



**Upper Tribunal  
(Immigration and Asylum Chamber)** Appeal Number: HU/12858/2019 (R)

**THE IMMIGRATION ACTS**

**Heard at Birmingham CJC  
with parties attending by Skype  
On 6<sup>th</sup> October 2020**

**Decision & Reasons Promulgated  
On 19<sup>th</sup> October 2020**

**Before**

**UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**MR KARAMJIT [S]  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondents

**Representation:**

For the Appellant: Mr. A Khan, SMK Solicitors

For the Respondent: Mrs. H Aboni, Senior Home Office Presenting Officer

**DECISION AND REASONS (R)**

1. The hearing before me on 6<sup>th</sup> October 2020 took the form of a remote hearing using skype for business. Neither party objected. At the outset, I was informed by Mr Khan that the appellant and sponsor are aware of the hearing but the sponsor does not have the facilities to join the hearing remotely. Had a request been made for a simultaneous BT conference call to be facilitated so that the appellant and/or sponsor

could hear the proceedings, I would have acceded to such a request. Mr Khan confirmed the appellant is happy for the hearing to proceed in his absence. I sat at the Birmingham Civil Justice Centre and the hearing room and building were open to the public. The hearing was publicly listed, and I was addressed by the representatives in exactly the same way as I would have been, if the parties had attended the hearing together. I was satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that it was in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing would ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

2. The appellant appeals the decision of First-tier Tribunal Judge E M Smith promulgated on 9<sup>th</sup> March 2020, in which he dismissed the appeal against the decision of the respondent of 5<sup>th</sup> July 2019 to refuse the appellant leave to enter the UK on private and family life grounds.
3. The appellant advances two grounds of appeal. First, Judge Smith unfairly refused an application for an adjournment that had been made by the sponsor. Second, in reaching his decision Judge Smith failed to have proper regard to the evidence regarding the age of the appellant's child who is a British citizen and failed to have proper regard to the best interests of the child. Permission to appeal was granted by FtT Judge Scott-Baker on 13<sup>th</sup> July 2020
4. On behalf of the respondent, Mrs Aboni, rightly in my judgement, accepts that the decision of Judge Smith is vitiated by material errors of

law. She properly acknowledges that it was unfair to proceed in the absence of the sponsor in circumstances where a written request for an adjournment had been made. The sponsor had sent a letter to the Tribunal dated 2<sup>nd</sup> March 2020 requesting an adjournment of the hearing because her daughter had a high temperature and the sponsor was looking after her. The sponsor had been advised to stay at home until her daughter recovered. That advice was perhaps unsurprising, as matters stood in early March 2020, and the precautions that were being advised to avoid the spread of Covid-19. Although the application had been refused by a Tribunal Caseworker, it appears that decision might not have reached the sponsor. Judge Smith notes in his decision that on the morning of the hearing, a copy of the letter requesting an adjournment had again been left with the Tribunal. Mrs Aboni also accepts the decision of Judge Smith is entirely perfunctory notwithstanding the very limited information that was before the Tribunal.

5. The issue of fairness in the context of adjournments was considered by the Upper Tribunal in the case of **Nwaigwe (adjournment: fairness) [2014] UKUT 418**. The President gave the following reminder;

"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. The cardinal rule rehearsed above is expressed in uncompromising language in the decision of the Court of Appeal in *SH (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 1284, at [13]:

"First, when considering whether the immigration Judge ought to have granted an adjournment, the test was not irrationality. The test was not whether his decision was properly open to him or was Wednesbury unreasonable or perverse. The test and sole test was whether it was unfair".

Alertness to this test by Tribunals at both tiers will serve to prevent judicial error. Regrettably, in the real and imperfect world of contemporary litigation, the question of adjourning a case not infrequently arises on the date of hearing, at the doors of the court. I am conscious, of course, that in the typical case the Judge will have invested much time and effort in preparation, is understandably anxious to complete the day's list of cases for hearing and may well feel frustrated by the (usually) unexpected advent of an adjournment request. Both the FtT and the Upper Tribunal have demanding workloads. Parties and stakeholders have expectations, typically elevated and sometimes unrealistic, relating to the throughput and output of cases in the system. In the present era, the spotlight on the judiciary is more acute than ever before. Moreover, Tribunals must consistently give effect to the overriding objective. Notwithstanding, sensations of frustration and inconvenience, no matter how legitimate, must always yield to the parties' right to a fair hearing. In determining applications for adjournments, Judges will also be guided by focusing on the overarching criterion enshrined in the overriding objective, which is that of fairness."

6. I am satisfied the decision to proceed in the absence of the sponsor deprived the appellant of his right to a fair hearing. It follows that the appeal is allowed.
7. As to disposal, I accept that the appropriate course is for the matter to be remitted to the FtT for hearing afresh.

### **Notice of Decision**

8. The appeal is allowed and the decision of First-tier Tribunal Judge E M Smith is set aside.
9. The appeal is remitted for hearing afresh before the First-tier Tribunal. The parties will be advised of a hearing date in due course.
10. No anonymity direction is applied for and none is made.

Signed

**V. Mandalia**

Date

6<sup>th</sup> October 2020

Upper Tribunal Judge Mandalia