Upper Tribunal
(Immigration and Asylum Chamber)

Quaidoo (new matter: procedure/process) [2018] UKUT 00087(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9th January 2018	
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Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE LINDSLEY

Between
BENJAMIN ASUAH QUAIDOO
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Yerokun of A & A Solicitors LLP
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

1. If, at a hearing, the Tribunal is satisfied that a matter which an appellant wishes to raise is a new matter, which by reason of section 85(5) of the Nationality, Immigration and Asylum Act 2002, the Tribunal may not consider unless the Secretary of State has given consent, and, in pursuance of the Secretary of State's Guidance, her representative applies for an adjournment for further time to consider whether to give such consent, then it will generally be appropriate to grant such an adjournment, rather than proceed without consideration of the new matter

2. If an appellant considers that the decision of the respondent not to consent to the consideration of a new matter is unlawful, either by reference to the respondent's guidance or otherwise, the appropriate remedy is a challenge by way of judicial review.

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Ghana born on 8th May 1989. He arrived in the UK on 15th February 2011 with entry clearance as a visitor and overstayed. On 4th September 2015 the appellant made a human rights application based on his private life with his parents and siblings and his four years residence in the UK. This application was refused in a decision dated 4th December 2015. His appeal against the decision was dismissed by First-tier Tribunal Judge Twydell in a determination promulgated on the 31st January 2017.

2. Permission to appeal was granted by Upper Tribunal Judge Reeds on 26th September 2017 on the basis that it was arguable that the First-tier judge had erred in law in failing to determine all matters before him and in refusing to grant an adjournment.

3. The matter came before us to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

4. In the grounds of appeal and in oral submissions Mr Yerokun argued that the First-tier Tribunal had erred in law in failing to adjourn the hearing, for two reasons.

5. Firstly, it was argued that it was wrong not to adjourn the hearing as there was no respondent's bundle served in accordance with the directions. He argued that it was not correct that the appellant had agreed that they had all of the documents. They had never received the bundle at any point, and the solicitors had not made the original application to the respondent so had no copy of that application. The respondent had made an application for an adjournment, as this was their normal practice when they had omitted to comply with directions, and this ought to have been granted in all the circumstances.

6. Secondly, it was argued that it was an error of law not to have adjourned the hearing when the respondent made a second application for an adjournment at 1.45pm in connection with whether the respondent consented to the new matter of the appellant's marriage being part of the appeal. It was argued that it was inaccurate to have recorded in the decision that the appellant alone asked for this second adjournment regarding the new matter. Counsel for the respondent was said to have wanted the matter adjourned as that would have been in accordance with the guidance of the respondent to ask for an adjournment in these circumstances, enabling a considered initial decision to be made by the respondent dealing with the new matter, and also meaning that the one stop appeal process could be maintained by consent being given to the new matter then being included in the current appeal. It was in this context that the submissions made by counsel for the respondent, and recorded at paragraph 10 of

the decision, were made. It would not make sense that these submissions were put forward if the respondent had not been advocating for an adjournment for further time for consideration of their consent to the inclusion of the new matter. The position of the respondent, as set out by her counsel in relation to consent to the admission of the new matter at the hearing, was that she did not consent if there was not an adjournment, but believed it would be fairer to grant an adjournment particularly given the possible consequences for the appellant under s.96 of the Nationality, Immigration and Asylum Act 2002 if the issue of the appellant's marriage and his wife's pregnancy was not dealt with in this appeal.

7. The failure to adjourn the hearing in these circumstances, the appellant argued, was therefore not procedurally fair or just, and thus was not in accordance with the principles in Nwaigwe (adjournment; fairness) [2014] UKUT 418 (IAC) or the Presidential Guidance Note No 1 of 2014 at paragraph 8(b). Further the First-tier Tribunal wrongly applied s.96 of the Nationality, Immigration and Asylum Act 2002 in this context as the appellant was actually trying to raise the new issues in the context of the appeal but was not being allowed to do so.

8. In a rule 24 notice the respondent stated that as she refused to consent to a new matter being raised then the First-tier Tribunal had no jurisdiction. This decision was in accordance with the law, but meant that the appellant could nevertheless raise all the excluded issues via a new application to the respondent. In these circumstances there was no error of law or unfairness with respect to the refusal to adjourn.

9. Mr Deller argued that the First-tier Tribunal had properly established that both parties and the Tribunal had all the relevant documents that were in the respondent's bundle at the start of the hearing as is set out at paragraph 4 of the decision, and that there was no error of law by the First-tier Tribunal in refusing to adjourn due to the formal failure of the respondent to comply with directions.

10. Mr Deller initially thought it might have been the case that the Secretary of State had advised her counsel to ask for an adjournment to consider further the issue of whether to consent to the new matter being admitted in this appeal, and had only refused to consent to the inclusion of the new matter in light of the First-tier Tribunal's refusal to grant this adjournment. However, after our adjourning the hearing before us over lunch for Mr Deller to investigate further, it transpired that this was not the case. Mr Deller produced a copy of the relevant notes for the respondent. According to these, counsel for the respondent had telephoned the Home Office twice. The first time was apparently prior to the start of the hearing, and on this occasion counsel had been advised to request an adjournment so that the respondent's bundle could be served. The second call was regarding the issue of whether the respondent consented to the inclusion of the appellant's marriage being considered as a new matter at the hearing. The notes reflect that both counsel and the respondent took the view that they should not consent to the new matter being included in the hearing, and that a new application should be made by the appellant to the respondent who would consider this with the best interests of the soon to be born child.

11. Mr Deller therefore argued that the First-tier Tribunal had not erred in law in failing to deal with an application for an adjournment by the respondent for further time to consider whether to consent to the inclusion of the new matter in this appeal as no such application had been made by the respondent. The respondent having refused to consent to the new matter being included, that was the end of this issue.

Conclusions – Error of Law

12. The case of Mahmud (S.85 NIAA 2002 – 'new matters') [2017] UKUT 00488 (IAC) sets out guidance as to how the issue of a "new matter" must be dealt with. The first requirement is that the First-tier Tribunal must determine whether an issue is a new matter. This was done at paragraph 13 of the decision in the present case. It is concluded that the appellant's marriage and imminent birth of his child are new matters which, given the lack of consent of the respondent, could not be dealt with in the appeal. It is clear that the new matter was correctly dealt with by the First-tier Tribunal as a "factual matrix" which had not been previously considered by the Secretary of State when consideration was given to the application made by the appellant and/or any s.120 notices.

13. The conclusion that this was a new matter was open to the First-tier Tribunal. The only previous reference in the application had been that the appellant had met a lady he hoped to marry without giving any details of her identity, the marriage and/ or the pregnancy. The marriage and pregnancy both came after the decision appealed against, with no further details provided to the respondent at all until a bundle was posted to her the day before the hearing. Applying paragraph 31 of Mahmud it is clear that the birth of a child will always be a new matter, and in the context of no details having been previously given about the relationship with the appellant's wife we find that it was right for the First-tier Tribunal to find that this marriage was likewise to be regarded as a new matter.

14. There is no evidence that the respondent's refusal to consent to the admission of the new matter arose as a result of the First-tier Tribunal refusing a respondent's application to adjourn so that she could have more time to consider this issue further. If, in a future appeal, a reasoned respondent's application is made for more time to consider consent to a new matter with reference to her guidance published on the 9th October 2017 "Rights of Appeal Version 6" at page 26 "Handling New Matters Before the Appeal Hearing" then it is our view that it would be appropriate, generally, for such an adjournment request to be granted to ensure, where possible, the integrity of the one-stop appeal process whilst also safeguarding the respondent from being taken by surprise and not being able to take a view as first decision-maker.

15. However in this case the respondent's notes (from the screenshot) record that the second call from her counsel regarding consent to admission of this new matter resulted in the unanimous decision that it was not appropriate to give consent to this being included in this appeal, and that instead it was appropriate for the appellant to make a fresh application to the respondent with details of his soon to be born child whose best interests could then be considered by the respondent.

This accords with what is said by the Judge of the First-tier Tribunal at paragraph 5 of his decision, where it is clear that it was only the appellant that made an application to adjourn for the respondent to consider this consent further. It would appear that counsel for the respondent did raise potential issues arising under s.96 of the Nationality, Immigration and Asylum Act 2002 to the First-tier Tribunal in the context of the appellant's application to adjourn, as are set out at paragraph 10. However, this does not mean that he was advancing an adjournment application, but simply that he was fairly providing information he thought might assist the First-tier Tribunal in their decision-making on the appellant's application for an adjournment.

16. As the First-tier Tribunal had properly decided that these new facts were a new matter and as the respondent had not consented to the new matter being dealt with under s.85(5) of the Nationality, Immigration and Asylum Act 2002 then there was no basis for an adjournment to be granted giving the respondent further time to deal with that issue. It was not the case that there were late changes to the grounds or reasons for refusal which would have meant that this adjournment was appropriate in accordance with paragraph 8(b) of the Presidential Guidance. It was not in any way an error of law or unfair for the adjournment to be refused.

17. If the appellant believed that the decision of the respondent to refuse to consent was unlawfully made, perhaps by reference to her guidance on the giving of such consent and/or the extent of fees that the approach of making a new application would be likely to incur, then the appropriate remedy would have been judicial review of the respondent's decision refusing consent; not a challenge to the refusal to adjourn by the First-tier Tribunal.

18. We are also satisfied that the First-tier Tribunal ensured properly that both parties had all of the relevant papers at the start of the hearing. Although the respondent's bundle had not been served and filed with the First-tier Tribunal in accordance with directions, the judge was satisfied that both parties had the relevant papers for the hearing which were included in that bundle, and that no one was taken by surprise: see paragraph 4 of the decision. There was no unfairness in proceeding simply for want of a formal respondent's bundle having been served on the appellant.

19. It is also clear that the First-tier Tribunal made no findings in relation to s.96 of the Nationality, Immigration and Asylum Act 2002, see paragraph 10 of the decision, and so there can be no error of law on the basis that this was improperly addressed.

20. It should be reassuring to the appellant, that the Secretary of State has confirmed that the new matters of his marriage and birth of his child will be considered by her if a new application is made, and that her representative before us, Mr Deller, was clear that it would not be appropriate for the respondent to certify any new refusal under s.96 of the 2002 Act. We are also of the view that this would not be appropriate as the appellant obviously has satisfactory reasons why he did not raise the new matter in this appeal under s.96(1)(c) of the 2002 Act as the respondent refused to consent despite his wishing to do so. We finally draw

attention to the fact that s.96 of the 2002 Act is not relevant to the interpretation of s.85 of the 2002 for the reasons set out in Mahmud at paragraph 27.

Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

2. We uphold the decision of the First-tier Tribunal dismissing the appeal on human rights grounds.

Signed: *Fiona Lindsley* Date: 9th January 2018
Upper Tribunal Judge Lindsley