



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM**  
**CHAMBER**

**Case No: UI-2022-003132**  
**First-tier Tribunal No:**  
**EA/15644/2021**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 18 August 2023**

**Before**  
**UPPER TRIBUNAL JUDGE O'CALLAGHAN**

**Between**

**NASEEM AKHTAR**  
**(NO ANONYMITY ORDER MADE)**

Appellant

and

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

Respondent

**Representation:**

For the Appellant: No attendance

For the Respondent: Mr T Melvin, Senior Presenting Officer

**Heard at Field House on 28 July 2023**

**DECISION AND REASONS**

**Introduction**

1. The appellant appeals against a decision of Judge of the First-tier Tribunal Juss ('the Judge') dismissing her appeal against a decision of the respondent to refuse her application to join her sponsoring daughter-in-law under the EU Settlement Scheme. Her daughter-in-law

is a national of Lithuania and resides in the United Kingdom. The Judge's decision was sent to the parties on 3 May 2022.

2. The Judge has identified the respondent as the 'secretary of state for the home department', though the challenged decision was issued by an entry clearance officer.
3. The appellant's son, Mr Tayyeb Awan, attended the hearing on 28 July 2023.

### **Relevant Facts**

4. The appellant is a national of Pakistan - not a national of Lithuania as recorded by the Judge. On 14 June 2021, she applied under the EUSS to join her sponsor in this country. The respondent refused the application by a decision dated 28 October 2021. The appellant exercised her right of appeal to the First-tier Tribunal.
5. The hearing of the appellant's appeal was listed at the First-tier Tribunal in Birmingham on 28 April 2022. No-one attended on behalf of the appellant. The Judge noted, at [9] and [10] of his decision:
  - '9. On the day of the Hearing before me, on 29 April 2022 (sic), the Appellant was unrepresented. Nor was there any explanation provided for why there was no one here on her behalf. Ms. Edwards, the HOPO, confirmed that a NOA (sic) had been sent out on 4 March 2022 and yet there had been no reply to that.
  10. I put this appeal to the back of my List for the day. When there was no appearance I proceeded to hear it. Ms Edwards submitted that there had been no further evidence on the issues that had been raised in the RL (sic). That being so, and particularly in circumstances where there had been no appearance by anyone, she had to ask me to dismiss the appeal.'
6. I observe that 29 April 2022 was a Saturday.
7. I understand 'RL' to refer to the respondent's decision to refuse entry clearance.

8. Neither Mr Melvin nor I understood the reference to NOA. We believe it to be a reference to 'notice of appeal' and was meant to refer to the notice of hearing sent to the parties.
9. Any judge considering an appeal pursued by a litigant-in-person should properly be wary of using unexplained shorthand when referring to documents in a decision.

### **Grounds of Appeal**

10. The grounds of appeal were drafted by Mr Awan and are succinct:
  - He did not receive a copy of the notice of hearing.
  - There was an error of fact in his mother being referred to as a Lithuanian national.
11. The core of the appellant's complaint is that the Judge acted with procedural unfairness by failing to consider with the required care the exercise of discretion to proceed in the absence of her witnesses.
12. On behalf of the appellant, Mr Awan sent a screen shot of his email inbox to establish that the notice of hearing was not received on 4 April 2022.
13. It is unclear to this Tribunal as to the date the notice of hearing was sent to the appellant and her sponsor. Mr Awan's screenshot relates to 4 April 2022, whilst the Judge records the notice of hearing being sent to the respondent on 4 March 2022. In the run-up to the listed error of law hearing, the Upper Tribunal sought to secure the requisite information from the First-tier Tribunal in Birmingham but was met with silence.
14. Permission to appeal was granted by Judge of the First-tier Tribunal Boyes. By a decision dated 25 May 2022 Judge Boyes reasoned, *inter alia*:
  - '3. Although proceeding in the absence of an appellant/sponsor is not always unfair, it is arguable in this case that proceeding without making an enquires of the appellant/sponsor was unfair.'

15. The respondent filed a rule 24 response, dated 27 July 2023.

**Discussion**

16. Rule 28 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 permits the First-tier Tribunal to proceed with a hearing if a party fails to attend. However, the exercise of discretion to proceed requires the First-tier Tribunal (1) to be satisfied that the party has been notified of the hearing or that reasonable steps have have been taken to notify the party of the hearing, and (2) considers that it is in the interests of justice to proceed with the hearing.
17. It is noted that even if (1) is satisfied, consideration is still to be given to whether proceeding in the absence of a party would be a breach of natural justice.
18. There is no express consideration of the relevant rule by the Judge. Neither is there any implicit engagement with the two mandatory conditions in the Judge's decision. Such failure is a material error of law.
19. A significant error was the failure by the Judge to request that his clerk contact the sponsor to ascertain the true situation. The adoption of such approach would be an aid in considering the exercise of judicial discretion as to whether to proceed in the absence of the appellant's sponsor and son, as it may have elicited information relevant to the two mandatory conditions of rule 28. It appears that it was passively, and erroneously, considered sufficient to proceed on the basis that no-one attended on behalf of the appellant and that the respondent had received notice of hearing. However, being mindful of the overriding objective it would have been proper for enquiries to be initiated by the Judge to ensure that the appellant and sponsor were aware of the hearing, and if so to ascertain whether there were any good reasons for non-attendance.
20. The approach adopted was procedurally unfair.
21. Mr Melvin submitted that such failure was not material, as the evidence before the Judge could not establish a successful appeal on behalf of the appellant, particularly in the absence of DNA evidence.

However, I accept that the appellant was not aware of the hearing, as asserted by her son, and consequently was unaware as to the timeframe in which relevant evidence was to be secured and both filed with the First-tier Tribunal and served upon the respondent.

22. In granting permission to appeal to the Upper Tribunal, the First-tier Tribunal should properly be aware of its power to set aside a decision when it is satisfied that a party did not receive a notice of hearing.

### **Resumed Hearing**

23. As there has been procedural unfairness, the proper course is to set aside the decision of the Judge, with no findings of fact preserved, and for the matter to be remitted to the First-tier Tribunal sitting in Birmingham.
24. Whilst it is not usually appropriate for this Tribunal to make case management decisions on behalf of the First-tier Tribunal, I note the concern of Mr Melvin that the First-tier Tribunal have the correct contact details for the sponsor and her husband. In the absence of the First-tier Tribunal providing relevant information to this Tribunal, I make the following direction, which was orally conveyed to Mr Awan at the error of law hearing.
25. It is directed that:
- i) The sponsor and Mr Awan are to confirm their home address and a contact email address to the First-tier Tribunal within 14 days of receiving this decision.

### **Decision**

26. The decision of the First-tier Tribunal dated 3 May 2022 is subject to material error of law and is set aside. No findings of fact are preserved.
27. The matter is remitted to the First-tier Tribunal sitting in Birmingham, to be heard by any judge other than Judge of the First-tier Tribunal Juss.

*D O'Callaghan*  
**Judge of the Upper Tribunal**

**Case No: UI-2022-  
003132  
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Immigration and Asylum Chamber

**31 July 2023**