



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-004790

First-tier Tribunal No: HU/50835/2021
IA/037333/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 29 March 2023

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

RAYNA BIBI
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr M Z Uddin, Syed Shaheen & Partners
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

Heard at Field House on 14 February 2023

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Reid heard on 18 July 2022 in the absence of the appellant or a representative.
2. Permission to appeal was granted by Upper Tribunal Judge Pickup on 9 November 2022.

Anonymity

3. No anonymity direction was made previously, and there is no reason for one now.

Background

4. The appellant entered the United Kingdom on 8 July 2006 with leave to enter as a visitor. She was granted an extension of leave as a carer until 15 May 2007. A further application was refused with no right of appeal on 10 July 2007 and this decision was maintained in a decision dated 8 November 2007. The appellant remained in the United Kingdom and, on 30 January 2011, sought leave to remain as a carer. That application was refused with no right of appeal, on 11 March 2011. The appellant made an application for an EEA residence card which was refused on 18 November 2016. An application for a fee waiver was rejected on 23 January 2020.
5. On 12 May 2020, the appellant made a human rights application which was refused by way of a decision dated 1 March 2021. It is this decision which is the subject of this appeal. In short, the Secretary of State noted that the appellant was not relying on a family life, that she could not meet the requirements of paragraph 276ADE (1) of the Rules and that there were no exceptional circumstances.

The decision of the First-tier Tribunal

6. At the hearing before the First-tier Tribunal, there was no appearance by or on behalf of the appellant. The judge was informed that the notice of hearing had been issued to the appellant's representative via CCD. The judge heard submissions on behalf of the respondent and considered witness statements which were submitted by the appellant. The appeal was dismissed in a decision dated 21 July 2022.

The grounds of appeal

7. The grounds of appeal made several points including that the appellant was not aware of the hearing date, that evidence submitted had not been considered and included a request that the decision be set aside under Rules 2 and 32 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.
8. Permission to appeal was granted on the basis sought, with the judge granting permission making the following remarks.

It is at least arguable that there may have been procedural unfairness, but only if the failure to attend and to comply with the Tribunal's directions can be demonstrated to be not the fault of the appellant. However, the appellant and/or her legal representatives will be expected to explain rather more clearly the failure to attend by credible supporting documentary evidence and not by mere assertions. That the solicitor with conduct of the case had left the country and became unwell is unlikely to be accepted as fact without adequate documentary support. Neither is the submission in the lawyer's witness statement that relevant documents had been misplaced likely to persuade the Tribunal. The chronology will need careful examination. For example, it appears that it was only after being

told that the hearing had taken place that an attempt was made to upload further documentation to the portal before the decision could be promulgated.

The hearing

9. When this matter came before me, Ms Cunha confirmed that the respondent opposed the appeal. I heard submissions from both representatives. At the end of the hearing, I concluded that the First-tier Tribunal made a material error of law and remitted the matter to the First-tier Tribunal for a de novo hearing.

Decision on error of law

10. The main criticism in the grounds concerns the decision of the First-tier Tribunal to proceed with the hearing in the absence of the appellant and her representative. Those representing the appellant have taken full responsibility for the circumstances which led to the appellant not being informed of the hearing and for her additional evidence not being before the judge. By way of background, this appeal was previously listed on 14 June 2022 and was adjourned owing to the appellant's ill-health. According to the witness statement of Mr Uddin, which was filed with the notice of appeal, he sought and was granted an extension of time to comply with directions to submit a consolidated bundle on 20 June 2022. Thereafter, Mr Uddin travelled abroad to assist his elderly mother, returning on 29 June 2022. Mr Uddin was unwell following his trip abroad and, in addition, has been supporting his wife with serious medical issues, full details of which are provided in his letter. Mr Uddin accepted that the appellant provided further evidence on 11 July 2022 but that he did not submit it promptly. Ultimately, Mr Uddin discovered that the appeal had already been heard when he logged on to the MYHMCTS portal. Mr Uddin offered his unconditional apology for his failure to handle the appellant's case with 'due care.'
11. On the face of it, it was not unreasonable for the First-tier Tribunal to proceed to hear the appellant's appeal in the absence of the appellant, her representative or her further evidence given the circumstances set out above. The First-tier Tribunal judge ensured that the notice of hearing had been sent to the representatives, that attempts were made to contact the representative by telephone and the appeal was put back until the afternoon. Nonetheless, I find that appellant, through no fault of her own was, inadvertently, denied an oral hearing, principally owing to the lack of professionalism of her representatives.
12. Considering the authority of *Nwaigwe* (adjournment: fairness) [2014] UKUT 00418 (IAC), it is the case that the test is not whether the judge acted reasonably but '*Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing?*'
13. At [3], the judge sets out the reasons for proceeding with the appeal.

Taking into account there had been no application for a postponement and no messages or contacts were received by 2.15pm I decided to proceed in the absence of the Appellant under Rule 28 of the Tribunal Rules 2014, it being in the interests of justice to do so, taking into account there had been a previous adjournment on 14th June 2022

14. In this case, the appellant had paid for an oral hearing, had submitted evidence in support of her appeal and in addition, there were several procedural applications which were made by the appellant's representatives. All these factors indicated that the appellant wished to participate in her appeal. The decision to proceed with the appeal in the appellant's absence does not engage with these factors nor consider whether that decision deprived the appellant of a right to a fair hearing.
15. I have carefully considered whether the error in the Tribunal not adjourning this matter of its own accord was material given that there was some evidence before the judge relating to the appellant's circumstances and that this evidence was given detailed consideration. Mr Uddin was able to direct me to further medical evidence which cast light on the appellant's mental health, as well as her updated witness statement which addressed an issue which was central to the dismissal of the appeal, that being the whereabouts of her son. That evidence was not before the judge owing to the delay in it being uploaded to the portal, but, again, this is not the fault of the appellant, who is an elderly widow, with poor mental health and who has lived in the United Kingdom since 2006.
16. I am satisfied that there was a material misdirection in law in the approach of the First-tier Tribunal and set aside its decision, with no findings preserved.
17. In deciding whether to retain the matter for remaking in the Upper Tribunal, I was mindful of statement 7 of the Senior President's Practice Statements of 25 September 2012. Taking into consideration the nature and extent of the findings to be made as well as that the appellant has yet to have an adequate consideration of her human rights appeal at the First-tier Tribunal, I reached the conclusion that it would be unfair to deprive her of such consideration.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Taylor House, with a time estimate of 3 hours by any judge except First-tier Tribunal Judge Reid.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

15 February 2023