Upper Tribunal (Immigration and Asylum Chamber) **Appeal Number: EA/06715/2019**

THE IMMIGRATION ACTS

Heard at Field House (via Skype)	**Decision & Reasons Promulgated**
On 15 April 2021	**On 04 May 2021**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

ABDUL MAJID
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Ahmed, counsel, instructed by No 12 Chambers
For the Respondent: Mr Melvin, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a Pakistani national who was born on 14 January 1989. He appeals, with permission granted by Upper Tribunal Judge Grubb, against a decision which was issued by FtT Judge I D Boyes ("the judge") on 13 February 2020. By that decision, the judge dismissed the appellant's appeal against the respondent's decision to revoke his residence card as the spouse of an EEA national exercising treaty rights in the UK.

Background

2. The appellant entered the UK as a student in 2011. He was granted further leave in that capacity until September 2014. Applications for further leave to remain were refused, however, and the appellant applied for a residence card as confirmation of his right to reside in the United Kingdom as the spouse of an EEA national. The appellant's wife is Tayba Naz Khan Bhatti, a French national. The appellant was issued with a residence card as the family member of a qualified person on 3 March 2017.

3. In 2018, the appellant's wife wrote to the respondent. She stated that the relationship had broken down and that she had decided to return to France permanently. On 19 April 2018, she signed a statement which stated materially as follows:

> I, Tayba Naz Khan Bhatti born on 12 November 1992, now living in France confirm that my relationship with Abdul Majid born on 14 January 1989 living in [address supplied] no longer subsists, that I do not live with them and that I do not intend to live with them as my spouse or partner in the future.
>
> My passport number [supplied] and my ex-partner passport number is [supplied]. Majid Home Office reference number is [supplied] and case number [supplied].
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> I give my permission for the Home Office to use the information referred to above.
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> I fully understand that by giving my permission, the information will become known to Abdul Majid.

4. The appellant's wife gave an address in South West Paris at the top of this statement.

5. On 30 October 2018, the respondent decided to revoke the appellant's residence card. She did so on the basis that the appellant's wife was no longer exercising Treaty Rights in the UK. The respondent therefore concluded that the appellant had ceased to have a right to reside under the Immigration (EEA) Regulations 2016 and that revocation was appropriate under regulation 24(3).

6. In a letter to Immigration Enforcement on 19 July 2019, the appellant stated that he was still officially married to his wife; that he was contesting the divorce proceedings which were afoot at Uxbridge Family Court; and that there was a parallel case at the Family Court in Bury St Edmunds, in which the appellant maintained that he was the victim of domestic violence during his marriage to Ms Bhatti. He maintained that he had retained the right to reside in the United Kingdom.

The Respondent's Decision

7. On 26 November 2019, the respondent decide to remove the appellant from the United Kingdom. She considered that removal directions could be given under regulations 23(6)(a) and 32(2) because the appellant was a person who had ceased to have a right to reside under the Regulations. The specific statement of reasons for that conclusion was as follows:

> You were issued with an EEA residence card on 3 March 2017 as the spouse of a French national. On 30 October 2018, your EEA residence card was revoked as your spouse had confirmed that the marriage had broken down and that she had left the UK. Further checks have confirmed that your spouse is still outside of the UK and as such you cannot benefit from the EEA Regulations as the spouse of an EEA national. It is considered that your rights under the (European Economic Area) Regulations 2016 have ceased.

The Appeal to the First-tier Tribunal

8. The appellant appealed against this decision, contending that he had retained the right to reside; that the decision was contrary to the Directive; and that it was also in breach of his rights under the ECHR.

9. The appeal was initially to be heard on 24 January 2020, at Newport. The appellant's then solicitors wrote to the Tribunal two days before the hearing, stating that he was unwell and seeking an adjournment. The hearing was adjourned to 11 February 2020. Four days before that hearing, the appellant's solicitors wrote again. Having mentioned the previous adjournment, the letter continued as follows:

> The matter was relisted for 11 February 2020. Unfortunately, we have been placed in the same position in that the appellant had been unable to attend the office because of continued back pain which was understand [sic] from him was partly due to the illness he suffered before, of which he was tested for [sic]. We have been provided with a letter from his GP (attached) together with various tests undertaken by [sic] Appellant for your attention.
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> We have still been unable to take [sic] prepare a bundle or fully take instructions as a result of the appellant continued lay off [sic] and unfortunately, we have been left with no choice to request for another adjournment of the hearing.

10. Appended to that letter was a document which described itself as a Private Medical Certificate. This certified that the appellant had been suffering from back pain and would be unable to attend work or school from 24 January 2020 until 7 February 2020 (four days before the hearing). The certificate contained notes for Employers, Educational Establishments and Courts. The latter note stated that "I have advised that any statement I provide regarding this illness does not excuse any failure to attend court as this can only be at the direction of the Court.". The certificate was stamped by Dr Saluja of the Saluja Clinic. There were also some further medical documents appended to the adjournment

application, showing that the appellant had been prescribed antibiotics and other drugs at the end of January 2020 and that he had provided a stool sample for investigation on 23 January 2020.

11. The adjournment application was refused by a Tribunal Case Worker ("TCW") on 10 February 2020. The TCW noted that the reason given was the same as before; that there was no time estimate within which the problem would be resolved; and that the medical evidence did not support the application. He gave permission for either party to rely on written submissions "as an alternative to attending in person".

12. The adjournment application was not renewed for paper consideration by a judge. On 11 February 2020, therefore, the appeal remained listed to be heard at Columbus House in Newport.

13. Before the judge, the respondent was represented by counsel – Mr Olphert. The appellant was not present or represented when the case was called on. Mr Olphert asked the judge to proceed in the absence of the appellant and his representatives. The judge caused a telephone call to be made to the appellant's solicitors. What was said during that telephone call is set out in a statement made by the caseworker who received it. She states that she had instructed Mr Alam of counsel to represent the appellant. He had been instructed to renew the adjournment application in court. She received the telephone call from the Tribunal at around 10am and stated that counsel was en route from High Wycombe. At 10.30, she received a telephone call from counsel, who stated that the hearing had already taken place (without him) and that notice of the decision would be sent out in due course. Her statement is supported by an attendance note dated 11 February 2020. This shows that a telephone call was received at 10am from the Tribunal at Newport. The Tribunal was concerned that no representative had attended. The case worker checked the position and 'informed counsel is Arman Alam and is on his way – he should be there shortly'.

14. The judge decided to proceed in the absence of the appellant or Mr Alam. The judge noted the following in his decision:

> [10] There was an application at the hearing by the Home Office to proceed in the appellant's absence bearing in mind that it was in in the interests of justice to do so and that the appellant was fully cognisant of the date and had instructed solicitors. No solicitor and/or representative had attended for the appellant by the time the case has [sic] called on at 10.15 hours.
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> [11] Having taken into account the fact that this matter has been ongoing since October 2018 and the fact that as far back as July 2019 the appellant was in correspondence with immigration enforcement and asserting the grounds upon which he sought to advance his appeal I was satisfied that it was in the interest of justice to proceed. The Home Office is entitled to a decision in a reasonable amount of time no less than [sic] appellant is. The issues in the case were simple and the appellant had had a

> considerable period of time, since 19 July 19, to properly advance his case, collect his evidence and make a written submission and/or witness statement to the court.
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> [12] Following the conclusion of the hearing and after the Home Office representative had left the court building I was informed that somebody had attended to represent Mr Majeed. It was explained that the hearing had already concluded and that Mr Majid had not attended. There was no application to re-open the case.

15. The judge went on to dismiss the appeal, finding that the appellant's wife had left for France; that it had not been shown that she was exercising Treaty Rights at the commencement of divorce proceedings; and that there was actually no evidence to show that she had ever exercised Treaty Rights: [21]. There was no evidence to show that there had ever been any domestic violence suffered by the appellant.

The Appeal to the Upper Tribunal

16. There is a single ground of appeal, which is that it was unfair in all the circumstances for the judge to proceed in the absence of the appellant and, in particular, his counsel, since confirmation had been provided to the Tribunal at around 10am that counsel was on his way to the hearing centre.

17. Permission was granted by Judge Grubb on 19 June 2020. He noted, amongst other things, that the assertions in the grounds would need to be established by evidence.

18. No evidence was provided within the 14 days permitted by Judge Grubb's decision. On 2 September 2020, therefore, the respondent responded to the grounds under rule 24 of the UT Rules, noting the absence of evidence and submitting that it was fair for the judge to proceed as he did.

19. It was only on 9 November 2020 that the appellant's solicitors filed the statement and the attendance note from the caseworker, as described above. That caused Judge Pitt to issue directions requiring, amongst other things, a response from the respondent to what was said in the statement.

20. A further response under rule 24 was provided on 11 January 2021. The respondent submitted that there was still no statement from counsel explaining, amongst other things, why he had not applied for the hearing to be re-opened. There was, in any event, no prospect of his securing an adjournment on the basis of the evidence supplied. Nor was there any prospect of the appeal succeeding on the basis of the evidence before the judge.

Submissions

21. Mr Ahmed based his submissions on the case worker's witness statement. He accepted that there was still no statement from counsel.

He did not know why that was so, but he had spoken to Mr Alam, who had confirmed that he could produce a statement if necessary. If that was thought to be necessary, Mr Ahmed sought an adjournment of the hearing for that purpose. His principal submission was that it was not necessary, since the accepted facts spoke for themselves. The judge had proceeded in the absence of the appellant and his counsel, despite the Tribunal having been told that counsel was on his way. The judge had seemingly concluded his entire list by 1030 and had released counsel for the respondent.

22. I asked Mr Ahmed to address me on the materiality of any such unfairness. He submitted that the appellant had been unwell and that the just course, had counsel attended, would have been to adjourn the appeal. It was notable, he submitted, that the appellant lived in Hayes, that he suffered from back pain, and that he was required to travel to South Wales for the hearing.

23. I asked Mr Ahmed to address me on relief. He submitted that the appeal should be remitted, so as to give the appellant further time in which to obtain evidence. Minds had been focused, he submitted, on the question of whether there was a legal error in the decision of the FtT and no thought had been given to the evidence which might be needed to support the underlying appeal. He had seen that evidence in conference with the appellant, however, and stated that there was evidence which could properly be adduced in answer to the respondent's refusal.

24. Mr Melvin relied on the second rule 24 response. He was surprised to hear that there was additional material upon which reliance might yet be placed, since there had been no application to adduce that material under rule 15(2A). He invited me to refuse Mr Ahmed's application to adjourn so that he could obtain a statement from counsel; there had been ample time, he submitted, to obtain that document. The proper course, in Mr Melvin's submission was to find that the judge had not erred in law. If I was not with him in that respect, he invited me to proceed directly to remake the decision on the appeal by dismissing it.

25. In a brief response, Mr Ahmed submitted that the caseworker's witness statement was not challenged and that there had been a clear procedural impropriety.

Analysis

26. There has been a tendency – particularly in the respondent's rule 24 responses, to elide the rather separate questions of whether the judge erred in law in proceedings as he did; whether any such error was material to the outcome of the appeal; and whether the appellant can conceivably hope to succeed in this appeal on the basis of the evidence now available. I propose to consider these questions separately. I do so on the basis of what is already before me. I indicated at the hearing that I was not prepared to adjourn to allow the appellant more time to obtain a statement from Mr Alam of counsel; there has obviously been more than ample opportunity to do so and it is fair to both parties to proceed.

27. The first question, it seems to me, is whether the judge's decision was tainted by procedural irregularity in deciding to proceed in the absence of the appellant himself. To put that question in the way required by the authorities, what I must consider is whether it was fair for the judge to proceed in the appellant's absence: SH (Afghanistan) v SSHD [2011] EWCA Civ 1284. I consider the answer to this question to be entirely straightforward. The medical evidence adduced by the appellant in an effort to show that he could not attend the hearing (or provide his solicitors with instructions to prepare for that hearing) was wholly inadequate. As the Tribunal Caseworker noted in refusing the adjournment application on the papers, the note from Dr Saluja specifically stated that it did not excuse attendance at court.

28. There is a further and more fundamental point about that note, with respect to the TCW. It only related to the period up to 7 February 2020 and the hearing was on 11 February 2020. There was, in reality, no basis whatsoever for concluding that the appellant was other than fit to attend the Tribunal. Had the sole question before me been whether it was fair to proceed in the appellant's absence, my answer would have been that it obviously was.

29. Logically, the second question is whether it was fair to proceed in the absence of counsel. In answering that question, I take full account of what is said by the caseworker and by the judge. I have reproduced what was said by both above.

30. I assume (as I think Judge Grubb did when he granted permission) that there was some error in communication between the staff at Columbus House and the judge. It seems from [10]-[12] of the judge's decision that he was not told that Mr Alam was en route. I note that his Record of Proceedings states that he had been told that a representative 'was at court – nobody here at all – clerk has checked'.

31. Had the judge been told that counsel was en route at 1015, there is obviously no conceivable way that he would have proceeded with the hearing in his absence. The timings which I have mentioned above are relevant. It seems that the matter was called on promptly at 1000 and that the judge was merely told that there was no attendance by or on behalf of the appellant. What I surmise is that the usher checked the waiting area and gave the judge perfectly accurate information but that the staff at the Tribunal had made additional enquiries with the solicitors, the results of which were not accurately communicated to the judge before he decided to proceed in counsel's absence. Had the judge been told a little after 10am that counsel was on his way, he would not have acceded to the request by counsel for the respondent to proceed in his absence. I doubt, frankly, that that request would even have been made if counsel for the respondent was aware that counsel for the appellant was said to be on his way. In the circumstances, I conclude that there was a procedural error in this case but it was not (as far as I can tell) an error on the part of the judge, who simply proceeded on the basis that there was no one in attendance. It was, instead, an error on the part of the FtT, in

failing to notify the judge of the correct position, as had been clarified by the caseworker in a telephone call minutes earlier. Was it fair to proceed in the absence of the appellant's counsel, therefore? I conclude that it was not.

32. Thus far, I have no real doubt that the judge was not at fault. I am decidedly less comfortable about what happened at 1030. In this respect, there is a perfect match between the statement of the caseworker and [12] of the judge's decision. He was informed that counsel had attended but he seemingly did nothing other than to send a message that the hearing was already concluded. As a matter of fairness, the appropriate course (particularly at that point in the court day) was surely to hear counsel for the appellant. The judge said that counsel for the respondent had left the hearing centre but that is a minor point in the age of the mobile telephone. The list had concluded less than half an hour after it began. It was not as though counsel for the respondent could not be contacted, and it seems that no thought was given to whether he should be asked to return to Columbus House for 11am, for example. No authority needs to be cited for any of this; it is simply inimical to justice that a judge should send a message to counsel who has attended court slightly late to say that his case has been concluded; that the court day has finished at 1030; and that his instructing solicitors should simply await the (inevitable) decision.

33. Then comes the rather more difficult question of materiality. I say that this is rather more difficult because of repeated notes of caution being sounded in the superior courts about the extent to which this question should ever be considered where there has been a procedural failing resulting in an unfair hearing. The most recent and most memorable statement on the subject is probably what Lord Wilson quoted Lord Reed as saying during argument in Serafin v Malkiewicz [2020] UKSC 23; [2020] 1 WLR 2455: "a judgment which results from an unfair trial is written in water": [49]. There can be no doubt that I should be extremely cautious before concluding that the judge came to the correct conclusion (or could not have come to a different conclusion) notwithstanding the errors I have set out above.

34. What would, or could, have happened if the judge had heard Mr Alam? We know that he would have made an application for the adjournment of the hearing. We know that the medical evidence which was before the TCW to support that application was wholly inadequate. We know that at least one of the inadequacies with that evidence was identified by the TCW when he refused the application on paper. We know that no additional evidence had been submitted after the TCW's decision to support the application which Mr Alam had been instructed to make. We know that no other basis for an adjournment was to be advanced; the application rested on the inadequate medical evidence.

35. There was, in truth, no proper basis to conclude that the appellant had been hampered by ill health in preparing for the appeal in the two months which had passed since the respondent's decision. Equally, as I have

explained above, there was no proper basis upon which to conclude that the appellant was unable to attend the hearing. Mr Ahmed was in some difficulty explaining how a judge of the FtT, properly directing himself to the over-riding objective and the facts of this case, could have seen fit to adjourn the case. Despite the caution which I must have in concluding that procedural errors of the types described above were immaterial to the outcome, I do not accept that any judge would have adjourned this appeal on the basis of the evidence adduced.

36. Had Mr Alam been heard by the judge, therefore, I come to the clear and firm conclusion that the appeal would have proceeded in the appellant's absence, and on the basis of the evidence before the FtT. There is no suggestion, whether in the grounds of appeal or in Mr Ahmed's realistic and measured submissions, that there is anything wrong with the judge's decision on the substance of the appeal. Nor could there have been. The appellant's wife has evidently left the country. That is clear from her statement and from the checks conducted by the respondent. She has no intention of returning and there is no proper basis for a submission that she continues to exercise Treaty Rights in this country. She is not a qualified person and the appellant ceased to have a right to reside as her family member.

37. The appellant has maintained throughout, however, that he has retained the right to reside in the United Kingdom under regulation 10. On the evidence before the FtT, and indeed the evidence as it stands before me, that submission was bound to fail. It is only regulation 10(5) which might apply to the appellant. Considering the requirements of that provision:

(i) There is no evidence to show that the appellant's wife was a qualified person or that she had permanent residence at the date on which divorce proceedings were initiated;

(ii) There is no evidence, therefore, to show that the appellant was residing in the UK in accordance with the Regulations at that date. (It is to be recalled, in this connection, that the Residence Card is merely declaratory; it does not confer a right to reside.)

(iii) There is no evidence to show that the marriage had lasted for at least three years prior to the date on which the divorce proceedings were initiated;

(iv) There is no suggestion that there are any children of the union;

(v) There is no evidence to show that the continued right of residence is warranted by particularly difficult circumstances, whether by reason of domestic violence or otherwise, since the appellant has failed to produce any evidence of the matters asserted in the letter he wrote to Immigration Enforcement in July 2019;

(vi) There is no evidence to show that the appellant would have been a qualified person if he had been an EEA national.

38. In the circumstances, I consider that the FtT erred procedurally in the way in which it proceeded in the absence of counsel. Had counsel been heard, however, the only appropriate course would have been to proceed with the appeal, and to dismiss it. In the circumstances, I dismiss the appeal on the basis that the errors of procedure were immaterial to the outcome.

39. I should add this. Had I concluded that the error was material, in the sense that a different result might properly have been reached on the evidence before the FtT, I would have proceeded directly to remake the decision on the appeal. I recognise, of course, that it might be suggested that 7.2(a) of the Practise Statement suggests that the proper course would be remittal where there has been serious procedural impropriety in the FtT. The PS is not a straitjacket, however, and the default position remains that 'remaking, rather than remitting' will be the normal course of action.

40. Despite Mr Ahmed's plea to the contrary, I see no proper basis to remit this appeal to the FtT. There is, and there never has been, any demonstrable evidential foundation for a submission that the appellant has retained a right to reside. Mr Ahmed said that he had seen relevant evidence in conference but there has never been any application to adduce further material under rule 15(2A). Mr Ahmed said that the focus had been on whether the FtT erred in law. If that is so, it is unacceptable; it was plainly incumbent on the appellant and his solicitors to give the Tribunal and the respondent notice of any further material upon which reliance might be placed. Had I decided to set aside the FtT's decision, therefore, the decision I would have made would have been to proceed with the appeal and to dismiss it for the reasons I have given at [37] above.

Notice of Decision

The appeal to the Upper Tribunal is dismissed. The decision of the FtT, dismissing the appeal, shall stand.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 April 2021