



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43477/2014**

THE IMMIGRATION ACTS

**Heard at Field House, London
On 3 December 2015**

**Determination Promulgated
On 14 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

PERIYASAMY MAKKAN MANGUDI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms W Bremang, instructed by Berkleys Solicitors

For the respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a national of India, appealed to the First-tier Tribunal against a decision by the respondent of 27 October 2014 to refuse his application to refuse his application for leave to remain as a Tier 1 (Entrepreneur) under the Points Based System (PBS). Judge of the First-tier Tribunal Griffith dismissed the appeal. The appellant now appeals with permission to this Tribunal.

2. In summary the background to this appeal is that the appellant came to the UK on 6 August 2010 with leave to enter as a Tier 4 student valid until 30 April 2012. He as granted further leave to remain as a Tier 1 (Post study) Migrant

until 18 May 21014 and applied for leave as a Tier 1 (Entrepreneur) Migrant on 15 May 2014. He was interviewed in connection with his application on 21 July 2014. The respondent refused the application under paragraph 245DD (h) of the Rules, having assessed the points listed at paragraph 245DD (i) and concluded that the appellant had not satisfactorily demonstrated that he is a genuine entrepreneur. The respondent further decided not to award the appellant any of the 75 points available for Attributes.

3. On the morning of the hearing before the First-tier Tribunal a fax was received from the appellant's representatives requesting an adjournment on the grounds of the appellant's ill health. A medical certificate from the appellant's GP dated 23 March 2015 was submitted stating that the appellant was suffering from acute back pain and that he was unfit to attend work for a period of 10 days and that he was advised to have bed rest for 10 days.

4. The First-tier Tribunal Judge refused the adjournment request on the basis that the evidence did not indicate that the appellant was unable to attend the hearing. It appears that a letter to that effect was posted to the appellant and his representatives that day advising that the application was refused and that the appellant may appear that same day before 10am for his case to be heard. As this response was not faxed or emailed it is likely that the appellant was unaware that the adjournments request had been refused until after the date of the hearing.

5. The Judge went on to consider the appeal on the papers on 30 March 2015 and decided the appeal on the basis of the evidence submitted to the Secretary of State. The Judge noted that the appellant had failed to submit any documents in advance of the hearing to answer the reasons for refusal and to demonstrate his compliance with the Rules and that the appellant had accordingly not demonstrated that he meets the requirements of the Rules for a Tier 1 (Entrepreneur) Migrant.

6. Permission to Appeal was refused by the First-tier Tribunal and the appellant renewed his application to the Upper Tribunal. The grounds rely in particular on the cases of Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) and MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC). Permission to Appeal was granted by Deputy Upper Tribunal Judge Saini on the basis that, as the decision to refuse the adjournment was returned to the appellant by post, he would not have known of the adjournment refusal and was unable to bring himself to attend on the same day.

Error of Law

7. The issue of fairness in the context of adjournments was considered by the Upper Tribunal in the case of Nwaigwe where the President gave the following reminder;

“7. If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to

apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? Any temptation to review the conduct and decision of the FtT through the lens of reasonableness must be firmly resisted, in order to avoid a misdirection in law. In a nutshell, fairness is the supreme criterion.

8. The cardinal rule rehearsed above is expressed in uncompromising language in the decision of the Court of Appeal in SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284, at [13]:

*"First, when considering whether the immigration Judge ought to have granted an adjournment, the test was not irrationality. The test was not whether his decision was properly open to him or was Wednesbury unreasonable or perverse. **The test and sole test was whether it was unfair**".*

[My emphasis]

Alertness to this test by Tribunals at both tiers will serve to prevent judicial error. Regrettably, in the real and imperfect world of contemporary litigation, the question of adjourning a case not infrequently arises on the date of hearing, at the doors of the court. I am conscious, of course, that in the typical case the Judge will have invested much time and effort in preparation, is understandably anxious to complete the day's list of cases for hearing and may well feel frustrated by the (usually) unexpected advent of an adjournment request. Both the FtT and the Upper Tribunal have demanding workloads. Parties and stakeholders have expectations, typically elevated and sometimes unrealistic, relating to the throughput and output of cases in the system. In the present era, the spotlight on the judiciary is more acute than ever before. Moreover, Tribunals must consistently give effect to the overriding objective. Notwithstanding, sensations of frustration and inconvenience, no matter how legitimate, must always yield to the parties' right to a fair hearing. In determining applications for adjournments, Judges will also be guided by focussing on the overarching criterion enshrined in the overriding objective, which is that of fairness."

8. In this case the Judge did act reasonably. I note in particular the fact that the appellant had not submitted any witness statement or documents in compliance with the directions, the appellant's representatives did not attend the hearing to make the adjournment request in person and did not contact the Tribunal that morning to seek information about the outcome of the adjournment request. In all of these circumstances it is easy to understand why the Judge acted as she did.

9. I also note Mr Kotas' submission, in reliance on Ahmed and Another (PBS: admissible evidence) [2014] UKUT 00365 (IAC), that any error is not material as the appellant could not produce any evidence not already submitted to the Secretary of State. However it may be that the appellant could have contributed oral evidence material to the evidence already submitted, particularly in light of the general grounds of refusal.

10. As is made clear in the decision in Nwaigwe, the issue is not one of reasonableness but of fairness. I note that the Judge did not address her mind to the requirements of the Asylum and Immigration Tribunal (Procedure) Rules 2014, which give the Tribunal discretion to adjourn in the context of the overriding objective which is to deal with a case fairly and justly. In this case the Judge did not specifically consider whether the case could be dealt with fairly in the context of the medical note and in the context of the method of delivery of the refusal to adjourn.

11. In these circumstances and in light of the guidance given in Nwaigwe I find that the decision to refuse to grant the adjournment requested amounted to a procedural unfairness and thus to an error of law. For that reason I set aside the decision of the First-tier Tribunal.

12. I proposed remaking the decision at the hearing in the Upper Tribunal however the appellant did not appear at the hearing before me and Ms Bremang was unable to contact her instructing solicitors to obtain instructions. This was unsatisfactory in light of the directions issued to the appellant and his representatives for the hearing in the Upper Tribunal.

13. However I considered the following guidance given by the President in the decision of MM

“26. By section 12 of the 2007 Act, where the Upper Tribunal concludes that the decision of the First-Tier Tribunal involved the making of an error on a point of law **and** decides to set the decision aside, it must either remit the case to the First-tier Tribunal or remake the decision itself. We consider that, as a fairly strong general rule, where a first instance decision is set aside on the basis of an error of law involving the deprivation of the Appellant's right to a fair hearing, the appropriate course will be to remit to a newly constituted First-Tier Tribunal for a fresh hearing. This is so because the common law right to a fair hearing is generally considered to rank as a right of constitutional importance and it is preferable that the litigant's statutory right of appeal to the Upper Tribunal should be triggered only where the former right has been fully enjoyed.” (*my emphasis*)

14. In light of the procedural error I am satisfied that it is appropriate in this case to remit the appeal to the First-tier Tribunal as the appellant has not had his case properly considered by the First-tier Tribunal. The nature and extent of the judicial fact finding which is necessary in order for the decision to be remade is such that (having regard to the overriding objective in Rule 2 of the Upper Tribunal Procedure Rules 2008) it is appropriate to remit the case to the First-tier Tribunal.

Decision

The Judge made an error on a point of law and the determination of the First-tier Tribunal is set aside.

The appeal is remitted to the First-tier Tribunal to be remade.

Signed

Date: 3 December 2015

A Grimes

Deputy Upper Tribunal Judge