Upper Tribunal (Immigration and Asylum Chamber) **Appeal Number: UI-2021-000475 [EA/04925/2020]**

THE IMMIGRATION ACTS

Heard at Field House On the 11 July 2022 **Decision & Reasons Promulgated On the 07 September 2022**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

ABDUL NASIR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Rashmi, instructed by Direct Access
For the Respondent: Mr Tufan, Senior Presenting Officer

DECISION AND REASONS

1. This decision is in short form because the outcome of the appeal was agreed between the parties.

2. The appellant is a Pakistani national who was born on 26 April 1988. On 23 September 2020, he was refused a Family Permit under the Immigration (EEA) Regulations 2016. The respondent did not accept that he had established that he was financially dependent upon his Lithuanian sister-in-law who resides in the UK. The respondent did not accept, therefore, that he was the sponsor's extended family member for the purposes of regulation 8.

The Appeal to the First-tier Tribunal

3. The appellant appealed against that decision. In compliance with rule 24A of the FtT Procedure Rules, the respondent undertook a review of her decision prior to the hearing. The single issue which was identified in the undated review document was as follows:

> Is the appellant financially reliant on the sponsor for his essential living needs in line with regulation 8 of the Immigration (European Economic Area) Regulations 2016?

4. Ms Rashmi, who represented the appellant then as she did before me, settled a skeleton argument for the FtT. That document was also undated. It identified the issue above, however, and made submissions in relation to it. Two bundles of evidence were filed and served by the appellant, focused (as one would expect) on the issue of dependency.

5. The appeal was heard by Judge C H Bennett on an unspecified date. He heard oral evidence from the appellant and the sponsor and submissions from the Presenting Officer and Ms Rashmi before reserving his decision.

6. In his reserved decision, the judge found that the sponsor was not a qualified person and that the appellant was not dependent upon her: [21] and [25]. He was also not satisfied that the appellant was a member of the sponsor's household: [26]. In the alternative, the judge concluded that it was not appropriate to issue a Family Permit to the appellant: [31].

The Appeal to the Upper Tribunal

7. The appellant sought permission to appeal. The grounds of appeal were settled by Ms Rashmi. I granted his application and, in doing so, I said this:

> [1] The appellant seeks permission to appeal from Judge C H Bennett's decision to dismiss his appeal against the respondent's refusal of his application for a family permit as the extended family member of an EEA national.
>
> [2] The grounds are singularly unhelpful. Grounds of appeal should be individually numbered and properly particularised. These grounds of appeal are a stream of consciousness which occupies ten pages of single-spaced type. Notwithstanding the lack of cogency in the grounds, I am satisfied that they contain at least two arguable points.
>
> [3] The grounds of refusal in this case were set out by the judge at [2] of his decision. The ECO was not satisfied that the appellant was dependent on the EEA national for his essential needs. Notwithstanding that focus, the judge's principal concern, considered over much of this 36 page decision, was that the EEA national was not a qualified person. It is apparent from the first two lines of [22] of his

> decision that this issue was not raised by anyone at the hearing. It is arguable, in those circumstances, that the conduct of the appeal was procedurally unfair. As noted 2 in the grounds of appeal, the evidence which was before the FtT had been provided in order to address the grounds of refusal. The failure to provide an opportunity to address a wholly new issue was arguably procedurally unfair.
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> [4] It is also arguable that, in his lengthy assessment of the point which had not been raised before him, the judge failed to consider whether the sponsor had retained the status of a qualified person in accordance with regulation 6(2).
>
> [5] The judge sought to suggest, and the judge who refused permission to appeal at first instance accepted, that the appeal would have been dismissed even if he had not considered the point which did not feature in the ECO's decision. That is arguably not so, not least because of the judge's reference to his earlier analysis in [28] of his decision. It is arguable, in other words, that the judge's conclusion that the sponsor is not a qualified person tainted and infected his assessment of the issues which had actually been identified in the ECO's decision.
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> [6] In the circumstances, permission is granted on all grounds.

8. At the outset of the hearing before me, Mr Tufan accepted that the judge had erred in law, that his decision could not stand and that the proper course in all the circumstances was for the appeal to be remitted to the FtT for consideration afresh by a different judge. He explained that he made that concession because the judge had considered issues which were not raised by either side, whether in writing or at the hearing. The judge had also failed to consider whether the sponsor might have retained her status as a worker even if she had stopped working. The only real issue was whether the test of dependency in Lim v ECO (Manila) [2015] EWCA Civ 1383; [2016] Imm AR 421 was satisfied but the judge had 'gone off on all sorts of tangents'.

9. I indicated that I agreed with Mr Tufan's stance. Ms Rashmi confirmed that she was content with the appeal being remitted to the FtT for hearing de novo. Interpreters would be needed for the appellant and the sponsor, Urdu and Lithuanian respectively.

Analysis

10. It is quite clear that the judge strayed from the issues which had been agreed between the parties to be the focus of this appeal. As Mr Tufan noted before me, the only issue identified by the respondent was whether the appellant was dependent upon the sponsor, in the sense that she was responsible for his essential needs. That focus was noted by the judge at [2]-[6] of his decision. There was then a section of the judge's decision in which he considered whether what was said in Ihemedu (OFMs – meaning) Nigeria [2011] UKUT 340 (IAC) remained

good law. The judge concluded that it did not, at [12]. He then analysed the oral and documentary evidence at length, at [13]-[21], and came to the conclusion that there were 'deficiencies in the evidence' as regards the sponsor exercising her Treaty Rights in the UK.

11. I very much doubt that the judge should have been considering whether or not the sponsor was a qualified person. As Mr Tufan noted, the point had not been raised in writing and it was not raised by the Presenting Officer. If he was to take the point against the appellant despite the fact that it had not been raised by the respondent at any stage, however, it was certainly incumbent upon him either to invite written submissions on it or, preferably, to reconvene the hearing. He decided not to do so, for five reasons he gave at [22]. With respect to the judge, I do not find a single one of those reasons persuasive. The reality is that the judge had identified a wholly new point which was adverse to the appellant and which the appellant had had no opportunity to address. It was the clearest breach of the right to a fair hearing not to give him that opportunity.

12. Contrary to what the judge said at [22](a), it is the function of the Tribunal to ensure that a party is aware of the deficiencies in their evidence <u>if</u> the deficiency in question relates to an issue which has not previously been raised. Contrary to what the judge said at [22](b), the appellant has never been represented by solicitors; he was represented by counsel (Ms Rashmi), instructed directly, and has been representing himself throughout. The judge expressed concern at [22](c) that he would have to delay matters and potentially reconvene the hearing if he gave the appellant an opportunity to adduce further evidence about the sponsor's economic activity in the UK. If he was to consider this point without any prior notice to the appellant, however, such a delay was inevitably required in order to give the appellant a fair hearing. At [22](d), the judge considered that there was no 'positive explanation' for the absence of evidence on this point. The obvious difficulty with that reasoning is that the appellant would not have thought to provide an explanation because the point had never been raised. At [22](e), the judge concluded that the appellant suffered no prejudice in any event because he would have dismissed the appeal on other bases. For the reasons I will set out shortly, however, those reasons were also flawed in law.

13. It follows that the judge erred in law in considering whether the sponsor was a qualified person. The issue had never been raised and it was procedurally unfair for the judge to take the point of his own volition without giving the appellant an opportunity to address it. Had that opportunity been given (as it should have been) the appellant might have submitted evidence to show that the sponsor had worked throughout. He might alternatively have submitted evidence designed to establish that the sponsor had retained the status of a worker by reference to regulation 6(2). She might equally have had no answer to the point. We simply do not know because the sponsor has never been asked to explain her situation.

14. The judge might nevertheless have gone on to consider, quite independently of his conclusion about the sponsor's economic activity,

whether the appellant had shown that he was dependent upon her. At [25], however, the judge showed quite clearly that his first conclusion (as to the sponsor's economic activity) informed his analysis of dependency. He said that

> … because I am not satisfied that [the sponsor] is now either employed or working on a self-employed basis, I am not satisfied that, whatever the position may have been in the period up to December 2020(when I accept an satisfied that she was employed by GS5 Motors Ltd), Mr N is now dependent on Mrs JV.

15. To make matters worse, each of the three reasons which the judge then gave for concluding that the appellant was not dependent upon the sponsor harked back to the concerns which the judge had expressed about the sponsor's employment. In those circumstances, it is quite clear to me that the judge's conclusions about the sponsor's economic activity (or lack thereof) infected his consideration of the real, and only, issue in this case.

16. The judge then entered into a lengthy consideration of whether the appellant should, in the alternative, be granted a family permit, assuming that he was genuinely financially dependent upon the sponsor and that she was a qualified person. That analysis followed on from the judge's conclusion at [12] that what the Upper Tribunal had said in Ihemedu was no longer good law. (Ihemedu (and other authorities which both pre- and post-date it) requires a judge who concludes that an individual is the extended family member of a qualified person to find that the decision under appeal is not in accordance with the law, thereby leaving it to the respondent to assess whether, in all the circumstances, it is appropriate to grant the family permit which is sought.) The difficulty with the judge's conclusion on this point is precisely similar to the flaw in his earlier conclusion: the point was not taken by either side and, although the judge stated that he had raised it with Ms Rashmi at the hearing (his [12](d) refers) it is far from clear what he said at the hearing or what directions he issued so as to focus the issue for Ms Rashmi's consideration. On the basis of what the judge said at [12](d) of the decision, I cannot be satisfied that the appellant was given proper notice of the point or a proper opportunity to address it.

17. The ongoing application of Ihemedu is certainly an interesting point, given the changes in the FtT's appellate jurisdiction as a result of the UK's withdrawal from the European Union, but it was a point on which the judge required the considered assistance of the parties if he was to depart from a long line of authority about the proper course in a case such as the present, in which the discretion in regulation 18(4) of the 2016 Regulations has never been considered by the respondent.

18. On one view of the law, the course stipulated in Ihemedu is still appropriate, since the Tribunal is now required in such an appeal to consider whether the decision under appeal breaches the appellant's *rights* under the EU Treaties and an error on the part of the respondent as to that individual's status (whether they are an extended family member or not) might be said to breach their rights in that respect.

What was said in Khan v SSHD [2017] EWCA Civ 1755; [2018] Imm AR 440 about the word 'entitlement' in this very context might be thought to support such an argument.

19. I received no submissions on the point, however, and Mr Tufan certainly did not seek to support the judge's analysis of the law. The point falls for consideration on another occasion when it arises by reference to findings of fact which have legitimately been made; it would not assist either party to attempt to resolve it in this appeal, in which no findings of fact made by the FtT can stand.

20. I agree with Mr Tufan's concession that the decision of the FtT is vitiated by errors of law. I regret to say that the decision is based almost entirely on frolics of the judge's own, rather than representing a lawful analysis of the sole issue in the case. The proper course, in these circumstances, is to set aside the decision of the FtT and to remit the appeal to the FtT for consideration afresh by another judge.

21. I add this. I have already recorded that Mr Tufan did not seek to submit before me that the appellant should fail in his appeal because the sponsor is not a qualified person or because the discretion in regulation 18(4) should be exercised against him *by the Tribunal.* If those points are to be taken by the respondent then the proper course under the Procedure Rules is clear: the point or points ought to be raised in writing in advance of the hearing. In the event that they are not, the appellant will be entitled to proceed on the basis that the road down which the FtT travelled on the last occasion will not be followed again.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on points of law and that decision is set aside. The appeal is remitted to the FtT to be heard *de novo* by another judge.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 July 2022