**Upper Tribunal**

**(Immigration and Asylum Chamber)** **Appeal Number: EA/05949/2018**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 5th July 2019** | **On 17th July 2019** |

**Before**

**UPPER TRIBUNAL JUDGE RIMINGTON**

**UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**Wasif Daud Khan**

**(Anonymity Direction Not Made)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: In person

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

## DECISION AND REASONS

1. The appellant seeks, with permission, to challenge the determination of the First Tier Tribunal, promulgated on 10th April 2019, which dismissed the appellant's appeal against the refusal of a permanent residence card under the Immigration (European Economic Area) Regulations 2016.

2. The grounds of challenge to the First-tier Tribunal asserted that the Tribunal erred in law in failing to adjourn the hearing given that the appellant had supplied a pre-dated sick note. The appellant stated that he had fallen down the stairs and was taken to hospital. The sick note showed that the appellant had been signed off work for 8 days from 18th March 2019 owing to low back pain and an injury at work. He had very limited funds and could not afford to pay for the solicitors to attend court on his behalf.

3. Permission was granted by First-tier Tribunal Judge Ford because it was arguable that the Tribunal should have concluded that he was unable to attend and that it would be unjust and/or unfair to proceed in his absence.

4. At the hearing before us the appellant, who attended in person, relied on his written grounds and stated that he had not had a fair hearing.

5. Ms Everett submitted that the Judge had not erred in determining the matter but there was no strong view on the procedural issue.

Analysis

6. The appeal before the First-tier Tribunal was listed for hearing on 21st March 2019. MA Solicitors, then acting, made an application for an adjournment on 20th March 2019 and confirmed that the appellant was unable to travel. The appellant produced a sick note (Med 3) to the Tribunal signed by a GP which was dated 18th March 2019. The representatives stated that the appellant had hoped he would get better, but he was not and requested the matter be adjourned. A further date in June/July was requested in order to give him time to recover.

7. The Med 3 note read

> *'low back pain*
> *Injury at work'*

and confirmed that the appellant was not fit for work for 8 days from 18th March 2019 to 25th March 2019 inclusive.

8. The adjournment request and Med 3 were stamped as received by the First-tier Tribunal on 20th March 2019

9. The application was refused by a Caseworker on the same day because the GP had not indicated that the appellant would be unable to attend the hearing.

10. A further letter from MA Solicitors also dated 20th March 2019 (but presumably opened by the Tribunal on 21st March 2019) explained that they were not '*dealing with this matter anymore as the appellant has withdrawn his instructions today late hours and has specifically asked not to attend the hearing tomorrow' (sic)*.

11. There was no appearance by or on behalf of the appellant and no representation by the Secretary of State. The matter was recorded in the determination, however, as being 'heard' on 1st April 2019 (promulgated on 10th April 2019) outside the period given for the sick leave. The Tribunal further considered whether to adjourn the hearing.

12. The First-tier Tribunal Judge stated at paragraph 5 of the determination

> '*Having reviewed the matter, I might have been minded to grant the application and have the matter relisted for oral hearing. However, the appellant's solicitors submitted a further letter by fax which stated that they were no longer acting for the appellant as he had withdrawn his instructions and 'has specifically asked* ***[us]*** *not to attend the hearing tomorrow'. In these circumstances and in particular what seems to me to be a clear statement of intention from the appellant that he will not attend an oral hearing, I am satisfied having considered that as a matter of fairness and having in mind the overriding objective, that the appeal must be determined on the available evidence'.*

13. This struck us as having omitted the word 'us', which we have identified/inserted in square brackets, rather than an indication that the appellant had deliberately not chosen to attend.

14. *Nwaigwe (adjournment: fairness)* [2014] UKUT 00418 (IAC) explains 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? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284.*

15. Specifically, the GP had stated that the appellant was unfit for work and the adjournment request indicated that the appellant was unfit for travel. Essentially the appellant had produced a Med 3, he was unable to attend, he is not obliged to instruct representatives, and, in the event, none were present on his behalf and his presence may, we stress may, have made a difference to the outcome. As the appellant stated he could do no more. Questions may have been put to him at the hearing, had he been able to attend, particularly in the absence of documentation. As the appellant pointed out in his grounds of appeal the matter could not be determined justly without him. We consider the refusal to adjourn to allow the appellant to be present was a material error of law.

16. We add these observations. The appellant had appealed the refusal of the application for the permanent residence card. That refusal was predicated on the basis that he had not provided a passport or identity card of the EEA national (his spouse) further to Regulation 21(5) of the EEA Regulations 2016 and that he had provided only one letter from HMRC. The Secretary of State, also, did not accept that as evidence of the sponsor exercising treaty rights. We highlight two points. *Rehman (EEA Regulations 2016 – specified evidence)* [2019] UKUT 000195 (IAC) is now relevant to the findings of the judge at paragraph 12 (production of ID for the EEA national) and at no point was there any consideration of a possible direction under *Amos v Secretary of State* [2011] EWCA Civ 552.

17. The Judge erred materially for the reasons identified. We set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2)(b)(i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

**Direction to First-tier Tribunal on remittal**

**In view of our observations at paragraph 16 the matter is to be considered for directions by a Designated Immigration Judge in the First-tier Tribunal 6 weeks PRIOR to any oral hearing.**

Signed Date 5th July 2109

Helen Rimington

Upper Tribunal Judge Rimington