



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/49612/2014

THE IMMIGRATION ACTS

Heard at Field House
On 18th February 2016

Decision & Reasons Promulgated
On 4th March 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR. VIGNESH SEKAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. S. Hosein, Solicitor

For the Respondent: Mr. P. Nath, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of India born on 5th July 1991. He appeals against the decision of Judge of the First-tier Tribunal Russell sitting at Taylor House who on the papers dismissed the Appellant's appeal against a decision of the Respondent dated 19th November 2014. That decision was to refuse the Appellant's application for leave to remain on the basis of the Appellant's family and private life.
2. The Appellant entered the United Kingdom on 12th February 2014 as a Tier 4 (General) Student. On 5th August 2014 he applied for further leave to remain on the

basis of his family and private life. The Respondent refused the application on the grounds that the Appellant did not enjoy family life with his relatives in the United Kingdom nor had he established a private life in such a short space of time. The Respondent declined to exercise her discretion in the Appellant's favour to grant him further leave because the Appellant was having problems with his place of study.

The Proceedings at First Instance

3. The Appellant appealed against that decision and on 11th February 2015 the Tribunal informed the Appellant and his representatives that the hearing of this matter would be take place on 17th July 2015, the Appellant having paid £140 for an oral hearing. On 13th July 2015 the Appellant's representatives Messrs. Simon Noble Solicitors wrote to the Tribunal seeking an adjournment on the grounds that the Appellant had contracted chickenpox. The solicitors stated that not only was the Appellant unable to attend the hearing he was also unable to give them any instructions. The letter attached some (photocopied) photographs of the Appellant's face and a pharmacy receipt and a packet of cream.

4. The application for an adjournment came on the papers before Designated Judge Campbell on 16th July 2015. He refused the application in the absence of medical evidence "that the Appellant is suffering from chickenpox". The Appellant sent another letter by fax later in the evening of the 16th at approximately 8.30pm stating that no medicine was available for chickenpox but the GP had suggested that the Appellant should buy some cream from the local pharmacy and stay at home. His letter added:

"Now as I have been refused with the adjournment application at the last moment I could not get any solicitors or Counsel to represent me having chickenpox. They even do not want to meet me because of the health and safety of others. Therefore I request once again to review the decision and adjourn my case."

5. When the case was called on 17th July 2015 there was no appearance by or for the Appellant by 12.15 pm. Attempts by the clerk to the Tribunal to contact the Appellant's representatives were unsuccessful. At paragraph 5 of the determination the Judge dealt with his reaction to this situation stating:

"In the absence of the Appellant or his representatives and noting that the Appellant has been on notice since 11th February to prepare for his hearing I proceeded to decide the Appellant's matter on the papers before me. The Appellant has submitted no further papers or statements for the hearing of this matter since being informed of the date of hearing. There is no Respondent's bundle on file."

6. The Judge concluded that the Appellant could not succeed under the Immigration Rules as there was no evidence of any family life the Appellant might have with his relatives in the United Kingdom. The Appellant could not succeed under paragraph 276ADE in relation to private life since the nature of the Appellant's connections to the United Kingdom or any problems he might face in reintegrating into India were

unknown. He was a citizen of India and had only recently entered the United Kingdom as a student with no legitimate expectation of being allowed to remain for a longer period than his studies.

7. At paragraphs 8 to 12 the Judge dealt with the Appellant's claim for leave to remain outside the Rules under Article 8. Directing himself in accordance with the step-by-step approach required in the case of **Razgar [2004] UKHL 27** the Judge found that the Appellant had failed to establish how the Respondent's decision interfered with the exercise of family or private life. Nor could the Appellant show that any interference there might be would have consequences of such gravity as to engage Article 8. If there was interference it was in accordance with the law. The Judge dismissed the appeal commenting at paragraph 12:

"In a matter as serious as an allegation of a breach of the Appellant's human rights and bearing in mind the long time the Appellant has had to prepare his case I would have expected to see material of sufficient weight to support the Appellant's appeal. As noted above the Appellant has submitted no further evidence and failed to appear for his hearing despite being informed that his matter would proceed on the date and at the time notified."

The Onward Appeal

8. The Appellant appealed against that decision arguing that he had been unable to get any medical evidence to confirm that he was suffering from chickenpox as he had been advised not to go to his General Practitioner or a hospital due to the infectious nature of the disease. The Tribunal had power to adjourn or postpone a hearing but the Judge had not considered this or indeed the authority of **Nwaigwe [2014] UKUT 00418**. The refusal of the adjournment application despite the fact that there was medical evidence without considering the overriding objective of the Procedure Rules to ensure a fair trial amounted to an arguable material error of law.
9. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Landes on 4th January 2016. In granting permission to appeal she wrote that it was arguable that the Judge had erred in failing to consider the further adjournment application sent by the Appellant on 16th July. Alternatively if the Judge had never seen that second application it was arguable that a procedure irregularity had occurred. It was not clear when the second application of 16th July 2015 was received by the Tribunal. There was nothing to indicate anything other than that it was received on the evening of 16th July. The Judge's decision would indicate that he had not seen that second application by 12.15 on 17th July or 18th July when he signed his decision. It was not inevitable that the second application would have been refused had it been considered by the Judge. The Procedure Rules did not require medical evidence to be supplied. It was arguable that the Appellant had supplied further information with the subsequent application both as to why he could not obtain medical evidence and also explaining that he had not been able to give instructions to his legal representatives or to be represented at the hearing.
10. Following the grant of permission the Respondent wrote to the Tribunal pursuant to Rule 24 of the Upper Tribunal Procedure Rules arguing that the first application for

an adjournment had been refused by the Tribunal for sustainable reasons but the Respondent could not comment on the second adjournment application as the Respondent had not seen the Appellant's letter of 16th July 2015 or attachments (there were a number of attachments to that letter but they appear to have been the same as was sent with the letter of 13th July 2015).

The Hearing Before Me

11. At the hearing before me the Appellant's solicitor stated that there was still no medical evidence to support the Appellant's claim to have suffered from chickenpox as he had been told not to attend the surgery. The letter of 16th July had been received by the Tribunal but had not reached the Judge when the case was called on for hearing on 17th. Had that letter been before the Judge he would have taken a different view of the request for the adjournment. Permission should be granted and the appeal should be remitted back to the First-tier. In response the Presenting Officer stated that as there was still nothing from a GP or doctor there was nothing to indicate that the Judge's decision was wrong.

Findings

12. The issue in this case is whether the Judge was correct to proceed with the hearing of the case or whether he should have adjourned. If the Appellant was suffering from chickenpox he would not have been able to attend for his hearing and the case should have been adjourned to another date. The question is whether the decision of the Designated Judge of 16th July and the decision of Judge Russell to require evidence that the Appellant actually was suffering from chickenpox and then go ahead with the hearing in the absence of evidence was correct. It was not necessary for evidence to be supplied in support of a request for an adjournment (that had been in the old Rule 21 of the 2005 Procedure Rules but Rule 21 had been abolished). However where evidence could reasonably be expected the trial Judge would be entitled to draw an adverse inference from the absence of such evidence.
13. Although the Judge granting permission was of the view that had the trial Judge seen the subsequent letter of 16th July it might have made a difference to the decision not to adjourn, it is difficult to see how it would have made any difference. There was little of substance in the letter of 16th July 2015 which was different from the letter of 13th July sent by the solicitors. The letter of 16th July repeated what had been said in the letter of 13th July namely that the Appellant had had medical advice not to go to hospital. The copy photographs and pharmacy receipt had been attached to the first request on 13th July which was rejected by the Designated Judge.
14. It does appear that the Judge had not seen the letter of 16th July. This was hardly surprising given that it was only received by the Tribunal after office hours the night before the hearing. However there was no error of law for the Judge to fail to refer to that document since it could have made no difference to the situation as it added nothing to the earlier application. The Appellant was well aware from the refusal of the Designated Judge what he was expected to provide but his letter of 16th July did not provide that. The position before the Judge was essentially the same as it was before the Designated Judge.

15. In this connection I note two points. Firstly there is still no evidence that the Appellant has ever suffered from chickenpox. All I have are two letters, one from his solicitors and the other from the Appellant himself both saying that the Appellant had complained of suffering from chickenpox but with no medical evidence to show that. The photographs in the file (they are photocopies but I was shown the original colour photographs during the hearing) merely show that the Appellant had a small number of spots on his face. They may or may not be indicative of chickenpox but they are not evidence (and certainly not medical evidence) which shows that it is more likely than not that the Appellant was indeed suffering from an infectious disease. In any event it is not clear when the photographs were taken and it is not surprising that both the Designated Judge and the Trial Judge came to the view that they did on that evidence.
16. The second point to note which creates a difficulty for the Appellant is that no-one represented him at the hearing on 17th July. The Appellant had paid for an oral hearing but an application for an adjournment had been refused and both the Appellant and his representatives were aware of that. In those circumstances it was a great discourtesy to the Tribunal that no-one from the Appellant's representatives attended the hearing at the very least to renew the application. It was not reasonable for the Appellant to expect that his application for an adjournment would be granted on the day in circumstances where he had been told what evidence he needed to produce to support his application for an adjournment. He had not produced that evidence and indeed he has still not produced any evidence. This is despite the fact that even if the Appellant was unwell in the few days before the hearing no explanation has been provided for the earlier failure to provide evidence to the First Tier in good time in support of the appeal in accordance with the Tribunal's directions.
17. In those circumstances it is difficult to see what else the Judge could have done but to continue with the case. The question of whether to adjourn or not is a test of fairness. Given that the Appellant had been told to produce some medical evidence to confirm his illness and given that no-one attended on his behalf at the hearing even though clearly he was instructing solicitors (hence their letter to the Tribunal of 13th July), fairness did not in my view require the Judge to grant an adjournment given the very limited information before him. I do not find that there was any error of law in the Judge refusing to adjourn the case and continuing with the hearing and deciding the way that he did.
18. The Appellant's appeal is essentially a procedural one. There is nothing to indicate that there was any merit in the Appellant's appeal in the first place. That of itself is not decisive since if there has been a fundamental error of procedure then the Appellant is entitled to have the matter looked at again. However I do not consider that there was any error although I am bound to say had I found an error and set the decision aside I would have remade the decision by dismissing the appeal. The Appellant cannot succeed under the Rules and there is no evidence to show any compelling reason why his appeal should be allowed outside the Rules. The Judge did not hear oral evidence from the Appellant but I have seen nothing in the papers that indicates that the Judge's conclusions on Article 8 inside or outside the Rules

were wrong. However as I have indicated the case does not reach that far as I do not find that there was any procedural error in the Tribunal proceeding with the hearing on 17th July.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 26th day of February 2016

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As the appeal has been dismissed there can be no fee award.

Signed this 26th day of February 2016

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Deputy Upper Tribunal Judge Woodcraft