**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: IA/44248/2014**

**THE IMMIGRATION ACTS**

**Heard at** Field House **Decision and Reasons Promulgated**

**On** 4 February 2016 **On 17 February 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

**Between**

**MUHAMMAD MUBASHIR ALI**
**(ANONYMITY DICTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr M Iqbal (counsel) instructed by Pride, solicitors
For the Respondent: Mr L Tarlow Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

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2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Clayton promulgated on 8 May 2015, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 14 June 1983 and is a national of Pakistan.

4. On 11 November 2014 the Secretary of State refused the Appellant's application for an EEA residence card (as an extended family member).

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Clayton ("the Judge") dismissed the appeal against the Respondent's decision.

6. Grounds of appeal were lodged and on 20 October 2015 Upper Tribunal Judge Rintoul gave permission to appeal stating *inter alia*

> "It is arguable that, if First-tier Tribunal Judge Clayton did not permit an adjournment of the appeal to allow the appellant's representatives to take instructions on documents served only on the day, in breach of directions, that there was a procedural error capable of giving rise to an error of law"

The Hearing

7. (a) Mr Iqbal, for the appellant told me that he would be relying on rule 24 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and the case of MH (Respondent's bundle; documents not provided) Pakistan [2010] UKUT 168(IAC). He took me to [58] to [62] of the decision, where it is recorded that documents produced during the hearing by the presenting officer were relied on by the Judge to make the finding contained in the final sentence of [62] - "*I find both the appellant and sponsor gave false information in cross-examination"*

(b) Mr Iqbal told me that neither the appellant nor his representative were given fair notice of the case that was made against the appellant, and allowing the documents to be received, although late, and then refusing to allow the appellant's representative an adjournment to take instructions on those documents, created inequality of arms and deprived the appellant of a fair hearing. He reminded me of the directions made in this case for production of documents to be relied on 28 days prior to the date of hearing. He told me that the original source of the documents was entirely irrelevant. What mattered was that the appellant had been ambushed by the production of documents which the Judge treated as a determinative aspect of the appeal. Mr Iqbal urged me to set the decision aside and to remit this case to the First-tier Tribunal to be heard of new because, he argued, the appellant had not been given a fair hearing.

8. Mr Tarlow, for the respondent, told me that the decision does not contain errors of law, material or otherwise. He relied on the rule 24 response dated 6 November 2015 and took me to [19] and [20] of the decision, where the Judge

records the adjournment application and the refusal of that application. He told me that the findings contained at [62] & [63] are findings which were open to the Judge to make. He told me that this appeal is simply an attempt to re-argue a case which has been unsuccessful in the First-tier. He urged me to dismiss the appeal and allow the decision to stand.

**Analysis**

9. Rule 24 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 says

> "24. —(1) Except in appeals to which rule 23 applies, when a respondent is provided with a copy of a notice of appeal, the respondent must provide the Tribunal with—
>
> (a) the notice of the decision to which the notice of appeal relates and any other document the respondent provided to the appellant giving reasons for that decision;
>
> (b) any statement of evidence or application form completed by the appellant;
>
> (c) any record of an interview with the appellant in relation to the decision being appealed;
>
> (d) any other unpublished document which is referred to in a document mentioned in sub-paragraph (a) or relied upon by the respondent; and
>
> (e) the notice of any other appealable decision made in relation to the appellant.
>
> (2) The respondent must, if the respondent intends to change or add to the grounds or reasons relied upon in the notice or the other documents referred to in paragraph (1)(a), provide the Tribunal and the other parties with a statement of whether the respondent opposes the appellant's case and the grounds for such opposition.
>
> (3) The documents listed in paragraph (1) and any statement required under paragraph (2) must be provided in writing within 28 days of the date on which the Tribunal sent to the respondent a copy of the notice of appeal and any accompanying documents or information provided under rule 19(6)."

10. In K (DRC) [2003] UKIAT 00133 the Tribunal said that, where a party produces a document for the first time at the hearing, it is elementary that it must be copied to the other party who must be given an opportunity to comment on it. It may be necessary in those circumstances to afford the other party an adjournment, if that other party would otherwise be prejudiced by the late production of the document.

11. In Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) it was held that 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?

12. It is beyond dispute that in this case the notice of hearing was served in December 2014 and directed the respondent to produce and intimate the documents that the respondent intended to rely on not later than 31 December 2014. The hearing took place on 8 May 2015. The reasons for refusal letter does not make reference to either of the documents produced and now complained of. The reasons for refusal letter does refer (in part) to the appellant's history of applications,

13. The Judge discusses the adjournment request and the reasons for refusal of the adjournment at [19] and [20]. At [20] the Judge records "*the adjournment was refused on the grounds that nothing had been sprung on the appellant. He must have been fully aware of the contents of the documents as he had submitted the information to the ECO with his Visa applications.*"

14. It is not clear from the decision what enquiry was made of the respondent, nor what reasons were offered, for the late production of documents which had been in the respondent's hands since at least August 2011. It is not clear from the decision what opportunity the appellant's advocate had to take instructions on a document which have potential to undermine the appellant's credibility.

15. The overarching test is one of fairness. The documents now form part of the court file, but on the date of the hearing the appellant did not have fair notice of the extent of the respondent's evidence. The initial burden of proof remains with the appellant, but it must have come as some surprise to find that, as the hearing unfolded, the respondent had evidence of a prior inconsistent statement which may be determinative of the appeal. On that basis it cannot be said that the appellant had a fair hearing. It is argued for the appellant that three separate applications were made for adjournment. That is not recorded in the decision. It is clear from the final sentence of [19] that the application for adjournment came during cross-examination. It is at least implied that the new documentary evidence was produced in the course of cross-examination. A brief adjournment (say one hour) may well have been sufficient to enable the appellant and his representative to consider their position, but it is not even suggested in the decision that a brief adjournment to take instructions was offered to the appellant's representative.

16. The net effect is there is at least the appearance of trial by ambush. That cannot be said to be a fair procedure to adopt. There is no explanation given in the decision for allowing documentary evidence to be received although late. The timing of the production of the documentary evidence is clearly a failure by

the respondent to adhere to rule 24 of the procedure rules. No explanation is given from departure from the procedure rules, nor for the departure from the standard directions.

17. I must find that the decision is tainted by a material error of law. I therefore set the decision aside

18. I therefore find that the decision is tainted by material errors of law. The Judge's decision cannot stand and must be set aside in its entirety. All matters must be determined of new.

REMITTAL TO FT

19. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

20. I find that this case should be remitted because the Appellant did not have a fair hearing and was deprived of the opportunity to lead relevant evidence in rebuttal of the documentary evidence now relied on by the respondent. In this case none of the findings of fact are to stand.

21. I remit the matter back to the First-tier Tribunal sitting at Taylor House, before any First-tier Judge other than Judge Clayton.

**CONCLUSION**

**Decision**

**22. The decision of the First-tier tribunal is tainted by material errors of law.**

**23. I set aside the decision. The appeal is remitted to the First Tier Tribunal to be determined of new.**

Signed Date 12 February 2016

Deputy Upper Tribunal Judge Doyle