Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/33494/2015**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 14 July 2017 **On 24 July 2017**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

MD MOFIZUL HOQUE SIKDER
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim of Counsel, instructed by SG Law
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant challenges the determination of First-tier Tribunal Judge Callender Smith dismissing his appeal against the respondent's refusal on 4 March 2015 to grant him indefinite leave to remain as the spouse of a person present and settled here under paragraphs A277A(a) and (b), 284(vi), A277B, 276ADE, 287(a)(ii), (vi), (vii) and 322(10). There was no appearance by or on behalf of the appellant at the hearing on 4 November 2016 at Taylor House and the judge proceeded in his absence. He dismissed the appeal by way of a determination promulgated on 17 November 2016.

© CROWN COPYRIGHT 2017

2. The appellant is a Bangladeshi national born on 2 June 1983 who arrived here in September 2009 as a student with leave until 31 July 2011. Further Tier 4 leave was granted from February 2012 until 23 June 2012. In May 2012, he married Khadra Mohamed Omer and, on 4 March 2013, obtained leave to remain on that basis until 4 March 2015. When he made his application for indefinite leave to remain through Gull Law Chambers on the last day of his leave, it was conceded that he had not taken the Life in the UK and/or language tests but his representatives maintained that a booking had been made and the results would be sent *"as soon as possible"*. No such evidence has materialised.

3. The appellant and his representatives were notified of the November date of hearing on 29 June 2016. On 5 October 2016, the appellant changed representatives and on 31 October a written request for an adjournment was made by his new solicitors in the following terms: *"…we write to inform you that we have been instructed by our client that the sponsor of the appellant has went to outside the UK to visit her mother who was critically ill in Dubai. Medical evidence and other evidence will be provided once it is received from the sponsor…the presence of the sponsor is vital to make the decision in appeal to establish subsisting relationship as the appellant claimed to have received no letter from the Home Office or his previous representative to attend for the interview"*. A letter in respect of Fadumo Handulle dated 13 October 2016 giving her an appointment for an annual diabetic eye screening test at Acton Town Medical Centre was attached.

4. On 2 November 2016, the adjournment application was refused on the basis that there was no evidence to confirm the sponsor's inability to attend appeal and that it was for the appellant to organise the evidence of his witness. Both the appellant and his representations were informed of this decision.

5. In his grounds, the appellant maintains that a further adjournment request had been made on the morning of the hearing, that he was ill, that his sponsor was still outside the country and that the judge ought to have adjourned the hearing. It is argued, rather confusingly, that *"as the FTJ had heard the appeal, he should have recused himself and granted an adjournment. His consideration of the adjournment request was tainted by the fact that the previous adjournment application was refused"*. It was also argued that the judge had not considered the appellant's illness when considering whether to adjourn. The grounds further argue that the judge had failed to consider material in the appellant's bundle which went towards establishing cohabitation and had failed to consider the appellant's explanation for not attending the interview with the Home Office. It is

maintained that the judge's observation that the appellant *"chose not to attend the hearing"* was unfair given that he had been ill.

6. Permission to appeal was granted by First-tier Tribunal Judge Page on 22 May 2017 because of the brevity of the decision and paucity of reasoning. He also observed that there may have been a fax to the judge which had not been placed before him.

The Hearing

7. At the hearing before me on 14 July 2017, I heard submissions from the parties. The appellant did not attend and nor did the sponsor.

8. Mr Karim submitted a copy of the adjournment request faxed to the Tribunal at 9.55 a.m. on the morning of the hearing. He relied on a copy of the Upper Tribunal's judgment in MM (unfairness: E & R) Sudan [2014] UKUT 00105. Headnote (2) reads: *"A successful appeal is not dependent on the demonstration of some failing on the part of the FtT. Thus an error of law may be found to have occurred in circumstances where some material evidence, through no fault of the First-tier Tribunal, was not considered, with resulting unfairness"*.

9. Mr Karim submitted that the grounds raised two issues. First, an adjournment application had been made on the day of the hearing and it was procedurally unfair for it not to have been considered. Had the judge seen the fax, he may have granted an adjournment and, even if it had been refused, he may have considered the non-attendance differently. Secondly, there was a lack of findings in the determination. The judge referred to the appellant's bundle but had failed to grapple with the evidence. Crucially he had not taken account of the appellant's complaint in respect of his previous representatives who had not informed him of the scheduled marriage interviews. Mr Karim submitted that the bundle contained a tenancy agreement and utility documents in joint names. He submitted that the judge had misunderstood the medical evidence in respect of the sponsor's mother. The determination contained material errors and should be set aside.

10. Mr Clarke responded. He submitted that the grounds were misconceived. Good grounds were required to establish unfairness. The appellant was represented and his representatives could have attended, particularly as a previous adjournment request had been unsuccessful. No evidence had been submitted of the sponsor's mother's illness or the appellant's. There was no evidence at all from the sponsor; a witness statement could have been obtained. The failure to attend interviews was not the only reason for the refusal. There was limited evidence relating to the relationship and the appellant had not taken the Life in the UK test. On that point alone he could not qualify for indefinite leave to remain. The appellant had had a year to prepare his appeal and he had been represented

throughout. The submitted evidence was wholly inadequate. The appeal should be dismissed.

11. Mr Karim replied. He stated that the appellant had not sat the Life in the UK test because his passport was with the Home Office. In the absence of that test, he expected to be granted a further two years of leave. The evidence showed that the appellant lived with his sponsor and her mother; that was a genuine set-up. Had the relationship not been genuine, how would the appellant had obtained a copy of the sponsor's passport and the letter regarding her mother's diabetic eye test. The representatives were without instructions to attend because the appellant was ill.

12. At the conclusion of the hearing, I reserved my determination which I now give.

Findings and conclusions

13. Mr Karim's submissions put forward two complaints. First, that there was procedural unfairness to the appellant by the failure of the judge to consider his second application for adjournment. It has to be said that the written grounds made a slightly different point; they did not appear to argue that the judge had not seen the second request for an adjournment, but that he had wrongly refused it. However, Mr Clarke did not seek to take issue with Mr Karim's clarification and so I deal with the argument as put in submissions.

14. It seems clear that the application for an adjournment faxed to the Tribunal five minutes before the scheduled hearing did not make its way to the judge; indeed, a copy was not on the court file and I had no sight of the letter until it was submitted by Mr Karim. No explanation for such a late application was put forward especially as the letter itself appears to suggest that the representatives were aware of the appellant's alleged indisposition the previous day. What they should have done was to attend the hearing and make an application in person. It is also clear from MM (*op cit*) that procedural unfairness can occur through no fault of the First-tier Tribunal Judge. It is certainly not Judge Callender Smith's fault that he was not given a copy of the fax from the appellant's representatives.

15. In order to determine whether there was unfairness to the appellant, such as to amount to a material error of law, I must consider the history of the application and the appeal. Plainly, there are issues with non-attendance and evidence. When the appellant made his application for indefinite leave to remain he claimed to have made a booking to take his Life in the UK test. He undertook to provide the results to the respondent. They have not materialised. Mr Karim maintained in his submissions that the appellant did not take the test as he did not have his passport but that was not the evidence of the

appellant when he made his application. It was his case that the test *had been booked*. There was no claim at that stage that he had been unable to make a booking because he did not have his passport. So, on that point, alone, the appellant would be unable to qualify for indefinite leave to remain and the challenge to the judge's decision is academic. Mr Karim submitted that the appellant expected a grant of two years' leave in the absence of a test certificate but his application was for indefinite leave to remain and not further limited leave. Any such expectation was misconceived.

16. It is correct, as Mr Clarke pointed out, that the appellant had over a year to prepare for his appeal hearing. His application was refused on 14 October 2015 and his appeal was not heard until 4 November 2016. Despite that lengthy period for preparation, the appellant's bundle, received by the Tribunal on 3 November 2016, was very modest; it contained the appellant's witness statement, copies of his and the sponsor's passport, a copy of his marriage certificate, tenancy agreement, a letter of complaint against the previous representatives, a letter from the NHS in respect of the sponsor's mother, utility bills, the appellant's bank statement and his P60 certificate. Several of these documents (such as the passport copies, marriage certificate and tenancy agreement) were already before the respondent and are contained in her appeals bundle. The fresh evidence of a subsisting relationship was, therefore, extremely limited. No explanation has been offered for why a witness statement from the sponsor had not been included. Given the basis for the refusal, one would have expected such evidence to have been obtained and the sponsor's undocumented absence from the UK does not excuse or explain the lack of such evidence.

17. It is important to note that despite the refusal of the first adjournment request on the basis that no confirmation of the sponsor's travel abroad had been provided, the appellant took no steps to obtain that evidence. Judge Callender Smith had regard to that refusal and noted that the claim that the sponsor's mother was seriously ill overseas was at odds with the only medical evidence adduced: a diabetic eye screening test appointment letter. Mr Karim submitted that the judge misunderstood the evidence but I do not agree. No explanation as to why this letter was submitted was offered by the representatives and, in spite of promises to adduce *"medical evidence and other evidence"* from the sponsor, none has been forthcoming and, even now, some seven months along, there is no information as to whether the sponsor and her mother are back in the UK.

18. I have had regard to the contents of the second adjournment application. It is equally as vague as the first. It is maintained the appellant *"has got a high fever"* and that *"medical evidence will be forwarded to the Tribunal as soon as the appellant recovers"*. No further details are given and no evidence has been forthcoming. Promises of providing evidence and then not following up on them

seem to be a pattern in this case. I also note that the representatives ask that the appeal be determined on the papers if an adjournment is not granted. There is no claim made in this fax that the evidence of either the appellant or the sponsor is crucial for the appeal.

19. As I noted, earlier, this fax did not make its way to the judge or the Tribunal file. However, given that it was a second adjournment request, that it was unsupported by any detailed information or evidence, that the promised evidence has not been forthcoming from this or the previous adjournment request and that the representatives suggested a paper determination in the event that an adjournment was refused, I conclude that there was no procedural unfairness to the appellant such as to merit setting aside the judge's determination. Even if the judge had seen the fax, I cannot see how he could have granted the adjournment given all the circumstances.

20. The second complaint raised is that the judge failed to grapple with the appellant's evidence. It is certainly the case that the findings are very brief and whilst I do not condone that in any way, having carefully considered all the evidence, I cannot see how a more detailed analysis of the documentary evidence could have led to a different outcome.

21. There are significant shortcomings in the evidence and serious problems raised by the documents adduced. Had these been considered by the judge, he would have had even more reasons to dismiss the appeal. I now set out some of the difficulties raised by the evidence.

22. The tenancy agreement is dated 10 March 2014 and had already been submitted to the respondent. It relates to a property at [ ] but the address given by the appellant as his residence in his witness statement is [ ]. There is no tenancy agreement for that address.

23. The appellant maintains in his statement that he had not been notified of the Home Office interview dates by his former representatives and that he only discovered that dates had been arranged when he received the decision letter. The decision was served on 14 October 2015 but his letter of complaint was not made until a year later, on 14 October 2016. There is no explanation for why he waited so long to make a complaint or why he continued to instruct them during that period and no evidence of whether he carried out his threat to report the firm to the SRA. Contrary to what is argued in the grounds, the judge was aware of the explanation offered for non-attendance (at paragraph 19) but he did not find this to be credible (at 28).

24. The appellant's address on the letter of complaint was [ ] but the letter to his mother-in-law dated 13 October 2016 (the day before) was sent to [ ]even though it is claimed by Mr Karim that the appellant, his wife and her mother all live together. It is of note that the Sinclair House address was where the sponsor was living at the time of the marriage in May 2012. The Nat West bank statements for May - August 2014 which post-date the tenancy agreement by a few months, give a different address of [ ] as do the appellant's pay slips for January 2014 – February 2015. The P45 for January 2014 gives an address of [ ] The British Gas bills for August 2015 - September 2016 give [ ] as the residential address for the appellant, Mrs Omer and Faraha Forkun. There is no explanation as to this third individual is. The sponsor's mother's name is given as Fadumo Handulle. It has never been claimed that the appellant lives with Ms Forkun.

25. Whilst the appellant claimed to be living at [ ] when he filed his notice of appeal on 26 October 2015, Sky Broadband bills to his wife for that period and beyond were addressed to [ ].

26. Whilst there are bank statement in respect of the appellant there are none relating to his wife and indeed the only joint evidence of cohabitation is the tenancy agreement which shows an address unsupported by any other documentary evidence, and indeed contradicted by it and British Gas bills which bear the name of an unknown individual along with the appellant and Mrs Omer. It cannot even remotely be argued that this wholly unsatisfactory and inadequate documentary evidence establishes a subsisting relationship.

27. It is my view, therefore, that even if the judge had conducted a fuller assessment of all the documentary evidence, he would have arrived at the same conclusions as he did. No material errors have thus been identified and the determination stands.

28. <u>Decision</u>

29. The appeal is dismissed.

Signed

Upper Tribunal Judge

Date: 21 July 2017