Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/01086/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 March 2018	**On 20 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SAMSON OLUSOJI OLODAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge G A Black promulgated on 27 June 2017, which dismissed the Appellant's appeal against the respondent's refusal to vary leave to remain in the UK.

Background

3. The Appellant was born on 07 July 1979 and is a national of Nigeria. On 15 February 2016 the Secretary of State refused the Appellant's application to vary leave to remain in the UK as a tier 2 migrant. The appellant entered the UK in April 2007 as a student. Leave to remain was extended until 1 March 2015. The appellant applied in time to vary leave under tier 2 as a minister of religion.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge G A Black ("the Judge") dismissed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 24 January 2018 Judge Holingworth granted permission to appeal, stating

> It is arguable that the Judge has fallen into error in the approach taken to the further evidence produced by the respondent. This evidence did not reach the Judge prior to the start of the appeal hearing. Whilst the evidence had been provided on 19 June it was in breach of directions. Clear directions were given by the Tribunal on form IA37 sent out on 21 December 2016. It was arguable in the circumstances that procedural unfairness has arisen. The permission application makes it clear that the further evidence played no part at the hearing. It is arguable that the Judge has set out an insufficient analysis or any analysis at all in relation to the extent of the evidence provided by the appellant in relation to an innocent explanation. The permission application refers to paragraphs 6 to 13 of the appellant's witness statement. In that witness statement the appellant has described the circumstances appertaining to taking the examinations. At paragraph 7 of the decision the Judge found that no innocent explanation was relied on. It is arguable that the Judge has failed to take into account the appellant's witness statement in this regard. It is arguable that the Judge has set out an insufficient analysis in relation to the matrix of factors relied upon in relation to the issue of the appellant being sponsored as a minister of religion. It is arguable that the Judge should have dealt with the question of whether the appellant had completed 10 years continuous lawful residence in the United Kingdom. That amended ground of appeal set forward this point. The Judge accepted that the appellant has established a private life as a result of his 10 years residence in the UK. It is arguable that the Judge should have considered the immigration rules in this context. The Judge referred to paragraph 276 ADE (1) (i) & (vi). It is arguable that the Judge should have set out a full analysis in relation to the question of whether very significant obstacles existed taking into account the extent of the available evidence in this regard.

The hearing

6. The Appellant did not attend the appeal nor was he represented at the appeal. I am satisfied that due notice of the appeal was served upon the Appellant at the address the appellant has given. I am therefore satisfied that having been served notice of the hearing and not attended it is in the interests of justice to proceed with the hearing in the Appellant's absence,

relying on paragraph 38 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

7. The grounds of appeal for the appellant were framed by counsel. There are four grounds of appeal. The first is that the Judge erred in the weight attributed to the evidence that the appellant is a Minister of religion, so that his finding that the appellant is a musician rather than a minister of religion is unsafe. The second is that the Judge's conclusion at paragraph 7 in relation to the immigration rules is made in error and is inadequately reasoned. The third ground of appeal is that the Judge failed to consider paragraph 276B of the immigration rules. The fourth ground of appeal is that the Judge's consideration of paragraph 276 ADE(1)(vi) of the rules is inadequately reasoned.

8.(a) For the respondent, Mr Clarke told me that the decision does not contain errors of law. He told me that, because both the decision and the application predate April 2015, the appellant enjoys rights of appeal which include appeals under the immigration rules. He took me to the appellant's application, in which the appellant specified that his job title is "Minister of religion". He referred me to rule 245HG and reminded me that, in terms of appendix 1 to the rules (as they were at the date of decision) the appellant needed 50 points to succeed, and that the award of points would be governed by the CoS. The CoS relied on by the appellant describes his job title as "instrumentalist". That description places the appellant within SoC code description 3415, so that the appellant cannot succeed under the immigration rules.

(b) Mr Clarke told me that the second ground of appeal is an allegation of procedural unfairness. He referred me specifically to the terms of the grounds of appeal where (at paragraph 9(i)) counsel for the appellant says that the respondent's supplementary bundle was received

> … The day before the hearing, and therefore far too late to respond to it.

(c) Mr Clarke told me that the appellant did not seek an adjournment and did not make submissions in relation to the supplementary bundle. Counsel for the appellant did not object to the receipt of the evidence, although late. The Judge records, at [3] of the decision, that she took account of the further bundle of evidence. He told me that in the circumstances the Judge was perfectly entitled to do so. He told me that the grounds of appeal make it clear that the appellant had fair notice of the evidence produced by the respondent and made no attempt to object to that evidence. He said that, in those circumstances, there cannot be procedural unfairness.

(d) Mr Clarke told me that the appellant has not made an application under paragraph 276B of the immigration rules. The decision appealed against is not a consideration of paragraph 276B of the rules so that if the Judge had considered paragraph 276B of the rules that would have been an error of law. In any event the Judge's decision is that the appellant has employed deception so that paragraph 322 of the immigration rules is

engaged. He told me that finding means that (in any event) the appellant cannot meet the requirements of paragraph 276B(iii) of the rules.

(e) Mr Clarke took me to [9] of the Judge's decision and told me that the final sentences there provide adequate reasoning for the Judge's finding that paragraph 276 ADE(1)(vi) of the rules is not met and that there are no significant obstacles to the appellants reintegration into Nigeria.

Analysis

9. Notwithstanding what was said by Mr Clarke, in this case the only competent ground of appeal is on ECHR grounds. The appellant's application was made on 1 April 2015. Under the pre-Immigration Act 2014 appeals regime, rights of appeal existed against the refusal of an application:

> (i) where entry clearance was refused, although the available grounds of appeal are limited for some cases by section 88A
>
> (ii) where a certificate of entitlement to a right of abode was refused
>
> (iii) where a decision was taken to refuse to vary a person's leave to enter or remain in the UK if the result of the refusal is that the person has no leave

Those appeal rights continue to exist for decisions made on or after 6 April 2015, but only where an application was made before 2 March 2015 for leave to remain as a Tier 1 migrant, Tier 2 migrant or Tier 5 migrant or their family member

10. The appellant's application was an application for leave to remain as a tier 2 (Minister of religion) Migrant and was made on 1 April 2015. Even though the decision notice sets out the rights of appeal which could only apply if the appellant's application was submitted before 2 March 2015, the only competent ground of appeal is on article 8 ECHR grounds. The fact that the respondent made an error and appears to offer grounds of appeal which are not available does not create competent grounds of appeal.

11. As a result the third ground of appeal is incompetent.

12. The first ground of appeal relates to the weight that the Judge gave to certain evidence, and the Judge's finding that the appellant is a musician, not a Minister of religion. Mr Clarke's submission about the evidence produced is entirely correct. The CoS details which the appellant relies on clearly identifies the appellant as an instrumentalist. It describes the appellant's job title as "instrumentalist". It describes the job type as "3415 musicians". The summary of job description provided dwells on musical accompaniment. That is the evidence that the appellant relied

on to support his application, so it is difficult to see what other conclusion the Judge could have come to.

13. At [6] of the decision the Judge analyses the appellant's evidence and the evidence of his witnesses. In reality, ground one is a complaint about the weight that the Judge attached to various strands of evidence. In Green (Article 8 – new rules) [2013] UKUT 254 (IAC) the Tribunal said that "*Giving weight to a factor one way or another is for the fact finding Tribunal and the assignment of weight will rarely give rise to an error of law*". There is no merit to the first ground of appeal.

14. The second ground of appeal goes straight [7] of the decision and says that procedural unfairness tainted the Judge's conclusions in relation to paragraphs 322(5) and 245HD(a) of the immigration rules. The grounds concede that the respondent's supplementary bundle was received the day before the hearing (albeit after close of business) and complains that the appellant was deprived of the opportunity to respond.

15. No application was made to adjourn. No objection was taken to the receipt of the evidence, although late. The appellant was represented by counsel at the hearing before the First-tier Tribunal. Counsel had the opportunity to oppose the admission of that evidence. The respondent was not represented before the First-tier. Counsel did not take the opportunity to either seek an adjournment or to object to the admission of evidence. In those circumstances there cannot be procedural unfairness. The appellant had notice of the case to be argued for the respondent before the hearing commenced. That notice came late, but if it made any difference to the appellants case then Counsel representing the appellant would have taken the opportunity to object to the admission of the evidence, and to seek an adjournment if the evidence was admitted. Those are the safeguards which provide for procedural fairness. The appellant was represented by counsel. Counsel chose to proceed with the hearing.

16. The second ground of appeal argues that the burden of proof is incorrectly applied and that the principles in SM and Qadir (ETS – Evidence – Burden of proof) [2016] UKUT 229 IAC were ignored by the Judge.

17. In R (on the application of Nawaz) v SSHD (ETS:review standard/evidential basis) [2017] UKUT 00288 it was held that the standard in ETS cases is on ordinary judicial review principles and deception is not a question of precedent fact except in particular circumstances. Evidence of an applicant's English language skills is unlikely to have any decisive effect in judicial review proceedings on the fairness of the decision under challenge. Evidence obtained by the use of the Look-up Tool and subject to the human verification procedure, is an adequate basis for the SSHD's deception finding in these cases bearing in mind the case of Flynn [2008] EWCA Crim 970 [24 – 27] and the evidence of Dr Harrison and Professor French. The lack of visible note-taking by the human verifiers does not provide any ground of challenge to the decision

as insufficiently transparent, where there has been an offer (whether accepted or not) to provide a copy of a voice recording for analysis.

18. In Shehzad and Chowdhury [2016] EWCA Civ 615 it was held that a decision under paragraph 322(1A) of the Rules required material justifying a conclusion that the individual under consideration had lied or submitted false documents. The initial evidential burden of furnishing proof of deception was on the Secretary of State. Where the Secretary of State provided prima facie evidence of deception, the burden shifted onto the individual to provide a plausible innocent explanation, and if the individual did so the burden shifted back to the Secretary of State. In effect it was held that a screenshot of the results which stated that that was the position and included the "ETS Lookup Tool" which showed the tests that were categorised as "invalid" sufficed to discharge the initial burden.

19. At [7] of the decision the Judge explains why she places reliance on the respondent's evidence and why the burden of proof shifts to the appellant. In the grounds of appeal the appellant complains that paragraphs 6 to 13 of his witness statement have been ignored. Paragraph 6 to 13 of the appellant's witness statement gives an account of the appellant's journey to Elizabeth College to take the TOIEC exam. The evidence simply amounts to an assertion that the appellant travelled to the College and took the exam himself. It does not offer an innocent explanation which would meaningfully challenge the evidence contained in the respondent's supplementary bundle. The Judge's finds that the appellant does not give an explanation capable of displacing the respondent's evidence that his test results were found to be invalid. That is a finding which was available to the Judge on the evidence presented. A description of a journey to and from college and a description of the component parts of a TOIEC exam does not offer an innocent explanation capable of explaining away prima facie evidence that a proxy test taker had been used.

20. As I have already indicated, the third ground of appeal is not competent because the First-tier Tribunal did not have jurisdiction to consider an appeal under the immigration rules. In any event the third ground of appeal makes little sense because the appellant's application was not made under paragraph 276B of the immigration rules. Even if I am wrong in each of those points, because the Judge finds that the appellant relies on a fraudulently obtained English language test certificate the Judge is correct to find that the appellant falls foul of paragraphs 322(2) & (5) of the rules. That finding means that paragraph 276B(iii) of the rules must operate against the appellant, so that the appellant could not succeed under paragraph 276B of the immigration rules.

21. At [9] of the decision the Judge finds that there are very significant obstacles to the appellants reintegration in Nigeria do not exist, so that the appellant cannot meet the requirements of paragraph 276ADE(1)(vi) of the rules. The fourth ground of appeal argues that that finding is inadequately reasoned. There is no merit in the fourth ground of appeal.

[9] of the decision contains a comprehensive consideration of paragraph 276ADE of the rules in its entirety. The Judge's proportionality assessment of article 8 ECHR grounds of appeal contains the same considerations which are required by paragraph 276ADE of the rules. The second and third last sentences of [9] are succinct findings of fact which indicate that there are no obstacles to the appellants reintegration in Nigeria. It would have done no harm if those two sentences occurred earlier in [9] of the decision, but that is a question of style. The substance of the two sentences is contained in the decision. There are clearly findings which apply to the article 8 assessment both in terms of paragraph 276 ADE of the rules and in terms of a freestanding article 8 assessment.

22. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

23. There is nothing wrong with the Judge's fact-finding exercise. In reality the appellant's appeal amounts to little more than a disagreement with the way the Judge has applied the facts as she found them to be. The respondent might not like the conclusion that the Judge has come to, but that conclusion is the result of the correctly applied legal equation. The correct test in law has been applied. The decision does not contain a material error of law.

24. The Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed.

25. No errors of law have been established. The Judge's decision stands.

DECISION

26. The appeal is dismissed. The decision of the First-tier Tribunal, promulgated on 27 June 2017, stands.

Signed Paul Doyle Date: 19 March 2018

Deputy Upper Tribunal Judge Doyle