



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

**Case No: UI-2022-006324**  
On appeal from: EA/04150/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 22 August 2023**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**VICTORY CHIEMERIE EZE**  
**[NO ANONYMITY ORDER]**

Respondent

**Representation:**

For the Appellant: Ms Julie Isherwood, a Senior Home Office Presenting Officer

For the Respondent: No appearance or representation

**Heard at Field House on 16 August 2023**

**DECISION AND REASONS**

**Introduction**

1. The Secretary of State challenges the decision of the First-tier Tribunal allowing the claimant's appeal against her decision on 5 April 2022 to refuse him settled or pre-settled status under Appendix EU, paragraphs 11 and 11A. He is a citizen of Nigeria.
2. The hearing today took place face to face.
3. I note from the First-tier Tribunal decision that the Secretary of State did not arrange representation for the First-tier Tribunal hearing.

4. The claimant's solicitors terminated their retainer by email on the day before the hearing. The claimant did not attend the hearing, nor did he arrange alternative representation, explain his absence, or seek an adjournment. The hearing proceeded in his absence.
5. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal and to the documents in the rule 15(2A) application considered below.
6. For the reasons set out in this decision, I have come to the conclusion nevertheless that there is no material error of law in the decision of the First-tier Tribunal and accordingly, the Secretary of State's appeal falls to be dismissed.
7. On 4 April 2023, the Secretary of State made a rule 15(2A) application to admit in these proceedings additional evidence from November and December 2021, concerning the EUSS application and immigration history of the appellant's partner, Ms Jessica Patricia Rey Rocha. That evidence was drawn from the Secretary of State's own files but was not put before the First-tier Tribunal.
8. The Secretary of State sought to rely on guidance in the judgment of Lord Justice Carnwath (with whom the Master of the Rolls and Lord Justice Mantell agreed) in *E and R v Secretary of State for the Home Department* [2004] EWCA Civ 49. Carnwath LJ approved and reaffirmed the *Ladd v Marshall* test, with some commentary. All of the examples given comprised evidence which was not available to the party seeking to rely upon it until after the hearing:
  - (1) In E's case, the evidence was sent to the IAT before the decision was promulgated, and the Court of Appeal considered that the Tribunal should have considered exercising its discretion to admit that evidence.
  - (2) In R's case, the Secretary of State had in good faith given an impression that apostates were safe in Afghanistan, relying on her 2002 CIPU report, but by the date of the IAT hearing, new evidence existed in a July 2002 UNHCR report, included in the Secretary of State's April 2003 CIPU, which indicated that there was a serious theoretical risk to apostates.

At the hearing on 23 April 2003, the IAT was not taken to the very new April 2003 CIPU. However, since the IAT's decision was not sent to the parties until August 2003, the Tribunal was taken to have been on notice of the CIPU report and to have been under a duty to consider exercising its discretion to have regard to that evidence.
9. At [12] of the application, the Secretary of State cited the judgment of Lord Justice Brooke, with whom Lord Justice Chadwick and Lord Justice Maurice Kay agreed, in *R (Iran) & Others v Secretary of State for the Home*

*Department* [2005] EWCA Civ 982. That judgment was concerned principally with whether the IAT (as it then was) could admit new evidence on what we would now call the remaking of the appeal, having found an error of law.

10. At [68], Brooke LJ said this:

“68. Indeed, it is not at all clear to us how it could be thought legitimate or relevant for the IAT to consider evidence which concerned a matter arising after the adjudicator's decision *at the stage when they were considering whether the adjudicator had made an error of law*. The examples of cases where the appellate courts have been willing to take into account evidence of matters arising after a trial at first instance (see paras 34-35 above) show that these powers were not invoked to show that the lower court had made an error of law - *indeed, the idea that a first instance judge had erred by failing to take into account matters which by definition he could not possibly have known about unless he was a soothsayer is one worthy of Lewis Carroll* - but to enable the appellate court to arrive at a just result through using the powers open to it to correct injustice (for which in the context of the IAT see para 5 above).

69. The power to consider matters that arose after the adjudicator's decision would of course be highly relevant when the IAT was considering what course they should take *after they had detected an error of law. ...*”  
[*Emphasis added*]

11. In 2010, the position was further clarified by the introduction into the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended), of paragraph 15(2A) added by S.1. 2010/44, which says this:

“(2A) In an asylum case or an immigration case— (a) if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party—

- (i) indicating the nature of the evidence; and
- (ii) explaining why it was not submitted to the First-tier Tribunal; and
- (b) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence.”

12. In her application, the Secretary of State sought the admission of 8 documents relating to EUSS applications and immigration history of the claimant's partner, Ms Rocha, dated between 22 November 2021 and 30 December 2021:

- (1) **22 November 2021:** EUSS application acknowledgment, application number 3434-2050-9273-8796;
- (2) **30 November 2021:** Port Interview record;

(3) **30 November 2021:** Forms IS.82 and IS.83, refusal of leave to enter and removal

directions;

(4) **30 December 2021:** Port Interview record;

(5) **30 December 2021:** Home Office minute sheet; and

(6) **30 December 2021:** EUSS application acknowledgement letter for application number: 3434-6294-9700-6099.

13. The Secretary of State contended, on the basis of these documents, that the claimant's application relied on a fraudulent document purporting to show that Ms Rocha had been granted EUSS status, and that the evidence Ms Rocha gave when interviewed in connection with the applications contradicted the claimant's assertion that she had lived in the UK continuously before the specified date of 11 pm on 31 December 2020.

14. The highest that the grounds of appeal put the Secretary of State's position on the new documents was as follows:

"13. ...Even if the Tribunal is not persuaded the SSHD meets all of the requisite conditions identified in the aforementioned caselaw, it is further submitted that as noted by the Court, it is permissible in the interest of justice where all of the above steps cannot be met, that discretion can be applied to permit the evidence to be admitted nonetheless. ...

19. The only conclusion that can be drawn from the above is that the [claimant] has misled the Tribunal and by relying on the false representations made, [the Tribunal] has erred in their conclusions through no fault of their own by making a material mistake of fact regarding the status of the [claimant's] wife."

15. The Secretary of State has not explained why this evidence was not submitted to the First-tier Tribunal for the hearing in October 2022: all of the above documents would have been in her custody or control between November/December 2021 and October 2022. The Secretary of State chose neither to look for and produce these documents from her files, nor to provide a Presenting Officer to assist the First-tier Tribunal, nor to challenge the claimant's evidence in cross-examination.

16. The appeal was heard in the First-tier Tribunal on 18 October 2022, with no indication from the Secretary of State that she intended to advance the argument now relied upon. The Secretary of State did not apply to produce the documents until April 2023, after the appeal had been allowed in the First-tier Tribunal.

17. I consider that the delay from November/December 2021 until April 2023 in disclosing information which was available to the Secretary of State from her own records, is plainly unreasonable. It cannot be an error of law for the First-tier Judge, in the absence of a representative from the Secretary of State or of the evidence now relied upon, to have relied on

the evidence which was before her and reached the conclusions which she did.

18. The Secretary of State's appeal is dismissed.

**Notice of Decision**

19. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Judith A J C Gleeson  
**2023**

**Dated: 16 August**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber