



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004465

First-tier Tribunal No: EA/04343/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 1st May 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

SVETLANA MILOKHINA
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms. M. Suri, Legal Representative

For the Respondent: Mr. T. Lindsay, Senior Home Office Presenting Officer

Heard at Field House on 16 April 2024

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of First-tier Tribunal Judge Brannan (the “judge”), promulgated on 24 July 2023, in which he dismissed the appellant’s appeal against the respondent’s decision to refuse her application under the EU Settlement Scheme.
2. Permission to appeal was granted by First-tier Tribunal Judge Chowdhury in a decision dated 27 September 2023 as follows:
 - “2. The appeal concerns the refusal of an application under the Settlement Scheme as the extended family member of an EEA national who was in a durable relationship with her EEA Sponsor. The Appellant claims in the Grounds of Appeal that she submitted substantial bundles of evidence including a skeleton argument. However, the substantive hearing scheduled for 22nd May 2023 was adjourned as the Presenting Officer did not have sufficient time to consider the material. The Appellant claims no written directions were provided by the judge following the adjournment hearing.

3. The Appellant and her legal representatives claim they were not notified of any CMR hearing which took place on 7th July 2023. In the judge's decision promulgated on 24th July 2023 the judge notes the 'disengagement of the Appellant', however it was unclear to the Judge what had occurred during the hearing of 22nd May 2023. The Judge without notice converted the CMR into a substantive hearing. The judge went on to dismiss the appeal. The Appellant submits she was engaged with her appeal and ready to proceed. The Appellant submits she had provided seventeen years' worth of evidence of her durable relationship with her EEA Sponsor. She submits the judge had overlooked the evidence submitted.
4. I have had regard to the email correspondence by the Appellant's representative to the HOPO enclosing bundles 21 May 2023. It is arguable that there was a procedural irregularity and it is for these reasons I grant permission to appeal".

The hearing

3. At the hearing I stated that I agreed that the grounds were made out and that the decision involved the making of a material error of law on the grounds of procedural irregularity. I set the decision aside and remitted it to the First-tier Tribunal to be re-made.

Error of Law

4. The grounds state at [10]:

"The Appellant was ready to proceed to a substantive hearing on the 22 May 2023 as records of proceedings will show, but agreed with the Presenting Officer's request to have hearing adjourned so that the documents he received could be perused and a second decision issued. The Appellant was engaged with her appeal and present at the hearing, ready to proceed. To state that the Appellant was disengaged with her appeal is speculation and disrespectful as she agreed to the appeal being adjourned that day to provide the Respondent opportunity to view the documents and as the IJ himself stated, he was unclear about what had happened during that appeal. This constitutes the first error of law."

5. The judge states in his decision at [4]:

"It is unclear what happened at the hearing on 22 May 2023 but it is clear that the matter was not decided substantively. On 2 June 2023 the Tribunal gave notice of a case management review hearing to take place on 7 July 2023. With this it gave directions that the Appellant was to have filed and served her bundle on 'today 22 May 2023'. I take from this wording that the direction was given orally at the hearing on 22 May 2023."

6. I find that the judge converted the CMR into a substantive hearing without knowing what had happened at the hearing on 22 May 2023. He states that it is "unclear" what happened on this date. He does not appear to have made any enquiries. He then states at [8(c)] that the appellant had disengaged with her appeal. To make this finding having accepted that he did not know what had happened on 22 May 2023 is unfair to the appellant, especially as the reason why the substantive appeal did not take place on 22 May 2023 was due to the respondent needing more time to consider the evidence provided by the appellant. The finding that she had disengaged with the appeal is incorrect. I find that the judge should have made enquiries as to what had occurred at the earlier hearing before making this finding.

7. As set out in the grounds of appeal, and as corroborated by the email evidence provided, the appellant had sent to Counsel who represented the respondent on 22 May 2023 a bundle of evidence and a skeleton argument. The emails show that the bundles were additionally sent to the respondent on 21 May 2023, prior to the hearing on 22 May 2023. It is clear that the appellant had engaged with her appeal.
8. Mr. Lindsay submitted that he had not seen the bundles as they had been sent directly to Counsel who was representing the respondent on 22 May 2023. The emails provided with the grounds of appeal show that they were sent directly to Counsel. However, the appellant had also sent them to the respondent on the day prior to the hearing on 21 May 2023.
9. The appellant states that she did not receive notice of the CMR, which she did not attend. However, irrespective of the failure of the appellant to attend the CMR hearing, to convert it to a substantive hearing without being aware of what had happened on 22 May 2023 is a procedural irregularity, which has caused unfairness to the appellant who has been deprived of an opportunity to present her case.
10. I find that the decision involves the making of a material error of law. In considering whether this appeal should be retained in the Upper Tribunal or remitted to the First-tier Tribunal to be remade I have taken into account the case of Begum [2023] UKUT 46 (IAC). At headnote (1) and (2) it states:

“(1) The effect of Part 3 of the Practice Direction and paragraph 7 of the Practice Statement is that where, following the grant of permission to appeal, the Upper Tribunal concludes that there has been an error of law then the general principle is that the case will be retained within the Upper Tribunal for the remaking of the decision.

(2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal.”
11. I have carefully considered the exceptions in 7(2)(a) and 7(2)(b). The appellant has been deprived of a fair hearing. In these circumstances, it is appropriate to remit this appeal to be reheard in the First-tier Tribunal.

Decision

12. The decision involves the making of a material error of law. I set the decision aside.
13. The appeal is remitted to the First-tier Tribunal to be remade.
14. The appeal is not to be listed before Judge Brannan.

Directions

1. The appellant’s representatives are to provide copies of all the documents on which they intend to rely to the respondent and to the Tribunal within 14 days of receipt of this decision.

Kate Chamberlain

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
24 April 2024