Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/29030/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 October 2017	**On 1 November 2017**

Before

UPPER TRIBUNAL JUDGE WARR

Between

LEKE FUA-NIJIA VINCENT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Al Arayn (Farani-Javid-Taylor Solicitors LLP)
For the Respondent: Mr Nath, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Cameroon born on 1 March 1984. He entered this country on 3 August 2011 with entry clearance as a Tier 4 (General) Student valid until 31 December 2012 and extended until 31 July 2014.

2. He applied for a residence card as the spouse of a Portuguese national on 31 March 2014. Immigration Officers visited the appellant's home address on 12 August 2014 but his spouse was not present nor was there any evidence that she lived there. The appellant said she was on holiday in Manchester but was unable to provide her address or a telephone number

for her. There was another woman present at the appellant's address which was claimed were family friends. However, this woman had made a recent application in which she had given her home address as that of the appellant. It was concluded that the appellant's marriage was one of convenience and the application for a residence card was refused on 26 August 2014.

3. The appellant's appeal initially came before First-tier Tribunal Judge Colvin on 27 May 2015. The judge noted that the appellant had been served with notice as an overstayer and granted temporary release with weekly reporting conditions. At the hearing it was accepted by the representatives that the appellant had not been an overstayer and accordingly the decision had not been in accordance with the law.

4. It was further noted that the Home Office had not served the transcript of the attendance and interview with the appellant and that it was still not available from the relevant Immigration Officer. The Presenting Officer requested an adjournment to comply with directions that had been given in January 2015 and had not been complied with. The application was refused. The judge allowed the appeal to the extent that the respondent's decision, in relation to the serving of the notice on the appellant as an overstayer, was unlawful.

5. A new decision was reached on 5 August 2015 but no interview transcripts were provided then. A hearing was listed on 25 July 2016 following the new decision. On 21 July 2016 the appellant's representatives applied for an adjournment noting that the transcripts had not yet been provided. The appeal was adjourned and a new hearing was listed on 28 November 2016. The transcripts had not been provided and an adjournment was again requested by the appellant's representatives on 22 November 2016. On 25 November 2016 the appellant's representatives again requested an adjournment and contacted the Tribunal staff who informed the representatives that their request had been received and an email had been sent to the relevant court staff requesting them to respond to the representatives. However there had been no response. On 25 November 2016 a further letter was sent by the representatives setting out the history and stating that the appellant was unable to attend the hearing due to his medical condition (scoliosis). He had requested his GP to issue him with a certificate. He could not afford to instruct Counsel to apply for an adjournment orally.

6. The matter came before a First-tier Judge on 28 November 2016. There was no appearance by or on behalf of the appellant. The judge referred to the representative's letter of 25 November 2016. The respondent objected to the application. The judge noted that no medical evidence had been forthcoming and was not satisfied that the appellant was physically unable to attend the hearing. The judge noted that the Immigration Officer's notebook regarding the visit to the appellant's house on 12 August 2014 had been provided. The refusal decision had been

based on the absence of the appellant's spouse and his ignorance as to her whereabouts rather than on supposed inconsistencies in the interview. No bundle had been served. It was in the interests of justice to proceed. Having reviewed the evidence the judge concluded that by failing to produce any evidence the appellant had failed to address the evidence justifying a reasonable suspicion that his marriage was entered into in order to obtain a residence permit and dismiss the appeal.

7. There was an application for permission to appeal which was lodged out of time. It was submitted that the Home Office had not provided the appellant with a copy of the transcripts and the appellant could not meet the respondent's case unless the evidence had been provided. There had been a failure by the Tribunal staff to convey the adjournment request on 22 November 2016 to the First-tier Judge.

8. On 21 August 2017 the First-tier Tribunal granted permission to appeal and extended time. The judge referred to the issue of the directions and the earlier successful appeal and the case law and correspondence from the representatives and found that the judge had arguably erred in law.

9. The respondent filed a response on 6 September 2017 noting that the First-tier Judge had all the evidence necessary to proceed with the hearing and because of the absence of medical evidence at the hearing or subsequently his decision had not disadvantaged the appellant.

10. At the hearing Mr Arayn lodged the case of **Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)**.

11. He submitted that the appellant had not been provided with a transcript as directed and the appeal raised issues of unfairness. It was not in the interests of justice for the appeal to have proceeded as the Judge had stated. In relation to the medical evidence the appellant had attempted to get his GP to provide the medical evidence but he had not been given it. There had been difficulties in preparing a witness statement for the appeal because of a change of circumstances between the appellant and his partner – divorce proceedings had been instituted. These proceedings were handled by other solicitors. A substantial number of pages needed to be added to the bundle. Moreover the representatives had not had a copy of the notebook that had been handed in at the First-tier hearing.

12. Mr Nath submitted that no new evidence had been provided to the Tribunal. Nothing had been done despite the directions that had been issued.

13. Mr Arayn submitted that there had been a long history of transcripts being directed to be produced and served on the appellant. An adjournment request had been made in advance of the hearing. It would be difficult to prepare for a hearing without the transcripts. There were also the medical issues. The appellant was present at the hearing before me.

14. At the conclusion of the submissions I requested Mr Nath to make available the copies of the Immigration Officer's notebook which Mr Arayn had not seen and reserved my decision.

15. This is very much a borderline case. In ordinary circumstances, where there is a failure to appear on behalf of an appellant which is not satisfactorily explained and unsupported by medical evidence, it would be hard to fault the decision of a First-tier Judge to refuse an adjournment application.

16. However there are features in this case which bring into play the question of fairness and Counsel refers me to the decision of the president in **Nwaigwe**.

17. While the judge notes that the Immigration Officer's notebook regarding the visit to the appellant in August 2014 "had been provided" a transcript had been directed to be produced in 2015 and frequent requests had been made without success by the appellant's representatives for that transcript. It is possible that the judge had been under the impression that the copy of the notebook that is in the court file had been provided to the representatives but it is clear that it had not been. The first opportunity the representatives had for seeing a copy of the Immigration Officer's notebook was at the hearing before me.

18. It is not at all clear whether the copies in the court bundle represent the entirety of the notes and records of interview that were seen by the First-tier Judge. All that appears in the Tribunal bundle are two photocopied pages. It may be that the material made available by Mr Nath to the representatives is more extensive.

19. This was a case where the respondent was in breach of court directions to supply material which had been repeatedly requested by the appellant's representatives. There was no excuse whatever for not furnishing the representatives with the material that had been placed before the First-tier Judge. The principles set out in **Nwaigwe** and reflected in the headnote are applicable in the circumstances of this case. As is said in the headnote:

> "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 First-tier Tribunal 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? See **SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284**."

20. It is worthwhile emphasising that the court directions were to provide transcripts of the interview. Even assuming that what was provided at the hearing were such transcripts it would not have been reasonable to expect the representatives, let alone an unrepresented appellant, to deal with the points raised. As Mr Arayn said it would have necessary to take instructions before proceeding. In the circumstances it would be difficult to envisage how an adjournment could properly have been refused given the belated response by the respondent to the direction. As I have suggested, it is far from clear that the material insofar as it appears in the court bundle amounts to compliance with those directions but that will be a matter for the appellant's representatives to pursue.

21. As was indicated when permission to appeal was granted, there are a number of factors in play in this decision. Of these factors, the breach of directions is the most troubling. There was also the Tribunal's failure to respond adequately to the representative's request for an adjournment. I find that applying the test in **Nwaigwe** and asking the question "was there any deprivation of the affected party's right to a fair hearing?" the answer is regrettably yes. The decision is affected by a material error of law. Having regard to the extent of the fact-finding required (bearing in mind recent changes in the appellant's marital circumstances) it is appropriate that this appeal should be heard afresh before a different First-tier Judge. The appeal is accordingly remitted for a fresh hearing.

22. The First-tier Judge made no anonymity order and I make none.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed Date 25 October 2017

G Warr, Judge of the Upper Tribunal