Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07545/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 July 2019	**On 23rd August 2019**
Extempore decision	

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MR OMAR SALEEM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Malik, Counsel, instructed on a Direct Access basis
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

The appellant is a citizen of Pakistan born 17 August 1988. He appeals against a decision of Judge Meah of the First-tier Tribunal promulgated on 7 March 2019 dismissing his appeal against a decision of the respondent 16 June 2016 to refuse his application for a residence card as the durable partner of an EEA citizen.

Procedural background

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This matter was originally listed before Judge Samimi of the First-tier Tribunal who, in a decision and reasons promulgated on 18 September 2017, held that the tribunal did not enjoy the jurisdiction to hear the case. This was in light of Sala (EFMs: Right of Appeal) [2016] UKUT 00411 (IAC), which held that there was no right of appeal against a decision under the Immigration (European Economic Area) Regulations 2006 against a decision of the respondent to refuse an application for a residence card as an extended family member or durable partner. Pursuant to Khan v Secretary of State for the Home Department (AIRE Centre intervening) [2017] EWCA Civ 1755, endorsed by the Supreme Court in SM (Algeria) v Secretary of State for the Home Department [2018] UKSC 9, it is now established that there is a statutory right of appeal against such decisions. In a decision and reasons promulgated on 27 April 2018, Judge Rintoul set aside Judge Samimi's decision, in light of Khan and SM. It was re-listed before Judge Meah, and it is Judge Meah's decision which is under consideration in these proceedings.

The decision of the First-tier Tribunal

The appellant did not attend the hearing before Judge Meah, which took place on 19 February 2019. At 4.58pm on 18 February, he sent a fax to the Tribunal stating that he wished to apply for an adjournment. That request stated that, essentially, he was seeking to find alternative legal representation as the solicitors he had previously instructed had not provided him with the service that he wanted. It is apparent from the decision of Judge Meah that that adjournment request was not presented to him by the Tribunal administration. The appellant did not attend the hearing to renew the application, despite having not received any form of acknowledgement or response to it. At [13] and [14] of his decision, Judge Meah addressed the non-attendance of the appellant in these terms:

> "13. There was no appearance by the appellant or any representatives and no explanation has been received for the absence. I waited until 1pm to allow possible difficulties in arriving at court for 10am. No-one turned up.
>
> 14. I am nonetheless satisfied that all relevant notices had been properly served on all parties concerned and there is sufficient information before me to make a fair and just decision in this matter in the absence of the appellant, hence I decided to proceed to hear the appeal. Mr Reader appeared for the respondent. He relied on the RFRL [the reasons for refusal letter], the contents of which I have duly taken note I my consideration of this appeal."

It is submitted on behalf of the appellant that the failure of the Tribunal administration to place the application before the judge was a material error. Mr Malik's submission is that the entire premise upon which the judge assessed whether or not it was fair to proceed in the absence of the appellant was flawed. The provisions of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the First-tier Tribunal Procedure Rules") concerning proceeding the absence of a party were not

engaged, as there had been a procedural error in transmitting the adjournment request to the judge.

The contention is that, had the judge considered the adjournment request and the reasons that the appellant had provided, he may – indeed would almost inevitably had to – have adjourned. Mr Malik submits that it would not have been fair for the judge to have proceeded in the absence of an adjournment, even were the appellant present before him. Permission to appeal was granted by Deputy Upper Tribunal Judge Roberts on that basis.

Discussion

The appellant faxed a notice of adjournment to the court very shortly before the close of working hours the evening before the hearing. The question for my consideration is whether the apparent administrative error which took place by virtue of the adjournment request not being placed before the judge infected the foundation upon which the judge decided that it was fair to proceed in the absence of the appellant.

There can be no question that the Judge correctly applied rule 28 of the First-tier Tribunal Procedure Rules, insofar as he considered that that was the presenting issue. Rule 28 permits the tribunal to proceed with a hearing in the absence of a party provided it is satisfied that two criteria are met:

(a) First, that the party concerned has been notified of the hearing, or that reasonable steps have been taken to notify the party. It is common ground in the present matter at the appellant knew that the hearing was scheduled to take place, and have received the notice of hearing.

(b) Secondly, the tribunal may proceed in the absence of the party if it considers it to be in the interests of justice to proceed with the hearing.

Turning to the second limb, at [13] and [14], the judge gave reasons for why he considered it to be “fair and just” for the proceedings to take place in the absence of the appellant. I consider the judge to have been entitled to reach the conclusion that it was in the interests of justice to proceed; the matter had a long history and had been before the tribunal in one form or another for a considerable period. The appellant had been legally represented and had previously furnished a copy of the bundle upon which he proposed to rely. It featured a statement from the appellant and other documentary evidence. The judge waited until 1 PM on the day of the hearing in order to give the appellant the maximum possible time to attend the proceedings. Such a step was a hallmark of the fairness with which the judge approached the non-attendance of the appellant. The judge would have been able to use the case management tools at his disposal to conduct the hearing in the absence of the appellant in a fair manner, taking into account the matters the appellant would have been likely to raise, and he attended. Indeed, so much is clear from the substantive analysis later in the judge’s decision, whereby he analysed the case advanced on behalf of the appellant in meticulously fair terms.

This was a case where the appellant's success depended on him being able to demonstrate and he was in a durable relationship with his Romanian sponsor, who had to be a "qualified person" under the Immigration (European Economic Area) Regulations 2006 at the relevant time. Against that background, the judge later had regard to the appellant's own written witness statement, in which he said that the relationship with his former partner had broken down, and that she was now residing in Romania with their child. Those developments in the relationship between the appellant and the sponsor were, as the judge rightly found on the basis of the evidence before him, fatal to the appellant being able to succeed. As such, having clearly have regard to the evidence the appellant had provided with the benefit of legal representation at an earlier point, the judge's decision that it would be fair and just to proceed in the appellant's absence was sound.

The substantive complaint advanced by Mr Malik is that the rule 28 assessment was flawed, as the judge clearly did not know that the appellant had made a last-minute adjournment request the night before. It was based on a false premise, submits Mr Malik. Had the judge been seized of the adjournment request, the analysis the judge had to perform would have taken on a different dimension. The guiding principle for whether adjournment should be granted is not whether reasons of cost or expedience mitigate against adjourning the proceedings, but whether it would be possible for the appellant to have a fair hearing: Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC).

Mr Malik submits that the reasons given by the appellant for seeking an adjournment, namely that his relationship with his previous legal representatives had broken down, and he sought to secure new representation, would have meant that the judge should have granted the adjournment request.

In order for Mr Malik's submission to have force, it is necessary for the adjournment request to have had some validity, such that it would not only be necessary for a judge formally to consider it, but that by virtue of the fact it had not been brought to his attention, there was some form of procedural error infecting the fairness of the proceedings.

At the hearing, I invited Mr Malik to address me on which provisions of the rules or relevant practice directions govern the making of adjournment applications. Initially, Mr Malik highlighted rule 12 of the Tribunal Procedure Rules, which provides that any document "to be provided to the tribunal" may be sent by fax, as a committed method of service. Mr Malik submitted that there is an unfettered right conferred by the rules on any party to make an adjournment application at any point prior to the hearing taking place. I invited Mr Malik to focus his submissions on part 9 of the Senior President of Tribunal's Practice Direction for the Immigration and Asylum Chamber, dated 18 December 2018. It provides:

> "9. Adjournments

> 9.1. Applications for the adjournment of appeals (other than fast track appeals) listed for hearing before the Tribunal must be made not later than 5.00p.m. one clear working day before the date of the hearing.
>
> 9.2. For the avoidance of doubt, where a case is listed for hearing on, for example, a Friday, the application must be received by 5.00p.m. on the Wednesday.
>
> 9.3. The application for an adjournment must be supported by full reasons and must be made in accordance with relevant Procedure Rules.
>
> 9.4. Any application made later than the end of the period mentioned in paragraph 9.1 must be made to the Tribunal at the hearing and will require the attendance of the party or the representative of the party seeking the adjournment.
>
> 9.5. It will be only in the most exceptional circumstances that a late application for an adjournment will be considered without the attendance of a party or representative.
>
> 9.6. Parties must not assume that an application, even if made in accordance with paragraph 9.1, will be successful and they must always check with the Tribunal as to the outcome of the application.
>
> 9.7. Any application for the adjournment of a fast track appeal must be made to the Tribunal at the hearing and will be considered by the Tribunal in accordance with relevant Procedure Rules.
>
> 9.8. If an adjournment is not granted and the party fails to attend the hearing, the Tribunal may in certain circumstances proceed with the hearing in that party's absence."

Once he had had time to consider the practice direction at the hearing, Mr Malik realistically accepted, as he was bound to, but the adjournment request was in breach of the practice direction. He also realistically accepted that it was "discourteous" of the appellant not to attend the hearing in order to renew his adjournment application in person. The appellant has never explained why he did not attend the tribunal, in compliance with the notice he had received. Nevertheless, submits Mr Malik, the overriding criterion as to whether or not an adjournment should have been granted was not one of whether the appellant had been discourteous, nor whether he had complied with the practice direction, but it was whether the requirements of fairness were such that an adjournment was required.

I find no support in the practice direction or the procedure rules for Mr Malik's submission that there is an unfettered right to make an application for an adjournment at any stage in the process, no matter how late. There were no "exceptional circumstances" for the purposes of paragraph 9.5 of the practice direction permitting the appellant not to attend, and no explanation has been provided to me as to why the appellant did not attend.

However, it is not necessary for me to reach a final view concerning whether such an unfettered right exists. On the information included in the adjournment request, it would not have been necessary for an adjournment to be granted in order for the appellant to enjoy a fair hearing. Judges in the First-tier Tribunal are well versed in taking unrepresented litigants through the key elements of

their case, explaining to them what they must satisfy in order to succeed, in a language they are able to understand. This appellant would have been attending the substantive hearing before the First-tier Tribunal unrepresented at the hearing but having had the benefit of legal representation during the earlier stages for the preparation of his case.

Addressing the appellant's evidence in written form is also helpful. The judge noted at [19] of his decision, that [4] to [8] of the witness statement that had already been provided by the appellant confirmed that the appellant was separated from his partner as she was living in Romania. The judge ascribed significance to those developments in the relationship for the purposes of finding that the relationship was no longer durable and indeed, the judge could have gone on to find, although did not need to, that because the appellant's sponsor was no longer a "qualified person" in this country, that the whole issue of whether or not he was a family member of a Union citizen fell away in any event. In any event, the judge was right to analyse the appellant's evidence in that way, which was of course fatal to the appellant's ability to succeed in the appeal.

Mr Malik contends that the evidence that was before the judge in the form of that witness statement was over a year old. The statement should not have been treated as determinative of the factual issues the tribunal needed to resolve, he submits. The issue for the consideration of the First-tier Tribunal relates to whether, at the date of hearing, there was a durable relationship with the sponsor exercising treaty rights in this country. Mr Malik submits that it is possible that there could have been developments in the relationship such that it had revived to such an extent that the appeal could have been allowed. Mr Malik said his instructions were that the appellant's relationship with the sponsor had been "on and off" in the year leading to the hearing.

I consider those submissions to be flawed. On the face of it, the appellant, had he renewed his application in person, the principles of Nwaigwe would have been relevant. The question is therefore could he have received a fair hearing. The reason that the appellant sought the adjournment was to obtain legal representation. It would have been possible for the judge to have elicited from the appellant what the latest status of his relationship was. It would not be necessary for the appellant to have secured the benefit of legal representation in order for the judge to hold a fair hearing. The primary issue of whether the relationship was continuing was a straightforward factual issue which the judge would have been able to determine fairly even in the absence of legal representation.

Secondly, it is necessary to recall the information that the appellant himself had been provided by the Tribunal ahead of the hearing. He was given a notice in writing of the fact he was to attend before the Tribunal on 19 February. It was not only discourteous, to adopt the words of Mr Malik, not to attend but it was also fatal to his ability to succeed in this argument. The notice of hearing in addition requires those who are to participate in proceedings before the Tribunal to provide an updated set of evidence and documents in order for their case to be presented in its best possible light.

Again, it is not necessary for the appellant to have been legally represented in order to have produced a statement or some other document outlining the fact that his relationship had evolved or may have evolved since his original statement was drafted. So much is clear from the fact that the appellant was able to produce a statement dated 19 February [*sic.*], which states in clear terms why he sought the adjournment request he had. There is no reason why the appellant could not have set out in similarly eloquent terms what the latest status of his relationship was.

The submission on the part of Mr Malik is also speculative; it relies on an assumption that the appellant would have been able to provide materially different evidence to that which he had already provided in written form, with the benefit of legal representation, the contents of which were fatal to his appeal succeeding. There was no application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 for the this Tribunal to consider evidence that was not before the First-tier, for example specifically relating to the status of the appellant's relationship, and the location and employment (or otherwise) status of the sponsor. Mr Malik was only able to make the rather unsatisfactory submission that his instructions were that the relationship between the two was "on and off", which is hardly supportive of the presence of a durable relationship, taken at its highest.

In my view, there is no reason why such a document could not have been prepared by the appellant acting without the benefit of legal representation, stating that he still is in a relationship with the sponsor and that she would have returned to the United Kingdom. Or he could have attended the tribunal to provide an oral update, which the judge could have helped him to provide. The requirements of fairness would not have necessitated the granting of an adjournment. Put simply, there would have been no reason for the adjournment request to be granted in order for the appellant to have received a fair hearing. I consider that the judge applied the correct legal framework when deciding to proceed in the absence of the appellant and that, even though he was not seized of the adjournment application, there was no error of law which infected the decision, for the reasons I have just outlined.

Although Mr Malik made no reference to it during his submissions, on 6 March 2019, the appellant had emailed the Taylor House Hearing Centre complaining that the matter had proceeded in his absence. In the email, the appellant attributed his non-attendance to his "crippling depression", adding that he would provide evidence to support those health-based claims in due course. No such evidence has been provided. First-tier Tribunal Judge Pickup (as he then was) referred to the changing contours of the appellant's claimed reasons for his non-attendance when refusing permission to appeal at the First-tier Tribunal level, noting that no medical evidence had been provided. Given this point was not pursued at the hearing, it is not necessary for me to say more about it, other than to observe that I endorse Judge Pickup's observations that no evidence had been provided to support the appellant's claimed illness. Indeed, by his silence on the point, Mr Malik appears to have abandoned reliance on this former strand of the appellant's case.

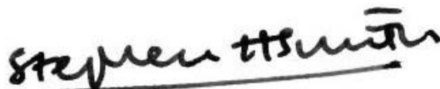
Conclusion

In summary, the appellant made a woefully late and inadequate request for an adjournment and failed to attend his own hearing before the tribunal in order to renew the application, or otherwise participate in the proceedings. It was hardly surprising that the First-tier judge was not seized of the adjournment application, given the circumstances of its admission. The evidence the appellant had previously submitted with the benefit of formal legal representation demonstrated that, taking his case at its highest, it was bound to fail. Had the adjournment request been before the judge, in contrast to the submissions advanced by Mr Malik, it would have been eminently possible for the appellant to enjoy a fair hearing. The overriding objective, the interests of justice, and the requirements of fairness, do not permit appellants simply to fail to turn up to their own hearings, and complain to this Tribunal that it was unfair for the judge to proceed in their absence in circumstances where, as here, had they attended a fair hearing would have been eminently possible. The appellant waived his right to attend the hearing before the First-tier Tribunal and cannot complain of any unfairness as a result.

Notice of Decision

This appeal is dismissed. The decision of Judge Meah stands.

No anonymity direction is made.

Signed  Date 20 August 2019

Upper Tribunal Judge Stephen Smith