Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2021-001028**
EA/05058/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 15 July 2022	**On the 07 September 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

KHALID MEHMOOD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Ms F. Allen, Counsel instructed by Sky Solicitors Ltd
For the Respondent: Mr S. Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. In this appeal, I find that the decision of the First-tier Tribunal involved the making of an error of law because the judge reached adverse credibility findings against the appellant based primarily on his immigration history, in circumstances where:

   (i) the immigration history provided by the Secretary of State on the front page of the respondent's bundle was not only erroneous but bore no resemblance to the appellant's (non-existent) immigration history;

(ii) neither party referred to or otherwise ascribed any significance to the immigration history provided by the Secretary of State, at the hearing or otherwise; and

(iii) the judge did not indicate to the parties that she was minded to hold the appellant's immigration history against him, or otherwise reach findings on a basis not ventilated by the parties.

Factual background

2. This is an appeal against a decision of First-tier Tribunal Judge CAS O'Garro ("the judge") in which she dismissed an appeal brought by the appellant, a citizen of Pakistan, against a decision of the respondent dated 13 March 2021 to refuse to grant an EEA family permit under regulations 6 and 8 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations").

3. The appellant is a citizen of Pakistan. By an application dated 7 December 2020, he applied for an EEA family permit as the extended family member of his brother, Anwar Ul Haq Chaudhry, a citizen of France residing in the UK ("the sponsor"). The application was refused on the basis that the Entry Clearance Officer was not satisfied (i) that the sponsor was the appellant's brother; (ii) that the sponsor was "exercising treaty rights" under regulation 6 of the 2016 Regulations; and (iii) that the appellant was dependent upon the sponsor as claimed.

4. The day before the hearing, the respondent had served her appeal bundle on the appellant and the First-tier Tribunal. On the first page, it said that the appellant had been granted visitor visas to the United Kingdom on four occasions: in 2011, 2012, 2019 and 2021. That was wrong. The appellant had never applied for a visitor's visa to the UK, let alone visited. That was the first time the respondent had made any reference to the appellant's purported immigration history. There had been no mention of it in the impugned decision.

5. In her findings, the judge accepted the appellant to be related to the sponsor and found that the sponsor was exercising treaty rights. However, she rejected his case that he was dependent upon the sponsor. The fact that the appellant had been issued four visitor's visas previously demonstrated that his financial circumstances in Pakistan must have been regarded as secure by the respondent in the past. The judge observed that the appellant's then counsel had not objected to the summary of the immigration history as set out in the respondent's bundle: [39]. The fact that the appellant was able to obtain visitor's visas was "good evidence" that he was not in need of the sponsor's financial support: [42]. The judge dismissed the appeal.

Grounds of appeal

6. The grounds contend that (i) the immigration history as summarised in the respondent's bundle was wrong and that the appellant had never

visited the United Kingdom previously; and (ii) that it was procedurally unfair for the judge to rely on the visas as central to her reasoning, since it the respondent had not done so, and the judge did not ventilate the issue at the hearing with the parties.

7. The appellant provided a witness statement in support of the grounds of appeal in which he stated that he had never been issued with any visitor's visas previously, nor ever visited the United Kingdom.

8. Permission to appeal was granted by First-tier Tribunal Judge Evans on the following basis:

> "The Judge made findings in relation to the Appellant's immigration history and then treated those findings as being of material importance to the question of dependency which the Judge proceeded to decide against the Appellant. This was an arguable error of law because it seems that (1) no point had been taken in relation to the Appellant's immigration history in the original decision; (2) no issue had been raised in relation to it by the Respondent at the Hearing; and (3) it was not put to the Appellant (or otherwise raised) at the Hearing so that he might have an opportunity to comment on it. "

The law

9. Since the appellant's application for an EEA family permit was made before the end of the "implementation period" prior to the UK's completed withdrawal from the European Union, the 2016 Regulations continue to apply to this appeal. See paragraph 3(3) and (4) of Schedule 3 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020.

10. Regulation 8(2) of the 2016 Regulations defines an "extended family member" of an EEA national in the following terms:

> "(2) The condition in this paragraph is that the person is –
>
> (a) a relative of an EEA national; and
>
> (b) residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of the EEA national's household; and either-"
>
> (i) is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or
>
> (ii) has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national's household."

An extended family member must have been dependent on the EEA sponsor prior to their arrival in this country, or a member of their household. This case turns on dependency.

11. Fairness is multifaceted. In *AM (Fair hearing) Sudan* [2015] UKUT 656 (IAC), this tribunal held, at paragraph (v) of the judicial headnote:

> "Fairness may require a Tribunal to canvas an issue which has not been ventilated by the parties or their representatives, in fulfilment of each party's right to a fair hearing."

Discussion

12. It was common ground at the hearing that the judge had erred in fact and that the decision must be set aside.

13. Mr Walker confirmed that the appellant had never applied for a visitor's visa, nor visited the UK in that – or any other – capacity. The immigration history in the respondent's bundle before the First-tier Tribunal was simply wrong.

14. I find that the judge made a mistake of fact by ascribing determinative significance to the appellant's history of visiting the UK and inferring from those visits that the Entry Clearance Officer must have been satisfied as to his financial independence and circumstances in Pakistan. The appellant had never visited the UK.

15. I also consider that the judge's approach to the appellant's apparent immigration history was procedurally unfair in any event. The respondent had not relied on the appellant's immigration history when reaching her conclusion that the appellant had not demonstrated his dependence on his brother. The presenting officer had not raised the immigration history at the hearing. The appellant had not been cross-examined on it. The judge did not ventilate her concerns with the parties, as she should have done since neither party thought it was necessary to address the issue. Because the judge did not raise the issue with the parties, neither party had any inclination that it could reach determinative significance in the judge's decision, and so did not have the opportunity to address the judge on what would become the central feature in her adverse findings against the appellant. Consequently, the basis upon which the judge reached her operative findings was not only factually incorrect, but unfair. As this tribunal held in *AM (Sudan)*, fairness may require a tribunal to canvas an issue which has not been ventilated by the parties, or the representatives, in order to ensure the proceedings are fair.

16. While one has a degree of sympathy for any judge furnished with incorrect information by a party to proceedings before them, had the judge aired this issue with the parties, as she should have done, the appellant would have been able to correct the misunderstanding, or the respondent could have taken steps to confirm the position, or both. It was nothing to the point to say, as the judge did at [39], that neither party raised an issue with the immigration history; as far as the parties were concerned, the appellant's immigration history was not in issue. It is hardly surprising that it was not mentioned before the judge by the parties.

17. This is not to say that a judge is required to give a running commentary on the case. Far from it. Rather, the losing party should not get a nasty surprise when finding out, some time after a hearing, that the operative basis upon which they lost was simply not an issue at the hearing.

18. It follows that the judgment must be set aside. Under paragraph 7.2 of the *Practice Statements – Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal*, where the effect of an error has been to deprive a party of a fair hearing, a remittal to the First-tier Tribunal is usually appropriate. It follows that the appeal should be remitted to the First-tier Tribunal, to be heard by a different judge.

19. Ms Allen submitted that I should preserve the judge's positive findings of fact, namely those which found that the appellant was related as claimed to the sponsor, and that the sponsor was genuinely self-employed in the United Kingdom. I decline to do so, for the following reasons.

    a. First, as the Supreme Court observed in *Serafin v Malkiewicz* [2020] UKSC 23 at [49], a judgment that results from an unfair trial "is written in water". It would be unfair on the Entry Clearance Officer for her to be held to those findings in circumstances where there must be a retrial on fairness grounds.

    b. Secondly, the evidence relating to dependency must be considered by the next judge at the rehearing in the round. It may, for example, be necessary to reach findings about the sponsor's financial circumstances to a greater level of detail than those reached by Judge O'Garro, which she arrived at on the footing that the appellant's in-country financial circumstances were far more buoyant than may otherwise be the case. Preserving some findings of fact, but not others, may unfairly constrain the judge conducting the rehearing.

20. Of course, if the judge at the resumed hearing shares Judge O'Garro's reasoning on the family relationship and Treaty rights issues, that judge may well adopt her reasoning and reach the same or similar conclusions. But whether the next judge does is entirely a matter for that judge. All findings are set aside. No findings are preserved.

Conclusion

21. This appeal is allowed.

Notice of Decision

The decision of Judge O'Garro involved the making of an error of law and is set aside with no findings preserved. The appeal is remitted to the First-tier Tribunal to be heard by a different judge, with no findings of fact preserved.

No anonymity direction is made.

Signed Stephen H Smith Date 18 July 2022

Upper Tribunal Judge Stephen Smith