Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/03746/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th December 2018	**On 14th January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR OLANREWAJU MUHAMMED AFOLABI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Nwaeku, Solicitor
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria born on 4th September 1983. The Appellant has an extensive immigration history having arrived in the UK on 12th October 2010 with entry clearance as a student valid until January 2012. The Appellant's entry clearance was extended until March 2014 as a Tier 1 (Post-Study) Student. The day before his leave expired the Appellant made an in country application for leave to remain under the ten year family/private life route as a partner. That application was granted until 2nd November 2016. On 1st November 2016 the Appellant made a further application for leave to remain on that basis which was refused.

2. The reasons for refusal were set out in the Notice of Refusal dated 14th February 2017. The detailed reasons for refusal are set out at paragraphs 8 to 12 of the decision of the First-tier Tribunal Judge.

3. I consequently accept that this is an Appellant who has not at any stage overstayed his application. All applications he has made have been made in time.

4. The Appellant appealed against the decision of the Secretary of State in the Notice of Refusal and that appeal came before Judge of the First-tier Tribunal Cameron sitting at Taylor House on 16th April 2018. In a Decision and Reasons promulgated on 17th May 2018 the Appellant's appeal was dismissed.

5. The Appellant lodged Grounds of Appeal to the Upper Tribunal on 30th May 2018. That application led to permission being refused to appeal by First-tier Tribunal Judge P J M Hollingworth on 1st July 2018. Renewed grounds were submitted to the Upper Tribunal and on 25th October 2018 Deputy Upper Tribunal Judge M Sutherland Williams granted permission to appeal. Judge Williams noted that the assertion made on behalf of the Appellant was that in the absence of a full transcript of the Appellant's interview the principles set out in *Miah (interviewer's comments; disclosure; fairness) [2014] UKUT 00515* were not complied with.

6. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by his instructing solicitor Mr Nwaeku. The Secretary of State appears by her Home Office Presenting Officer, Mr Tufan.

Submission/Discussion

7. Mr Nwaeku's submission stands on the basis that the interview transcript of the Appellant's interview as to the validity of his marriage dated 13th January 2017 was not before the First-tier Tribunal Judge and that the judge reached the decision and made conclusions thereon without having had the benefit of such information. Mr Tufan indicates that copies of the interview were made available to the Appellant so he knew what questions were being posed to him, but Mr Nwaeku submits that it is clear from paragraph 4 of the judge's decision as to what he had before him and that whilst there were a substantial number of documents they did not include the interview. He points out that the onus falls on the Secretary of State, bearing in mind that it is the Secretary of State's contention that the marriage is not valid, and as the evidence was not there it was inappropriate, and indeed a material error of law, for the judge to make a finding on what was right and wrong without having had that evidence.

8. Mr Tufan comments that the judge has made some positive findings, although he acknowledged that it is, to a certain extent, unclear as to how, if the interview record was not before the judge, he was able to do so. He cannot comment further save than to say that his understanding is that the case was a float case and that the matter had been conducted by

previous solicitors and that the interview record was not, at that time, part of the Respondent's bundle.

The Law

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

11. The issue in this matter is whether or not there is procedural unfairness to the Appellant in the making of the findings by the First-tier Tribunal Judge based on a document that was not before him. Further, it is the strong contention of the Appellant's legal representative that had the interview record been available then that would show clearly that there had been a valid and subsisting marriage. I cannot comment about that, that is a matter possibly for further evidence.

12. I accept that this was a float case and I accept what Mr Tufan states that the interview record was not part of the Respondent's bundle. There are references to the interview within the decision, but I acknowledge that it goes to the material finding of fact and credibility and that that is critical to this case. In such circumstances I accept that there would be procedural unfairness of the judge proceeding to hear this matter without having the interview record in his possession. In such circumstances the decision is unsafe. Of course, had the judge had the record and there had been proof of it, then my finding may well have been different, but that is not a matter that is before me, nor is it an issue that is submitted upon.

13. Consequently, I set aside the decision and remit the matter to the First-tier Tribunal for rehearing. For the record I record that the Secretary of State's

representative, Mr Tufan, has passed to both Mr Nwaeku and myself further copies of the interview record of 13th January 2017 and it is clear that that document is now both in the possession of the Appellant's legal representatives (in that it is not disputed that that may well have previously been the case), but that it is now certainly in the remit of the Tribunal and is on the court file.

Decision and Directions

14. The decision of the First-tier Tribunal contains a material error of law in that it would have been procedurally unfair for the judge to have made his findings of fact and credibility without having reference to the interview record of 13th January 2017. In such circumstances I set aside the decision of the First-tier Tribunal and make the following directions:-

    (1) On finding that there is a material error of law in the decision of the First-tier Tribunal Judge for reasons set out above, I set aside that decision and the appeal is remitted to the First-tier Tribunal sitting at Taylor House on the first available date 21 days hence with an ELH of two hours.

    (2) That none of the findings of fact are to stand.

    (3) That the appeal is to be heard before any judge of the First-tier Tribunal other than Immigration Judge Cameron.

    (4) That there be leave to either party to file and serve a bundle of such further objective evidence and/or subjective evidence upon which they seek to rely at least seven days prior to the restored hearing.

    (5) That it is not envisaged that the Appellant seeks an interpreter but in the event that he does at the restored hearing, then it is a requirement that his instructing solicitors do notify the Tribunal within seven days of receipt of this order.

    (6) No anonymity direction is made.

Signed Date: 04 January 2019

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date: 04 January 2019

Deputy Upper Tribunal Judge D N Harris