Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/03324/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 17th September 2018	**On 20th September 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

RAVINATHA CHATURANGA DESHAPRIYA NAOTUNNA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Uddin, instructed by York, solicitors
For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Birk promulgated on 4 April 2018, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 11 April 1986 and is a national of Sri Lanka. The appellant arrived in the UK on 4 September 2019 as a Tier 4 (General) Student. He was granted successive periods of leave until 23 February 2016. On 3 November 2015 he applied for further leave to remain in the UK. That application was refused by the respondent on 7 February 2017.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Birk ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 7 August 2018 Judge Gibb gave permission to appeal stating

> 1. The appellant, a citizen of Sri Lanka, was refused leave on 07/02/2017, and his appeal against removal was dismissed by Judge of the First-tier Tribunal Birk (promulgated on 04/04/2018)
>
> 2. The grounds, which were in time, complaint that the Judge erred in refusing to adjourn the appeal to allow the appellant and his representatives to prepare and obtain evidence.
>
> 3. The grounds are arguable. In refusing the adjournment the Judge, at [5], focuses on whether the appellant should have been capable of preparing fully without legal assistance, and whether he should have appointed representatives earlier. As a result it is arguable that the Judge did not consider whether the refusal to adjourn would deprive the appellant of a fair hearing, thus not addressing the fairness test (Nwaigwe (adjournment: fairness)) [2014] UKUT 00418 (IAC).

The Hearing

5.(a) For the appellant, Mr Uddin moved the grounds of appeal. He told me that this appeal raised two questions

> 1. Did the refusal of an application to adjourn deprive the appellant of a fair hearing, and
>
> 2.Was the appellant prevented form presenting material evidence to the tribunal

(b) Mr Uddin told me that the procedural history set out in [3] of the decision is correct. He then took me to [4] of the decision. There the Judge accepts the appellant instructed solicitors two weeks before the hearing. The grounds of appeal narrated that the notice of hearing was sent three

weeks before the date of hearing. He told me that at [5] the Judge speculates that the appellant has had the benefit of legal advice.

(c) Mr Uddin drew my attention to the final sentence of [5] in which the Judge concedes that the evidence the appellant would like to leave is relevant, and then took me to [20] of the decision where, in the final sentence, the Judge appears to find that the financial evidence which the appellant said he would obtain if an adjournment was granted is determinative of the appeal.

(d) Mr Uddin reminded me that Article 8 ECHR is the sole ground of appeal and told me that if the Judge granted the application to adjourn the appellant would have (i) had the opportunity to produce the evidence necessary for the proportionality assessment, and (ii) the appellant would have had the benefit of legal representation. He urged me to allow the appeal, to set the decision aside and to remit this case to the First-tier Tribunal.

6. (a) For the respondent Ms Willocks-Briscoe told me that the decision does not contain an error. She told me that the Judge's decision not to adjourn the case must be viewed against the fact that the appellant's application was refused under paragraph 322(1) of the immigration rules, which is a mandatory refusal. She told me that the appellant's appeal had no realistic prospect of success anyway, and that the only fair course of action was to refuse the application to adjourn and reach a decision in the appellant's outstanding appeal.

(b) Ms Willocks- Briscoe relied on Ukus (discretion: when reviewable) [2012] UKUT 00307 (IAC), Gulshan (Article 8 – New Rules – correct approach)[2013] UKUT 00640 (IAC), Patel & Others v SSHD [2013] UKSC 72 and Sabir (Appendix FM – EX.1 not freestanding) [2014] UKUT 00063 (IAC), and told me that article 8 is not a general dispensing power. She told me that refusing the adjournment, in the particular circumstances of this case, was not unfair.

Analysis

7. The 2014 Procedure Rules Rule 4(3)(h) empowers the Tribunal to adjourn a hearing. Rule 2 sets out the overriding objectives under the Rules which the Tribunal "must seek to give effect to" when exercising any power under the Rules. It follows that they are the issues to be considered on an adjournment application. The overriding objective is to deal with cases fairly and justly. This is defined as including

> (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 is practicable, that the parties are able to participate fully in the proceedings;
(d) using any special expertise of the Tribunal effectively;
(e) avoiding delay so far as compatible with proper consideration of the issues.

8. In Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) it was held that 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 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?

9. The Judge deals with the adjournment request at [4] and [5] of the decision. The Judge's focus appears to be on avoiding delay. No consideration is given to the question of fairness. The Judge's decision not to adjourn focuses on the procedural history of the case. At [4] the Judge acknowledges that the appellant has instructed solicitors and has further evidence to produce, but the Judge's decision renders the appellant unrepresented and deprives him of an opportunity to produce evidence which the Judge appears to regard at [20] of the decision as being central to the appellant's case.

10. I do not consider the merits of this case, I look only at the question of fairness. The refusal of the application to adjourn put the appellant in a position where he had to represent himself and prevented the appellant from producing evidence which he regarded as important. The Judge did not take guidance from Nwaigwe, and did not consider the question of fairness. The manner in which the application to adjourn was dealt with is a material error of law.

11. I therefore find that the decision promulgated on 4 April 2018 contains a material error of law, because the proceedings were tainted by unfairness. I set the decision aside.

12. I cannot substitute my own decision because a new fact-finding exercise is necessary.

Remittal to First-Tier Tribunal

13. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

15. In this case I have determined that the case should be remitted because a new fact-finding exercise is required. None of the findings of fact are to stand and a complete re hearing is necessary.

16. I remit the matter to the First-tier Tribunal sitting at Birmingham to be heard before any First-tier Judge other than Judge Birk.

Decision

17. The decision of the First-tier Tribunal is tainted by material errors of law.

18. I set aside the Judge's decision promulgated on 04 April 2018.

The appeal is remitted to the First-tier Tribunal to be determined of new.

Signed Date 19 September 2018

Deputy Upper Tribunal Judge Doyle