Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33361/2014

THE IMMIGRATION ACTS

Heard at City Centre Tower, Birmingham	**Decision & Reasons Promulgated**
On 13th November 2015	**On 7th December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS ASTHA SIMON
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr David Mills (HOPO)
For the Respondent: Ms A. B. Faryl (Counsel)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge McDade, promulgated on 14th November 2014, following a hearing at Stoke-on-Trent on 31st October 2014. In the determination, the judge

dismissed the appeal of Mrs Astha Simon. The Appellant subsequently applied, 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, who was born on 6th August 1986. She appealed against the decision of the Secretary of State refusing her leave to remain in the UK as a spouse of a person present and settled here. However, the refusal letter dated 5th August 2014, records that,

> "Your spouse has contacted us to state that your relationship has broken down and your relationship no longer subsists. Therefore, as your relationship has broken down, you have failed to demonstrate that your relationship is still subsisting".

Given that this was the case, upon E-LTRP.1.7 being applied, it was concluded that the Appellant was no longer in a genuine and subsisting relationship with the Sponsor, her husband, Sareen James, and that as far as private life was concerned, upon application of paragraph 276ADE, the Appellant could not succeed, as she could not under Article 8 of the ECHR generally, either.

The Judge's Decision

3. The judge's decision is short, but to the point, and clear and comprehensive. He observes, how on the day before the hearing, on 30th October 2013, at 13.56 hours, the representatives for the Appellant sent a fax seeking an adjournment and stating that their client "has fallen ill". They stated that the Appellant was physically unable to attend the hearing. The matter was considered by a Designated Judge and he refused the application in terms that, *"there is no medical evidence to show that the Appellant is unfit to attend. Leave as listed".*

4. Despite the adjournment application having been turned down, the Appellant's representatives, VAS UK of 389 Derby Street, Bolton, B13 6LT, persisted with the application for an adjournment. They now sent a further fax to the Tribunal after close of business on 30th October at 18.57 hours. At this time they stated that the client had made an appointment to visit a "walk in" centre on Friday 31st October, and that they would provide relevant medical evidence in due course. What is most troubling, however, is that with adjournment application having been granted by the Tribunal, the representatives then chose not to attend the hearing before Judge McDade, but instead sent a further fax with details of the Appellant's visit to the walk in centre.

5. As the judge records, "*this made interesting reading"* because the doctor's report now recorded that the Appellant had stated that she had started to experience chest pains at approximately 9pm, on the evening before, whereas the complaint of the Appellant has been that there was a medical

problem prior to this time, which the record did not disclose. As the judge observed, *"this is wholly contrary to what the representative's claim in the first application that their client had fallen ill on the morning of the day before the hearing and that the appointment at the walk in centre was made as a consequence of that illness".*

6. The judge went on to consider the situation as it unfolded before him, in circumstances where there was no representative on behalf of the Appellant and a late bundle of documents, which had only been served the day before the hearing *"with no explanation as to why and no application that these be admitted in evidence despite the fact that they did not comply with the Procedure Rules*" (see paragraph 2). As the judge concluded, *"I see no reason to admit these documents on this basis"* (see paragraph 2). In any event, what the judge did find was that the medical report only proscribed painkillers for the Appellant. It also showed that *"the Appellant had taken no painkillers prior to a visit to the walk in centre despite alleging that she had been in pain".* The judge further found that, *"there is nothing in the record of the doctor to show that any abnormality was found and/or the Appellant was unfit to attend the hearing*". He went on to say that on this basis he refused the application for an adjournment.

7. The judge took a dim view, as he was bound to have done, of the Appellant's representative's failure to attend or to have sufficiently prepared for this hearing and observed that the conduct of the representatives left much to be desired, as it was tantamount to imposing pressure upon the Tribunal to vacate the hearing, even though the application for an adjournment had already been turned down. The judge observed:

> "In my judgment the decision of the representative not to attend the hearing, despite the first adjournment request having been refused, was a somewhat cynical attempt to force the Tribunal's hand into adjourning this matter. I hold there to be absolutely no justification for such an adjournment." (Paragraph 1).

8. In determining the appeal, the judge went on to hold that the burden was entirely upon the Appellant to prove that she continues to be in a genuine and subsisting relationship with her spouse. He held that,

> "Her absence, the absence of her spouse, the absence of her representatives and the absence of documentary evidence submitted in compliance with the Procedure Rules leads me to the inevitable conclusion that she has not discharged this burden". (Paragraph 2).

9. The appeal was dismissed.

Grounds of Application

10. The grounds of application state that the judge was wrong to have discarded the medical evidence as he did and this was tantamount to an error of law.

11. On 16th January 2015, permission to appeal was granted by the First-tier Tribunal.

12. On 23rd January 2015, a Rule 24 response was entered by the Respondent Secretary of State to the effect that the judge was faced with a situation where the Designated Judge had refused an adjournment on the basis that there was no medical evidence to support the application, the documentary evidence was not served in accordance with the directions, and there was no Appellant present and no representative.

Submissions

13. At the hearing before me, the Appellant was represented by Ms Faryl. She found herself in the difficult position, which she managed most professionally and in an entirely commendable manner, given the invidious position that she was placed in. She began by stating that she thought this was a First-tier Tribunal hearing. She said that these were her instructions. She had also been instructed by VAS UK, the Appellant's representatives, to the effect that the hearing was actually in Manchester.

14. Not being entirely satisfied with what she was being told, she asked for a notice of hearing to be disclosed to her. This made it clear that the hearing was indeed before the Upper Tribunal and it was not in Manchester, but in Birmingham. She submitted that, given that her understanding was that this was a First-tier Tribunal hearing in Manchester, both the Appellant and her sponsoring spouse, Mr Sareen James, had today turned up to give evidence. In having realised that this was manifestly not a First-tier Tribunal hearing, she asked for time to prepare her submissions before this Upper Tribunal.

15. I am bound to say that the conduct of VAS UK leaves much to be desired, not only when regard is had to what transpired at the hearing before this Tribunal, but most notably also by what transpired before Judge McDade, to which he makes a most clear and direct reference. At 10.25am, I adjourned the hearing to enable Ms Faryl to prepare her submissions before this Tribunal, and indicated that I would take this matter at the end of this morning's list.

16. When Ms Faryl returned at 12.10pm, she submitted that having had a separate conference with both the Sponsor and the Appellant, the Sponsor, Sareen James, had made it clear to that he wanted to support his wife's application for indefinite leave to remain, despite the fact that there was a reference in the refusal letter to his having contacted the Home Office to say that their relationship has broken down and was no longer subsisting. She was aware that a number of letters had been written, or allegedly written, by Mr Sareen James to the authorities with respect to the

nature of his marriage with the Appellant. She submitted that these matters could be probed further, were the evidence to be heard again on a remittal back to the First-tier Tribunal, subject to an error of law having been found by this Tribunal. I explained that the first task before this Tribunal was to determine whether Judge McDade's determination did indeed comprise an error of law. The matters that she referred to would only be germane once a finding had been made in her favour. Otherwise they would not be relevant.

17. Ms Faryl submitted that an adjournment should have been granted given the overriding objective considerations that had become relevant as of 20th October 2014 before the Tribunals. The purpose was to safeguard the interests of both parties. The test was whether the appeal could be justly determined. This was a case where the Appellant showed good reason for requesting an adjournment. Even if she had not done so, the Tribunal determination in **Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)**, in which Mr Justice McCloskey emphasised (at paragraph 5) that the Tribunal is obliged in every case to consider whether the appeal can be "justly determined" in removing party's absence. In principle, there may be cases where an adjournment should be ordered notwithstanding that the moving parties failed to demonstrate a good reason for this course. Ms Faryl submitted that Judge McDade made an error in not looking at whether the appeal could be justly determined. He also made it an error in failing to recognise that the late submission of a bundle did not prejudice anyone, as the Respondent's representative did not make a submission that he was unable to avail himself of the new material before him.

18. For his part, Mr Mills submitted that the general Rules on adjournment are about fairness. However, the judge in this case did not just have the failure of the husband and wife to attend, but a decision from the Respondent authority that their marriage was not genuine and subsisting, and the medical evidence was deficient, and the submission of a late bundle entirely unhelpful, such that the Appellant had been the architect of her own situation, which her representatives had done nothing to resolve, but only to exacerbate.

19. Second, the judge also had a letter written directly to him in late September from Mr Sareen James himself confirming that he was not supporting his wife's application. In the circumstances, it could not be said that the failure to adjourn would have prejudiced the Appellant because no other result than the one reached by the judge was possible on the facts of this case.

20. Finally, it may well be that the parties have today decided to reconcile, but that was not the position before the judge. It may well be, as the Appellant is now claiming through her representative before this Tribunal today, that she was pregnant, but that was not the position that Judge McDade had to decide upon. He had to decide whether or not to grant an adjournment.

21. On the basis of the evidence before him, and the deliberate refusal of the representatives to either turn up themselves or to send Counsel to represent the Appellant, the judge was entitled to refuse the adjournment. The error, even if one was made by the judge, could not remotely be said to be a material error.

22. In reply, Ms Faryl relied upon the case of **Nwaigwe** again and submitted that the Appellant had been deprived of a chance to put her case to the Tribunal.

No Error of Law

23. I am satisfied that the making of the decision by the judge did not involve 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 and remake the decision. My reasons are as follows.

24. First, Ms Faryl, notwithstanding her determined efforts to persuade me otherwise, fails to consider the Tribunal's judgment in **Nwaigwe** in its full respects. She relies upon paragraph 5. However, as Mr Justice McCloskey made it clear in paragraph 5 there are two important considerations here that are paramount.

25. First, whereas in principle there may be cases where the adjournment should be ordered notwithstanding that the party in question has failed to demonstrate good reason for this course, the decision to refuse an application must be made on the Tribunal satisfying itself that the appeal can be justly determined in the absence of the party concerned. This was precisely the conclusion of Judge McDade below. He concluded that the appeal could indeed be "*justly determined"* because the medical evidence was either not reliable or completely absent. It was not reliable for the reasons that the judge pointed out. It was absent because, despite the fact that the Grounds of Appeal state (see paragraph 6) that, *"the reason the representative did not attend the hearing was due to the fact that he is awaiting the relevant medical evidence from the Appellant which the Tribunal had requested",* no medical evidence was ever faxed, either to the Tribunal or to have been known to be in existence as far as Ms Faryl was concerned.

26. In fact, the Grounds of Appeal are unfortunate in the inappropriate use of language that is employed. It is not only said that the *"judge was clearly adamant on finding against the Appellant"* (paragraph 9) but there is an allegation of *"those biased on the part of the judge"* (paragraph 10) and that he had *"pre-empted"* the decision to refuse the Appellant's appeal (paragraph 10), such that the decision to refuse the adjournment was "*wholly unacceptable"* (paragraph 3).

27. Second, paragraph 5 of **Nwaigwe** makes it clear that,

> "As a general rule, good reason will have to be demonstrated in order to secure an adjournment. There are strong practical and case management reasons for this, particularly in the contemporary litigation culture with its emphasis on efficiency and expedition".

If these considerations are to be tempered that is to be on the basis that every litigant has the right to a fair hearing. However, whether or not the Appellant has been denied a right to a fair hearing can only be determined after taking into account all the material considerations. This the judge did do. The judge exceeded immaterial considerations and took into account all material matters before him. The burden of proof, after all, is upon the Appellant. That burden of proof was not discharged.

28. Third, there is an additional issue arising in this appeal which has been lurking in the shadows but must be confronted head on in the interests of openness and transparency of legal proceedings. This is to do with the Sponsor Mr Sareen James, having informed the Respondent authority that the marriage is no longer subsisting. The issue is not irrelevant for two reasons. First, it is the basis of the Home Office refusal of 4th August 2014 where it is stated that, *"your Sponsor has contacted us to state that your relationship has broken down and your relationship no longer subsists ..."*. Second, it formed a significant part of the submissions before me today, both from Ms Faryl, and from Mr Mills on behalf of the Home Office. That being so, it is difficult to treat what the Sponsor, Mr Sareen James has said, as being entirely irrelevant to the core issue in this appeal.

29. There were at least three separate communications from Mr Sareen James to the authorities. The Tribunal below did not expressly deal with them. Judge McDade apparently discretely avoided consideration of them. First, there is the refusal letter itself of 5th August 2014 that I have already referred to that clearly suggests that the Sponsor has contacted the Respondent Home Office to say that the relationship has broken down. Second, there is a letter of 16th August 2014 written by the Sponsor, with the heading "To whom it may concern", but with a Home Office reference number given, and this states,

> "Quite on the contrary, that with the Appellant having received a refusal letter on 8th August 2014 on the basis that the marriage was no longer a subsisting one, the Sponsor would like to make it clear that, 'Astha Simon and I are in a subsisting relationship. We are happily married, residing together and meet all the requirements of the Home Office'."

30. He goes on to say that, "*I can confirm that I have not contacted the Home Office with regards to my marriage with Astha Simon prior to this statement".* He further adds that he was able to prove that the marriage is genuine and subsisting because he has evidence of *"joint residence through utility bills, council tax bills and tenancy agreement ...".* He ends with the statement that he is happy to *"take a stand in court if necessary to declare that prior to this statement I have not contacted the Home*

Office to inform them of any changes in my marriage". This letter, however, is unsigned by Mr Sareen James.

31. It is, however, the third letter which is more intriguing. This is dated 23rd September 2014. It is signed by Mr Sareen James. It is addressed directly to the First-tier Tribunal in Stoke-on-Trent. It was received at the hearing centre on 3rd October 2014. Both representatives appearing before me agreed that the letter would have been before Judge McDade but that he had deemed it prudent to avoid referring to it. Here, Mr Sareen James states that his marriage *"broke down a long time ago and is no longer subsisting".* He states that, *"I felt frightened and pressured into making that application",* referring to the application made for indefinite leave by his wife. He goes on to explain that,

> "I have been forced into this position by means of threats of physical violence and through mental torture. Astha has threatened my widowed mother in Delhi, India. She has said that she will make my mother's life a 'living hell'. She will do this by lodging complaints with the local police alleging harassment and demands for excessive dowry by my family. Once this happens, my mother will be harassed by the police. I will not be able to return safely to visit her either".

32. Mr Sareen James goes on to explain why he has taken a different position earlier on, making it quite clear that,

> "I would like to state clearly that while I have said one thing to Astha, I have never misled her legal representatives and nor have I been dishonest with the Home Office. I cannot tell Astha that I did not support her, but if I am compelled to state this under oath before the Tribunal, then I will".

33. It is clear from this letter, which is, as I have explained signed by Mr Sareen James and dated, that the Sponsor was prepared to say under oath that the marriage had broken down and that he did not support her application. The letter ends by further adding that,

> "You will see from the papers and police reports that my life has been very difficult. My work colleagues will also say the same if asked. I am embarrassed to admit that I am and have been a male victim of domestic abuse. That is my position and I hope you understand the difficulty I face".

34. Judge McDade did not refer to this letter. He did not deem it necessary to do so. The application before him was for an adjournment. He had ample and proper grounds to refuse that application. He then considered the merits of the appeal, in circumstances of a late submission of her bundle not in compliance with the Procedure Rules, and in the absence of the representative and both the Appellant and her sponsoring husband. He concluded, in circumstances where the marriage was plainly an issue before the Home Office, that it could not be said to be a subsisting one,

with the burden of proof being upon the Appellant and, that burden not having been discharged.

35. The question however, is whether as a matter of judicial policy communications of these kind, by one party to a marriage, who does not apparently show agreement with the application of their spouse, should be disclosed in court. In this case, difficult as the Sponsor's position is on the letters written, he does not ask for confidentiality. In fact, he states that, *"if I am compelled to state this under oath before the Tribunal, then I will".* That is a route that Judge McDade could have adopted had the Sponsor bothered to turn up at the hearing.

36. On the other hand, it is true that the allegation by Mr Sareen James is that he has been *"a male victim of domestic abuse"* and fears repercussions of a serious nature being visited upon his widowed mother in New Delhi through the hands of the police. If there is a threat to life then one view would be to keep such communication with the authorities confidential. It would then be open to the Home Office to either inform the forced marriage unit, were that to be an appropriate case for referral, or to the police, or to the Foreign & Commonwealth Office.

37. In the instant case, however, given the factors outlined above, namely, that the basis of the decision letter was a contact by the Sponsor with the authorities to say that the marriage was no longer subsisting and had broken down, followed by a unsigned letter of 16th August 2014 after the refusal letter, which claimed the opposite to be the case, namely, that the Sponsor was indeed in a subsisting marriage and could prove this with the disclosure of utility bills and council tax bills and the like, these letters were a matter properly for consideration by the Tribunal.

38. This is not least given that a later letter of 23rd September 2014 was written directly to the judge at the hearing centre on Stoke-on-Trent. Had the judge used any of these letters as a basis of his decision, he would have been duty-bound to disclose their content. In the circumstances, the judge plainly did not use them as a basis for the decision. He proceeded on the basis that the parties were not in attendance. The representative had chosen not to come to court, and the late bundle not in compliance with the Procedure Rules could not be considered. The onus was upon the Appellant. She had the burden of proof. She failed to discharge it.

39. Accordingly, there can not be an error of law on this basis either. The decision by the judge was entirely safe and entirely sustainable.

40. Finally, I should add that there is also, what is referred to as a *"Public Statement – relationship no longer subsisting",* made by the Sponsor, Sareen James, and specifically signed by him, and dated 24th July 2014, where he states that,

> "I, Sareen James, confirmed that my relationship with Astha Simon no longer subsists, that I do not live with her and that I do not intend to

> live with her as my Sponsor in the future. I give my permission for the Home Office to use the information referred to above. I fully understand that by giving my permission the information above will become known to Astha Simon".

It is not clear whether this document was before the judge below, and not clear how it was disclosed, and to whom, and neither Ms Faryl nor Mr Mills referred to it, but it was plainly a document that was both signed and dated by the Sponsor, and meant for public circulation.

Notice of Decision

41. There is no material error of law in the original judge's decision. The determination shall stand.

42. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 30th November 2015