Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002762
HU/04592/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 October 2022	**On 11 December 2022**
Extempore	

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MISS FARSHTA HASHEMI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person and without legal representation
For the Respondent: Mr D Clarke, Senior Presenting Officer

DECISION AND REASONS

1. To avoid confusion I shall refer to the parties as they were before the First-tier Tribunal: thus, the Secretary of State is once more "the Respondent" and Mrs Hashemi is "the Appellant".

2. The Respondent appeals against the decision of First-tier Tribunal Judge Hembrough ("" the judge), promulgated on 1 March 2022. By that decision the judge allowed the Appellant's appeal against the Respondent's refusal of her human rights claim.

3. The Appellant is an Afghan citizen born in 1992. The Appellant married Mr Ramin Hashemi ("the Sponsor") in Afghanistan in May 2019. In December 2017 the Appellant arrived in the United Kingdom with leave as a spouse, valid until 21 August 2020. She then made an in-time extension application. That application was refused by the Respondent on 27 August 2021.

4. The basis of the refusal was twofold: first it was not accepted that the couple were in a genuine and subsisting relationship; second it was not accepted that the Appellant had met the English language eligibility requirement.

5. The Appellant and Sponsor, who were not legally represented, attended the remote hearing before the judge and they both gave oral evidence. The judge concluded that the couple were indeed in a genuine and subsisting relationship. That particular finding has not been challenged by the Respondent.

6. During the course of the hearing the Sponsor emailed through evidence upon which the Appellant sought to rely. In particular, he sent an English language test certificate which went, it was said, to address the second basis of the Respondent's refusal. The Sponsor had apparently stated that he had hand-delivered this evidence to the Respondent previously, although that is less than clear. In any event on receipt of the evidence, the Respondent's Presenting Officer sought an adjournment so that the English language test certificate could be verified. The Sponsor objected to the adjournment application on the basis that he and the Appellant had already waited a significant amount of time in order to have her permission to stay determined. Further, the Appellant was at that time seven months pregnant.

7. At paragraph 13, the judge stated that he had considered the overriding objective and that he would proceed with the hearing. Having reached that conclusion, he went on to conclude that the couple's relationship was genuine and subsisting (as mentioned previously) and also that the English language test certificate was reliable and demonstrated that the Appellant had satisfied the relevant level of English. Accordingly, he allowed the appeal on human rights grounds on the basis that all of the relevant Immigration Rules had been satisfied and that this was in effect determinative of the Article 8 claim.

8. The Respondent was dissatisfied with the judge's decision on the basis that he (the judge) should have adjourned the hearing in order that the English language test certificate could have been verified. The judge had acted with procedural unfairness.

9. The grounds of appeal make the following assertion:

> "Following the appeal hearing, there were checks on the Cambridge English verification which produced two expired certificates, one of which was a fail. There was no evidence of an ESOL dated 16 March 2018 on the verification

site. The situation remains that the Appellant has not passed the necessary test to meet the criteria to allow a grant of leave in the UK".

10. At the hearing in the Upper Tribunal, the Appellant and Sponsor attended and I explained the nature of proceedings to them. I am satisfied that they understood what was being said.

11. Mr Clarke accepted that no evidence had been adduced by the Respondent to support the assertion made in the grounds of appeal as to the checks undertaken and the claimed results of those checks. He quite fairly accepted that this presented a difficulty for the Respondent. In addition (and again he should be commended for his professionalism in this regard), Mr Clarke noted that the couple had, at the time of the judge's decision, a British citizen child. Whilst the judge had noted this fact, he had not reached a specific conclusion on the consequences of this factual circumstance. Mr Clarke observed that the Appellant's nationality meant that it was, in effect, highly unlikely that it would be reasonable to expect the British citizen child to relocate to Afghanistan at this time. Mr Clarke submitted that this factual circumstance might be said to go to the materiality of any error relating to procedural unfairness.

12. At the end of the hearing I announced my decision that the judge had erred in law but that his decision was not, in all the circumstances, material to the outcome. My reasons for this conclusion are as follows.

13. It is, I accept, somewhat unclear as to whether the Sponsor had effectively served relevant evidence on the Respondent before the hearing. On balance I am satisfied that he had not. It is clear that relevant evidence in the form of the English language test certificate had been provided to the Presenting Officer and the judge during the course of the hearing. The Presenting Officer immediately sought an adjournment on the not unreasonable basis that the Respondent would wish to undertake verification checks on the certificate. In considering whether or not to adjourn, it was incumbent on the judge to apply a fairness test to the situation. At paragraph 13 the judge made reference to the overriding objective, but nothing was said about whether fairness required an adjournment. The judge provided no reasons at all for why he had concluded that he should proceed.

14. In the circumstances he committed a clear error of law by (a) failing to consider whether fairness required an adjournment in the circumstances and/or (b) failing to give any, or any legally adequate reasons for his decision not to adjourn.

15. Having said that I am satisfied that the error of law based on procedural unfairness was not material to the outcome. This is so for two reasons.

16. First, the Respondent has failed to provide *any* evidence of checks made on the English language test certificate and/or any results of such checks. It is one thing to make assertions in grounds of appeal, but quite another for these to be backed up by evidence. There has been ample

opportunity to provide relevant evidence. It should have been included together with application for permission to appeal, which was made in early March 2022. Failing that, there have been a number of months during which it could and should have been provided. There has been no explanation for the absence of the evidence. Having regard to need for procedural rigour and for the other party to know the case presented against them, I conclude that the absence of evidence fatally undermines the materiality of the judge's error. In other words the Respondent has been unable to demonstrate that the failure to adjourn could have made any difference to the outcome of the appeal.

17. Second I agree with Mr Clarke's observation about the British citizen child. Whilst it could be said that the judge did not specifically base his decision on that issue, it was an undisputed fact. It is also uncontroversial in my view that it could not on any rational view be reasonable to expect a British citizen child to relocate to Afghanistan at this time. I acknowledge that there is no Rule 24 response making this point, but I bear in mind that the Appellant has, at all times, been unrepresented. Even if the judge had not been satisfied that the Appellant could meet the English language requirement under the Rules, it is plain to me that he would have allowed the appeal on the basis of Section 117B(6) of the Nationality, Immigration and Asylum Act 2002, as amended.

18. In light of the above, I do not exercise my discretion to set aside the judge's decision. The First-tier Tribunal's decision shall stand.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that its decision should be set aside.

The decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed H Norton-Taylor Date: 7 November 2022

Upper Tribunal Judge Norton-Taylor