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

Appeal Numbers: EA/07966/2017 &
EA/08394/2017

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 10th July 2018** | **On 17th July 2018** |

**Before**

**UPPER TRIBUNAL JUDGE LINDSLEY**

**Between**

**SAID [E] (1)**
**MADALINA [F] (2)**
**(ANONYMITY ORDER NOT MADE)**

Appellants

**and**

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

Respondent

**Representation:**

For the Appellant: Mr R Jones, of Counsel, instructed by HS Legal Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

**DECISION AND REASONS**

*Introduction*

1. The first appellant is a citizen of Egypt and the second appellant is a citizen of Romania. They were married on 24th February 2017. The first appellant entered the

UK illegally in a container from France in 2014. He applied initially to remain as the dependent of his brother's Greek wife but this was refused in 2016. He made an application for a residence card based on his marriage on 20th March 2017. The second appellant, his wife, applied at the same time for a registration card. The first appellant's application was refused on the basis the marriage was one of convenience on 1st September 2017, and the second appellant's application was refused on the basis that she had misused her EEA rights on 18th October 2017. Their appeal against the decision was dismissed by First-tier Tribunal Judge Oxlade in a determination promulgated on the 1st December 2017.

2. Permission to appeal was granted by Upper Tribunal Judge Finch on 4th May 2018 on the basis that it was arguable that the First-tier judge had erred in law in failing to adjourn the hearing in the interests of justice due to the first appellant's ill-health.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

*Submissions – Error of Law*

4. The appeal had been adjourned on 31st October 2017 because the respondent had failed to serve the marriage interview notes. On 27th November 2017 the matter was relisted for hearing. On 23rd November 2017 the previous legal representatives of the appellants applied for an adjournment on the basis of the mental health of the first appellant who was detained. He was suffering from claustrophobia due to being detained as this brought back memories of his travel to the UK in a container. Medical records submitted with the application showed that he was taking antidepressant medication. The first appellant was said not to be well enough to attend the hearing, and he was not produced. The representatives also did not attend as they say they did not receive the refusal of their request for an adjournment, although it transpires one was issued on 24th November 2017. It is argued that the refusal to adjourn was unfair and unlawful.

5. Secondly, it is argued that the decision that the appellants had entered into marriage predominantly for the purpose of gaining an immigration advantage was not soundly reached by the First-tier Tribunal. The discrepancies in the interview all related to historic matters about their home countries and families and that they gave a consistent account of their future plans. There was a failure to consider the totality of the evidence from the interviews and also the other documents in the bundle. Further the health conditions of both appellants were not considered: aside from the medical condition of the first appellant outlined above, the second appellant has high blood pressure and a heart condition.

6. Mr Bramble relied upon a Rule 24 response which stated that the appeal was opposed, and there was no medical evidence to show that the first appellant was not well enough to attend the hearing, and that there were adequate reasons given for dismissing the appeal with the application of the correct legal tests.

7. After hearing submissions I told the appellants that I found the First-tier Tribunal had erred in law by not adjourning their hearing and that the matter would be remitted to the First-tier Tribunal for a rehearing with no findings preserved. I have taken into account paragraph 7.2 of the Senior President's Practice Statements, and find that it is appropriate to remit this appeal back to the First-tier Tribunal to be heard afresh. The error of law was one in which the appellants were denied a fair hearing before the First-tier Tribunal. Further there are no findings preserved, and a substantial fact-finding needs to be undertaken, and this is more appropriately undertaken by the First-tier Tribunal rather than the Upper Tribunal.

8. At the conclusion of the hearing the first appellant had a serious panic attack which needed the emergency services to be called. The first appellant and his representatives must consider with his doctors whether there are any medical steps which can be taken to try to avert a panic attack taking place when he gives evidence at the next Tribunal hearing and efforts should be made to ensure that he has any preventative medications to hands; or alternatively his representatives may produce medical evidence, served properly on the respondent and First-tier Tribunal in advance of that hearing, that it is not medically safe for the first appellant to give evidence if they are so advised.

*Conclusions – Error of Law*

9. The guidance issued by the Upper Tribunal on the proper test in relation to an adjournment request is set out in Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC), and reads as follows: "*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.*"

10. The issue of the adjournment in this appeal is dealt with by the First-tier Tribunal at paragraphs 17 to 25 of the decision. It is clear that no one attended for the appellants and that they did not attend either. The previous solicitors seem to have assumed that the matter was adjourned following their application on 23rd November 2017, but when informed on the day of the hearing that this had been refused reapplied in writing stating that they were unable to attend in time and that the first appellant was medically unfit to do so. The First-tier Tribunal were understandably critical of the previous representatives for failing to attend if they had not heard about the outcome of their adjournment request, and for failing to chase the request up with the First-tier Tribunal if they had not received a response. The First-tier Tribunal concluded that the medical evidence did not show that the

first appellant was not fit to attend the hearing or give oral evidence as none of the evidence came from the appellant himself, and because the medical evidence only dealt with his problems being in detention.

11. The Heathrow Immigration Removal Centre Patient Records for the appellant submitted with the adjournment request of 23rd November 2017 and which were the medical evidence available to the First-tier Tribunal showed that on 16th and 17th November 2017 he was depressed, anxious, having panic attacks and on anti-depressants as well as suffering from claustrophobia. They noted that his mum and his wife were protective factors against self-harm.

12. I find that the Heathrow Immigration Removal Centre Patient Records evidence was relevant to the question as to whether the first appellant was medically unfit to attend and give evidence before the First-tier Tribunal. The First-tier Tribunal also needed to consider in addition that the appellants had been wrongly advised by their representatives that they need not attend the hearing because it had been adjourned. As the first appellant was in detention he could not choose to attend when the First-tier Tribunal let it be known that the hearing was not adjourned as he would have needed to be produced. I find that given that the first appellant was vulnerable, detained and mentally unwell and had relied upon legal advice in not being produced for the hearing the failure to adjourn the hearing was unfair as it denied him access to a hearing at which he could have put forward his witness evidence that his relationship with the second appellant was genuine, this being central to the sole factual issue to determine in these appeals.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal in its entirety.

3. I remit the remaking of this appeal to the First-tier Tribunal.

Signed: *Fiona Lindsley* Date: 10th July 2018
Upper Tribunal Judge Lindsley