



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No's: UI-2022-002519, UI-2022-002520, UI-2022-002521
First-tier Tribunal No: EA/04972/2021, EA/04974/2021, EA/05593/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 5 April 2023

Before

UPPER TRIBUNAL JUDGE REEDS

Between

**AFZAAL AHMED
MUHAMMAD USMAN
AMIR SHAHZAD
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms G. Patel, Counsel instructed on behalf of the appellants.
For the Respondent: Mr Diwnycz, Senior Presenting Officer

Heard at Phoenix House (Bradford) on 17 February 2023

DECISION AND REASONS

1. The appellants appeal with permission against the decision of the First-tier Tribunal (Judge Stedman) (hereinafter referred to as the "FtTJ") who dismissed their appeals against the decision made to refuse their applications for a family permit as dependent extended family members of an EEA national in a decision promulgated on 16 February 2022.
2. The FtTJ did not make an anonymity order. Nor has there been any application for such an order before the Upper Tribunal.
3. Each of the appellants applied for a family permit as the extended family member of the sponsor ((Mr Rafaqat Ali Bibi), a national of Spain, resident in the United Kingdom. In those applications, the appellants set out that the sponsor was their uncle, who was a Spanish national who was residing and

working in the United Kingdom. Their applications were refused by the respondent and the appellants appealed the decisions made.

4. The appeals were listed before the FtT to be determined “on the papers” and in a decision promulgated on 16 February 2022 the FtTJ dismissed their appeals.
5. Permission to appeal was issued and on 16 May 2022 permission was granted by FtTJ Parkes.
6. The appeal came before the Upper Tribunal on the 17 February 2023. Ms Patel, Counsel appeared on behalf of the appellants and the Entry Clearance Officer (“ECO”) by Mr Diwnycz, Senior Presenting Officer.
7. For the purposes of the hearing the evidence was contained in the documentation filed on the CE File, which included the bundle of documents on behalf of the each of the named appellants and the accompanying respondent’s bundles for each appellant. It is common ground between the parties that the documents that are now before the Upper Tribunal were not put before the FtTJ when he made his decision on the papers although they had been filed. It is also the position that the documentation had not been made available to the senior presenting officer. As a result the documentation was provided to Mr Diwnycz who had the opportunity to consider that documentation before the appeal resumed.
8. Ms Patel on behalf of the appellants submitted that there were 3 separate appeals before the FtTJ and that each appellant had filed a separate bundle and the documentation provided was not identical for each of the appellants. She identified that the evidence relating to the money remittances and transfers were different for each appellant. However the documentation, although filed, did not make its way to the FtTJ when he was determining the appeals “on the papers”. Consequently the findings made by the FtTJ, and his assessment was made in the absence of a full picture of the evidence available and therefore must have had an impact on the overall decisions reached.
9. Ms Patel referred to paragraph 16 of the FtTJ’s decision and the findings made on the evidence that the appellant was living on “very minimal amounts sent to him by the sponsor”. Reference was also made at paragraph 17 to the “very modest amounts”. However she submitted, that finding was not made by having considered all of the documentation that had been filed as it failed to take into account the transfer receipts that had been provided for each of the appellants. She therefore submitted it had an impact on the factual assessment made by the FtTJ and also the assessment of dependency.
10. Insofar as the grounds of appeal were concerned, she was not able to identify who it was who drafted the grounds, but she confirmed she relied upon the first part of the grounds which referred to the point she had already made about the decision being made in relation to all 3 appellants when the FtTJ only had documentation in respect of one of the appellants. She submitted that there was a procedural irregularity which had led to unfairness and that the documentation should have been before the FtTJ and in those circumstances the decision was not sustainable.
11. Ms Patel also relied upon the point made concerning the translation of the documents and that notwithstanding the lack of translation it can be seen from the face of the documents who received the amounts and that they were sent

by the sponsor. Those documents were historical documents in the sense that they evidenced, it is said, remittances sent from 2006 onwards.

12. Ms Patel referred to the FtTJ's decision at paragraphs 12 and 13, which related to the breakdown of monies sent since 2016 from the sponsor. However the total sums set out in the decision, which are based on page 39 of the bundle, failed to take into account the totality of the remittances that had been sent because they only referred to one appellant. In the bundles that were missing, there were further schedules showing other payments that had been made.
13. Having had the opportunity to consider the documentation in the light of the submissions made by Ms Patel, Mr Diwnycz on behalf of the respondent conceded that there was an error of law in the decision made by the FtTJ, which was material and as a consequence required the decision to be reheard.
14. The parties therefore agree that the decision of the FtTJ involved the making of an error on a point of law and that the appropriate disposal is for the decision to be set aside. In the circumstances it is only necessary to set out in brief terms why the parties have reached that view.
15. When the appeals came before the FtTJ to be determined on the papers there is no dispute that while the FtTJ noted that there were 3 appellants with 3 separate appeal numbers, the only bundle that was before the FtTJ related to one of the appellants, Muhammad Usman. At paragraph 3 of his decision the FtTJ set out that the only bundle he had been provided with was the bundle for Mr Usman and that he only had the refusal letter relating to his application. He expressly stated that he had no documents in relation to either of the other 2 appellants. Notwithstanding the lack of documentation in respect of the other 2 appellants, the FtTJ went on to consider that the decision in relation to Mr Usman would be determinative of the outcome of the three appeals.
16. Whilst the decision sets out the appeal numbers for all 3 appellants, as Ms Patel points out, the only appellant named on the face of the decision is Muhammad Usman and the factual findings are made only in respect of one appellant as indicated by the use of the word "appellant" in the singular.
17. The papers now available demonstrate that the appellants applied for family permits as the extended family members of the sponsor ((Mr Rafaqat Ali Bibi), a national of Spain, resident in the United Kingdom. Their applications were made on different dates. Muhammad Usman made an application on 16 October 2020; Amir Shahzad made his application on 8 December 2020 and the 3rd appellant Afzaal Ahmed made an application on a date in December 2020. Each of the applications were refused in decision letters issued by the entry clearance officer on 1 April 2021 (in relation to the applications made by Muhammad Usman and Afzaal Ahmed) and 9 January 2021 (in relation to the application of Amir Shahzad). It is right to observe that whilst the dates of the decision letter were different, the substance of the refusals were in the same or similar terms. The respondent considered that the evidence of the claimed relationship between the appellant and the sponsor was insufficient to prove the relationship that was necessary. The respondent did not accept the evidence of dependency noting that the money transfer receipts were limited and that the appellants had not provided adequate evidence of their own circumstances and lastly that the sponsor did not provide adequate evidence of his employment and his income.

18. However, each of the appellants filed grounds of appeal against the decisions reached and also provided separate bundles for each of the appellants. Again some of that evidence was duplicated for example, some of the evidence that related to the sponsor however each of the appellants had filed a separate witness statement and had provided separate schedules and documentation in respect of money receipts and transfers .
19. For reasons that have not been explained, the bundle of documentation that related to the other two appellants were not made available to the FtTJ. It is also of note that FtTJ Mills had issued a preliminary issue decision on 11 August 2021 which related to the appellants Mr Ahmed and Mr Shahzad which determined that each of them had a right of appeal. That decision was not before the FtTJ either. It can be further noted from the documentation now available that there is reference made to documents in the respondent's bundle annexes A-H where it is stated "all documents inaccessible". These appear to be documents that were sent to the respondent for the purposes of the applications.
20. The parties agree that there was a procedural irregularity that occurred when the appeals were determined "on the papers" in the light of documentation having been filed in relation to all 3 appellants but which had not been made available to the FtTJ when he reached his decision. It is also unclear whether all the documentation that had been sent to the ECO had been provided given the reference in the material to being "inaccessible". In those circumstances to decide the appeal of one appellant on the basis that it determined the appeal of all the appellants, failed to take account of material evidence in existence and for reasons that have not been explained, was not before the tribunal. Each appellant had made a separate application and whilst there was some overlap in the evidence, as the parties agree, there was also different evidence provided in relation to each of the appellants. As Ms Patel pointed out, there were different schedules of remittances, and therefore the factual assessment of the remittances made did not accurately reflect the position evidentially.
21. For those reasons, and in the light of the parties agreement that there was a procedural irregularity which led to unfairness as a consequence the decision should be set aside and for the appeals of each appellant to be reheard.
22. I have therefore considered whether it should be remade in the Upper Tribunal or remitted to the FtT for a further hearing. In reaching that decision I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

23. Ms Patel submitted that in light of the problems that had been outlined above, the appeals should be heard by way of an oral hearing and both advocates agreed that the venue for hearing the appeal should be the FtT.
24. I have carefully considered the submissions of the advocates and have done so in the light of the practice statement recited and the recent decision of the Court of Appeal in AEB v SSHD [2022] EWCA Civ 1512. As to the issue of remaking the appeal, I am satisfied that the appeal falls within paragraphs 7.2 (a) and (b) of the practice statement. It is agreed between the parties that the decision of the FTT involved the making of an error of law based on a procedural irregularity that gave rise to unfairness. In those circumstances the appeal falls within paragraph 7.2 (a) and the best course and consistent with the overriding objective is for it to be remitted to the FTT for a hearing. It will be for the First-tier tribunal to undertake a fresh assessment of the evidence provided.
25. For those reasons, the decision of the FtTJ involved the making of an error on a point of law and the decision is set aside. It is remitted to the First-tier Tribunal for a fresh hearing with none of the factual findings being preserved.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and therefore the decision of the FtT shall be set aside and remitted to the FtT for a hearing afresh.

Upper Tribunal Judge Reeds

Upper Tribunal Judge Reeds
24 February 2023.