IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003201
First-tier Tribunal No:
EA/05840/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 03 April 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SHAWAL IFTIKAR
(NO ANONYMITY ORDER MADE)

Appellant

and

AN ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Ms S Khan instructed by Parkview Solicitors.
For the Respondent: Mr Williams, a Senior Home Office Presenting Officer.

Heard at Birmingham Civil Justice Centre on 9 March 2023

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Mack ('the Judge'), promulgated on 3 March 2022, in which the Judge dismissed the appellant's appeal against the refusal of his application for an EEA Family Permit as a family member of the Sponsor, a Portuguese national exercising treaty rights in the UK.
2. Permission to appeal was initially refused by another judge of the First-tier Tribunal but granted on a renewed application by Upper Tribunal Judge Jackson on 28 September 2022. The grounds of appeal challenging the decision assert the Judge erred in law in (i) failing to put matters to the appellant on points that were not relied upon by the respondent thereby not giving the appellant an opportunity to respond to the same and (ii) irrationally concluding that the appellant is not dependent on the Sponsor for his essential needs on the basis of the evidence was 'self generated', household support and evidence of other smaller financial support.
3. Judge Jackson found the grounds "just to be arguable" although noting that in relation to the second ground of appeal in particular the lack of evidence

about the appellant's household finances and other sources of support appeared to be findings that were open to the Tribunal to make given the evidence before it. It is said the first ground of appeal needs to be put somewhat into context such that there would not have been points taken on it in the decision letter. It was directed that as to whether these were put to the appellant appearing as a matter of evidence is something upon which those representing the appellant should make a formal statement. A direction was provided that no later than 14 days from the date on which the grant of permission was sent, the solicitor who represented the appellant was to file and serve a witness statement as to the matters raised in ground 1, with a provision for the respondent to reply if so advised.

4. There was no Home Office Presenting Officer made available to assist the Judge and although not seen by the Tribunal prior to the hearing Ms Khan was able to provide a copy of the previous advocates transcript of the hearing before the Judge, as directed. This notes that the Judge asked a number of questions by way of clarification but not in relation to the points that are material to the Judge's decision.

5. Ground 1 asserted a procedural irregularity by the Judge in relation to the failure of the duty to put matters to the appellant. This ground is pleaded in the following terms:

> Ground 1: Procedural Irregularity: Duty to put matters.
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> 3. The Entry Clearance Officer was not represented before the First Tier Tribunal. The FTT takes against the Appellant a number of points which were not taken by the Respondent and could not have reasonably been anticipated by the Appellant or his advisors as undermining the case. In such circumstances the Judge was obliged to put those matters to the Appellant's representatives.
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> 4. At [32], the FTT takes against the Appellant the fact that his bank statements reflect deposits from individuals other than his UK based sponsor. At [40] the FTT notes that, "no satisfactory explanation has been proffered for this". The simple explanation for the absence of a satisfactory explanation is that this matter was not put to the Appellant's advisors.
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> 5. At [38] - [39] the FTT advances its own, independent theory of the case that the Appellant and his parents may well have other sources of income. This alternative, wholly speculative, hypothesis was not advanced by the Respondent and was not canvassed with the Appellant's representatives.
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> 6. By developing its own independent theory of the case and failing to put this case to the Appellant and his advisors for comment, the Tribunal has deprived the Appellant of a fair hearing.

6. Mr Williams on behalf of the Entry Clearance Officer accepted that the matters complained of in the grounds had been relied upon by the Judge and held against the appellant, for example at [40] of the decision under challenge. Mr Williams conceded that the challenge to the determination was made out as there has been a procedural irregularity resulting in an unfair decision.

7. In light of the concession it was not necessary to hear further in relation to ground 2 as the determination of the Judge is set aside with no preserved findings.

8. The Surendran Guidelines in full read:

THE SURENDRAN GUIDELINES

1. Where the Home Office is not represented, we do not consider that a special adjudicator is entitled to treat a decision appealed against as having been withdrawn. The withdrawal of a decision to refuse leave to enter and asylum requires a positive act on the part of the Home Office in the form of a statement in writing that the decision has been withdrawn. In the instant case, and in similar cases, this is not the position. The Home Office, on the contrary, requests that the special adjudicator deals with the appeal on the basis of the contents of the letter of refusal and any other written submissions which the Home Office makes when indicating that it would not be represented.

2. Nor do we consider that the appeal should be allowed simpliciter. The function of the adjudicator is to review the reasons given by the Home Office for refusing asylum within the context of the evidence before him and the submissions made on behalf of the appellant, and then come to his own conclusions as to whether or not the appeal should be allowed or dismissed. In doing so he must, of course, observe the correct burden and standard of proof.

3. Where an adjudicator is aware that the Home Office is not to be represented, he should take particular care to read all the papers in the bundle before him prior to the hearing and, if necessary, in particular in those cases where he has only been informed on the morning of the hearing that the Home Office will not appear, he should consider the advisability of adjourning for the purposes of reading the papers and therefore putting the case further back in his list for the same day.

4. Where matters of credibility are raised in the letter of refusal, the special adjudicator should request the representative to address these matters, particularly in his examination of the appellant or, if the appellant is not giving evidence, in his submissions. Whether or not these matters are addressed by the representative, and whether or not the special adjudicator has himself expressed any particular concern, he is entitled to form his own view as to credibility on the basis of the material before him.

5. Where no matters of credibility are raised in the letter of refusal but, from a reading of the papers, the special adjudicator himself considers that there are matters of credibility arising therefrom, he should similarly point these matters out to the representative and ask that they be dealt with, either in examination of the appellant or in submissions.

6. It is our view that it is not the function of a special adjudicator to adopt an inquisitorial role in cases of this nature. The system pertaining at present is essentially an adversial system and the special adjudicator is an impartial judge and assessor of the evidence before him. Where the Home Office does not appear the Home Office’s argument and basis of refusal, as contained in the letter of refusal, is the Home Office’s case purely and simply, subject to any other representations which the Home Office may make to the special adjudicator. It is not the function of the special adjudicator to expand upon that document, nor is it his function to raise matters which are not raised in it, unless these are matters which are apparent to him

from a reading of the papers, in which case these matters should be drawn to the attention of the appellant's representative who should then be invited to make submissions or call evidence in relation thereto. We would add that this is not necessarily the same function which has to be performed by a special adjudicator where he has refused to adjourn a case in the absence of a representative for the appellant, and the appellant is virtually conducting his own appeal. In such event, it is the duty of the special adjudicator to give every assistance, which he can give, to the appellant.

7. Where, having received the evidence or submissions in relation to matters which he has drawn to the attention of the representatives, the special adjudicator considers clarification is necessary, then he should be at liberty to ask questions for the purposes of seeking clarification. We would emphasise, however, that it is not his function to raise matters which a Presenting Officer might have raised in cross-examination had he been present.

8. There might well be matters which are not raised in the letter of refusal which the special adjudicator considers to be relevant and of importance. We have in mind, for example, the question of whether or not, in the event that the special adjudicator concludes that a Convention ground exists, internal flight is relevant, or perhaps, where, from the letter of refusal and the other documents in the file, it appears to the special adjudicator that the question of whether or not the appellant is entitled to Convention protection by reason of the existence of civil war (matters raised by the House of Lords in the case of *Adan*). Where these are matters which clearly the special adjudicator considers he may well wish to deal with in his determination, then he should raise these with the representative and invite submissions to be made in relation thereto.

9. There are documents which are now available on the Internet and which can be considered to be in the public domain, which may not be included in the bundle before the special adjudicator. We have in mind the US State Department Report, Amnesty Reports and Home Office Country Reports. If the special adjudicator considers that he might well wish to refer to these documents in his determination, then he should so indicate to the representative and invite submissions in relation thereto.

10. We do not consider that a special adjudicator should grant an adjournment except in the most exceptional circumstances and where, in the view of the special adjudicator, matters of concern in the evidence before him cannot be properly addressed by examination of the appellant by his representative or submissions made by that representative. If, during the course of a hearing, it becomes apparent to a special adjudicator that such circumstances have arisen, then he should adjourn the case part heard, require the Home Office to make available a Presenting Officer at the adjourned hearing, and prepare a record of proceedings of the case, which should be submitted to both parties up to the point of the adjournment, and such record to be submitted prior to the adjourned hearing.

9. The grounds of challenge, accepted by Mr Williams, show the Judge fell foul of paragraph 8 of the Surendran Guidelines as the evidence shows that

matters relied upon in the determination were not raised with the appellant's representative and submissions invited in relation thereto.

10. In relation to disposal, recent guidance has been provided as to whether it is appropriate for an appeal to be retained within the Upper Tribunal or remitted to the First-Tier Tribunal in the case of Begum [2023] UKUT 00046. The position of both advocates is that the appeal should be remitted to the First-tier Tribunal.

11. Paragraph 7.2 (a) and (b) of the Practice Statement relating to disposals of appeals by the Upper Tribunal reads:

> 7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
>
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
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> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

12. In the current appeal there is a conceded unfairness in the manner in which the Judge determined the appeal which it was accepted was the at the core of the Judge's decision to find against the appellant. I find that considering matters as a whole the effect of the accepted error has been to deny the appellant a fair hearing and to have the case put considered by the First-tier Tribunal properly.

13. In relation to the extent of the fact finding that will be required in order to determine the appeal, this is an appeal in which the identified unfairness is sufficient to dispose of the issues in the appeal to the extent that the hearing before the Judge was of no value to the parties at all. I find on that basis both exceptions set out in paragraph 7.2 are made out and that it is appropriate for the appeal to be remitted to the First-tier Tribunal (IAC) sitting in Birmingham to be heard afresh by a judge other than Judge Mack.

Notice of Decision

14. The First-tier Tribunal has materially erred in law. The decision of the Judge shall be set aside. The appeal shall be remitted to the First-tier Tribunal sitting at Birmingham to be heard de novo by a judge other than Judge Mack.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

22 March 2023