**Upper Tribunal**
**(Immigration and Asylum Chamber)**

**Appeal Numbers: IA/11006/2014**
**IA/11007/2014**
**and IA/10459/2014**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 19 February 2015** | **On 20 February 2015** |

**Before**

**Deputy Upper Tribunal Judge MANUELL**

**Between**

**(1) Mrs FATIMA SHAFANI HAROON**
**(2) Mr NIZAMDEEN RISMAL SHARA**
**(3) Mr MOHAMMED FAIROOS AHAMED ANSAR**
**(NO ANONYMITY DIRECTION)**

Appellants

**and**

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

Respondent

**Representation:**
For the Appellant: Ms U Miszkiel, Counsel (instructed by Jein Solicitors)
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The Appellants in these linked cases appealed with permission granted by First-tier Tribunal Judge Kelly on 29 December 2014 against the determination of First-tier Tribunal Judge Vincent Fox who had dismissed the Appellants' appeals against the Secretary of State's decision dated 17 February 2014 in a

determination promulgated on 10 November 2014. The Appellants are nationals of Sri Lanka, who had applied for further leave to remain in Tier 1 as a team of Entrepreneur Migrants and as a dependant. This was refused on general grounds and removal directions were made under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. Judge Kelly considered it arguable that Judge Fox should not have refused to adjourn the hearings in the face of medical evidence that the First Appellant was unfit to attend the hearing. It was arguable that the First Appellant might have been able to give relevant evidence and that the tribunal had acted unfairly in refusing the adjournment.

3. The Respondent opposed the onwards appeal, by notice under rule 24 in the form of a letter to the Upper Tribunal dated 8 January 2015.

4. Ms Miszkiel for the Appellants relied on the onwards grounds and the grant of permission to appeal. Ms Miszkiel made an application that I should recuse myself and adjourn the hearing to another judge, on the grounds of potential perceived bias. Judge Fox at [15] of his determination had referred to an earlier interlocutory decision of mine to refuse an adjournment. Ms Miszkiel's application was not supported by Mr Whitwell. I refused the application because the appeal was against the refusal of Judge Fox to adjourn the hearing before him on 25 September 2014, on the basis of a renewed application which was not my decision; see [13] of the determination. The decision to proceed was his alone. I had expressed no view of the merits of the appeals at any stage and none was attributed to me. No reasonable observer would perceive potential for bias in that situation.

5. Ms Miszkiel went on to submit that the judge had erred in law by accepting into evidence material provided by the Appellants which was inadmissible because it was post decision. Ms Miszkiel contended that Ahmed and Another (PBS: admissible evidence) [2014] UKUT 00365 (IAC) showed that the judge should not have admitted such evidence, notwithstanding that the Appellants had asked him to do so. Consideration of post decision evidence was not permitted in Points Based System appeals.

6. Ms Miszkiel further submitted that in any event the judge ought to have found procedural unfairness at common law by the Secretary of State and returned the decisions to be remade in accordance with the law. The Appellants had not been given the opportunity to comment on the alleged discrepancies in their respective records of interview prior to the issue of the decisions embodied in the reasons for refusal letters. This was such an obvious example of unfairness that the judge should have spotted the point in accordance with the principles of R v the Secretary of State for the Home Department, ex p Robinson [1997] 3 WLR 1162. The fact that the point had not been raised before the judge at the hearing and had not been taken in the Notice of Appeal was immaterial.

7. Counsel further submitted that the effect of refusing the adjournment was that the First Appellant was not able to give evidence of matters which could and should have been put to her, for example, in relation to inconsistencies between the partners about their business as the reasons for refusal letter had claimed had emerged at their respective interviews. The absence of the First Appellant from the hearing was significant. Counsel reminded the tribunal that the hearing had been conducted under the Asylum and Immigration Tribunal (Procedure) Rule 2005 (as amended).

8. Mr Whitwell for the Respondent submitted that the Appellants' grounds of onwards appeal were internally inconsistent. The judge was not under any Robinson (above) duty. The Appellants were represented by solicitors and counsel and it was for them to raise the points they wished the judge to consider. Paragraph 245DD(j) of the Immigration Rules created a discretion in the Secretary of State to call for additional information but no duty to do so. The judge had been entitled to refuse the adjournment application made to him as the medical certificate failed to show that the First Appellant was unfit to attend court. The Appellants had not been prevented from presenting their appeals. There had been no procedural unfairness at any stage.

9. In reply Ms Miszkiel reiterated her earlier submissions. The Appellants had been unfairly treated.

10. At the conclusion of submissions I indicated that I found that the judge had not fallen into material error of law and reserved my determination, which now follows.

11. The judge was obliged to consider the application to adjourn the hearing in accordance with rules 21 and 19 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (as amended), which were in force at the date of the hearing, but which are now obsolete. Rule 4, the overriding objective, applied to that consideration, as the judge noted at [15] of his determination. Rule 21 provided that the tribunal must not adjourn a hearing of an appeal unless satisfied that the appeal cannot otherwise be justly determined. Rule 19 provided that the tribunal may hear an appeal in the absence of a party or his representative if satisfied that there is no good reason for such absence. Judge Fox plainly had all three rules in mind.

12. From the medical certificate provided by the First Appellant's local GP in London SW18, the judge noted that the First Appellant was not certified to be unfit to attend court, i.e., a potential time span of an hour or so, plus return travel. The judge must have noted that the Appellant's home address was in London SW18, which is no more than 7 miles from the Richmond court (postcode TW9 2RF) and thus perhaps 30-45 minutes away. The judge would also have noted that the medical certificate was vague in its terms. The fact as the judge noted that the appeal had previously been adjourned because of the

First Appellant's health was a relevant consideration. There was no indication as to when she might be free of the health difficulties she asserted. The judge had before him a witness statement for the First Appellant prepared by her solicitors and the Third Appellant who had also provided a witness statement was present at the hearing. The Appellant's counsel was present. It was thus open to the judge to conclude that there was no good reason for the First Appellant's absence and that an adjournment was not required to enable the appeal to be justly determined and further was not in accordance with the overriding objective.

13. If, as Ms Miszkiel contended, the judge had failed to have proper regard to Ahmed and Another (above), by considering post decision evidence provided by the Appellants, it is impossible to see how that could have prejudiced the Appellants. The judge simply did as they had requested him. Ahmed and Another (above) was not cited to the judge, yet the Appellants' solicitor and counsel were under a duty to do so if it were relevant. There can be no conceivable unfairness to the Appellants as the result of the judge's approach, whether or not it was impermissibly generous. It follows that whether Ms Miszkiel's interpretation of Ahmed and Another (above) may be unduly restrictive need not be decided.

14. The submission that the judge should have considered for himself whether there had been procedural unfairness by the Secretary of State at the decision making stage was in my judgment an extravagant and mistaken one. No such allegation had been made in the Appellants' Notice of Appeal nor was any such submission made to the judge. The point was not so obvious that it should have been taken by him, whether or not Robinson is capable of such extension, which in my view is dubious. The judge's rôle was adjudicative, not inquisitorial. But Ms Miszkiel's point was surely wrong in any event. As Mr Whitwell submitted, the Secretary of State has the option of seeking additional evidence from applicants under paragraph 245DD(j) of the Immigration Rules. There is no duty, as the power is discretionary. The rule appears to be a statement of the obvious, but perhaps it is needed for the avoidance of doubt. The opportunity for applicants to challenge the Respondent's decision(s) is provided for by means of an appeal to the First-tier Tribunal. The Respondent did not have to maintain an open dialogue with the Appellants.

15. Ms Miszkiel's final point, that the First Appellant could have given evidence on significant issues had she been granted an adjournment, had no substance. The essence of the Appellants' claim was that the First Appellant and the Third Appellant were partners with a viable and credible business. They and their advisors were all well aware of the grounds of refusal of the applications. The First Appellant had the opportunity to deal with any relevant matter in her witness statement, which was, of course, her evidence in chief, and where she was obliged to state the facts or matters on which she relied. Rule 53 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (as amended)

emphasised that the burden of proof lies on the appellant to show that he or she complies with the Immigration Rules.

16. Moreover, and equally importantly, the Third Appellant was at the hearing and gave evidence. It was open to him to offer evidence on any fact or matter within his knowledge, whether hearsay or otherwise. The rules of evidence do not apply to the First-tier Tribunal: see rule 51 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (as amended). There was no suggestion that the judge did not endeavour to obtain the best evidence available about the appeals before reaching his decision. The Appellants were not restricted, even where Ms Miszkiel says they ought to have been. If the Appellants failed to raise an important matter, that was down to them. It was not unfairness on Judge Fox's part.

17. The tribunal concludes that that the Appellants have failed to show any material error of law in the determination. Their onwards appeals are accordingly dismissed.

**DECISION**

The making of the previous decision did not involve the making of an error on a point of law. The determination stands unchanged

**Signed** **Dated 20 February 2015**

**Deputy Upper Tribunal Judge Manuell**