



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

Appeal Number: IA/15950/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
on 31 July 2017**

**Decision & Reasons  
promulgated  
on 15 September 2017**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

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

Appellant

**and**

**DURGAVATI SEEWOOGOOLAM  
(anonymity direction not made)**

Respondent

**Representation:**

For the Appellant: Mr Armstrong Senior Home Office Presenting Officer

For the Respondent: Mr P Lewis of Counsel

**ERROR OF LAW FINDING AND REASONS**

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Callender-Smith promulgated on 21 November 2016 in which the Judge allowed the appellant's appeal.

## **Background**

2. Ms Seewootoolam, is a citizen of Mauritius, was born on 10 October 1978.
3. Ms Seewootoolam entered the United Kingdom on 2 February 2005 lawfully as a student with leave extended to 31 December 2011. On 3 July 2012 Ms Seewootoolam applied for leave as the spouse of a person present and settled in the UK which was refused with no right of appeal on 21 November 2012. On 26 January 2015 Ms Seewootoolam applied for leave to remain in the UK on human rights grounds and under the Immigration Rules which was refused by the Secretary of State on 2 April 2015.
4. The Judge sets out findings and reasons at [15] to [39] of the decision under challenge.
5. The Judge notes at [15]:

“The appellant’s position, as is clear from her written witness statement and the oral evidence that she gave in the appeal hearing, has changed substantially from the time at which the Respondent made her original decision to refuse leave to the Appellant.”

6. The above comment relates to the fact that Ms Seewootoolam for the first time mentioned at the hearing a fear of return based upon domestic violence issues. In relation to this matter the Judge records:

“32. As I have said, the Appellant is unable to provide evidence to “prove” that she was the victim of domestic violence within the terms of the Immigration Rules. That does not, however, prevent her account been assessed in terms of the findings that I have made about the credibility and substance of her account.

33. I have considered carefully the medical evidence that has been presented in this case including that from a psychiatrist who has examined her and expressed the view that her mental health is consistent with the treatment she has described being subjected to.

34. I have found the Appellant is someone who had previously complied with all the requirements of the Immigration Rules but, because of the situation she faced in terms of the control and domestic violence been exercised by Mr Jenkins, the fact that she became an over stayer was no fault of hers.

35. I find that given the serious nature of her psychiatric condition, her estrangement from her parents caused by her ill-fated relationship with Mr Jenkins and the risk for her should she now be returned to Mauritius in the state she is in that she satisfies the requirements of Paragraph 276 ADE (vi) subparagraph 2. I find that she is someone who has lived continuously in the UK for less than 20 years but who would face very significant obstacles to reintegration in Mauritius if she was required to leave the UK. She has a particular handicap in terms of reintegration because of the lack of her former family’s support. Those who have

suffered the kind of controlling domestic violence that she has faced are inevitably going to be more vulnerable and fragile on any kind of relocation exercise.

36. She is clearly in a situation where there are exceptional circumstances rendering any decision to remove her to Mauritius as being exceptional and, thus, disproportionate. She previously had entirely lawful leave. She only overstayed because of the deliberate actions of her former partner and not because she wished to. She thought the overstaying would be converted into lawful residents through her relationship with him and that was a reasonable assumption that formed the focus of her view at that time meaning that she was thinking specifically not of overstaying but are becoming a fully lawful resident in the UK.
  37. She has been a victim of domestic violence over a considerable period of time, she has been ostracised now by her family and those who suffer from domestic violence are entitled to the basic protection of the law.
  38. She should be allowed discretionary leave to remain in the UK because that is a temporary status that enables her to re-establish a private life in a much more secure footing.
  39. It would enable her to address the medical and psychological conditions she now faces, she can speak English and she has never had recourse to public funds in the UK and she has experience of working in professional area where she would be able to make a very significant contribution by remaining in the UK."
7. The Judges notice of decision, which is the issue under appeal is written in the following terms:
- "... the appeal is allowed on the basis that, given the new factual matrix in this appeal, the decision is not in accordance with the Immigration Rules and is disproportionate in the context of Article 8 human rights."
8. The Secretary of State sought permission to appeal stating it is not entirely clear what the Judge means in the notice of decision at the conclusion of the determination which the author of the grounds presumed, in the terms of the Rules, is a referral to paragraph 276ADE. It is asserted the Judge erred in such finding as the focus of the Rules is a requirement for the Judge to consider the evidence that exists at the date of application.
  9. In terms of article 8 it is asserted there is no proportionality assessment with the appropriate reference to section 117 B taking into account the public interest in maintaining immigration control.
  10. The Grounds also assert it was a case in which the Presenting Officer submitted the case should be remitted to the Secretary of State to consider the 'new factual matrix', evidence of domestic violence having been seen for the first time in the appellant's bundle of evidence served on the morning of the hearing.

11. Permission to appeal was granted by another judge of the First-tier Tribunal on the Secretary States grounds.

### **Error of law**

12. Mr Armstrong asserts the Judge committed a procedural irregularity sufficient to amount to an arguable error of law in relation to the new issue raised for the first time on the day of the hearing upon which the appeal was allowed. It was argued the Presenting Officer (HOPO) before the Judge objected and the HOPO's note of the hearing was handed to the Upper Tribunal and Mr Lewis which is written in the following terms:

"Appellant present. Decision 2012. New issue at appeal as appellant now claiming domestic violence. Appellant's bundle only served today at onset of hearing to me and IAC. This has not been before SOS and IJ decided against my objection is to go ahead and hear appeal today. I did not ask any questions of appellant. IJ should not be primary decision maker. Reps on the other hand stated appellant waited so long for decision and is venerable (sic), and therefore asked IJ to allow appeal.

IJ reserved."

13. Mr Lewis submitted that no application was made for an adjournment on the day or for the matter to be remitted to the Secretary of State which he later clarified as being a submission that no formal application had been made. It was accepted that the HOPO did raise as a preliminary issue at the start of the case the question of whether the matter should be remitted to the Secretary of State but that the Judge indicated she was prepared to give the HOPO time but claimed to be concerned with the welfare of the applicant who was described as being vulnerable. Mr Lewis submitted that although the Judge indicated she was willing to put the matter back no request for it to be put back was made and the Judge proceeded to hear the appeal.
14. Mr Armstrong submitted that the application made by the HOPO was the same as an adjournment request and that the case should have been put off for further consideration. It was argued that on 28 January 2015 there was human rights claim and that what was adduced at the hearing was fresh evidence. It was not made out that the appellant before the First-tier Tribunal would have been prejudiced if the new evidence was considered by the Secretary of State.
15. In relation to Ground 1, I find the Secretary of State has made out her case of procedural unfairness. Whether a Judge decides to admit new evidence served contrary to the directions given in this or any appeal, and particularly that adduced on the day, falls within the discretionary case management powers available to the Judge. In deciding whether to exercise such powers in a party's favour and by what means, a judge must be guided by the well-established principle that both parties to an action are entitled to a fair hearing.

16. There appears to be insufficient evidence to support a claim the Judge was required to proceed on the day as it was not made out to failure to do so would result in adverse consequences sufficient to override any request made by the Secretary of State for further time. It is not disputed the evidence relating to domestic violence was not notified to either the First-tier Tribunal or Secretary of State until the appeal bundle was served and it is not disputed that the HOPO raised justifiable concerns at the commencement of the hearing that a new issue had been raised at the appeal which had not been before the Secretary of State and that further time was required to consider this material. It also appears this matter was allocated to the Float List meaning that the first time any Presenting Officer may have seen it would have been when the case was allocated to a particular judges list.
17. The Judge in the decision under challenge fails to deal with what was clearly a request for an adjournment, even if not put in a form that Mr Lewis may view as being a 'formal application', and fails to give any satisfactory explanation for why the matter could not have been put back to another date to allow the Secretary State to consider the new material. The HOPO was effectively ambushed by the new material and was arguably denied the right to a fair hearing in relation to both the provision of adequate time to enable proper consideration of that evidence and to consider how that material should be approached in relation to both the previous refusal and any new issues that may arise. Adequate preparation is also key to proper cross examination. The new evidence included a seven-page statement, psychiatric report, further documents, and oral evidence given on that topic.
18. The finding of a procedural irregularity sufficient to amount to material error of law is determinative of the outcome as procedural unfairness in this case undermines the reliability of the impugned decision.
19. The second ground asserts a failure to undertake a proper proportionality assessment with reference to section 117B. A reading of the decision under challenge suggests there is arguable merit in this assertion. A properly conducted proportionality decision will set out both parties cases and explain how the conflicting competing elements stand against each other in arriving at the outcome of the proportionality exercise. This does not appear to have occurred.
20. In light of the procedure regularity the decision is set aside. There shall be no preserved findings. The appeal shall be remitted to a differently constituted First-tier Tribunal sitting at Taylor House to be heard afresh by a different judge appointed by the Resident Judge of that hearing centre.

## **Decision**

21. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remit the appeal to a differently constituted First-tier Tribunal sitting at Taylor**

**House to be heard afresh by a different judge appointed by the Resident Judge of that hearing centre.**

Anonymity.

22. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....  
Upper Tribunal Judge Hanson

Dated the 14 September 2017