



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/08882/2016

THE IMMIGRATION ACTS

**Heard at Birmingham Employment
Centre
On 8 October 2018**

**Decision & Reasons
Promulgated
On 25 October 2018**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL McCARTHY

Between

**AMANDEEP [K]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Khan, Khirri Solicitors

For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. At the end of the hearing on 8 October 2018, I informed the parties that although I found there was procedural unfairness in the handling of the appellant's case before the First-tier Tribunal, and although such unfairness amounted to a legal error, on the facts of the case it could not be a material error, and therefore I would not set aside the decision of First-tier Tribunal Judge Lodge that was issued on 26 April 2017.
2. To understand the procedural unfairness argument, I set out the following events, which I have drawn from the evidence and submissions.

- 12 April 2017 Appellant instructs Khirri Solicitors that she will be unable to attend the appeal hearing on 19 April 2017 because of medical complication arising from her pregnancy.
- 19 April 2017 Mr Khan, representing the appellant before Judge Lodge, requests an adjournment because of the appellant's ill health; or in the alternative, time to supply medical evidence to confirm her infirmities.
- 22 April 2017 Judge Lodge dates his written decision and reasons statement and submits it for promulgation.
- 24 April 2017 Khirri Solicitors supply the Tribunal with medical evidence that states the appellant, "was unfit to attend court on the 19-4-17" but the Tribunal takes no action.
- 26 April 2017 Judge Lodge's decision and reasons statement is promulgated

3. Mr Khan and Mr Whitwell agree that the failure of the Tribunal to act on the medical evidence is a procedural error that amounts to an error of law because Judge lodge remained seized of the appeal until his decision and reasons statement was issued. Although he was required to consider that evidence and to decide whether in all the circumstances it remained appropriate to have proceeded with the hearing in the absence of the appellant the application of 24 April 2017 was not passed to him and he could neither review his decision nor make further assessment of what might or might not be in the interests of justice.
4. Without that consideration, it cannot be said that the Tribunal had proper regard to the provisions in rule 28 of the First-tier Tribunal Procedure Rules as to when the Tribunal might proceed with a hearing in the absence of a party. Although it was clear that the appellant had been notified of the hearing, it was unclear whether it remained in the interests of justice to proceed without the appellant. It is the failure to consider whether it remained in the interests of justice to proceed in absence of the appellant that makes the procedural error a legal error.
5. Turning to the second issue, whether the error of law is such as to require me to set aside Judge Lodge's decision, after discussion on 8 October 2018, Mr Khan and Mr Whitwell agreed that the outcome of the appeal could be no different even if the appeal were remitted to the First-tier Tribunal for a fresh hearing.
6. The appellant wished to rely on new matters, namely the fact her children might be able to acquire British citizenship if her husband was granted indefinite leave to remain, which would bring her within paragraph EX.1 of appendix FM to the immigration rules and would reduce the public interest in refusing leave to remain because of s.117B(6) of the Nationality, Immigration and Asylum Act 2002. It was only on these issues that she wished to give evidence.

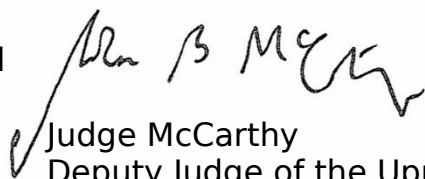
7. However, under s.85 of the 2002 Act, the First-tier Tribunal is prevented from considering such issues unless the Secretary of State gives consent because they are new matters. This has been confirmed by the Upper Tribunal in cases such as *Quaidoo (new matter: procedure/process) Ghana* [2018] UKUT 87 and *Mahmud (S. 85 NIAA 2002 - 'new matters': Iran)* [2017] UKUT 488. Home Office policy indicates that consent will not be given in the circumstances of this appeal, a position confirmed by Mr Whitwell and acknowledged by Mr Khan.
8. Therefore, the issues the appellant seeks to pursue in this appeal are ones that cannot be pursued. The findings made by Judge Lodge from [15] to [22] are sound and no other findings could be made. He properly considered the circumstances at the date of hearing. This conclusion is reinforced by the failure of the appellant to provide an appeal bundle for the hearing in the First-tier Tribunal or since. The appellant was hoping that events that were yet to happen might be taken into consideration by the judge but that is not possible given Judge Lodge had to consider her circumstances at the date of hearing and in light of the reasons for refusal. This is not to suggest that Judge Lodge ignored the possible future changes to the appellant's circumstances. He considered those arguments that [23] and [24], reminding himself that he had to consider the appellant's circumstances at the date of hearing.
9. Mr Khan has not suggested there was or is any documentary evidence on which the appellant could rely in relation to future events. Nor was there any oral evidence to be given that would change the facts as at the date of hearing.
10. In these circumstances, I am satisfied the appellant's absence from the hearing did not deprive her of a fair hearing given the facts as they were and the restrictions on new matters. For this reason, I find the legal error was not material.

Notice of Decision

Although there is legal error in the decision and reasons statement of First-tier Tribunal Judge Lodge that was issued on 26 April 2017, the error is not such as to require me to set his decision aside.

Therefore, the appeal to the Upper Tribunal is dismissed and I uphold the decision of Judge Lodge.

Signed



Date

8 October 2018

Judge McCarthy
Deputy Judge of the Upper Tribunal

