Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/25623/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21 January 2014	**On 29 January 2014**
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(Given orally at hearing)

Before

UPPER TRIBUNAL JUDGE SOUTHERN

Between

MELINDA CALLANTA MARCO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L Islam, Legal Representative
For the Respondent: Ms Z Kiss, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who is a national of the Philippines, born on 18 April 1964 has been granted permission to appeal against the determination of First-tier Tribunal Judge Phull, promulgated on 19 November 2013 by which the judge dismissed the appellant's appeal against the decision of the respondent made on 11 June 2013 to refuse to vary the appellant's leave to remain by way of the grant of further leave.

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2. The issue to be addressed is whether, in proceeding with the hearing on 6 November 2013 in the absence of the appellant or any representative, the judge made an error of law such as to require that her decision be set aside and the appeal either remitted to be heard afresh by the First-tier Tribunal, or decision re-made in the Upper Tribunal. The appellant's case is that the judge was wrong to proceed with the hearing because on the basis of the information that was available to her, the only proper response was to grant an adjournment to enable the appellant to attend on another day. The respondent submits that the judge made no error of law in proceeding with the hearing because, on the basis of the facts and the situation as it was before the judge, she was entitled to proceed as she did.

3. In order to resolve this question, I look at the process of events leading to the hearing on 6 November. After notice of that hearing had been sent to the parties, the appellant's representatives sent a letter dated 14 October 2013 to the Tribunal saying that their client was unable to attend the hearing at Birmingham on 6 November because she was living closer to London and it would be more convenient for her to attend a hearing in London. That, therefore, amounted to an application for an adjournment of the hearing and for it to be re-listed at a London venue. By a letter dated 4 November 2013 the First-tier Tribunal refused that application so that all concerned were on notice that the hearing would proceed on 6 November. On 5 November 2013, the appellant's representatives sent a fax to the First-tier Tribunal asking for an adjournment on the basis that the appellant was unwell. That came before the judge who said at paragraph [4] of her determination:

> "The Tribunal received a fax dated 5 November 2013 from Immigration and Work Permit asking that the appellant's appeal hearing be adjourned because the appellant had been "laid up and she is not able to travel from London to Birmingham to give evidence in the hearing…we request the honourable Tribunal to adjourn the above mentioned hearing. Medical evidence in this regards will be sent to the Tribunal at the earliest.""

4. The judge looked at that request and caused a telephone call to be made by a clerk of the Tribunal to the representatives to ascertain whether the appellant would be attending the hearing, and also to discover why no representative was present. The response from the appellant's representatives was that no one would be attending and the appellant was sick. The judge noted that no evidence of the appellant's ill health had been provided and that no satisfactory explanation had been offered by the representative as to why they had not attended and, in the context that the earlier application for the adjournment had already been refused, she decided to exercise her discretion to proceed with the appeal in the absence of the appellant and representative.

5. We now have, as was recognised by the judge who granted permission to appeal, a letter from the appellant's doctor, Dr Debs Lawton, dated 6

November 2013, confirming a diagnosis of gastroenteritis following a visit by the appellant to the surgery on 5 November; that letter stating also that the appellant would not be able to travel by train because of diarrhoea. Curiously, that letter was not sent to the Tribunal until 19 November, which was the day after the determination had been written. I am told today that the reason that letter could not be sent to the Tribunal on the day of the hearing, 6 November, or indeed 5 November (the date of the consultation) is because the document was not created until subsequently so that it was backdated to 6 November. I have to say that, in the absence of any credible explanation as to why a reputable organisation such as the office of the appellants doctor would choose to back-date such a letter, I am simply unable to accept that to be an accurate description of events, and I am not prepared to proceed on the basis that the Fairbrook Medical Centre backdated the letter, that being the reason why it was not available until the date it was provided.

6. I asked for an explanation as to why, even if the appellant was unable to attend, the representatives did not attend the hearing on 16 November at Birmingham, as they were on the record as the representatives. I am told that this is because the appellant instructed her representatives not to attend. Thus either the adjournment would be granted on the day by the judge, or the hearing would not be able to proceed because there was no representative present. That, of course, is wholly unacceptable. The representatives have a duty to attend whilst they remain on the record, whether or not the appellant herself does.

7. The decision of the judge was informed, of course by rule 19 of the Asylum and Immigration Tribunal (Procedure) Rules 2005, which provides as follows:

> **19 Hearing appeal in absence of a party**
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> (1) The Tribunal may hear an appeal in the absence of a party or his representative, if satisfied that-
>
> (a) the party or his representative has been given notice of the date, time and place of the hearing, and
>
> (b) there is no good reason for such absence.
>
> (2) Where paragraph (1) does not apply, the Tribunal may hear an appeal in the absence of a party if satisfied that—
>
> (a) a representative of the party is present at the hearing;
>
> (b) the party is outside the United Kingdom;
>
> (c) the party is suffering from a communicable disease or there is a risk of him behaving in a violent or disorderly manner;
>
> (d) the party is unable to attend the hearing because of illness, accident or some other good reason;
>
> (e) the party is unrepresented and it is impracticable to give him notice of the hearing; or

(f) the party has notified the Tribunal that he does not wish to attend the hearing.

8. Drawing all this together, I am in no doubt at all that on the basis of the information available to the judge, she was entitled to proceed with the hearing and she made no error of law in doing so. No good reason was provided for the absence of the appellant's representative and no evidence was offered of the asserted illness, which was bound to be assessed in the light of the earlier refusal to adjourn for reasons concerning the appellant's convenience rather than her ability to attend the hearing. I maintain that assessment as being the correct one, even in the light of the letter that subsequently came from the doctor confirming a diagnosis of gastroenteritis and expressing an opinion that the appellant should not travel. In any event, I invited Mr Islam today to set out the factors, if taken at their very highest and if taken as unchallenged, which he said would have entitled the appellant to succeed on human rights grounds. Those factors can be summarised as follows:

9. The appellant arrived in the United Kingdom in 2009 as a student. That leave was extended but subsequently in August 2012 she was given notice of curtailment of leave because the college sponsor licence had been withdrawn although she was given until 27 October 2012 in order to make arrangements for an alternative college. A few days before that leave expired she submitted the application, not for further leave as a student, but outside the rules on human rights grounds. Mr Islam points out that while she has been here, the appellant has not drawn on public funds; she has studied; she has paid fees for a course which she was unable to complete because of the withdrawal of the sponsor licence and it was no fault of hers that her studies came to an end in that way. She has insufficient funds to start another course; she subsequently sought to regularise her status by making this application; she has no savings left with which to re-establish herself in the Philippines and has no job to return to; and in any event wishes to stay to make a life for herself in the United Kingdom where she hopes to find work and enjoy the private life, which of course, she has built up since 2009. There is no element of family life arising in this case.

10. It is plain beyond doubt that this is a claim which could not possibly succeed on human rights grounds. The assertion that the refusal to vary leave by the grant of further leave in these circumstances was such as to disclose an impermissible infringement of rights protected by Article 8 of the ECHR is wholly unarguable. This reinforces the conclusion I have already reached that the judge made no error of law that was material to the outcome of this appeal and therefore the appeal to the Upper Tribunal will be dismissed.

Upper Tribunal Judge Southern

Immigration and Asylum Chamber
Date: 21 January 2014