



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-003851
UI-2023-003854
First-tier Tribunal Nos:
HU/58782/2022
HU/58783/2022
(LH/00698/2023)
(LH/00699/2023)

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 07 December 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

GOPAL CHANDRA GHOSH (Appellant 1)
NAMITA GHOSH (Appellant 2)
(NO ANONYMITY ORDERS MADE)

Appellants

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellants: Ms K. McCarthy, Counsel instructed by Direct Access

For the Respondent: Mr M. Parvar, Senior Home Office Presenting Officer

Heard at Field House on 22 November 2023

DECISION AND REASONS

Introduction

1. The Appellants appeal the decision of First-tier Tribunal Judge Coll (hereafter "the Judge") who dismissed their Article 8 ECHR appeals against the decisions of the Respondent to refuse them Leave to Enter the UK under the Adult Dependent Relative route within the Immigration Rules.

2. Permission was granted by Judge G Clarke on 11 September 2023 with no restriction on the grounds to be argued.

Relevant background

3. The Appellants are nationals of India born in 1942 and 1948 respectively. It is accepted in this case that Appellant 1 suffers with dementia and needs long-term personal care (para. 17 of the Judge's decision); Appellant 2 suffers with cirrhosis of the liver, (para. 18).
4. On 6 May 2022, the Appellants applied for entry clearance as the adult dependent relatives of their son (and Sponsor), Mr Sudipt Ghosh who has Indefinite Leave to Remain in the UK.
5. These applications were refused by the Respondent on 24 October 2022 and the Appellants therefore appealed to the First-tier Tribunal.
6. The appeal was heard before the Judge at Taylor House on 21 June 2023. On 19 June and 20 June 2023, the Sponsor uploaded 35 further documents (including a video) onto the CCD platform.

The Judge's decision

7. At the hearing before the Judge, the Sponsor attended but there was no representation for the Appellants. Equally the Appellants were residing in India and therefore could not be present during the appeal hearing itself.
8. According to para. 9 of the decision, the Respondent did not send the additional 35 documents to Mr Eaton (who was representing the Respondent at the hearing).
9. At para. 10, the Judge records that the Sponsor asked the Tribunal to consider the additional 35 items of further evidence and explained that because he was representing himself he could not have known that he should provide the further evidence earlier.
10. The Judge concluded that this was insufficient explanation for why the documents were admitted late. The Judge reasoned that the directions were easy to understand and that the Sponsor came across as an intelligent individual who should have had no difficulty in understanding them. It is also recorded that Mr Eaton opposed the application to admit the documents on the basis that the Respondent would be ambushed.
11. The Judge concluded that the documents should not be admitted because: one the Sponsor had not given a plausible explanation for the late service of the documents and two, that it would be unfair to the Respondent to admit them.
12. It is also clear from para. 11 that the Sponsor had expected the Tribunal's interpreter to be able to assist him with translating letters from his mother

and maternal uncle written in Hindi. The Judge agreed with the Respondent's objection and decided that the Tribunal interpreter should not be used for this purpose and recorded that the Sponsor had given no plausible explanation for why he had not sought to pay for certified translations of the letters. The Judge also thought that allowing the interpreter to assist with the translation would amount to a further ambush against the Respondent and that in any event these letters were within the 35 documents which had not been admitted.

13. At para. 13, the Judge found that the Sponsor had not himself made a witness statement for the Tribunal hearing but had written the statement of Appellant 1 in the application form and therefore this document represented his views. It is also recorded that the Respondent's barrister did not cross-examine the Sponsor.
14. In going on to assess the competing evidence, the Judge made some criticism of the medical letters provided from India. The Judge also concluded that the evidence showed that Appellant 2 can offer Appellant 1 emotional support and conversation (para. 31) and could help Appellant 1 with feeding and some other physical aspects of his necessary day-to-day care, (para. 32).
15. The Judge also found that there was insufficient evidence from the Appellants' other son in India to show that he could not look after them adequately and/or why he could not hire the assistance of a servant (para. 33.2). The Judge similarly concluded that there was insufficient evidence to show that the Sponsor's uncle would not be able to care for Appellant 1, (para. 34).
16. At para. 40, the Judge identified that the Sponsor had failed to provide evidence from central or local authorities in India. The Judge was also critical of the reliability of the Sponsor's evidence in respect of the level of financial support he had been giving the Appellants and his evidence that he would facilitate his parents in relying upon the NHS contrary to his written undertaking, (para. 42.2).
17. Overall, at para. 43, the Judge concluded that Appellant 1 can be cared for by a combination of Appellant 2, his uncle and their neighbours or they could live with their other son in India. The Judge therefore dismissed the appeal.

The error of law hearing

18. At the error of law hearing, the Appellants were represented by counsel who had drafted the grounds of appeal on their behalf.
19. At the beginning of the hearing, it was confirmed that Mr Parvar accepted the Appellant's argument in ground 1: namely that the Judge had erred in holding against the Sponsor's credibility his evidence that his parents would rely upon NHS services in the UK. Mr Parvar confirmed that he agreed with

Ms McCarthy's argument at para 11 to 15 of the grounds of appeal, that part of the application payment includes the Immigration Health Surcharge which allows those who have paid the fee to use the NHS in a similar way to a person ordinarily resident in the UK with the proviso that they will still need to pay for certain NHS services including prescriptions, dental treatment and assisted conception services. Mr Parvar however argued that this error was not material as it was housed within credibility findings made only in respect of the affordability of the Appellants' treatment.

Findings and reasons

20. I have decided that it is unnecessary to make a firm finding on whether the accepted error is in fact a material one because, in my view, there is clearer strength in the Appellant's argument in respect of procedural fairness at ground 2.

Ground 2

21. In ground 2 as drafted, and in oral submission before me, the Appellants highlight (through numerous examples) that the Sponsor was plainly not aware of some of the basic fundamentals of the hearing on 21 June 2023 including: that the Sponsor did not realise that the Appellants could not give evidence by video link from overseas and that he did not realise that the Tribunal's interpreter would not be allowed to translate the witness statements from his brother and mother (which were part of the evidence cohort which was not admitted by the Judge).

22. Ms McCarthy argued that the Judge's assessment of what was fair was incomplete and that the reasoning showed no regard to the Equal Treatment Bench Book guidance on litigants in person. She additionally submitted that the Judge had assumed, without checking, that the Sponsor had understood how and when to upload documents; had failed to consider the relevance of the 35 documents which the Sponsor had sought to enter into evidence late; had not assessed whether the issues in the case could be determined fairly without admission of those documents and had failed to consider an adjournment in order for those documents to be admitted, therefore removing the inconvenience and any potential unfairness to the Respondent.

23. In his response, Mr Parvar contended that the Judge was entitled to conclude that the Sponsor had had sufficient warning and information in the relevant direction sent out and that the Judge had made an adverse credibility finding in respect of the Sponsor's explanation for why he had not complied with those directions when seeking to admit the 35 pieces of additional evidence.

24. In assessing the competing arguments, I have borne in mind the Supreme Court's view that the rules of courts (and, it can be inferred from the reasoning, the rules of tribunals) must be complied with even by litigants in person absent good reason, see: Barton v Wright Hassall LLP [2018] UKSC 12

at para. 18 and R (Hysaj) v Secretary of State for the Home Department [2015] 1 WLR 2472 at para. 44.

25. The Judge was therefore entitled to consider carefully the explanation given by the Sponsor at the hearing.
26. The initial difficulty however with the Judge's reasoning as expressed in para. 10, is that it is not clear under what circumstances the Sponsor gave some of the evidence which the Judge refers to in the consideration of both the application for the admission of the new evidence, as well as some of the evidence given about the Appellants' circumstances in India. As I have already recorded, the Judge states at para. 13 that the Sponsor was not cross-examined by the Respondent, and I can see no clear explanation from the Judge as to when it was that the Sponsor was deemed to have given evidence. I have therefore proceeded on the basis that the Judge asked questions of the Sponsor during his submissions.
27. Whilst I reject the Appellants' argument that the Judge's failure to expressly consider, in her reasons, the Equal Treatment Bench Book guidance on litigants in person is in itself evidence of procedural fairness, I nonetheless conclude that there is real force in the Appellants' complaint that the Judge did act procedurally unfairly when refusing the admission of the additional 35 documents.
28. Ultimately, in my view the Appellants are right to say that the Judge's consideration of the issues in respect of fairness at para. 10 are limited and do not, in my view, properly apply binding authority which requires a Judge to assess the question of fairness set in the full context of all the relevant elements.
29. I find that the Judge did materially err by showing no consideration of the first important aspect of the context: namely that the Appellants were themselves not present at the hearing and were not able to give evidence by video link (either because they were in India or because, as the decision shows, at para. 11, the Sponsor had concluded that the Appellants' internet connection was not strong enough to allow them to join the hearing remotely). Ultimately this is a case in which the Appellants were not even litigants in person but were being assisted (rather than represented) by the Sponsor in person.
30. I also accept the Appellant's argument that, under the circumstances of there being a Sponsor present on behalf of two unrepresented Appellants, the Judge should have directed himself to the consideration of whether it was fair to adjourn the hearing to allow the admission of the documents and thereby give time to the Respondent to consider them. I also accept that this would have required the Judge to consider, as best as could be done without translations, whether the new documents were potentially relevant to the issues to be decided.

31. The question of fairness in every appeal is case specific, and in my view it was a necessary element of a lawful assessment of procedural fairness that the Judge consider whether an adjournment should be given to avoid the very ambush which the Judge considered was the consequence of such admission. This is especially the case where the accepted evidence was that both Appellants are suffering with serious health conditions and were not able to attend the hearing either in person or remotely. In coming to that conclusion I have accepted that the new documents (which the Judge refused to admit) were potentially of relevance to the issues to be decided and not peripheral to them.

Notice of Decision

32. I therefore find that the Appellants have established there was procedural fairness in this case and, as a consequence, the entirety of the Judge's decision must be set aside.

Remittal to the First-tier Tribunal

33. In light of my finding that the Judge acted procedurally unfairly, I find that the rehearing of this appeal must be heard in full at the First-tier Tribunal by a Judge other than Judge Coll.

34. The Sponsor should now be alive to the need to look very carefully at any further notices or directions sent to him by the Tribunal and that he must do his best to comply with any requirements within those documents.

I P Jarvis

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 November 2023

