IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005427
First-tier Tribunal No:
EA/10053/2021

Hybrid hearing

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 12 October 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE BLACK

Between

Sanam Shehzad
(NO ANONYMITY DIRECTION MADE)

Appellant

and

The Entry Clearance Officer

Respondent

Representation:
For the Appellant: In person (via *Teams*)
For the Respondent: Mr A. Basra, Senior Home Office Presenting Officer (via *Teams*)

Heard at Field House on 5 September 2023

DECISION AND REASONS

1. By a decision promulgated on 27 July 2022, First-tier Tribunal Judge Prudham ("the judge") dismissed an appeal brought by the appellant, a citizen of Pakistan, for an EEA family permit under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). The appellant now appeals against the judge's decision with the permission of First-tier Tribunal Judge Aldridge.

2. The appellant was not represented and participated in the proceedings before us remotely from Pakistan. Consistent with the jurisdiction of the Upper Tribunal when convened to hear an error of law appeal against a decision of the First-tier Tribunal, and the guidance in *Agbabiaka (evidence from abroad; Nare guidance)* [2021] UKUT 286 (IAC), the appellant did not give evidence, and limited his

participation to making submissions concerning why the decision of the judge involved the making of an error of law. The appellant spoke through an Urdu interpreter.

3. Mr Basra also participated remotely.

Factual background and the decision of the First-tier Tribunal

4. The appellant is a citizen of Pakistan. On 30 December 2020, he applied for an EEA Family Permit under the 2016 Regulations. He claimed to be dependent upon his uncle, Shakil Ahmad, a citizen of Portugal, who is residing in the UK. We refer to Mr Ahmad as "the sponsor". The Entry Clearance Officer refused the application because she was not satisfied that the appellant was related to the sponsor as claimed, nor that he was financially dependent upon him. Although there was some evidence of financial support that had been included with the application, the Entry Clearance Officer said that she expected to have seen evidence of financial support over a longer period. There were no details of the appellant's own family circumstances, nor his overall financial position. The decision-maker was not satisfied that the appellant was financially dependent upon his sponsor as claimed.

5. The appellant appealed to the First-tier Tribunal under regulation 36 of the 2016 Regulations. A hearing took place on the papers before Judge Prudham, dismissing the appeal. It appears that that decision was later set aside by a different constitution of this tribunal (see para. 3 of the judge's decision) on the basis that the decision had been taken without sight of the appellant's papers. The appeal is said to have been remitted by the Upper Tribunal to the same judge, who re-took the decision by a further written decision dated 27 July 2022, dismissing the appeal. We do not have a copy of either the first decision of the First-tier Tribunal or the earlier decision of the Upper Tribunal.

6. The second paper hearing before the judge appears to have been set by practical difficulties, of the appellant's making. The appellant had been asked to supply a bundle in support of his case. He did so. However, the bundle he supplied related to a different appellant in another EEA Family Permit appeal, Mr Z. The appellant was asked by the tribunal staff to provide a further bundle, relating to his appeal. He did so. When the matter was allocated to the judge to consider, the judge had available to him the original, "incorrect" bundle from Mr Z's appeal, and the "correct" bundles subsequently provided by the appellant.

7. The judge looked at all materials; the correct and the incorrect, as it were. He had significant concerns arising from the contents of the "wrong" bundle when compared to the appellant's; although it related to a different appellant (Mr Z), many of the documents it featured were very similar to those the appellant had relied upon, the judge found. Both appellants claimed to live at the same address. Electricity bills that had been submitted in support of each application were in the name of the same person. Receipts which had been included purportedly pertaining to the living expenses of the appellant had also been submitted in the proceedings relating to the other, unrelated appellant. The judge listed the similarities at paras 15 and 16. He said, at para. 16:

> "It would appear that both the appellant and [Mr Z, the other appellant] were using essentially almost identical evidence in their respective claims."

8. The judge concluded his operative analysis in the following terms, at para. 17:

> "I find that these discrepancies are of such a nature that I attached little weight to any of the documents provided by the appellant to support his claim. Further the discrepancies were such that I attached little weight to the statements provided by the appellant and the sponsor. I find that given this lack of weight the appellant has not satisfied the burden of proof either that he is related to the sponsor or that he is a dependent of the sponsor. I therefore dismiss the appeal."

9. The judge did not convene a hearing in order to raise these concerns with the appellant, or otherwise seek his views in relation to them before dismissing the appeal in the terms set out above. The Entry Clearance Officer had not raised the concerns herself, despite presumably being privy to both sets of papers.

Issues on appeal to the Upper Tribunal

10. The appellant's case is that the judge should not have looked at the "wrong" bundle when deciding his claim, still less found against him for the reasons he gave. There was, the appellant said, an innocent explanation for the apparent confusion. Both he and the "wrong" appellant had appeals before the First-tier Tribunal, and the appellant enlisted the help of the other appellant, Mr Z, to prepare his bundle. He used Mr Z's computer to upload the bundle to the First-tier Tribunal's portal, but mistakenly uploaded the wrong set of papers, namely those belonging to Mr Z. In relation to the similarities the judge found to exist between the two sets of papers, the appellant said the judge made mistakes of fact. His addresses and that of Mr Z were not the same, contrary to what the judge had said. The electricity bills were not in the same name but were all addressed to the same area. Para. 9 of the grounds of appeal states:

> "… our bills are not delivered here via post or door to door rather they leave the bills at local shop [sic] and then people collect themselves by recognising their names, that is why the address on the bills only shows name of the bill payer and the place Shafqat Abad M.B.Din and (M.B.Din) is the short form of Mandi Bahauddin."

11. As for the similar receipts, that was explained by virtue of the fact the appellant and Mr Z live near each other and frequent the same establishments. Their circumstances are similar to each other, which is why the receipts appear to be for similar goods. The receipts were issued in Urdu and the appellant had used the translation services recommended by Mr Z.

An unfair process

12. While the judge understandably had concerns arising from the striking similarity between Mr Z's papers and those submitted by the appellant, he did not provide the appellant with an opportunity to respond to those concerns prior to reaching a conclusion in the proceedings. Those concerns had not been raised by the Entry Clearance Officer. As it happens, the appellant has sought to provide an explanation in relation to the similarities as found by the judge. Had he been on notice that the judge was minded to raise concerns of the sort that featured in the operative reasoning of his decision, the appellant would have been able to provide the explanation he has provided in the grounds of appeal to this tribunal. Of course, the judge would not have been bound to accept the explanation, and may, in any event, have decided to reject those explanations. That would undoubtedly have been an avenue open to the judge, even if he did have the benefit of the appellant's explanation in relation to the otherwise striking similarities.

13. However, we conclude that the process adopted by the judge was unfair. He relied on points that had not been ventilated between the parties in order to reach a conclusion adverse to the appellant without first giving the appellant the opportunity to respond to any concerns that he had. Of course, judges are not required to give a running commentary on their potential decisions and are not constrained by the approach of the parties to the issues in their resolution. But in some circumstances fairness does require a party to be provided with the opportunity to respond to concerns going to the credibility of a party of the sort raised by the judge of his own motion. See *AM (Fair hearing) Sudan* [2015] UKUT 656 (IAC) at para. (v) of the 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."

14. We cannot say that, had the judge not adopted this approach, he would not have reached a different conclusion. Nor do we conclude that any procedural unfairness was immaterial. For example, other than reaching overall findings relating to the reliability of the documents relied upon by the appellant, the judge did not address or otherwise engage with their contents. He did not make an express finding in relation to the claimed familial relationship between the appellant and the sponsor. He did not consider whether the documents the appellant sought to rely upon, taken at their highest (disregarding any concerns arising from Mr Z) demonstrated that the appellant was reliant upon the sponsor for his essential needs. Had he done so, any procedural unfairness arising from the judge's findings in relation to Mr Z may well have been immaterial. In the circumstances, the judge's findings concerning Mr Z's papers lay at the heart of his findings. We conclude that the paper hearing before the judge was unfair.

15. In light of this finding, bearing in mind para. 7.2(a) of the Practice Statement, we conclude that the effect of the error was to deprive the appellant of a fair hearing before the First-tier Tribunal. A remittal with no findings of fact preserved is therefore the only appropriate course.

16. We reach this conclusion mindful of the fact that this matter will be remitted for a third hearing before the First-tier Tribunal. While that is unfortunate, we do consider that it is the conclusion required by the Practice Statement, and we see no reason to depart from or otherwise disapply its guidance.

17. While the onward management of these proceedings will be a matter for the First-tier Tribunal, it appears to us that this case would most appropriately be dealt with by means of an oral hearing. It is also likely that the remitted hearing would benefit from the Entry Clearance Officer's considered position in relation to the apparent similarities between Mr Z's documents and those of the appellant, in light of the explanation given by the appellant.

Notice of Decision

The appeal is allowed.

The decision of Judge Prudham is set aside with no findings of fact preserved.

The appeal is remitted to the First-tier Tribunal to be heard by a different judge.

Stephen H Smith

Case No: UI-2022-005427
First-tier Tribunal No: EA/10053/2021

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 September 2023