Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/03088/2019 (P)
HU/03092/2019 (P)

THE IMMIGRATION ACTS

Determined without a hearing under Rule 34	**Decision & Reasons Promulgated**
On 30 October 2020	**On 6 November 2020**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

KAMRUL [I]
SALMA [K]

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Londonium Solicitors (written submissions)
For the Respondent: No representative and no submissions

DECISION AND REASONS

Introduction

1. The appellants are citizens of Bangladesh who was born respectively on 31 December 1986 and 16 June 1985. They are a married couple. On 4 May 2019, the second appellant gave birth to their child in the United Kingdom.

2. On 27 April 2017, the appellants made an application for further leave to remain on the basis of Art 8 of the ECHR. The first appellant had initially

arrived in the UK on 6 October 2010 as a Tier 4 Student and the second appellant had entered the UK on 4 March 2013 with leave as his dependant.

3. On 31 January 2019, the Secretary of State refused each of the appellants leave to remain under Art 8 of the ECHR (including under the relevant Immigration Rules relating to Art 8).

The Appeal

4. The appellants appealed to the First-tier Tribunal. The appeal was initially listed for hearing on 26 April 2019 but was adjourned at the request of the appellants. The adjourned hearing was listed on 20 August 2019 but that was also adjourned at the request of the appellants.

5. The appeal was then re-listed on 16 January 2020 before Judge Cohen at the Taylor House Hearing Centre. On 10 January 2020, six days before the scheduled hearing, the appellants' legal representatives made a further application to adjourn the hearing. The basis of that application was that the second appellant was unable to attend the hearing because of her poor health, including both her physical and mental health. A letter of support from the second appellant's General Practitioner (Dr Tamara Hibbert) dated 9 January 2020 was enclosed. On 14 January 2020, that application was refused by a Tribunal Case Worker.

6. As a consequence, the appeal was listed before Judge Cohen on 16 January 2020. At that hearing, the appellants' Counsel renewed the application to adjourn the hearing on the basis of the Second Appellant's health.

7. The judge refused that application and the appeal proceeded in the absence of the appellants. Judge Cohen dismissed the appellants' appeals on human rights grounds, under Art 8 of the ECHR.

8. The appellants sought permission to appeal to the Upper Tribunal on the basis that the refusal of the adjournment was unfair in the light of the supporting medical evidence concerning the second appellant. Permission was initially refused by the First-tier Tribunal (Judge Froom) on 22 April 2020. However, on 6 July 2020, the Upper Tribunal (UTJ Lindsley) granted the appellants permission to appeal. With her permission decision, UTJ Lindsley issued directions that, in the light of the COVID-19 crisis, her provisional view was that it was appropriate to determine the issues of whether the First-tier Tribunal made an error of law and, if so, whether its decision should be set aside, without a hearing. She invited submissions from the parties both as to the substantive issue raised in the appeal and also as to whether the appeal should be determined without a hearing.

9. In response to those directions, the appellants made submissions as to the legal issue, namely whether the judge's decision not to adjourn the

hearing was unfair. The appellants raised no objection to the appeal being determined without a hearing.

10. The Respondent filed no submissions in response to UTJ Lindsley's directions.

11. In the light of the party's submissions, and neither party having raised any objection, having regard to the interests of justice and the overriding objective of determining the appeal justly and fairly and the nature of the legal issue raised, I am satisfied that it is in the interests of justice to determine this appeal without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) and para 4 of the *Amended General Pilot Practice Directions: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal* (14 September 2020) issued by (then) Vice Senior President and (now) Senior President of Tribunals, the Rt. Hon. Sir Keith Lindblom.

12. The sole issue raised in the grounds of appeal and in the submissions made subsequent to the grant of permission concerns the fairness of the judge's decision not to adjourn the appeal.

Discussion

13. The judge dealt with the adjournment application made at the hearing by the appellant's Counsel in paras 12-13 of his determination as follows:

> "12. The appellant did not attend his appeal but was represented before me. Mr Parkin sought a further adjournment. He indicated that the appellant will be likely to be fit to give evidence within 6 to 12 months. I refused the adjournment request. I indicated that the appeal had been previously adjourned for medical reasons on multiple occasions dating back to 26 April 2019. There was no prospect of the parties being fit enough to give evidence within a week reasonable timescale (*sic*). Matters have moved on as the 2nd appellant's depression related to miscarriages but she has now successfully given birth. Mr Parkin indicated that his instructions were to withdraw if the adjournment was not granted. He however asked for permission to seek further instructions. He reverted and indicated that he wished to make brief submissions.
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> 13. I was not provided with any evidence that the appellants were currently taking any anti-depressants. The appellants had not displayed suicidal ideation or self-harm. They had not required any treatment in hospital under section or voluntarily in respect of mental health necessitating treatment as an in-patient."

14. In granting permission to appeal, UTJ Lindsley summarised the judge's reasoning at para 4 and the basis on which she considered the grounds were arguable at para 5 of her decision:

> "4. At paragraphs 12 and 13 of the decision the issue of the adjournment is dealt with by the First-tier Tribunal Judge. He finds that it was not right to adjourn the appeal for the following reasons: there was no medical evidence that the appellants were

currently taking medication, self-harming or had suicidal ideation or required any hospital treatment; there was no evidence that the appellants would be fit to attend the hearing in a reasonable period of time; the appeal had been adjourned on multiple occasions since April 2019; and the second appellant had now given birth moving on the issue of her having depression as a result of miscarriages.

5. It is arguable that the decision was unfair given the medical evidence from the second appellant's GP at page 18 of the bundle [] and the submissions set out at pages 14 to 17 of the bundle on this issue. It is also arguable that the reasons for refusing the adjournment are not adequate in addressing this evidence."

15. The First-tier Tribunal has a discretion to adjourn a hearing. That is set out in its case management powers in rule 4(3)(h) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604) where it is stated:

> "In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may –
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> ....
>
> (h) adjourn or postpone a hearing; ..."

16. Further, by rule 28 the First-tier Tribunal may proceed with a hearing where a party fails to attend where it is:

> "(a) satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
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> (b) considers that it is in the interests of justice to proceed with the hearing."

17. It is clear that the discretion must be exercised fairly. The issue is not whether the discretion was exercised reasonably or rationally but fairly. That was made plain by the Court of Appeal in SH (Afghanistan) v SSHD [2011] EWCA Civ 1284 where at [13] Moses LJ (with whom Ward and Patten LJJ agreed) said:

> "...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."

18. Further exposition was given by the Upper Tribunal in Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) (McCloskey J, President). There, in the judicial headnote, the (then) President's view is summarised 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 tests; and acting

> irrationality. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. When 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?"

19. In relation to applications for adjournments, the President of the First-tier Tribunal (Immigration and Asylum Chamber) has issued guidance in the "Presidential Guidance Note No 1 of 2014: The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014" at para 8(a) in the following terms:

> "8. Factors weighing in favour of adjourning an appeal, even at a late stage of proceedings, include:
>
> (a) Sudden illness or other compelling reason preventing a party or a witness attending a hearing. Normally such a reason should be supported by medical or other relevant evidence, unless there has been insufficient time to obtain such evidence. However, where there is no likelihood that the party will be able to attend the hearing within a reasonable period, a hearing may proceed in absence where the Tribunal considers that this is in the interests of justice in terms of Rule 28."

20. Judge Cohen's reasons in paras 12-13 were brief. He appears to have been influenced by the fact that the appeals had been adjourned for medical reasons "on multiple occasions dating back to 26 April 2019". As far as I am able to tell, there were only two previous adjournments: one in April and one in August 2019 both for medical reasons. The judge was undoubtedly correct to note that there was no evidence that the second appellant (he refers to the "appellants") was taking any anti-depressants. He also said that she had not displayed suicidal ideation or self-harm arising from her mental health. Stating that, it is not clear whether the judge had taken into account the letter from Dr Hibbert submitted in support of the application for an adjournment. She is the second appellant's GP. In her letter dated January 2020, Dr Hibbert said this:

> "The above named patient is being treated for depression and has a 35 week old baby to look after. She has started counselling sessions exclusively for women who are pregnant or who have babies up to 52 weeks old. [The second appellant] is currently in a very vulnerable position with her depression; she is also having investigations for heavy periods and found her pregnancy very difficult.
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> In view of her physical and mental poor health she has anxiety, insomnia and even suicidal thoughts. I do not think she will be fit to attend a Tribunal on 16th January 2020. It can take 6 to 12 months for mood to stabilise and it will be better to postpone the hearing until then. I hope this letter will be considered when setting the date for the next hearing."

21. Contrary to what the judge said in para 13 of his determination, the only medical evidence before him was to the effect that the second appellant

was having "suicidal thoughts". It was also the GP's view that the second appellant would not be fit to attend a hearing on 16 January 2020. That medical evidence was unchallenged before the judge. The respondent was not, in fact, represented at the hearing. Whilst the judge did not, necessarily, have to accept the medical evidence, he did have to grapple with it and its conclusion, based upon the GP's knowledge of the second appellant's health, that she was unfit to attend the hearing. The judge did not do that and also failed to take into account that, in fact, the second appellant is prone to suicidal thoughts.

22. Whilst it may be relevant that the appeal had been adjourned previously, that was not a factor which could, in itself, determine the fairness of proceeding with the hearing in the absence of the second appellant. There is no doubt that the evidence of the appellants, including the second appellant, would be an important factor in determining their Art 8 appeal. That is, of course, without having regard to the underlying fairness that individuals should be able to take part in their appeal hearings if they wish to. There is a suggestion in the judge's reasoning, when he refers to there having been "multiple occasions" when adjournments have been granted, that he overstated the history of the appeals. Those two previous adjournments, it must be taken were properly granted on the basis of medical evidence concerning the second appellant. This was not a case where it was being said that the appeal had no future prospect of going ahead with the second appellant present. The GP indicated that the second appellant's mood might take "6 to 12 months" to stabilise.

23. In my judgment, the judge erred in law by failing to grapple with the medical evidence sufficiently and thereby gave inadequate reasons for his decision to refuse the adjournment application which resulted in unfairness, in all the circumstances, to the second appellant.

Decision

24. The decision of the First-tier Tribunal to dismiss the appellants' appeals involved the making of an error of law. The First-tier Tribunal's decision cannot stand and is set aside.

25. Having regard to the nature of the error, namely that the appellants were unfairly deprived of a hearing, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is that it is remitted to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Cohen.

Signed

Andrew Grubb

Judge of the Upper Tribunal
3 November 2020