



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: OA/06742/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 3<sup>rd</sup> July 2017**

**Decision & Reasons Promulgated  
On 11<sup>th</sup> July 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

**Between**

**MR ADEJIMI ASAYE ADEYEMI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr R O Ojukotola, SLA Solicitors

For the Respondent: Mr S Kandola, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant, a national of Nigeria, appealed to the First-tier Tribunal against the decision of the Entry Clearance Officer dated 13<sup>th</sup> March 2015 to refuse his application for an EEA family permit to join his wife Mrs Chelia Maria Da Sa Pascoal, a Portuguese national. First-tier Tribunal Judge Harris dismissed the appeal in a decision promulgated on 4 November 2016.

2. The Appellant applied for permission to appeal to the Upper Tribunal and permission was granted on 27<sup>th</sup> April 2017 by First-tier Tribunal Judge Page.

### **Background**

3. The Appellant's application for an EEA family permit was submitted on 26<sup>th</sup> February 2015. The Appellant was interviewed on 12<sup>th</sup> March 2015 and the Entry Clearance Officer issued the refusal decision on 13<sup>th</sup> March 2015. The Appellant lodged the appeal on 8<sup>th</sup> April 2015 and the appeal was listed for hearing on the first occasion on 11<sup>th</sup> August 2016. On that occasion the Sponsor and a friend attended along with Counsel. However the case was adjourned but no new date was fixed for the hearing. On 18<sup>th</sup> August 2016 the parties were advised that the hearing was fixed for 8<sup>th</sup> September 2016. On 5<sup>th</sup> September 2016 an application was made on the Appellant's behalf for an adjournment of the hearing and that application was refused by the Tribunal on 7<sup>th</sup> September 2016. At the hearing on 8<sup>th</sup> September 2016 neither the Appellant or a representative appeared and there was no representative on behalf of the Respondent.
4. The main issue raised by the Grounds of appeal is whether the judge erred in proceeding to hear the appeal in circumstances where an application for adjournment had been made three days before the hearing and refused by the Tribunal and where there was no appearance at the hearing by or on behalf of the Appellant. In the Rule 24 notice the Secretary of State opposed the appeal on the basis that there had been no renewed application for an adjournment at the hearing and therefore the issue was not before the judge and in any event the judge was correct to proceed in all of the circumstances.

### **Submissions**

5. At the hearing before me Mr Ojukotola relied on the grounds. Ground 1 contends that the judge proceeded unfairly in failing to adjourn the appeal and that it was in the interests of justice and fairness to adjourn the appeal. Mr Ojukotola's submitted that this was particularly so given that this case was one where the Respondent alleged that this was a marriage of convenience and therefore the Appellant was not a spouse under Regulation 2 of the Immigration (EEA) Regulations 2006. In those circumstances the initial burden of proof was on the Respondent and that can switch to the Appellant. In his submission, given the nature of this case and particularly in the absence of the Respondent as was in the interests of fairness that the Appellant be given opportunity to respond to the allegations against him. As the Appellant is not in the UK he can only be represented by the Sponsor who is in the UK. He submitted that at the time she travelled the Sponsor was not aware of a new hearing date. He submitted that when the application for an adjournment was made on 5<sup>th</sup> September copies of the flight tickets were attached. He submitted that the adjournment application was refused on 7<sup>th</sup> September and given the proximity of time the Appellant could not have received notification of that

refusal in Portugal in time. The second ground contends that the issues raised by the judge in dismissing the appeal in terms of the substantive issues should have been put to the Appellant. The judge found as a factor against the Appellant the fact that the Sponsor did not attend the hearing and it is contended that this demonstrates further unfairness to the Appellant. The third ground contends that the Respondent did not attend the hearing and was not represented and the Respondent should have been given opportunity to subject the Appellant's EEA Sponsor to cross-examination to establish the probative value of her witness statement and that the Respondent would not have been prejudiced as a result of the adjournment of the case.

6. In response Mr Kandola submitted that the judge noted that there was no good reason why the application for an adjournment was made so late. Mr Kandola accepted that the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 do not require a renewed application to have been made at the hearing but submitted that such an application could have been made at the hearing. No-one attended the hearing and there was no suggestion that the representatives or any witnesses were abroad. The Appellant was represented and the decision in relation to the adjournment was sent to the representatives. Mr Kandola accepted that the judge does not specifically refer to Rule 28 of the Tribunal Procedure Rules 2014 but submitted that at paragraphs 12 onwards the judge examined the procedural background, the adjournment history and the lack of explanation as to why the Sponsor was unable to return for the hearing and therefore give adequate consideration to the circumstances of the case.
7. In response Mr Ojukotola submitted that the last sentence of paragraph 12 was a mistake in that it states that the Sponsor's flight was booked on 7<sup>th</sup> or 9<sup>th</sup> August 2016. In fact he showed a confirmation from Ryanair that he said was submitted with the application for permission to appeal. Those confirmation emails show that the Appellant booked a flight on 7<sup>th</sup> August 2016 to travel to Lisbon on 15<sup>th</sup> August and on 2<sup>nd</sup> September 2016 she booked a return flight to London for 12<sup>th</sup> September. He submitted that the case put here is that the Appellant and the Sponsor were both out of the country and the judge should have considered adjourning the case and exercising his discretion. In light of the overriding objective at Rule 2 the case could not be dealt with justly and fairly. He submitted that the judge should have exercised his discretion differently.

## **Discussion**

8. The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 set out the overriding objective at Rule 2 which states:

“2.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

- (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
  - (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
  - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
  - (d) using any special expertise of the Tribunal effectively; and
  - (e) avoiding delay, so far as compatible with proper consideration of the issues.
- (3) The Tribunal must seek to give effect to the overriding objective when it—
- (a) exercises any power under these Rules; or
  - (b) interprets any rule or practice direction.
- (4) Parties must—
- (a) help the Tribunal to further the overriding objective; and
  - (b) co-operate with the Tribunal generally.”

Rule 4 states:

- “4.—(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
- (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
- ((3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may—
- (a) extend or shorten the time for complying with any rule, practice direction or direction;
  - (b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues;
  - (c) permit or require a party to amend a document;
  - (d) permit or require a party or another person to provide documents, information, evidence or submissions to the Tribunal or a party;
  - (e) provide for a particular matter to be dealt with as a preliminary issue;
  - (f) hold a hearing to consider any matter, including a case management issue;
  - (g) decide the form of any hearing;
  - (h) adjourn or postpone a hearing;
- ...”

Rule 28 provides:

- “28. If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—
- (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
  - (b) considers that it is in the interests of justice to proceed with the hearing.”

9. It is clear from Rule 4 of the Rules that the Tribunal did not require a further application for an adjournment in order to consider this issue

afresh at the hearing on 8<sup>th</sup> September. In determining whether to proceed with the appeal in the absence of the Appellant the judge was required under Rule 28 to be satisfied that the party had been notified of the hearing and where the Tribunal considers that it is in the interests of justice to proceed with the hearing. There is no dispute in this case that the Appellant and the Sponsor were aware of the hearing. I accept Mr Kandola's submission that the consideration at paragraphs 12 to 17 indicates that the judge did consider the background to the application for an adjournment. Whilst not expressly referred to, I accept that it is clear that the judge decided that was in the interests of justice to proceed with the hearing.

10. No explanation was given by or on behalf of the Appellant as to why the application for an adjournment was only made on 5<sup>th</sup> September given that the notice of hearing had been issued on 18<sup>th</sup> August. Although that application was refused on 7<sup>th</sup> September it was served on the Appellant's solicitors. In the absence of confirmation that the hearing had been adjourned the Appellant and his representatives were not entitled to assume that it was so adjourned and should have attended the hearing if they wished renew the application for an adjournment. Again no explanation was given for their failure to attend and this too is noted by the judge. The judge further noted that no other witnesses attended the hearing and that no explanation had been given for their non-attendance.
11. The judge also noted that it had not been explained why the Sponsor was unable to return a few days earlier to the UK in order to attend the hearing. The emails sent to the Tribunal with the application for adjournment dated 5<sup>th</sup> September 2015 show an email to the Sponsor from Ryanair dated 2<sup>nd</sup> September 2016 confirming her reservation for a flight on 12<sup>th</sup> September 2016. This is consistent with Mr Ojukotola's submission that the Sponsor only booked a one way ticket on 7<sup>th</sup> August. She appears to have booked a return trip on 2<sup>nd</sup> September. At this stage she would have been aware of the hearing date which had been notified on 18<sup>th</sup> August. The judge noted that it was asserted that the Sponsor was unable to attend the hearing as she travelled to Portugal for an emergency matter. However the judge noted that the Appellant had not explained the nature of the emergency that required her to travel to Portugal. The judge was entitled to take this matter into account also.
12. In my view the judge took into account all relevant matters in deciding whether to proceed in the absence of the Appellant and made a decision open to him on the basis of that evidence. The judge clearly exercised his discretion to proceed with the hearing in the absence of the Appellant or his representative. On the basis of the evidence before him this was a decision which the judge was entitled to reach.
13. I note the guidance given by the Upper Tribunal in the case of **Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)** where the Tribunal gave the following guidance as summarised in the head note:

“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 parties to a fair hearing? See **SH (Afghanistan) v Secretary of State [2011] EWCA Civ 1284.**”

14. In this case I am satisfied that the judge took into account all material considerations and made a decision to proceed with the hearing in the absence of the Appellant which was open to him on the basis of the evidence before him.
15. In these circumstances there is no unfairness and no material error in the First-tier Tribunal Judge’s decision.

**Notice of Decision**

The decision of the First-tier Tribunal Judge does not contain any material error of law.

The decision of the First-tier Tribunal Judge shall stand.

No anonymity direction is made.

Signed

Date: 10<sup>th</sup> July 2017

Deputy Upper Tribunal Judge Grimes

**TO THE RESPONDENT**  
**FEE AWARD**

As the appeal has been dismissed there can be no fee award.

Signed

Date: 10<sup>th</sup> July 2017

Deputy Upper Tribunal Judge Grimes