



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-001751

First-tier Tribunal No: EA/06762/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 23 February 2023

Before

UPPER TRIBUNAL JUDGE LANE
DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR OLADIMEJI OLAYINKA AROWOFILA
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O'Gunneby, Legal Representative
For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

Heard at Field House on 7 February 2023

DECISION AND REASONS

1. The Appellant is a national of Nigeria, date of birth 20 June 1975, who on 2 November 2020 applied for a residence card as confirmation of a right of residence under European Community Law as the husband of Amorette Emely Simon, a Dutch national, who was exercising treaty rights in the United Kingdom.
2. The Respondent refused his application in a decision dated 3 April 2021 for the following reasons:

- a. The Appellant did not provide adequate evidence to show that he qualified for a right to reside as the family member of the Sponsor. In particular, the Appellant had not provided adequate evidence to show he was the family member of a person exercising Treaty Rights in the United Kingdom.
 - b. The Appellant provided wage slips dated between June and October 2020 from the Sponsor's employer. These confirmed that the Sponsor was subject to PAYE deductions, but HMRC records showed no records of the Sponsor being employed by that employer for the claimed period. It was not therefore accepted that the EEA national Sponsor was exercising Treaty Rights in the United Kingdom as required by Regulation 6 of the Regulations.
 - c. As the Respondent found that the application did not meet the requirements stipulated by Regulation 6, no further consideration was given to the other requirements which need to be satisfied under the Regulations. However, it was noted that the Respondent deemed that other documents that had been provided in support of the Appellant's application were false and that the provision of false documents cast doubt on the genuineness of the Appellant's relationship with the Sponsor.
3. The Appellant appealed this decision on 12 April 2021 and in doing so elected to have his appeal dealt with on the papers as against by way of oral hearing.
 4. The Tribunal gave directions on 14 June 2021 with regard to the future conduct of the proceedings. These were not complied with by the Appellant or his representatives so further directions were issued on 7 December 2021 in which the Appellant was given 14 days to comply with those directions otherwise "*the Appellant would be deemed to rely solely on the grounds of appeal*".
 5. The case was listed before Judge of the First-tier Tribunal Field (hereinafter referred to as the FTTJ) on 17 January 2022 as a paper case. This listing was more than 14 days after the direction given on 7 December 2021.
 6. The FTTJ noted at paragraph [3] of the decision that the Respondent's bundle totalled 63 pages and that save for the IAF-5 appeal form and the documents attached to it no further documents had been served. In a decision dated 29 January 2022 but promulgated by the Tribunal on 7 February 2022, the FTTJ dismissed the appeal.
 7. Permission to appeal was sought on behalf of the Appellant by his representatives. These grounds were based on procedural unfairness and centred on two matters:

- a. The FTTJ had failed to take into account a bundle which had been sent by email to both the Tribunal at Taylor House and the Respondent on 28 January 2022.
 - b. The FTTJ should have adjourned the case for an oral hearing as a request for an oral hearing had been emailed to the Tribunal at Taylor House on 31 January 2022.
8. Permission to appeal was granted by Judge of the First-tier Tribunal Athwal on 8 April 2022. The Judge found it arguable there was an error in law stating:
- “The grounds assert that the Judge erred in finding the Appellant did not provide additional documentation at the date of decision. The Appellant submitted a full bundle on 28 January 2022. On 31 January 2022 the Appellant requested an oral hearing. This application was not considered.”*
9. No Rule 24 response was filed but at today’s hearing Mr Tufan confirmed the Respondent opposed the application and submitted the FTTJ had dealt with the appeal on what was placed before him and in line with the Tribunal’s directions.
10. Mr O’Gunneby adopted the grounds of appeal and submitted that as the decision was not promulgated until 7 February 2022 the FTTJ had materially erred (a) by failing to consider the documents that had been sent to the Tribunal and (b) by failing to adjourn for an oral hearing. Mr O’Gunneby stated the Appellant could not provide the necessary paperwork by 21 December 2021 due to Covid 19 restrictions, Christmas and New Year breaks and invited the Tribunal to set aside the FTTJ’s decision.

DISCUSSION AND FINDINGS

11. The Appellant had lodged his grounds of appeal as long ago as 12 April 2021. It appears he was represented albeit possibly not by his current representatives. He paid a reduced fee to have his appeal dealt with on the papers.
12. Having lodged his appeal directions were issued as to the future conduct of the proceedings on 14 June 2021 but neither the Appellant nor his representatives at the time complied with those directions. Those directions had provided for the parties to serve additional evidence within a given time frame.
13. As no evidence was served the Appellant was given a further opportunity on 7 December 2021 to serve additional evidence by 21 December 2021 failing which the Tribunal made it clear “the Appellant would be deemed to rely solely on the grounds of appeal.”

14. The case was listed before the FTTJ on the 17 January 2022. It is unclear whether he formed a view on the evidence on that day as although the decision was dated the 29 January 2022 it contained, at the commencement of the decision, the words “Decided on the papers at Taylor House on 17 January 2022”.
15. We know from the evidence lodged with the grounds of appeal that the Appellant’s representatives did not serve any additional evidence before the 17 January 2022 blaming “Covid 19 restrictions, Christmas and New Year breaks”. Evidence was served on the 28 January 2022 by email and three days later there was a request for an oral hearing.
16. The grounds of appeal invite us to find there was procedural unfairness as the evidence and request for an oral hearing were submitted before the decision was promulgated by the Tribunal.
17. The procedure for promulgating a decision in a case such as this in the First-tier Tribunal is the Judge submits his written decision by email to a designated email address and a member of the Tribunal staff promulgates the decision as and when he/she reaches the email containing the decision.
18. We are satisfied that when the FTTJ wrote his decision, be that on 17 January or the 29 January 2022, he was unaware of the additional documents that had been emailed to the Tribunal on 28 January 2022 because the FTTJ made no reference to those documents and specifically stated at paragraph [10] of the decision that “at the date of writing this decision no additional documentation has been received either from the Appellant or his representative.”
19. We cannot say when this decision was written for the reason stated in paragraph [14] above, but what we do know is that by the time the FTTJ sent his decision to the promulgation team the bundle had been lodged albeit only on the previous day (a Friday).
20. The Tribunal service did not promulgate this decision for a further 10 days albeit the 29 January 2022 was a Saturday so promulgation could happen only on the 31 January 2022 at the earliest. It seems it took the promulgation team a further working week to promulgate the FTTJ’s decision.
21. We are satisfied the Appellant failed to comply with the directions given by the Tribunal on both the 21 June and 7 December 2021. The directions issued on 7 December made it clear to the Appellant, and his representatives, that if no documents were served by 21 December 2021 the Appellant would be deemed to rely solely on the grounds of appeal. There was also no application to file the bundle out of time and there was no evidence before the Tribunal that the Appellant’s Representatives enquired when the case was to be dealt with or sought an extension to the timetable.

22. Whilst we accept the Appellant's representatives did serve a bundle of documents before the decision was promulgated by the Tribunal and before the end date entered on the decision (by the FTTJ) nevertheless this was after the cut off date (21 December 2021) set out in the directions.
23. Mr O'Gunneby submitted that he had only been instructed in November 2021 but we find that does not assist the Appellant because Mr O'Gunneby would have been fully aware of the directions issued as they were issued after he was instructed.
24. The Appellant must show the FTTJ acted unfairly and we do not find there was any unfairness in this case. The Tribunal's directions clearly spelt out when evidence needed to be served and also made it clear what would happen to the case if further evidence was not served. The FTTJ dealt with the appeal in line with those directions.
25. Although the decision was only promulgated after the new evidence was submitted we nevertheless conclude the FTTJ did not err by dealing with the appeal based solely on what was before him on 17 January 2022. We make this finding because the court file made it clear on what basis the appeal would be considered. Whilst further evidence was lodged it was filed late and the directions made it clear to all parties how the case would be considered. We therefore find no error on the first ground of appeal.
26. We have considered the second ground namely the failure to adjourn the appeal for an oral hearing. The case had been listed for a paper hearing on 17 January 2022 and the FTTJ completed his decision on 29 January 2022. We find no merit in the submission the FTTJ should have adjourned for an oral hearing because the request for an oral hearing was sent in after the FTTJ had dealt with the case. We find that if the Appellant wanted an oral hearing then such a request should have been made much earlier in the proceedings. We find no error in the second ground of appeal.

Notice of Decision

There is no error in law. The First-tier Tribunal's decision shall stand and the appeal is dismissed.

No anonymity order is made.

Deputy Judge of the Upper Tribunal Alis
Immigration and Asylum Chamber

8 February 2023