Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/03945/2016
HU/03949/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 2 November 2017	**On 29 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

MR RAJIB KUMAR BANIK

First Appellant

MRS JHUMA BANIK

(ANONYMITY DIRECTION NOT MADE)

Second Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Azeoke, Counsel
For the Respondent: Miss Holmes, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are husband and wife and are citizens of Bangladesh born on 12 December 1981 and 1 January 1987 respectively. They appealed

against the decision of the respondent dated 27 January 2016 refusing their applications for leave to remain in the United Kingdom outside the Rules on the basis of their family life.

2. The appeals were heard by Judge of the First-Tier Tribunal Oliver on 22 December 2016. The appeals were dismissed under the Immigration Rules and on human rights grounds in a decision promulgated on 25 January 2017.

3. An application for permission to appeal was lodged and permission was refused by the First-Tier Tribunal. Permission to appeal was made to the Upper Tribunal and permission was granted by Upper Tribunal Judge Kopieczuk on 11 September 2017. The permission states that although the Judge has significant reservations about the viability of the Article 8 claim on the basis of the evidence before him, his reason for refusing to adjourn the hearing, in circumstances where neither appellant attended, was too concise and lacked adequate analysis. The permission goes on to state that at the hearing before the Upper Tribunal, it will have to be explained, on behalf of the appellants, how their Article 8 claim could have succeeded and thus, how any error of law on the part of the First-Tier Judge could have been material to the outcome.

4. There is a Rule 24 response on file which states that the Judge has considered all the evidence he was directed to and has given adequate reasons for his findings. It states that the grounds are just a disagreement with his findings. On 15 December the appellants' solicitors were told their adjournment application was refused which gave them a week to prepare all the documents they required for the appeal hearing. The First-Tier Judge refused the oral adjournment at the hearing because there was insufficient evidence of why the appellants could not attend. The appellants' representative felt unable to make submissions at the First-Tier hearing. The Judge finds there is no breach of Article 8 as the appellants will be leaving as one family unit and little private life evidence was served.

The Hearing

5. I read out to the parties the permission to appeal and I informed Counsel for the appellants that what he has to do is explain how the Article 8 claim could have succeeded had the adjournment been granted and had the appellants been able to give oral evidence.

6. Counsel submitted that the appellants are relying on Article 3 which if successful will support their Article 8 claim. He accepted that the appellants have not claimed asylum. He submitted that persecution should be taken into account under Article 3 and integration into society in Bangladesh should be found to be a difficulty for the appellants.

7. He submitted that had the appellants been able to give evidence they could have given details of their circumstances and if these were found credible by the Judge then oral evidence along with the objective evidence could have resulted in the Judge allowing the appeal. I asked Counsel if objective evidence had been before the Judge. This was not clear. Counsel submitted that it was a material error not to grant the adjournment and hear the appellants' evidence about their situation if they have to return to Bangladesh.

8. The Presenting Officer submitted that there is no error of law in the Judge's decision. She submitted that the Judge did not err when he refused the adjournment. She submitted that the adjournment requests were inconsistent. The first adjournment request had been to enable the appellants to have sufficient time to collect the relevant documents and this had been refused because they had had ample time to do this. Seven days later a further adjournment request was made stating that the second appellant had a medical appointment on the date of the hearing and had been advised that her husband should go with her to the hospital. This was refused because there was no evidence that this was the case. Then on 22 December 2016 the appellants did not attend the hearing and their representative renewed the application and submitted a short bundle. There was a hospital letter with this but the Judge considered this and found that it did not show that the appellants were unable to attend the hearing. She submitted that the appellants, although they had been alerted to what was required for the adjournment to be granted, had not provided sufficient evidence and they and their representative had been aware of the problem but did not take proper steps to deal with it.

9. The Presenting Officer submitted that if there is an error of law in the decision it does not appear to be material. I was referred to paragraph 11 of the decision which states that the representative of the appellants felt unable to make submissions and as there was no Presenting Officer the Judge had to deal with the case on the papers. The Presenting Officer submitted that it was open to the Judge to reach the decision he did and in the circumstances the appellants are unable to complain about the adjournment not being granted.

10. She then referred to the appellants claiming under Article 3 of ECHR and made reference to the refusal letter which states that if they want to make a claim on protection issues they should submit an asylum application but they did not do that. She submitted that this indicates that they may well have had no confidence in an asylum claim and what they are now trying to do is bolster a feeble Article 8 claim.

11. She submitted that there is no error of law in the Judge's decision but if I find there is, it is not a material error.

12. Counsel for the appellants stated that the situation in Bangladesh for Hindus is appalling. He submitted that the Judge should have considered

this under Article 3 of ECHR and because he did not do that his decision is not complete.

13. He submitted that at paragraph 13 of the decision the Judge refers to paragraph 276ADE of the Immigration Rules stating that the terms of the Rules relating to family life cannot be satisfied. He submitted that the Judge has not made detailed findings and has not considered what was before him. He then submitted that all the evidence which should have been before the Judge was not before him and because of this the adjournment request should have been granted, and as he did not have all the evidence before him, this has resulted in an unfair hearing. I was asked to find that there is a material error of law in the decision and direct a re-hearing or a second stage hearing.

Decision and Reasons

14. It is clear from the evidence on file that an adjournment request was made on three occasions and on each occasion it was refused. The reasons for each refusal are satisfactory. It was found that the appellants and their representative had had sufficient time to prepare the case and obtain any documents required and it was found that there was insufficient evidence that the appellants were unable to attend the hearing to give evidence. After the second adjournment request was refused the appellants and their representative were aware of what was required but although medical evidence of the appellants' attendance at the hospital was made available there was nothing to state that the appellants were unable to attend the hearing to give evidence. There was no error of law in the Judge refusing the adjournment.

15. The refusal letter makes it clear that if a protection claim is being relied on then an asylum application should be made. This is repeated in the decision. The appellants did not apply for asylum.

16. Counsel for the appellants states that the decision was made without the Judge having sight of all the evidence. What he appears to be referring to is objective evidence. This is not an asylum claim. The Judge is dealing with a family life claim under Article 8 of ECHR.

17. The permission states that at the hearing it will have to be explained how the appellants' Article 8 claim could have succeeded and how any error of law, on the part of the First-Tier Judge, could have been material to the outcome. Counsel has not explained this. The Judge's findings on the appellant's Article 8 claim contain no error of law and there is no error in the way that the hearing proceeded.

18. The burden of proof is on the appellant and if objective evidence should have been submitted as suggested by Counsel, that was the appellants' responsibility. I do not see how this could have strengthened their Article 8 claim and I find that what the Judge had before him was sufficient to

enable him to reach a fair decision and he has properly explained his findings on how he reached his decision.

19. I have considered the case of ***Nwaigwe*** [2014] UKUT 00418 (IAC) and I find that the First-Tier Tribunal acted reasonably in refusing the adjournment request.

Notice of Decision

There is no material error of law in the Judge's decision promulgated on 25 January 2017 and Judge Oliver's decision must stand.

Anonymity has not been directed.

Signed Date 28 November 2017

Deputy Upper Tribunal Judge Murray