



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/00116/2021**

**Appeal Number:
[UI-2021-001119]**

THE IMMIGRATION ACTS

**Heard at Field House
On 28 February 2022**

**Decision & Reasons
Promulgated
On the 25 April 2022**

Before

**UPPER TRIBUNAL JUDGE SHERIDAN
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**NASIR JAVED MALICK
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation

For the Appellant: Mr Lam, Khans Solicitors

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Respondent, to whom we shall refer as the Claimant, is a national of Pakistan, born on 25 October 1953. On 2 September 2020, he made an application for entry clearance to the United Kingdom on the basis of family life with his son. In a decision dated 7 December 2020, this

application was refused by Sheffield Visa Centre with reference to E-ECDR 2.2.; E-ECDR 2.5 and E-ECP 3.1. of Appendix FM of the Immigration Rules.

2. The Claimant appealed and his appeal came before First tier Tribunal Judge Lucas for hearing on 24 August 2021. In a decision and reasons promulgated on 8 September 2021, the Judge allowed the appeal, finding at [25] that the combined effect of the third party support of the eldest son and the investment portfolio of the spouse is sufficient to satisfy the relevant financial rules under the partner route of the Rules and at [26] that there were exceptional reasons in that it is obvious that the Appellant has a subsisting and extensive relationship with his wife and UK based family who are better placed to provide the physical and emotional support he needs.

3. The SSHD sought permission to appeal against this decision on the basis that:

(i) the Judge erred in their consideration of GEN 3.1 and submitted that exceptional circumstances which would result in unjustifiably harsh consequences do not exist. The Judge failed to consider that the refusal letter states that the son cannot afford to pay for a residential home or a carer and failed to reconcile this with the financial evidence in respect of which the Judge allowed the appeal under 21A(2); and

(ii) the Judge materially erred when deciding to hear the appeal substantively without the Presenting Officer, who whilst she had not received the Appellant's bundle, stated that she was happy to read the bundle and present the appeal. This is a material error as the appeal was allowed on claimed exceptional circumstances and finances which were not subject to cross examination and therefore the fairness of the appeal was affected.

4. Permission to appeal was granted by First tier Tribunal Judge Mills in a decision dated 1 December 2021 on the basis that whilst he found that ground one *"strikes me as being largely a simple disagreement with the Judge's findings"* ... *"I consider that the second ground, which asserts that there has been procedural unfairness in that the Judge proceeded with the appeal in the absence of the presenting officer, without the respondent consenting to the same, does have merit."*

Hearing

5. At the hearing before the Upper Tribunal, Ms Everett submitted that whilst she does not know from the minute drafted by the Presenting Officer after the hearing whether or not there was a discussion with the Judge, she seems to have been excluded from the hearing. Ms Everett clarified that it is not recorded why,

although the Appellant's bundle and skeleton argument were uploaded on 2 March, the Presenting Officer Ms Mackenzie did not see them, nor why the Judge did not give her time to read and consider that evidence.

6. Ms Everett submitted, in relation to the first ground of appeal, that the Judge does not refer to the test as to whether or not there would be unjustifiably harsh consequences for the Appellant. With regard to third party support and the Sponsor's P60 and payslips, Ms Everett accepted that the SSHD had not challenged the Judge's acceptance of that evidence. However, Ms Everett submitted that the evidence regarding the inability to afford to pay for residential care in Pakistan and the evidence of the third party support in the form of the Sponsor's income was something that the Judge needed to have resolved.

7. In his submissions, Mr Lam sought to rely on the rule 24 response. He submitted that the Judge referred to page 2 at AB 178 where at [5] he highlighted that the Claimant has diabetes, hypertension and is living in solitary confinement. At [22] the Judge's finding was that the witnesses were all credible and at [24]-[25] he referred to third party support and at [26] exceptional circumstances and addressed this. When there is a lot of evidence Mr Lam submitted that it is unrealistic to expect the Judge to go back and address it all. The Judge decided that there are exceptional compassionate circumstances which was a finding open to the Judge to make. In this particular case, it was not obvious there was any error that the Judge had made. The SSHD's grounds go to the fairness rather than the substance of the failure. It would not make any material difference to the outcome, which was not about credibility but proved by documentary evidence eg from the doctor that the Claimant is suffering from depression and has been living away from his loved ones for 20 years. As far as third party support is concerned, Mr Lam submitted that it was open to the Judge to look at this, given that there was not just verbal but documentary evidence to confirm that the eldest son was earning in excess of £100k a year and the Claimant's wife had a property portfolio of over £100k and that in a human rights appeal the judge was entitled to consider all the documents before him. Mr Lam submitted that, even if the Home Office Presenting Officer had been able to cross examine the Sponsor, the financial situation was confirmed by the documents and the doctor's letter. Thus, even if there was an error, he submitted that it was not material.

8. In response to a question from the Upper Tribunal concerning the cost of care in Pakistan, Mr Lam submitted that this was not mutually exclusive. He submitted that the care costs in Pakistan were unknown and could be significantly higher than in the UK. The Judge had evidence that the Claimant's son was earning in excess of £99,000 pa and that he was not sure how far evidence as to care costs would take matters. As to procedural unfairness, Mr Lam submitted that the SSHD is not disputing that they received the papers in March and the notice of hearing in July and were effectively asking for a second bite of the cherry as they had the

opportunity to consider the evidence in advance of the hearing before the First tier Tribunal.

9. In reply, Ms Everett read out extracts from the minute drafted by the Presenting Officer, Ms Mackenzie, at the hearing before the First tier Tribunal and served copies upon Mr Lam and the Upper Tribunal. She submitted that it was clear from the minute that the appeal proceeded without representation on behalf of the SSHD and without the agreement of the Presenting Officer to that course of action. Given that she had been excluded from participating in the hearing this was a material error, regardless of whether or not she might have chosen not to cross examine the witnesses.

10. Both parties agreed that, were we to find that the First tier Tribunal Judge made a material error of law that the appeal would require re-hearing. We reserved our decision which we now give with our reasons.

Decision and reasons

11. We have concluded that the First tier Tribunal Judge materially erred in law in proceeding with the Claimant's appeal in the absence of a Presenting Officer, given that from her minute of the proceedings, she indicated that she wished to participate in the hearing if she could be given time to read the Appellant's bundle.

12. Whilst we entirely accept that it would have been frustrating for the Judge and for the Claimant that the Presenting Officer had not had sight of the Claimant's bundle before the start of the hearing, this does not justify the procedural unfairness underlying the Judge's decision to proceed with the appeal in her absence. It would have been a different matter had the Presenting Officer indicated that she was content for the appeal to proceed in her absence, but in this particular case she clearly took the view, presumably based on the terms of the refusal decision, that there would be questions that she would wish to put to the witnesses and she told the Judge that she wished to participate on behalf of the SSHD.

13. It is also entirely unclear to us and Ms Everett was unable to shed any light upon the question as to why the Presenting Officer had not accessed the Claimant's bundle prior to the hearing, given that it had been uploaded to the online system on 2 March 2021 and the hearing was on 24 August 2021. Given that there is no longer reliance on documents being served by post and thus documents are accessible to all parties well in advance of the hearing date, we would not expect to see a repetition of the problem that arose in this appeal in that we would expect all parties to access and read the relevant papers in good time to provide representation at appeal hearings in the First tier Tribunal.

14. We also consider that the Judge failed to grapple with, on the one hand, the assertion in interview that the Sponsor would be unable to

afford to pay for residential care or a carer in Pakistan, which was an issue raised in the refusal decision and on the other, the Sponsor's income of £99,000 per annum. In light of this unresolved issue, whilst it may well be that the Judge was entitled to find that the Sponsor was in a financial position to be able to provide third party support, we are in agreement with the parties that a hearing *de novo* before the First tier Tribunal is required in order that the appeal can proceed in a procedurally fair manner.

Decision

15. The decision of the First tier Tribunal contains material errors of law. We set that decision aside and remit the appeal for a hearing *de novo* before the First tier Tribunal.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

14 March 2022