



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/14823/2015

THE IMMIGRATION ACTS

Heard at Field House
On 9th of August 2018

Decision & Reasons Promulgated
On 28th August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR SADAN MIAH
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: The Appellant did not appear and was not represented
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Bangladesh born on 25th of November 1988. He appeals against the decision of Judge of the First-tier Tribunal Lucas sitting at Taylor House on 23rd of May 2017. The Judge dismissed the Appellant's appeal against a decision of the Respondent dated 30th of March 2015 to refuse to grant the Appellant a residence card as the spouse of an EEA national exercising treaty rights. The Appellant did not attend the hearing on 23rd of May 2017, indeed he has not attended any of the three hearings which have taken place in respect of his appeal.

2. The Appellant entered the United Kingdom on 28th of October 2009 with leave to remain as a Tier 4 migrant valid until 30th of April 2014. His leave was curtailed with no right of appeal on 14th of February 2014. On 22nd of January 2015 the Appellant submitted an out of time application for a residence card as the spouse of an EEA national, Margaret Ampah, who he said was exercising treaty rights ("the sponsor").
3. The application was refused by the Respondent because the Respondent considered that it was a marriage of convenience and there was insufficient evidence to show that the sponsor was currently exercising treaty rights in the United Kingdom. The Respondent had conducted marriage interviews with the Appellant and the sponsor on 21st of March 2015 asking the sponsor 495 questions and the Appellant 400. The Respondent's refusal letter highlighted a number of discrepancies between the answers given by the Appellant and the sponsor which had led to the conclusion that it was a marriage of convenience.
4. The Appellant appealed against that decision arguing that the Appellant and sponsor had been asked different questions and this was a genuine marriage. Their respective families did not live in the United Kingdom, so they could not remember all of the details sought by the Respondent. The Respondent's decision had breached the Appellant's rights under Article 8.
5. Following receipt of the notice of appeal the Tribunal fixed Tuesday, 19th of July 2016 at Taylor House to hear the appeal. That hearing was adjourned until 24th of August 2016 for the Respondent to provide the interview records. That hearing in turn was adjourned to 29th of November 2016 when the Appellant was represented. The matter was adjourned again because the interview records were still not produced. The new hearing was fixed for Tuesday 23rd of May 2017. Shortly before that hearing was to take place the sponsor wrote a letter to the Tribunal stating that she and the Appellant had separated on 30th of November 2016. The Appellant had moved out of her address and the couple were now considering divorce proceedings.

The Decision at First Instance

6. The Appellant's solicitors requested a further adjournment on the grounds of the Appellant's medical condition. They produced a letter from a general practitioner stating that the Appellant had presented with a history of back pain and abdominal pain and wanted a few days to recover. This application was refused on the papers because it was not considered that the medical evidence supplied established that the Appellant was unfit to attend the Tribunal.
7. On 23rd of May the case was called on for hearing before Judge Lucas but there was no attendance on the part of the Appellant and no representative attended. The Judge noted the evidence on file. Although no reference was made to the letter from the sponsor indicating that she was seeking a divorce, the Judge referred instead to a witness statement from the sponsor claiming that the marriage was genuine. At

[20] the Judge found the appeal had no prospect of success. The Appellant had not attended the hearing and significantly neither had the sponsor. There was no evidence to suggest she was medically unfit to attend. There was little evidence to show that there was indeed a genuine marriage. The documentary evidence, of utility bills, showed nothing other than a common correspondence address. The marriage interview illustrated a material lack of knowledge by the parties of each other. There were fundamental and numerous inconsistencies in the interview. There had been an attempt to cover up those basic inconsistencies retrospectively. He dismissed the appeal. The following day the sponsor wrote a further letter stating once again that the Appellant did not live at her address and they were no longer a couple.

The Onward Appeal

8. The Appellant appealed against the dismissal of his appeal on 19th of June 2017 on grounds settled by his then solicitors who had acted for him up to that point. The grounds argued that it was impossible to conceive that the Judge could have accepted that an adjournment application had been made but still go on to say that the Appellant had not attended the hearing. The grounds also made some generic remarks about Article 8.
9. In refusing permission to appeal Judge of the First-tier Tribunal Doyle commented that it was difficult to make sense of the first three numbered paragraphs of the grounds of appeal. It was clear that no explanation has been given for the failure of the Appellant and his solicitors to attend the hearing and the Judge had considered each strand of evidence and analysed it. The Appellant had not been deprived of a fair hearing. Article 8 did not apply in this case as it was an EEA appeal only see the case of Amirteymour [2015] UKUT 466 [subsequently approved by the Court of Appeal as [2017] EWCA Civ 353].
10. The Appellant renewed his application for permission to appeal to the Upper Tribunal arguing that due to a serious illness he was unable to attend the hearing and had thus been deprived of the opportunity of a fair hearing. If there had been any doubt as to the severity of his illness the case should have been adjourned requesting a detailed medical report. He argued that he and his wife really loved each other and wanted to stay together and that was why they had married each other. He did not deal in his grounds for permission to appeal with the allegation from the sponsor that he and the sponsor had separated.
11. The renewed application for permission came on the papers before Deputy Upper Tribunal Judge Zucker on 29th of March 2018. In granting permission to appeal he found it arguable that there had been procedural unfairness in the case stating it was not at all clear whether the desire by the Appellant to have a few days off work mentioned in the GP letter was reasonable or necessary. The request for the adjournment might not have been received by the Tribunal until 5th of June 2017 about two weeks after the hearing but before the decision was promulgated. He concluded: "whilst the Appellant may have some explaining to do, it is arguable

that the adjournment request should have been put before the Judge before the decision was promulgated so that it could be considered”.

12. As a result of the grant of permission the matter came before Deputy Upper Tribunal Judge Hill QC sitting at Field House on 4th of July 2018 to determine whether there was a material error of law. There was again no attendance by the Appellant at the hearing. On 3rd of July 2018, the day before the hearing was due to take place, a further email was received by the Tribunal from the Appellant requesting an adjournment. The Appellant complained this time that he had a back injury from 2nd of July and had been advised by his doctor to rest for three days. He attached a sick note from the doctor dated 3rd of July 2018 which said that the Appellant had suffered a muscular skeletal back injury as a consequence of trying to lift a beer barrel whilst at work. On examination on 2nd of July he had significant lower back pain and had been advised to rest and take appropriate analgesia as he would not be fit for work at least for the next three days and possibly longer. Notably the letter from the GP did not say the Appellant was unfit to attend court only that he was unfit to go to work.
13. I would pause to comment at this stage that it is debatable in those circumstances whether the letter from the GP produced by the Appellant was in fact a sufficient reason for him to fail to attend the Upper Tribunal hearing. Judge Hill found that Judge Zucker may have misunderstood the chronology. Although there was a date stamp 5th of July 2017 applied to the solicitor’s letter asking for the adjournment itself dated 18th of May 2017, the application to adjourn was self-evidently received prior to 5th of July because it was considered by the First-tier on 22nd of May 2017 and rejected. That was recorded by Judge Lucas in [4] to [7] of his determination.
14. The appeal could not possibly succeed on the basis outlined by Judge Zucker. An interlocutory application to adjourn had been properly refused. That decision had been communicated to the Appellant’s representative. The Appellant for whatever reason had chosen not to attend the First-tier Tribunal notwithstanding that his application to adjourn had been refused. His lawyers had also chosen not to attend and did so in the knowledge that the First-tier hearing was still effective. The basis of the grant of permission to appeal was flawed.
15. The Respondent had refused the Appellant’s application for residence card on the basis not only that it was a sham marriage but also that there was no satisfactory evidence to show the sponsor was exercising treaty rights. If the Appellant could not show that, any appeal must fail. Judge Hill did not dismiss the appeal there and then because he found that the Appellant had shown every intention of attending the hearing in the Upper Tribunal on the error of law point. Further the Appellant would have a legitimate sense of grievance had his case been disposed of in his absence when there was material before the Upper Tribunal indicating that the Appellant’s non-attendance was due to physical incapacity.
16. Judge Hill went on to give the Appellant a warning at [13]: “the Appellant should be in no doubt, however, that when his appeal is next listed he will be expected to be

present. If he chooses not to attend, or if for medical reasons he is unable to attend, then the matter will proceed in his absence and it is highly probable, unless he can argue successfully to the contrary, that for each and all of the reasons I have identified above, his appeal will have little prospect of success.”

The Hearing Before Me

17. As a result of the decision of Judge Hill to adjourn the matter without making a finding of a material error of law, the matter came before me on 9th of August 2018 to so determine. Once again there was no attendance on the part of the Appellant. Once again there had been an application by the Appellant for an adjournment on medical grounds. This time the medical cause given by the Appellant was that he had been diagnosed with cancer and had gone through various tests and operations and he attached a letter from Cambridge University Hospital. The Appellant said that as a result of the diagnosis he was shocked and upset. He had wanted to attend the hearing but was not mentally sound in his thinking.
18. The medical evidence comprised two letters from Addenbrooke’s Hospital in Cambridge. The first indicated that a small polyp had been removed from the Appellant’s rectum and there was a need to carry out a repeat limited camera test on the bowel. The second letter offered the Appellant an appointment on 8th of August at 10 AM. Neither letter stated that he would be unfit to attend the Tribunal the following day 9th of August.
19. The application for an adjournment came on the papers before a lawyer of the Upper Tribunal on 8th of August. In refusing the application the lawyer noted that the Appellant had not attended any of the previous hearings and had been warned by Judge Hill that the case would proceed on the next occasion in any event. The lawyer also noted that neither letter produced by the Appellant stated the Appellant was unfit to attend on 9th of August.
20. In consequence of that decision the case remained in the list and came before me on 9th of August to determine whether the decision of the First-tier Tribunal contained a material error of law and should be set aside. If it did not, the decision of the First-tier would stand. The Appellant did not attend. Brief comments from the Presenting Officer were to the effect that there had been no good reason why the Appellant’s solicitors had not attended in the First-tier. I thereafter reserved my decision.

Findings

21. In some respects, it is difficult to see how this case has got as far as it has since as Judge Hill pointed out and I respectfully agree with him, there was no material error of law in the decision of the First-tier Tribunal to dismiss this appeal. Permission to appeal should not have been granted by the Upper Tribunal. Where I disagree with Judge Hill is in the assessment of the Appellant’s willingness to engage with these proceedings. The Appellant made a weak application for an

adjournment of the First-tier proceedings and his representatives appeared to have wrongly assumed that simply making an application for an adjournment regardless of its merits meant that they did not then need to attend on the Appellant's behalf at the hearing. The medical evidence submitted for the hearing at first instance was that the Appellant wish to have a few days off work to recover. As was pointed out in both the refusal of the application to adjourn and the Judge's decision the medical evidence did not establish that the Appellant was unfit to attend his hearing in the First-tier. There was no good reason why the Appellant had failed to attend the hearing and it was quite properly open to the Judge to proceed to deal with the matter on the basis of what he had before him.

22. He had an unsigned witness statement from the Appellant and a witness statement from the sponsor. There was no detailed evidence which in any way met the concerns of the Respondent arising from the inconsistencies in the marriage interviews. The Judge's conclusion was that this was a marriage of convenience and the Appellant could not demonstrate that the sponsor was exercising treaty rights at the relevant time. Such evidence as there was showed that the sponsor was in receipt of state benefits not that she was working. In the circumstances it is difficult to see what else the Judge could have done with the case.
23. The only reason why the matter is still without a final decision and was in the list before me was because of the pattern of behaviour of the Appellant of failing to attend hearings. Not only did he not attend before the Judge in the First-tier but he also did not attend before Judge Hill when the matter was listed to determine a material error of law. Judge Hill warned the Appellant in very stark terms that the matter would not be adjourned again on the next occasion. Very shortly before the hearing before me the Appellant sought a further adjournment on different medical grounds to what he had previously argued. This time the Appellant suggested he had a much more serious medical condition although again there was no direct medical evidence to suggest that the Appellant could not in fact attend on 9th of August.
24. Given the warning which Judge Hill had issued on the previous occasion and the history of weak applications for an adjournment on medical grounds, it was reasonable for the Upper Tribunal to expect rather stronger evidence that the Appellant was unable to attend on 9th of August than what was submitted. I agree with the decision of the Tribunal lawyer to refuse the Appellant's application for an adjournment on the papers. I appreciate that by the time the matter came before me the Appellant was no longer legally represented and therefore did not have a representative who could have come to the Tribunal in any event to argue the merits of the error of law complaint. However, I also consider it significant that the Appellant has never sent documentation which answers the objections of the Respondent to any satisfactory degree even though this case has been proceeding for two years. The bundle filed by the Appellant's solicitors or the First-tier hearing, dated 15th July 2016, was wholly inadequate for the reasons given by Judge Lucas.

25. The burden of proof of establishing that the Appellant was in a genuine and subsisting marriage to an EEA national exercising treaty rights rested on the Appellant and the standard of proof was the usual civil standard of balance of probabilities. At no point throughout these proceedings has the Appellant produced evidence which shows that it is more likely than not that his contentions are correct. There was no material error of law in the decision of the First-tier Tribunal and the Appellant has not engaged with these proceedings in such a way as to show that there was a material error of law. He has had one opportunity to attend the Upper Tribunal which he did not take. Judge Hill, quite rightly in my view, regarded the medical evidence before him to explain the Appellant's non-attendance at the error of law hearing "with a high level of scepticism".
26. In my view, the medical evidence before Judge Hill did not justify an adjournment on medical grounds since that medical evidence did not suggest that the Appellant was unfit to attend that hearing just as the medical evidence before the First-tier had not shown that the Appellant was unfit to attend that hearing. Indeed, I do not read Judge Hill's determination as being an endorsement of the need to adjourn on medical grounds. I bear in mind Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 which provides that if a party fails to attend the hearing the Upper Tribunal may proceed with the hearing if the Upper Tribunal is satisfied that the party has been notified of the hearing and considers that it is in the interests of justice to proceed with the hearing.
27. The Appellant was aware of both the hearing before Judge Hill and the hearing before me. Judge Hill did not consider it was in the interests of justice to proceed with the hearing at that point but gave a clear indication to the Appellant that it would be in the interests of justice to proceed on the next occasion even if the Appellant again failed to attend. In my view it is in the interests of justice to proceed notwithstanding the absence of the Appellant. Even if it can be argued that the Appellant's condition on this occasion is genuine and is a kind that might prevent him from being able to attend I do not consider it appropriate to adjourn. The lack of merits in the appeal, the fact that the Appellant has had one opportunity already in the Upper Tribunal to present his case which he did not take, and the need for finality in this litigation means that it is in the interests of justice that I proceed and give my decision.
28. The Appellant was given fair warning by Judge Hill at [13] of his decision that the matter would proceed on the next occasion come what may. I see no reason why that should not still be the case. The Appellant did not attend before me, I do not accept that the medical evidence produced justifies the Appellant's non-attendance without more explanation and I consider that I should give a final ruling on this case. As no material error of law has been demonstrated in the decision of the First-tier Tribunal for the reasons which I have set out above and which were given by Judge Hill in his decision, I dismiss this appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 17th of August 2018

.....
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed this 17th of August 2018

.....
Judge Woodcraft
Deputy Upper Tribunal Judge