



IAC-FH-AR-V1

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

Appeal Number: IA/45078/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 20 January 2016**

**Decision & Reasons Promulgated  
On 24 February 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD**

**Between**

**DIPACKSING DALHOONSIG  
(ANONYMITY DIRECTION NOT MADE)**

**Appellant**

**and**

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

**Respondent**

**Representation:**

For the Appellant: Mr S Bellara, Counsel, instructed by Western Solicitors  
For the Respondent: Miss J Isherwood, Home Office Presenting Officer

**DECISION AND REASONS**

1. In respect of this matter the Appellant's appeal had been listed for hearing on 15 July 2015 at Hatton Cross. The case was to be heard First-tier Tribunal Judge Wright. Mr Bellara of Counsel had attended before the Judge but there was no representation on behalf of the Secretary of State. It does not appear that any reason was provided as to why the Secretary of State was not represented at that hearing.

2. As my extempore decision will show, a difficulty arose, indeed a very significant difficulty arose at that hearing. The Appellant had not attended the hearing. The First-tier Tribunal Judge at paragraph 8 refers to what appears to have happened on the day and he said in part as follows:

“The matter eventually proceeded to full hearing in the afternoon (submissions only) following refusal of Mr Bellara’s brief adjournment application based on the Appellant's non-attendance (application not supported by any medical evidence from A&E/Whitechapel Hospital or from the Appellant's GP or to his claimed unfitness to attend the Tribunal [see Western Solicitors’ letter of 15 July 2015 based on a text message]. Despite the matter initially being put back in the last until after lunch and then again and Mr Bellara’s finally request until 3 pm, the Tribunal being satisfied after careful consideration of Rule 2 overriding objective and parties’ obligations to cooperate with the Tribunal together with Rule 4 Case Management Powers of the Tribunal Procedure First-tier Tribunal Immigration and Asylum Chamber Rules 2014 [the 2014 Procedure Rules] and the case of **Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)** that the Appellant's case could still be dealt with fairly and justly and without the Appellant being deprived of his right to a fair hearing, especially in light of the fact that the Appellant was legally represented at court by Mr Bellara Counsel) ...”

3. In this case the position is that there was an initial letter from the Appellant's solicitors to the Tribunal to say that the Appellant was unwell. As it happened the Appellant was also seeking medical attention and a medical note to prove that was also sought. That medical note did not make its way to the Tribunal or the Tribunal judge until after 3 pm on the same day of the hearing. The grounds of appeal on behalf of the Appellant are detailed and state in part as follows:

“3. It is clear that the Appellant's representative made written submissions at the appeal hearing to adjourn matters as the Appellant was not well. At paragraph 8 the judge states that the Appellant did not provide any evidence that he was unfit to attend. The representatives sent the evidence through fax at 15.43 pm and 15.46 pm. The adjournment request and the faxed confirmation is attached herewith. ...”

4. And it is said at paragraph 4

“4. The judge appears to have overlooked the importance of considering an adjournment simply because no medical evidence was provided. There had been no consideration by the judge of whether it was fair to hear the appeal and the overriding objective was not taken into account. The Appellant’s solicitors had written to the Tribunal stating that the Appellant was unwell. It was unfortunate that the Appellant could not provide medical evidence at 15.00 pm, however, medical evidence was provide at 15.45 pm [sic]. The Appellant was unable to get evidence in time as the GP was in meeting since morning [sic] and the Appellant was unable to see him until 15.00 pm. The Appellant was not well, someone help him to reach at net café in order to scan the medical evidence to the representatives. The circumstances or alternatively delay were not in the Appellant control [sic].

5. The judge also had an explanation from the Appellant's solicitors that due to the ill health of the Appellant he was able to pick up the two additional witnesses. These witnesses had also produced witness statements."

5. The judge rightly referred to the Presidential Tribunal's decision in **Nwaigwe (Adjournment: fairness) [2014] UKUT 00418 (IAC)**. That is a very important decision which it is right to say changed the way in which the Tribunal ought to consider adjournment applications. The judicial head note makes it clear

"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 had 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?"

6. In the body of the decision at paragraph 5 it states

"In the Rules matrix outlined above, Rule 21(2) is a provision of critical importance. Its effect is that where a party applies for an adjournment of a hearing, the Tribunal is obliged, in every case, to consider whether the appeal can be "justly determined" in the moving party's absence. If the decision is to refuse the application, this must be based on the Tribunal satisfying itself that the appeal can be justly determined in the absence of the party concerned. This means that, in principle, there may be cases where an adjournment should be ordered notwithstanding that the moving party has failed to demonstrate good reason for this course. 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. However, these considerations, unquestionably important though they are, must be tempered and applied with the recognition that a fundamental common law right, namely the right of every litigant to a fair hearing, is engaged."

7. And then at paragraph 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. Therefore I now consider the substantive matters before me. I am well aware and accept that there are attempts by some litigants in this jurisdiction as in others to "play the system". Some litigants want to delay the hearing of their case because it means they can remain in the United Kingdom for longer than they would normally

be permitted to do so and when it is clear as a pikestaff that they have no basis to remain.

9. This case was very different to those sorts of cases. This is an Appellant who has always turned up at his hearing. He was represented. His solicitors had alerted the Tribunal to the problem of his illness, it appears, as soon as they became aware of it by sending a communication urgently to the First-tier Tribunal and to the Appellant's Counsel who had been at the hearing and was appearing before Judge Wright.
10. This was an Appellant who had cooperated in terms of bundles of documents and in terms of the preparation towards his case.
11. In this day and age of course one would hope that patients are able to see their general practitioner or a medical practitioner swiftly but that is not always possible. I can well accept that the medical practitioner in this instance was not able to see the Appellant immediately, that the Appellant had to wait towards the end of the day, and that when the Appellant was ultimately seen, a brief short document was completed and provided to the Appellant by the medical practitioner. In turn the Appellant then had to find an internet café to get that document scanned and sent to the Tribunal.
12. I take judicial knowledge of the fact that it is not always easy to immediately see a medical or general practitioner and to get a letter or document from that medical practitioner. Medical practitioners are busy and they have other things to do. Their priority is not the Tribunal. Their priority is their list of patients that they have to get through.
13. It is therefore noteworthy that this Appellant did produce supporting corroborative evidence of his attendance at a general practitioner albeit it was not within the timescale sought by Judge Wright. It was just under an hour later than the time imposed by the judge. When I come back to the question which the Presidential Tribunal raises in Nwaigwe at paragraph 7 and reminding myself that fairness is a supreme criterion, I ask myself was there fairness in this case? In my judgement there was not. There was material error of law. There should have been an adjournment of the case to enable the Appellant to give evidence and for his witnesses to give evidence. I do not indicate one way or the other the strength of the Appellant's case. That is for a different occasion. But reminding myself, as I have to of what the test is at this stage, I am of the clear view that the decision of First-tier Tribunal Judge Wright has to be set aside.

### **Notice of Decision**

14. Having given some thought to what should happen next, in my judgment it is quite clear that there has to be a rehearing and for the Appellant and/or his witnesses to have the opportunity to give evidence. The appropriate forum for that is at the First-tier Tribunal. This case was originally heard at Hatton Cross. It should return for hearing at Hatton Cross and will be heard by a judge there other than Judge Wright.

15. The decision of First-tier Tribunal contains a material error of law and is set aside.

16. The appeal shall be re-heard at the First-tier Tribunal.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Mahmood