



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM**  
**CHAMBER**

Case Nos: UI-2023-005417  
UI-2023-005418  
UI-2023-005419  
First-tier Tribunal Nos:  
EA/01240/2023  
EA/01243/2023  
EA/01244/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

On 21<sup>st</sup> of March 2024

**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**  
**DEPUTY UPPER TRIBUNAL JUDGE BLACK**

**Between**

**IBTESAM IBTESAM (FIRST APPELLANT)**  
**BASHEERUNNISA BEGUM (SECOND APPELLANT)**  
**MUSAB ALI MOHAMMED (THIRD APPELLANT)**

**(NO ANONYMITY ORDER MADE)**

Appellants

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr J Dhanji, Counsel instructed on a Direct Access basis

For the Respondent: Ms A Everett, Senior Presenting Officer

**Heard at Field House on 5 March 2024**

**EXTEMPORE DECISION AND REASONS**

## **Introduction**

1. The Appellants appeal with permission against the decision of First-tier Tribunal Judge Shukla, who dismissed their appeals against the Respondent's refusals of their EUSS applications.
2. The first Appellant is the wife of the Sponsor, Mr Muhammed (a naturalised British citizen), the second Appellant is the Sponsor's mother and the third Appellant is the son of the first Appellant and the Sponsor. All are Indian nationals. The Appellants made the EUSS applications in question on 30 June 2021. This was effectively based on the Surinder Singh scenario: the Sponsor had worked in Bulgaria and the family unit had resided there, albeit for a relatively short period of time, and they had then all come to the United Kingdom.
3. The Respondent's refusals are dated 7 October 2022 in respect of the first Appellant and 10 October 2022 in respect of the other two.

## **Conclusions**

4. The Appellants did not instruct solicitors, but Mr Dhanji has appeared as Counsel on a Direct Access basis both in the First-tier Tribunal and before us. His clearly articulated grounds of appeal have assisted us, and indeed Ms Everett, in considering the Respondent's position. She has in our view quite properly accepted that the First-tier Tribunal erred in law as contended for in the grounds of appeal. In light of this we need only give brief reasons for our conclusion that the judge materially erred in law.
5. The first error of law relates to procedural unfairness. It is apparent that midway through the hearing Counsel for the Respondent produced a previous decision of the First-tier Tribunal (Judge Wyman, promulgated on

23 March 2020), which the Sponsor asserted he or any of the Appellants had never seen before. Some limited time was given by the judge for this to be considered on the day of the hearing, following which an application to adjourn was made. It was made on the basis that the Appellants wished to contact their previous solicitors in respect of the alleged failure by the firm to have brought the previous decision to their attention and/or to consider their response to that Judge Wyman's decision.

6. The judge refused the application in part based on a rejection of the credibility of the explanation put forward at the hearing (i.e. the lack of knowledge of the previous decision).
7. As conceded by Ms Everett, the judge did act with procedural unfairness by refusing the adjournment application. The previous decision was quite clearly provided very late in the day. Fairness necessitated the need for adequate time to be provided in order to contact the previous representatives and/or properly consider a response to that decision and if necessary to provide further evidence relating to it.
8. In light of the Court of Appeal's recent judgment in Abdi v ECO [2023] EWCA Civ 1455, at [38], the materiality threshold in procedural unfairness cases is very low indeed: would the outcome have inevitably been the same? In our view, and as implicitly accepted by Ms Everett, the answer to that is no. On this basis alone the judge's decision would have to be set aside.
9. Mr Dhanji's grounds included the alternative contention that the judge had, in any event, failed to engage with, or make findings on, the new evidence before her (from the Sponsor in particular), nor had she provided any reasons if that evidence was rejected.
10. Ms Everett was again right to have conceded this point. The well-known Devaseelan guidance clearly applied to this case, given Judge

Wyman's decision. However, as has been repeatedly said by the higher courts, that guidance operates as a starting point, not as a straitjacket. It is incumbent upon a judge to address evidence that was not before a previous tribunal.

11. In the present case there clearly was such evidence and it is equally clear that the judge failed to engage with it. The judge's reference to one of the guidelines in Devaseelan did not reflect a totality of the passage in question. The guidance at [41(6)] of Devaseelan deals with a scenario where the facts might appear not to be materially different from those put forward previously. However, with reference to other aspects of the guidance, [41(6)] also makes it clear that evidence arising after that previous decision or indeed relating to the same facts must be engaged with. This is the second basis on which the judge's decision is to be set aside.

12. Finally, it is clear to us that the case of ZA (Regulation 9 EEA Regs; abuse of rights) Afghanistan [2019] UKUT 00281 (IAC) was applicable to the scenario before the judge, given the Respondent's case against the Appellants and the fact that Judge Wyman had not taken it into account. It required specific consideration and that did not occur. This is a further basis on which the judge materially erred in law.

### **Disposal**

13. Both representatives agreed that in light of the procedural unfairness error, the appeals should be remitted to the First-tier Tribunal for a complete rehearing. We agree. In the circumstances, there shall be no preserved findings of fact.

### **Anonymity**

14. There has been no application for an anonymity direction and there is no basis on which one should be made.

### **Notice of Decision**

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

**We exercise our discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.**

**We remit the appeals to the First-tier Tribunal.**

### **Directions to the First-tier Tribunal**

1. These linked appeals are omitted to the First-tier Tribunal (Taylor House hearing centre) for a complete rehearing with no preserved findings of fact;
2. The rehearing shall be conducted by a judge other than First-tier Tribunal Judge Shukla;
3. The First-tier Tribunal will issue any further case management directions deemed appropriate.

**H Norton-Taylor**

**Judge of the Upper Tribunal  
Immigration and Asylum Chamber**

**Dated: 14 March 2024**