



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20017/2016**

THE IMMIGRATION ACTS

**Heard at Field House
On 26 March 2018**

**Decision & Reasons Promulgated
On 6 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**SHEROZE KHAN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Mr J Plowright (counsel) instructed by Nasim & Co,
solicitors

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Greasley, promulgated on 4 January 2018 which allowed the Appellant's appeal against the respondent's decision to refuse to grant the appellant leave to remain in the UK,

Background

3. The Appellant was born on 14 November 1990 and is a national of Pakistan. The appellant entered the UK on 28 July 2010 as a tier 4 student. The respondent extended leave to remain until 30 October 2013. The appellant was then granted an extension of stay as a spouse until 5 June 2016. On 6 June 2016 the appellant submitted an application for leave to remain in the UK as the spouse of a British citizen. The respondent refused that application on 3 August 2016. The appellant's wife and daughter are British citizens.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Greasley ("the Judge") allowed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 23 January 2018 Resident Judge Zucker gave permission to appeal stating

"3. It is arguable that in refusing the application the Judge failed to recognise that the criterion which determines whether an adjournment should be granted is whether a party has an opportunity to present their case - "fairness". At paragraph 9 the Judge appears to have recognised the need to be fair to the appellant but arguably has failed to recognise the need to be fair to both sides.

4. In granting permission, I am heavily influenced by what appears at paragraph 9 of the decision and there having been a "last-minute change to the list". The Upper Tribunal may well require some evidence of what is meant by "last-minute" because ordinarily it is incumbent upon a party properly to prepare and all the more so the Respondent in cases in which there is a strong public interest. There is otherwise no merit in the grounds. Permission therefore is NOT granted to argue proportionality."

The Hearing

5.(a) Mr Bramble for the respondent produced a post hearing minute prepared by the Home Office Presenting Officer who conducted the appeal before the First-tier Tribunal, together with a brief email dated 12 December 2017. He told me that the email indicated that the respondent's generic bundle (typically produced in ETS cases) was sent to the Tribunal on 12 December 2017, but was not received by either the Tribunal or the appellant's representative.

(b) Mr Bramble drew my attention to the preliminary issues listed by the Home Office Presenting Officer in his post hearing minute, and told me that those issues indicate that the standard Home Office generic bundle was not before the First-tier Tribunal so that the Judge's decision not to adjourn on the Home Office Presenting Officer's application deprived the respondent of a fair hearing. He referred me to [9] of the decision and told me that the Judge makes no mention of a missing bundle or of need for further time to prepare.

(c) Mr Bramble referred me to the respondent's bundle which was before the First-tier Tribunal. He told me that if the Judge had adjourned to allow production of the generic ETS bundle, then the respondent's complete case would have been before the Judge. Because the Judge refused the application to adjourn, an incomplete case was presented by the respondent.

6.(a) For the appellant Mr Plowright adopted the terms of the rule 24 response. He invited me to consider the Home Office presenting officer's post hearing minute carefully and to look at the reasons for the adjournment request. He emphasised that the need to produce further evidence was not argued to support an application to adjourn. All that he said to the First-tier Tribunal Judge was that the Home Office Presenting Officer did not have the skill and experience to present an argument on an ETS case. It was only after the Home Office Presenting Officer's application had been refused, and after the Home Office Presenting Officer had a further 15 minutes to prepare the case, that the Home Office Presenting Officer noticed that the ETS generic materials were not before the First-tier Tribunal.

(b) Mr Plowright reminded me that the respondent's decision was made in 2016, so that the respondent has almost 18 months to prepare for the hearing. He told me that the respondent was now trying to shift the burden for preparation of one party's argument to the Judge. He reminded me that the test is whether or not the adjournment should have been granted in fairness to both parties. He urged me to read [9] and [10] of the decision. He asked me to dismiss the appeal and allow the decision to stand.

Analysis

7. Permission to appeal was granted on limited grounds. The only issues before me relates to the Judge's decision to refuse an application to adjourn. [9] of the decision says

"At the commencement of the appeal hearing, Mr Stevenson, for the respondent, asked for an adjournment. He indicated that there had been a change to the list at the last moment and he had not had time properly to discuss with the caseworker the implications of an ETS refusal. He wished to be in a position to do so. Mr Coleman, for the respondent, vigorously opposed the application stating that this was not a proper basis upon which to

adjourn and that the matter should proceed. I declined the application to adjourn, basing my reasoning upon my general obligation to ensure a fair and timely disposal of the appeal hearing, and also having regard to the Upper Tribunal decision of Nwaigwe in relation to fairness to the appellant.”

8. The Home Office presenting officer’s post decision minute says this under the hearing of preliminary issues

- Adjournment request made by myself. Cite very late list change around 16:00 hours of previous day. Case has ETS elements which I have not been instructed on and do not know which lines to take. Instructed by SCW to request adjournment. Assurances made that if adjourned would be represented by appropriate HOPO next time around.
- Rep opposed adjournment on grounds that overriding objective of tribunal not served and is for the respondent to assure cases are appropriately staffed.
- IJ agrees with with Rep - adjournment request refused.
- Had around 15 minutes to prep case morning before hearing.
- Home Office bundle did not contain generic ETS/TOEIC evidence.

9. The rule 24 response for the appellant was prepared by counsel who represented the appellant before the First-tier Tribunal. The author of that response insists that the request to adjourn was made because the Home Office representative had no experience with cases of this sort. No application was made to produce further evidence.

10. At [24] of the decision the Judge finds that the respondent does not produce evidence to support the assertion that the appellant dishonestly obtained an English language test certificate. The Judge concludes [24] by saying that the respondent has had ample opportunity

“... To obtain and serve supporting generic evidence in relation to the allegations of forgery but has failed to do so.”

11. What was before the Judge was an inexperienced presenting officer who confessed that he was out of his depth and did not know how to properly represent the respondent.

12. The 2014 Procedure Rules Rule 4(3)(h) empowers the Tribunal to adjourn a hearing. Rule 2 sets out the overriding objectives under the Rules which the Tribunal "must seek to give effect to" when exercising any power under the Rules. It follows that they are the issues to be considered on an adjournment application as well. The overriding

objective is to deal with cases fairly and justly. This is defined as including

- (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
- (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (c) ensuring, so far as is practicable, that the parties are able to participate fully in the proceedings;
- (d) using any special expertise of the Tribunal effectively;
- (e) avoiding delay so far as compatible with proper consideration of the issues.

13. In Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) it was 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 First-tier Tribunal 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?”*

14. The decision against which the appellant appealed was dated 3 August 2016. The notice of appeal was lodged on 26 August 2016. Notice of hearing was sent to both parties on 27 July 2017. The Tribunal reminded both parties that the hearing was fixed for 27 December 2017 by letter dated 14 December 2017.

15. The respondent had exactly the same notice of the hearing as the appellant. The respondent has significant resources. The sole ground for seeking an adjournment was that the presenting officer representing the respondent before the First-tier Tribunal was inexperienced and inadequately trained. The respondent has a number of presenting officers. The respondent chose to send that particular Home Office presenting officer to the First-tier Tribunal.

16. At [10] of the decision the Judge notes that both the appellant and the respondent were represented, and that the appellant and his wife were present and ready to give evidence. The Judge’s decision to refuse the application demonstrates fairness to both parties and is entirely in accordance with both the procedure rules and the guidance given in the case of Nwaigwe. If the last seven words of [9] of the

decision had not been used by the Judge, then permission to appeal would not have been granted. A fair reading of the decision indicates that those last seven words are unnecessary and make no difference to the Judge's decision. It is clear from the decision as a whole that the test applied by the Judge was fairness to both parties.

17. The decision promulgated on 4 January 2018 does not contain an error of law. What is argued before me is not what was argued before the First-tier Tribunal when the Presenting Officer there sought an adjournment. The Judge correctly took guidance from both the procedure rules and the case of Nwaigwe before refusing the application to adjourn. It was the Respondent who selected her representative from a number of available presenting officers.

18. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the Judge draws from the primary data were not reasonably open to him.

19. In this case, there is no misdirection in law & the fact-finding exercise is beyond criticism. The decision is not tainted by a material error of law.

CONCLUSION

20. No errors of law have been established. The Judge's decision stands.

DECISION

21. The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed

Paul Doyle

Date 5 April 2018

Deputy Upper Tribunal Judge Doyle