



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/07447/2018**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 29 January 2019

**Decision & Reasons
Promulgated**

On 7 February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

**RAIMA KERIMOVA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Vanas of Visa Inn immigration Specialist
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

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 Roopnarine-Davies promulgated on 12 December 2018, which dismissed the Appellant's appeal.

Background

3. The Appellant was born on 6 February 1988 and is a national of Turkmenistan. On 2 March 2016 the Secretary of State refused the Appellant's application for leave to remain in the UK.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Roopnarine-Davies ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 28 December 2018 Judge J Grant-Hutchison granted permission to appeal stating, inter alia

The appellant had the date of 16 November 2018 allotted to her as the date of her oral hearing. The appellant made a request in good time for the hearing to proceed on the papers but due to an administrative error the appellant had not been informed that the case was to be listed as a paper case and put before the Judge to consider on 6 November 2018. As such the appellant had not forwarded a bundle in time for the Judge to take it into account. It is arguable that had the appellant being given due notification she would have been able to lodge evidence which may have made a material difference to the outcome or the fairness of the proceedings (Naigwe (adjournment: fairness) [2014] UKUT 00418(IAC)).

The Hearing

5. Ms Cunha, for the respondent, told me that she is now satisfied that the appellant's bundle was tendered before the Judge's decision was promulgated. Because the Judge's decision takes no account of the appellant's bundle the appeal is no longer resisted. She invited me to set the decision aside and remit this case to the First-tier Tribunal so that a fact-finding exercise can be carried out.

6. Mr Vanas, for the appellant, asked me to immediately substitute my own decision. He told me that the appellant is the mother of two British citizens and asked me to allow the appeal on article 8 ECHR grounds.

Analysis

7. It is common ground that, due to an administrative error, the appellant's bundle was not placed before the First-tier Tribunal Judge. Because no evidence was placed before the First-tier Tribunal Judge her findings of fact are brief.

8. In Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) it was held that if a Tribunal refuses to accede to an adjournment request, such

decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the First-tier Tribunal acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing?

9. It is now accepted that the appellant was deprived of a fair hearing because there was confusion over the date that his appeal should be dealt with and because (due to administrative problems) the appellant's bundle was not placed before the First-tier Judge, even though it was received before the decision was promulgated. Through no fault of the Judge the appellant has been deprived of a fair hearing. That is a material error of law. I set the decision aside

10. I find I cannot substitute my own decision because the respondent has not had an opportunity to consider the appellant's bundle. At the date of today's hearing the respondent has still not received the appellant's bundle. Ms Cunha has only seen evidence that the bundle was tendered. Fairness must be applied to both parties. This is a case where the appellant has not had a fair hearing because the Judge did not have the opportunity to consider evidence with anxious scrutiny. The respondent has not yet had fair notice of the appellant's position. The only appropriate way to proceed is to remit this case to the First-tier so that the fact-finding exercise can be carried out after both parties have fair notice of the evidence to be led.

Remittal to First-Tier Tribunal

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:

(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

(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.

12. In this case I have determined that the case should be remitted because a new fact-finding exercise is required. None of the findings of fact are to stand and a complete re hearing is necessary.

13. I remit the matter to the First-tier Tribunal sitting at Taylor House to be heard before any First-tier Judge other than Judge Roopnarine-Davies.

Decision

14. The decision of the First-tier Tribunal is tainted by a material error of law.

15. I set aside the Judge's decision promulgated on 12 December 2018. The appeal is remitted to the First-tier Tribunal to be determined of new.

A handwritten signature in grey ink, appearing to read "Paul Doyle". The signature is written in a cursive, flowing style.

February 2019

Date 4

Deputy Upper Tribunal Judge Doyle