



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

Appeal Numbers: HU/08836/2016  
HU/08833/2016

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision & Reasons  
delivered ex tempore at  
the hearing.**

**On 7 February 2018**

**On 8 March 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD**

**Between**

**MR PALLAB SARKER  
MRS MOUMITA DUTTA  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

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

Respondent

**Representation:**

For the Appellants: Mr M Ashraf, Legal Representative, Chancery Solicitors

For the Respondent: Ms A Everett, A Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellants appeal with permission against the decision of First-tier Tribunal Judge Mill who, in a decision and reasons promulgated on 31 August 2017, had dismissed the Appellants' appeals based ostensibly on Article 8 ECHR grounds. The Appellants had not attended the hearing but they were legally represented by Mr Rana, a legal representative at Chancery Solicitors.

2. The judge had noted that there had been a previous application to adjourn a few days before the hearing and that had been refused on the papers. Then on the morning of the hearing Mr Rana, the Appellants' legal representative had applied for an adjournment on the basis that one of his clients had gone to hospital, apparently not being well. The judge said in respect of that matter at paragraph 8 as follows:

“Neither of the Appellants appeared personally. Mr N Rana, solicitor, appeared on behalf of the Appellants. He stated he was seeking an adjournment. He referred to the fact that the second Appellant [Mrs Dutta] had gone to hospital earlier in the morning with chest pains and reading difficulties. He advised that the first Appellant was accompanying her at hospital. He was unable to provide any further information and his submissions were somewhat vague. No documentary evidence or vouching was produced in respect of the second Appellant's health condition, nor her attendance at hospital.”

3. The judge referred to the decision of the President in **Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)** and the judge noted that the grounds of appeal had been lodged in April 2016 [this hearing was on 23 August 2017], that a recent adjournment application had been made and the application had been refused.

4. Permission to appeal was granted by Upper Tribunal Judge Martin by way of a decision dated 10 November 2017 and she had said as follows:

“If the Appellants were in truth at hospital on the morning of the hearing then the grounds have merit. I have some sympathy with the Judge on the day who noted that the Appellants had made a recent adjournment application on the basis that they were unprepared which had been refused. The representative's adjournment application was also vague. The Appellants must produce evidence to the Upper Tribunal that they were at hospital on the day of the hearing.”

5. Before me this morning, Mr Ashraf, on behalf of the Appellants, has provided a skeleton argument where he refers to the decision in **Nwaigwe** and submits in that skeleton argument (which he adopted as his submissions today) that the test for the judge at the First-tier Tribunal was whether the procedure was unfair as opposed to whether the judge had acted reasonably in refusing the Appellants' application for an adjournment.

6. In addition to his skeleton argument, and indeed not within it, he brought to the Tribunal's attention that in fact there had been a further application to adjourn today's hearing but that had been refused by an Upper Tribunal Judge by way of a decision sent out on 23 January. In that most recent application to adjourn it was said that Mrs Dutta was pregnant with the couple's second child and that she had pregnancy related tiredness, weight loss and low blood pressure. There was no explanation as to why Mr Sarker, her husband, was not able to attend his appeal hearing today. In any event, in addition to that application which had been rejected, under cover of a letter of 23 January a Rule 15(2A) application had been

made for the admission of further evidence. Amongst that bundle there is indeed correspondence to show that on the morning of the hearing before the First-tier Tribunal that Mrs Dutta was being seen in hospital and it appears that her husband had accompanied her.

7. As explored during the submissions of both parties I have real concern, and I have to say suspicion, about the nature of the applications to adjourn which have been made by the Appellants and indeed it is a curious feature of the case that although the Appellants have been told they can make an in-person claim for asylum that they have failed to do that. In any event I discussed in particular with Mr Ashraf the timing of the applications which were to be substantively considered and indeed the timing of the unfortunate events which have led to the Appellants failing to appear, now twice, at the Tribunal, once at the First-tier Tribunal and the second time here at the Upper Tribunal and he assures me that he will pass my concerns on to the Appellants in no uncertain terms. Mr Ashraf also assures me that he understands that he not only represents the Appellants and appears on their behalf, but he is there to advise them as well and that he will give them appropriate advice. I remind myself of the decision in **Nwaigwe**, the head note of which says as follows:

“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?...”.

8. I find my hands are somewhat tied in being able to take the investigation of what is going on in the background any further without Mr Sarker and Mrs Dutta present. I do considerate it is appropriate though to set out my concerns in this ex tempore decision. I conclude that there is no real alternative but to conclude there is an error of law in the judge’s decision. I similarly, to Upper Tribunal Judge Martin, conclude that I have sympathy for the way in which First-tier Tribunal Judge Mill had to deal with this matter, but nonetheless I conclude that the matter has to be remitted to the First-tier Tribunal for rehearing. None of the current findings shall stand but again I stress and make clear, it if is not already clear, that a time will soon come where any further applications for adjournments are likely to begin to undermine the veracity of what the Appellants are putting forward as their concerns in relation to their appeal. Any further directions will be for the First-tier Tribunal. Mr Ashraf has assured me that he will inform the First-tier Tribunal of any interpreter requirements within the next three days.

## **Notice of Decision**

The decision of the First-tier Tribunal contained a procedural error and is therefore set aside. None of the findings shall stand.

There shall be a re-hearing at the First-tier Tribunal.

No anonymity direction is made.

Signed: Abid Mahmood

Date: 7 February 2018

Deputy Upper Tribunal Judge Mahmood