IN THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER) **JR-2021-LON-000090**

BEFORE MR JUSTICE DOVE and Mr C M G OCKELTON

BETWEEN:

THE KING (on the application of DOUGLAS LWEYUNGA

Applicant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

UPON the hearing counsel for the Applicant and counsel for the Respondent it is ordered that:

1. The decision of the First-tier Tribunal dated 22nd October 2021 setting aside the decision in the applicant's appeal dated 14th October 2021 is quashed.
2. The decision is returned to the First-tier Tribunal for a lawful decision to be made in relation to the question of whether the power to set aside should be exercised.
3. The Applicant shall file and serve any submissions in relation to the costs of these proceedings by 4pm on 21st December 2023; the Respondent shall file and serve any submissions in relation to costs in response by 4 pm on 11th January following which the submissions will be placed before the panel for determination on the papers.

Ian Dove

Dated this 8th day of December 2023

Case No: JR-2021-LON-000090

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

Judgment date: 19th December 2023

Before:

THE HON MR JUSTICE DOVE, PRESIDENT

MR C M G OCKELTON, VICE PRESIDENT

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Between:

THE KING
(on the application of
DOUGLAS LWEYUNGA)

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- - - - - - - - - - - - - - - - - - - -

Mr Michael Biggs and Mr Michael West
(instructed by Adukus Solicitors), for the applicant

Mr Colin Thomann
(instructed by the Government Legal Department) for the respondent

Hearing date: 10th October 2023

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J U D G M E N T

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Mr Justice Dove:

Introduction

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1. The applicant is a citizen of Uganda who was born on 20th August 1982. On 27th November 2020 he applied for entry clearance as the spouse of Ms Rebecca Gwaliwa who is a British citizen resident in the UK. That application was refused on 11th March 2021 and it is the appeal against that refusal, pursuant to section 82(1)(b) of the Nationality, Immigration Asylum Act 2002, which is the background to this judicial review. The claimant brings an application for judicial review against the decision of the First-tier Tribunal ("FtT") to set aside a decision which had been reached by the FtT following the hearing of his appeal on 14th October 2021. The chronology of the matter is set out below.

Chronology

2. The refusal of the application by the Entry Clearance Officer was based upon the allegation that the claimant had forged the passport which he had used to make the application which was being considered. The basis of that allegation of forgery was set out in the decision letter as follows:

> "All documents submitted as supporting evidence for visa applications to the UK are checked thoroughly. On checking your passport I noted anomalies not normally seen on passports and requested a UK VI expert opinion on the passport you submitted.
> The passport in question was thoroughly examined and scrutinised by a UK VI trained expert and the following anomalies were observed:
> - The UV Crest does not contain the definition and clarity of an original sample document. The loss of definition occurs specifically around the secondary image section of the Biodata page and this combined with the damage to the page around the image of the holder denotes alteration.
>
> Given the anomalies noted above with regard to the UV Safeguards, I am satisfied that the Ugandan passport you have submitted has been altered and that you, the applicant, is not the genuine document holder.
> Following our checks a document examination report was completed verifying the passport you provided as non-genuine. Although, each visa application to enter the UK is considered on its own merits, I noted you have a history of producing false documentation in order to gain entry clearance to the UK as an application you made to visit was refused on 04/06/2004, VAF No 4007087, the application was refused due to deception producing false documents."

3. This allegation is denied by the applicant who contends that the passport is genuine. The applicant therefore appealed against the decision as set out above.

4. On the 13th August 2021 the respondent emailed the FtT requesting that, pursuant to section 108 of the Nationality, Immigration and Asylum Act 2002, the respondent should not be required to disclose documents pertinent to the respondent's decision. The documents were said to "contain detailed procedural steps conducted by the Decision-Making Centre (DMC) to determine documents related to this case were forged" and therefore withholding them from the applicant and his representatives was said to be in the public interest. The email set out the

respondent's proposal that the relevant documents should be provided to the immigration judge but not disclosed to the applicant or their representatives.

5. On 19th August 2021 the FtT replied pointing out that in order to make a decision invoking section 108 of the 2002 Act the FtT not only needed to view the documents but also required submissions from the respondent as to why it was appropriate for those documents to be withheld from the applicant. The FtT required both the documents and the submissions detailing the reasons for invoking section 108 of the 2002 Act prior to 4pm on 26th September 2021. In fact the documents were submitted on 27th September 2021, and it is unclear from the accompanying email as to whether or not any submissions in support of the withholding of their disclosure were provided to accompany them, although this is covered in evidence submitted as part of this application for judicial review.

6. The hearing of the appeal occurred on 14th October 2021 by remote video link. The applicant was represented by Mr Michael West of counsel and the respondent was represented by a Home Office Presenting Officer. The Home Office Presenting Officer adduced no evidence in support of the allegation that the applicant had used a forged passport, explaining that the respondent was prepared to proceed without any evidence in support of this contention. This was subsequently reported by the FtT Judge in the determination. There was no reference made by the Home Office Presenting Officer to the section 108 application, and it appears from the evidence which has been filed in these proceedings that the Home Office Presenting Officer was, for whatever reason, unaware of that section 108 application.

7. The FtT Judge proceeded to an ex tempore decision at the close of evidence and argument. The FtT Judge allowed the appeal for reasons which were set out in a written decision promulgated on the same day. The FtT Judge found that the respondent had failed to discharge the burden of proving that the applicant's passport was a forgery and had also failed to provide any evidence to support the suggestion that the applicant had previously sought to use false documents in any entry clearance application. The FtT Judge went on to conclude that he found the sponsor an entirely credible witness and that the appellant met the suitability requirements of the Immigration Rules.

8. On 22nd October 2021 FtT Resident Judge Holmes set aside the decision which had been made on 14th October 2021 pursuant to rule 32 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber Rules 2014). This decision was reached without notice to the parties and of his own motion. The reasons given for making this decision were set out in full as follows:

> "1. The President has delegated to me his powers and set aside under rule 32 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.
> 2. I have reviewed the Decision and Reasons promulgated on 14th October 2021 of Judge Louveaux in the First-tier Tribunal in this appeal and I set aside the determination under rule 32 and order the relevant proceedings to be dealt with again by that Tribunal. The reason is that Judge Louveaux was not made aware of a prior application under section 108 of the Nationality, Immigration and Asylum Act 2002 and the appeal proceeded without the section 108 application being determined so that there has been a material procedural irregularity in the proceedings.

3. I direct the appeal to be re-listed before a Judge of the First-tier Tribunal other than Judge Louveaux for re-hiring on the first available date."

9. On 5th November 2021 the applicant issued the current proceedings for judicial review challenging the decision of FtT Resident Judge Holmes of 22nd October 2021. Since the re-hearing of the appeal was listed for 8th November 2021 an application for an adjournment of the re-hearing was made and granted by the FtT. On 5th May 2022 UT Judge Macleman refused permission to apply for judicial review on the papers and the applicant renewed that application orally. At the oral hearing on 15th July 2022 UT Judge Kebede refused permission to apply for judicial review. The matter was then appealed to the Court of Appeal. On 21st October 2022 Singh LJ granted permission to appeal, observing in the course of doing so that the case raised "important issues about procedural fairness when a decision is made to set aside an earlier decision of the FtT". Ultimately, by a consent order approved on 19th June 2023, the appeal to the Court of Appeal was allowed and Judge Kebede's decision set aside and replaced with a decision granting permission to apply for judicial review on the three grounds which are set out below.

The grounds

10. So far as relevant rule 32 of the 2014 rules provides as follows:

"32 – (1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if –
(a) the Tribunal considers that it is in the interests of justice to do so;
(b) and one or more of the conditions in paragraph (2) is satisfied.

(2) the conditions are –
…
(c) there has been some other procedural irregularity in the proceedings."

11. Grounds 1 and 2 of the applicant's case relate to the approach to rule 32 of the 2014 Rules in the decision of FtT Resident Judge Holmes. The applicant draws attention to the requirements of the rules that it must be "in the interests of justice" to set aside an earlier decision. It is submitted firstly that the judge failed to apply this test in making his decision to set aside the earlier decision. That requirement was overriding and the judge failed to apply it in reaching his conclusions. Furthermore, it is submitted that the judge's reasons make no mention of the overriding requirement for a decision to set aside to be in the interests of justice and thus in the absence of any mention of that requirement it must be inferred that the judge was in error.

12. Ground 3 of the application is the contention that FtT Resident Judge Holmes failed to comply with a fair procedure in considering whether or not it was appropriate to set aside the decision which had been reached on 14th October 2021. The judge was under an obligation to act fairly, and acting fairly required giving notice that such a decision was being considered and thereafter providing the opportunity for the parties to make representations in relation to that decision either in the form of an oral hearing or, at least, by providing the opportunity for written representations

on the decision. Whilst it was contended by the respondent that the applicant could not demonstrate that he had suffered any prejudice as a result of failing to follow this procedure such a submission was plainly wrong. It was not possible to conclude that there would have been no difference to the decision even if the applicant had the opportunity to make representations.

Submissions and Conclusions

13. For reasons which will become apparent, we have found it convenient to deal with the submissions made in respect of procedural fairness under ground 3 first, and prior to the submissions made on the approach to rule 32 of the 2014 Rules. It should also be noted that no issue was taken by either the applicant or respondent in relation to the FtT's entitlement to engage the power under rule 32 of the 2014 Rules of its own motion.

14. The submission made on behalf of the applicant was, as set out above, that it was unfair for the FtT to set aside the decision made on 14th October 2021 without notice, and in particular without the opportunity for the applicant to make representations in relation to whether or not the decision should in fact be set aside. It was not disputed by the applicant that the failure to deal with the section 108 application was a procedural irregularity in the proceedings which had the potential to justify the setting aside of the decision.

15. The points which the applicant relied upon in support of the need for representations to be made related purely to the overriding question of whether or not it was in the interests of justice for that decision to be set aside. The applicant places particular reliance upon the case of *R (Balajigari) & others v SSHD* [2019] EWCA Civ 673, [2019] 1 WLR 4647. Having reviewed a range of authorities in relation to procedural fairness, commencing in particular with the decision of the House of Lords in *R v Secretary of State for the Home Department ex p Doody* [1994] 1 AC 531 and in particular the opinion of Lord Mustill at 560, Underhill LJ provided the following explanation of the relevant principles in paragraphs 59 and 60 of his judgment:

"59. In the first place, although sometimes the duty to act fairly may not require a fair process to be followed before a decision is reached (as was made clear by Lord Mustill in the passage in *Doody* which we have quoted earlier), fairness will usually require that to be done where that is feasible for practical and other reasons. In *Bank Mellat v HM Treasury (2)* [2013] UKSC 39, [2014] AC 700, Lord Neuberger (after having cited at paragraph 178 the above passage from *Doody*) said at paragraph 179:

"In my view, the rule is that, before a statutory power is exercised, any person who foreseeably would be significantly detrimentally effected by the exercise should be given the opportunity to make representations in advance, unless (1) the statutory provisions concerned expressly or impliedly provide otherwise or (2) the circumstances in which the power is to be exercised would render it impossible, impractical or pointless to afford such an opportunity. I would add that any argument advanced in support of impossibility, impracticality or pointlessness should be very closely examined, as a court would be slow to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed within the relevant statute."

60. This led to the proposition that, unless the circumstances of a particular case make this impracticable, the ability to make representations only *after* a decision has been taken will usually be insufficient to satisfy the demands of common law procedural fairness. The rationale for this proposition lies in the underlying reasons for having procedural fairness in the first place. It is conducive to better decision-making because it ensures that the decision-maker is fully informed at a point when a decision is still at a formative stage. It also shows respect for the individual who's interests are effected, who will know that they have had the opportunity to influence a decision before it is made. Another rationale is no doubt that, if a decision has already been made, human nature being what it is, the decision-maker may unconsciously and in good faith tend to be defensive over the decision to which he or she had previously come."

16. Against the background of the general principle being that prior to exercise of a statutory power an affected person should be given the opportunity to make representations, the applicant emphasises those matters which would have been brought to the attention of the FtT Judge to persuade him to decline to exercise his power to set the decision aside.

17. Firstly, the applicant contends that had he been allowed to make submissions in support of preserving the decision made on 14th October 2021 he would have pointed out that on that occasion the parties had a conclusively fair and final hearing of the appeal. involving in particular the use of the applicant's and the Tribunal's time and resources. These considerations engage the overriding objective of the 2014 Rules. The applicant in particular relies upon the weight to be attached to the principle of finality in litigation recently emphasised in the case of *AIC Ltd v Federal Airports Authority of Nigeria* [2022] UKSC 16, [2022] 1 WLR 3223, at paragraphs 29-40 in the judgment of Lord Briggs and Lord Sales, with whom the other members of the court agreed.

18. Secondly, the applicant draws attention to his concern that the section 108 request was doomed to fail, on the basis that it had not been adequately explained in submissions why it was that the section 108 power should be exercised in respect of documentation which was critical to the determination of the applicant's appeal. Thirdly, the applicant submits that the Home Office Presenting Officer chose to proceed without adducing any evidence at all in respect of the allegation that the passport was forged, notwithstanding that it appeared she was aware that there was a document verification report as she alluded to it in the course of her submissions at the hearing on 14th October 2021. In effect, the applicant submits that the respondent should be held to her election that no evidence would be offered to support the allegation of forgery. Finally, it is submitted that even were there some substance in the section 108 request, there was no explanation or reasonable excuse offered for the Home Office Presenting Officer's ignorance of that request, and even in the context of evidence offered in the course of this application no explanation has been offered by the Home Office Presenting Officer.

19. In response to these submissions, on behalf of the respondent it is submitted that the requirements of fairness can be met by the refusal of this application for judicial review, and the matter continuing to be considered by the FtT pursuant to the set-aside. This would enable the FtT to evaluate the section 108 application and, thereafter, reconsider the appeal. It is submitted that no procedural unfairness

would arise because in the context of the redetermination of the matter the section 108 application could be fully evaluated and the appellant would have the opportunity to make such representations as he thought appropriate in respect of the validity of that application.

20. In respect of the applicant's points pertaining to the finality of litigation, the respondent submits that this overlooks the significance of the section 108 application which was before the FtT, and which has yet to be determined. This application should have the opportunity to be determined on its merits, as part of any remittal of the matter to the FtT and reconsideration of the merits. It is further submitted that it is inappropriate for the Upper Tribunal to be forming a view of the merits of the section 108 application in the context of a judicial review which is not fully seized of the merits of application.

21. The respondent observes that whilst the applicant seeks to rely upon the failure of the Home Office Presenting Officer to pursue the section 108 application, and adduce the evidence of fraud underpinning the decision, by the same token the applicant fails to acknowledge that the proceedings on the 14th October 2021 proceeded in circumstances where the Home Office Presenting Officer and the Judge were both unaware that the section 108 application had been made, and indeed that evidence and submissions in support of that application had been filed, which the applicant would have the opportunity to respond to in the context of the matter resuming before the FtT. Thus, in all the circumstances, it is submitted on behalf of the respondent that this application for judicial review should be rejected and the matter continue to be heard in the FtT so that all the arguments which ought to have been deployed on 14th October 2021 can be considered, and a decision taken in the light of all of the matters which ought to have been before the FtT on that occasion.

22. Having considered these submissions we are satisfied that there was a failure to proceed fairly in respect of the consideration by the FtT judge of the exercise of the power under rule 32 of the 2014 Rules. It is important to emphasise, in the light of the submissions we received, that the question which is raised by this judicial review is not whether or not were the appeal to be reconsidered by the FtT the parties would receive a fair hearing, but rather, whether the procedure followed in relation to the exercise of the power under rule 32 of the 2014 Rules was one which was fair to the applicant.

23. The consideration of the requirements of fairness in this case has to be undertaken in the light of the distillation of principles set out in *Balajigari* and their application in the context of the specific facts of this case. In our view the starting point must be, firstly, that it has not been suggested that it would be impossible or impractical for representations to have been sought and obtained prior to determining whether or not the power under rule 32 of the 2014 Rules should be exercised. The respondent submits that it would have been pointless to afford such an opportunity since all representations that the applicant may wish to make in relation to the section 108 application are capable of being made in the context of the FtT reconsidering the appeal. However, that submission is prone to overlook the starting point for the assessment of the application of rule 32 and its governing

principle, namely that the power should be exercised in the interests of justice. The proper starting point has to at least acknowledge that the applicant has already had a full hearing of his appeal and, perhaps most importantly, received a decision which is clearly in his favour.

24. Bearing in mind the breadth of the matters which need to be considered when assessing the interests of justice in this case, and the fact that the appellant already has a decision allowing his appeal, it is in our view not open to the respondent to suggest that an opportunity for the respondent to make representations would be worthless. In truth, as the applicant points out, there are many points which could be made in support of the contention that it would not be in the interests of justice for the decision reached on 14th October 2021 to be set aside. Amongst the points that the applicant could make to seek to persuade the judge not to exercise the rule 32 power are the following. Firstly, the applicant can draw attention to the interests of finality emphasised by the Supreme Court in the case of *AIC Ltd* which support the proposition that the applicant, having invested in the appeal process and having had his sponsor's evidence tested and found to be credible, the interests of finality in litigation do not support the setting aside of the decision in the interests of justice.

25. Allied to this contention, the applicant would be entitled to observe that the failure to prosecute the section 108 application, or for the Home Office Presenting Officer to seek an adjournment or some other means of adducing that evidence, is in the nature of a concession and, in the light of the decision of the court of appeal in *AM (Iran) v SSHD [2018]* EWCA Civ 2706, there would need to be good reasons to explain why the respondent's representative proceeded to allow the appeal to be determined without adducing the evidence which is now said to be central to it. Thirdly, it would be open to the applicant to contend that, when assessing the interests of justice, it needs to be born in mind that the procedural irregularity occurred without any fault on his part. Indeed the applicant may well wish to contend that such fault as led to the procedural irregularity was the responsibility of the respondent or a combination of the respondent and the FtT.

26. There may be other points in addition which the applicant could make. It is not for the Upper Tribunal in the context of this judicial review to resolve whether or not ultimately these, or indeed any other points, will be sufficient to persuade the FtT not to exercise the power under Rule 32 of the 2014 rules to set aside the earlier decision. It suffices for the purposes of this judicial review to note that in the light of the availability of these submissions it is not possible to suggest that the opportunity to make them would be pointless and that therefore the requirements of fairness can be dispensed with.

27. One of the points made by the respondent in support of her approach is that to quash the decision made by the FtT would potentially lead to a proliferation of proceedings and a more cumbersome means of determining the issues. Thus, it is contended that in fact a more practical course is for this judicial review to be dismissed, and for the matter to return to the FtT for the section 108 application to be considered and a further appeal hearing to take place. Having reflected on that submission we are unable to accept it. It appears to us that the requirements of

fairness could quite easily and practically be served in the present case by an invitation to the parties to make written submission on the question of whether or not in the particular circumstances of the case the power under rule 32 of the 2014 Rules should be exercised. In the vast majority of cases the receipt of written submissions will be more than adequate to enable the FtT to understand the parties' positions and to proceed to a decision as to whether or not to exercise that power. We do not consider therefore that there is any practical constraint upon affording the opportunity to comply with the requirements of fairness in the present case, or cases of this kind more widely.

28. It follows from these conclusions that we are satisfied that the applicant should succeed under ground 3 of this application for judicial review and that the decision of the FtT on the 22nd October 2021 should be quashed and returned for the FtT to consider lawfully whether the power under rule 32 of the 2014 Rules should be exercised. In the light of that conclusion it is unnecessary for us to reach conclusions in relation to grounds 1 and 2 and we do not propose to do so.

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