



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000511
First-tier Tribunal No: EA/09063/2022

THE IMMIGRATION ACTS

Decision and Reasons Issued:
On 19th of December 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE MALIK KC

Between

ENTRY CLEARANCE OFFICER

Appellant

and

SAMAD HOSSAIN KHAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation

For the Appellant: Mr David Clarke, Senior Presenting Officer
For the Respondent: Mr Nazir Ahmed, instructed by ASM Immigration Services

Heard at Field House on 23 November 2023

DECISION AND REASONS

Introduction

1. This is the re-making of the decision in the appeal brought by Mr Samad Hossain Khan ("Mr Khan") from the decision made by the Entry Clearance Officer ("ECO") on 25 August 2022. By that decision, the ECO refused Mr Khan's application for a Family Permit under the European Union Settlement Scheme ("EUSS"). Mr Khan's appeal was originally allowed by First-tier Tribunal Judge Beg ("the Judge") in a decision promulgated on 10 January 2023. We set aside the Judge's decision as being wrong in law on 6 October 2023 and retained the

appeal for re-making of the decision. A copy of our error of law decision is annexed to this decision.

Factual background

2. Mr Khan is a citizen of Bangladesh and was born on 10 February 2002.
3. Mr Khan made an application for a Family Permit under the European Union Settlement Scheme on 4 March 2022 on the basis that his father, Mr Abdul Hossain Begum ("Mr Begum") is a Spanish national settled in the United Kingdom. The ECO granted that application and issued the Family Permit on 7 July 2022 valid until 19 January 2023.
4. Mr Khan sought to travel to the United Kingdom with the Family Permit on 2 August 2022. He, however, was stopped by the local authorities at Sylhet Airport and was not allowed to board his flight. He was subsequently interviewed over telephone by the ECO. When he was asked about Mr Begum's date of birth, he gave 1956 as the year of birth and stated that he was unable to recall the date. When he was asked about his siblings, he gave two names and omitted to name another person who Mr Begum had previously sponsored as his child. When asked about the telephone number given in the application form, he stated it was his sister's number. The name that he gave for that person was not one of the two names he gave earlier when asked about his siblings. Another passenger had given the same telephone number stating that it belonged to their aunt. When asked about that passenger, he stated that he did not know them. He then stated that they were paternal cousins. This was not entirely consistent with another answer that he gave during the interview suggesting that his father has no siblings. When the apparent inconsistency was put to him, he stated that the other passenger was the daughter of his father's cousin. He was also asked about the name of the restaurant where Mr Begum worked in the United Kingdom. He was unable to name the restaurant.
5. The ECO issued a fresh decision on 25 August 2022. In that decision, the ECO suggested that the Family Permit had been revoked and, therefore, Mr Khan's application fell to be considered afresh. The ECO took the view, based on the answer given by Mr Khan in the interview, that false or misleading information was provided by him as part of his application. The ECO held that Mr Khan was not related to Mr Begum as claimed. The ECO, therefore, refused Mr Khan's application referring to Paragraph FP7(3)(a) of Appendix EU (Family Permit) to the Immigration Rules.
6. Mr Khan's appeal from the ECO's decision came before the Judge at an oral hearing on 9 January 2023. Mr Begum gave oral evidence and was cross-examined. The Judge found that Mr Begum was not a credible witness but took the view that the documentary evidence showed that he was in fact Mr Khan's biological father. The Judge allowed the appeal by a decision promulgated on 10 January 2023.

The ECO was granted permission to appeal from the Judge's decision on 9 March 2023.

7. We heard the ECO's appeal from the Judge's decision on 12 September 2023. We found that the Judge failed to follow the guidance in *Tanveer Ahmed v Secretary of State for the Home Department* [2002] UKIAT 00439 [2002] Imm AR 318 and gave inadequate reasons for allowing the appeal. We, therefore, set aside the Judge's decision on 6 October 2023. We retained the appeal for re-making of the decision and gave further case management directions.

Resumed hearing

8. We are grateful to Mr Clarke, who appeared for the ECO, and Mr Ahmed, who appeared for Mr Khan, for their assistance and able submissions at the resumed hearing.
9. Mr Clarke had filed a skeleton argument in advance of the resumed hearing. In that skeleton argument, he submitted that the Family Permit issued to Mr Khan had been revoked and his underlying application was reconsidered and refused on 25 August 2022. In his oral submissions, however, he accepted that the decision of 25 August 2022 does not include a decision to revoke the Family Permit. He also accepted that no decision to revoke the Family Permit was taken prior to the decision of 25 August 2022. He referred us to a letter dated 8 November 2022 suggesting that the Family Permit was revoked on that day but accepted that there is no evidence that the letter was served on Mr Khan. He also acknowledged that the letter, in any event, does not comply with the mandatory requirements in the Immigration (Notices) Regulations 2003 ("the Notices Regulations"). It was submitted in his skeleton argument that a decision to revoke entry clearance does not attract a right of appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the Appeals Regulations"). However, in his oral submissions, he accepted that there is indeed a right of appeal in respect of such a decision under Regulation 5 of the Appeals Regulations. He further submitted that the reference in the ECO's decision to Paragraph FP7(3)(a) of Immigration Rules Appendix EU (Family Permit) was in error. He submitted the applicable provision was Paragraph FP7(4)(a) of Immigration Rules Appendix EU (Family Permit).
10. Mr Ahmed had also filed a skeleton argument in advance of the resumed hearing. The key submission made by him was that the ECO had taken no revocation decision as of 25 August 2022 and, therefore, the fresh decision taken on that day to refuse Mr Khan's application was unlawful.

Discussion

11. Regulation 5 of the Appeals Regulations concerns “right of appeal against decisions made in connection with scheme entry clearance”. So far as relevant, it provides that “a person may appeal against a decision made on or after exit day”, (a) “where the person applies for scheme entry clearance on or after exit day, to refuse their application”, and (b), “to cancel or revoke their scheme entry clearance”. The phrase “scheme entry clearance” is defined in Regulation 2 of the Appeals Regulations as “entry clearance granted by virtue of relevant entry clearance immigration rules”. The relevant Immigration Rules, in this context, are in Immigration Rules Appendix EU (Family Permit). Regulation 8(3)(a) of the Appeals Regulations provides that a person may appeal against a decision mentioned in Regulation 5 on the ground that “it is not in accordance with the provision of the immigration rules by virtue of which it was made”. This is the ground that is at the heart of this appeal.
12. The ECO, as we note above, referred to Paragraph FP7(3)(a) of Immigration Rules Appendix EU (Family Permit) in their decision. There is, however, no such provision in the Immigration Rules. Paragraph FP7(3) of Immigration Rules Appendix EU (Family Permit), which does not have sub-paragraph (a), relates to those who are subject of a deportation order. It is of no relevance to this case. Mr Clarke suggested that the ECO had meant to refer to Paragraph FP7(4)(a) of Immigration Rules Appendix EU (Family Permit) in their decision, which provides that an application may be refused if “it is proportionate to refuse the application where, in relation to the application and whether or not to the applicant’s knowledge, false or misleading information, representations or documents have been submitted (including false or misleading information submitted to any person to obtain a document used in support of the application); and the information, representation or documentation is material to the decision whether or not to grant the applicant an entry clearance under this Appendix”. There is, however, nothing in that provision, or elsewhere in Immigration Rules Appendix EU (Family Permit), that allows the ECO refuse an application that has already been granted.
13. Annex 3 to Immigration Rules Appendix EU (Family Permit) sets out the circumstances in which a person’s entry clearance can be revoked. Those circumstances include, at Paragraph 3.2(b), where “it is proportionate” and “the revocation is justified on grounds that, in relation to the relevant application under this Appendix, and whether or not to the applicant’s knowledge, false or misleading information, representations or documents were submitted (including false or misleading information submitted to any person to obtain a document used in support of the application); and the information, representation or documentation was material to the decision to grant the applicant an entry clearance under this Appendix”. It follows that, in principle, it was open to the ECO to revoke Mr Khan’s entry clearance following his somewhat unsatisfactory interview and then to reconsider his underlying application and to refuse it with a fresh

decision. However, as we note above, this is not what happened in this case. As Mr Clarke made it clear in his oral submissions, the ECO took no decision prior to, or on, 25 August 2022 to revoke Mr Khan's entry clearance.

14. The ECO's decision of 25 August 2022, under the heading "reasons for revocation of EUSS Family Permit", provides:

"... Following the issue of the EU Settlement Scheme Family Permit it has been identified by the Home Office the issue of this EU Settlement Scheme Family Permit was incorrect as Immigration Officers conducted an Interview with yourself on 2 August 2022. This letter outlines the reason why EU Settlement Scheme Family Permit was issued to you must now be revoked and gives a right of appeal against that revocation ..."

15. If, contrary to Mr Clarke's acceptance, this amounts to a revocation decision, it is simply untenable. There is no power under Annex 3 to Immigration Rules Appendix EU (Family Permit) to revoke an entry clearance on the basis that the grant of it was "incorrect". The ECO did not cite or apply the test in Paragraph 3.2(b) of Annex 3 to Immigration Rules Appendix EU (Family Permit) in their decision.
16. The ECO's letter of 8 November 2022 seeks to provide an ex post facto rationalisation of the earlier decision. It fails to meet that objective by a considerable margin. If the ECO had already refused Mr Khan's application for entry clearance, it could make no sense to suggest that the entry clearance was revoked by this letter. If, on the other hand, Mr Khan had valid entry clearance, this letter purports to revoke it in a defective manner. There is, as Mr Clarke accepted, no evidence that this letter has been served on Mr Khan. In any event, as we note above, a decision to revoke entry clearance in this context attracts a right of appeal under Regulation 5 of the Appeals Regulations. This letter provides no information as to the right of appeal and the provisions on which the right of appeal is based. It does not say whether an appeal may be brought from within, or outside, the United Kingdom. It provides no advice as to the grounds on which such an appeal may be brought and the facilities available in connection with such an appeal. It follows that it does not, as Mr Clarke accepted, meet the mandatory requirements in Regulation 5 of the Notices Regulations. Paragraph 3 of Schedule 4 to the Appeals Regulations extend the application of the Notices Regulations to decisions which can be appealed under the Appeals Regulations. In the circumstances, this letter provides no assistance to the ECO in this appeal. It is not capable of curing the defect in the earlier decision.
17. Our focus must be on the ECO's decision of 25 August 2022. In our judgment, the ECO's decision is neither a lawful refusal of entry clearance nor a lawful revocation of entry clearance. It is purportedly made under a provision in Immigration Rules Appendix EU (Family

Permit) that does not exist. The provisions in Immigration Rules Appendix EU (Family Permit) do not allow the ECO to refuse an application for entry clearance that has been granted, or to revoke entry clearance on the basis that the grant of it was “incorrect”. We find that the ECO’s decision, whether it is a refusal of entry clearance or a revocation of entry clearance, or both, it is not in accordance with the provision of the Immigration Rules by virtue of which it was made.

Conclusion

18. For all these reasons, we allow Mr Khan’s underlying appeal on the ground that the ECO’s decision is not in accordance with the provision of the Immigration Rules by virtue of which it was made.

Decision

19. The First-tier Tribunal’s decision having being set aside, we re-make the decision on appeal by allowing it.

Anonymity

20. In our judgment, having regard to the Presidential Guidance Note No 2 of 2022, *Anonymity Orders and Hearing in Private*, and the overriding objective, an anonymity order is not justified in the circumstances of this case. We make no order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Fee award

21. The First-tier Tribunal made no fee award when it previously allowed Mr Khan’s appeal. In all the circumstances, we also take the view that it would not be appropriate to make a fee award in this case.

Zane Malik KC
Deputy Judge of Upper Tribunal
Immigration and Asylum Chamber
Date: 13 December 2023

ANNEX: ERROR OF LAW DECISION



IN THE UPPER TRIBUNAL
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UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE MALIK KC

Between

ENTRY CLEARANCE OFFICER

Appellant

and

SAMAD HOSSAIN KHAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation

For the Appellant: Mr David Clarke, Senior Presenting Officer
For the Respondent: Mr Abdus Salam Masum, ASM Immigration Services

Heard at Field House on 12 September 2023

DECISION AND REASONS

Introduction

1. This is an appeal by the Entry Clearance Officer (“ECO”) from the decision of First-tier Tribunal Judge Beg (“Judge”) promulgated on 10 January 2023. By that decision, the Judge allowed the appeal brought by Mr Samad Hossain Khan (“Mr Khan”) from the ECO’s decision to refuse his application for a Family Permit under the European Union Settlement Scheme (“EUSS”).

Factual background

2. Mr Khan is a citizen of Bangladesh and was born on 10 February 2002.
3. Mr Khan made an application for a Family Permit under the EUSS on 4 March 2022 on the basis that his father, Mr Abdul Hossain Begum ("Mr Begum") is a Spanish national settled in the United Kingdom. The ECO granted that application and issued the Family Permit on 7 July 2022 valid until 19 January 2023.
4. Mr Khan sought to travel to the United Kingdom with the Family Permit on 2 August 2022. He, however, was stopped by the local authorities at Sylhet Airport and was not allowed to board his flight. He was subsequently interviewed over telephone by the ECO. When he was asked about Mr Begum's date of birth, he gave 1956 as the year of birth and stated that he was unable to recall the date. When he was asked about his siblings, he gave two names and omitted to name another person who Mr Begum had previously sponsored as his child. When asked about the telephone number given in the application form, he stated it was his sister's number. The name that he gave for that person was not one of the two names he gave earlier when asked about his siblings. Another passenger had given the same telephone number stating that it belonged to their aunt. When asked about that passenger, he stated that he did not know them. He then stated that they were paternal cousins. This was not entirely consistent with another answer that he gave during the interview suggesting that his father has no siblings. When the apparent inconsistency was put to him, he stated that the other passenger was the daughter of his father's cousin. He was also asked about the name of the restaurant where Mr Begum worked in the United Kingdom. He was unable to name the restaurant.
5. The ECO issued a fresh decision on 25 August 2022. In that decision, the ECO suggested that the Family Permit had been revoked and, therefore, Mr Khan's application fell to be considered afresh. The ECO took the view, based on the answer given by Mr Khan in the interview, that false or misleading information was provided by him as part of his application. The ECO held that Mr Khan was not related to Mr Begum as claimed. The ECO, therefore, refused Mr Khan's application. The ECO referred to Paragraph FP7(3)(a) of Appendix EU (Family Permit) to the Immigration Rules in their decision. There is, however, no such provision in the Immigration Rules. Paragraph FP7(3) of Appendix EU (Family Permit), which does not have sub-paragraph (a), relates to those who are subject of a deportation order. It is of no relevance to this case.
6. Mr Khan's appeal from the ECO's decision came before the Judge at an oral hearing on 9 January 2023. Mr Begum gave oral evidence and was cross-examined. The Judge found that Mr Begum was not a credible witness but took the view that the documentary evidence showed that he was in fact Mr Khan's biological father. The Judge

allowed the appeal by a decision promulgated on 10 January 2023. The ECO was granted permission to appeal from the Judge's decision on 9 March 2023.

Grounds of appeal

7. The grounds of appeal pleaded by the ECO contend that the Judge failed to follow the guidance in *Tanveer Ahmed v Secretary of State for the Home Department* [2002] UKIAT 00439 [2002] Imm AR 318 and gave inadequate reasons for allowing the appeal.

Submissions

8. We are grateful to Mr Clarke, who appeared for the ECO, and Mr Masum, who appeared for Mr Khan, for their assistance and able submissions.
9. Mr Clarke developed the pleaded grounds of appeal in his oral submissions. He submitted that the Judge erred in treating the documentary evidence as determinative. He further submitted that the Judge failed to consider all the evidence in the round and to give adequate reasons. He invited us to set aside the Judge's decision.
10. Mr Masum resisted the ECO's appeal. He emphasised that the only issue before the Judge was about the relationship between Mr Khan and Mr Begum. He took us to some of the documentary evidence and submitted that the Judge was entitled to find that Mr Khan was Mr Begum's son and to allow the appeal on that basis. He invited us to uphold the Judge's decision.

Discussion

11. Mr Begum, as we note above, gave oral evidence before the Judge. The Judge, at [17], found that he was not a credible witness. The Judge added that he was not truthful with regards to being the only child. The Judge found that he was attempting to explain away the discrepancy that arose during Mr Khan's interview as to the relationship with the fellow passenger. The Judge found that Mr Khan's answers during the interview as to that matter was also not credible. The Judge recorded, at [19], that Mr Begum initially claimed in his evidence that he did not know that passenger but later suggested that they might be related. The Judge found it highly likely that both Mr Khan and Mr Begum knew the passenger. The Judge found that Mr Begum was not a truthful witness. The Judge, at [21], found that Mr Khan had also initially lied in that respect.
12. The Judge's key reasons for allowing the appeal are, at [22], in these terms:

"I find that the appellant has produced a number of documents which I refer to above to confirm that the sponsor and Rina Khan are his parents. However, there are significant discrepancies in

the evidence of the sponsor and in the interview answers and witness statement of the appellant. I take into account all the relevant facts and circumstances in this matter, including the seriousness of the discrepancies. However, I do not find that the appellant provided misleading or false statements which were material to the application.”

13. The Judge, on that basis, at [23], found that Mr Khan is the biological son of Mr Begum, and allowed the appeal.
14. In *Tanveer Ahmed*, at [38], the Presidential Panel encapsulated the proper approach to documentary evidence in three principles. First, it is for an individual applicant to show that a document on which they seek to rely is reliable. Second, the decision maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round. Third, only very rarely will there be the need to make an allegation of forgery, or evidence strong enough to support it. The allegation should not be made without such evidence. Failure to establish the allegation on the balance of probabilities does not show that a document is reliable. The decision maker will still need to apply the first two principles. This approach was expressly endorsed by the Court of Appeal in *MA (Bangladesh) v Secretary of State for the Home Department* [2016] EWCA Civ 175, at [21]-[23].
15. In our judgment, the Judge has not followed this guidance. The Judge referred to various documents adduced by Mr Khan but simply failed to determine whether those documents were reliable. The Judge made serious and adverse credibility findings as to Mr Khan and Mr Begum. The Judge was obliged to consider whether the documentary evidence was reliable in the light of those findings. We acknowledge, as Mr Masum submitted, that there were various documents in evidence naming Mr Begum as Mr Khan’s father. There was no suggestion that those documents were forged. It was, however, for Mr Khan to establish that those documents were reliable. There is no indication in the Judge’s decision that she considered those documents in the round. The Judge considered those documents in isolation.
16. We are also persuaded that the Judge gave inadequate reasons for her ultimate decision. It is, in principle, open to a judge to accept the evidence on one point and find it unpersuasive on another point. In this case, as we note above, the Judge found Mr Begum to be an untruthful witness. The Judge also found that Mr Khan’s account as put forward in the interview was not credible. It was incumbent upon the Judge to explain why, in those circumstances, she was prepared to accept the documentary evidence adduced in the appeal. It was not enough for the Judge to simply say, at [22], that she took into account all the relevant facts and evidence. The Judge was obliged to explain, with adequate reasons, as to why, in the light of her adverse

credibility findings, the documentary evidence was deemed sufficient to establish the claim.

17. We are mindful that we should not rush to find an error of law in the Judge's decision merely because we might have reached a different conclusion on the facts or expressed it differently. Where a relevant point is not expressly mentioned, it does not necessarily mean that it has been disregarded altogether. It should not be assumed too readily that a judge erred in law just because not every step in the reasoning is fully set out and we should exercise judicial restraint in appeals based on inadequacy of reasons. Experienced judges in this specialised field are to be taken to be aware of the relevant authorities and to be seeking to apply them without needing to refer to them specifically. In this instance, for the reason set out above, it is clear that the Judge failed to follow the guidance in *Tanveer Ahmed* and gave inadequate reasons. We are satisfied that the Judge's decision is materially wrong in law.

Conclusion

18. For all these reasons, we find that the Judge erred on a point of law in allowing Mr Khan's appeal and the error was material to the outcome. We set aside the Judge's decision in its entirety. We apply the guidance in *AB (preserved FtT findings; Wisniewski principles) Iraq* [2020] UKUT 268 (IAC) and conclude that no findings of fact are to be preserved.
19. Having regard to paragraph 7.2 of the Senior President's Practice Statement for the Immigration and Asylum Chambers and the guidance in *AEB v Secretary of State for the Home Department* [2022] EWCA Civ 1512 [2023] 4 WLR 12 and *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 46 (IAC), we retain the appeal for the purpose of re-making of the decision. This is not a case where the effect of the error made the Judge has been to deprive a party of a fair hearing or other opportunity for that party's case to be put to and considered below. 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, it is appropriate to retain the appeal.

Decision

20. The First-tier Tribunal's decision is set aside and the appeal is retained at the Upper Tribunal for re-making of the decision.

Directions for the resumed hearing

21. We give the following directions as to the future conduct of this appeal:
 - (1) The appeal shall be listed for a resumed face-to-face hearing at Field House with a time estimate of three hours.

(3) A Bengali (Sylheti) interpreter shall be booked for the resumed hearing.

(2) Mr Khan, no less than 21 days before the resumed hearing, shall file and serve a composite appeal bundle in accordance with the Presidential Guidance Note, *Upper Tribunal Immigration and Asylum Chamber: Guidance Note on Ce-file and Electronic Bundles*, so to include:

(a) All documentary evidence relied upon by Mr Khan before the First-tier Tribunal,

(b) All documentary evidence relied upon by the ECO before the First-tier Tribunal, and

(c) Any application under Rule 15(2A) the Tribunal Procedure (Upper Tribunal) Rules 2008 to rely on evidence not before the First-tier Tribunal and any evidence to which such application relates.

(3) The ECO, no less than 14 days before the resumed hearing, shall file a skeleton argument addressing, among other things, these matters:

(a) the applicable provision in the Immigration Rules under which the ECO has taken the decision (i) to revoke the Family Permit and (ii) to refuse the application for the Family Permit,

(b) the source of the power exercised by the ECO to revoke the Family Permit, and how and when that power was exercised in the present case,

(c) the applicable provisions in the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 that confer a right of appeal against the decision (i) to revoke the Family Permit and (ii) to refuse the application for the Family Permit, and

(d) the burden and standard of proof.

(4) Mr Khan, no less than 7 days before the resumed hearing, shall file and serve skeleton argument addressing, among other things, the matters set out above.

(5) Mr Khan, no less than 3 days before the resumed hearing, shall file and serve, a composite authorities bundle in accordance with the Presidential Guidance Note, *Upper Tribunal Immigration and Asylum Chamber: Guidance Note on Ce-file and Electronic Bundles*.

22. These directions must be followed unless varied, substituted or supplemented by further directions. The parties are reminded that

any failure to comply with these directions may result in the making of an adverse order pursuant to the power under Rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Anonymity

23. In our judgement, having regard to the Presidential Guidance Note No 2 of 2022, *Anonymity Orders and Hearing in Private*, and the overriding objective, an anonymity order is not justified in the circumstances of this case. We make no order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Zane Malik KC
**Deputy Judge of Upper Tribunal
Immigration and Asylum Chamber
Date: 6 October 2023**