



**Upper Tier Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/20610/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 18 March 2015**

**Determination Promulgated
On 22 April 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Entry Clearance Officer - Shefo

Appellant

and

**Adetola Adedeji Ogunjimi
[No anonymity direction made]**

Claimant

Representation:

For the claimant: Mr M Iqbal, instructed by Frederick Rine Solicitors
For the appellant: Ms A Holmes, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of the Entry Clearance Officer against the determination of First-tier Tribunal Judge Coutts promulgated 1.12.14, allowing the claimant's appeal against the decision of the respondent to refuse him entry clearance to the United Kingdom to settle with his wife and sponsor. The Judge heard the appeal on 14.11.14.
2. First-tier Tribunal Judge Nicholson granted permission to appeal on 25.1.15.
3. Thus the matter came before me on 18.3.15 as an appeal in the Upper

Tribunal.

Error of Law

4. For the reasons set out herein I find that there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Coutts should be set aside.
5. The application was refused on 28.2.14 because the claimant failed to meet the specified evidence requirements of Appendix FM-SE in relation to the maintenance requirements.
6. Judge Coutts purported to dispense with those requirements, expressing satisfaction from the sponsor's oral evidence that the sponsor's income met the requirements. However, the judge has no discretion to dispense with or override the mandatory financial requirements of Appendix FM-SE. To do so was an error of law such that the decision cannot stand and must be set aside to be remade.
7. Mr Iqbal accepts that documentary evidence demonstrating that the claimant met the strict requirements of Appendix FM-SE was not submitted with the application. Neither was the necessary evidence before the Entry Clearance Officer when the decision was made, nor was it before the First-tier Tribunal at the appeal hearing. However, he sought leave to adduce this evidence before me, with a bundle under cover of letter dated 6.2.15. His argument is that as section 85A(2) of the 2002 Act permits the Tribunal to consider the circumstances pertaining at the date of decision, I should now, even in the error of law assessment, consider this material. I do not accept his submission. The issue is whether there was an error of law in the making of the decision of the Tribunal. I cannot assess that by reference to material which was not put before the First-tier Tribunal.
8. He further wished to submit that the reason the evidence he sought to rely on was not submitted with the application, or at any time earlier than 6.2.15, was because of failure on the part of the claimant's representatives. However, that was not put before the First-tier Tribunal and I note that there has been no Rule 24 response by the claimant making any such assertion.
9. Whilst the grounds of appeal to the First-tier Tribunal included a generic claim that the decision was incompatible with the claimant's rights under ECHR, that does not appear to have been advanced at the First-tier Tribunal hearing and was not raised before me in the error of law hearing.
10. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

11. In all the circumstances, I relist this appeal for a fresh hearing in the First-tier Tribunal, on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the parties of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

12. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the decision to be remade afresh in the First-tier Tribunal.



Signed:

Date: 18 March 2015

Deputy Upper Tribunal Judge Pickup

Consequential Directions

1. The appeal is remitted to be remade afresh in the First-tier Tribunal at Hatton Cross;
2. No findings of fact are preserved;
3. It has been listed for 26.8.15 with a time estimate of 2 hours;

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.



Signed:

Date: 18 March 2015

Deputy Upper Tribunal Judge Pickup