IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004663

First-tier Tribunal No: HU/62091/2023
LH/03716/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:

16th January 2025

Before

UPPER TRIBUNAL JUDGE RASTOGI
DEPUTY UPPER TRIBUNAL JUDGE CONNAL

Between

BAHAAELDIN ABDELFADIL MOHAMED ABDELMAGUID
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. The Appellant, who is a national of Egypt, appeals, with the permission of First-tier Tribunal Judge Seelhoff, the decision of First-tier Tribunal Judge Juss (the "Judge") dated 11 August 2024 (the "Decision"). In the Decision, the Judge dismissed the Appellant's appeal against the Respondent's refusal of the Appellant's application for leave to remain based on his family and private life. The Respondent's decision was made on 27 September 2023.

2. In summary, the Appellant challenged the Decision on the grounds that the Judge:

    a. failed to make findings in respect of material aspects of the appeal, in particular regarding the Appellant's established family life in the UK (at [30] of the Decision) (Ground 1);

    b. erred in respect of the applicable law, in particular in appearing to wrongly give consideration to the insurmountable obstacles test (at [31] of the Decision), and failing to apply the correct Immigration Rules both when finding that the Appellant would only have to return temporarily in

order to make a lawful application to re-enter on a spouses' visa (at [29] of the Decision), and also when referring to Paragraph 276ADE rather than Appendix Private Life (at [30] of the Decision) (Ground 2);

c. failed to consider important factors when coming to conclusions and failed to conduct a proper proportionality assessment, in particular in failing to consider the correct Immigration Rules and principles when finding that the Appellant would only have to return to Egypt "temporarily", and making associated findings in relation to how the Appellant's wife could expect to manage in the Appellant's temporary absence, when the Appellant could only make an application as a dependent of a skilled worker and would be subject to a 12 month mandatory refusal period, and failing to carry out an evaluation of the amount of weight to be given to the public interest (at [29] of the Decision) (Ground 3);

d. reached conclusions based on speculation, in particular regarding the ability of the Appellant's brother and sister-in-law to provide childcare for the Appellant's wife, and the ability of the Appellant's wife to privately pay for such childcare, if the Appellant was removed from the UK (at [29] of the Decision) (Ground 4); and

e. failed to consider the best interests of the children, specifically the Appellant's young child and his young niece and nephews (Ground 5).

3. In a decision dated 9 October 2024, the First-tier Tribunal granted permission to appeal on all grounds.

4. By way of a Rule 24 Notice dated 27 November 2024, the Respondent conceded that there was a material error of law within [29] of the Decision which infected the entire decision, such that no findings could be preserved. As the parties were in agreement, the hearing was vacated and our reasons herein will be brief.

5. At [29] of the Decision, the Judge found:

> *"29. I have given careful consideration to the documents before me and the evidence and oral submissions I have heard. I find that the Appellant does not discharge the burden of proof that is upon him, although I accept his marriage is a genuine one with someone who has no permanent right to remain in the UK. I find that it would not be disproportionate to his rights to require him to return to Egypt and apply lawfully as the spouse of his lawfully resident wife in the UK. The most compelling argument in the Appellant's favour is that if he were removed his wife would have to go with him and that this would remove his only source of income. However, she does not have to go with him. I note the argument that his partner's Visa is contingent on her working in the highly skilled category and that if she ceases to do so she will lose that highly coveted status. However, the Appellant has sought to remain here unlawfully for much of his time here. She does not have to give up work. The young child can be looked after by the Appellant's brother and sister-in-law or they can arrange for a paid support at home. The Appellant would only have to return temporarily in order to make a lawful application to re-enter on a spouses' visa. It is clear from* ***Younas (section 117B (6) (b); Chikwamba; Zambrano) [2020] UKUT 129*** *(at §§ 89 and 97) that it is for the Appellant to demonstrate that*

a decision to refuse would be disproportionate in light of the important public interest of the maintenance of effective immigration controls".

6. We find the Respondent's concession to have been rightly made. We are satisfied that Grounds 2, 3 and 4 are made out insofar as they relate to [29] of the Decision. We are satisfied the Judge made a misdirection in law by applying Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 (IAC) ("Younas") to the Appellant's case (the Judge referring to [89] and [97] thereof). The Judge fell into error in finding that the Appellant would only have to return to Egypt temporarily in order to make a lawful application to re-enter on a spouses' visa, when that is a route not open to the Appellant. The Appellant's wife is an Egyptian national who is resident in the United Kingdom on a skilled workers visa, and as such we are satisfied that she is not eligible to sponsor the Appellant as a spouse. The Judge did not consider whether or not there were any other routes available to the Appellant to re-enter and nor did the Judge consider the impact of the Appellant's overstaying in the United Kingdom and whether this would be a barrier to him re-entering within 12 months, thereby putting into sharp focus the Judge's finding that the Appellant would only have to return to Egypt temporarily. Further, even if Younas had been correctly applied to the Appellant's case, the Judge further erred by failing to carry out a proportionality assessment setting out the weight to attach to the public interest in the event of temporary removal contrary to [95] - [97] of Younas. Finally, we are satisfied that the Judge engaged in speculation in finding that the Appellant's young child could be looked after by his brother and sister-in-law, when it is clear from [22]-[26] of the Decision that neither were asked about whether they were able to do so (such a finding in any event being made in the context of the Judge's finding that the Appellant would only be absent from the UK temporarily).

7. Paragraph [29] of the Decision is the first paragraph which appears in the section headed "Reasons & Decision". The errors therein infect the remainder of the Judge's assessment (for example, at [31], where the Judge finds that there are no exceptional circumstances, the Judge again refers to [89] and [97] of Younas and states that it is for the Appellant to demonstrate that removal for a "temporary period" would be disproportionate). As such, it is not necessary for us to deal with the other grounds of appeal.

8. The decision is to be set aside in its entirety pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Having regard to the decisions of the Presidential Panel in AB (preserved FtT findings; Wisniewski principles) Iraq [2020] UKUT 268 (IAC) and Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC), the appropriate course is for the appeal to be remitted to the First-tier Tribunal for hearing afresh, with no findings preserved.

Notice of Decision

1. The decision of the First-tier Tribunal contains a material error of law and is set aside.

2. The appeal is remitted to the First-tier Tribunal for hearing afresh, by a judge other than Judge Juss. No findings are preserved.

3. The parties will be notified of a fresh hearing date in due course.

L.C. Connal

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
13 January 2025