Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04531/2019 (P)

THE IMMIGRATION ACTS

Decided Under Rule 34	**Decision & Reasons Promulgated**
On 4 September 2020	**On 9 September 2020**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

ANDON QERKEZI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION

1. The appellant ,a citizen of Albania, appeals with permission from the decision of the First tier (Judge Stedman) dismissing his appeal against the respondent's decision to refuse to issue him with a residence card as confirmation of a right of residence as the unmarried partner of the sponsor.

2. The grounds of appeal submitted that there was procedural unfairness on the part of the FtTJ who had heard the appeal in the appellant's absence. It was stated that the appellant had not attended the hearing because he had not received notice of the hearing nor did his legal representatives. Thus, he should be given the opportunity to present his case as he would have attended the hearing of his appeal.

3. Permission was granted by the FtT (Judge Grant-Hutchinson) on the 5 May 2020. The FtTJ considered that it was arguable the decision of the FtTJ disclosed the making of an error on a point of law based on the procedural irregularity set out in the grounds.

4. In the light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules[1], directions were sent out to the parties that the Upper Tribunal's provisional view was that it would be appropriate to determine the following questions without a hearing:

   (a) whether the making of the First-tier Tribunal's decision involved the making of an error of law, and, if so

   (b) whether that decision should be set aside.

5. That decision also set out directions. It was sent out the parties by way of email.

6. In compliance with those directions, submissions were provided on behalf of the appellant by email on the 2 July 2020. In those short submissions, it was stated that the appellant could not present his case because he did not receive the notice of hearing. The submissions state that his circumstances had changed between the Home Office decision to refuse his application and the appeal hearing date and with new circumstances his appeal would most likely have been successful. It was submitted also that he had everything to gain by attending the hearing in January 2020 and there was no incentive for not attending but for the fact that he did not receive the hearing notice nor did his legal representatives. The submissions make reference to a sworn affidavit from the legal representatives concerned in which it is stated that the hearing went ahead without the appellant and without his legal representatives and that they had not received the hearing notice. The affidavit set out the post procedures at paragraphs 8 – 10 and that there would be no reason why any letter delivered, if it had been, would go missing.

7. The submissions stated that they requested a hearing as the appellant was not able to present his case because he did not receive the notice of hearing, and that without the benefit of a new hearing, the appellant would continue to suffer the consequences of the appeal hearing he missed and lost, he had everything to gain by attending the hearing and had no incentive for not attending. It is also said that his circumstances had changed between the decision to refuse his application and the appeal hearing date in January and that with the new circumstances his appeal would most likely have been successful. It is now said that his partner has become his wife post the Home Office decision. There is also reference to a new application submitted on the 16 January 2020

[1] The overriding objective is to enable the Upper Tribunal to deal with cases fairly and justly: rule 2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008; see also rule 2(2) to (4).

and resubmitted on 13 March 2020 with no decision received at the present time.

8. There has also been a response from the respondent dated 6 July 2020 which indicated that she accepted that the decision of the FtTJ contained material errors of law and therefore did not oppose the application for permission to appeal and invited the Upper Tribunal to determine the appeal by setting aside the decision of the First-tier Tribunal (Judge Stedman).

9. In those submissions, the respondent sets out that on the face of the decision the judge appeared to confirm that the notice was not sent to the appellant but only to the representatives but that the decision also suggested that no enquiries were made by the tribunal itself about the absence of the parties. At paragraph 5 of the submissions, it is stated that on the basis that this is an accurate summary of the circumstances relating to the service of the hearing notice and the extent to which the tribunal made enquiries, the Secretary of State accepts that there was procedural unfairness. The submissions further go on to say at paragraph 6 that it would normally be the case that the appellant will be served with a notice of their own hearing but that does not appear to have happened in this case and that even if the situation stemmed from a failing on the appellant's part, the Secretary of State accepted that the tribunal should have attempted to make contact with the appellant's representatives or the appellant in order to establish the reason for absence. On the basis that the decision records that no enquiries were made, the Secretary of State accepted that the disposal of the hearing was unfair, and on that basis should be set aside.

10. As to the assertion made in the further submissions that the appellant is now a family member through marriage, the Secretary of State was not able to make further submissions on this because it had not been evidenced nor was it relevant to the reason why the Tribunal had erred in law in January 2020.

11. The respondent therefore sets out that the decision should be set aside in its entirety and the matter reheard substantively in the FtT.

12. There has been no further correspondence from the appellant or his legal representatives since those submissions were filed and there has been no reply to the submissions filed on behalf of the respondent as summarised above.

13. Having had full regard to the Pilot Practice Direction: Contingency arrangements in the First -Tier Tribunal and Upper Tribunal, the Presidential Guidance Note No 1 2020 and all documents submitted by the parties, including the representations made to the Upper Tribunal for the application for permission to appeal and the parties respective submissions I have reached the decision on this appeal should be made without a hearing.

14. The Overriding Objective is contained in the Upper Tribunal Procedure Rules. Rule 2(2) explains that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues.

15. Rule 2(4) puts a duty on the parties to help the Upper Tribunal to further the overriding objective; and to cooperate with the Upper Tribunal generally.

16. Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008 provides:

> '34.-"
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> (1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
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> (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing.
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> (3) In immigration judicial review proceedings, the Upper Tribunal must hold a hearing before making a decision which disposes of proceedings.
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> (4) Paragraph (3) does not affect the power of the Upper Tribunal to-"
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> (a) strike out a party's case, pursuant to rule 8(1)(b) or 8(2);
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> (b) consent to withdrawal, pursuant to rule 17;
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> (c) determine an application for permission to bring judicial review proceedings, pursuant to rule 30; or
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> (d) make a consent order disposing of proceedings, pursuant to rule 39, without a hearing.'

17. In the preceding paragraphs I have set out the submissions advanced on behalf of the appellant in the original application for permission to appeal. No issues have been raised other than those addressed in the written submissions. In my judgment and in the light of the issues set out in the respondent's written submissions which have been resolved in favour of the appellant there is no complexity which necessitates an oral hearing to ensure fairness and that the decision is one which can properly and fairly be made on the papers taking into account the overriding objective as set out in the Tribunal Procedure Rules which includes the issue of delay. I therefore consider in light of all the available material that it is appropriate in all the circumstances of this case to exercise my to determine the issue of whether the Judge has made an error of law material to the decision to dismiss the appeal on

the papers. I find this is in accordance with the overriding objectives. It has not been made out it will deny any party the opportunity to have this matter considered in a fair and just manner at this stage.

18. In a reply from the respondent dated 6 July 2020, it has now been conceded by the respondent that the decision of the FtTJ involved the making of a material error of law and should be set aside.

19. Having considered the papers and in the light of the submissions of the parties and the submissions made on behalf of the respondent in which it is conceded that the decision of Judge Stedman involve the making of a material error of law, I am satisfied that the decision should be set aside. The FtTJ made reference to the appellant's failure to attend the hearing at paragraphs 5 and 6. He recorded that neither the appellant, his partner or legal representative attended on his behalf and that the file indicated that notification of the hearing had been sent to the appellant's solicitors who had been instructed from at least 24 August 2019, having completed the appeal forms and had submitted documents. At paragraph 6, the judge also recorded that he had received no information from the appellant's solicitors or from the appellant and therefore reached the conclusion that the appellant had decided not to attend and support his appeal.

20. The file does indicate that a notice of hearing was sent to the appellant's solicitors on 20 September 2019. It also appears to state that the hearing notice was sent to the appellant on the same date. I have considered the sworn affidavit of the legal representatives and the principal solicitor of that firm and the evidence contained at paragraphs 8 – 10 which describes the location of the office and that all letters are opened either by him or his assistant in his presence and thus there was no reason why any letter that had been delivered would ever go missing. It is also stated that there were good reasons for the appellant to attend his hearing. In the light of that evidence and taken together with the point made in the respondent's grounds that the tribunal did not take any steps to contact the appellant or the appellant's legal representatives to confirm the position, I consider that not all steps were taken to ascertain why the appellant and his legal representatives had not attended the hearing. Consequently, it had been procedurally unfair to determine the appeal in the absence of the appellant in the circumstances set out above. I therefore set aside the decision of the FtTJ.

21. As to the remaking of the appeal I have taken into consideration the basis upon which the decision has been set aside. The whole basis of the grounds of appeal relate to a procedural unfairness having occurred whereby the First-tier Tribunal determined the appeal in the absence of the appellant.

22. I have therefore considered whether the appeal should be remitted to the FtT for a further hearing. In reaching that decision I have given

careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

> "[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
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> (a) 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; or
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> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

23. Having considered the practice statement in the light of the grounds and the reasons for setting aside the decision, in my judgement the appeal falls within subparagraph (a) as the effect of the error has been to deprive the appellant of a fair hearing and for an opportunity for his case to be put in to be considered by the FtT.

24. Whilst the written submissions submitted on behalf of the appellant make reference to a change in his circumstances since the hearing in January, namely that he has now married, the decision letter of the respondent set out reasons why the Secretary of State considered the relationship between the appellant and the sponsor was one of convenience, for the sole purpose of obtaining an immigration advantage and that the relationship was not genuine and subsisting. This was based on the inconsistencies between the appellant and sponsors answers in interview. In the light of the issues raised in the decision letter and on the basis that the judge recorded that there had been no bundle of documents on behalf of the appellant, in my judgement the appeal will require a rehearing on the evidence to deal with those evidential issues and in the interests of fairness for the appellant. The appellant’s solicitors should ensure that the Tribunal is given the up-to-date address of the appellant to ensure that any further hearing is served to the correct address and upon the appellant as well as the legal representatives.

Decision:

25. Accordingly, the decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside, and the decision is remitted to the FtT for a hearing.

Upper Tribunal Judge Reeds Dated: 4 September 2020

Upper Tribunal Judge Reeds

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email