



IN THE UPPER TRIBUNAL
IMMIGRATION AND
CHAMBER

Case No: UI-2021-001912
First-tier Tribunal No: EA/50464/2020
IA/01426/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 January 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SARABJIT KUMAR
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Vokes instructed by SMK Solicitors.

For the Respondent: Mr Gazge, a Senior Home Office Presenting Officer.

Heard at Birmingham Civil Justice Centre on 10 January 2023

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Law ('the Judge'), promulgated following a hearing at the Nottingham Justice Centre on 6 May 2021, in which the Judge dismissed the appellant's appeal against the refusal of his application for an EEA family permit as an extended family member pursuant to the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations').
2. The appellant sought permission to appeal asserting a procedural unfairness in rejecting the appellant's application for an adjournment and secondly asserting the Judge made a material error of law when assessing whether the appellant was financially dependent upon the EEA sponsor.
3. The Judge refers to the procedure at the hearing between [4 - 8] in the following terms:

4. I was aware that the appellant's representatives had made an adjournment request the afternoon before the hearing, which had been refused by a later that afternoon. An adjournment had been requested on health grounds relating to the counsel instructed. The tribunal case worker noted that no medical evidence had been supplied and that the request had not been made at least one full working day before the hearing. The representatives were invited to renew their request at the hearing itself.
 5. The appeal had been listed for a face to face hearing at 11:30 AM and Ms Simbi was present to represent the respondent, but there was no appearance by the appellant or any representative on his behalf. At 10:38 AM contact had been made with the representatives Syeds solicitors and a video link was established with a Ms Kamaljeet Kaur of that firm in connection with a different appeal in which the same counsel had been instructed. She told me that the person with the conduct of the appeal in her office was otherwise engaged and that she was instructed to renew the adjournment request on the same grounds, which she clarified by stating that counsel was self isolating and there had been insufficient time to instruct another representative. She told me that the appellant had been contacted and had indicated that he was unwilling to attend the hearing without counsel in attendance. I asked if she was able to clarify the basis on which the appeal might be successful, bearing in mind the appellant's statement in his application form that he was not dependent on or living with the sponsor before he came to the UK. Ms Kaur said she was not familiar with the case, but understood that the appellant would say that he met the rules as to prior dependency and/or membership of household.
 6. Ms Simbi opposed the adjournment, stating that she was ready to proceed.
 7. Having regard to the overriding objective and the need to deal with cases fairly and justly, bearing in mind the requirements of proportionality, I was not satisfied that an adjournment was appropriate. There was no medical evidence or evidence of self isolation to support the adjournment request, although such evidence will often be present where the reason for absence occurs shortly before the hearing date. I particularly took into account question 6.1 of the application form according to which the appellant was not dependent on or a member of the sponsor's household before he came to the UK. Furthermore, question 6.2 and 6.7 of the application form indicate that the appellant was not receiving money from the sponsor or living with the sponsor before he came to the UK. I also took into account the contents of the witness statements the resources of the Tribunal are finite and it is not proportionate to adjourn an appeal which has no prospect of success.
 8. I therefore decided to proceed in the appellant's absence. Ms Simbi said that she relied on the reasons for refusal and subsequent review, adding that there was evidence of the appellant working in the UK which cast further doubt on whether he was dependent, while Ms Kaur said that the appellant had been given permission to work in 2020. I reserved my decision.
4. Ground one asserts the Judge's reasoning regarding the adjournment is procedurally unfair and perverse. The grounds argue it was not disputed by the Judge that the counsel instructed in the appeal was self isolating as it was also on record that the same counsel had been instructed in a different appeal but had not appeared. The Grounds argue the Judge misdirected himself by requiring medical evidence of self isolation at such short notice and that the Judge failed to exercise his power to adjourn or postpone the hearing and did not give effect to the overriding objective of dealing with the cases fairly and justly. The appellant also argues the Judge went beyond the primary question of the adjournment and decided to adjudicate on the merits without giving the appellant a fair chance of hearing the Judges indication. It is claimed the Judge made his mind up on the

merits of the appeal prior to hearing the evidence of the witnesses and submissions from counsel which would be an error of its own.

5. Permission to appeal was granted by another judge of the First-tier Tribunal, the operative part of the grant being in the following terms:
 2. The grounds are arguable in their assertion that it was procedurally unfair to continue with the (face to face) hearing where counsel did not attend due a self-isolation requirement. First, in most cases the Tribunal is entitled to take such statements from regulated legal professionals at face value, and can arguably be expected to give reasons when it does not. The Judge's decision arguably gave weight to the lack of medical evidence without explicitly accepting or rejecting the explanation given, which in these circumstances is arguably unfair. Second, it was arguably unfair to proceed because the Judge considered that the appeal was bound to fail. The Judge did not have the benefit of legal argument before making that assessment, and the risks of such a course of action are illustrated by the grounds now putting forward just such an argument that was not considered by the Judge.
 3. In considering whether the error identified above would, if established, be material to the final outcome, I bear in mind the caution urged in *R. (Cotton) v Chief Constable of Thames Valley Police* [1990] IRLR 344 as analysed in *MM (unfairness; E & R) Sudan* [2014] UKUT 105 (IAC) at [14]- [18]. While I should not be taken as giving any indication that the appellant has a strong case on his substantive appeal, it is not so manifestly without merit such as to justify refusing permission for its full consideration by the Upper Tribunal.
6. There is no Rule 24 response from the Secretary of State.
7. As submitted by Mr Vokes, ground one relates to the question of fairness of the proceedings and whether the Judge has made procedural error sufficient to amount to an error of law. It was submitted that that question has to be answered irrespective of the merits of the appeal.
8. The general principle that justice must not only be done but must be seen to be done is not disputed. 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 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? At [8] it was found "...sensations of frustration and inconvenience, no matter how legitimate, must always yield to the parties' right to a fair hearing..."
9. In the lead Court of Appeal authority of this *SH (Afghanistan) v SSHD* [2011] EWCA Civ 1284 at [13], it was stated "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." See also *AM (Somalia) v SSHD* [2019] EWCA Civ 774 at [56].
10. In relation to why procedural fairness is important, it cannot be disputed that a hearing that has been conducted fairly, with the parties having the option of being able to put their arguments before a judge, will improve the prospect of a correct decision being reached.
11. In relation to the argument the Judge's finding that there were no realistic prospects of success on the facts of this appeal in any event meant no reason to

adjourn, a view challenged by Mr Vokes before me, Magarry J in John v Rees [1970] Ch 345 at [402] said:

"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

12. It is important when considering issue of fairness of proceedings to ensure that any party to the proceedings feels that they have had the opportunity to put their case, that their case has been listened to and properly considered by the judge, in addition to the need for the judge to explain clearly in any judgement why a particular outcome has been reached. The appellant in this appeal indicated that he wanted to be represented by his counsel to enable his case to be put and evidence given.
13. It is not disputed that the appellant's counsel did not attend court on that day, both in relation to this appeal and another case. There is nothing to suggest that the reasons given by counsel, a positive Covid test, is not genuine. The barrister cannot be criticised for following published government guidance at that time of the need to self isolate if a person tests positive. The point of the guidance was to avoid the risk of Covid spreading to individuals with whom the infected person may be in contact, a likely scenario if counsel had attended court.
14. It is unclear why a remote hearing was not arranged which counsel could have attended, but that is an aside.
15. It cannot be disputed that the loss of legal representation only a few days before the hearing was not as a result of anything for which the appellant was responsible. The appellant wanted to be represented, had instructed a person the solicitors considered to be an experienced and suitably qualified barrister to represent him, who properly sought an adjournment as a result of the need to isolate in accordance with published government advice.
16. The Judge's reasoning, as set out above, refers to the lack of medical evidence. As the representative was isolating it is not clear what the Judge was considering counsel could provide other than the positive Covid test, if that was still available. This is not a case of an individual falling ill, seeking medical advice or support and being able to provide a letter from the GP or otherwise, which in the normal course of events may warrant a need for supportive evidence to be provided, but in a situation where it was highly unlikely that any evidence from a third-party medical source was available unless the individual who was isolating deteriorated and required such intervention. That was not made out in this appeal.
17. The appellant's claim to be entitled to a Residence Card as an extended family member on the basis of being a member of the EEA nationals household in India, which continued until the present position in the UK, may have little merit, in light of the fact the sponsor only became an EEA national in March 2017 after the appellant had already entered the UK, and the facts.
18. The appellant's claim was also to be dependent upon EEA national. The Judge addresses that in the decision arguing that the evidence did not support that any payments being received by the appellant from the sponsor were sufficient to meet essential needs.
19. Article 3 of the Citizens' Rights Directive 2004/38/EC ('the Free Movement Directive') referred to the need for dependency upon the EEA national to arise in

the country from which the extended family member has come. In this case that is India. It is arguable the appellant cannot have been dependent upon an EEA national during the time he was in India as at that time the sponsor was not an EEA national. Mr Vokes submitted that he could put an argument to show the appellant was able to succeed even though the only time he had been dependant upon the EEA national was after he arrived in the UK and after the sponsor obtained his Portuguese citizenship in 2017. It was submitted there was no guidance from the Upper Tribunal or Court of Appeal on the points he wished to raise.

20. The unfairness is therefore the refusal of the adjournment request for inadequate reasons, the failure to consider the reality of the situation at that time in light of the published guidance in relation to isolation if a person tests positive for Covid, and the resultant denial of the opportunity for the appellant to be represented and for his barrister to put his case to a judge, as indicated by Mr Vokes.
21. I find that procedural unfairness has been established in the judge refusing the adjournment for the reason stated, which was not disputed by Mr Gazge.
22. I set the decision aside with no preserved findings in light of the procedural irregularity.

Notice of Decision

23. The First-tier Tribunal Judge materially erred in law. I set the decision of the Judge aside. I remit the appeal to the First-tier Tribunal sitting at Birmingham to be heard de novo by a judge other than Judge Law.

Mr C J Hanson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 January 2023