Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU099182015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal	**Decision and Reasons Promulgated**
On 6 June 2017	**On 21 June 2017**

Before

UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE M ROBERTSON

Between

YASREEN QURBAN
(anonymity direction not made)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Salam, Solicitor, from Salam & Co, Solicitors
For the Respondent: Mr Mills, Senior Presenting Officer

DECISION AND REASONS

Claim History

1. The appeal of the Appellant against the refusal of the Respondent to grant her further leave to remain in the UK as the spouse of Mr Shaban Mahmood, a British citizen, was dismissed by First-tier Tribunal Judge Ghani (the Judge) under Article 8 ECHR in a decision promulgated on 11 August 2016.

2. Prior to the hearing, by letter dated 10 August 2016 from her then representatives, Iqbal Law Chambers, the Appellant applied for an adjournment on the basis that her

partner had sudden chest pains, was unwell and could not attend court. This letter had attached to it an employee's statement of sickness, which is a self-certification, and in which Mr Mahmood stated that his period of sickness started on 9 August 2015, although the date on which it ended could either be 10 or 15 August 2015. However, if it is 15 August 2015, it is not clear how Mr Mahmood would have known that the back, chest and shoulder pains he described would end on 15 August, when the letter was faxed on 10 August. The request was refused on the basis that (i) being unable to attend for work was different from not being able to attend a hearing; (ii) the Appellant had failed to submit any documents despite the directions sent out on 30 June 2016; and she had (iii) thereby failed to co-operate with the Tribunal. It was noted in the notification of refusal that the late request to adjourn the hearing was simply an attempt to delay the hearing, which was contrary to the interests of justice.

3. The Appellant attended the first-tier Tribunal without a representative and without Mr Mahmood, her husband. She again applied for an adjournment on the grounds that she wished to seek another representative. This was refused because she had had sufficient time to prepare her case and to seek other representatives, and because her partner had not attended and the only evidence provided as to his non-attendance was a self-certification and no medical evidence.

4. Permission to appeal was granted in the following terms:

> *"3. The grounds complain that the Judge erred in Law by 1. Refusing to grant her an adjournment to seek legal representation and provide supporting medical evidence in support of her appeal; 2. Failure to properly consider the evidence regarding the risk to the Appellant's husband in considering the parties circumstances and in particular as to whether there are significant obstacles to the Appellant returning to Pakistan; 3. Failure to have proper regard to the Appellant's husband's especial circumstances; 4. Failure to consider the risk to the Appellant if she returns in light of her fear of persecution; 5 Failure to have due/proper regard to the sick certificate in respect of the Appellant's husband.*
>
> *4. I have read the decision made by Judge Ghani with care and note that whilst reference was made to the sick certificate submitted in respect of the Appellant's husband, it was then noted that no medical evidence had been submitted with regard to his condition. This reference was inherently inconsistent.*
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> *5. In a very short decision (3 pages), Judge Ghani had made very brief findings (3 paragraphs) with regard to all the issue under appeal. Bearing in mind the nature and complexities of the issues under appeal, especially in light of the fact that the Appellant was unrepresented and had also sought an adjournment to present the evidence. There appears to have been an arguable failure on the part of the Judge to have proper regard to all the evidence and law.*
>
> *6. It is arguable that the Judge failed to properly undertake an assessment of the particular risk to the Appellant or the Appellant's husband.*
>
> *7. The above grounds disclose arguable errors of law".*

5. For the purposes of the hearing, a large bundle had been submitted on behalf of the Appellant. We made clear to the parties that we would not be considering this evidence for the purposes of the error of law hearing; we could only consider the evidence that was before the Judge.

6. Mr Salam, on behalf of the Appellant, relied on his skeleton argument. He also submitted that:

    a. The Appellant had not been properly advised; she had trusted her solicitors and they had not asked her for any evidence in support of her appeal, so she had asked for an adjournment to seek new representatives so that she could have a fair hearing. Her solicitors had not submitted a bundle or witness statements. He stated that the Appellant had thought that if she did not have a representative, she would get an adjournment.

    b. The decision was only three pages long. The Judge had considered whether there were insurmountable obstacles to family life continuing in Pakistan, when there was no need to consider the provisions of para EX.1(b) of Appendix FM because it was stated in the decision that the Appellant met the suitability and eligibility requirements and therefore may have qualified for leave as the spouse of a British national, particularly as it was stated in the covering letter that was sent with the Appellant's application that the Sponsor earned £1,583.33 per month, which equated to £19,000 per annum. Both the Respondent and the Judge had jumped into a consideration of the provisions of EX.1(b) without ascertaining if it was necessary.

    c. The Judge did not follow **AK (Iran) v SSHD [2008] EWCA Civ 94**, where it was found that it was an error of law not to grant an adjournment where the representative withdraws at the last minute, and **Nwaigwe [2014] UKUT 418 (IAC)**, which gave primacy to the criterion of fairness. Further, Rule 4(3)(h) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 permits the Judge to adjourn or postpone a hearing.

7. In view of the guidance in **SV (Alleging misconduct and suppressing evidence) Iran [2005] UKAIT 00160** and **BT (Former solicitors' alleged misconduct) Nepal [2004] UKIAT 00311,** in which it was found that if an appeal is based in whole or in part on allegations about the conduct of former representatives, there must be evidence that those allegations have been put to the former representative, and the Tribunal must be shown either the response or correspondence indicating that there has been no response. Mr Salam was asked if the alleged failures of the Appellant's solicitors had been put to them, that is, whether they had written to them in relation to the Appellant's complaints about their conduct. He said that he had not, and that his firm had received instructions from the Appellant after she had received the notice of today's hearing, which was sometime in May of this year. He confirmed that the Appellant had not instructed them to write a letter of complaint to her former representatives, although she had been upset because she said that she had paid them a lot of money.

8. On behalf of the Respondent, Mr Mills submitted that:

a. Allegations against previous solicitors could not be used as an excuse for failing to submit evidence unless the allegations had been put to them and they had either responded or failed to respond. There was no evidence before us of any complaints having been made to the previous solicitors.

b. The Appellant applied using form FLR(FP), this was not the usual application for an application for leave to remain as the spouse of British national under the 5 year route. It was a private life application outside the Rules. Although it was noted in the covering letter that the Sponsor earned £1,583.33 per month, it may have been that the specified evidence had not been provided. In any event, the Appellant did not come with any documents and it is difficult to see how the Judge could have dealt with the hearing differently.

c. As to the absence of the Sponsor, the adjournment request had previously been refused. The Appellant's solicitors had been instructed for several months. They had not confirmed that the Appellant had not had adequate time to prepare for the hearing.

d. Although the guidance in **Nwaigwe** focussed on fairness, the provisions of Rule 4(3)(h) of the Procedure Rules, could not be an open door to adjournment requests on demand. It was open to the Judge to refuse the application.

9. In reply, Mr Salam submitted that the Appellant had been denied representation at the last minute, and reliance was placed on **SH (Afghanistan) v SSHD [2011] EWCA Civ 1284**. **AK (Iran)** provided that even if a previous adjournment request had been refused, it was still necessary to grant a request where a previous representative had withdrawn at the last minute. He submitted that the case-law was "on our side".

10. It was put to Mr Salam that when the request was made in writing, there was nothing in the representative's letter of 10 August 2016 to say that they had not had sufficient time to prepare for the hearing, yet no bundle had been submitted. The only reference was to the health of the Appellant. He was asked if the Appellant had instructed them not to attend so that she could gain more time to prepare. Mr Salam stated that the Appellant had said that she had paid them everything and they had charged her a lot of money. When asked if she had given her former representatives any documents, he said that they had not asked her for any and she had thought that maybe they did not need them. Mr Salam stated that the Appellant thought that if she instructed solicitors, they would do the paperwork.

Decision and reasons

11. We do not find that the Judge materially erred in law in refusing the adjournment request for the following reasons:

12. The Appellant was represented at all times prior to the hearing before Judge Ghani. He found that a previous adjournment request on the same basis had been refused.

Although the Appellant attended the hearing without a representative, she had been represented to 10 August 2016, the day before the hearing. There is no suggestion in the representative's letter, in which the adjournment was requested, that they were not prepared to attend the hearing if the request was refused. The letter was written in the following terms (inaccuracies as in the original):

> *"We note from the refusal letter that the main issue before the tribunal is the Appellants partners medical conditions. Unfortunately, we have been instructed that as the result of sudden chest pains the Appellants Partner is unwell to attend court on 11 August 2016. See attached a copy of the Employee's statement of sickness for your attention.*
>
> *In light of the above, we submit it would be unfair and unjust to deny the Appellant an adjournment considering the above circumstances and in particular where the Appellants Partner has ongoing medical conditions and his evidence is vital to the outcome of the appeal.*
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> *We further submit that the tribunal would not be able to make a full article 8 assessment in the absence of the Appellants Partners oral evidence.*
>
> *We humbly request that considering the above circumstances as a whole the tribunal should conclude that it would render it unjust to not grant an adjournment for at least 2 weeks from the appeal hearing date in order for the Appellants partner to be fit to attend court".*

13. As noted in the refusal of the adjournment request, there is a difference between being unfit to go to work and being unfit to attend court. There was no medical evidence to suggest that the Appellant's husband could not attend court; The evidence before Judge Ghani was not medical evidence from a medical practitioner; it was a self-certification from the Appellant's husband and it was open to Judge Ghani to so find.

14. When Judge Ghani refused the adjournment request, he would have been aware of the contents of the letter of request and the terms of the refusal. He would also have been aware that the Appellant's representatives then wrote a further letter on 10 August 2016, in which they stated that "We are no longer the instructed representatives of the above named persons appeal matter and if you could kindly update your records accordingly." This does not suggest that the representatives withdrew; it suggests that their instructions were withdrawn, to support the Appellant's position before Judge Ghani that she was without representation.

15. Although there was significant emphasis on the Appellant having been let down by her former representatives, the evidence before Judge Ghani did not suggest that the Appellant had been let down by her former representatives; the evidence was that the Appellant's former representatives were no longer instructed. This is supported by Mr Salam's submission that the Appellant thought that if she did not have a representative she would get an adjournment. There was no evidence before us to support the submission that the fault for lack of preparation for the hearing lay at the door of her former representatives. Even though she now has new representation, and we are told that she has complained to them of the conduct of her former representatives, these complaints have not been put to her former representatives and we find that these allegations are unsubstantiated. There was no reliable evidence

before Judge Ghani that an adjournment would mean that the Appellant was better prepared for a substantive hearing, or that her husband would attend such a hearing, if he adjourned the hearing particularly as Judge Ghani recorded at [6] that the Appellant stated that her husband was due to go to his GP on 10 August 2016 (the day before the hearing) and refused to attend. Whilst we accept in principle that an unfair decision on an interlocutory matter, such as an adjournment request, can amount to an error of law (**SH (Afghanistan)**), we find that Judge Ghani did not materially err in law in refusing the adjournment request.

16. As to paragraphs 6 and 7 of the terms of the grant of permission to appeal, as set out at paragraph 4 above, no issues were raised with regard to risk on return in the grounds of appeal (as attached to the notice of appeal) before Judge Ghani, and it would appear that these were raised for the first time at the hearing. Although Judge Ghani's decision is short and a number of issues were raised by the Appellant, the Judge's findings were that despite the assertions of the Appellant as to risk on return, she had made no application for asylum and provided no evidence to substantiate her assertions. These findings were open to him on the evidence before him (see [6] and [8]); the evidence before the Judge was extremely vague (see [6]).

17. Mr Salam submitted that the Respondent and the Judge had jumped to a consideration of insurmountable obstacles, when they should not have because it was stated in the reasons for refusal letter, dated 28 October 2016 (the reasons letter), which was sent to the Appellant, that the suitability and the eligibility criteria were met. Therefore, he submitted, the provisions of the Immigration Rules were satisfied.

18. However, as submitted by Mr Mills, there was no evidence to suggest that the application was made under the 5 year partner route. There would have been no need to consider EX.1(b) in the reasons letter if the Appellant had met all the requirements of R-LTRP.1.1(c)(i) and (c)(ii). Because the application did not appear to have been made under the 5 year partner route (and there is no evidence in the Respondent's bundle to indicate that any financial evidence was submitted to support the assertion in the covering letter sent with the application that the Appellant's husband earned £1,583.33 per month), the eligibility provisions that were met were R-LTRP.1.1(d)(ii) (i.e, the provisions of E-LTRP.1.2 – 1.12 and E-LTRP.2.1. – 2.2 and not all the provisions of E-LTRP.1.2 – 4.2, as required by R-LTRP.1.1(c)(ii) with reference to E-LTRP.1.1), it was appropriate for the Respondent and Judge Ghani to consider the provisions of Appendix FM para EX.1(b), and we find that no material errors of law are disclosed in Judge Ghani's approach or his findings.

19. We find that, read as a whole, the Judge's findings were open to him on the evidence before him and no arguable material errors of law are disclosed. As the Appellant has now provided a substantial body of evidence, the appropriate course for her is to submit a new application with the correct supporting evidence.

Decision

20. **There is no material error of law in the First-tier Tribunal Judge's decision. The decision stands.**

Anonymity

21. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. On the facts of this case, we see no reasons to make such an order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

Date 21 June 2017

M Robertson
Deputy Judge of the Upper Tribunal