Upper Tribunal
(Immigration and Asylum Chamber)

Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham	**Determination Promulgated**
On 09 July 2014	
	……

Before

The President, The Hon. Mr Justice McCloskey

Between

KELECHI EMANUEL NWAIGWE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant:	Did not attend and was not represented.
Respondent:	Mr Smart, Senior Home Office Presenting Officer.

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.

DETERMINATION AND REASONS

INTRODUCTION

1. By a decision dated 29 May 2013 on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), the Appellant's application for leave to remain in the United Kingdom as a Tier 1 (General) Migrant was refused. The refusal was based on an assessed failure to comply with the "Maintenance (Funds)" requirement, whereby the Appellant was obliged to demonstrate that he had been in possession of at least £900 of available funds during a consecutive period of 90 days. The assessment of the bank statements submitted was that "*…. the level of available funds fell below £900 on several occasions in this period*".

DECISION OF THE FIRST-TIER TRIBUNAL

2. The First-tier Tribunal (the "*FtT*") dismissed the ensuing appeal, on 04 April 2014. In its determination, the FtT recorded that neither party was present or represented. It was further recorded:

> "*His solicitors wrote …… on 31st March indicating that they had been informed he was ill, but they were unable to give any further information. None was forthcoming on 4th April 2014. The solicitors asked for an adjournment or for consideration of the appeal on the papers if the appeal were not adjourned. In my view, there was insufficient information for me to adjourn the appeal on the basis that the Appellant was unfit to attend the hearing. In my view he failed to show a good reason why an adjournment was necessary for the purposes* [of] *paragraph 21 of the Asylum and Immigration Tribunal (Procedure) Rules 2005.*
>
> *I have considered a copy of the solicitor's letter to which reference is made in this passage.*"

The letter to which reference is made was written by the Appellant's solicitors four days in advance of the hearing. It states:

> "*We write further to our client's appeal hearing on 04 April 2014 and request for a short adjournment on the ground that we have been unable to obtain instructions from our client to enable us prepare properly for the hearing. We have been informed that our client has been ill and all attempts to contact his doctor and hospital to provide us with information about his situation have proved abortive due mainly to legal restraint under the Data Protection Act. We are therefore left with no other option than to apply to the Tribunal for its indulgence to adjourn the hearing for a short period of time to enable us obtain sufficient instruction to prepare for the hearing. In the event that the Tribunal is not disposed to granting the adjournment sought, we respectfully request that our client appeal be considered on paper.*"
>
> [*sic*].

In the same passage, the FtT recorded:

> "*Despite standard directions, the Appellant has failed to provide any evidence in support of his appeal.*"

Having decided to determine the appeal as a paper exercise, the Judge dismissed it in the following terms:

> "*The evidence on which the Secretary of State relied in deciding to award the Appellant no points for maintenance has not been challenged or rebutted. I am not satisfied to the required standard that he had sufficient funds to comply with the requirement in the Immigration Rules.*"

The Judge further opined that by virtue of section 85A of the Nationality, Immigration and Asylum Act 2002 the FtT was confined to considering evidence provided by the Appellant at the time of making the application culminating in the impugned decision.

APPEAL TO THIS TRIBUNAL

3. Permission to appeal was granted on the following ground only:

> "*The Judge was in error when he refused an application for adjournment presented by my solicitor even though my solicitor clearly informed the Court that I was sick and could not give them a clear brief. I am recently diagnosed of diabetes and have been struggling with the medication …. going on and off into hyperglycaemia especially on 07/04/14, 08/04/14 and 09/04/14 and could hardly do anything for myself. Hence the difficulty in giving my solicitors a specific brief ……..*
>
> *I have attached evidence to show my diabetic condition ……*"

The Appellant did not attend the hearing before this Tribunal and was not represented. Having perused the file, it is evident that there has been no communication from the Appellant or any representative on his behalf since the Notice of Appeal was filed on 22 April 2014. On behalf of the Secretary of State, Mr Smart invited a dismissal of the appeal. He stated that, from the information available to him, the Appellant appeared to have made a further Tier 1 Application on 19 December 2013. At that stage, his appeal to the FtT was pending, with the result that this further application was "voided" by the Secretary of State's officials.

GOVERNING PRINCIPLES AND PROCEDURAL RULES

4. Rule 19 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (the "*2005 Rules*"), under the rubric "Hearing Appeal in Absence of a Party", provides:

"*(1) The Tribunal may hear an appeal in the absence of a party or his representative, if satisfied that –*

i. the party or his representative has been given notice of the date, time and place of the hearing, and

ii. there is no good reason for such absence."

This must be considered in conjunction with Rule 21, which states:

"*(1) Where a party applies for an adjournment of a hearing of an appeal, he must –*

(a) if practicable, notify all other parties of the application;

(b) show good reason why an adjournment is necessary; and

(c) provide evidence of any fact or matter relied upon in support of the application.

(2) The Tribunal must not adjourn a hearing of an appeal on the application of a party, unless satisfied that the appeal cannot otherwise be justly determined."

Each of these provisions of the Rules must be construed and applied by reference to the overriding objective enshrined in Rule 4, which provides:

"*The overriding objective of these Rules is to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible; and, where appropriate, that members of the Tribunal have responsibility for ensuring this, in the interests of the parties to the proceedings and in the wider public interest.*"

This is the provision of the 2005 Rules to which the FtT was, evidently, referring in [4] of its determination.

5. In the Rules matrix outlined above, rule 21(2) is a provision of critical importance. Its effect is that where a party applies for an adjournment of a hearing, the Tribunal is obliged, in every case, to consider whether the appeal can be "*justly determined*" in the moving party's absence. If the decision is to refuse the application, this must be based on the Tribunal satisfying itself that the appeal can be justly determined in the absence of the party concerned. This means that, <u>in principle</u>, there may be cases where an adjournment should be ordered notwithstanding that the moving party has failed to demonstrate good reason for this course. As a general rule, good reason will have to be demonstrated in order to secure an adjournment. There are strong practical and case management reasons for this, particularly in the contemporary litigation culture with its emphasis on efficiency and expedition. However, these considerations, unquestionably important though they are, must be tempered and applied with the recognition that a fundamental common law right, namely the right

of every litigant to a fair hearing, is engaged. In any case where a question of possible adjournment arises, this is the dominant consideration. It is also important to recognise that the relevant provisions of the 2005 Rules, rehearsed above, do not modify or dilute, and are the handmaidens, their master, and the common law right in play.

6. Viewed through this prism, rule 21(2) is to be considered as reflecting the common law right engaged. In every case, the Tribunal must have careful regard to rule 21(2). This provision of the Rules expresses the common law right of every party to a fair hearing. In considering rule 21(1)(b) in tandem with rule 21(2), together with the right to a fair hearing of the party or parties concerned, a balancing exercise must be conducted. In performing this task, tribunals should be alert to the doctrine of abuse of process. In cases where the Tribunal considers that an adjournment application is based on spurious or frivolous grounds or is vexatious, the requirement of demonstrating good reason will not be satisfied. However, this will not be determinative of the question of whether refusing an adjournment request would compromise the right to a fair hearing of the party concerned. In some cases, adjournment applications based on particularly trivial or unmeritorious grounds may give rise to an assessment that the process of the Tribunal is being misused and will result in a refusal. Tribunals should be very slow to conclude that the party concerned has waived its right to a fair hearing or any discrete aspect thereof. Where any suggestion of this kind arises, it will be preferable to evaluate the conduct of the party concerned through the lens of abuse of process and it will always be necessary to give effect to both parties' right to a fair hearing.

7. 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.

8. The cardinal rule rehearsed above is expressed in uncompromising language in the decision of the Court of Appeal in SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284, at [13]:

> *"First, when considering whether the immigration Judge ought to have granted an adjournment, the test was not irrationality. The test was not whether his decision was properly open to him or was Wednesbury unreasonable or perverse.* ***The test and sole test was whether it was unfair****".*

[My emphasis]

Alertness to this test by Tribunals at both tiers will serve to prevent judicial error. Regrettably, in the real and imperfect world of contemporary litigation, the question of adjourning a case not infrequently arises on the date of hearing, at the doors of the court. I am conscious, of course, that in the typical case the Judge will have invested much time and effort in preparation, is understandably anxious to complete the day's list of cases for hearing and may well feel frustrated by the (usually) unexpected advent of an adjournment request. Both the FtT and the Upper Tribunal have demanding workloads. Parties and stakeholders have expectations, typically elevated and sometimes unrealistic, relating to the throughput and output of cases in the system. In the present era, the spotlight on the judiciary is more acute than ever before. Moreover, Tribunals must consistently give effect to the overriding objective. Notwithstanding, sensations of frustration and inconvenience, no matter how legitimate, must always yield to the parties' right to a fair hearing. In determining applications for adjournments, Judges will also be guided by focussing on the overarching criterion enshrined in the overriding objective, which is that of fairness.

9. In passing, I am conscious that the FtT procedural rules are scheduled to be replaced by a new code which is expected to come into operation on 20 October 2014. The provisions relating to adjournments, previously enshrined in rules 19 and 21 (*supra*), have been substantially simplified. Within the new code, the Asylum and Immigration Tribunal (Procedure) Rules 2014[1], Rule 4(3)(h), under the rubric "Case Management Powers", provides that the FtT -

> "*may … adjourn or postpone a hearing* "

This substantially less prescriptive formula reinforces the necessity of giving full effect, in every case, to the common law right and principles discussed above. The overriding objective remains unchanged: see Rule 2. FtT Judges dealing with adjournment issues should continue to apply the principles rehearsed above and the decision of the Court of Appeal in SH (Afghanistan), giving primacy to the criterion of fairness.

CONCLUSIONS

10. I consider that the FtT erred in law in deciding that the Appellant's adjournment application should be refused. The error consisted of the Tribunal considering the "*good reason*" limb of rule 21, while neglecting to consider and apply the "*justly determined*" provision, in conjunction with the principles outlined above. In short, the Judge failed to apply the dominant test of fairness and misdirected himself in law in consequence.

[1] SI 2014/2604 was laid before Parliament on 29 September 2014 and will come into force on 20 October 2014

11. The next question which arises is whether this error of law was material. I consider that it was not, since the sole question for the FtT was whether, based on an assessment of the documentary evidence, the Secretary of State's decision was sustainable. The Judge, in answering this question affirmatively, focused on the issue of the Appellant's earnings. I consider that this was misguided since, properly construed, the Secretary of State's decision letter had awarded the Appellant full points [15] in respect of previous earnings. As noted above, the key passage in the decision letter was that awarding zero points in response to the Appellant's claim for 10 points in respect of maintenance/funds. The Judge does not advert to this in his determination. This was a further, freestanding error of law.

12. However, it is clear from the bank statements provided, which I have considered, that the Secretary of State's assessment, rehearsed in the decision letter, was unassailably correct. The FtT was, and this Tribunal is, entitled to consider the bank statements as they formed part of the materials considered by the Secretary of State's decision at the time when the impugned decision was made: see Nasim and Others [2013] UKUT 610 (IAC). While the Judge's invocation of the prohibition enshrined in section 85A(3)(a) of the 2002 Act may have been in error, this was of no consequence, for the reasons appearing above. Furthermore, given the above analysis, the other errors of law which I have identified were immaterial. It follows inexorably that the refusal to adjourn the hearing was not unfair, since the Appellant could not on any showing have succeeded. See, in this context, the decision of this Tribunal in MM Sudan [2014] UKUT 105 (IAC), [15] – [17] especially. This leads to the conclusion that the decision of the FtT is not vitiated by any material error of law.

13. I have considered, finally, whether the hearing of this appeal should be adjourned and relisted, given the Appellant's non-attendance and the absence of any legal representative on his behalf. This engages a different rule of procedure. Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides:

> "*If a party fails to attend a hearing, the Upper Tribunal may proceed with the hearing if the Upper Tribunal –*
>
> *(a) Is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and*
>
> *(b) considers that it is in the interests of justice to proceed with the hearing.*"

As regards (a), the conventional "Notice of Hearing" indicates that, on 11 June 2014, the Appellant was notified of this hearing. The Notice was sent to the address specified in the application for permission to appeal. As regards (b), the cardinal rule of fairness, identified above, applies fully. My assessment, logically, replicates that set out in [12] above. For the reasons given there, I consider that this appeal was doomed to fail. The Appellant's attendance, whether represented or otherwise, could not have made any difference. Accordingly, I conclude that an adjournment and relisting are inappropriate.

14. I would add the following. If it should transpire – see [3] above – that this appeal has been superseded by a fresh application on the part of the Appellant, whether actual or contemplated, or that the Appellant decided, for whatever reason, that he would not pursue the appeal, the effect of this may well be that the process of the Upper Tribunal has been misused. Where any appeal becomes moot, in whatever circumstances, there is a pressing duty on the litigant or legal representative concerned to communicate this immediately to the Upper Tribunal and all other parties. A failure to do so without reasonable excuse will be considered a misdemeanour of some moment and may be regarded as a misuse of process.

DECISION

15. I dismiss the appeal and affirm the decision of the FtT.

THE HON. MR JUSTICEMCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 21 August 2014