



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11563/2017

THE IMMIGRATION ACTS

Heard at Field House
On 3rd August 2018

Decision & Reasons Promulgated
On 21st August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ASLAMSHA DIWAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim of Counsel, instructed by J Stifford Solicitors

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Richards-Clarke (the judge) of the First-tier Tribunal (the FtT) promulgated on 5th December 2017.
2. The Appellant is a citizen of India, born 26th May 1984. On 22nd December 2016 he applied for leave to remain in the UK on the basis of his family life with his partner Natalie Duro (the Sponsor). That application was refused on 19th September 2017. The

Appellant appealed to the FtT. His solicitors indicated in the appeal form that he required his appeal to be decided on the papers without an oral hearing.

3. The appeal was decided on the papers by the judge, and dismissed.
4. The Appellant applied for permission to appeal to the Upper Tribunal. It was contended that there had been a procedural error which had led to unfairness. The error was that on 26th October 2017 the Appellant's solicitors had submitted a fax to the Tribunal indicating that the Appellant required an oral hearing. Neither the Appellant nor his solicitors heard anything further from the Tribunal and therefore were unaware that the Tribunal had taken no action on this fax, and the appeal proceeded to be decided on the papers.
5. In addition it was submitted that the judge had erred by recording that the burden of proof was on the Appellant, whereas one of the reasons for refusal related to suitability, and in that case the burden was on the Respondent.
6. It was also submitted that the judge had erred by failing to consider section 117B(6) of the Nationality, Immigration and Asylum Act 2002, and/or EX.1 of Appendix FM.
7. Permission to appeal was initially refused, but subsequently granted by Upper Tribunal Judge Bruce.
8. Directions were issued making provision for there to be a hearing before the Upper Tribunal to ascertain whether the FtT decision contained an error of law such that it should be set aside.

The Upper Tribunal Hearing

9. Mr Kotas indicated that it was accepted that there had been a procedural error leading to unfairness. It was accepted that the Appellant's solicitors had sent a fax to the Tribunal indicating that an oral hearing of the appeal was required.
10. Both representatives invited me to find a material error of law and to set aside the decision of the FtT, and to remit the appeal back to the FtT to be heard afresh.

My Conclusions and Reasons

11. I find a material error of law on the basis of a procedural irregularity. The judge is not to be blamed for this.
12. The appeal form was incorrectly completed by the Appellant's solicitors who indicated that a hearing on the papers was requested. Following receipt of the appeal form the Tribunal issued a notice dated 24th October 2017 confirming that the appeal would be decided on the papers without a hearing. I have seen a copy of a fax dated 26th October 2017 from the Appellant's solicitors confirming that an oral hearing was required. Unfortunately no action was taken in response to this fax, and no further notices or directions were sent to the Appellant or his solicitors. The Appellant was therefore unaware that his appeal had been decided on the papers.

13. I take into account the guidance in MM Sudan [2014] UKUT 00105 (IAC) which confirms that where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the FtT to be set aside. A successful appeal is not dependent on the demonstration of some failing on the part of the FtT.
14. I am satisfied that it was unfair to hear the appeal on the papers given the circumstances of this case. Therefore it is appropriate to set aside the decision of the FtT.
15. The decision is set aside with no findings preserved. I have taken into account paragraph 7.2 of the Senior President's Practice Statements, and find that because the Appellant has not had an opportunity for his case to be put to and fairly considered by the FtT, it is appropriate to remit this appeal back to the FtT to be decided afresh.
16. The parties will be advised of the time and date of the hearing in due course. The appeal is to be heard by an FtT Judge other than Judge Richards-Clarke.

Notice of Decision

The decision of the FtT involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the FtT with no findings of fact preserved.

Anonymity

The FtT made no anonymity direction. There has been no request for anonymity made to the Upper Tribunal and I see no need to make an anonymity order.

Signed

Date 3rd August 2018

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

No fee award is made by the Upper Tribunal. The issue of any fee award will need to be considered by the FtT.

Signed

Date 3rd August 2018

Deputy Upper Tribunal Judge M A Hall