



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/01217/2017  
HU/01218/2017

THE IMMIGRATION ACTS

Heard at Field House  
On 20 August 2018

Decision Promulgated  
On 29 August 2018

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

SITA [B]  
RAJENDRA [D]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant:

Ms P. Glass, instructed by Shah Jalal Solicitors

For the respondent:

Ms A. Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appealed against the respondent's decision dated 03 January 2017 to refuse a human rights claim.
2. The appeal was listed for hearing on 20 April 2018. The appellants applied for an adjournment on 06 April 2018. The appellants said that their child had a medical

appointment on 20 April 2018. They were unable to get this appointment before because there was a long wait for appointments. The appellants said that their six-year-old son was suffering from a bad root canal problem and that he needed an anaesthetic. Due to a high number of referrals they had only just received the appointment. The appellants attached a copy of a letter from Dr Andrzej Oborski dated 22 March 2018 offering a “pre-General Anaesthetic Assessment” appointment for 20 April 2018. The First-tier Tribunal refused the adjournment request on 10 April 2018 stating that the appointment was only for an assessment and not surgery and that alternative child care arrangements could be made.

3. First-tier Tribunal Judge Fox (“the judge”) dismissed the appeal in a decision promulgated on 02 May 2018. The appellants were represented by counsel, who renewed the application for an adjournment. The judge refused the adjournment request in the following terms:

- “11. Mr Lourdes renewed the application at the hearing. I noted that there is no further evidence to go behind the Tribunal’s original decision. I also noted that the child’s dental appointment was made on 22 March 2018 for 20 April 2018 at 9.50am at a venue in south-east London. The appellants were notified of the appeal hearing in a notice dated 11 September 2018.
12. They nominated a date for the non-urgent dental consultation which conflicts with their appeal hearing. Mr Lourdes stated that the child wanted both appellants to attend the dental appointment with him.
13. The matter was put back until 2pm for the appellants to attend the hearing. The timing of the dental appointment and its location makes it reasonable for the appellants to attend the hearing centre after the dental appointment.
14. Mr Lourdes provided me with an update at 12.45pm. He spoke with the first appellant at 11am. The dental appointment had been concluded by then and the appellants have decided to return to their home before embarking upon their journey to the Tribunal hearing centre. The appellants expect the journey from their home to the hearing centre to take approximately 90 minutes.
15. When the matter was called forward at 2pm Mr Lourdes stated that he has spoken once again with the first appellant at 1.45pm. The child was unwell during the journey home so the journey was interrupted to buy food for him in the Catford area. The appellants now feel too tired to travel to the hearing centre.
16. The hearing can proceed justly and fairly in these circumstances. They have chosen to prioritise a non-urgent dental appointment made 6 months after they were notified of the hearing date. The Tribunal facilitated the opportunity to engage with both obligations and there is no reasonable excuse for their absence.
17. They have been afforded every reasonable opportunity to attend the hearing and engage with the appeal, they have submitted documentary evidence in support of the appeal and they are formally represented.”

4. The appellants applied for permission to appeal, explaining that it was important that their child attended the pre-operative dental appointment. His teeth were decayed to the extent that it might cause an infection and nerve damage. If they had not accepted the appointment date offered to them they would have had to wait another 1-2 months

for another assessment appointment and another 3-4 months for the operation. They tried their best to attend the hearing once they had been to the appointment, but their son was sick on the way home. They had to get off the bus in Catford to feed him. They did not get home until 1.00pm, by which time they thought that it was too late to attend the hearing.

5. Upper Tribunal Judge Storey granted permission in the following terms:

“It is just arguable that in concluding that there was no valid reason to adjourn the judge failed to take sufficient account of (or to reasonably assess) the circumstances which had led the principal appellant to book an appointment for her child on the same day as the appeal hearing.”

### **Decision and reasons**

6. This is a borderline decision, but I have concluded that the First-tier Tribunal erred on grounds of procedural fairness and that the appeal must be remitted for a fresh hearing.
7. This is not a case where the appellants gave no explanation for their non-attendance. The judge considered the circumstances and gave the appellants a reasonable opportunity to attend the hearing later in the day.
8. However, the judge may not have fully appreciated the importance of the medical appointment in the context of the child’s treatment. The appellants were on notice of the hearing but were only informed of the appointment date shortly before the First-tier Tribunal hearing. The evidence before the judge showed that the child needed to attend a “pre-General Anaesthetic Assessment appointment” and indicated that the clinic received a high number of referrals. Although the appellants’ letter did not explain the length of time they had been waiting for the appointment, or the consequences if they did not attend, the evidence indicated that it was likely to be an important appointment if the child was awaiting treatment that would have to be done under general anaesthetic. It is difficult to assess the extent of the information provided to the judge at the hearing if counsel had only recently been instructed and might only have taken instructions over the telephone on the morning of the hearing. However, the evidence indicated that the child was suffering from a dental problem that was sufficiently serious to require treatment under general anaesthetic, and in those circumstances, it was reasonable to infer that it was not necessarily a “non-urgent dental consultation” in the general sense of the phrase. There was some indication that it related to a relatively serious problem that might justify prioritising the appointment in the best interests of the child.
9. Even if the judge was sceptical about the appellant’s decision to prioritise the appointment rather than the immigration hearing, it seems clear that the appellants did attempt to travel to the hearing centre. When informed that they had to return home because the child was unwell, the judge needed to reconsider whether it was in the interests of justice to adjourn the hearing in light of that information, taking into account the distance that the appellants would have to travel from Plumstead to


Hatton Cross. The appellants kept the court informed of the situation and appeared to make efforts to attend the hearing. This was not a case where there was evidence to suggest that the appellants were deliberately seeking to delay the proceedings.

10. Ms Fijiwala argued that any unfairness that might have been caused was immaterial given that the appellants did not meet the requirements of the immigration rules and no exceptional circumstances were disclosed that might engage the operation of Article 8 outside the rules. However, I bear in mind that matters of fairness must be considered carefully. The fact that, on the face of the evidence, the appellants are not likely to have a strong claim to remain in the UK on human rights grounds is immaterial to issues of procedural fairness. Fairness is not reserved only for those who have a good prospect of success. The appellants were deprived of an opportunity to give evidence so that the judge could properly evaluate the strength of their ties to the UK, and in particular, the ties that their child might have established during his six years of residence.
11. After having considered all the circumstances, I conclude that it was unfair to refuse to adjourn the hearing in the circumstances of this case. The First-tier Tribunal decision involved the making of an error of law. The effect of the error was to deprive the appellants of a fair hearing and an opportunity to give evidence before the First-tier Tribunal. In such circumstances it is appropriate to remit the case for a fresh hearing before the First-tier Tribunal (see paragraph 7.2(a) Practice Statement – 25 September 2012).

## DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside and remitted for a fresh hearing in the First-tier Tribunal

Signed   
Upper Tribunal Judge Canavan

Date 20 August 2018