IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23619/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd February 2016	**On 14th March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

MR MOJIBOLA OLORUNTIMILEHIN
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Wells, Counsel, instructed by M&K Solicitors
For the Respondent: Ms N Willock-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nigeria whose appeal was dismissed by First-tier Tribunal Hussain in a decision promulgated on 28th May 2015.

2. The basis of the Appellant's claim was that it would be a breach of his rights under Article 8 ECHR if he was removed to Nigeria.

3. There was no representation from the Respondent. The Judge made a critical factual finding in paragraph 38 of his decision that she was not satisfied that the Appellant was in a cohabiting relationship with his partner May. He had noted that the documentary evidence submitted showed that he and his partner were residing at a different address and while the Appellant gave an explanation about that the Judge considered that very little evidence was produced of his residence with his partner and hence the factual finding that they were not in a cohabiting relationship.

4. Grounds of Appeal were lodged with reference to the **Surendran** guidelines. They state that:

> "Where no matters of credibility are raised in the letter of refusal but, from a reading of the papers, especially the Adjudicator himself considers that there are matters of credibility arising therefrom, you 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."

5. The grounds narrate that the Judge had found that the Appellant's involvement with his British citizen child was not substantial noting that he had no explanation from the Appellant as to how he managed to earn money whilst at the same time taking his son to school and picking him up from school. The grounds say the Judge ought to have indicated his concern to the Appellant's representatives or ask clarifying questions of his own volition in order to afford the Appellant an opportunity to address that issue. He rejected the possibility that there might be a perfectly plausible explanation of his concern and took neither option. This was said to be procedurally unfair and contrary to the principles of natural justice and also contrary to the **Surendran** guidelines. Furthermore the Judge had similarly acted in the concern he expressed over the absence of evidence relating to cohabitation between the Appellant and his partner.

6. Permission to appeal was initially refused by Judge Martin but granted by Upper Tribunal Judge Lane.

7. The Secretary of State lodged a Rule 24 Notice indicating that the Judge's decision had been properly reasoned.

8. Before me Mr Wells relied on his grounds and said that it was a fundamental issue of fairness. The Judge had reached conclusions on points which had never been put to the Appellant for his consideration either in the refusal letter or at the hearing. I was asked to set aside the decision and remit it to the First-tier Tribunal.

9. For the Home Office it was said by Ms Willock-Briscoe that she did not have all the documents that had been placed before the Judge.

10. I reserved my decision but indicated to the parties that I would be allowing this appeal. My reasons are as follows.

Conclusions

11. The fundamental issue in this case is whether or not there has been unfairness to the Appellant and it seems to me tolerably clear that there has. An Appellant is entitled to prepare his case on the basis of what is said against him in the reasons for refusal letter. While not a system of written pleadings between parties this procedure allows the Appellant to prepare the case within the confines of the refusal letter. In addition he has to deal with matters which may be properly raised at the hearing. Unfortunately, in this case, that did not happen. The Judge found against the Appellant on critical issues that went to heart of his claim and where the Appellant was denied an opportunity to deal with them. It is, of course, not always straightforward for a judge to grasp what they consider to be a material point at the time of the hearing and that sometimes only occurs when in the privacy of chambers. Given his concern about the issues on which he found against the Appellant the Judge should have reconvened the hearing however administratively inconvenient that may have appeared to be. It was manifestly unfair to the Appellant for the Judge to proceed in the way he did and accordingly this decision must be set aside.

12. The decision of the First-tier Tribunal is therefore set aside in its entirety. No findings of the First-tier Tribunal are to stand. Under Section 12(2)(b)(i) of the 2007 Act and of Practice Statement 7.2 the nature and extent of the judicial fact-finding necessary for the decision to be remade is such that it is proportionate to remit the case to the First-tier Tribunal.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I remit the appeal to the First-tier Tribunal.

No anonymity order is necessary.

Signed Date

Deputy Upper Tribunal Judge J G Macdonald