IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-004320
First-tier Tribunal Nos:
HU/00231/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 14 December 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

MR OLAYINKA AYOBAMI OMIKUNLE
(NO ANONYMITY ORDER MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: The Sponsor appeared in person without legal representation
For the Respondents: Mr Tan, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 5 December 2023

DECISION AND REASONS

Background

1. This matter concerns an appeal against the Respondent's decision letter of 24 October 2022, refusing the Appellant's application made on 10 May 2022.

2. The Appellant applied for entry clearance on the basis of family life with his wife, the Sponsor Ms Bolaji Agnes Adeniji. I cannot see that a copy of the application has ever been provided.

3. The Respondent refused the Appellant's claim by letter dated 24 October 2022 ("the Refusal Letter") for several reasons, being that:

(a) the Appellant had not provided a TB certificate in breach of paragraph A39 of the immigration rules;

(b) he did not meet the eligibility relationship requirement under E-ECP2.1-2.10 particularly (E-ECP.1.1(d)) because that the Respondent was not satisfied that the relationship was genuine or subsisting or that the couple intended to live together permanently in the UK;

(c) he did not meet the eligibility financial requirement under E-ECP3.1-3.4, because he had not submitted documents required by appendix FM_SE of the rules, being payslips and bank statements for the last six months plus a letter from his employer;

(d) he did not meet the English language requirement in E-ECP4.2 because there was no evidence concerning his ability to speak English; and

(e) there were no exceptional circumstances.

4. The Appellant appealed the refusal decision.

5. His appeal was heard by First-tier Tribunal Judge N. Malik ("the Judge") on paper. The Judge subsequently dismissed the appeal in his decision promulgated on 14 September 2023.

6. The Appellant applied for permission to appeal to this Tribunal on two grounds which may be summarised as follows:

> Ground 1: The Judge did not consider evidence arising after the date of application as he was able to do under section 85(4) Nationality and Immigration Act 2002, such that the Judge did not properly consider all of the evidence before him, which included evidence concerning visits, payslips and bank statements and an English-language test certificate;
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> Ground 2: The Judge did not consider several issues and evidence that were raised in the grounds of appeal, which is contrary to s.86 NIA 2002 requiring the Tribunal to determine each matter raised as a ground of appeal.

7. Permission to appeal was granted by First-tier Tribunal Judge Hatton on 27 September 2023, stating:

> "1. The application is in time.
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> 2. The grounds assert the Judge erred in failing to fully consider the documentary evidence provided. When viewed in conjunction with the excerpts from the Appellant's Bundle ("AB") helpfully adduced with the grounds, I accept the Judge arguably erred in this regard. In particular, I accept the Judge's finding at [11] that the sponsor provided just two payslips is arguably at odds with the payslips at [AB, pp.22-29] and the accompanying Halifax statements at [HB, pp.30-40], and the finding at [12] that there was "no evidence" of the Appellant passing an English language test appears to be at odds with the document at [AB, p.41]. Further, I accept it is arguable, on the applicable balance of probabilities, that the stamps showing regular visits to and from Nigeria at [AB,pp.42-44] are capable of constituting evidence of contact. By the same token, I accept the grounds' contention that, in accordance with Section 85(4) of the Nationality, Immigration and Asylum Act 2002, this Tribunal may consider any matter which it thinks relevant

> to the substance of any decision made by the Respondent, including a matter arising after the date of decision. The practical implications of this discretionary power conferred by statute were clarified by the Tribunal in **EA (Section 85(4) explained) Nigeria [2007] UKAIT 00013 at [7**] i.e. "*The correct interpretation of s85(4) is perhaps best indicated by saying that the appellant cannot succeed by showing that he would be granted leave if he made an application on the date of the hearing:* ***he can succeed only by showing that he would be granted leave if he made, on the date of the hearing, the same application as that which resulted in the decision under appeal."*** **[emphasis added**]. The Tribunal in EA further clarified at [8] that the question to be asked in accordance with Section 85(4) is whether the evidence available to the Immigration Judge showed that, at the date of the hearing, the specific application should be granted rather than refused. In applying the ratio of EA to the facts of this case, I consider that the post-application documentation relied upon by the Appellant was arguably sufficient to enable him to succeed under the Immigration Rules, and correspondingly, it is arguable the Judge erred in dismissing such evidence e.g. at [12] simply because it was provided after the date of application.
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> 3. Permission to appeal is granted on all grounds".

The Hearing

8. The matter came before me for hearing on 5 December 2023 at Manchester Civil Justice Centre.

9. The Sponsor attended as a litigant in person on behalf of the Appellant and Mr Tan attended for the Respondent.

10. Given the lack of legal representation for the Appellant, I took care to explain the background which had led to, and the reason for, the hearing. I said my preliminary view was that the Respondent was fighting an uphill battle to show there are no errors of law, for the reasons stated in the grant of permission.

11. Mr Tan said that he had only seen the documents appended to the grounds of appeal; as this was a paper case it may be that the Respondent was not copied in on papers filed with the Tribunal; he accepted that if papers were filed with the Tribunal as is alleged in the grounds, then there is merit to the grounds and he would have to accept that the Judge has not considered the full range of evidence.

12. I said I had seen the Appellant's bundles filed before the First-tier Tribunal which contained all of the documents referred to in the grounds of appeal and several others. I was therefore satisfied that the documents had been before the Judge and was at a loss as to why the Judge appears not to have reviewed all of them. I said I was satisfied that there was a material error of law and proposed setting aside the decision and remitting it back to the First-tier Tribunal requiring there to be an oral hearing. Mr Tan did not object to this proposed course of action. I explained to the Sponsor what was happening and said that I would provide a brief written decision, which I now do.

Discussion and Findings

13. It is well established that the decisions of judges should contain sufficient explanation and reasoning, including as to the origin of a point or evidence on which findings are based so as to avoid both confusion and further dispute in any onward appeal – see, for example, the headnote of MK (duty to give reasons)

Pakistan [2013] UKUT 00641 (IAC). This also necessitates a judge having regard to all of the relevant evidence before them.

14. The first page of the Judge's decision states that the matter is being dealt with as a 'paper case'. In terms of the evidence, he describes this at [5]:

> "The evidence before me consists of four appellant's appeal bundles, two of which are duplicated. There was no respondent's appeal bundle."

15. It is unfortunate that there is no description of the documents contained within the said bundles. With the case being dealt with on paper, and in the absence of an oral hearing, there would have been no opportunity to check whether the papers in front of the Judge accorded with what the Appellant considered he had filed. It would therefore have been desirable to have clarity as to what the Judge actually had in front of him. I note however, that the Judge's description of there being four Appellant bundles corresponds with this Tribunal's case management system showing that bundles numbered 1 to 4 were filed with the First-tier Tribunal. I find those bundles contain the documents referred to in the grounds of appeal such that these documents were before the Judge. The fact that Judge Hatton (in granting permission prior to the matter coming to this Tribunal) also refers to the Judge's comments being at odds with the evidence is further proof of the same.

16. The Judge sets out the correct legal basis for the appeal in [3]-[4], including the correct burden and standard of proof. However, there is no mention of section 85(4) of the Nationality and Immigration act 2002 which states that:

> "On an appeal under section 82(1) ... against a decision [the Tribunal] may consider ... any matter which [it] thinks relevant to the substance of the decision, including ... a matter arising after the date of the decision".

17. In [6] Judge correctly summarises the Respondent's position taken in the Refusal Letter. The Judge does not set out the Appellant's case in the same way, but refers to it in the course of his findings. In [7] he states that:

> "In determining this appeal, I have considered the evidence before me, including any submissions provided by the parties. If I have not specifically mentioned a document, certain evidence, or submission in this decision it does not mean I have not considered it and given it appropriate weight in reaching my findings."

18. Despite this, as I will go on to discuss, I find the Judge did not consider all of the evidence before him.

19. At [8] the Judge states that:

> "With reference to the requirement of provide a TB test, the appellant has now provided a 'UK Pre-Departure Tuberculosis Detection Programme Medical' certificate issued on 11/01/23; this indicates an abnormal result and the appellant has been given a referral letter. It does not though state there is evidence of active pulmonary TB."

20. The Judge does not make mention of the certificate stating that, despite the abnormal result, there was nevertheless "no evidence of active pulmonary TB" such that it is not clear the Judge properly read the certificate. He also does not make any specific findings as to whether the requirements of paragraph A39 of the rules are satisfied by this certificate. As it is an issue raised in the Refusal

Letter, even if the certificate was provided after the date of application, such a finding was needed. This is an error.

21. In [9] the Judge finds that the Appellant has not addressed the Respondent's concerns regarding the genuineness of the marriage. The Judge's reasons appear to be that: there was no evidence of contact between the couple other than several undated photographs; there was only one page of the Sponsor's Nigerian passport indicating she had visited Nigeria; and there was no evidence to suggest either piece of evidence was provided with the application.

22. Whilst it is correct that the passport and photographs were the items submitted as evidence of contact, the descriptions are inaccurate, as there are in fact several pages of the passport showing several stamps evidencing travel between 2021 and 2023, and there are several photographs which appear to show the couple on at least 10 different occasions, looking at the various outfits and backgrounds featured therein. The Judge also makes no comment as to the marriage certificate and what, if any weight was attached to it, in demonstrating relationship. Even if, having taken all of this into account, the evidence of relationship was found to be thin, the Judge was under a duty to at least consider it properly and, having done so, to make clear, properly reasoned findings.

23. In [10]-[11] the Judge says that:

> "10. With refence to the financial requirement, the grounds of appeal say the sponsor still works at Rodch Services Ltd earning £48,000 per annum and her payslips for seven months from October 2021 to April 2022, prior to the making of the application in May 2022, were provided to the respondent – as were her bank statements for the same period and a letter of employment. It is said this was disregarded and that the evidence is contained in the appellant appeal bundle. There is a letter in the evidence before me said to be from the sponsor's employers dated 29/01/21, but no evidence other than the appellant's say so that it was provided with the application.
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> 11. There are only two payslips in the appellant's appeal bundles for the sponsor for the months of October 2021 and November 2021. Payslips are required covering a full six months prior to the application, as are bank statements. This is not in the evidence before me - or that this required evidence was provided as at the time of application. Consequently, I find the appellant has not addressed this basis of the respondent's refusal."

24. It is not correct that there were only two payslips and no corresponding bank statements in the appeal bundles. The bundles actually contain payslips from and including October 2021 to and including May 2022, along with bank statements in which the salary payments from these payslips can be seen. There was also a letter from the Sponsor's employer dated 29 January 2021 stating that she commenced employment on 1 February 21 earning £48,000 pa in a full-time permanent role. The application was dated 10 May 2022 such that the payslips, letter and bank statements go to the six months leading to the date of application. It is unclear why, with this evidence before him, the Judge finds that there is an absence of required evidence. Even if he found this evidence was not sent with the application, the Judge should have made findings in relation to it since having been provided and whether it now 'ticked the boxes' in terms of specified evidence for the financial requirement. I find the Judge erred in not considering this (relevant and material) evidence and not making rational findings in relation to it.

25. In [12] the Judge states:

> "With refence to the English language requirement, the grounds of appeal say the appellant passed an approved English language test on 12/01/23 and has provided the certificate in his appeal bundle. There is no evidence of this in the evidence provided to me - but even if it were, it was after the date of application."

26. Again this is inaccurate, as the Appellant's bundles contain an IELTS certificate dated 18 January 2023 stating that the Appellant has passed an English language test. Failing to consider the certificate and make appropriate findings was an error.

27. The Judge's conclusion at [13] that the Appellant does not meet the requirements of the rules, is infected by the errors I have found. It cannot be said with certainty that the Judge would have reached the same conclusion had those errors not occurred. They are therefore material.

28. There is only one paragraph in the decision dealing with the Appellant's claim under article 8 ECHR, as follows:

> "14. I now determine the appeal based on essentially the five questions endorsed by the House of Lords in Razgar 2004 UKHL 00027. Given the lack of evidence regarding contact between the parties, I am not satisfied, on balance, that Article 8 family life is engaged. Even if it is, I find there is in place a legislative framework giving rise to the interference with Article 8 rights, which is precise and accessible enough for the appellant to regulate his conduct by reference to it. I find the interference does have a legitimate aim, as it is in pursuit of one of the legitimate aims set out in Article 8 (2), necessary in the pursuit of the economic well-being of the country, through the maintenance of the requirements of the policy on immigration control. The State has the right to control non-nationals into its territory and Article 8 does not mean an individual can choose where they enjoy their family and private life. The evidence does not suggest there are any minor children from the marriage. With reference to section 117 considerations, I find, on balance, the appellant has not discharged the burden that he is financially independent. There is no evidence to suggest it would disproportionate for the appellant to make a further application for entry clearance if in possession of the required evidence, that the time taken to do so would be disproportionate - or that the parties could not maintain contact in the interim as they claim to do now. Finally, the evidence also does not suggest there are any compassionate or compelling circumstances".

29. As above, had the Judge properly considered the evidence before him, his decision as regards the Appellant's ability to meet the requirements of the immigration rules may have been different. If he had found the Appellant actually met the rules, this would have been determinative for the purposes of the proportionality exercise pursuant to the case of TZ (Pakistan) [2018] EWCA Civ 1109. The findings in [14] concerning article 8 are therefore infected by the errors already found.

30. It follows that I find the errors found infect the decision as a whole such that it cannot stand.

31. In these circumstances, given the amount of fact finding needed and given a hearing has so far not taken place, I find the appropriate course of action is for the matter to be remitted to the First-tier Tribunal for hearing afresh.

Conclusion

32. I am satisfied the decision of the First-tier Tribunal did involve the making of errors of law.

33. Given that the material errors identified fatally undermine the findings of fact as a whole, I set aside the decision of the Judge and preserve no findings.

34. In the light of the need for extensive judicial fact-finding, I am satisfied that the appropriate course of action is to remit the appeal to the First-tier Tribunal to be heard afresh by a judge other than Judge N. Malik, with an oral hearing being required.

Notice of Decision

35. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

36. I remit the appeal to the First-tier Tribunal for a fresh decision on all issues by way of oral hearing. No findings of fact are preserved.

37. No anonymity order is made.

L.Shepherd
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
8 December 2023