



**IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER**

Case No: UI-2024-001770

First-tier Tribunal No:
EA/03592/2022

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 24 October 2024**

Before

UPPER TRIBUNAL JUDGE MAHMOOD

Between

**Mr Elhadji Modou Ndiaye
(NO ANONYMITY ORDER MADE)**

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr R Dar, Solicitor of Trojan Solicitors acting on behalf of
Green Solicitors

For the Respondent: Ms Gilmore, Senior Presenting Officer

Heard at Field House on 9 October 2024

DECISION AND REASONS

1. This is my oral decision which I delivered at the hearing today.

Introduction

2. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Buckwell ("the Judge") dated 6 June 2023 whereby the Judge had dismissed his appeal against the Respondent's decision to

refuse his application for status under the EU Settlement Scheme as a family member of a relevant EEA citizen.

Appellant's Solicitors Non-Compliance with Directions.

3. This matter has a very detailed procedural history which I shall return to. This matter also has an unfortunate history in terms of the Appellant's solicitor's non-compliance with directions.
4. An Error of Law hearing had been listed to take place before Deputy Upper Tribunal Judge Grimes on 7 August 2024. Judge Grimes was compelled to adjourn that hearing. As explained within her directions order dated 8 August 2024, a number of key documents were unavailable to the parties and to the Tribunal on 7 August 2024.
5. With a view to ensuring that there would be a smooth hearing on the next occasion, Judge Grimes ordered that the Appellant's representatives were to file with the Upper Tribunal and to serve the Respondent a composite electronic bundle by 28 August 2024. It was also made clear that that bundle must comply with the Principal Resident Judge's Standard Directions and with the Practice Direction for the Immigration and Asylum Chamber of the Upper Tribunal: Electronic filing of documents online-CE-File. A copy of the Standard Directions were attached to Judge Grimes' order.
6. As I shall refer to further, there has been non-compliance once again by the Appellant's solicitors.
7. It is also necessary to highlight that this case was listed with a time estimate of one and a half hours and to commence at 10am. It is now 3.40pm and it is only now that I am able to give judgment after hearing submissions which have just completed and after awaiting the arrival of and then hearing the evidence of the Appellant's instructing solicitor's caseworker.

The Overriding Objective

8. The failure by the Appellant's representatives to comply with the directions has meant that the Appellant's solicitors have failed to further the overriding objective referred to at Rule 2 of the Tribunal Procedure (Upper Tribunal) Procedure Rules 2008. This is of such importance that I set it out in full. There is a like provision in Rule 2 of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

Overriding objective and parties' obligation to co-operate with the Upper Tribunal

- (1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.
- (2) Dealing with a case fairly and justly includes—

- (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
 - (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
 - (d) using any special expertise of the Upper Tribunal effectively; and
 - (e) avoiding delay, so far as compatible with proper consideration of the issues.
- (3) The Upper Tribunal must seek to give effect to the overriding objective when it—
- (a) exercises any power under these Rules; or
 - (b) interprets any rule or practice direction.
- (4) Parties must—
- (a) help the Upper Tribunal to further the overriding objective; and
 - (b) co-operate with the Upper Tribunal generally

9. The heading to the overriding objective and Rule 2(4) makes clear that the parties must co-operate with the Tribunal and help it to further the overriding objective.
10. The Tribunal expects that the parties are aware that procedural rigour will be applied. There may well have been a time in the past when procedural rigour was not considered by the parties as a paramount concern because the Tribunal would perhaps overlook failures to comply with procedure or with bundle requirements. That is very much history.
11. It is most regrettable that the Applicant's solicitors have not ensured that they further the overriding objective and indeed they have severely hindered progress in this case.
12. In addition, there has been an undue amount of time taken on this case instead of time being spent on other cases which await consideration. The errors on the part of the Appellant's legal representatives in non-compliance with directions are numerous including a total failure to serve the bundle on the Respondent. It has been made clear in numerous cases that filing documents on CE-File is not service on the Respondent.
13. Even then, the bundle which was filed by the Appellant's solicitors was wholly deficient with a poor index, non-navigable documents and overall, it was very difficult to use during today's hearing. I took the precaution of printing off some documents and despite having two screens in court. All the parties struggled with the different pages numbers which the different bundles appear to have. I make it very clear that this should not have happened in this case, and it must not occur again.

The Appeal Before Me and the Procedural History

14. Turning to the substantive matter, there had been an earlier decision of the First-tier Tribunal before the current one. That earlier decision had been set aside by the Upper Tribunal because the Appellant's contention

was, in effect, the same as this one. Namely that the Appellant wished to have made representations at the hearing but there was a procedural error because he was not aware of the date of the hearing and was thereby deprived of a hearing. On that occasion the Respondent agreed to the matter being heard de novo at the First-tier Tribunal.

15. On this occasion, as observed by the judge who looked at the permission application, by remarkable coincidence, it was being contended in the Appellant's grounds of appeal, that the same happened again.
16. It is worth setting out some of the history, but this is by no means all of it.

First-tier Tribunal Judge's Decision

17. I begin with the decision of First-tier Tribunal Buckwell. He had considered the appeal on the papers. His decision was promulgated on 6 June 2023. The Judge noted the history to the appeal including that the appeal that he was dealing had been remitted following an error of law decision of Upper Tribunal Judge Lindsley promulgated on 30 March 2023. The Judge comprehensively set out the matters that he had to consider and concluded that the appeal had to be dismissed. The Judge noted specifically at paragraph 19 as follows:

"The Appellant was given a further opportunity to produce any additional documentation within the directions issued by Judge O'Keeffe. From the documents available to me on Microsoft Teams I do not see that the Appellant responded and there is no evidence to suggest that the appropriate service of those Directions had not been undertaken."

18. The Judge had dismissed the appeal. The Appellant filed grounds of appeal seeking permission to appeal against that decision of Judge Buckwell. Permission to appeal was refused by First-tier Tribunal Judge Wilson on 17 November 2023. Judge Wilson noted at paragraph 5 as follows:

"Contrary to what is stated in the grounds the tribunal's records indicate that the appellant's representatives were emailed Judge O'Keeffe's directions on 25 April 2023. Those directions required service of a bundle and ASA and invited the Appellant to confirm whether an oral hearing was required and if so to put forward witness evidence. Given the tribunal's records and a lack of evidence from the appellant's representatives (for example a witness statement setting out the reasonable searches that have made of their email systems to establish whether the mail with directions had been received and confirmation that it had not supported by a statement of truth) the tribunal does not consider that it is arguable that the appellant was deprived of a procedurally fair hearing."

19. Judge Wilson also went on to say that in any event, Judge Buckwell had properly considered the evidence in relation to the proxy wedding in Senegal and the findings were properly open to Judge Buckwell.

20. The Appellant's solicitors renewed their application for permission to appeal to the Upper Tribunal. The Appellant's solicitors attached a witness statement which was some two and a half pages in length dated 1 February 2024. That statement is by Mr Ibrahima Diarra. It is note headed paper for solicitors with "QCL" with an address of 1st Floor, 1 Finsbury Square, Moorgate, London EC2A 1AB. Within that witness statement, Mr Ibrahima Diarra said he was a consultant working for QC Law. He says that:

"On 19 January 2024 I received an email from the Tribunal refusing the appellant's appeal. I was shocked because the last email we received indicated that the appeal had been remitted to the First-tier Tribunal for a de novo hearing."

The witness statement then says:

"When you went through the decision when on to say that a direction was sent to us on 25 April 2023.

Surprisingly we checked our email to retrieve the direction so that we can have clear indication about what is happening.

Unfortunately, no email was received.

I have diligently checked my mailbox, email inbox, spam, archives, deleted items, junk, trash and any to see whether the Tribunal's directions were received.

Despite my efforts, no such directions or communications have been received.

After all the searches, I can strongly confirm that the email was not received. We have checked the mailbox, junk mail, even the quarantine box (preventing spams). A quarantine box block all and release them few hours later. The quarantine box only email received on 26 April 2023 and these emails were not from the Tribunal, and all other relevant folders were checked."

It says further in that statement, *"It is obvious that before we take any positive action, we must receive the Tribunal directions, as mentioned in the Upper Tribunal. We were supposed to receive the First-tier Tribunal directions, but this never arrived."* And then it says later in that statement, *"I would like to mention that this appeal is 3 days late because I wanted to instruct the Barrister who drafted the previous grounds ..."*

Mr Diarra

21. Mr Diarra was good enough to attend court today when Ms Gilmore indicated this morning that she would like to ask questions of him in relation to that witness statement. Mr Diarra affirmed and then provided evidence, and I shall return to that evidence shortly.

22. After the grounds of appeal to the Upper Tribunal permission was considered by Deputy Upper Tribunal Judge Metzger KC. In his grant of permission Judge Metzger KC said the following on 29 May 2024:

“However, the Appellant’s representatives have provided a sworn statement averting [sic] that no such directions were ever received. Those representatives owe a primary duty to the Court on which they must be aware and know the serious consequences if something is being asserted in the sworn declaration which does not turn out to be true. I therefore must proceed that they have complied with that duty and the directions were not received although I pause to note it is a curious coincidence that this appears to happen for a second time. In the circumstances, I grant permission on the procedural ground ...”

23. The matter was then listed for the error of law hearing before Deputy Upper Tribunal Judge Grimes which I referred to earlier and whereby I had said that Judge Grimes had felt compelled to adjourn the matter. The matter has come for hearing before me.

24. I should say from the outset that Mr Dar has sought to assist the Tribunal as much as he has been able to, including with the provision of a chronology which he prepared during the short adjournment, and I am grateful to him for his assistance. Ms Gilmore presented the case in a fair and structured way for which I am also grateful.

Judge O’Keeffe’s Directions Order and Proper Service was Effected

25. I turn to the issue which arise. Did the First-tier Tribunal send to the Appellant’s solicitors the directions made by Judge O’Keeffe on 25 April 2023? Those directions order had said the following:

- (1) No later than 4pm on 26th May 2023. The Appellant file and serve:
 - (a) a specific skeleton argument;
 - (b) a consolidated indexed bundle;
 - (c) if the Appellant has requested an oral hearing, he was to notify the Tribunal the names of witnesses; and
 - (d) any reasonable adjustments including whether any interpreters were required.

26. There is no doubt whatsoever in my mind that the Appellant’s representatives were sent a copy of those directions. The reasons that there is no no doubt in my mind are:

- (1) It is clear from the numerous orders made by the First-tier Tribunal following the directions order that those directions were sent;

(2) The consideration of the matter by the First-tier Tribunal including by Judge Buckwell and by Judge Wilson shows that the directions were sent to the Appellant's solicitors. For example, Judge Wilson referred to the directions on the online file; and

(3) The parties have a copy of an email from the First-tier Tribunal to "Amir" at the Appellant's solicitor's office. I had sought that with the assistance of the Upper Tribunal's Office during the short adjournment today. It is crystal that the First-tier Tribunal sent the e-mail with the directions order to the Appellant's solicitor to the "Amir" e-mail address. I should add that I ensured for fairness purposes that both parties had that e-mail before Mr Diarra gave his oral evidence to me this afternoon.

27. To be clear therefore, Judge O'Keefe's directions of 25 April 2023 were sent via e-mail to the Appellant's solicitors. There is no doubt about that.

28. Mr Diarra confirmed in his evidence today that "Amir" is Mr Amir Khan. Mr Diarra also told me that Amir Khan is a qualified solicitor at the Appellant's solicitors.

Appellant's Concession

29. Mr Dar quite properly conceded in his closing submissions, that because there had been proper service of the Judge O'Keefe's directions on 25 April 2023 then in the circumstances, this appeal which wholly relies on non-service cannot possibly succeed.

30. That concession is a fair and proper concession in the light of overwhelming evidence about service.

31. I go onto assess matters further because of the concerning way in which the situation has arisen.

Assessment of Mr Diarra's evidence

32. At the very least it is right to say that the evidence of Mr Diarra has not been accurate. One hesitates to say that a legal representative may not have told the truth, and I will ensure that I remain measured in what I have to say.

33. Being as charitable as I can, it is possible that the problems which arose in this case are just as likely to be because of a chaotic working pattern by Mr Diarra and in respect of his clients' cases, but it may also be that there is something more concerning happening. I simply do not know.

34. My findings in relation to Diarra's evidence are as follows.

35. Firstly, Mr Diarra's signed witness statement did not give the complete picture. Any legal representative knows that they must present the complete picture. The affirmation he provided required him to provide the "The whole truth and nothing but the truth".

36. Although Mr Diarra uses the title “consultant” he has told me today that in fact he is not a qualified solicitor, nor is he counsel, and he is not a Legal Executive. He told me that he has a Masters in law and has a diploma. Nonetheless, those who present immigration cases or indeed any cases to a Tribunal or Court must uphold the highest standards and must ensure that they further the overriding objective, even if not qualified.
37. I take just two examples of extreme concern which I have about Mr Diarra’s written and oral evidence. He says within his written statement dated 1 February 2024 that when he was looking for Judge O’Keeffe’s directions order, “**We** have checked the mailbox, junk mail, even the quarantine box.”. I stress the “We” in Mr Diarra’s witness statement.
38. Mr Diarra told me today that he had asked others whether they had received email from the Tribunal. He told me that answer from them was ‘no’. The two different statements from Mr Diarra are mutually exclusive. It cannot be on the one hand that “We” checked the mailbox, junk box etc but on the other hand that he had spoken to Amir Khan and was told that there was no such email. It is clear that there was the e-mail to Amir Khan because all of us have seen it today and the contemporaneous orders of the judges at the First-tier Tribunal confirm that to be so.
39. Matters get worse because Mr Diarra attempted to blame others. He now said that he did not understand why the First-tier Tribunal was sending an email to Amir Khan.
40. This is worrying because even Mr Diarra’s own bundle for this hearing refers to Amir Khan with emails from the Upper Tribunal to him on at least two occasions.
41. In my judgment it is clear that the First-tier Tribunal could not simply have guessed a name at the Appellant’s firm and then come up with Amir Khan. It is obvious that Mr Amir Khan is a solicitor at the Appellant’s solicitor’s firm, and he is and was the ‘contact’ for immigration work at the Appellant’s solicitor’s firm. If I understood Mr Diarra correctly, then Mr Amir Khan is Mr Diarra’s supervisor for immigration work. Even if he is not, the point is that Mr Amir Khan is a solicitor at the Appellant’s solicitor’s office.
42. I appreciate that this area of law has time limits which are always pressing with work which is intense and the issues which arise require careful handling. Ms Gilmore within her cross examination and drawing upon my questions of Mr Diarra when I sought clarification without entering the arena, elicited that Mr Diarra has been involved with various law firms. Mr Diarra mentioned at least five, including the firm called QC Law, Queens Court, Green Solicitors; Farani Taylor and Milestone Solicitors. The current firm is Green Solicitors.
43. Mr Diarra relied on screenshots to contend that he had not received the directions order of Judge O’Keeffe. I will go no further than to say that it is

obvious that the screenshots are incomplete. They do not have the e-mail address of the person the e-mails were being sent to or emanating from. For example, is this Mr Diarra's e-mail address for this firm or one of the other 4 firms he was working at? I simply do not know.

44. It is possible that Mr Diarra had simply become overwhelmed over time with the different cases that he was dealing with at the various different firms.
45. I very much hope that a clear message has gone out to Mr Diarra that it is absolutely vital that he checks and double checks before he makes representations in witness statements or in grounds of appeal.
46. A statement of truth which is not accurate can lead to contempt of court proceedings. On this occasion, I am unlikely to take matters further but if this were ever to arise again, I am sure that a different approach would be taken by me and others. What I consider to be a highly mitigating factor is that Mr Diarra attended this hearing willingly and at short notice and provided co-operation.
47. I will also add that I was concerned about Mr Diarra's evidence during cross-examination when he was asked whether this had happened previously. At first his answer was 'yes'. Namely he had purportedly not received documents from the Tribunal previously in other cases and so had lodged appeals on that basis. If that really is the case, then that is a very serious matter. I expect there to be a review of the cases that the firms that Mr Diarra is involved with to ensure that the correct information has been provided in grounds of appeal and in witness statements.
48. As I say, on this occasion, because of the measured way in which Mr Dar has presented the case on behalf of the Appellant, I am prepared to restrict what I have said in case the matter needs to be sent to professional bodies which Mr Diarra and the firms that he works for oversee.
49. I return to the appeal itself and I am conscious that the Appellant is here in court. What cannot happen is that procedure is bypassed and instead submissions sway a judge that the procedure should be ignored or bypassed. Fairness is essential for both parties and the fact that this issue arose previously it should have meant that the Appellant's solicitors were even more careful this time around to ensure that the fault was not at their end.
50. Whilst I appreciate that the Appellant himself may feel that he has not had an opportunity to present his case, that is a matter for him to consider because unfortunately is not a matter for me. It is not for a judge of the Upper Tribunal to seek to provide a remedy in this scenario albeit I have considered carefully whether there is any possible way in which I can conclude, for the purpose of the Court of Appeal's decision in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982; [2005]

INLR 633 whether there was a material error of law. As Mr Dar correctly said, there was proper service of the directions order and thereby there was no procedural or other error.

Notice of Decision and Further Directions

There is no error of law in the decision of the First-tier Tribunal.

Therefore, the decision First-tier Tribunal Judge Buckwell, which had dismissed the appeal, stands.

The senior partner at Greens Solicitors shall within 28 days of service of this order provide for the attention of Judge Mahmood the following in a witness statement with a statement of truth:

- (1) That they have read this decision;
- (2) They have provided a copy of the decision to each of the solicitors referred to at paragraph 42 above and has received their confirmation of receipt of the decision;
- (3) What action will be taken to ensure that the matters which arose in this case will not arise again; and
- (4) What review processes are being undertaken to deal with any other cases in which Mr Diarra has filed grounds of appeal claiming that he or the firm(s) had not received previous listing orders or directions orders.

Abid Mahmood
Judge of the Upper Tribunal
Immigration and Asylum Chamber

2024

9 October