the evidential burden. There is no email or statement from the Registrar, and no explanation is given as to why he concluded that the original birth certificates are not authentic.

60. I note from the email dated 19 October 2020 from Gatwick Border Casework (Appendix 1) that the ECO had marked the birth certificates as being checked. In circumstances where the appellants were issued EEA family permits by the High Commission in Banjul, having been satisfied that the birth certificates were authentic, a proper explanation in the form of a witness statement or affidavit is required. I therefore do not find that the respondent has discharged even the evidential burden in this case and the appellants’ appeal succeed on this basis.’

26. The Judge considered matters in the alternative, in respect of the overall legal burden, at paras. 61 to 80 of her decision. She noted at para. 63 that the recently acquired birth certificates now relied upon were confirmed as genuine by both the Gambian High Commission in London and the Ministry of Health, Social Welfare in The Gambia. As to the evidence of Mr. Fatty, relied upon by the Secretary of State, the Judge concluded:

‘77. There is no signed letter, statement or affidavit from Mr. Fatty setting out his role and responsibilities, how the registry operates, where it operates, how births are registered and certificates obtained, what information a birth certificate should contain, who has authority to issue and sign birth certificates and whether a replacement birth certificate can contain a different number. The email is not only lacking in detail, it comes from a ‘yahoo’ email address, and not from an official account. It is not clear how the British High Commission have even verified this person to be the Registrar of Births and Deaths.

78. Mr. Fatty states that he is the only person able to verify whether a birth certificate is genuine however he has provided no evidence of this and the UNICEF data factsheet on Birth, Marriage and Death Registration in Gambia provided by the appellants' representatives states that certificates are issued on a central and regional level, which indicates that there are registrars in different parts of the country. I also note that the letter from Mr. Bah was not sent to Mr. Fatty for comment.
79. In relation to A2, his second certificate was verified by someone on behalf of Mr. Fatty. This was not sent to Mr. Fatty, although I note that the respondent's review mentions that the bundle for A2 was not received. In the absence of evidence from the respondent to establish this letter is forged, I accept it as genuine.
80. I therefore find that the evidence relied on by the respondent is wholly inadequate to discharge the legal burden in this case. As such, I find that the appellants are entitled to family permits as family members of an EEA national. Their appeals are therefore allowed.'

Decision on Error of Law

Procedural unfairness

27. Rule 28 of the 2014 Rules states:

- '28. If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal -
 - (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
 - (b) considers that it is in the interests of justice to proceed with the hearing.'

28. Though we accept that the First-tier Tribunal sent the notice of hearing to the Secretary of State by email, we conclude that it was not received. It is clearly apparent that Ms. McKenzie was taking steps to ascertain the listing of the hearing several weeks after it was heard. Whilst the sending of the notice of hearing constitutes deemed service, we are satisfied that Ms. McKenzie's emails establish non-receipt of the notice and so rebuts the presumption of service. In reaching our conclusion we have been mindful that it would be a 'strong step' not to accept an assertion by a professional that a notice sent otherwise than by recorded delivery had not been received: *R (Karagoz) v. Immigration Appeal Tribunal* [2003] EWHC 1228 (Admin), at [30].

29. When considering procedural fairness, our assessment is concerned with the evidence now available to us, not with the situation as understood by the Judge at the time of her decision to proceed with the appeal in the absence of the respondent. The test is therefore not one of whether her decision was properly open to her or was *Wednesbury* unreasonable or perverse. The test, and sole test, is whether the decision was unfair.

30. We observe that the common law imposes minimum standards of procedural fairness, with fairness being conducive to the rule of law: *R (Citizens UK) v. Secretary of State for the Home Department* [2018] EWCA Civ 1812, [2019] 1 All E.R. 416, at [83]. The scope of the duty of fairness is context specific. We are satisfied that the Secretary of State wished to attend the hearing before the First-tier Tribunal and defend her decision. That she did not do was solely because she did not receive notice of the hearing and so was unfairly denied the right to be heard. We observe the guidance of the House of Lords in *General Medical Council v. Spackman* [1943] AC 627, 644-645, per Lord Wright, that “if the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision.” We adopt such approach in this matter.
31. We set aside the decision of the Judge on the ground of procedural unfairness.
32. The claimant’s appeals are remitted to the First-tier Tribunal as the effect of the error has been to deprive the Secretary of State of a fair hearing before the First-tier Tribunal: Practice Statement 7.2(a) of the Senior President’s Practice Statements of 25 September 2012.

Observation

33. The Secretary of State is entitled to defend her decision, and ultimately it will be for the First-tier Tribunal to make its reasoned decision. However, we observed to Mr. Tufan at the conclusion of the hearing that the Secretary of State may wish to review her decision before these appeals are next heard. We agree that, excluding the matter of procedural fairness, the Judge carefully considered the evidence before her, and no proper complaint can be made as to the approach adopted. She identified the Secretary of State as being unable to discharge the evidential burden placed upon her. Having considered the evidence presently placed before us we agree that the Secretary of State can expect most reasonable Judges, properly directed, to reach the same conclusion. The evidence relied upon by the Secretary of State is limited for the reasons identified by the Judge. We are satisfied that the complaints made at paras. 2 and 3 of the Secretary of State’s grounds of appeal, when taken at their highest, are not by themselves sufficient to undermine our conclusion as to the likely approach to be adopted by most judges, properly directing themselves, in respect of this appeal.

Notice of Decision

34. The making of the decision by the First-tier Tribunal, dated 10 February 2021, involved the making of a material error on a point of law. We set

aside the Judge's decision in its entirety pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

35. No findings of fact are preserved.
36. The matter is remitted to the First-tier Tribunal for a hearing before any judge other than Judge of the First-tier Tribunal Murshed.

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

Date: 6 December 2021