IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000671

First-tier Tribunal No:
HU/51389/2022
IA/02191/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 28 December 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MS ADAMA DANESI YUSUF EHIDIAME
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Karnic, Counsel
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 14 December 2023

DECISION AND REASONS

1. The Appellant is a national of Nigeria, date of birth 27 June 1973. She applied for indefinite leave to remain on the basis of long residence. The Respondent refused this application on 16 February 2022.

2. The Appellant appealed this decision and her appeal came before Judge of the First-tier Tribunal Kelly (hereinafter referred to as the FTTJ) on 9 November 2022 who dismissed the Appellant's appeal.

3. Upper Tribunal Judge Rintoul granted permission to appeal on 24 April 2023 finding it arguable the FTTJ erred in concluding the Appellant was dishonest for the reasons set out in the renewed grounds of appeal.

4. Mr Karnic adopted the amended grounds of appeal and submitted there had been a material error in law. In summary, Mr Karnic argued the Respondent accepted in his Rule 24 response the FTTJ had made mistakes of fact but sought to argue that such findings were not material to the decision. Mr Karnic argued such mistakes went to the heart of decision and must be material as they demonstrated the FTTJ had misunderstood what was being said. It could not be argued such errors were not material to the FTTJ's overall assessment or that any rational tribunal would come to the same decision especially as it had never been the Respondent's or HMRC's case the Appellant had been dishonest.

5. Mr Bates opposed the application and adopted the Rule 24 response dated 7 November 2023. Mr Bates referred to the headnote in Ashfaq (Balajigari: appeals) [2020] UKUT 00226 (IAC) and submitted the FTTJ had rejected the innocent explanation advanced by the Appellant. At its heart this was a refusal on suitability and the Respondent had identified a discrepancy between earning records provided to HMRC and Respondent. The Respondent assumed the Appellant had failed to disclose earnings and the FTTJ identified this issue in his decision. The FTTJ considered whether there was a deception or an innocent mistake be that to the Respondent or HMRC and was entitled to reach the finding he did. Any mistakes in the decision were not material.

6. No anonymity direction was made.

DISCUSSION AND FINDINGS

7. Having heard detailed submissions, which are contained in my notes of the hearing. I have concluded there was an error in law.

8. The approach to be taken in appeals such as this one was set out by the Court of Appeal in Balajigari and others v SSHD [2019] EWCA Civ 673.

9. The FTTJ recognised this in his decision by making reference to the appropriate test and setting out that the burden of proof in demonstrating dishonesty remained with the Respondent and if that was shown it would not in general be sufficient for the Appellant to assert it was simply a mistake without providing a full and particularised explanation of what the mistake was and how it arose. The Upper Tribunal in Ashfaq stated the following:

a. In an earnings discrepancy case there is no a reason to suppose that any of the declared figures were accurate. In particular, the fact that a person is now prepared to pay a sum of money to HMRC does not of itself prove past income at the level claimed.

b. The explanation by any accountant said to have made or contributed to an error is essential because the allegation of error goes to the accountant's professional standing. Without evidence from the accountant, the Tribunal may consider that the facts laid by the Secretary of State establish the appellant's dishonesty.

10. The grant of permission centred around mistakes as to fact and Mr Karnic submitted that these were material and undermined the FTTJ's assessment of the evidence.

11. Mr Bates, in a Rule 24 response and oral submissions, accepted the FTTJ had made errors but argued the errors were not material to the ultimate decision and he emphasised that the Respondent's refusal was based in the Appellant's inability to satisfy the good character requirements under suitability to warrant a grant of indefinite leave to remain.

12. The Respondent conceded in the Rule 24 response that the FTTJ had made errors of fact and at paragraph [11] of the Rule 24 letter the Respondent wrote, "it is therefore regrettably unclear to which accounts the FTTJ is actually referring" and at paragraph [12] stated "on balance it is likely that the FTTJ's reference to accounts submitted to Company's House were intended to be a reference to accounts submitted to HMRC….. and it must be accepted the UTR reference is 2330265488 rather than the UTR 1314218440 quoted by the FTTJ. Whilst the FTTJ has made mistakes …. the Respondent challenges the materiality of the error"

13. Mr Karnic's submission is the fact there were mistakes of fact would, as the grant of permission made clear, be relevant to the FTTJ's assessment. Mr Bates, in adopting the Rule 24, argued the errors were not material.

14. Where there are mistakes as to fact and these are relevant to any subsequent assessment on credibility, honesty and character I accept these errors may have unwittingly impacted on the FTTJ's approach to the evidence.

15. The fact there were mistakes cannot be overlook as they were relevant to the overall picture that had to be considered. I cannot find they are not material or would not have impacted on the FTTJ's assessment as to whether the Appellant satisfied the good character requirements.

16. Whilst Mr Bates sought to persuade me the errors were not material the fact there were such errors do go to the heart of the decision and for this reason I find there was a material error in law.

17. Paragraph 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

    a. the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

    b. the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

18. In my judgment, given that it is necessary for all the issues in this case to be considered afresh on the merits, this case falls within para 7.2 (a) and (b) because further evidence, including oral evidence is likely, and findings of fact on the issues will need to be made.

Notice of Decision

The decision of the First-tier Tribunal did involve the making of an error on points of law. I have set aside the decision and remit the same back to the First-tier Tribunal to be heard by a Judge other than Judge of the First-tier Tribunal Kelly.

Deputy Judge of the Upper Tribunal Alis
Immigration and Asylum Chamber

20 December 2023