Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/21205/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 October 2017	**On 5 December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

MUDASSAR ABDUL-REHMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S. Usman, Solicitor, of Harvard Solicitors
For the Respondent: Mr S. Walker, Home Office Presenting Officer

DECISION ON ERROR OF LAW

Background

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge N. Amin (hereafter "the FtTJ") dismissing his appeal against the Respondent's decision to refuse him leave to remain under the Immigration Rules and on human rights grounds.

2. The Appellant is a citizen of Pakistan. He has remained in the United Kingdom (UK) since his entry in 2007 as a student. His last period of leave in that capacity expired on 3 May 2014. On 23 December 2014, he lodged

a further application for leave to remain on family and private life grounds on the basis of his relationship with his partner and child. The Respondent refused the application on 2 June 2015. The Appellant appealed.

The Decision of the FtTJ

3. The appeal came before the FtTJ on 21 June 2017. The parties were represented before the FtTJ who heard oral evidence from the Appellant and received submissions from both representatives. The FtTJ's decision is brief comprising of three pages. Her findings are set out at [10]-[19]. By the time of the hearing before the FtTJ, the Appellant's relationship had broken down and it was thus conceded by his representative that he could not meet the requirements of the Immigration Rules on account of that relationship. The Appellant's ex-partner had however since given birth to their child, and while the Appellant had not seen that child, the appeal was pursued on the basis that there were ongoing family court proceedings in relation to that child. The FtTJ accepted that on 24 February 2017 the Family Court issued a parental responsibility order to the Appellant, but noted that he had not been able to exercise his rights under that order and hence a further hearing had been scheduled for 14 July 2017.

4. The FtTJ's reasons for dismissing the appeal at [17]-[19] are expressed in the following terms:

"However, the Appellant has not seen this child since her birth and there is nothing before me to show that he has sole parental responsibility. The child lives with her mother and the Appellant's ex-partner."

In the circumstances, I am satisfied that the Appellant's appeal fails because the decision of the Respondent at the time it was made was in accordance with the law.

The refusal is therefore in accordance with the law and the Respondent has shown that the interference is justified and is proportionate to the legitimate aim of controlling immigration."

5. The FtTJ thus dismissed the appeal *"under Article 8 of the ECHR."*

6. The Appellant sought permission to appeal. Permission to appeal was granted by First-tier Tribunal Judge Farrelly on 29 August 2017 on all grounds. A rule 24 response was filed by the Respondent opposing the appeal.

Error of Law

7. This decision is brief due to the concession rightly made by Mr Walker on behalf of the Respondent at the hearing, who agreed with the Tribunal's observation that it was plain the FtTJ materially erred in law.

8. The appeal concerned the welfare of the Appellant's child - the subject of contact proceedings. The grounds argue, and the Presenting Officer's minutes of the hearing helpfully adduced by Mr Walker confirm, that the FtTJ heard an adjournment application on behalf of the Appellant on the basis that the Family Court were to consider the parental responsibility order and the Appellant's inability to exercise that order at a hearing scheduled for 14 July 2017, approximately three weeks' after the hearing before the First-tier Tribunal. The FtTJ makes no reference to the adjournment application. The Presenting Officer's minutes indicate that the FtTJ refused the application for an adjournment on the basis that the family court proceedings were irrelevant and that the FtTJ referred to the fact that the appeal had been adjourned on two previous occasions.

9. It is a troubling feature of this case that the FtTJ's Decision is entirely silent in respect of these circumstances.

10. The applicable law in respect of adjournments is helpfully explored in the decision of **Nwaigwe (adjournment – fairness) [2014] UKUT 00418 (IAC)**. I have considered what is set out at paragraphs [7]-[9]:

> "*7. 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? Any temptation to review the conduct and decision of the FtT through the lens of reasonableness must be firmly resisted, in order to avoid a misdirection in law. In a nutshell, fairness is the supreme criterion.*

8. *The cardinal rule rehearsed above is expressed in uncompromising language in the decision of the Court of Appeal in SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284, at [13]:*

> *'First, when considering whether the immigration Judge ought to have granted an adjournment, the test was not irrationality. The test was not whether his decision was properly open to him or was Wednesbury unreasonable or perverse. The test and sole test was whether it was unfair'.*

Alertness to this test by Tribunals at both tiers will serve to prevent judicial error. Regrettably, in the real and imperfect world of contemporary litigation, the question of adjourning a case not infrequently arises on the date of hearing, at the doors of the court. I am conscious, of course, that in the typical case the Judge will have invested much time and effort in preparation, is understandably anxious to complete the day's list of cases for hearing and may well feel frustrated by the (usually) unexpected advent of an adjournment request. Both the FtT and the Upper Tribunal have demanding workloads. Parties and stakeholders have expectations, typically elevated and sometimes unrealistic, relating to the throughput and output of cases in the system. In the present era, the spotlight on the judiciary is more acute than ever before. Moreover, Tribunals must consistently give effect to the overriding objective. Notwithstanding, sensations of frustration and inconvenience, no matter how legitimate, must always yield to the parties' right to a fair hearing. In determining applications for adjournments, Judges will also be guided by focussing on the overarching criterion enshrined in the overriding objective, which is that of fairness.

9. *In passing, I am conscious that the FtT procedural rules are scheduled to be replaced by a new code which is expected to come into operation on 20 October 2014. The provisions relating to adjournments, previously enshrined in rules 19 and 21 have been substantially simplified. Within the new code, the Asylum and Immigration Tribunal (Procedure) Rules 2014, Rule 4(3)(h), under the rubric 'Case Management Powers', provides that the FtT -*

> *'may … adjourn or postpone a hearing'.*

> *This substantially less prescriptive formula reinforces the necessity of giving full effect, in every case, to the common law right and principles discussed above. The overriding objective remains unchanged: see Rule 2. FtT Judges dealing with adjournment issues should continue to apply the principles rehearsed above and the decision of the Court of Appeal in SH (Afghanistan), giving primacy to the criterion of fairness*."

11. In my judgement it is apparent that the FtTJ singularly failed to demonstrate that she gave consideration and/or had regard to the Appellant's common law right to a fair hearing, in circumstances where her decision did not address any of the events that is accepted occurred at that hearing. The FtTJ has not given reasons for her decision to proceed with the hearing and thus has not demonstrated why in her view she considered it fair to proceed. The absence of any consideration of an adjournment or an explanation for the decision to proceed, constitutes an error of law, which in this case is compounded by the FtTJ's findings that the Appellant had not seen his child, a situation which was resolved shortly after the hearing by the commencement of supervised contact.

12. It is further plain that the FtTJ erred as contended in the grounds in failing to consider the best interests of the child. The FtTJ's consideration of the position of the child at [17] was evidently inadequate and no consideration was given to the Tribunal's jurisprudence in respect of a child subject to ongoing family court proceedings.

13. In those circumstances, I find the FtTJ erred in law. The only outcome must be that the decision of FtTJ is set aside. The appeal by consent of the parties is remitted to the First-tier Tribunal for a rehearing.

DECISION

The decision of the First-tier Tribunal involved the making of an error on a point of law such that the decision is set aside. The appeal is remitted to the First-tier Tribunal for a rehearing to be heard by a judge other than FtTJ N. Amin.

Signed Dated: 25 November 2017

Deputy Upper Tribunal Judge Bagral