



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: HU/23416/2018

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre

Decision Promulgated

On 10 July 2019

On 17 July 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

M J

(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Mottershaw Counsel instructed by Dickson Solicitors

For the Respondent: Mr Tan Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.
2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Dearden promulgated on 11 February 2019 which dismissed the Appellant's appeal against a refusal of a human rights claim on all grounds.
3. It is not in dispute that the Appellant applied for leave to remain as a spouse which was refused under Appendix FM on the basis that she did not have the necessary language certificate. The refusal letter considered EX.1 but while noting that the Sponsor was in receipt of DLA found that there were no insurmountable obstacles to family life continuing in China.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Dearden ("the Judge") dismissed the appeal against the Respondent's decision. The Judge noted that this was an appeal under a new system whereby all the papers were sent to the Judge electronically. However the Judge notes at paragraph 4 that he did not receive a copy of the grounds of appeal only the notice of appeal or any other documents for either the Appellant or the Respondent other than the refusal letter. He found against the Appellant on the challenges raised in the refusal letter.
5. Grounds of appeal were lodged arguing procedural unfairness and permission was granted by Upper Tribunal Judge Canavan on 30 May 2019.

Discussion

6. Mr Tan conceded that there was procedural unfairness in proceeding when the Judge was aware he was not in possession of the relevant papers. It was material because even if she had still not obtained the language certificate the

grounds of appeal had made reference to the fact that the Sponsor was profoundly deaf and this was clearly relevant to EX.1.

Finding on Material Error

7. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law.
8. The Judge was aware that he had no papers other than the refusal letter. He should have been aware that the Procedural Rules required the Appellant to lodge Grounds of Appeal as well as a Notice of Appeal and therefore there were papers that existed that were not before him. I am satisfied that he should have made additional enquiries to obtain those papers. Those papers revealed two issues that could have been material to the outcome of the case both by reference to EX.1 and Article 8: the Appellant's partner was profoundly deaf which could have made a difference to the assessment under EX.1 and the Respondent was in possession of the Appellants passport and therefore while she was subsequently unable to take the test required for the visa application prior to the appeal date she was actually enrolled on a language course at a higher level.
9. The failure of the First-tier Tribunal to address and determine these issues constitutes a clear error of law. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply.
10. I therefore found that errors of law have been established and that the Judge's determination cannot stand and must be set aside in its entirety. All matters to be re-determined afresh.
11. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that '*the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal.*'

12. In this case I have determined that the case should be remitted because the Appellant did not have a fair hearing due to procedural unfairness. In this case none of the findings of fact are to stand and the matter will be a complete re hearing.
13. I consequently remit the matter back to the First-tier Tribunal sitting at Manchester to be heard on a date to be fixed before me. I noted that Mr Tan gave the Appellant her passport back. I indicated if she took the approved test before the date of the resumed hearing it may well be that the Respondent will withdraw the decision.

Signed

Date 12.7.2019

Deputy Upper Tribunal Judge Birrell