IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001829

First-tier Tribunal Nos: HU/57313/2021
IA/16606/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 19th of December 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA
and
DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

Ojonla Taofeeq Adeyanju
(NO ANONYMITY ORDER MADE)

Appellant

and

Entry Clearance Officer

Respondent

Representation:

For the Appellant: Mr T Lester, Counsel, instructed by LS Legal Solicitors Ltd
For the Respondent: Ms S Cunha, Home Office Presenting Officer

Heard at Field House on 5 December 2023

DECISION AND REASONS

1. Although this is an appeal by the Entry Clearance Officer we refer to the parties as they were in the First-tier Tribunal.

2. The Appellant is a national of Nigeria. On 1 April 2021 he applied for entry clearance under Appendix FM on the basis of his family life with his partner. The Entry Clearance Officer (ECO) refused the application. First-tier Tribunal Judge Farrelly allowed the Appellant's appeal in a decision promulgated on 17 May 2023. The Entry Clearance Officer appeals to this Tribunal with permission granted by First-tier Tribunal Judge Aziz on 2 June 2023.

3. The background to this appeal is that the Appellant first came to the UK illegally in October 2003. He was granted leave to remain in 2005. He was subsequently naturalised as a British citizen on 4 September 2009. However a decision was made on 8 July 2015 to deprive him of his British nationality. His appeal against that decision was dismissed by the First-tier Tribunal on 18 November 2015. According to the refusal letter, a deprivation order was served on 21 April 2016. On 19 April 2018 the Appellant travelled to Nigeria and on 24 May 2018 he attempted to re-enter the UK using his Nigerian passport on which his indefinite leave to remain was stamped. He was denied entry to the UK and advised that his indefinite leave to remain was lost when he was granted British citizenship. He was returned to Nigeria.

4. On 1 April 2021 the Appellant applied for entry clearance to join his wife and son in the UK. He appeals against the refusal of that decision. According to his witness statement the Appellant met Fatima Shittu, a British national, in Saudi Arabia in October 2011. Their son was born in London on 25 October 2013 and is a British citizen by descent. He attends primary school in the UK. The Appellant and his wife married officially in Nigeria on 8 August 2019.

5. In the refusal decision dated 5 October 2021, the Respondent refused the application on a number of grounds. The first is under the general grounds in reliance on paragraph 9.8.2 of the Immigration Rules. The Entry Clearance Officer stated that the Appellant had previously contrived in a significant way to frustrate the intentions of the Immigration Rules. The Entry Clearance Officer further refused the application on suitability grounds under Section S-EC of Appendix FM because he was found to have obtained his British nationality by deception and a Deprivation Order had been served on him on 21 April 2016 after an unsuccessful appeal and, despite that order, the Appellant attempted to enter the UK as a returning resident on 24 May 2018. The Entry Clearance Officer rejected the Appellant's claim that he did not receive the Order in 2016. The Respondent stated that the Appellant's conduct in seeking to enter the UK as a returning resident, in the knowledge that his representatives were seeking to overturn a decision to deprive him of his British nationality, in conjunction with his complicity in using deception, demonstrates a complete disregard for the Immigration Rules and the ECO was satisfied that the Appellant's exclusion from the UK is conducive to the public good and the application was refused under paragraph EC-P.1.1.(c) of Appendix FM of the Immigration Rules (S-EC.1.5). The Respondent accepted that the Appellant met the eligibility requirements of Appendix FM.

6. In considering the appeal, Judge Farrelly referred to the Respondent's Guidance on Suitability version 2 of 10 November 2021 in considering suitability under Appendix FM. The judge considered the evidence before him in terms of the previous revocation of citizenship, noting at paragraph 20 that the Appellant's appeal was unsuccessful and he therefore stands as a person whose citizenship was revoked. The judge found on the balance of probabilities that the Appellant was notified of the Respondent's intention to revoke his citizenship. He noted the appellant had engaged lawyers to contest that decision. The judge also found the appellant would have been aware of the appeal hearing (in November 2015) [21]. The judge acknowledged that he was not dealing directly with the merits of the revocation [22]. The judge noted that the reason behind the refusal was the Appellant's character [23].

7. The judge found at paragraph 24:

> "I do not find the respondent has demonstrated that it was undesirable to grant him entry clearance. The evidence does suggest a past history of abuse of the immigration laws by entering illegally and obtaining citizenship through suspect means. However, there is nothing to indicate his behaviour fell into the categories of conduct anticipated in the guidance. Consequently, the other conditions for entry clearance being satisfied his appeal succeeds."

8. The judge then went on to consider, in the alternative, the appeal on a freestanding basis in relation the Appellant's Article 8 rights, finding that the Appellant had a family life with his wife and child before he went to Nigeria [25] and that he is in a genuine and subsisting relationship with his wife, who is a British national and settled here and has grown up children in the UK [26]. The judge attached particular significance to the presence of the Appellant's British citizen son in the UK [27]. The judge had regard to the section 117B considerations and concluded that it would be a disproportionate interference with the family life of the Appellant, his wife and their son to refuse him entry clearance [29]. The judge allowed the appeal.

9. The Secretary of State appeals on three grounds which we consider in turn.

Ground 1

10. The Entry Clearance Officer contends that the judge failed to consider the general Ground for Refusal under paragraph 9.8.2 set out in the refusal letter which provides as follows:

> "9.8.2. An application for entry clearance or permission to enter may be refused where:
>
> (a) the applicant has previously breached immigration laws; and
>
> (b) the application was made outside the relevant time period in paragraph 9.8.7; and
>
> (c) the applicant has previously contrived in a significant way to frustrate the intention of the rules, or there are other aggravating circumstances (in addition to the immigration breach), such as a failure to cooperate with the redocumentation process, such as using a false identity, or a failure to comply with enforcement processes, such as failing to report, or absconding."

11. The Respondent claims that the judge failed to consider or make findings on the application of paragraph 9.8.2 of the Rules despite the uncontested findings of fact that the Appellant had previously obtained British citizenship by deception. The respondent claimed in the decision under appeal that the criteria of 9.8.2 is met and the judge failed to address that claim.

12. At the hearing, Ms Cunha further highlighted that in the refusal letter at page A3 of the Respondent's bundle, the Entry Clearance Officer had set out the circumstances of the Appellant's background and had indicated that they were satisfied that the Appellant had previously contrived in a significant way to frustrate the intentions of the Immigration Rules. She accepted that there were no further documents in the papers before the First-tier Tribunal Judge as to the refusal of entry clearance or entry in 2018. But, in her submission, it was not

challenged by the Appellant that this refusal took place in the manner set out by the ECO. She highlighted the Appellant's witness statement, where he stated that he attempted to enter the UK in 2018. In her view this was the matter before the First-tier Tribunal and the judge failed to deal with it.

13. In response Mr Lester submitted that the Respondent did not contend in the Grounds of Appeal that the judge failed to take account of a material matter in terms of the 2018 attempted entry to the UK. In his submission, the judge referred to the May 2018 attempted entry at paragraph 8 of the decision. He submitted that the refusal letter did not make clear that the Respondent was relying on the attempted entry in 2018 in terms of paragraph 9.8.2 and references in the refusal letter to an interview relate to an interview which took place in relation to the deprivation of citizenship and not in relation to the attempted entry in 2018. He submitted that it is likely that the First-tier Tribunal judge took the view that paragraph 9.8.2 was not met and in his submission, it was not clear that the Entry Clearance Officer was relying on the attempted entry in May 2018.

14. Mr Lester accepted that there is no explicit reference to paragraph 9.8.2 of the Rules in the decision. In his submission, the judge is not required to refer to all provisions of the Rules where the Respondent relied on multiple provisions of the Rules. In the alternative he submitted that, even if the judge failed to make a finding in relation to paragraph 9.8.2, this is not a material error. He accepted that there is a different focus in paragraph 9.8.2 from the suitability requirements in Appendix FM. He accepted that the wording is different and it involves a different exercise of discretion. However, in his submission, there is no material error in that there was no real information before the judge from the Entry Clearance Officer to particularise the deception in 2018. He referred to the wording of 9.8.2(c) which allows refusal where the Appellant had previously contrived in a significant way to frustrate the intention of the Rules or there would have to be other aggravating circumstances. In his submission, there was nothing in the evidence before the First-tier Tribunal Judge or in the refusal letter to demonstrate that this threshold could have been met. In his submission, the judge's assertion at paragraph 23 that the reason behind the refusal was the Appellant's character, was adequate to show that the judge was looking at the broad discretion to be exercised under paragraph 9.8.2.

15. We have considered the submissions before us and in our judgment the judge made a material error in failing to deal with paragraph 9.8.2 of the Immigration Rules. It is clear from the reasons for refusal letter that there were two main grounds for refusal under the Immigration Rules. The first heading is 'General Grounds' where the discretionary refusal under paragraph 9.8.2 of the Rules is detailed. The second is under 'Suitability' under Section E-EC of Appendix FM of the Rules. The judge dealt with the second but not the first ground of refusal. In our view, it was incumbent on the judge to engage with paragraph 9.8.2.

16. It is clear from the refusal letter that paragraph 9.8.2 potentially covers both the Appellant's deception in obtaining British nationality and his attempt to enter in 2018. We do not accept that the judge's statement at paragraph 23, that the reason behind the refusal was the Appellant's character, is adequate to demonstrate any proper engagement with paragraph 9.8.2 of the Immigration Rules.

17. At paragraph 24 the judge engages with the desirability of granting the Appellant entry clearance in terms of the guidance referred to at paragraph 18. However the focus of the guidance is the suitability requirements of Appendix FM. Mr Lester could not point us to any specific engagement with paragraph 9.8.2 in the judge's decision. We cannot see any engagement. In our view, this is a material error because this discretionary ground of refusal was specifically relied on by the Entry Clearance Officer in the decision to refuse entry clearance. As acknowledged by Mr Lester, the wording of paragraph 9.8.2 differs from the wording in the suitability requirements and involves the exercise of a different discretion. In these circumstances it was a material error to fail to deal with paragraph 9.8.2.

Ground 2

18. The Respondent claims in ground 2 that the judge erred in having regard to the guidance, 'Suitability: non-conducive grounds for refusal or cancellation of entry clearance or permission' (Version 2 10 November 2021). The guidance applies to the assessment of conduct which is non-conducive to the public good. The Respondent contends that the judge failed to appreciate that the test is broad in nature so that it can be applied proportionately on a case-by-case basis and failed to appreciate that the categories of conduct in the guidance are examples and not exhaustive.

19. At paragraph 24 the judge found that there is nothing to indicate that the Appellant's behaviour fell into the categories of conduct anticipated in the guidance. This suggests that the judge considered the categories listed there to be exhaustive. In our view this is a material error.

Ground 3

20. The Respondent claims in ground 3 that the judge failed to factor in the failure to meet the requirements of the Immigration Rules in his consideration of the proportionality of the decision within the freestanding Article 8 assessment.

21. In our judgement, the error identified at ground 3 flows from the errors we have found arising from grounds 1 and 2, and whether or not the requirements of the Rules are met. The inability to meet the requirements is a relevant factor when considering whether the decision to refuse entry clearance in proportionate. In the absence of any finding as to whether entry clearance was properly refused under paragraph 9.8.2, the judge was unable to make any finding as to the weight to be attached to the failure or otherwise to meet the provisions of the Immigration Rules. That, in our judgment, fundamentally undermines the Article 8 proportionality assessment.

22. In his skeleton argument Mr Lester relied on the decision in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 at paragraph 53. However, there, Lord Reed acknowledged that the policies adopted by the Secretary of State, and given effect by the Rules, "are nevertheless a relevant and important consideration for tribunals determining appeals brought on Convention grounds, because they reflect the assessment of the general public interest made by the responsible minister and endorsed by Parliament. In particular, tribunals should accord respect to the Secretary of State's assessment of the strength of the general public interest in the deportation of foreign

offenders, and also consider all factors relevant to the specific case before them, …"

23. We have also considered the decision in Agyarko v SSHD [2017] UKSC 11 where Lord Reed said:

> "47. The Rules therefore reflect the responsible Minister's assessment, at a general level, of the relative weight of the competing factors when striking a fair balance under article 8. The courts can review that general assessment in the event that the decision-making process is challenged as being incompatible with Convention rights or based on an erroneous understanding of the law, but they have to bear in mind the Secretary of State's constitutional responsibility for policy in this area, and the endorsement of the Rules by Parliament. It is also the function of the courts to consider individual cases which come before them on appeal or by way of judicial review, and that will require them to consider how the balance is struck in individual cases. In doing so, they have to take the Secretary of State's policy into account and to attach considerable weight to it at a general level, as well as considering all the factors which are relevant to the particular case. This was explained in *Hesham Ali* at paras 44-46, 50 and 53."

24. The judge was therefore required to take the Immigration Rules into account and to attach considerable weight to them at a general level as well as considering all the factors relevant to the appellant's case. The judge failed to take account of paragraph 9.8.2 and erred in his assessment as to whether the application fell for refusal on suitability grounds. The errors infected the judge's assessment of whether the decision to refuse entry clearance is proportionate.

Conclusion

25. We find that the grounds are made out. In the circumstances, we find that there are material errors of law in the decision of the First-tier Tribunal Judge. Accordingly, we set aside that decision. Mr Lester requested that the Article 8 findings be preserved in circumstances where there is no dispute as to the Appellant's circumstances. That is inappropriate where we have concluded that the judge erred in his assessment of the Article 8 claim, whether under or outside the Immigration Rules. It follows that we set aside the decision of the First-tier Tribunal judge with no findings preserved.

26. As to disposal, we have considered whether the proper course is to remit the appeal or to order that the decision be remade in the Upper Tribunal. In doing so, we have considered what was said in Begum (remaking or remittal) [2023] UKUT 46 (IAC). Given that the decision on the appeal needs to be taken afresh, and given the nature of the error into which the FtT fell, we have concluded that the just and proper course is to remit the appeal to the FtT for rehearing.

Notice of Decision

27. The decision of First-tier Tribunal Judge Farrelly to allow the appeal is set aside with no findings preserved.

28. We remit the appeal for rehearing *de novo* before the First-tier Tribunal with no findings preserved.

A Grimes

Deputy Upper Tribunal Judge Grimes

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 December 2023