



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003591

First-tier Tribunal No: EA/05899/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:

13th December 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

YEMISI ALICE ATOYEBI
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Jibowu, Counsel instructed by MJ Solomon & Partners

For the Respondent: Ms Gilmour, Senior Home Office Presenting Officer

Heard at Field House on 15 November 2023

DECISION AND REASONS

Introduction

1. The Appellant is a citizen of Nigeria born on 11 May 1993. She applied for an EEA family permit on 3 October 2019 as the family member of Andrea Elena Simeria, her sister-in-law (“the sponsor”). The application was refused as the Respondent concluded that from 1 February 2017 the rights of extended family members only applied to relatives of the EEA national, and not relatives of the EEA national’s spouse. As the Appellant was the sister of the sponsor’s spouse the Respondent concluded that she did not qualify under Regulation 8 of the Immigration EEA Regulations 2016 (“The Regulations”).

2. The Appellant's appeal against the decision was dismissed by First-tier Tribunal Judge Lloyd-Lawrie ("the Judge") in a decision promulgated on 5 May 2023 who, at the Appellant's request, determined the appeal without a hearing. She correctly noted that the Regulations had been amended to extend the definition of extended family members to include relatives of the spouse/civil partner of the EEA national. She noted that the Respondent's decision was silent on whether the Appellant met the rules on dependency. She concluded on the evidence before her that the Appellant was not dependent on the EEA national but on the Appellant's brother and that the dependency had to be on the EEA national to satisfy the requirements of the Regulations.
3. Permission to appeal was granted on renewal by Upper Tribunal Judge Canavan on 10 October 2023. She concluded that it was at least arguable that the Judge erred in determining the issue of dependency without inviting further submissions from the parties on the matter. She remarked that given that it did not form any part of the Respondent's reasons for refusing the application, it was hardly surprising that the Appellant did not submit more detailed evidence relating to this issue in the bundle for the hearing. She considered it also arguable that the Judge may have erred in failing to consider relevant evidence that was included in the bundle.
4. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether any such error was material and the decision should be set aside.

Error of Law - Grounds of Appeal

5. In the grounds of appeal it is argued that the First-tier Tribunal erred in law by ignoring relevant evidence in the form of witness statements from the sponsor and his wife and a letter from the Appellant's sister in law. It is also argued that the Judge erred in failing to inform the parties that a previously uncontested issue was going to be raised so the parties could address it.

The hearing

6. Judge Canavan queried in her grant of permission why there had been a delay between the date of the Respondent's decision on 3 October 2019 and the determination of the appeal in May 2023. She required the parties to update the Upper Tribunal on the position at the error of law hearing.
7. Ms Gilmour said that according to the Respondent's records the initial appeal was dismissed on 9 February 2021. The Appellant appealed on 3 March 2021 to the Upper Tribunal and the First-tier Tribunal set aside the decision on 27 February 2023 under Rule 35 of Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. The appeal was then listed for a hearing on the papers.

8. Ms Gilmour's position in submissions was that, although there was no Rule 24 response, the Respondent was opposing the appeal. The Judge had directed herself correctly in law and dealt with the evidence appropriately.
9. Mr Jibowu maintained that the decision was procedurally unfair as the Appellant was neither on notice that dependency was in issue nor that the issue of on whom the dependency should be was a matter to be addressed. The decision was flawed. Having found there was a matter not raised in the notice of decision which concerned her, he submitted that the Judge should have invited the parties to make submissions and adjourned with directions. Mr Jibowu also submitted that the Judge erred in law in finding that the dependency had to be on the EEA national and not on the sponsor. As this matter had not been pleaded in the grounds both parties agreed to upload written submissions on this issue which they duly did on 16 and 17 November 2023.
10. I considered that it was relevant to the issue of procedural unfairness whether the First-tier Tribunal had issued directions after the decision of the First-tier Tribunal had been set aside on 27 February 2023. Enquiries revealed that a legal officer had issued directions on 13 March 2023 requiring the Appellant to file and serve all documents that she wished to rely on and for the Respondent to file and serve a response. Mr Jibowu said that the Appellant had complied with those directions. Ms Gilmour accepted that the Respondent had not.

Conclusions - Error of Law

11. In written submissions in response to my Directions the Appellant maintains her position that the Judge's decision was procedurally unfair and the Appellant was denied a fair hearing because, had she been aware that the question of dependency was to be raised she would have produced further evidence. In relation to the question of on whom the dependency must be, the Appellant argues that the issue is not settled by authority and alternatively the Appellant's dependence could be satisfied by material contribution from her brother.
12. The Respondent's response to directions concedes that the Respondent applied the incorrect legal provisions when refusing the Appellant's application but argues that the First-tier Tribunal Judge applied the correct legal provisions when determining the appeal. It is conceded that the Respondent failed to comply with directions issued by the First-tier Tribunal on 13 March 2023 which would have been an opportunity for the Respondent to review the decision and correct the erroneous application of the Regulations at that stage. It is submitted however that the outcome would have been the same for the Appellant due to the dependency being on her brother and not on the EEA national sponsor. In relation to the question of on whom the dependency must be, the Respondent concedes that there is no specific authority that

aligns with the circumstances of the Appellant, but cites case law for the proposition that it must be on the EEA national at the material time.

13. The original notice of decision dated 3 October 2019 only puts one matter in issue, namely the relationship between the Appellant and the EEA national sponsor. As correctly noted by the Judge, the definition of extended family members was extended to include relatives of the spouse/civil partner of the EEA national by virtue of the Immigration (European Economic Area) (Amendment) Regulations 2019 (S.I 2019/1155) which came into force on 15 August 2019. The sole issue raised by the Respondent in the notice of decision therefore fell away.
14. The decision letter was silent on the issue of dependency. The Appellant's bundle is dated 11 December 2020. The delay in the appeal being determined has been explained by the Rule 35 procedure. The Appellant's bundle contained submissions in which it is contended that the only matter for deliberation is that of dependence, which the Respondent has not disputed. The evidence consisted of witness statements from the Appellant, the sponsor and the Appellant's brother all dated 12 June 2020. The Appellant asserts that she is dependent on her brother and the sponsor. The sponsor asserts that the Appellant "enjoys essential economic benefit and support from my husband and I". Her brother asserts that "the Appellant depends on my wife and I".
15. The Judge considered the question of dependency after having noted that it was not addressed in the notice of decision. She finds, having considered the Appellant's brother and the EEA national sponsor's payslips, bank statements and evidence in relation to rent and educational fees for the Appellant, that there was no proof of money passing between the sponsor and Appellant. She finds that the papers "appear to demonstrate that the appellant is supported by her brother, the sponsor's husband, not the sponsor." She further finds that it appears that the Appellant is "entirely financially supported by her brother since her parents could no longer support her." She dismissed the appeal because the dependency was not on the EEA national, but on the Appellant's brother.
16. I was not provided with any authorities on the issue of procedural unfairness in analogous circumstances. However, I conclude that the decision of the First-tier Tribunal was procedurally unfair for the following reasons. There is authority for the proposition that there is procedural unfairness amounting to an error of law where a point is taken against an appellant that is not in the original decision and notice of the additional point is not given to the Appellant (YHY (China) AP Petition for JR [2014] CSOH 11). In AM (fair hearing) Sudan [2015] UKUT 00656 (IAC) the Upper Tribunal conclude at paragraph 7 (v) that:

"If a judge has concerns or reservations about the evidence adduced by either party which have not been ventilated by the parties or their representatives, these may require to be ventilated in fulfilment of the "*audi alteram partem*" duty, namely the obligation to ensure that each

party has a reasonable opportunity to put its case fully. This duty may extend beyond the date of hearing, in certain contexts. In this respect, the decision in Secretary for the Home Department v Maheshwaran [2002] EWCA Civ 173, at [3] – [5] especially, on which the Secretary of State relied in argument, does not purport to be either prescriptive or exhaustive of the requirements of a procedurally fair hearing. Furthermore, it contains no acknowledgement of the public law dimension and the absence of any *lis inter-partes*. “

17. Further, the Upper Tribunal has stressed the importance of issue based reasoning and procedural rigour in two recent cases (TC (PS compliance - "issues-based" reasoning) Zimbabwe [2023] UKUT 00164 (IAC) and Lata (FtT: principal controversial issues) [2023] UKUT 00163 (IAC). These cases underline the need for the identification of the principle important controversial issues by the parties in advance of the hearing. The task of a judge is to deal with the issues that the parties have identified.
18. In this case, not only was dependency not put in issue in the notice of decision, but the Respondent failed to amend the notice of decision or raise the matter in a Review pursuant to Directions. The Appellant’s submissions in her appeal bundle made it clear that she considered the Respondent was not disputing dependency. She was entitled to come to this conclusion on the basis of the grounds for refusal. The witness statements asserted that the Appellant was dependent on both the sponsor and her brother. I conclude that the Appellant was entitled to notice, pursuant to her right to a fair hearing, that the Judge considered that dependency was in issue and that she had concerns about the evidence in relation to dependency in order that the Appellant could address it by way of further evidence if she was able. Procedural fairness in this case required an adjournment with Directions to the Appellant in order that she have a reasonable opportunity to put her case.
19. I also conclude, that in finding that the dependency was on the Appellant’s brother alone, no reference was made to the three witness statements which averred that the dependency was on both the sponsor and her brother and the Judge therefore failed to take a material matter into account.
20. In view of the fact that I have concluded that the Appellant was denied a fair hearing I do not need to address the question of whether the Judge further erred in directing herself that dependency was not proved as a matter of law because it was on her brother.
21. Both representatives agreed that a remittal would be appropriate if I found that the decision was infected by procedural unfairness. I have considered the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. I have also had regard to the decision of the Court of Appeal in AEB v SSHD [2022] EWCA Civ 1512 and of the Upper Tribunal in Begum (Remaking

or remittal) Bangladesh [2023] UKUT 46 and am satisfied that remittal is the correct course. The effect of the error has been to deprive the Appellant of a fair hearing and therefore the presumption of remaking in the Upper Tribunal is reversed (paragraph 7.2 (a)).

Decision:

1. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
2. I set aside the decision.
3. The appeal is remitted to the First-tier Tribunal, not before Judge Lloyd-Lawrie.

L Murray

Deputy Upper Tribunal Judge
Immigration and Asylum Chamber

4 December 2023