Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13611/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 March 2021	**On 6 April 2021**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

MRS ABIDA BEGUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Jafferji, Counsel instructed by Lawfare Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

The Appellant is a citizen of Pakistan. Her date of birth is 1 January 1941.

On 17 April 2020 First-tier Tribunal Judge Bird granted permission to the Appellant to appeal against the decision of First-tier Tribunal Judge M A Khan (promulgated on 15 November 2020) to dismiss the Appellant's appeal against the decision of the Respondent (on 24 July 2019) to refuse her application for leave on Article 8 European Convention on Human Rights grounds.

The grounds of appeal

The thrust of the grounds is that there was procedural unfairness arising from the decision of the judge to refuse the Appellant's application to adjourn the case.

The decision of the First-tier Tribunal

Mr Jafferji represented the Appellant before the First-tier Tribunal. At the start of the hearing, he made an application to adjourn. The judge identified two reasons given by Mr Jafferji for seeking an adjournment. First, the Appellant's granddaughter, who works for the Home Office, had been told by her employer the that she was not allowed to give evidence in support of her grandmother's appeal. Secondly, the Appellant sought time to obtain medical evidence. The judge refused to accede to the adjournment request. At paragraph 5 of the decision, he gave the following reason: -

> "on the grounds that the Appellant's medical records have not been provided to see what is the past history of the Appellant's medical situation. The Appellant's legal representatives have had sufficient time to gather all the evidence necessary in support of the Appellant's case, including medical evidence".

Error of law

Ms Everett at the hearing before me conceded that there was a material error arising from the refusal by the judge to adjourn. I agree. The judge's reasoning is factually incorrect. There was evidence of the Appellant's poor physical and mental health, including specifically her medical records, in the Appellant's bundle. In addition, the decision does not disclose how, if at all, the judge gave effect to the overriding objective, specifically to deal with the case fairly and justly, when refusing the application[1]. Furthermore, the judge wholly failed to engage with the first reason given by Mr Jafferji for seeking the adjournment.

For the above reason, I agree with the concession made by Ms Everett that there is a procedural irregularity giving rise to unfairness. The Appellant in this case was deprived of a fair hearing. The judge made an error of fact and did not apply the correct test: see Nwaigwe (adjournment: fairness) [2014] UKUT 00418.[2] I set aside the decision.

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[1]The Tribunal Procedure Rules 2014 (Rule 2)

Overriding objective and parties' obligation to co-operate with the Tribunal

2.- (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(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 practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

[2]In Nwaigwe (adjournment: fairness) [2014] UKUT 00418, the UT stated the following at [7]:

I find that there are problems with the substantive decision of the judge. At paragraph 31 the judge stated, "I find that the Appellant or someone on her behalf has made up the evidence, which I find has been fabricated to assist her …" At paragraph 34 the judge acknowledged that the Respondent had not made an allegation of deception. He stated, "… I certainly do not wish to get into the realm of deception. However, one thing is clear from the evidence that the Appellant entered on her last visit in 2012 with a clear decision of settling in the United Kingdom permanently." The judge was entitled to find that the Appellant had not discharged the burden of proof. However, he went further. He implied a level of dishonesty; however, this was not an issue raised by the Respondent.

After recording parts of the Appellant's evidence, the judge inserted the words "vague" and/or "evasive" in brackets. At paragraph 31 the judge said that the Appellant's evidence was "extremely vague and evasive". There are no reasons given in the decision to explain why the judge formed the view that the evidence was vague, and the Appellant was evasive.

The matter is remitted to the First-tier Tribunal to be heard *de novo*, properly applying paragraph 7.2 (a) of the Practice Statement of the Senior President dated 24 September 2012[3].

In relation to the first reason given for seeking an adjournment, Ms Everett indicated that she was unaware of any such policy preventing family members working for the Home Office supporting or attending an appeal hearing and giving evidence in support of an Appellant. Mr Jafferji indicated that he was also unaware of such a policy.

Mr Jafferji pointed out to me that the Appellant's evidence in relation to family members in Pakistan was before the decision-maker and it had not been

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> "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".

[3]

> 7 Disposal of appeals in Upper Tribunal
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> 7.1 Where under section 12(1) of the 2007 Act (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).
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> 7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-(a)the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or (b)the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.
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> 7.3 Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary

challenged. I explained to him that it was not for me to make findings of fact or to seek to tie the hands of the Judge of the First-tier Tribunal who will be determining the Appellant's appeal in due course.

Notice of Decision

The decision of the First-tier Tribunal is set aside. The appeal is remitted to the First-tier Tribunal for a fresh hearing.

Signed Joanna McWilliam Date 24 March 2021

Upper Tribunal Judge McWilliam