



Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03003/2017

THE IMMIGRATION ACTS

Heard at Field House
On 18th July 2018

Decision and Reasons Promulgated
On the 09th August 2018

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MARYAM BABAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: None
For the Respondent: Ms Willocks-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of a First-tier Tribunal Judge promulgated on 19th January 2018 in which he dismissed the appellant's appeal against the Entry Clearance Officer's refusal to issue a family permit under the Immigration (European Economic Area) Regulations 2006.
2. The appellant appealed on the basis of procedural unfairness and permission to appeal was granted on the following grounds:

'In an otherwise commendably concise decision and reasons it is nonetheless arguable that the Appellant's bundle was properly filed and faxed to the Tribunal

dated 27th December 2017. The file reveals that the Appellant's bundle was actually received by the judge on 16th January 2018 by which time the decision had already been promulgated. That is evidence from a brief search through the file. It is therefore arguable that the Appellant had suffered prejudice and/or an abuse of process by the decision of the judge (that is certainly no criticism of him) which was completed without the benefit of having been provided with the Appellant's evidence. That arguable evidence had been properly filed'.

3. At the hearing before me there was no representation on behalf of the appellant (she was unrepresented) and no attendance by the sponsor. Nonetheless in the circumstances I considered it was in the interests of justice to proceed.
4. The chronology is as follows. The appellant advised that she wished her appeal to be determined on the papers. The Tribunal on 2nd November 2017 sent a notice of directions to the Appellant advising her to submit written evidence by 29th December 2017. The Tribunal sent a further notice on the same date, 2nd November 2017 to the appellant notifying her that the Respondent had not served any evidence but that she may wish to submit copies of documents relating to her case. Both parties were notified that the proceedings would be determined on or after 29th December 2018.
5. On 2nd January 2018 at 1145 hours, (according to the fax heading) the appellant faxed a letter to the Tribunal dated 27th December 2018 apologising for not being able to send the appeal bundle by the deadline but that her children had been involved in a school bus accident and had been in hospital and that she could if required provide evidence. The appellant provided an appeal bundle. That bundle was stamped by the Tribunal on 11th January 2018 but the fax header was recorded as the 2nd January 2018.
6. The judge determined the matter on the papers on 11th January 2018. The appellant's bundle was forwarded under cover of a memo on 13th January 2018 to the First-tier Tribunal Judge asking him to link the correspondence to the file. Written by hand by the judge on that memo on the bundle is the following
'Received pm 16.1.18 after Decision had been promulgated'
7. The judge had written and prepared the decision and submitted it for promulgation but the decision was not promulgated until 19th January 2018.
8. In **SD (treatment of post-hearing evidence) Russia** [2008] UKIAT 00037 the Tribunal held that in the rare case where an immigration judge, prior to the promulgation of a determination, receives a submission of late evidence, then consideration must first be given to the principles in **Ladd v Marshall** [1954] 1 WLR.

9. This begs the question what should a judge do when sent correspondence to be linked to a file, post determination in paper cases and after having recently submitted a decision for promulgation?
10. All cases require care and a vigilant approach is required when considering paper cases because the parties are not present to confirm the documentation provided. The Procedural Rules allow for consideration of late evidence but it is also possible that evidence is not 'late' but simply not linked to the file. There are various scenarios which may attract consideration of procedural fairness including (i) where the evidence was in fact submitted *prior* to the determining of the appeal and was simply not linked to the file but comes to the attention of the judge prior to promulgation (ii) where the evidence is provided *after* the determination but prior to the determination being promulgated (iii) where evidence has been submitted but is not drawn to the judge's attention at all or until post promulgation.
11. In both of the first two instances clearly there should be a 'turning of the judicial mind' to the material when it comes to the attention of the judge. Where a decision has recently been prepared and submitted for promulgation the judge should check whether that decision has in fact been promulgated because the judge continues to be seized of the matter.
12. In scenario (i) even if the submission of the evidence appears to be or is 'late' (following the directions), but before the actual paper determination, the judge should consider whether s/he would have admitted the evidence and consider the evidence in the light of the Tribunal Procedure Rules and whether to admit the evidence accordingly. He/she should also consider in all cases whether the respondent has had sight of the evidence.
13. In scenario (ii) where the judge receives late evidence/correspondence in an appeal and the decision has been submitted for promulgation, the judge should nevertheless, check whether the decision has in fact been promulgated. It is established case law that a judge is still seized of the matter until the determination is promulgated. Following a determination and where further evidence is only submitted *post the hearing or determination* the principles in **Ladd and Marshall** [1954] 1 WLR 1489, should apply and as set out in **Russia** [2008] UKAIT 00037

'In the rare case where an immigration judge, prior to the promulgation of a determination, receives a submission of late evidence, then consideration must first be given to the principles in Ladd v Marshall [1954] 1WLR 1489. Under those, a tribunal should not normally admit fresh evidence unless it could not have been previously obtained with due diligence for use at the trial, would probably have had an important influence on the result and was apparently credible. If, applying that test, the judge was satisfied there was a risk of serious injustice because of something which had gone wrong at the hearing or this was evidence that had been overlooked, then it was likely to be material. In those circumstances, it will be necessary either to reconvene the hearing or to obtain the written submissions of the other side in relation to the matters included in the late submission'.

14. The judge should therefore consider the evidence following the **Ladd and Marshall** principles. A tribunal should not normally admit fresh evidence unless it could not have been previously obtained with due diligence for use at the trial, would probably have had an important influence on the outcome and was apparently credible. If the judge was satisfied there was a risk of serious injustice because of evidence which has been overlooked it is likely to be material.
15. There requires a 'turning of the judicial mind' to the process in order to avoid a risk of injustice. It may be necessary to consider, whether there should be an oral hearing. The courts have placed an emphasis has been principle of finality but the Tribunal Procedural Rules set out a deadline for the promulgation of decisions which renders these .
16. What of Scenario (iii) such that the evidence was provided to the Tribunal while the judge still had to determine the appeal but the judge is not even aware of the evidence and a decision is promulgated. The lack of judicial consideration of the late evidence signifies a systemic failure and a failure to consider the appeal on the totality of the evidence. Clearly, however, any party would have to make good this assertion before any procedural error could be maintained.
17. In the instant case I accept that the evidence was provided to the Tribunal prior even to the determination of the matter and certainly prior to the promulgation. It is unfortunate that the evidence was not linked to the file earlier and this is a procedural error. Ms Willocks-Briscoe conceded that the decision was thus undermined by an error of law and that the matter should be remitted to the First-tier Tribunal for a hearing de novo on all the evidence.

Signed

Helen Rimington

Date 18th July 2018

Upper Tribunal Judge Rimington