



**Upper Tribunal  
(Immigration and Asylum  
Chamber)**

**Appeal Number: UI-2022-003908  
On Appeal from HU/57768/2021  
IA/17059/2021**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On the 2 December 2022**

**Decision & Reasons Promulgated  
On the 05 January 2023**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON**

**Between**

**ABDUL HASEEB  
[NO ANONYMITY ORDER]**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

Representation:

For the appellant: Ms Charlotte Bayati of Counsel, instructed by Law & Co Solicitors

For the respondent: Mr Myroslav Diwnycz, a Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 18 November 2021 to refuse him leave to remain as a spouse on human rights grounds. The appellant is a citizen of Pakistan.

2. **Mode of hearing.** The hearing today took place as a blended face to face and remote hearing, with Mr Diwnycz appearing remotely and all other parties being in the hearing room. There were no significant technical difficulties: Mr Diwnycz's screen froze a few times, but it was brief, and on each occasion, he asked for the few seconds he had missed to be repeated, which was done. I am satisfied that all parties were in a quiet and private place and that the hearing was completed fairly, with the cooperation of both representatives.

## **Background**

3. The appellant entered the UK as a Tier 1 (General) child migrant in 2014, but has not had extant leave since 6 March 2016. He was born on 10 February 1998, so he would have been an adult on that date.
4. The appellant made two applications for leave to remain in 2016, without success. Neither was appealed. He did not embark, remaining in the UK without leave. In April 2019, he made an private and family life application which was refused. He was served with form RED.0001 on 8 December 2020, but did not embark.
5. On 18 February 2021, the appellant made the application for leave to remain as a spouse which is the subject of this application. The couple married on 24 June 2019 and are living together. The appellant's wife is a British citizen. The couple are pursuing private fertility treatment as they want to start a family.
6. The appellant says that he gives support to members of his wife's family, who have various illnesses and vulnerabilities.

## **First-tier Tribunal decision**

7. There was no Home Office Presenting Officer at the First-tier Tribunal hearing. The appellant and his witness gave evidence-in-chief but were not cross-examined.
8. The First-tier Judge dismissed the appeal, finding the appellant and his witness to lack credibility.
9. The appellant appealed to the Upper Tribunal.

## **Permission to appeal**

10. Permission to appeal was granted on the basis that it was arguably an error of law to find that the appellant and his witness had not given a credible account, when their evidence was untested and unchallenged.
11. The respondent reviewed but maintained her decision. Neither in her refusal letter, nor in the review, did she suggest that the appellant was not a witness of truth.

## **Rule 24 Reply**

12. On 15 September 2022, the respondent filed a Rule 24 Reply, saying this:

"3. The judge does not, as the grounds seek to imply, seek to go behind positive findings already accepted by the respondent. The respondent's review did not accept that the sponsor had any significant caring responsibilities for her family as evidenced by reference to the fact that the sponsor was not a registered carer, nor was she even living with the relatives she claimed to be caring for.

4. Additionally, the First-tier Judge at paragraph 78 noted inconsistencies between the oral and written evidence. It is an obvious point that the respondent's review would have been unable to anticipate that the sponsor's oral evidence at the hearing would be inconsistent with the written evidence of her mother.

5. The First-tier Judge finds that the medical evidence and the inconsistent testimony provided at the hearing did not support the claimant that the UK sponsor's family had the required level of care that the sponsor and appellant claim they do, and also at paragraph 84, that alternative care is available in the UK."

13. That is the basis on which this appeal came before the Upper Tribunal.

### **Upper Tribunal hearing**

14. At the Upper Tribunal hearing, Ms Bayati submitted that as credibility had not been raised in the refusal letter, the appellant's representative was not on notice of any need to address credibility and that the resultant findings were perverse. The factual circumstances had not previously been disputed and the appellant's mother-in-law had provided a detailed letter and documents supporting her claimed ailments, including copy prescriptions and a current and previous DWP assessment, to which the judge did not have regard.

### **The *Surendran* guidelines**

15. Where there is no presenting officer, the approach to be taken by the judge is set out in the *Surendran* guidelines: see *STARRED MNM (Surendran guidelines for [judges]) (Kenya)* [2000] UKIAT 00005 (31 October 2000) and *WN (Surendran; credibility; new evidence) Democratic Republic of Congo* [2004] UKIAT 00213 (04 August 2004).

16. In *MNM*, the Guidelines were rehearsed as follows:

"1. Where the Home Office is not represented, we do not consider that a [judge] is entitled to treat a decision appealed against as having been withdrawn. ... The Home Office, on the contrary, requests that the [judge] deals with the appeal on the basis of the contents of the letter of refusal and any other written submissions which the Home Office makes when indicating that it would not be represented. ...

4. Where matters of credibility are raised in the letter of refusal, the [judge] should request the representative to address these matters, particularly in his examination of the appellant or, if the appellant is not giving evidence, in his submissions. Whether or not these matters are addressed by the representative, and whether or not the [judge] has himself expressed any particular concern, he is entitled to form his own view as to credibility on the basis of the material before him."

17. In *WN (DRC)* the Tribunal added a gloss on those Guidelines:

“... 39. There is a tension, reflected in the guidelines, between fairness in enabling a party to know the points on which [a judge] may be minded to reach conclusions adverse to him where they have not directly otherwise been raised, and fairness in the [judge] not appearing to be partisan, asking questions that no-one else has thought it necessary to ask. This has proved troublesome on a number of occasions.

The tension should be resolved, so far as practicable, by recognising the following:

(1) It is not necessary for obvious points on credibility to be put, where credibility is generally at issue in the light of the refusal letter or obviously at issue as a result of later evidence.

(2) Where the point is important to the decision but not obvious or where the issue of credibility has not been raised or does not obviously arise on new material, or where an Appellant is unrepresented, it is generally better for the [judge] to raise the point if it is not otherwise raised. He can do so by direct questioning of a witness in an appropriate manner.

(3) We have set out the way in which such question should be asked.

(4) There is no hard and fast rule embodied in (1) and (2). It is a question in each case for a judgment as to what is fair and properly perceived as fair.

The *Surendran* guidelines and *MNM* should be read with what we have set out above.”

18. That is the basis on which we have approached the grounds of appeal here.

## **Analysis**

19. It is clear from the refusal letter and the respondent’s review that credibility was not expressly in issue in either document. The witnesses were not cross-examined and the judge did not give any indication that she was considering making a negative credibility finding.

20. Accordingly, her approach is a breach of the *Surendran* guidelines and the decision is procedurally unfair.

## **DECISION**

21. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. The decision in this appeal will be remade in the First-tier Tribunal.

Signed Judith AJC Gleeson  
2022

Date: 2 December

Upper Tribunal Judge Gleeson