Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/03259/2018
HU/04818/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 May 2019	**On 10 June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

ABDUS SYED MOHAMMAD MONIR AHMED
SABINA BEGUM
(ANONYMITY DIRECTIONS NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr A Badar of Counsel instructed by Connaught Law
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. These are linked appeals against the decisions of First-tier Tribunal Judge Bulpitt promulgated on 19 March 2019 in which the respective appeals of the Appellants were dismissed on human rights grounds.

2. Both Appellants are citizens of Bangladesh. They are husband and wife. The First Appellant was born on 7 September 1979; the Second Appellant was born on 14 September 1979. The couple have a son born on 18

August 2012 who is not strictly speaking a party to these proceedings - but necessarily his position is inextricably linked to those of his parents.

3. The First Appellant is indeed the principal applicant and Appellant in matters in relation to the couple's immigration history. His wife is essentially a dependant in immigration terms. Accordingly hereafter when I refer to 'the Appellant', I am referring to the First Appellant unless the meaning indicates otherwise.

4. For present purposes it is unnecessary to detail the previous immigration histories: suffice to say, the Appellant made an application for indefinite leave to remain on 26 August 2016 on the basis of ten years' continuous lawful residence.

5. The application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 11 January 2018. The Respondent did not dispute the fact of the Appellant's continuous lawful residence in the United Kingdom for a period of ten years, but refused the application with particular reference to paragraph 322(5) of the Immigration Rules. Paragraph 322(5) was invoked with reference to matters revealed during the course of investigation and enquiry showing that the Appellant's tax returns did not correlate with the levels of income declared in support of some of his immigration applications.

6. The Appellant appealed to the IAC.

7. The appeal eventually came to be considered by First-tier Tribunal Judge Bulpitt on 1 March 2019. The Appellant did not attend and neither did his wife. A representative instructed by the Appellant's solicitors attended - instructed only to apply for an adjournment. It appears that the Appellant's brother attended the hearing.

8. The application for the adjournment was refused and the hearing thereafter proceeded in the Appellant's absence.

9. I pause to note that after the application had been refused, the First-tier Tribunal Judge indicated that he was prepared to put the matter back until later in the day to allow the Appellant to attend the hearing but this offer was declined (paragraph 25).

10. The First-tier Tribunal Judge dismissed the linked appeals for the reasons given in the Decision and Reasons promulgated on 19 March 2019.

11. The Appellant applied for permission to appeal to the Upper Tribunal, which was granted on 22 April 2019 by First-tier Tribunal Judge Osborne.

12. The primary focus of the challenge to the decision of the First-tier Tribunal is in relation to the refusal to grant an adjournment. Further to this, there is also a challenge to the substance of the decision of the First-tier Tribunal - albeit less weight appears to be placed on this latter aspect of the challenge.

13. The First-tier Tribunal dealt with the application for adjournment at some considerable length; even before directly addressing the application the Judge set out the history of the appeals in order to provide the context. I can do little better by way of illustrating the detailed thoroughness of the Judge's approach than reproducing the relevant paragraphs from the Decision in their entirety:

> *"**The History of the Appeals***
>
> *7. Neither appellant attended the hearing before me. At the commencement of the hearing an application to adjourn was made on behalf of the appellants by Mr Maurantonis, Counsel instructed by Connaughts solicitors. Mr Maurantonis made it clear to me that he was instructed only to make an application to adjourn and he would thereafter be engaged in a hearing in another court. To set the application to adjourn into context it is necessary to explain in some detail the history of the appellants' applications and their appeals.*
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> *8. When they submitted their applications in August 2016 the two appellants were not represented by solicitors. The first appellant's application was brought on the basis of his having had at least 10 years continuous lawful residence in the United Kingdom and therefore he qualified for indefinite leave to remain by virtue of paragraph 276B of the immigration rules. The second appellant's application was brought on the presumption that the first appellant's application would be approved on the basis that she was the wife of a person settled in the United Kingdom and therefore she qualified for leave to remain by virtue of appendix FM of the rules. Within their applications the appellant's both made reference to their son Syed who was born on 18 August 2012 in London.*
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> *9. In response to the first appellant's application the respondent wrote to him in May 2017 asking him to complete a tax questionnaire and provide evidence, including a tax summary for the years during which he was self-employed for consideration by the respondent when deciding his application. At this point the appellant instructed DJ Webb and Co Solicitors (DJ Webb) to represent him and his wife in their immigration applications. The respondent's bundle contains a letter from DJ Webb dated 6 June 2017 in which they enclosed a letter of authority from the first appellant authorising them to represent him. In their letter DJ Webb explained that it had become apparent to the appellant that incorrect information had previously been supplied to HMRC and therefore he had recently submitted an amended set of tax returns, copies of which were enclosed with the letter. Further letters from DJ Webb were sent on 15 August 2017 and 5 January 2018 providing*

additional explanations and documents concerning the appellant's amended tax returns.

10. *The respondent refused the first appellant's application because, although it was accepted that he had 10 years continuous lawful residence in the United Kingdom, it was decided in accordance with paragraph 322(5) of the immigration rules, that it would be undesirable to permit the first appellant to remain in the United Kingdom in the light of his conduct and character or associations. This was due to a discrepancy between the income declared by the first appellant to the respondent when seeking leave to remain in the United Kingdom in April 2011 and the income declared by the first appellant to HMRC when making his tax returns for the same year and also a discrepancy between the income declared to the respondent when seeking leave to remain in the United Kingdom in June 2013 and the amount of tax paid that year. The second appellant's application was subsequently refused on the basis that the first appellant was not settled in the United Kingdom.*

11. *Following the refusal by the respondent of both appellants applications, notices of appeal were submitted to the Tribunal by DJ Webb on the appellants' behalf. The notices identified DJ Webb as the appellant's legal representatives. Later DJ Webb wrote to the Tribunal in January and February 2018 to correct the information about the appellant's address which the Tribunal held.*

12. *The two appeals were first listed for hearing on 6 September 2018. Prior to the hearing DJ Webb wrote to the respondent and the Tribunal chasing the service of a respondent's bundle. An appellant's bundle was served by DJ Webb on 5 September 2018 together with a skeleton argument. The appellant's bundle included a 10 page witness statement from the first appellant and a four page witness statement from the second appellant. The bundle also contained the completed tax questionnaire, amended tax return, amended tax calculations, a letter from HMRC and evidence of payment by the appellant to HMRC of his outstanding tax bill.*

13. *Neither appellant attended the hearing on 6 September 2018. Mr Shah a solicitor from DJ Webb, did appear and informed the tribunal that the first appellant had gone to the accident and emergency department of Royal London Hospital that morning complaining of chest pains. On this basis the hearing of the appeals was adjourned, and the new date of hearing – 1 March 2019 – was fixed. The appellant was directed to serve medical evidence relating to his attendance at hospital within seven days. In accordance with that direction DJ Webb wrote to the tribunal on 10*

September 2018 enclosing a certificate of attendance which confirmed tht the first appellant had attended the emergency department of the Royal London Hospital at 11.17 on 6 September together with a statutory sick pay form which confirmed that the appellant was fit to return to work the following day 7 September 2018.

14. *Upon receipt of the written notice of the new hearing date. DJ Webb wrote to the tribunal on 13 November 2018 to confirm a change of the appellants' address. The next communication concerning these appeals received by the tribunal was a letter dated 22nd of February 2019 from DJ Webb stating that they had been informed that day that the appellants had instructed Connaughts solicitors to represent them in their immigration proceedings and asking to be taken off the record. This was followed by a further letter from DJ Webb dated 25th of February to the same effect which was sent to the tribunal by special delivery.*

15. *At 6.46pm on 25 February 2019 Connaughts Solicitors faxed notification that they had been instructed and a request for an adjournment of the hearing on 1st March 2019 to the tribunal. Unfortunately the fax was not linked to the case papers prior to the hearing on 1st March 2019 so the application to adjourn was not considered until the morning of the hearing.*

The Application to Adjourn

16. *As previously stated, neither appellant attended the hearing. Instead, the brother of the first appellant attended with a bundle of papers including a letter from Connaughts Solicitors, a copy of the application to adjourn which had previously been faxed to the Tribunal and a letter from the first appellant dated 28 February 2019. Mr Maurantonis told me that his understanding was that the appellants had not attended because having received advice from their new solicitors they anticipated the case being adjourned. He confirmed that the appellants still lived in East London and that he was able to contact them through the first appellant's brother who remained throughout the hearing.*

17. *On behalf of the appellants, Mr Maurankonis sought an adjournment of the appeal hearing on the basis that their new solicitors were not in a position to adequately prepare for the hearing and therefore there could not be a fair hearing. Mr Maurankonis relied on the application to adjourn drafted by Connaughts Solicitors. This confirmed that Connaughts Solicitors were instructed by the appellant on 18 February 2019. It stated that since then they had written to DJ Webb on 21st and 22nd February 2019 asking a copy of the file but had received no response to their letters.*

18. *The letter from the first appellant suggested that the reason why he had changed solicitors was because responsibility for his case had recently been passed from the most senior lawyer at DJ Webb to a new lawyer at the firm. The first appellant states that after working a few days with the new solicitor he was not at all happy and so chose to appoint a new firm to represent him and his wife. The letter from Connaughts gave a different explanation, it says that despite multiple and frantic requests the appellant had been unable to get in touch with his previous solicitors (DJ Webb).*

19. *Mr Maurantonis submitted that without papers it had not been possible for Connaughts Solicitors to prepare for the hearing and in these circumstances the appellants would be deprived of a fair hearing of their appeal if it were not be deprived of a fair hearing of their appeal if it were not adjourned.*

20. *On behalf of the respondent Ms Kugendran submitted that the appellants were seeking to manipulate the tribunal in order to ensure that their appeals were heard after their son's seventh birthday at which point he would become a qualifying child as defined in section 117D Nationality, Immigration and Asylum Act 2002. Ms Kugendran submitted that this was apparent from the appellant's failure to attend either of the hearing dates and the late decision to change solicitors. Ms Kugendran pointed out that the hearing date had been set six months earlier giving the appellants ample opportunity to instruct new representatives, but they chose to do so very shortly before the scheduled hearing. On this basis Ms Kugendran submitted that it would be in the interests of justice and fairness for the appeal to proceed.*

21. *It is common ground that the Rule 4(3)(h) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (the Rules) gives me the power to adjourn the hearing and that rule 28 of the Rules gives me the power to proceed with the hearing in the absence of the appellant's if it is in the interests of justice to do so. I must exercise my discretion in respect of both these rules within the overriding objective set out in rule two which is to deal with cases fairly and justly (see rule 2 (3)). Further guidance is provided to me in the Presidential Guidance Note number one of 2014, paragraphs 6-9 of which deal with applications for adjournments. As paragraph 6 of that guidance makes clear the Upper Tribunal decision in Nwaigwe (adjournment; fairness) (2014) UKUT 00418 (IAC) emphasises the importance of the test of fairness and the question of whether a party will be deprived of a fair hearing if an adjournment is refused. I have taken into*

consideration and applied this guidance when reaching my decision to refuse an adjournment.

22. *As paragraph 6 of Nwaigwe recognises: 'in some cases , adjournment applications based on particularly trivial or unmeritorious grounds may give rise to an assessment that the process of the tribunal is being misused and will result in a refusal.' Having considered the history of these appeals, including the application for an adjournment itself I found that it is likely that this was one such case. I do not accept the suggestion in the letter from Connaughts Solicitors that despite the multiple and frantic requests the appellant had been unable to get in touch with DJ Webb solicitors to prepare for the appeal. This suggestion is inconsistent with the letter from the first appellant in which he describes 'working for a few days with the new solicitor from DJ Webb'. The suggestion is also inconsistent with DJ Webb's conscientious and proactive dealings throughout the process of the appeal. I consider it very unlikely that a firm of solicitors would refuse to respond to requests for information from a client and from his new solicitors while simultaneously repeatedly corresponding with the tribunal. In these circumstances I do not accept the explanation given for the very late change in solicitors.*

23. *Instead I find that the late change of solicitors was an attempt to present to the tribunal a fait accompli whereby the Tribunal was consider itself bound to grant an adjournment. In reaching this conclusion I take into account the slow response to the change in solicitors including the fact that despite the impending hearing DJ Webb were not asked to provide papers until three days after the appellant had instructed his new solicitors. Further, despite the two firms of solicitors offices being in close proximity no attempt was made by either the new solicitors or the appellant themselves to go to DJ Webb's and retrieve the papers. Additionally, I take account of the fact that neither appellant attended the hearing. As Mr Maurantonis accepted, the appellants would not have been advised by the new solicitors that there was no need to attend and the presence of the first appellant's brother with a written request for an adjournment demonstrates that the appellants knew that the question of whether or not an adjournment would be granted was still to be resolved. Finally, I take account of the submission by Ms Kugendran that there is a clear incentive for the appellants to delay the hearing of this appeal until after their son's birthday in August. In all these circumstances I found that the Tribunal process was being misused through the application to adjourn.*

24. Notwithstanding this finding, I went on to consider whether a fair hearing would be possible in the absence of the appellants. This appeal revolves around a straightforward disputed issue which is whether the agreed discrepancies in the first appellant's tax returns as compared to his immigration applications means it is undesirable to permit him to remain in the United Kingdom. The first appellant has known about this issue wince he completed the tax questionnaire in May 2017. He has therefore had 20 months to prepare for an argument over this disputed issue. In fact there is already significant evidence before me of the first appellant's position on this disputed issue and his evidence about it. There are first the letters from DJ Webb solicitors from June and August 2017 which set out the appellant's position. More recently a 40 page appellant's bundle, including the appellant first appellant's 10 page witness statement was served in advance of the adjourned hearing on 8 September 2018 and but for the first appellant's chest pains this bundle would have formed the appellant's evidence on the issue of that hearing. Additionally a skeleton argument was also prepared and served ready for that hearing. There is therefore a large amount of evidence before the tribunal on behalf the two appellants despite their absence. In these circumstances I found that a fair hearing was plausible in the appellant's absence. When reaching this conclusion I also had regard to rule 2(2)(e) of the rules which states that dealing with cases fairly and justly includes avoiding delay so far as compatible with proper consideration of the issues.

25. I therefore found that dealing with these appeals fairly and justly meant refusing the application to adjourn and proceeding with the hearing. Since the appellant's live in London, when I informed Mr Maurantonis of my decision to refuse an adjournment I told him that I would put the matter back until the afternoon to enable the appellant to attend. Having spoken to the first appellant's brother Mr Maurantonis confirmed that the appellants would still not be attending the hearing. On this basis I proceeded to hear the appeal and Mr Maurantonis withdrew."

14. The challenge to the refusal of the application to adjourn is made with reference to paragraphs 2-5 of the grounds in support of the application for permission to appeal.

15. In respect of paragraph 2, which is broken down into four subsections, Mr Badar has ably and succinctly sought to amplify certain aspects of the challenge. So far as paragraphs 3 to 5 are concerned, he acknowledges that these can essentially be summed up by the overarching submission that it was unfair for the appeal to proceed in the absence of the Appellant

because necessarily that inhibited his ability to present his case to the Tribunal.

16. In respect of paragraph 2 of the Grounds, subparagraph (i) essentially 'sets the scene' and contains no specific submission.

17. Subparagraph (ii) essentially pleads that the First-tier Tribunal was in error in finding the basis upon which the Appellant had indicated he had had to change representatives was inconsistent. The ground is in these terms:

> *"The explanation of why the Applicant changed solicitors is: the Applicant states that his matter had been passed from the most senior lawyer to a new lawyer. The Applicant's cover letter explains that the Applicant was unable to get in touch with his lawyer. The IJ finds this as inconsistent (p.22). It is clear that the statement corroborates the Applicant's version of events that his matter was transferred from a senior lawyer to another one, whom the Applicant is unable to get in touch with. As a result, the Applicant changed legal representatives prior to the hearing."*

18. In this context my attention was directed in particular to paragraph 18, where the Judge refers to the materials that were before him in support of the application, and also to paragraph 22 where the Judge draws these matters together before concluding that he did "*not accept the explanation given for the very late change in solicitors*".

19. The materials referred to at paragraph 18 are a matter of record on file. The letter from the Appellant that was presented in support of the application for the adjournment indeed includes matters that are adequately represented by the Judge's summary at paragraph 18: for example - *"I was not at all happy after working a few days with new solicitor as I had to tell him everything from start to end"*. Equally, the Judge's reference to the written submission seems to be a clear, accurate, and adequate reflection of a passage at paragraph 4 of the written submission - *"his reason for changing legal representation was due to the fact that despite the Applicant's multiple (and lately frantic) request he was unable to get in touch with his previous legal representatives to prepare for his appeal".*

20. In my judgement the First-tier Tribunal Judge was absolutely correct to identify that these were discrepant, inconsistent, accounts. Necessarily this undermined the credibility of the explanation that was being advanced as to why the Appellant had felt it necessary to change his legal representatives.

21. In the circumstances I can find nothing of any substance in subparagraph (ii) of paragraph 2 of the grounds of challenge.

22. Subparagraph 2(iii) is in these terms.

"As the IJ mentioned in p. 10, the Applicant already meets the core requirements of 276B. The only reason for refusal is under 322(5). Succeeding under Section 117D (p.20/23) would still entail that the issue under 322(5) would need to be dealt with. The Applicant's child meeting the requirements of the Section 117D is not a trump card, nor would have the importance of qualification, for example, under Rule 276B… The Respondent's assumption that the Applicants seek to 'manipulate' the Tribunal, apart from a serious unsubstantiated allegation, could not possibly have the effect that it had made out to be. Unfortunately, the IJ accepted this reasoning, at paragraph 23."

23. In amplification of this ground Mr Badar directed my attention to a passage in the recent case of **Balajigari v Secretary of State for the Home Department [2019] EWCA Civ 673** at paragraph 39, which uncontroversially indicates that the circumstance of there being a qualifying child will not necessarily lead to a grant of leave to remain depending upon the circumstances of a particular case.

24. It seems to me that the difficulty with the submission at subparagraph (iii) is that it is premised on the notion that the First-tier Tribunal Judge thought that if the Appellant could delay his appeal until such time as his son reached the age of 7 (i.e. August 2019), when he perceived that he would win his case by simple reason of there being a qualifying child. I do not see that that was the approach of the First-tier Tribunal Judge.

25. I considered with Mr Badar the substance of the Presenting Officer's submissions before the First-tier Tribunal (paragraph 20), and the Judge's conclusions in this regard (paragraph 23). In neither of those passages - or anywhere else - does the foundation for the submission in subparagraph (iii) emerge. I cannot identify at all that the First-tier Tribunal Judge thought that the Appellant considered that he would automatically win his case if he could delay matters until such time as his child became a qualifying child. Rather, the Judge proceeds on the basis that this might improve the Appellant's prospects in the appeal: it seems to me that that was a matter that was open to the Judge.

26. The remaining ground of challenge under paragraph 2 – subparagraph (iv) - is essentially that the Judge introduced factors into the Article 8 consideration of his own motion. This is a matter that goes to the substance of the decision in the appeal, rather than the reasons for refusing the adjournment. On that basis I do not consider it adds anything to the primary submission.

27. It seems to me absolutely clear that the First-tier Tribunal Judge considered the application for adjournment with manifest care and in very considerable detail. The full contextual history was referenced; the substance of the application was expressly considered; the Judge made findings of primary fact that were open to him on the materials; the findings were considered appropriately within the framework of the Procedure Rules and the Presidential Guidance Note, and also with

reference to guidance from case law such as **Nwaigwe**. Clear and sustainable reasons were given for refusing the application.

28. The essential position was that the Appellant had had ample opportunity to participate in the appeal process. He had prepared a bundle and statements addressing the issues in the appeal. The only claimed difficulty being presented at the time of the hearing on 1 March 2019 arose because - on his account - he had had to change representatives at short notice. The Judge rejected this explanation, and necessarily therefore rejected the offered explanation of why the Appellant felt unable to participate in proceedings at the time of the listed hearing. In short, the Appellant was unable to explain his claimed present difficulties. Even then, the Judge made it clear that it was open to the Appellant to attend the hearing so that he could provide oral evidence in support of his written evidence. That invitation was declined; no reason was offered for declining - that to the First-tier Tribunal or now to the Upper Tribunal. In all the circumstances I fail to see that the Appellant has had anything other than the fullest opportunity to engage with the appeal process. In all such circumstances I can identify no procedural unfairness in refusing to grant an adjournment. I reject the primary basis of the challenge.

29. As regards the challenge to the substance of the appeal, I have noted already the residual aspect of the primary challenge seeking to impugn an aspect of the overall balance with reference to paragraph 46 (paragraph 2(iv) of the grounds). In this context Mr Badar identified that it was specifically the factor listed at paragraph 46(e) to which objection was taken - *"The appellants would return to Bangladesh having achieved an education and job experience in the United Kingdom which would give them an advantage in the job market in Bangladesh".* It is submitted that that was essentially a speculative observation, and not founded on any express evidence.

30. True it might be that there was no express evidence before the First-tier Tribunal with regard to the job market in Bangladesh, but it seems to me that it was a reasonable inference for the Judge to draw that the experience gained during the time in the United Kingdom would be of some value in the job market in Bangladesh which would put the Appellant at an advantage over others without such international work experience. I can find nothing expressly objectionable in that consideration.

31. The focus of paragraphs 6 and 7 of the grounds of challenge are in reference to the Judge's observation at paragraphs 44 in respect of 'best interests' of the child, and the case of **KO (Nigeria) [2018] UKSC 53**. The primary criticism in this regard is that the Judge considered the 'real world' position on the premise that the parents did not have lawful status in the United Kingdom, it being pointed out that at all material times the Appellants had had leave to remain, had made applications 'in-time', and had been successful in those applications. Whilst those circumstances are correct, it seems to me it does not undermine what was being said by the Judge at paragraph 44. The position with regard to the 'real world'

situation in considering the position of the Appellants' child was premised on the position of the parents being that they would not have further leave to remain - if it was otherwise the situation for the child would not require such consideration.

32. Criticism is also made that the First-tier Tribunal Judge did not factor into the 'balance sheet' approach the period of lawful residence that the Appellant had enjoyed in the United Kingdom. It seems to me that that is not a matter ultimately of any material relevance. The Judge sets out at paragraphs 45-48 - again it seems to me with manifest care and detail - the 'balance sheet', putting the factors against the Appellants at paragraph 46 and the factors in favour of the Appellants at paragraphs 47. Included in paragraph 47 is a recognition that the Appellants have lived in the United Kingdom for a considerable period of time. I do not accept that it is likely that the Judge lost sight of the fact that that was pursuant to leave duly granted. However, any reliance upon the lawfulness of that position is necessarily undermined by the fact that successive periods of leave were only secured by presenting material that did not adequately or properly reflect the Appellant's economic circumstances and which was a matter of express adverse finding by the First-tier Tribunal Judge (see paragraph 40).

33. Accordingly, I can see nothing of material substance in any of the matters of challenge to the substantive decision under Article 8.

Notices of Decisions

34. The decisions of the First-tier Tribunal contained no material error of law and accordingly stand

35. Both appeals remain dismissed.

36. No anonymity directions are sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed: Date: **3 June 2019**

Deputy Upper Tribunal Judge I A Lewis