



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

Appeal Numbers: IA/44426/2014
IA/44445/2014

THE IMMIGRATION ACTS

**Heard at: Field House
On: 6 November 2015**

**Decision & Reasons Promulgated
On: 2 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

**Between
Ms O U
Mr R M**

~~(ANONYMITY DIRECTIONS NOT MADE)~~

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: no appearance

For the Respondent: Mr Clarke, Senior Presenting Officer

DETERMINATION AND REASONS

1. The first appellant is a citizen of Nigeria. The first appellant is born on 30 April 1986. The second appellant is a national of Portugal born on 4 February 1983. They appealed to the First-tier Tribunal against the decisions of the respondent dated 23 October 2014 to refuse the first appellant's application for registration certificate a Registration Certificate

as confirmation of his right to reside in the United Kingdom under the EEA Regulations on the basis that his marriage is one of convenience.

2. The First-tier Tribunal dismissed the appellant's appeal in a determination dated 12 June 2015. Permission to appeal was granted by First-tier Tribunal Judge PJM Hollingworth in a decision dated 4 September 2015, stating that it is arguable that the Judge fell into error in not granting the appellant an adjournment set against the facts available to the Judge as referred to in the decision.
3. Thus the appeal came before me.

The findings of the First-tier Tribunal

4. The First-tier Tribunal refused to give the appellant an adjournment on the following basis which I summarise. The appellant had sent a fax dated 1 June 2015 at 12:35 PM, from a private fax machine stating that she will not be able to attend the hearing as she was ill and no other explanation was given. On the day of the hearing, a further fax was sent at 9:46 AM by the first appellant in which she said that she was admitted to hospital around 2 AM and was still in pain and had been told to rest for the next couple of days having been given more medication and that a follow-up scan had to be done. The appellant asked for her date to be extended. Attached to the fax for the adjournment there was a GP extract printout from her medical records. This extract stated that the appellant went to her GP on 1 June 2015, stating that she had missed her monthly cycle and that she needed antibiotics as there was "something left inside". The extract went on further to state that the first appellant had pain on and off, had apparently vomited four times and had some dysuria on passing urine. Her bowels opened and she was not constipated and had no diarrhoea. She has had an ultrasound with her previous GP which was fine aside from known PCOS (polycystic ovary syndrome). The appellant had a little blood around in her stool and has a history of piles.
5. The medical report continued, the first appellant's examination included her temperature, blood pressure, blood sugar, using blood test and all was found to be normal. In light of her reporting severe pain, the GP noted that "the patient was keen for A&E not an empirical review in GP". The GP agreed to an A&E assessment".
6. The Judge stated "I considered the application for an adjournment from the first appellant having regard to the Procedure Rules before me including Rule 2 and Rule 28. I did not accept the request for an adjournment. I found that the first appellant's initial fax sent the day before on 1 June 2015 at 11:35 PM stating that she was "ill" which must be, presumably after seeing her GP, and was not going to attend, as indicating the appellant had no intention of attending her hearing on 2 June 2015, come what may. I do not accept the appellant's explanation that she was too unwell to attend. Her examination at her GP was all normal and she has not provided me with any details of what the hospital

said. I find the first appellant's insistence on going to A&E was part and parcel of her determination to show that she remained too unwell to attend. The appellant did not reveal what medication she was given and why having taken medication, the day before and by the hospital, she was unfit to attend. There was nothing from the hospital or GP, before me, confirming that she needed to rest. I do not accept the appellant was so unwell or tired that she was unfit to attend her hearing. I find the account given is part and parcel of the first appellant's intent not to attend her hearing. I do not accept, if she went to A&E after her GP visit, the previous morning that she was kept in hospital and then released or not seen until 2 AM."

7. The Judge continued at paragraph 12 "that the first appellant never intended to attend his hearing was reiterated by her failure to send a representative, despite one being on record in the past. The second appellant did not attend either and there is no reason, why he could not have attended to inform the Tribunal of what was exactly wrong with his wife."

The grounds of appeal

8. The appellant's grounds of appeal state the following which I summarise. The Judge had by not allowing the application for an adjournment as she was medically unfit to attend court. "I made every effort in spite of how I was feeling to contact the court and notify them of my circumstances".
9. At paragraph 10 of the determination "the Judge wrongly assumes that I was not discharged from A&E around 2 AM as I had stated in my letter. The Judge did not say why he did not accept this. The fact is, that is exactly what happened. My condition was serious enough for me to be admitted to the A&E department of Lewisham Hospital, after they did some tests and observations. I was put on a drip and I had finished the treatment before was discharged around 2 AM. The Judge also stated that I had no intention of coming to court, and do not accept my explanation that I was too unwell to attend court. This assumption by the Judge was wrong and is directly at odds with the medical evidence that I have presented.... It was procedurally unfair for the Judge to continue with my appeal in my absence. I had provided as much information as I could regarding my medical condition at the time. The Judge placed too much weight on the fact that I did not have a representative. I had informed the Tribunal that I intended to come to court on my own. The fact that no papers were filled on my behalf is because my representative stopped acting for me after the appeal was lodged. The appeal was not only based on the decision to refuse my EEA application but also against a decision to remove me. Due to my illness I should have been granted a short adjournment."

The hearing

10. There was no appearance for both appellant at the hearing. I satisfied myself that they had been properly served and have proceeded to make my decision in their absence.

Decision as to whether there is a material error of law in the determination

11. The first appellant complains that she ought to have been granted an adjournment because she could not attend the hearing because of her ill-health. Therefore the issue raised by the appellant in her grounds of appeal is procedural fairness by not accepting her account that she was too unwell to attend.
12. Even if the first appellant could not attend the hearing of the First-tier Tribunal, the grounds of appeal do not say why her husband, the second appellant, did not attend the hearing. Therefore this appeal for an adjournment was only in respect of the first appellant.
13. The Judge in a very detailed way explained why he refused to grant the appellant an adjournment. He did not accept the appellant's explanation and gave good reasons in paragraph 11 - 16 of his determination. He was entitled to not accept the appellant's explanation given that the evidence before him made it clear that the appellant herself suggested that she needs to attend A&E. The Judge noted the GP's remarks that the "patient was keen for A&E and not an empirical review in GP". This clearly indicated to the Judge that it was the appellant who insisted on going to the A&E.
14. The Judge also found that her symptoms were not objectively justified. The Judge took into account her examination report which included her temperature, blood pressure, blood sugar, blood test which were all found to be normal. The Judge said that there was no evidence as to what happened at the hospital.
15. The Judge was entitled to find that the appellant having contacted the Tribunal the day before the hearing at 12:35 PM said that she would not be attending because she was "ill". This demonstrated to the Judge that as of 1 June 2015, the appellant had no intention of attending having alerted the Tribunal that she was not going to attend. The Judge was entitled to find that the appellant had no intention of attending the hearing and that her purported medical condition was contrived in order to be granted an adjournment.
16. The Judge considered the overriding objective carefully and said that the appellant has not provided any documents which were not before the previous determination of Judge Herwald who heard the appellant's appeal on 2 May 2014 on the papers and dismissed the appellant's appeal. He stated that the appellants were therefore aware of all the issues in this appeal and the need to provide evidence especially since the refusal letter was virtually identical as the one before.

17. The Judge went on to say that the appellant had the assistance of a representative at the time of lodging the grounds of appeal so would have been informed of the need to provide supporting evidence as a rebuttal to what was stated by the respondent. The Judge was satisfied and indeed was entitled to do so given the appellants failure to provide documents demonstrated that the appellants never intended to take their refusal seriously.
18. The judge was entitled to find that the appellants were wasting the Tribunal's time and resources on an appeal which they were not keen to pursue. The Judge warned himself that there is a need to ensure fairness when deciding adjournments and to seek flexibility and avoid formality. However the Judge rightly remain satisfied that he could proceed to deal with this case fairly and justly and that any further delay should be avoided having regard to the resources of the Tribunal and the issues in this case which have already been refused, in a previous determination in October 2014 and there is no further evidence that has been sent to support the appeal.
19. At the hearing before me, the appellants did not attend the Tribunal and no communication was sent to the Tribunal for why they could not attend. The appellants did not attend the hearing before the First-tier Tribunal and asked that their appeal be heard on the papers. They did not attend the subsequent hearing of the hearing before me. This demonstrates to me that the Judge was correct when he said that the appellants have no real appetite to pursue their appeals.
20. The Judge then considered the appellant's appeal and although he does not specifically referred to the case of **Devasleen** that he took into account that the starting point for his determination is the previous determination in which the appellant's appeal is were dismissed on the same facts as those before him. He stated that there was no new evidence for him to consider but even so the Judge considered the appellant's appeal and found that the appellant's marriage was one of convenience.
21. The Judge stated at paragraph 38 that he has had regard to Judge Herwald's decision who found that the second appellant on the evidence before him was not a qualified person exercising treaty rights. Accordingly the appeal of the first appellant failed as she was not a family member. The Judge found the statement from the immigration officer to be persuasive and taken with the other evidence, he found that the appellants' marriage was one of convenience.
22. The Judge noted that the same bank statements, utility bills were provided with the application. These are provided to show that the appellants are living together which the previous Judge did not accept. He also did not accept the family photographs which was also provided to Judge Herwald. He was also satisfied that these are staged photographs for the purpose of assisting the application.

23. The Judge found that he was satisfied that fraudulent attempts have been made to assist the first appellant to obtain a right of residence in the United Kingdom by engaging in a marriage of convenience. He found that the second appellant's behaviour was an abuse of the right to reside conferred upon him. He said that Community Law cannot be relied upon for fraudulent or abusive ends. He was satisfied that the second appellant's conduct was such that the respondent is wholly entitled to deny him the benefit of the provisions of Community Law on which he relies to remain in this country. He found that there are substantial grounds for the respondent intervening and there is public policy grounds for removing the second appellant on the basis that his personal conduct engaging in this sort of behaviour represents a genuine and serious threat to the fundamental interests of society. He has clearly taken advantage of the opportunity afforded to him remaining here by engaging in fraudulent behaviour thereby enabling others to obtain a right to reside, when they have no such right in the first place. He was satisfied that there are good public policy grounds in the respondents intervening. The Judge was satisfied that the appellants have against in the marriage of convenience and the second appellant has abused the right to reside conferred upon him. The Judge correctly found that Article 8 is not engaged.
24. The upshot is that there is no material error of law in the determination of the Judge in respect of procedural fairness by failing to grant and adjournment. The Judge's decision on the evidence before him, is sound and cannot be faulted. I therefore uphold the First-tier Tribunal's determination.
25. The appellants did not seek to rely on Article 8 of the European Convention on Human Rights.

DECISION

Appeals dismissed for both appellants pursuant to the Immigration Rules.

Signed by

This 25th day of November 2015

A Deputy Judge of the Upper Tribunal
Mrs S Chana