IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004956

First-tier Tribunal No: EA/16390/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 12 January 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

LOUISA OBENG
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr E Waheed, counsel instructed by Adam Bernard Solicitors
For the Respondent: Ms H Gilmore, Senior Home Office Presenting Officer

Heard at Field House on 22 December 2023

DECISION AND REASONS

1. No anonymity direction has been made and I see no basis upon which an anonymity direction is appropriate in view of the principle of open justice and indeed none has been sought.

2. This is my oral decision which I delivered at the hearing today. This matter relates to an EU Settlement Scheme application which was rejected by the Respondent and whereby the Appellant's appeal was dismissed at the First-tier Tribunal.

Procedural History and Bundles

3. It is right that I deal with the procedural history in respect of this matter first.

4. The Upper Tribunal's task has been made more difficult in this case. The Tribunal has not been provided with a composite bundle, despite the Presidential Note on CE-Files and

Electronic Bundles. The Principal Resident Judge's standard directions refer to the President's Guidance and have been in circulation now for a significant period of time. The Appellant's solicitors have not complied with the standard directions. I am aware from the digital organisation of my files that there were repeated requests by the Tribunal Office seeking a composite bundle from the Appellant's solicitors. It is regrettable that even this morning there was no such bundle available.

5. Although on this occasion I was able to find some of the relevant documentation amongst other files held by the Upper Tribunal, this is something that cannot be ignored if it arises again. I know that Mr Waheed will inform his instructing solicitors of the wide powers that the Upper Tribunal has in relation to orders in respect of costs and indeed in relation to asking the Appellant's solicitors to attend the Tribunal to explain their lack of compliance with the standard directions. As I say, it is incumbent upon all parties to ensure that the overriding objective is properly and fully considered and to ensure that best use is made of the valuable Tribunal time. Many other cases await consideration. I appreciate that the parties might be under pressure of work, but it is imperative that bundles for the Tribunal are placed as a high priority in the future.

6. There is a second aspect which regrettably causes me to deal with the procedural history. Mr Waheed appeared as counsel at the First-tier Tribunal. He then drafted the grounds of appeal against the decision of the First-tier Tribunal. Whilst he identified in his grounds of appeal the need for a transcript or recording of the CVP video hearing, his instructing solicitors have not obtained that transcript. Again, I know that Mr Waheed will explain to his instructing solicitors that these matters must be dealt with in the correct manner to ensure that there is no undue delay at the Upper Tribunal. As it happens though, it appears we can proceed without a transcript for the reasons that I shall come to.

The Hearing at the First-tier Tribunal and the Submissions Before Me.

7. I turn to the substantive matter, which is before me. The hearing of the Appellant's appeal had come for consideration at the Taylor House Hearing Centre by way of a Cloud Video Platform remote hearing on 10 May 2022. First-tier Tribunal Judge Khawar ("the judge") had considered the matter and by way of a decision and reasons dated 25 October 2022, he had dismissed the Appellant's claim which had related to an EUSS application with connection to the Appellant's biological father.

8. The Appellant had sought permission to appeal against the judge's decision relying on two grounds of appeal. It is not necessary for me to consider the first ground of appeal because Mr Waheed made very clear in his submissions today that he does not rely on that ground.

9. Mr Waheed in his second ground of appeal contends that the unexplained delay of over five months between the date of the hearing and the signing of the decision is bound to have undermined the assessment of the evidence and thereby it is bound to have infected the assessment of credibility.

10. Ms Gilmore in her submissions had said that even if there were relatively minor aspects in relation to the judge's recording of what occurred within his determination, such matters were not material and in particular, she set out that the judge had found several reasons as to why the judge identified that the Sponsor's evidence was unreliable. She referred me to paragraph 12 of the judge's decision where the judge referred to a CPIN from September 2020, which explained that registrations of births not made within a year are unreliable. The judge said at

paragraph 13 that the Sponsor had changed his account during questioning. At paragraph 14 the process undertaken by the Sponsor was subjectively inconsistent, with the account being given by the sponsor during his oral evidence. At paragraph 16 the judge said that the certificate itself was in a format which was impossible because the Appellant's mother had died in 2013.

11. Mr Waheed said that the delay of 5 ½ months itself shows that there is uncertainty as to the way in which the judge considered the evidence. He said that in respect of paragraph 13 of the judge's decision, although there is a recital that there was an inconsistency, when one looks at paragraph 13, it is difficult to decipher an actual inconsistency. Mr Waheed says, in addition paragraph 13 shows ellipsis and thereby a failure to comprehensively or accurately record the evidence of the Sponsor. It is said that there was a 'small piece of paper' (with a note of the date), which is referred to by the Sponsor during his evidence, but that is omitted from the judge's decision. Mr Waheed says that at paragraph 15 the judge speculated as to whether the Appellant's maternal aunt could have attested to the birth but there was no such evidence which had come before the judge for consideration.

12. Mr Waheed states that there need not be a transcript of the hearing. He relies on the recent decision from two weeks ago of the Court of Appeal in **Abdi and others v Entry Clearance Officer [2023] EWCA Civ 1455**. In particular, he relies on paragraphs 20 to 27.

13. I note that at paragraph 20 Popplewell LJ, with whom Arnold and King LJJ agreed, said in part as follows:

> "Although the terms of Rule 24 did not make service of a notice mandatory in this case, Rule 2 dictates that one should be served where the notice of appeal contains a complaint as to what happened at the hearing as the factual basis of a ground of appeal. A Rule 24 notice ought then to be served identifying whether that factual basis is in issue, and if so, highlighting the nature of the controversy. Only in that way can any dispute be identified in a way which enables orderly preparations to be made for it to be resolved at the appeal hearing, if necessary by evidence, so as to avoid unnecessary delay and expense. If resolution of any dispute necessitates a witness statement from counsel, that will give rise to particular consequences which may include new counsel being instructed to conduct the appeal: see *BW v Secretary of State for the Home Department* [2014] UKUT 00568 (IAC) at [5]. No such Rule 24 notice was served in response to the grounds of appeal in this case."

Then at paragraph 24:

> "However where, as in this case, the point relied on is simply that a matter was not raised at the hearing, in circumstances where there is no reason to anticipate a dispute, the convenient way of dealing with it is that which was adopted in the present case. Requiring the appellants to apply and pay for a transcript, or Ms Dirie to make a witness statement, before there was any reason to suspect that the point might be in dispute, would simply have led to additional expense and delay to no useful purpose."

And at Paragraph 25:

> "It happens frequently that courts or tribunals sitting on appeal inquire as to what happened below and are told the position by counsel. In the absence of any reason to question what counsel says, the court can proceed on the basis of what they are told by counsel in fulfilment of their professional duty."

14. I have to also consider the Court of Appeal's decision in **R (on the Application Of) SS (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 1391**. The only reasoned judgment was that of Leggatt LJ (as he then was) and with whom the rest of the Court of Appeal agreed.

15. Mr Waheed referred me to paragraphs 25, 28 and 29. The Court of Appeal in that case was dealing, in essence, with whether a delay of three months between the hearing and then the decision being signed was sufficient to amount to an error of law.

16. I note that the Court of Appeal said that the delay of itself was not sufficient and that a nexus needs to be shown between the delay and the safety of the decision. At paragraph 29 it was held,

> "29. It can therefore be confirmed that the approach to the issue of delay adopted by the Upper Tribunal in the case of ***Arusha and Demushi***, applying the decision of this court in ***RK (Algeria),*** which requires a nexus to be shown between the delay and the safety of the decision, is the correct approach."

17. Mr Waheed explained that his grounds of appeal were based on him using the ratio from the **SS (Sri Lanka)** case.

Further Analysis

18. I have to say as I did when highlighting the procedural background to this matter, that the Upper Tribunal's task in this case has been made more difficult by the lack of compliance with directions. Reflecting though, as I have on the submissions which have been made and the careful way in which Ms Gilmore has explained the approach which she takes on behalf of the Respondent, I conclude that the decision of First-tier Tribunal Judge Khawar contains a material error.

19. I am concerned by three particular aspects. Firstly, paragraph 13, with the ellipses in relation to the recording of the evidence (meaning the "…") shows thereby the gaps in the recording of the evidence by the judge. I simply cannot be satisfied that the judge has properly recorded and, thereby importantly I cannot be satisfied that the judge properly recalled the evidence from the hearing some five and a half months earlier. Because this is a case where credibility was a vital aspect in relation to the assessment of the matter, it is a serious concern that part of the evidence might not have been noted or recorded correctly and then not recalled correctly when assessing credibility.

20. Secondly, I am concerned in respect of the judge's recording of the evidence in relation to the Appellant's aunt. I was not taken to anything by the Respondent by way of documentation which supports what the judge used in assessing credibility in relation to the aunt's ability to attest to the birth. The judge may simply have not recalled this correctly or not recorded it correctly. It was a matter which affected his decision in respect of the credibility of the account.

21. Thirdly, there is the issue of the 'small piece of paper'. This is not entirely clear, but it appears to be said that there was a note with a date on it. The judge has not referred to this sufficiently. It has the potential to have made a difference when assessed alongside the other aspects of the case.

22. Turning to the two decisions of the Court of Appeal, in my judgment the recent decision in **Abdi** focuses on important aspects which arise, but in my judgment, there will remain certain circumstances in which transcripts of the hearing and/or where a witness statement will be required of the advocate at the First-tier Tribunal. Therefore the Court of Appeal's earlier decision in **SS (Sri Lanka)** remains valid guidance in certain circumstance albeit more limited than was the case prior to the more recent decision in **Abdi**.

23. I have given careful consideration to the points made by Ms Gilmore particularly because there is background evidence within the CPIN which suggests that what the Appellant says in terms of how a birth certificate came to be obtained is wrong, but that of itself does not mean that what 'usually happens' was followed in this case. In this case the Appellant provided evidence explaining what she says happened in this case and she appears to have provided evidence of why what 'usually happens' did not need to happen to obtain the birth certificate. These things would not usually be sufficient for the purposes of identifying a material error of law in line with the Court of Appeal decision in **R (Iran),** but the delay between the hearing and the signing of the decision becomes relevant.

24. The period between the hearing and the signing of the decision was 5 ½ months. The three matters that I have referred to in respect of (i) paragraph 13 of the judge's decision, (ii) the ellipsis in respect of the recording of the evidence and (iii) the 'small piece of paper' which may have contained a date, all taken cumulatively are such that they have a nexus to the assessment of credibility and the recording of the evidence.

25. I conclude, albeit reluctantly, that because the delay appears to have a direct nexus with the safety of the judge's decision, then I must conclude that there is a material error of law in the judge's decision.

26. Having reflected on the submissions, I set aside the decision of the First-tier Tribunal. I apply **AEB [2022] EWCA Civ 1512 and Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC),** and I carefully consider whether to retain the matter for remaking in the Upper Tribunal in line with the general principle set out in Paragraph 7 of the Senior President's Practice Statement. I take into account the history of this case, the nature and extent of the findings to be made and that this appeal requires assessment of the Appellant's evidence. In considering paragraph 7.1 and 7.2 of the Senior President's Practice Statement there has to be a re-assessment of the Appellant's claim as a whole, I conclude that fairness requires that there be a re-hearing at the First-tier Tribunal and that the Appellant be afforded the opportunity of having their appeal heard by the First-tier Tribunal.

Notice of Decision

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

The matter is remitted to the First-tier Tribunal for re-hearing. None of the current findings shall stand.

No anonymity order is made.

Abid Mahmood
Deputy Judge of the Upper Tribunal

Immigration and Asylum Chamber

22 December 2023