IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/08334/2015
IA/08337/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 January 2016	**On 9 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

RAJWINDER KAUR
JASWANT SINGH
(ANONYMITY ORDER NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: No appearance or representation
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. These are linked appeals against the decisions of First-tier Tribunal Judge Anstis promulgated on 10 August 2015 brought with the permission of Upper Tribunal Judge Martin granted on 11 December 2015.

2. The grant of permission to appeal provides a helpful and succinct summary of the issues that now arise. The grant of permission is in these terms:

> "The Appellants seek permission to appeal against a Decision of the First-tier Tribunal (Judge Anstis) who, in a Decision and Reasons promulgated on 10th August 2015, dismissed their appeals, against the Secretary of State's decision to refuse them leave to remain in the UK as a Tier 2 (General) Migrant and her dependant spouse.
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> It is arguable that the First-tier Tribunal erred in proceeding with the appeal in the Appellants' absence and saying that there had been no application for an adjournment when there had been a previous application on the basis that the main Appellant was ill. That application was arguably unfairly refused as the reason for the refusal was said to be the absence of medical evidence when there was a letter from the Dr attached."

3. The Appellants' appeals had initially been listed for 17 August 2015, but the hearing had been brought forward to 27 July 2015. On 22 July 2015 the Appellants' then representatives, Aston Brooke Solicitors, wrote to the Tribunal requesting an adjournment and enclosing a letter from Dr Murtaza Khanbhai who was said to be the First Appellant's GP. The letter requesting the adjournment noted that the Appellant had recently been diagnosed with acute stress and depression and that due to her medical condition the representatives had been unable to take a substantive witness statement in order to prepare for the appeal. Concern is also expressed about the appeal being heard without the Appellant being medically fit, it being suggested that this might be prejudicial to her appeal. The letter from the GP - also dated 22 July 2015 - is drafted in these terms:

> "Mrs Kaur is currently being treated for acute stress and depressive symptoms. She started medication last week. Her symptoms are of insomnia, change in appetite, low mood and anhedonia. I understand she is due to attend an appeal hearing next week and I feel this should be postponed for a period of time until her treatment has had time to take effect. She will be reviewed in 4 weeks."

4. The request for an adjournment was considered and refused and notice of that refusal was sent out by the Tribunal on 24 July 2015. The refusal was given for the following reasons:

> "1. No evidence Appellant is unfit to attend court.
>
> 2. The Appellant has had since February to prepare her statement.
>
> 3. Overriding objective in PR2."

5. When the matter came on before First-tier Tribunal Judge Anstis there was no appearance or representation by the Appellants, or indeed by the Respondent. Judge Anstis says this at paragraph 2 of his decision, "*I did not receive any written representations, any explanation for the non-attendance or application for an adjournment from either party*". In those circumstances, and having directed himself to the Procedure Rules, the Judge decided to proceed with the appeal in the absence of the Appellants (and indeed in the absence of a representative from the Respondent), and determined the appeal for reasons set out in his decision.

6. The essence of the Judge's adverse decisions under the Rules and in turn Article 8 is set out in the following terms at paragraphs 7 and 8:

> "7. The requirements of the Immigration Rules are that the application must have a valid CoS number. This is an essential requirement of the application. There was no valid CoS number provided in respect of these applications. I do not consider that in such a situation references to common law fairness and public law assist the Appellants. The application was fundamentally flawed by the absence of a valid CoS number. Where there is no valid CoS number it is bound to fail.
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> 8. The grounds of appeal make reference to article 8 in respect of both family and private life in general terms, but there is nothing in the grounds of appeal or other papers before [me] to show the extent to which the Appellants have established a family or private life in the United Kingdom, or to show that the decisions made by the Respondent engage article 8 at all. In the absence of any evidence as to how (if at all) article 8 is engaged in the Appellants' case I cannot go on to consider whether the decision amounts to a disproportionate interference with the Appellants' rights under article 8. There is simply no evidence to suggest that article 8 is engaged in the first place, so the Appellants' appeal cannot succeed by reference to article 8."

7. As already indicated in the quotation above from the reasons of Upper Tribunal Judge Martin in granting permission to appeal, the Appellants complain that they were deprived of a fair hearing by reason of the First-tier Tribunal Judge proceeding to consider their appeals in their absence: it is argued in the written grounds that there was an error of law in that the Judge appeared to be under the impression that there had been no application for an adjournment.

8. In one sense there was no application for an adjournment before Judge Anstis in that the application made on 22 July 2015 had already been made, considered, and refused prior to hearing date. Be that as it may, it seems highly likely that Judge Anstis was unaware of that circumstance: it is reasonable to expect that had he been aware he would have made some reference to the fact of an adjournment application having been made and refused when considering the circumstances of the non-attendance of the Appellants.

9. I pause to note, very much parenthetically, that even if it were the case that the First Appellant felt unable to attend the hearing there is absolutely no explanation as to why the Second Appellant did not attend - either to pursue further an application for an adjournment, or, in the event of the adjournment being refused a second time, to pursue whatever representations he might have felt able to make.

10. Be that as it may, on balance I am persuaded that the Judge has proceeded on a factual misconception as to the circumstance of an adjournment application having been made, and also without regard to the supporting evidence submitted with that application. That is not to say that the Judge would inevitably have been bound to reconsider the adjournment application, or if he had done so would have been bound to grant an adjournment. In this latter regard it may well be that the fact that the medical evidence does not expressly support the notion that the First Appellant was unfit to attend court is such that the basis of the application

was not made out. However, on balance I am just persuaded that the most appropriate course of action here is to determine that the First-tier Tribunal Judge did indeed err in law in proceeding on a misconception of fact, and that such an error was material in that it related to the First Appellant's opportunity of putting her case to the First-tier Tribunal. The decision of the First-tier Tribunal is set aside accordingly, and the decisions in the appeals now require to be re-made.

11. Directions have been issued by this Tribunal in the standard form alerting the Appellants to the need to prepare for this hearing on the basis that if the Upper Tribunal decides to set aside the decision of the First-tier Tribunal any further evidence, including supplementary oral evidence that the Upper Tribunal may need to consider if it decides to re-make the decision, should be available before the Tribunal today. I have already indicated that no supporting documents were filed before the First-tier Tribunal. It is the case that as of today no supporting documents have been filed before the Upper Tribunal either. Nor have the Appellants attended today: in this context I am satisfied that due notice of the hearing has been given and that the Appellants have had the opportunity both of attending and of sending to the Tribunal any statements or documents upon which they might wish to rely. I am satisfied that it appropriate to proceed with their linked appeals in their absence.

12. The Appellants have failed to advance their case by reference to any evidence whatsoever. In those circumstances, although I have set aside the decision of Judge Anstis, the Appellants now having had a clear and unambiguous opportunity to present their case to the Tribunal – that is they have had a fair hearing - I have little hesitation in concluding in the same terms outlined by First-tier Tribunal Judge Anstis at his paragraphs 7 and 8 (which I have quoted above). The appeals under the Immigration Rules fail for the reasons given by Judge Anstis, and the appeals under Article 8 fail for the reasons given by Judge Anstis: such reasons are now to be read as having been incorporated into my own independent reasons.

Notice of Decision

13. The decisions of the First-tier Tribunal contained a material error of law and is set aside.

14. I remake the decisions in the appeals.

15. Appeal IA/08334/2015 is dismissed on all grounds.

16. Appeal IA/08337/2015 is dismissed on all grounds.

17. No anonymity directions are sought or made.

The above represents a corrected transcript of an ex tempore decision given at the conclusion of the hearing.

Signed: Date: 4 February 2016

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeals and therefore there can be no fee award.

Signed: Date: 4 February 2016

Deputy Upper Tribunal Judge I A Lewis