IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005721

First-tier Tribunal No: HU/51193/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 6 June 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

DORCAS ADEJOKE EMMANUEL
(no anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Paraskos, instructed by AO and Associates Services
For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

Heard at Field House on 31 May 2023

DECISION AND REASONS

1. This is the re-making of the decision in the appellant's appeal, following the setting aside, in a decision of 15 March 2023, of the decision of First-tier Tribunal Seelhoff.

2. The appellant is a national of Nigeria born on 8 June 1980. She made an application for entry clearance as a visitor on 20 July 2006. On 17 December 2006 she arrived in the UK with a visit visa valid until 11 January 2007 in the name of Adejoke Ogunade Olukayode. On 25 October 2012 the appellant married George William Prosser, having met him and commenced a relationship with him in 2010. She made various applications for leave to remain as Mr Prosser's spouse which were all refused. She unsuccessfully appealed a refusal decision in 2016 and eventually, after further unsuccessful applications, she made a voluntary departure from the UK on 10 May 2021.

3. On 29 September 2021 the appellant made an entry clearance application under Appendix FM on the basis of her family life with Mr Prosser. Her application was refused on 3 February 2022 on the basis that the respondent was satisfied that she had previously contrived in a significant way to frustrate the intentions of the Immigration Rules by staying in the UK beyond the validity of her visa/ permission to stay and that she had previously entered the UK by deception, entering on a false visa and failing to disclose other names and date of birth. On that basis her application was refused under paragraph 9.8.2.(a) and (c) of the immigration rules. It was also refused on grounds of suitability under paragraph EC-P.1.1(c) of Appendix FM with reference to S-EC.1.5, on the grounds that it was undesirable to issue her with entry clearance owing to her conduct, and to S-EC.2.2(b) on the grounds that she had failed to disclose material facts in her application of 30 January 2019. The respondent considered further that the appellant did not meet the eligibility financial requirement as the documents submitted relating to her sponsor's employment were inadequate and there were no exceptional circumstances in her case.

4. The appellant's appeal against that decision was heard on 14 October 2022 in the First-tier Tribunal by Judge Seelhoff and allowed in a decision on 21 October 2022. Judge Seelhoff found that the eligibility financial requirements under the immigration rules had been met as he had been provided with the documents for the sponsor which were missing at the time of the respondent's decision. As for the issue of suitability, the judge took as his starting point, on Devaseelan principles, the factual findings made previously about the appellant's past use of false passports and working illegally and noted that she had not denied having used deception in the past. However he took account of the fact that, since the appeal before the previous judge, the appellant had left the UK voluntarily in order to make an entry clearance application. He referred to the case of PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 in that regard. He concluded that it was not appropriate to refuse the appellant's application on suitability grounds and he found that the requirements of the immigration rules were met. He allowed the appeal.

5. Following a grant of permission to the respondent to appeal to the Upper Tribunal, the matter came before me on 14 October 2022. The Home Office Presenting Officer at that hearing, Mr Clarke, raised the point that the entry clearance officer had referred to the wrong provision of part 9 of the immigration rules and ought to have refused the appellant's application under the mandatory provisions in paragraph 9.8.1 rather than the discretionary provisions in 9.8.2, because the application had been made within the relevant time period in paragraph 9.8.7, of 12 months. He also submitted that there had been a conflict of interest because Judge Seelhoff had previously given advice to the appellant and that should have been put to the Secretary of State prior to proceeding with the appeal.

6. I set aside Judge Seelhoff's decision on the following basis:

> "18. As I advised Mr Clarke at the hearing, the merits of the Secretary of State's challenge lay in the first ground rather than the second. I do not accept that there was any procedural impropriety in Judge Seelhoff proceeding with the appeal without further consultation from the respondent. The respondent was a party to the proceedings and would have had an opportunity to express an opinion on any possible conflict of interest had she elected to send a representative to the hearing, but she did not do so. In any event, Judge Seelhoff clearly turned his mind to the issue and would no doubt have been careful to take his previous involvement in the appellant's case into account when making his decision in the current appeal. He had regard to any possible objection the respondent

may have had and was entitled to conclude that there was no reasonable basis for not proceeding with the appeal.

19. However there is merit in the first ground and I consider that that ground identifies a material error in the judge's decision. Judge Seelhoff did not address the refusal under Part 9 of the immigration rules at any point in his decision, but only addressed the question of the appellant's past conduct in the context of the suitability provisions under Appendix FM. At first glance it may seem that that was not a material omission, given that the same or similar issues arose in both. Indeed, the reference to PS (India) was made in the context of a decision taken under the equivalent provisions to paragraph 9.8.2, in paragraph 320(11), and thus covered similar considerations. I have to agree with Mr Clarke that the judge's failure to consider the exclusion period has, however, led to the omission being material.

20. The appellant made her application only four months after departing from the UK. She could not, therefore, succeed under the immigration rules, given the mandatory nature of paragraph 9.8.1 which precluded her from making an application within 12 months, as set out at paragraph 9.8.7. The fact that the Secretary of State's grounds of appeal and the grant of permission referred to an exclusion period of two years rather than 12 months is not particularly relevant, since the effect of the exclusion on the appellant was the same on either basis. It is correct, as Mr Clarke submitted, that the refusal decision relied upon paragraph 9.8.2 rather than 9.8.1, which was a discretionary rule and which, as I have said, was effectively considered by the judge in his findings on the suitability provisions. It is also correct that paragraph 9.8.1 was not a matter cited before the judge, either in the refusal decision itself or in the respondent's review. Ordinarily, a failure to consider a matter not put to the judge could not give rise to an error of law, since the judge could not be blamed for failing to consider something that was not relied upon before him. However, as Mr Clarke submitted, it was incumbent upon the judge, when assessing the weight to be given to the public interest in excluding the appellant from the UK, to make a decision on whether the requirements of the relevant immigration rules were met in general. Had he specifically turned his mind to the refusal under paragraph 9.8.2, it would no doubt have become apparent to him that the appellant had made her application during the exclusion period. It should then have been obvious to him that paragraph 9.8.1 was applicable and equally obvious that the appellant could not meet the requirements of Part 9 as a result, given the mandatory nature of the relevant rule and therefore could not succeed under the immigration rules. As Mr Clarke properly submitted, that in turn impacted upon his decision under Article 8 as a whole since his proportionality assessment was conducted on the basis that the requirements of the immigration rules were met. Indeed that was the sole reason the judge gave for allowing the appeal under Article 8.

21. It was Mr Paraskos's submission that even though paragraph 9.8.1 of the immigration rules "tended to suggest" that the appellant could not make a further application for entry clearance within the 12 months from her departure from the UK, it was now almost 2 years since she left and thus double the exclusion period. However, that still does not assist the appellant in the challenge to Judge Seelhoff's decision, as she still could not meet the requirements of the immigration rules because she made her entry clearance application during the exclusion period.

221. Accordingly, and (in the particular circumstances arising in this case) irrespective of the respondent's error in reciting the applicable immigration rule and irrespective of the error in the grounds of appeal as to the relevant exclusion period, it can only be concluded that the judge made a material error of law by failing to consider the refusal under Part 9 of the immigration rules and by considering that the requirements of the rules were met. There still needed to be a full proportionality assessment outside the immigration rules giving appropriate weight to the public interest. I therefore set aside Judge Seelhoff's decision on that basis.

23. Mr Clarke submitted that the decision in the appeal could be re-made by dismissing the appeal without the need for a further hearing as the appellant had not produced any

> evidence to show that the consequences of the respondent's decision refusing entry clearance were unjustifiably harsh. Mr Paraskos, however, asked that the case be remitted to the First-tier Tribunal for a *de novo* hearing. He accepted that there was no further evidence to be considered, but he submitted that there was a question mark over whether the appellant had used a false visa for entry to the UK.
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> 24. I do not consider that a *de novo* hearing would be appropriate. The question of whether or not the appellant used a false visa and passport has been determined by a previous tribunal, and on the basis of the appellant's own concession. Judge Seelhoff found, at [19], that that previous decision was his starting point, in terms of those factual findings, and there is no reason to go behind that finding. There are therefore preserved findings which need to be considered as part of a proportionality assessment outside the immigration rules. Having said that, I do not consider it appropriate simply to re-make the decision by dismissing the appeal without giving the appellant an opportunity to make full submissions before me on the basis of her current circumstances, considering that the appeal before Judge Seelhoff was heard several months ago and that Article 8 has to be assessed at the date of the decision. However the appellant will have to show that there are compelling circumstances outweighing the public interest in the case of a person who cannot meet the requirements of the immigration rules, such circumstances to include reasons why she could not simply make a new entry clearance application now that the exclusion period has passed.
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> 25. Accordingly, the Secretary of State's appeal is allowed and I set aside Judge Seelhoff's decision. His findings of fact, other than his finding that the requirements of the immigration rules were met, are preserved. The decision will be re-made at a resumed hearing in the Upper Tribunal on a date to be notified to the parties."

7. The matter then came before me for a resumed hearing on 31 May 2023. Mr Terrell advised me that Mr Clarke had in fact been in error in relying upon paragraph 9.8.1 of the immigration rules, since paragraph 9.1.1 made it clear that that paragraph did not apply to the appellant's application:

> "9.1.1. Part 9 does not apply to the following:
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> (a) Appendix FM, except paragraphs 9.2.2, 9.3.2, 9.4.5, 9.9.2, 9.15.1, 9.15.2, 9.15.3, 9.16.2, 9.19.2, 9.20.1, 9.23.1 and 9.24.1. apply, and paragraph 9.7.3 applies to permission to stay; and paragraph 9.8.2 (a) and (c) applies where the application is for entry clearance;…"

8. Accordingly, the reliance by the respondent on paragraph 9.8.2 rather than 9.8.1 in the refusal decision had been correct. Mr Terrell accepted that, in light of the reasons I had given in my decision for setting aside Judge Seelhoff's decision, namely solely due to a failure to consider the mandatory provisions in paragraph 9.8.1, he was not seeking to make any further arguments and he agreed that the decision in the appeal could simply be re-made by allowing the appeal. It was agreed by all parties that that was the most sensible approach to take in the circumstances, rather than seeking to restore Judge Seelhoff's decision. Accordingly, for the reasons given in my decision which essentially supported Judge Seelhoff's findings, other than with regard to paragraph 9.8.1, I re-make the decision by allowing the appellant's appeal against the respondent's decision to refuse her entry clearance to the UK.

Notice of Decision

9. The decision of the First-tier Tribunal having been set aside, the decision is re-made by allowing the appellant's appeal.

Signed: S Kebede

Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

31 May 2023