Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers HU/01404/2020

THE IMMIGRATION ACTS

Heard at Field House on	**Decision and Reasons Promulgated**
On 9 December 2021	**On 20 January 2022**

Before

Upper Tribunal Judge O'Callaghan
Deputy Upper Tribunal Judge Sills

Between

KAMORUDEEN OLALEKAN SOYEGE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

ERROR OF LAW DECISION

Representation:
For the Appellant: Mr Pipi, Devine Solicitors
For the Respondent: Mr Lindsey, Home Office Presenting Officer

Introduction

1. The Appellant (A) appeals against the decision of First-tier Tribunal Judge Housego (the FTT Judge) dated 24 February 2021 dismissing his appeal against the refusal of his application for entry clearance.

Factual Background

2. A is a citizen of Nigeria, born on 9 December 1965. He seeks entry to the UK on the basis of his relationship with Olasumbo Funmilayo Soyege, his spouse and sponsor (S), and their three children born in 1999, 2004, and 2007.

3. A previously came to the UK in 2003 as a visitor. He overstayed. In 2004 A attempted to marry a Portuguese national. A was removed and subject to a 10-year re-entry ban on the basis that this was a proposed sham marriage.

4. S and the 3 children entered the UK in 2007 and after a period of overstaying were granted limited leave to remain in around 2018. They all still have limited leave to remain in the UK.

5. On 13 August 2019, A applied for entry clearance as S's spouse. The application was refused on 16 December 2019. The Respondent (R) did not accept that A met the relationship requirements under Appendix FM E-ECP 2.1-2.10.

6. The FTT Judge dismissed A's appeal. The FTT Judge found as follows. A and S had not been in a genuine and subsisting relationship since 2008. A's children would welcome his presence in the UK and A did have frequent contact with his children, but this did not amount to family life. As regards the best interests of the two minor children, their separation from their father had been imposed by their mother. A previously contrived in a significant way to frustrate the intentions of the Rules by overstaying and seeking to enter a sham marriage. There were no exceptional circumstances which would cause serious hardship. The appeal was dismissed.

7. A applied for permission to appeal on the following grounds. First, at para 48 the FTT Judge had stated that A's English was 'very accented', and he was 'hard to understand'. This was not raised at the hearing with A. It was irrational, unreasonable, and unfair for the Judge to then make adverse findings against A. Second, the FTT Judge made errors in the ECHR Article 8 assessment including an error in finding that A did not enjoy family life with his children, and an error in assessing the best interests of the children.

8. Permission to appeal was granted by UT Judge Owens who considered it arguable both that there had been procedural unfairness due to the FTT Judge's failure to raise his difficulty understanding A at the hearing, and that the FTT Judge erred in finding that there was no family life between A and his children when they had frequent contact.

9. R's Rule 24 Response opposed the appeal. A had failed to set out what evidence had been recorded inaccurately. It was conceded that the FTT Judge had erred in finding that A did not enjoy family life with his children. However, this was not a material error as the decision did not cause any interference with family life and the grounds did not set out

how the decision was unreasonable, or what compelling circumstances existed.

10. On 8 December 2021, A filed and served a witness statement from his solicitor, Seyi Kwushue, setting out A's instructions on the FTT decision. The statement records that no communication problems were raised with A at the hearing. A denied being evasive, confused or long winded. His evidence was as recorded in his witness statement.

The Hearing

11. We heard from Mr Lindsay first. He relied upon the Rule 24 response. He raised an additional point not considered in the FTT decision, that as S did not have settled status in the UK, A could not satisfy the requirements of Appendix FM. Mr Lindsay accept that this was not fatal to A's appeal on human rights grounds. In relation to the first ground, Mr Lindsay argued that there was a difference between stating a person was hard to understand, and that they were not understood. A had not established the latter. There was no record of evidence from A's counsel. The witness statement was inadequate as it was not from A himself. The FTT Judge had been entitled to make the findings made. On the second ground, Mr Lindsay argued that on the basis of the findings made, the only conclusion available to the FTT Judge would have been that the decision to refuse entry clearance was not unjustifiably harsh.

12. After hearing Mr Lindsay's submission, we informed the parties that we were satisfied that the FTT decision did contain an error of law and would be set aside, with reasons to follow. We heard brief submissions on whether the matter should be remade by the UT or remitted to the FTT.

Findings

13. As a matter of basic fairness, it was the FTT Judge's responsibility to ensure that he could understand A's spoken English and hence A's evidence without an interpreter. A further basic principle is that justice must not only be done, but be seen to be done.

14. The key paragraph of the FTT decision is para 48. It states as follows:

> *'48. The Appellant's evidence was confused and contradictory. His English is very accented and he is hard to understand. (It is unclear from his oral evidence how he managed to pass an English language test.) His answers were evasive, and long-winded, while conveying little meaning. It appeared that his evidence was as follows.'*

15. These statements raise a serious doubt as to whether the FTT Judge could understand A's spoken English. Having raised this doubt, fairness, and the need for justice to be seen to be done, required the FTT Judge

to resolve this issue and make clear whether or not he was able to understand A's spoken English and hence his evidence, without the need of an interpreter. The FTT Judge did not do this. In failing to resolve this issue the FTT Judge has failed to ensure a fair procedure and has failed to ensure that justice is not only done but seen to be done.

16. A is left with a genuine and legitimate concern as to whether or not the FTT Judge understood his spoken English, and whether any misunderstanding of his English influenced the FTT Judge's adverse findings on his evidence. For instance, the comments raise a concern as to whether the FTT Judge's assessment at para 48 that A's evidence was 'evasive, and long-winded, while conveying little meaning' was due to the fact that the FTT Judge could not understand A's spoken English. While we accept Mr Lindsay's point that the Judge was entitled to comment on A's level of English, the FTT Judge fell into error by failing to confirm whether or not he was able to understand A's spoken English such that an interpreter was not necessary. The FTT Judge is silent on this issue, and in the absence of confirmation that the Judge could understand A's spoken English, justice cannot be seen to have been done.

17. A further states that the communication difficulties were not raised at the hearing by the FTT Judge. This claim is made in the grounds to the UT and repeated in Ms Kwushue's witness statement. While Mr Lindsay points out that there is no statement from A's representative at the hearing, nor is there any statement from R's representative. The FTT Judge's record of proceedings do not contain any note of the FTT Judge raising the communication problems at the hearing. As A has made this claim at least from the outset of the application to the UT, it is confirmed indirectly by A's solicitor, and there is nothing from either representative at the hearing or the FTT Judge's record of proceedings to contradict this claim, we accept that the FTT Judge did not raise the communication difficulties with A at the hearing. Had the FTT Judge raised the issue at the hearing, whether or not the FTT Judge could understand A's spoken English and hence A's evidence without an interpreter would most likely have been resolved at the hearing. Given what the FTT Judge states about A's spoken English, fairness required the FTT Judge to raise his concerns at the hearing.

18. We acknowledge that there were a number of credibility issues in relation to A's case that did not necessarily depend upon A's oral evidence. R's decision letter highlights a number of issues. It is not in dispute that A was removed from the UK after being found to have attempted to enter into a marriage of convenience. However, the adverse findings made by the FTT Judge do concern A's oral evidence. The FTT Judge makes criticisms of A's oral evidence, whether explicit or implicit, at paras 48, 50, 67-70, and 75. The criticisms are in general terms, in relation to the sham marriage, the reason why S moved to the UK, A and S's account of their lack of contact over 10 years, and A's

motivation for applying for entry clearance for the UK in 2011 and 2014. The FTT Judge's assessment of A's oral evidence was relevant to the findings of fact leading to the conclusions at para 82 that there was no genuine and subsisting marital relationship between A and S.

19. We therefore conclude that the making of the FTT Judge's decision involved the making of an error on a point of law. The FTT Judge acted procedurally unfairly in failing to confirm whether or not he could understand A's spoken English having raised serious doubts as to whether he could do so, and in failing to raise this issue at the hearing. The FTT Judge's assessment of A's oral evidence was material to the matters in dispute and did form part of the reasons why the FTT Judge found that the relationship between A and S was not subsisting. A was denied a fair hearing and justice has not been seen to be done. Hence the decision involved the Judge acting procedurally unfairly. In view of this conclusion on the first ground of challenge, it is not necessary to consider A's other ground of challenge. We set aside the FTT decision.

20. With regard to para 7 of the 2014 Practice Statement for the Immigration and Asylum Chamber of the Upper Tribunal, as A has been deprived of a fair hearing due to procedural unfairness, it is appropriate to remit the appeal to the First-tier Tribunal with no preserved findings.

Notice of Decision

The determination of the First-tier Tribunal contains a material error of law and is set aside.

The appeal is remitted to the First-tier Tribunal sitting at Hatton Cross to be considered afresh with no findings preserved by a judge other than First-tier Tribunal Judge Housego.

Anonymity Direction Not Made

Signed Date 4

January 2022

Deputy Upper Tribunal Judge Sills