IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000624
First-tier Tribunal No:
HU/51501/2022
IA/02373/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 27 September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AMT ALKREEM MANSUR QAYID ABDULATEF AL-KHULAIDI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr A Ali, ASH Immigration Services

Heard at Field House on 5 September 2023

DECISION AND REASONS

1. Although the Secretary of State is the Appellant in the proceedings in this chamber I refer to the parties as they were in the First-tier Tribunal.

2. The Secretary of State appeals, with permission granted by Upper Tribunal Judge Kebede on 28 March 2023, against a decision of First-tier Tribunal Judge Howorth dated 15 December 2022 allowing the Appellant's appeal on human rights grounds.

3. The background to this appeal is that the Appellant applied for entry clearance on 2 November 2021 under Appendix FM of the Immigration Rules on the basis of her family life with her partner. The Entry Clearance Officer refused the application in a decision dated 7 February 2022. The application was refused on

suitability grounds under Section S-EC of Appendix FM, paragraph EC-P1.1.(c) on the basis that the Appellant submitted IELTS life skill test report form as evidence of meeting the English language requirement under Appendix FM. However the ECO made checks which indicated that the document is not genuine as IELTS confirmed that the details on the test report form does not match the records and is not authentic. The Respondent relied on a document verification report (DVR) to that effect. The Respondent further refused the application on the basis that the Appellant did not meet the eligibility English language requirement of paragraphs E-ECP.4.1 to 4.2.

4. The Appellant appealed to the First-tier Tribunal on 15 December 2022. The judge's decision noted that the Respondent had made an application for an adjournment due to illness. The Appellant's representative opposed that application and the judge decided to refuse the for an adjournment application due to the urgency of the appeal [8] and went on to hear the appeal in the absence of the Respondent.

5. The judge found that the Respondent had not discharged the burden upon her to show fraud (applying the guidance in **DK and RK (ETS: SSHD evidence, proof) India [2022] UKUT 112 (IAC)**) [10]. The judge indicated that in those circumstances he need not consider further evidence but went on in any event to consider the evidence in the round in the event that he was wrong [11]. The judge went on to consider the evidence before him and found that the Appellant took and passed the English language test on 16 September 2021 as claimed and therefore meets the suitability and English language requirements of Appendix FM and allowed the appeal on human rights grounds.

6. The Secretary of State's application for permission to appeal was refused by the First-tier Tribunal on 9 January 2023 and was granted by the Upper Tribunal on 28 March 2023.

7. The Secretary of State appeals on three grounds. These are that the judge erred in his approach to the application for an adjournment made by the Secretary of State. Reliance is placed on the decision in **Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)**, in particular the guidance that, in considering an adjournment request, the issue is whether the refusal deprives the affected party of his right to a fair hearing, the issue being fairness rather than reasonableness. The Secretary of State contends that the judge failed to take account of this test and failed, as required, to consider whether the Respondent would be deprived of a fair hearing if the adjournment request was refused. It is contended in the second ground that the judge erred in applying the wrong standard of proof in that, in rejecting the DVR report and finding that the initial evidential burden had not been discharged, the judge was requiring evidence more akin to 'beyond reasonable doubt'. It is contended in the third ground that the judge's alternative consideration, in the alternative that the burden had been discharged, is devoid of adequate reasoning.

8. At the hearing before me Mr Lindsay expanded upon the grounds. In relation to the first ground, Mr Lindsay submitted that there was no Presenting Officer before the First-tier Tribunal as the Presenting Officer was unwell and highlighted that a formal application was made as the Respondent wished to be represented. He accepted that there is no suggestion that an adjournment must be granted in every case where the Respondent makes such a request, but, in his submission, in fairness to both parties there must be proper consideration of the adjournment application in all cases. He highlighted that at paragraphs 7 to 8 where the judge considered the adjournment request, he made no reference to the issue of

fairness as set out in the decision in **Nwaigwe**. He submitted that this was of particular import in this case where there was an allegation that a false document had been relied on and the credibility of the Appellant was in issue. In his submission cross-examination was therefore likely to be of particular importance. The judge only considered possible prejudice to the Appellant without considering fairness to the Respondent.

9. In relation to Ground 2 Mr Lindsay submitted that he accepted that at paragraphs 6 and 10 the judge directed himself to the relevant authorities. However, in his submission the judge did not, as required, answer the question asked at paragraph 6, which is whether the Secretary of State's evidence would enable a properly instructed trier of fact to determine that the burden of proof had been discharged on the balance of probabilities. The judge in his submission did not consider whether the evidence produced would support such a finding. In his submission the document verification report considered at paragraph 10 is capable of showing on the balance of probabilities that the English language certificate is not authentic. In his submission the judge imposed an impermissibly high burden of proof asking for more than what was properly required. The DVR in this case contains information specific to this particular Applicant and in his submission that amply discharges the Respondent's burden of proof.

10. In terms of the third ground Mr Lindsay submitted that this ground goes to what could have been presented by the Secretary of State had she been represented at the hearing. In his submission the third ground shows the materiality of the first ground.

11. Mr Ali submitted that the judge was right to refuse the adjournment request. He highlighted that the judge asked to see the evidence that the Appellant had recently returned to Yemen. The Sponsor showed the judge the Appellant's passport which was on his mobile phone and the judge was able to see the stamps establishing that the Appellant returned to Yemen. In his submission this was relevant to the judge's assessment of the Appellant's current situation. He submitted that it is cleat that the judge granted the adjournment because of the Appellant's current situation, had it been the case that she remained in Egypt the judge would not have granted the adjournment request in his view. In terms of the second ground, Mr Ali submitted that the judge made clear findings at paragraphs 10 to 11 and gave reasons for finding that the Secretary of State's burden had not been discharged attaching weight to the Appellant having taken a further English language test. In his submission if a Presenting Officer had been in attendance it would have made no difference to the outcome as the Appellant had taken a second English language test.

Discussion

12. I have considered the submissions in relation to Ground 1. The judge stated at paragraph 7 that the Respondent had made an application for an adjournment due to illness, that Mr Ali who represented the Appellant before the First-tier Tribunal, opposed the application and the Sponsor asked to speak and this was permitted. He set out at paragraph 8 that the Sponsor stated that the Appellant had returned to Yemen. The judge considered evidence of the Appellant's passport and accepted that the Appellant had gone from Egypt to Yemen and the judge concluded:

> "Given where the Appellant is living and the country conditions I can well understand the Sponsor's desperation for the appeal to be heard as soon as

possible and I understand the need for the hearing to occur without delay. I therefore have decided to refuse the application of the Respondent due to the urgency of the appeal".

13. In my view the difficulty with this approach is the judge's failure to consider the guidance in the decision of **Nwaigwe**. The headnote of that case states:

> *If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284.*

14. I note at paragraph 8 of the decision in **Nwaigwe** where the Upper Tribunal emphasised that Tribunals must consistently give effect to the overriding objective and went on to say:

> "Notwithstanding, sensations of frustration and inconvenience, no matter how legitimate, must always yield to the parties' right to a fair hearing. In determining applications for adjournments, judges will also be guided by focussing on the overarching criterion enshrined in the overriding objective, which is that of fairness".

15. It is not in dispute that the Respondent had applied for an adjournment on the basis of illness. The judge did not query or seek further evidence or information about the stated reason for the adjournment.

16. In this particular case, as set out by the judge in his assessment of the evidence, the Secretary of State bore the burden of establishing that the evidence on which the refusal was based was sufficient to establish that a false document was submitted. In my view, it is clear from the judge's consideration of this matter that no consideration was given to the reasons for the Respondent's representative's absence, the burden on the Secretary of State or the issue of fairness to the Secretary of State in consideration of the application for adjournment. The only factor considered by the judge was the Sponsor's desperation for the appeal to be heard as soon as possible in circumstances where the Appellant was residing in Yemen.

17. In these circumstances I find that the judge made a procedural error in failing to give proper reasons for the decision to refuse the adjournment request in accordance with the guidance in **Nwaigwe**.

18. I indicated to the parties at the hearing that I consider that Grounds 2 and 3 stand or fall with the adjournment issue in that, in circumstances where I find that there is an error in the judge's approach to the adjournment issue, the judge's findings on the substantive issue cannot stand.

19. Accordingly I set aside the decision of the First-tier Tribunal on the basis that there is a procedural error of law in relation to the refusal to adjourn the hearing.

In these circumstances the parties agreed that it is appropriate to remit the appeal to the First-tier Tribunal for a fresh hearing.

Notice of decision

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
The decision is set aside.
The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), to be heard before any judge aside from Judge Howorth.
The Appellant's representative has requested that there be an expedited hearing in circumstances where the Appellant remains in Yemen.

A G Grimes

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 September 2023