IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003226

First-tier Tribunal Nos: EA/51020/2021
IA/06834/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 23 October 2024

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

Kunle Amos Oladipo
(NO ANONYMITY ORDER MADE)

Appellant

and

Entry Clearance Officer (ECO)

Respondent

Representation:
For the Appellant: Ms K Turner, Counsel, instructed by Gilead Solicitors Limited
For the Respondent: Mrs A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 23 September 2024

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State on behalf of the ECO, but nonetheless, for the purposes of this appeal, we shall refer to the parties as they were described before the First-tier Tribunal, that Mr Oladipo as the appellant and the ECO as the respondent.

2. The ECO appealed against the decision of First-tier Tribunal (FtT) Judge Cohen (the judge), who allowed the appellant's appeal on 25 January 2023. The underlying decision was that of the ECO dated 7th April 2021 which refused the appellant an EEA family permit under the Immigration (European Economic Area) Regulations 2016 (not 28 August 2020 as recorded by the judge at paragraph 1 of his determination). The genuineness of the marriage certificate and the lack of evidence in support of the relationship were cited as reasons for refusal.

Background

3. The appellant has made various applications to enter the UK. On 20 March 2007 the appellant was convicted of possessing a false passport and assuming the identity of Johnson Brown, a national of the Democratic Republic of Congo with a date of birth of 11 November 1975 and was sentenced to twelve months' imprisonment at Woolwich Crown Court.

4. In fact the appellant is a citizen of Nigeria born on 11 November 1974 .

5. The judge set out at paragraph 2 of the challenged decision the appellant's immigration history. On the 18 February 2008 the appellant was excluded from entering the UK by virtue of an exclusion order by the Home Secretary owing to his criminality in the UK.

6. At paragraph 3 the judge noted that the appellant had received a previous decision dated 21 August 2018 in which the appellant had been refused entry clearance under paragraph V3.2(a) because false representations or false documents or information had been submitted and/or material facts had not been disclosed. The judge recorded that the appellant had acknowledged he was excluded from the UK by the Secretary of State on 18 February 2008 and had not declared this material fact in his application form and his application was thus refused under V3.6(b) and that he was notified that any future application was likely to be refused unless circumstances changed.

7. The appellant apparently visited Sweden on a visit visa on two occasions in 2019 and also the UAE.

8. On 28 August 2020 the appellant was encountered at Hawarden Aerodrome having re-entered the UK in breach of an exclusion order and was served with an IS81 form. The appellant's case was reviewed and he was refused leave to enter. The judge recorded at [7] the circumstances of the appellant's arrival at Hawarden Aerodrome in August 2020 whereupon he submitted that he was a managing director of the company who owned the aircraft, but the respondent was not satisfied that the appellant met the definition of a crew member under Section 33 of the Immigration Act 1971. Furthermore the judge noted that the appellant had been manifested as crew upon a flight when he was patently not a crew member on the aircraft and sought to avail himself of Section 8 of the Immigration Act 1971 when he had no entitlement to do so. The respondent was further satisfied that this was an order to circumvent the Immigration Rules. The respondent therefore refused the appellant's leave to enter in August 2020 under V 3.3 of the Immigration Rules [9].

9. The judge recorded at paragraphs 12 and 13:

> *"12. The appellant subsequently applied for an EEA family permit to accompany Ms Nnenaa Mary Uche-Ifedi (sponsor) his wife, who is a Swedish national to the UK. It was noted that the appellant and his spouse married on 22 December 2020 after being in a relationship in living together since April 2018. As evidence of that relationship, the appellant submitted a marriage certificate. The appellant further stated that he and his spouse were both in attendance at the marriage ceremony. However, the signature of the spouse on the marriage certificate was considerably different to the signature that appeared in the sponsor's passport, which had been provided in support of the*

application and as evidence of her identity. The respondent would not expect such a notable difference to occur. The discrepancy casts doubt on the genuineness of the document.

13. *It was stated that in the light of the above and as the appellant had not chosen to provide any other evidence in support of relationship of over two years with the sponsor, the respondent could not be satisfied that the appellant was related to the sponsor as claimed that he met the requirements of regulation 7 of the regulations. The respondent therefore refused the appellant's application."* [our underlining].

10. The judge proceeded to allow the appeal stating as follows:

"17. The burden of proving that the decision of the respondent was not in accordance with the law and the Regulations rests upon the appellant. The standard of that proof is the balance of probabilities. The relevant date for the consideration of the evidence is for the purposes of this appeal is the date of the hearing.

18. *The respondent refused the application solely on the basis that it was found that the signature of the sponsor on the marriage certificate differed to that in her passport and as such it was not accepted that it was a genuine marriage certificate or that the parties were in a genuine marriage.*

19. *The respondent has in effect refused the appellant's application based on an allegation of deception. However, this allegation is not substantiated by any evidence whatsoever. The respondent has not followed his own procedures in respect of an allegation of a falsified document. There is no document verification report. There is no expert report. There is no evidence to support the claim that the signatures are different any way, shape or form. There is a high burden of proof in respect of an allegation of fraud and this is simply not been discharged.*

20. *On the other hand, the sponsor has produced a marriage certificate to me which I accept to be genuine; together with proof by way of entry and exit stamps identifying her as being present in Nigeria at the date of the marriage and photographs of the wedding ceremony which was clearly attended not only by her and the appellant but also by friends and family members and I find this to be compelling evidence to indicate that the parties were generally married in Nigeria as claimed by them.*

21. *In addition to the above, the sponsor gave evidence before me. I found her to be a credible witness and I attach significant weight to the evidence that she gave to me of the circumstances in which he met the appellant, their relationship and the circumstances in which they married. Furthermore, I attach weight to the sponsor's evidence with reference to stamps in her passport indicating that she had subsequently visited the appellant in Nigeria on multiple occasions."*

Grounds of Appeal

11. The grounds of appeal were fourfold.

(i) that the judge had made a material misdirection in law applying the incorrect standard of proof and paragraph 19 was identified, which cited a high burden of proof in respect of an allegation of fraud, whereupon the ordinary civil standard applied. It was submitted that the reference at paragraph 17 did not cure the defect.

(ii) the judge failed to have regard to the appellant's very poor immigration history in an appeal where credibility was very much in issue. The judge had improperly excluded arguably relevant matters.

(iii) as was clear from the Presenting Officer's note of the hearing, the judge relied on the fact that he himself used different signatures as a reason for rejecting the Secretary of State's case. It was not open to the judge to take judicial notice that a person could have more than one signature. For plainly self-evident reasons relating to security and identity, such as banking, it is possible to challenge the notion that it is normal for people to have more than one signature but it was not open to the judge to take his own experience as relevant to this issue.

(iv) there was a procedural irregularity because the judge indicated at the outset that he was minded to allow the appeal and thus rejected the Secretary of State's case outright on the issue of signatures. The judge thus refused the respondent's representative an opportunity to cross-examine on matters relevant to credibility and unfairly relied on his own subjective experience to reject the Entry Clearance Officer's case.

Submissions

12. At the hearing before us we noted the "grounds in support" which Ms Turner contended was a Rule 24 notice. In the written submission she made an application for an adjournment, which she renewed at the hearing on the basis that the solicitors had only received the Presenting Officer's minute note of the FtT hearing on Friday 20 September 2024. It was pointed out that this was incorrect because the minute note had in fact been uploaded onto the CCD files (the FtT electronic system), in support of an application for permission to appeal to the FtT and filed on 23 May 2023. The Home Officer Presenting Officer's minute note was thus available to the solicitors and counsel in May 2023.

13. Ms Turner's Rule 24 notice submitted that there was no mention of deception in the refusal letter or that the marriage was not a genuine one, which was raised by Counsel at the hearing and merely a bare assertion that the signature was not genuine. She stated: "It is submitted that given the burden of proof or even the seriousness of an allegation of deception, this is not how it is meant to be raised in the context of a marriage".

14. The sponsor's credibility was tested by way of oral evidence and not just by her passport entry and exit stamps produced at court and the grounds were merely a disagreement with the decision. Ms Turner noted that Judge Gleeson's permission granting permission to appeal had identified that the Secretary of State had argued the hearing was procedurally unfair and it was not the recollection of the author of the grounds that Judge Cohen expressed a view on the case before it began.

15. At paragraph 22 of her Rule 24 notice Ms Turner stated, "Reliance is placed upon the speech of Lord Hoffman in **Re B (Children)** **[2009] 1 AC 11** for the

proposition that the criminal standard of proof should be applied to allegations of dishonesty".

16. Mrs Nolan relied on the written grounds of appeal, confirmed that the minute note was filed on 23rd May 2023, identified that the judge had relied on the wrong standard of proof and stated that the grounds of refusal related to the genuineness of the marriage certificate were clearly raised in the refusal letter. The judge had not applied Tanveer Ahmed [2002] UKIAT 00439.

Conclusions

17. We refused the application for an adjournment such that Ms Turner could produce her own notes. We considered the overriding objective of The Tribunal Procedure (Upper Tribunal) Rules 2008 and the interests of justice and fairness.

18. In the Rule 24 notice Ms Turner submitted that she had no recollection of Judge Cohen expressing a view on the case before it began, such as to prejudice the hearing. We were rather surprised, however, that Ms Turner also made a submission that her solicitors and she had not had sight of the minute note of the Home Office Presenting Officer which identified the procedural challenge and thus that no response was made thereto in the Rule 24 notice. We pointed out the Home Office Presenting Officer's minute note (on behalf of the ECO) had evidently been uploaded on 23 May 2023 with the grounds of appeal and well before the hearing in the Upper Tribunal and the submission that the solicitors and Ms Turner had only received notice of it on Friday 20 September 2024 was manifestly mistaken.

19. The ECO's challenge was raised prior to the Rule 24 notice but we note that no witness statement was put in from Ms Turner. Although she represented the appellant at the FtT she attended the hearing in the Upper Tribunal before us and we note **BW (witness statements by advocates) Afghanistan [2014] UKUT 00568 (IAC)** such that '*An advocate must never assume the role of witness'.*

20. The appellant thus had ample notice of the nature of the grounds of the Secretary of State had made and we were most surprised to hear from Ms Turner that when she drafted the Rule 24 she did not have the grounds for permission to appeal before her and which specifically included the reference to the minute note, but merely the decision of Judge Cohen and the refusal of Judge Mills to grant permission and the grant of permission by Judge Gleeson.

21. Moreover and fundamentally, aside from the procedural challenge, the decision contained a separate and material errors of law.

22. We note that at paragraph 1 the judge records that the appeal was made against the decision of the respondent dated 28 August 2020 (contradicted by the date of appeal given at paragraph 14). In fact the appeal cited in the appeal was against the decision of the respondent dated 7th April 2021.

23. Going to the root of the appeal was the standard of proof applied by the judge. Ms Turner was incorrect to submit or infer that the standard of proof to be used, as per paragraph 22 of her Rule 24 notice, is that of the criminal standard. It is clear that the ordinary civil standard applies, as notified in **Re B (Children) [2009] 1 AC 11** and on a careful reading of the decision by Judge Cohen, albeit

at paragraph 17, he had self-directed that it was for the appellant to meet the standard of proof on the basis of the balance of probabilities, the correct standard was not applied, as it clearly can be seen in paragraph 19 above. There is not a "high burden of proof" in such immigration matters but an ordinary civil standard.

24. As we noted from Ms Nolan's submission the refusal letter did not say the marriage certificate was a forgery but evidently the signatures on the marriage certificate cast doubt on the genuineness of the document. The judge was required to assess the evidence in the round and apply Tanveer Ahmed which remains good law as regards the correct approach to documents adduced in immigration appeals. A document verification report is not a requirement. As stated in Tanveer Ahmed

> '35. …In all cases where there is a material document it should be assessed in the same way as any other piece of evidence. A document should not be viewed in isolation. The decision maker should look at the evidence as a whole or in the round (which is the same thing).
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> 36. There is no obligation on the Home Office to make detailed enquiries about documents produced by individual claimants. Doubtless there are cost and logistical difficulties in the light of the number of documents submitted by many asylum claimants. In the absence of a particular reason on the facts of an individual case a decision by the Home Office not to make inquiries, produce in-country evidence relating to a particular document or scientific evidence should not give rise to any presumption in favour of an individual claimant or against the Home Office.'

It is the validity of the document which is in issue, not whether a marriage had taken place.

25. The judge, in relation to ground (ii), specifically stated that the appellant has an extremely adverse immigration history but "this has no bearing on the present application before me". The judge clearly attached no weight to the appellant's immigration history but it was incumbent upon the judge to consider this when considering the documentation and the evidence as a whole. It was not open to the judge in these circumstances merely to rely on the evidence of the witness alone. We were thus not persuaded by Ms Turner's submission on ground (ii) or indeed (iii) that the judge had considered the evidence in the round.

26. In relation to ground (iii), is it not open to the judge, merely on his own use and experience of signatures to take judicial notice of something which may be subject to significant debate and is not obvious.

27. Bearing in mind our findings in relation to the first three grounds, and on which we find a material error of law, we see no need to proceed to ground (iv) and merely make observations in relation to the procedural aspect of this as we have done above. We consider that owing to the nature of the findings required in relation to the first three grounds the matter should be remitted to the FtT.

28. In terms of **Begum (Remaking or remittal) Bangladesh [2023] UKUT 46 (IAC)** , both parties agreed that should the appeal as to error of law be allowed, the matter should be remitted to the First-tier Tribunal, such that there should be a hearing de novo.

Notice of Decision

29. The Judge erred materially for the reasons identified. We set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Helen Rimington

Judge of the Upper Tribunal
Immigration and Asylum Chamber