



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003893
UI-2023-003894
First-tier Tribunal No: EA/05552/2021
EA/05548/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 12 December 2024**

Before

UPPER TRIBUNAL JUDGE HIRST

Between

**THIAGO DA COSTA SERAFIM
TATIANE AKEMY NOGUTI
(NO ANONYMITY ORDER MADE)**

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms Panagiotopoulou, counsel instructed by Western Solicitors
For the Respondent: Mr Parvar, Senior Home Office Presenting Officer

Heard at Field House on 3 December 2024

DECISION AND REASONS

1. The Appellants appeal from the decision of First Tier Tribunal Judge Swaney promulgated on 3 November 2022 dismissing their appeals against the refusal of residence cards as the extended family members of an EEA national.

Background

2. The Appellants are nationals of Brazil. The First Appellant is the brother-in-law of the sponsor and the Second Appellant is the First Appellant's wife. On 30 November 2020 the Respondent made a decision refusing the Appellants' applications for residence cards as the extended family members of an EEA national exercising Treaty rights in the UK. The Respondent accepted that the Appellants were related as claimed to the sponsor but did not accept that they were dependent on the sponsor.

3. On 25 May 2021 First Tier Tribunal Judge Swaney made directions noting that the Appellants' representative had requested a paper hearing and requiring the Appellants to file and serve written evidence and submissions no later than 28 days after the Respondent's bundles were provided. The Appellants did not file any written evidence. A further direction was given on 15 September 2022 again requiring the Appellants to file and serve evidence within 28 days, failing which their appeals would be determined on the basis of information and evidence on file. The Appellants did not respond. In a decision on the papers promulgated on 3 November 2022 the judge dismissed the appeals.
4. The Appellants sought permission to appeal on the single ground of procedural unfairness. They contended that whilst Judge Swaney had not made any procedural error, they had not instructed their former representative to ask for a paper hearing; they had not been kept informed by their former representative and had not been asked to provide documents and evidence to the Tribunal.
5. Permission to appeal was refused by First Tier Tribunal Judge Mills on 4 January 2023. The Appellants' renewed application was supported by witness statements from the Appellants. Permission to appeal was granted by Upper Tribunal Judge Smith on 4 July 2024.
6. On 9 October 2024 the Respondent filed a Rule 24 response accepting that whilst there had been no error on the part of Judge Swaney, there had been procedural unfairness in the First Tier Tribunal proceedings such that the appeal should be allowed.
7. On 29 October 2024 the appeals were listed by the Upper Tribunal for an error of law hearing on 3 December 2024. On 29 October 2024, the Appellants' solicitor emailed the Upper Tribunal requesting that the appeals be withdrawn. On 15 November 2024, however, the Appellants' solicitor requested that the appeals be reinstated.
8. The appeals came before me at an error of law hearing on 3 December 2024.

Decision

9. The power of the Upper Tribunal to set aside a decision of the First Tier Tribunal under s12 Tribunals, Courts and Enforcement Act 2007 arises where the decision "involved the making of an error on a point of law". The right to a fair hearing is a fundamental and irreducible right, and procedural unfairness in the hearing before the First Tier Tribunal may constitute an error of law which requires the decision to be set aside. Such an error of law does not necessarily require any error on the part of the judge who conducted the hearing, as the Upper Tribunal made clear in *MM (unfairness; E & R)* [2014] UKUT 105.
10. It is common ground between the parties in this case that there was no error of law on the part of First Tier Tribunal Judge Swaney, who determined the appeals on the evidence before her without being aware of any issues with the conduct of the Appellants' former representative. However, it is also common ground that there was unfairness in the First Tier Tribunal hearing because the Appellants' previous representative requested a paper hearing without consulting them and did not inform them of the Tribunal's directions to file evidence for the hearing. As a result, the Appellants were not able to file evidence on the central issue in the appeal (their dependency on the sponsor).

11. I am satisfied that the conduct of the Appellants' former representative did give rise to procedural unfairness in the process by which the First Tier Tribunal reached its decision, although there was no fault on the part of First Tier Tribunal Judge Swaney, and that the decision should be set aside. The parties were agreed that the appeal should be remitted to the First Tier Tribunal on the first available date for a de novo hearing with no findings preserved.

Notice of Decision

The decision of the First Tier Tribunal involved the making of an error of law and is set aside. The appeal is remitted to the First Tier Tribunal for a de novo hearing on the first available date with no findings preserved.

L Hirst

**Judge of the Upper Tribunal
Immigration and Asylum Chamber**

3 December 2024