



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003453
First-tier Tribunal No:
EA/13163/2021

THE IMMIGRATION ACTS

Directions Issued:
On the 05 June 2023

Before

UPPER TRIBUNAL JUDGE BLUM

Between

MOHAMED YOUSSEF BEJI
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Determined at Field House on 5 June 2023

DECISION AND REASONS

1. By a decision dated 1 July 2022 Judge of the First-tier Tribunal J Handler granted the appellant permission to appeal the decision of Judge of the First-tier Tribunal I Ross, promulgated on 7 June 2022, dismissing the appellant's appeal against the decision by the respondent dated 4 August 2021 refusing the appellant's application under the European Settlement Scheme (EUSS).
2. In his decision Judge Ross stated [4] that neither the appellant nor his EEA sponsor attended the appeal hearing and that the appellant was not legally represented. Judge Ross also stated that the 'stitched' bundle before him did not contain any witness statements [supra].
3. At [5] Judge Ross stated that the only issue in the appeal was whether the requirements of the EUSS had been met. The judge noted that the marriage between the appellant and the sponsor did not take place before 30 December 2020. Judge Ross stated that insufficient evidence of a durable relationship had been provided. The appeal was dismissed.

4. The grounds of appeal contend that, contrary to Judge Ross's decision, both the appellant and his sponsor were present at the hearing, that the appellant was represented by Mr Ellis Wilford of counsel at the hearing, that both the appellant and his sponsor gave evidence, and that witness statements had been provided. The grounds essentially contend that Judge Ross determined the wrong appeal.
5. The grounds referred to the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, specifically, rule 31 ('slip rule') and rule 32 (giving the First-tier Tribunal the power to set aside a decision that disposes of proceedings if certain conditions are satisfied, one of which includes the existence of a procedural irregularity). Although Judge Handler referred to these rules when summarising the grounds of appeal, the judge did not purport to exercise the First-tier Tribunal's power under those rules. Judge Handler simply found the grounds to be arguable.
6. In a Rule 24 response dated 22 August 2022 Mr Whitwell, Senior Presenting Officer, indicated that the respondent was "unfortunately not currently in a position to assist." This was because there was no Presenting Officer at the First-tier Tribunal hearing, no results were gleaned from a search of CCD, and the respondent did not have access to any CVP recording. Mr Whitwell did however state:
 1. However, whilst the Respondent has no reason to doubt the Appellant's narrative, as it currently stands it is noted there is no evidence save for the contents of the IAF-4 which appears to acknowledge the shortfall in stating "... *but we can draft a witness statement confirming that Mr Ellis Wilford was present and the Appellants were present*".
 2. Accordingly, the Respondent would adopt the position taken by FtTJ Handler in granting permission to appeal (who appears to have declined to use the powers under Rules 31 and 32 of the Tribunal Procedure (First-tier Tribunal) Procedure Rules 2014) in that *if* the Appellant's narrative is correct, then clearly the Appellant has suffered from a procedural irregularity and the Respondent would not oppose such an application and invite the Tribunal to remit the matter *de novo* to the FtT(IAC) for consideration.
 3. It may be that on reviewing the evidence on the IAC file and/or recording on the CVP platform will shed led on the Appellant's grounds, so much so that the UT(IAC) is satisfied that a material error of law has occurred and obviating the need for an oral hearing.
7. In email correspondence addressed to the Principal Resident Judge of the Upper Tribunal dated 18 January 2023 the appellant's legal representatives (BMAP Law) asserted that the content of Judge Ross's determination, as described above, was inaccurate, that they expected the determination of Judge Ross to have been set aside by the First-tier Tribunal, and that the matter should now proceed with all due expedition. Attached was an attendance note from Mr Wilford dated 28 November 2022 confirming his attendance at the hearing, and that he emailed his skeleton argument to Judge Ross on the morning of the hearing. The email correspondence from BMAP Law was unfortunately only forwarded to me on 10 March 2023.
8. I listened to a recording of the CVP recording of the hearing before Judge Ross at Taylor House on 6 April 2022, in respect of EA/13163/2021 (Mohamed Youssef Beji).
9. On the audio file it is unmistakably clear that:

- (i) Mr Wilford was representing the appellant at the hearing (11:39);
- (ii) Judge Ross referred to Mr Wilford by name (13:17);
- (iii) Mr Wilford confirmed the correct First-tier Tribunal case reference number (13:35);
- (iv) Mr Wilford confirmed he was instructed by BMAP law (14:25);
- (v) Judge Ross confirmed that the appellant and his sponsor (wife) were present (15:20);
- (vi) Judge Ross made reference to the appellant adopting his statement (18:30);
- (vii) Mr Wilford confirmed that the appellant signed his witness statement which was dated 4 March 2022.

10. In light of the above it was my preliminary view that Judge Ross either mixed up the appeals that were before him or made fundamental mistakes as to the nature of the evidence before him. Either way, it was my preliminary view that Judge Ross's decision was vitiated by a material error of law, specifically, a serious procedural error manifested in the mistaken belief that the appellant and his sponsor and his counsel were not present, that there was no oral evidence or witness statements, and by a failure to take account of counsel's skeleton argument. It was also my preliminary view that this procedural error was of such a significant nature that the only recourse would be to remit the case back to the First-tier Tribunal.

11. With this in mind I issued the following directions on 15 March 2023:

- 1. No later than 10 days after these directions are sent the parties must inform the Upper Tribunal whether they object to the appeal being determined without a hearing pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 on the basis that an error of law has been identified and the matter is remitted back to the First-tier Tribunal for a de novo hearing before a different judge.**
- 2. If the Upper Tribunal does not receive any correspondence from the parties pursuant to (1) it will proceed on the basis that neither party objects to the appeal being determined pursuant to rule 34 on the basis set out above.**

12. This appeal was to be returned to me to review. Unfortunately the file was not returned to me to review. More significantly, the directions were sent to the appellant's solicitors using the wrong case reference (although the Upper Tribunal maintains that it was sent to the correct email address).

13. On 17 March 2023 the Upper Tribunal received the following response from Sian Rushforth, Senior Presenting Officer.

Having had sight of the directions of Principal Resident Judge of the Upper Tribunal Blum dated 15/3/23, I confirm on behalf of the SSHD that in view of that which is confirmed in paragraph 9-11 of the directions, the respondent has no objection to the appeal being determined without a hearing pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the matter being remitted to the FTT for a de novo hearing

14. On 26 May 2023 I was made aware that the directions I issued contained the incorrect solicitor's reference and that no formal response had been received

from the appellant's representatives. Given that the Upper Tribunal used the incorrect solicitors' reference (although sent to the correct email address), and out of an abundance of caution, the Upper Tribunal resent the direction to BMAP law with instruction that they were to provide any response by 31 May 2023.

15. The directions were re-sent to the appellant's representatives on Friday 26 May 2023. The covering email by which the directions were sent indicated that the appellant's representatives had until 5pm on 31 May 2023 to file any objection to the matter being remitted to the First-tier Tribunal for a de novo hearing pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No written response had been received from the appellant's representatives when a search was conducted on 1 June 2023, and then again on 5 June 2023.
16. I am satisfied that both parties have been given an opportunity to give their views on whether an 'error of law' hearing is necessary, and I have had regard to the views expressed by the respondent, and the absence of any written view from the appellant's representatives.
17. I am satisfied, for the reasons given above at [10], that the First-tier Tribunal decision is vitiated by a material legal error. I am further satisfied that the interests of justice require the appeal to be remitted to the First-tier Tribunal to be determined afresh before a judge other than Judge of the First-tier Tribunal Ross.

Notice of Decision

The appeal is allowed on the basis that the First-tier Tribunal's decision contains a material error of law; the matter is remitted back to the First-tier Tribunal before a judge other than Judge of the First-tier Tribunal Ross

D. Blum

Judge of the Upper Tribunal
Immigration and Asylum Chamber

5 June 2023