IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000106
First-tier Tribunal No: EA/01680/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 14 June 2024

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

OMOWALE FADAINI
(no anonymity order requested or made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr H Anyiam of counsel, instructed by Finsbury Law, Solicitors
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

Heard at Field House, London on 26 February 2024

DECISION AND REASONS

1. The appellant appealed to the FtT against refusal of her application for settled or pre-settled status under appendix EU of the immigration rules (the "EUSS"). Judge Moffat heard her appeal via "CVP" on 13 September 2023, and dismissed it by a decision promulgated on 24 November 2023.

2. The appellant sought permission to appeal to the UT on 4 grounds - in summary, as follows:

    (1) procedural irregularity arising from remote hearing – hearing marred by technical glitches, computer illiteracy of appellant, who has

minimal education and whose first language is not English; judge's misapprehension that appellant was being prompted;

(2) decision not supported by the evidence – misapprehension that the appellant said she has worked in the UK since 2008, when the evidence from her and from her sponsor was that she worked only since permitted to do so in 2021; misapprehension that the appellant's cousin "Barney" worked at Finsbury Law, when his name is "Benson";

(3) failure to note that the appellant met the definition of a family member in article 10 (e) and (f) of the Withdrawal Agreement; and

(4) speculation at [40] in stating there was no evidence that the appellant's residence permit granted in 2021 was based on dependency on the sponsor.

3. On 20 December 2023, FtT Judge Austin granted permission:

> 3. The first and second grounds rely on procedural irregularities said to have arisen because of a misinterpretation of the appellant's demeanour when giving evidence or as to the evidence which was given by the appellant and, it is suggested, misinterpreted against the appellant's interests.
>
> 4. The issues which arose appear to have been relied on in reaching factual findings, and the appellant appears not to have had the opportunity to address the concerns which arose as a result of what are said to have been difficulties with the link and misheard answers. In the circumstances it is arguable that one or both matters may have infected the decision reached and that a different conclusion may have been reached. On that basis the application is granted.

4. The UT issued its standard directions, and these additional directions:

> Both parties are, no later than 7 days prior to the error of law hearing to file at the Tribunal and serve on the other parties copies of their respective record of proceedings before the First-tier Tribunal.

5. The SSHD responded to the grounds on 25 January 2024, submitting that there was no procedural irregularity, and no error in the decision on any point of law.

6. The appellant provided a bundle in compliance with standard directions, but no copy record of proceedings.

7. The SSHD filed a letter dated 21 February 2024, explaining that the only record on that side is a post-hearing minute prepared by the presenting officer, a copy of which is attached. This is a brief note of submissions. It casts no light on the allegations about procedure.

8. The appellant's solicitors filed a letter dated 23 February 2024, with an email attached from the solicitor-advocate who represented the appellant,

stating that she is unable to retrieve her attendance note due to computer damage.

9. Mr Anyiam provided a helpful skeleton argument, advancing in particular grounds 1 and 2, which he further developed in oral submissions. He accepted that allegations of procedural irregularity in grounds of appeal are not self-proving, and that more might have been done to set these up – for example, by statements. However, he contended that it was clear enough from the information available that something had gone wrong; the conclusions reached did not reflect the state of the evidence; and fairness required a fresh hearing.

10. Mr Deller observed that the appellant might have been expected to do more to make her case, including a request for access to the recording of the hearing. However, he noted that the grant of permission was not restricted to procedural irregularity. He accepted that the decision appeared to be based on matters which were not well grounded in the evidence. He suggested that both sides had failed to assist the tribunal by exploring the nature of the application which had been outstanding for 13 years, why it was so long delayed, the basis of its eventual success, and the light that might shed on the relationship between appellant and sponsor. The residence card must have been issued for a reason, which might well bear on eligibility.

11. Having heard the submissions, I indicated that the decision would be set aside.

12. The appellant has not done as much as she might have to establish procedural irregularity, as touched upon in submissions for both sides. (The fault is not attributable to Mr Anyiam, who was instructed only shortly before the hearing.) The mishearing of “Benson” as “Barney” was said to be indicative of general misunderstanding, but I cannot see that as more than a slight mishearing, of no wider significance. On the other hand, the decision at [11] and at [21] hints at impropriety in presenting the case by the appellant and the sponsor; but under the later heading of “findings” it does not resolve those points. The appellant was not put on notice to answer them. The decision gives the impression that they played a considerable part in deciding against her.

13. The Judge records at [13] and [28] that the appellant accepted in oral evidence that she has been working since 2008, contradicting her written and supporting evidence. That was crucial to the adverse credibility finding at [41].

14. Despite the shortcomings in presenting the appellant’s case, both in the FtT and in the UT, I find that grounds 1 and 2 cross the threshold of showing that the judge (i) went wrong, procedurally, by not putting the appellant on notice, and (ii) fell into a misunderstanding of the evidence.

15. Ground 3 is only a vague expression of disagreement.

16. Ground 4 is not well framed. Rather than “speculation”, it discloses the poor state of the evidence, through shortcomings on both sides. The Judge was left in the dark when parties should have provided clarity on the immigration history and on what underlay the grant of the residence card. However, Mr Deller accepted that this ground contributes to the overall impression of a case which strayed off the rails and needs to be revisited.

17. It is to be hoped that parties will provide better focused assistance next time around. The materials missing from the evidence are within the knowledge of both sides. They both have a duty to present them.

18. It was not clear why the hearing took place remotely. Remote hearings often have their difficulties, which was contributed to matters going wrong. The next hearing should be face-to-face.

19. The decision of the FtT is set aside. The case is remitted for a fresh hearing before another Judge.

Hugh Macleman

Judge of the Upper Tribunal
Immigration and Asylum Chamber
29 February 2024