IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006249
First-tier Tribunal No: EA/04219/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 08 September 2023

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

EZEKIEL OLUWABANJI MORIFEOLUWA AJAYI
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S. Ferguson, Counsel by Direct Access
For the Respondent: Mr E. Terrel, Senior Home Office Presenting Officer

Heard at Field House on 25 August 2023

DECISION AND REASONS

1. The appellant is a citizen of Nigeria, born in 1968. On 31 December 2020 he made an application for a residence card as an extended family member of an EEA citizen, his brother, on the basis of dependency and membership of his brother's household. On 26 February 2021 that application was refused with reference to regulation 8 of the Immigration (European Economic Area) Regulations 2016 (as amended).

2. The appellant appealed that decision and his appeal came before First-tier Tribunal G.A Black ("the FtJ") at a hearing on 20 April 2022. In a decision promulgated on 25 April 2022 the FtJ dismissed the appeal.

Permission to appeal the FtJ's decision having been granted by a judge of the First-tier Tribunal ("FtT"), the matter came before us.

3. The FtJ found that the appellant and the sponsor were brothers as claimed, as does the respondent's decision. However, having referred to aspects of the evidence said to show financial dependency, she concluded that the appellant had not established that the required dependency had been established. She also found, at [9] of her decision, that "there was no independent evidence to show that the appellant was a member of his brother's household in either Manchester or Nigeria".

4. At [10] of her decision the FtJ said as follows:

> "I accept that the appellant's previous visa applications made in 2005, 2011 and 2012 do not demonstrate any dependency on his brother but it is the respondent's case that this demonstrates a lack of credibility. I find that the appellant entered the UK in 2009 for a two week visit and remained in the UK for over 5 months whilst attending a training course, which does impact negatively on his credibility. I accept that the appellant's case is now premised on his changed circumstances since 2017 but having considered all of the evidence in the round I conclude that he has not shown dependency for his essential needs."

5. In a 'rule 24' response dated 9 March 2023, the respondent said at [2] that she "does not oppose the appellant's application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing." The rule 24 response clearly indicates, therefore, that the respondent does not oppose the appeal to the Upper Tribunal ("UT").

6. At [3] the rule 24 response states as follows:

> "The appellant claimed the dependency started in 2017. The judge may well have erred by finding that the absence of evidence of dependency in the refusals of visit visas in 2005, 2011 and 2012 had any bearing on the appellant's circumstances since 2017."

7. Until we referred to it, neither Ms Ferguson nor Mr Terrel was aware that the respondent had provided a rule 24 response. We allowed time for them to consider it. After consideration, Mr Terrel made an application to withdraw the concession: that the appeal was not opposed on the basis that the FtJ may have erred in law.

8. Mr Terrel submitted that the concession in the rule 24 response appeared to be based on a misreading of the FtJ's decision. He submitted that a careful reading of [10] does not show that she took into account the visit visa applications in 2005, 2011 and 2012 as adversely affecting the credibility of the claim of dependency.

9. We were referred by Mr Terrel to *NR (Jamaica) v Secretary of State for the Home Department* [2009] EWCA Civ 856 in relation to a tribunal's discretion to allow a concession to be withdrawn. Mr Terrel submitted that

the Tribunal has a wide discretion. He accepted that it would have been wrong in law for the FtJ to have considered the visit visa applications in 2005, 2011 and 2012 as adversely affecting the claim of dependency given that the dependency is claimed to have arisen since 2017. However, as a matter of general credibility, the FtJ was entitled to conclude at [10] that the 'overstaying' in 2009 was relevant, he submitted.

10. Ms Ferguson submitted that the respondent should not be permitted to withdraw the concession which, she argued, was correctly made. The respondent's decision to refuse the application for a residence card wrongly took into account the previous visa applications and the FtJ appears to have repeated that error, notwithstanding that she referred to the changed circumstances since 2017. It was further submitted that the FtJ had not considered the issue of the appellant being part of the sponsor's household.

Assessment and conclusions

11. At the hearing we notified the parties our refusal to allow the respondent to withdraw the concession made in the rule 24 response. We take into account that there was no obvious prejudice to the appellant, in that Ms Ferguson, and therefore the appellant, was not aware of the concession prior to the hearing. However, we conclude that [10] of the FtJ's decision, to which the concession was directed, is at best ambiguous as to whether the FtJ impermissibly took into account the visa applications of 2005, 2011 and 2012, bearing in mind that the appellant's case for dependency is premised on circumstances since 2017.

12. In addition, it is clear that the FtJ did make an adverse credibility assessment on the basis that the appellant stayed in the UK for five months in 2009, having apparently indicated that he was only visiting for two weeks. That did not form part of the concession but it is not easy to disentangle that aspect of the FtJ's decision at [10] from the earlier reference to the visa applications of 2005, 2011 and 2012.

13. But more particularly, we do not consider that it is made out that the concession in the rule 24 response is based on a misunderstanding of the FtJ's decision. In addition, we take into account that the rule 24 response is dated 9 March 2023; over five months before the hearing before us, with no indication prior to the hearing that the respondent wanted to withdraw the concession.

14. Accordingly, we decline to exercise our discretion to allow the concession to be withdrawn.

15. In the light of that ruling, Mr Terrel accepted, as does the rule 24 response, that the decision must be set aside for error of law.

16. Therefore, we are satisfied in the light of the respondent's concession as to error of law made in the rule 24 response, that the FtJ did materially err in law in her decision and that her decision must be set aside.

17. Having regard to paragraph 7.2 of the Senior President's Practice Statement, the appropriate course is for the appeal to be remitted to the FtT for a fresh hearing with no findings of fact preserved.

18. It appears that this appeal has previously been remitted to the FtT by the UT following a hearing in the FtT 'on the papers'. We do not make a direction to the FtT about it, even if we had the power to do so, but express the view that in the circumstances it may be preferable for the fresh appeal to be listed for oral hearing, rather than the appeal being considered 'on the papers'.

Decision

19. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal is remitted to the First-tier Tribunal for a *de novo* hearing before a judge other than First-tier Tribunal judge G.A. Black, with no findings of fact preserved.

A. M. Kopieczek

Judge of the Upper Tribunal
Immigration and Asylum Chamber

28/08/2023