



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/13940/2017

**THE IMMIGRATION ACTS**

Heard at Birmingham Employment Tribunals  
On 5<sup>th</sup> October 2018

Decision & Reasons Promulgated  
On 29<sup>th</sup> October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

SUKHVINDER [K]  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: No legal representation  
For the Respondent: Mr Diwnycz (Senior HOPO)

**DETERMINATION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge Traynor, promulgated on 31<sup>st</sup> May 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

### **The Appellant**

2. The Appellant is a citizen of India, was born on 31<sup>st</sup> March 1983, and is a female. She appealed against the decision of the Respondent dated 19<sup>th</sup> October 2017, refusing her application for leave to remain in the UK on human rights grounds, as the spouse of her sponsoring husband, [GM].

### **The Issues**

3. The essential issues in the appeal were the financial circumstances of the sponsoring husband, and his ability to show that he earned £18,600 to meet the threshold requirement in such cases. Second, there was the issue in relation to Article 8, particularly given that the Appellant alleged that she had a child now in this country, who is a British citizen.

### **The Judge's Findings**

4. The judge held that, in an application that was to be determined "on the papers" the appeal was before it of practically all the necessary documentations. The burden of proof was upon the Appellant. Equally, the Respondent Secretary of State had not furnished a bundle either. In the circumstances, the Appellant could not discharge the burden of proof that was upon her.

### **Grounds of Application**

5. The grounds of application state that the Appellant's sponsoring husband had twice e-mailed over documents to the Home Office. He did so first on 31<sup>st</sup> October 2017 and then he did so again on 21<sup>st</sup> March 2018. When he telephoned, the people on the other side were less than helpful. Then on 4<sup>th</sup> June 2018 he sent over a recorded delivery set of documents specifically for the attention of Judge Traynor. Importantly, the grounds make it clear that six sets of e-mail bundles were e-mailed over, there were six replies confirming that documents had been received. Yet, the judge had come to the conclusion that the necessary bundles had not been furnished.
6. On 1<sup>st</sup> August 2018, permission to appeal was granted by the Tribunal on the basis that it was arguable that the judge was not in possession of all the requisite papers and that unfairness can be seen to have arisen.
7. On 25<sup>th</sup> September 2018, a Rule 24 response was entered by the Respondent Secretary of State to the effect that,  

"the Respondent does not oppose the Appellant's application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing to consider where the Appellant had produced relevant evidence to show that she now had a child in the United Kingdom, and the effect of that on the decision" (see paragraph 2).

### **Submissions**

8. At the hearing before me on 5<sup>th</sup> October 2018, the Appellant was unrepresented. However, she entered the courtroom with her little child, accompanied by her

husband, [GM]. He chose to spoke on her behalf in clear and fluent English. He repeated the grounds of application. He submitted that he had more than once sent over the necessary documents, and received confirmation, and yet the judge's decision shows that no documentation reached his desk when he was considering the appeal. For his part, Mr Diwnycz submitted that the communication shows the Appellant contacting the Sheffield office of the Respondent, and it was unfortunate that the documentation had gone astray. He relied upon the Rule 24 response and submitted that he did not oppose the Appellant's application for permission to appeal.

### **Error of Law**

9. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. I come to this conclusion notwithstanding the evidence, which shows the judge to have been at no fault whatsoever in not having the necessary documentation before him, as it was simply not forwarded to him on the day when he considered the appeal "on the papers". What is clear, however, is that the Appellant did send documents over by e-mail on 31<sup>st</sup> October 2017 and then again on 21<sup>st</sup> March 2018. That gave ample time for the documents to be forwarded to the judge for his consideration of the appeal in May.
10. Second, this means that the judge's decision cannot be upheld, because of the fundamental reliance that it places upon the lack of documentation from the Appellant, so as to be unable to discharge the burden of proof that is upon her.
11. Thus, the judge observes how "the Respondent had failed to provide a bundle of documents" and that "in addition, it was noted that the Tribunal did not have any of the documents which the Appellant claimed to have sent with a Notice of Appeal ..." (paragraph 8). The judge went on to record, that having been handed the papers for the appeal on 2<sup>nd</sup> May 2018, "no further documentation had been produced by either party" (paragraph 9). On this basis, the judge concluded that,

"notwithstanding the fact that the Respondent has so far failed to comply with the directions to provide a bundle of those documents which the Appellant supplied in support of the application, I am nevertheless satisfied that there is sufficient information available to me to enable me to fairly and justly determine the issues in this appeal without further reference to the parties" (paragraph 9).

In the light of the Appellant having specifically sent over documentation, that conclusion, it is now clear, was one that led to procedural unfairness for the Appellant.

12. In terms of the findings by the judge, the judge was clear that,
 

"it is not without note that the burden of proof is upon the Appellant to establish upon a balance of probabilities that the Respondent's decision in refusing her application under the Immigration Rules was not in accordance with those Rules ..." (paragraph 17).

Plainly, if the documentation was not forwarded to the judge then he was bound to have come to the conclusion that the Appellant had failed to discharge the burden of proof, although that was contrary to the Appellant's own actions where meticulous care had been taken to ensure that documentation was with the judge.

13. In the same way, the judge concluded that "the Appellant had provided no evidence to show that she was pregnant or any medical documents to show when her baby was expected" (paragraph 18). The judge noted that "no evidence has been provided by the Appellant either to confirm that she was pregnant or that she has given birth" (paragraph 18).

14. Thereafter, the judge considered

"The fundamental reason for refusing the Appellant's application, namely that it had not been established by way of appropriate documentary evidence that the Appellant's husband earns at least £18,600 as the minimum income threshold ..."  
(paragraph 19).

The Appellant claims that such documentation was indeed sent.

15. Inevitably, with the conclusion that, "the Appellant elected for her appeal to be considered on papers and therefore it is all the more important that she should submit the relevant and necessary documentation which establishes her circumstances" (paragraph 20), the failure to consider the documentation that had been sent in compliance with the directions by the Appellant, obviously led to a decision that was procedurally unfair to the Appellant.

16. I note that there is a degree of consensus between the Appellant and the Respondent Secretary of State, confirmed by Mr Diwnycz today at the hearing, that they do not oppose the appeal. This matter should therefore be returned back to the First-tier Tribunal for a hearing on the basis of the documentation that should be looked at.

### **Notice of Decision**

17. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed under practice statement 7.2(a) because 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 and considered by the First-tier Tribunal. The appeal is to be heard by a judge other than Judge Traynor.

18. No anonymity direction is made.

19. This appeal is allowed.

Signed

Dated

Deputy Upper Tribunal Judge Juss

22<sup>nd</sup> October 2018