

**Upper Tribunal  
(Immigration and Asylum  
Chamber)  
HU/12778/2016**



**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 12 October 2017**

**Decision & Reasons  
Promulgated  
On 24 October 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON**

**Between**

**MR NURUL HUDA  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: No representative  
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant in this case is a national of Bangladesh born on 1<sup>st</sup> February 1989. He entered the United Kingdom on 27<sup>th</sup> November with entry clearance as a Tier 4 (General) Student until 20<sup>th</sup> February 2013. The appellant's leave was curtailed on 31<sup>st</sup> March 2012 with no right of appeal. The appellant was subsequently granted further leave to remain as a Tier 4 (General) Student until 5<sup>th</sup> May 2015. This was also curtailed with no right of appeal, to expire on 16<sup>th</sup> February 2015. On 16<sup>th</sup> February 2015 the appellant made an application for leave to remain outside the Rules on the basis that the 60 day period to find an alternative Tier 4 sponsor was not sufficient. The respondent refused that decision on 29<sup>th</sup> April 2016. In a decision promulgated on 10<sup>th</sup> July 2017, Judge of the First-tier Tribunal Davidson dismissed the appellant's appeal.

2. The appellant appeals with permission on the ground that the judge may have materially erred in failing to adjourn the hearing when the appellant was in hospital due to sudden ill-health.

### **Error of Law Decision**

3. There was no appearance before me by or on behalf of the appellant. In a letter dated 10<sup>th</sup> October 2017 the appellant's representatives confirmed that they had been instructed to request the Tribunal to conduct the hearing on the papers because the appellant does not have funding to pay the representation. The Tribunal indicated in a letter dated 10<sup>th</sup> October 2017 to the appellant's representatives the respondent's representative would have an opportunity to make oral submissions. I heard from Mr Tufan. He noted that there was now a note, which was not before the judge, from North Middlesex University Hospital showing that the appellant had attended on the date of his hearing at 8.19 in the morning complaining of vomiting blood, abdominal pain and a pain in the back of his head. He was subsequently diagnosed with a headache and discharged on the same day with no follow-up treatment. Mr Tufan submitted however that there was no further evidence of the claimed illness or any evidence produced by the appellant which might support any Article 8 claim.
4. I have considered what was said in the Upper Tribunal decision of **Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)** where the Upper Tribunal held that:
 

“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? See **SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284**”.
5. I take into account that the judge in considering whether or not to grant an adjournment noted, at [2], that the respondent objected to an adjournment request and submitted that “in any event, given that the right of appeal was very limited, the Appellant would not be able to add anything to the hearing even if he was in attendance”. The judge noted that the respondent submitted that at [15] “There is no jurisdiction to hear Article 8 arguments as there is only a limited right of appeal in this case”.
6. Mr Tufan conceded that this submission was clearly wrong. I bear in mind what was said in the case of **Patel & Ors v Secretary of State for the**

**Home Department {2013} UKSC 72** in relation to private life including that Article 8 is not a general dispensing power and that “the opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under Article 8”. However Mr Tufan conceded that this does not mean that the appellant is not entitled to a fair hearing on Article 8. I am satisfied that the judge took into account irrelevant considerations in considering as she did that the appeal right was “very limited”.

7. Although there was limited evidence of illness, I accept that the appellant did attend hospital on the morning of his hearing. Whilst it may have been reasonable for the judge to refuse the adjournment, that is not the test which applies. This appellant will have an uphill struggle to discharge the burden of proof in relation to Article 8; however he has not had an opportunity to address those issues before the Tribunal. Although the judge made alternative findings that “even if Article 8 arguments were taken into account” that the appellant did not discharge the burden, I am satisfied that the judge’s findings were tainted, including by her consideration of the submissions that there was no appeal under Article 8. Mr Tufan did not pursue the respondent’s case with any great force.

### **Notice of Decision**

8. The decision of the First-tier Tribunal contains an error of law such that it must be set aside. Given that the appellant has not had an opportunity for a fair hearing I remit the appeal to the First-tier Tribunal, other than to Judge Davidson. No findings of fact are preserved.
9. No anonymity direction was sought or is appropriate and none is made.

Signed

Dated: 20 October 2017

Deputy Upper Tribunal Judge Hutchinson

### **TO THE RESPONDENT** **FEE AWARD**

No fee award is made.

Signed

Dated: 20 October 2017